



PRINCE EDWARD ISLAND

Regulatory & Appeals Commission  
Commission de réglementation et d'appels

ÎLE-DU-PRINCE-ÉDOUARD

Date Issued: June 22, 2022  
Docket: LA21025  
Type: Planning Appeal

INDEXED AS: Clare Fagan v. City of Summerside

**Order No: LA22-09**

**BETWEEN:**

CLARE FAGAN

**Appellant**

**AND:**

CITY OF SUMMERSIDE

**Respondent**

## **ORDER**

Panel Members:

J. Scott MacKenzie, Chair  
Erin T. Mitchell, Commissioner

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

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## 1. INTRODUCTION

1. This is an appeal of the decision of the City of Summerside (the “City”), dated October 5, 2021, to grant a development permit at 182 Putters Street, Summerside, Prince Edward Island by the Appellant, Clare Fagan (the “Appellant”).
2. This appeal before the Commission raises questions regarding the procedure used by, and the sound planning principles considered by, the City. This decision is focused on these two questions because in a written decision dated February 10, 2022, the Commission resolved a number of preliminary issues between the parties around the jurisdiction of the Commission. The statutory authority of the Commission to hear and decide this appeal is found in s. 28(1.1) of the *Planning Act*.<sup>1</sup>

## 2. BACKGROUND

3. On October 5, 2021, the City approved development permit number 2021-9-0351 for the development of four-unit row houses on a site located at 182 Putters Street in Summerside, Prince Edward Island.
4. On October 26, 2021, the Appellant filed a notice of appeal with the Commission challenging, among other things, the approval of the development permit.
5. On November 18, 2021, the City filed a motion seeking dismissal of the appeal on the ground that all or some of the issues raised in the notice of appeal were not issues within the jurisdiction of the Commission.
6. Written submissions were received from both parties in relation to the motion.
7. On February 10, 2022, the Commission decided a number of preliminary questions related to its jurisdiction. Reasons for this jurisdictional decision are recorded as Order LA22-02.<sup>2</sup> The remaining ground of appeal, which related to the development permit, was scheduled for a hearing.
8. On April 21, 2022, the appeal was heard by the Commission and a decision was reserved.

## 3. ISSUES

9. The appeal raises two main questions for the Commission. First, the Commission must consider whether the City followed its procedure and discharged its duty of procedural fairness. Second, the Commission must consider whether the decision made by the City accords with sound planning principles. Some legitimate concerns expressed by the Appellant and her witnesses fall outside the statutory authority of the Commission. In these instances, the Commission does not make any findings. If they wish to do so, the parties involved may pursue legal proceedings in the Supreme Court of Prince Edward Island.

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<sup>1</sup> R.S.P.E.I. 1988, c. P-8.

<sup>2</sup> Order LA22-02, *Clare Fagan v. City of Summerside* (February 10, 2022).

#### **4. DISPOSITION**

10. For the reasons that follow, the appeal is dismissed. The Commission is satisfied that the City followed its bylaw procedure and discharged its duty of procedural fairness when it considered and approved the development permit for this as-of-right development. The Commission is also satisfied that the decision made by the City incorporated sound planning principles as expressed in its Subdivision and Site Development Bylaw SS-19 (“Development Bylaw”), Zoning Bylaw SS-15 (“Zoning Bylaw”), and generally. The Appellant expressed a number of legitimate concerns about the impact of the new development on nearby properties as well as certain representations made previously to nearby residents when they agreed to purchase their properties. The Commission, however, does not have statutory authority to consider potential claims grounded in nuisance, contract, or misrepresentation. Those claims fall within the exclusive jurisdiction of the Supreme Court of Prince Edward Island.

#### **5. POSITIONS OF THE PARTIES**

##### **Appellant**

11. In her submissions, the Appellant argues that the City failed to provide proper notice to nearby residents about the development. This is the main argument of the Appellant. According to the Appellant, there has been a lack of due process in this case. The Appellant and her witnesses testified that they were shocked to learn that the development had been approved by the City. According to the Appellant and her witnesses, notice of the development was in the form of a bulldozer which arrived on site to begin construction. The Appellant submits that the process leading to the issuance of the development permit violated her right to procedural fairness.
12. The Appellant called three witnesses at the hearing: Richard Xu, Neville Brisson, and Sarah Huang. All of the witnesses are impacted by the development in question; however, the only notice of appeal was filed by the Appellant. The Appellant also filed with the Commission a number of signed written statements from residents, including Anne Gaudet, James Gaudet, Sarah Huang, Neville Brisson, and Richard Xu. The Appellant also included a petition signed by a number of individuals seeking to stop the development in question.
13. Richard Xu (“Xu”) owns the property located at 186 Putters Street. He testified that when he purchased the property, he did not know that the surrounding lands were zoned to allow for high-density development. Xu acknowledged that he had a lawyer represent him on the real estate transaction and, although he did receive a number of documents as part of the transaction, he did not pay attention to any one particular document. He also testified that the developer, Nathan Kember (“Kember”), told him that the property would be a good property to buy because it has a view of the nearby golf course.
14. Neville Brisson (“Brisson”) testified that he only found out about the development after a telephone call from the Appellant. He testified that he purchased his property in large measure because of the view of the golf course. Brisson also stated that he was

