



**THE ISLAND REGULATORY AND
APPEALS COMMISSION**
Prince Edward Island
Île-du-Prince-Édouard
CANADA

**Docket LA09015
Order LA09-11**

IN THE MATTER of an appeal by
629857 N.B. Inc. et al of a decision of the City
of Charlottetown, dated June 15, 2009.

BEFORE THE COMMISSION
on Tuesday, the 10th day of November, 2009.

Allan Rankin, Vice-Chair
John Broderick, Commissioner
Gordon McCarville, Commissioner

Order

Compared and Certified a True Copy

(Sgd.) Philip J. Rafuse

Appeals Administrator
Land, Corporate and Appellate Services Division

IN THE MATTER of an appeal by
629857 N.B. Inc. et al of a decision of the City
of Charlottetown, dated June 15, 2009.

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IN THE MATTER of an appeal by
629857 N.B. Inc. et al of a decision of the City
of Charlottetown, dated June 15, 2009.

Appearances & Witnesses

Written submissions filed by:

1. For the Appellant 629857 N.B. Inc. et al

Counsel:

Sean J. Casey, Q.C.

2. For the Respondent City of Charlottetown

Counsel:

David W. Hooley, Q.C.

IN THE MATTER of an appeal by
629857 N.B. Inc. et al of a decision of the City
of Charlottetown, dated June 15, 2009.

Reasons for Order

1. Introduction

[1] The Appellants 629857 N.B. Inc. (dba Island Chevrolet Cadillac), City Collision Services, Reliable Motors Ltd., Brian Carmichael (dba Brian Carmichael Automotive), Blair Lapierre Inc. (dba Mr. Plumber), and Largo Fitness Center (the Appellants) have filed an appeal with the Island Regulatory and Appeals Commission (the Commission) under section 28 of the **Planning Act**, R.S.P.E.I. 1988, Cap. P-8, (the **Planning Act**). The Appellants' Notice of Appeal was received on August 3, 2009.

[2] This appeal concerns a June 15, 2009 decision of the Respondent City of Charlottetown (the City) to undertake a redesign of the Allen Street / Mount Edward Road intersection with a modern roundabout alignment and begin final tender preparation for said project.

[3] By letter dated August 5, 2009, Commission staff identified possible concerns with respect to the Commission's jurisdiction to hear this appeal and invited the parties to provide written submissions and rebuttal submissions on the jurisdictional issues. Legal counsel for the Appellants and for the City filed written submissions on September 4, 2009 and written rebuttal submissions on September 18, 2009.

[4] This Order addresses the issue of whether the Commission has the jurisdiction to hear this appeal.

2. Discussion

The Jurisdictional Issues

[5] In the August 5, 2009 letter from the Commission's Appeals Administrator to the parties, the following points were made with respect to a question as to whether the Commission has the jurisdiction to hear this appeal:

- *The City's decision was made on June 15, 2009 and the Notice of Appeal was received August 3, 2009. This time period does exceed the 21 day appeal period set out in section 28 of the **Planning Act**. I do note, however, that the Notice of Appeal refers to the minutes of the June 15, 2009 meeting of Council becoming available at the July 13,*

2009 meeting of Council. The Commission will have to consider when the Appellants first received notice of the City's decision within the principles set out in *Booth and Peak v. Island Regulatory and Appeals Commission 2004 PESCAD 18* (October 4, 2004). I would further note that section 23.1 of the **Planning Act** was proclaimed on June 30, 2009 and said proclamation was published in the July 11, 2009 Royal Gazette. Although section 23.1 was not part of the **Planning Act** at the time of the City's decision, it became law during the 21 day appeal period and therefore, the applicability of the notice requirements contained in section 23.1 may possibly be at issue.

- There would appear to be a question as to whether the City's June 15, 2009 decision to undertake a redesign of the Allen Street / Mount Edward Road intersection falls within the class of municipal decisions which may be appealed under section 28 of the **Planning Act**. Once again, the amendments to the **Planning Act**, proclaimed on June 30, 2009, may affect the Commission's jurisdiction with respect to this matter. In particular, subsection 28(1.1) of the **Planning Act** may be germane to this appeal, said subsection reading as follows:

(1.1) Subject to subsections (1.2) to (1.4), any person who is dissatisfied by a decision of the council of a municipality

(a) that is made in respect of an application by the person, or any other person, under a bylaw for

- (i) a building, development or occupancy permit,
- (ii) a preliminary approval of a subdivision,
- (iii) a final approval of a subdivision; or

(b) to adopt an amendment to a bylaw, including

- (i) an amendment to a zoning map established in a bylaw, or
- (ii) an amendment to the text of a bylaw,

may appeal the decision to the Commission by filing with the Commission a notice of appeal.

The Appellants' Submissions

[6] The Appellants' legal counsel filed detailed written submissions. A very brief summary follows:

- There was no public notice given of the City's June 15, 2009 decision. The Appellants only became aware of the City's decision on or about July 14, 2009 when the council minutes of June 15, 2009 became available to the public. Accordingly, the Appellants only received specific notice of the City's June 15, 2009 decision until July 14, 2009 at the earliest. The Appellants submit that they had 21 days from July 14, 2009 to appeal the June 15, 2009 decision. The Appellants complied with this 21 day limitation by filing a Notice of Appeal with the Commission on August 3, 2009.