told by a representative of the developer that there would be nothing built behind his property. He further testified that, after all four of the existing homes on Putters Street were sold, the bulldozer showed up. Brisson acknowledged that he, too, had a lawyer represent him on the property transaction. However, Brisson testified that he was told he would have a golf course view by both the developer as well as the developer's brother. While no corroborating documentary evidence was tendered on this point, Brisson stated that the Kijiji ad which originally advertised his property for sale stated that the property had a "golf course view."

15. Sarah Huang ("Huang") is married to Xu and also resides at 186 Putters Street. She stated that she did not understand why she was not notified of the development. Huang testified that she did not know that there would be buildings placed behind her property, and that she was particularly disappointed to have neighbours so close because she and her husband had moved to Canada from Beijing and were trying to avoid high-density residential areas.

### City

16. In its submissions, the City argues that the development in question is an as-of-right development and the City had no obligation to provide notice to the Appellant. According to the City, its Development Bylaw did not include any requirement to provide notice to the public about this application for a development permit. The development was available based on the current zoning of the property. According to the City, the only notice required was related to the publication of its approval decision. The City argues that it discharged this notice obligation in accordance with s. 23.1 of the *Planning Act*. In short, the City submits that it followed the procedure prescribed by its Development Bylaw and discharged its duty of procedural fairness.
17. The City also argues that its decision was made in accordance with sound planning principles. According to the City, sound planning principles were considered throughout the development application process and, in the case of an as-of-right development, some of these principles are integrated into the requirements of the Development Bylaw and its Zoning Bylaw, such as the types of development permissible, the density of such development, and the setbacks for development. In the City's submission, its decision to approve the development application reflected sound planning principles.
18. The City called two witnesses at the hearing: Linda Stevenson ("Stevenson") and Thayne Jenkins ("Jenkins").
19. Stevenson is a development officer at the City. She testified about the procedure followed by the City during its review and approval of the development permit. Stevenson reviewed the record filed with the Commission by the City. This review by Stevenson was to demonstrate that the procedural requirements for the issuance of the development permit had been satisfied by the City.
20. Jenkins is a planning officer at the City. He was accepted by the Commission as an expert qualified to offer opinion evidence regarding land-use planning, and he tendered a report for the Commission. Jenkins testified that each of the requirements

for a development permit were satisfied in this case and, when considering whether to issue or deny the permit, the City considered sound planning principles. According to Jenkins, these principles are also reflected in part in the text of the applicable bylaw enacted by the City.

## 6. ANALYSIS

### Authority and Guideline

21. The Commission has the legal authority to substitute its decision for one made by a municipality. However, the Commission does not lightly interfere with these types of decisions. Over time, the Commission has developed a guideline for exercising its appellate authority under the *Planning Act*. The guideline involves two main considerations:

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- *Whether the municipality followed the proper procedure as required by its bylaw, the Planning Act and the law in general, including the duty of procedural fairness; and*
- *Whether the decision made by the municipality was based on sound planning principles in the field of land use planning.*<sup>3</sup>

22. When a municipality fails to do these things as the primary decision-maker, whether by failing to follow its process or by making a decision that is not grounded in sound planning principles, the Commission is not required to show deference to the decision made by council.<sup>4</sup> As confirmed by the Prince Edward Island Court of Appeal, “if it so decided,” the Commission can substitute its decision for the one being appealed.<sup>5</sup>

### Development Bylaw

23. By virtue of its combined total floor area, the development in question was a “major development” within the meaning of the Development Bylaw passed by the City.<sup>6</sup> The application and review procedure for such a development is set out in ss. 9.3 - 9.6 of the Development Bylaw. These bylaw provisions incorporate other provisions elsewhere in the Development Bylaw.<sup>7</sup> However, when all of these bylaw provisions are reviewed, none of them provide for notice to the public or nearby residents about any application for a proposed major development. The only notices in this context are actually directed to the applicant by the Development Bylaw. Those notices follow

<sup>3</sup> LA17-02, *APM Construction Services Inc. v. Community of Brackley* (May 26, 2017) at para. 21.

<sup>4</sup> *Charlottetown (City) v. Island Regulatory and Appeals Commission*, 2013 PECA 10 at para. 40 [Charlottetown].

<sup>5</sup> *Doiron v. Island Regulatory and Appeals Commission*, 2011 PECA 9 at para. 20 [Doiron]. See also Order LA16-05, *Marshall MacPherson Ltd. v. Town of Stratford* (October 28, 2016) at para. 67.

<sup>6</sup> Development Bylaw, s. 9.1(a).

<sup>7</sup> Development Bylaw, ss. 9.4(b) and 9.6(d).

- certain approvals associated with the development. The Development Bylaw does not, however, direct them to the public or nearby residents.
24. This is contrasted with applications to amend the official plan or zoning bylaw for the City. In those types of applications, the Zoning Bylaw specifically provides that the City must give notice to the public and nearby residents.<sup>8</sup> No such process is applicable in this case.
25. While the Appellant may question the wisdom of not providing notice to the public or nearby residents when an application for a major development is being considered, that legislative choice expressed by the City in its Development Bylaw must be respected by the Commission. The Appellant or others may apply or lobby the City to amend its Development Bylaw to include such notice. However, for the purpose of this case and the law as it presently exists, the Commission must conclude that the City followed the procedure set forth in the Development Bylaw and discharged its duty of procedural fairness.
26. The Commission is also satisfied that the City discharged its notice obligations after approving the development permit in accordance with s. 23.1 of the *Planning Act*. Notice of the approved development permit was published by the City on October 8, 2021. These notices were posted on the website of the City and on the bulletin board located inside Summerside City Hall. By publishing these notices within the prescribed time periods, the City discharged its statutory notice obligations under s. 23.1 of the *Planning Act*. The Appellant was therefore able to access notice of the approval decision and filed her appeal with the Commission within the required statutory time period.

### **Sound Planning Principles and Other Avenues**

27. Sound planning principles ensure that land-use planning and development decisions are animated by proper considerations. They help to prevent arbitrary decisions. They also contribute to consistent decision-making given the important interests at stake. The Commission has described these principles on a number of occasions. In Order LA17-06, the Commission described sound planning principles as follows:

*Sound planning principles are a guard against arbitrary decision making especially where a regulatory checklist does not address a concern. Sound planning principles require regulatory compliance but go beyond merely insuring such compliance and require discretion to be exercised in a principled and informed manner. Sound planning principles require the decision maker to take into consideration the broader implications of their decisions.<sup>9</sup>*

28. In short, sound planning principles include compliance with the requirements found in official plans and bylaws. However, strict compliance with prescribed requirements

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<sup>8</sup> Zoning Bylaw, s. 5.10.

<sup>9</sup> Order LA17-06, *Stringer v. Minister of Communities, Land and Environment* (10 August 2017) at para. 64.

does not end the inquiry. The Commission must also be satisfied that sound planning principles were considered and applied during the decision-making process as a whole. This type of evidence is most commonly provided by a development officer, a land use planner, or evident from the record before the Commission.

29. In this case, the Appellant has put in issue – albeit indirectly – whether the City considered and applied sound planning principles when it approved this application for a major development. In response to this issue, the City called evidence from Stevenson and Jenkins. Stevenson testified as to procedural requirements of the Development Bylaw. Jenkins tendered an expert report and testified as to the consideration and application of sound planning principles. The Commission accepts this evidence and is satisfied, based on this testimony, that the City considered and applied sound planning principles when it approved this application for a development permit.

### **Other Concerns and the Proper Forum for Such Concerns**

30. During the course of the hearing before the Commission, the Appellant expressed legitimate concerns – directly and by way of witnesses and written statements – about earlier representations which were allegedly made by the developer to purchasers of the properties on Putters Street. Those representations related to, among other things, views of a golf course. The Appellant also raised questions about the potential impacts that this major development would have on the properties of nearby residents. These legitimate concerns were heard by the Commission. However, they are properly considered and decided in a different forum by a different decision-maker.
31. The 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.<sup>10</sup> The concerns raised by the Appellant, which relate to potential relief grounded in nuisance, contract or misrepresentation, are outside the statutory jurisdiction of the Commission. Those issues and any potential relief fall within the exclusive jurisdiction of the Supreme Court of Prince Edward Island and are not properly before the Commission.

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<sup>10</sup> 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).

## **7. CONCLUSION**

32. For the reasons above the appeal is dismissed. The Commission thanks the parties for their evidence and submissions.

### **IT IS ORDERED THAT:**

- 1. The appeal is dismissed.**
- 2. Development permit 2021-9-0351 issued on October 5, 2021 is hereby confirmed.**

**DATED** at Charlottetown, Prince Edward Island, June 22, 2022.

### **BY THE COMMISSION:**

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J. Scott MacKenzie, Q.C., Chair

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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.