- The Appellants submit that the City's Zoning and Development Bylaw defines the term "Development" in a broad manner. The Appellants submit that a major redesign and construction of a roundabout at the intersection of Mt. Edward Road and Allen Street constitutes a Development, and therefore a building permit is required. The Appellants submit that the decision taken by the City to undertake a redesign of the Mt. Edward Road and Allen Street intersection constitutes a decision made in respect of the administration of regulations or bylaws made pursuant to the powers conferred by the **Planning Act**. The Appellants submit that the City's June 15, 2009 decision falls within the scope of decisions that can be appealed pursuant to section 28 of the **Planning Act** as it existed on June 15, 2009.

[7] The Appellants therefore submit that the Commission has the jurisdiction to hear this appeal.

The City's Submissions

[8] The City's legal counsel filed detailed written submissions. A very brief summary follows:

- The City submits that its June 15, 2009 decision is not the type of decision contemplated under either subsection 28(1.1) or the former subsection 28(1) of the **Planning Act**. Instead, the City's June 15, 2009 decision is made pursuant to several powers granted to the City under the **Charlottetown Area Municipalities Act**, specifically sections 1(k), 5, 19, 21(i), 63.1, 63.2 and 64. In addition, the City refers to its powers as a "traffic authority" under the **Highway Traffic Act**. The City owns, controls and has responsibility for the management of the City's streets and roads. These decisions are not appealable to the Commission under section 28(1.1) of the **Planning Act**.
- The City submits that the appeal was filed well beyond the 21 day appeal period set out in the **Planning Act**.

[9] The City therefore submits that the Commission does not have the jurisdiction to hear this appeal.

3. Findings

[10] After a careful review of the submissions of the parties and the applicable law, it is the decision of the Commission that it does not have the jurisdiction to hear this appeal. The reasons for the Commission's decision follow.

[11] Section 5 of the **Island Regulatory and Appeals Commission Act** sets out the functions of the Commission:

5. *The functions of the Commission are*

- (a) *to regulate utilities except sewerage and water utilities owned, operated, managed or controlled by the City of Charlottetown, City of Summerside or the Towns of*

Charlottetown South or Charlottetown West; {eff.} March 31/95

- (b) *to hear and decide matters relating to land use, to decide upon the disposition of applications respecting the acquisition of land by non-residents and corporations where so required by any Act;*
- (c) *to hear and decide appeals from decisions of*
 - (i) *the Director under the Rental of Residential Property Act R.S.P.E.I. 1988, Cap. R-13.1,*
 - (ii) *the Provincial Treasurer under the Real Property Assessment Act R.S.P.E.I. 1988, Cap. R-4 or the Real Property Tax Act R.S.P.E.I. 1988, Cap. R-5,*
 - (iii) *the Provincial Tax Commissioner under the Revenue Tax Act R.S.P.E.I. 1988, Cap. R-14;*
 - (iv) *the Provincial Treasurer under the Emergency 911 Act R.S.P.E.I. 1988, Cap. E.5.1; and*
- (d) *to perform such other functions as may be conferred on the Commission under any enactment. 1991,c.18,s.5; 1993,c.29,s.4; 1994,c.25,s.30 {eff.} July 4/94; 1994,c.29,s.1; 2006,c.30.7.*

[12] Subsection 28(1.1) of the **Planning Act** reads as follows:

28(1.1) Subject to subsections (1.2) to (1.4), any person who is dissatisfied by a decision of the council of a municipality

- (a) *that is made in respect of an application by the person, or any other person, under a bylaw for*
 - (i) *a building, development or occupancy permit,*
 - (ii) *a preliminary approval of a subdivision,*
 - (iii) *final approval of a subdivision; or*
- (b) *to adopt an amendment to a bylaw, including*
 - (i) *an amendment to a zoning map established in a bylaw, or*
 - (ii) *(ii) an amendment to the text of a bylaw,*

may appeal the decision to the Commission by filing with the Commission a notice of appeal.

[13] The former subsection 28(1) of the **Planning Act** read as follows:

28. (1) Subject to subsections (2), (3) and (4), any person who is dissatisfied by a decision of a council or the Minister in respect of the administration of regulations or bylaws made pursuant to the powers conferred by this Act may, within twenty-one days of the decision appeal to the Commission.

[14] The Commission is a creature of statute. Its powers are defined by statute. It is subject to the principles of natural justice and fairness. However, like other administrative tribunals, it lacks inherent jurisdiction and thus its powers are only those granted to it by the legislature.

[15] The Commission, like similar quasi-judicial tribunals in Canada and elsewhere, has the power to hear appeals of municipal decisions with respect to land use planning issues, and, where, appropriate, overturn a municipal decision. Municipal zoning, subdivision and development requirements effectively regulate and limit the rights of private landowners to deal with their own land as they see fit. Recognizing that such municipal requirements restrict landowner's property rights, municipal decisions affecting such rights are, in many jurisdictions, subject to a statutory appeal process before a quasi-judicial tribunal. However, unless otherwise specified by legislation, this appellate power to overrule municipal decisions should be confined strictly to municipal land use planning decisions and not be applied to broader municipal decisions.

[16] "Development" is defined in section 1, clause (d) of the **Planning Act** as:

1. (d) "development" means the carrying out of any building operation, including excavation in preparation for building, on, over or under land, or the making of a material change in the use or the intensity of the use of any land, buildings or premises, and includes the placing of structures on, over or under land;

[17] Subsection 20(1) and section 8, clauses (e) and (j) of the **Planning Act** read as follows:

20. (1) The powers of a council to make bylaws includes the power to make bylaws applicable within the municipality with respect to all of the matters set out in clauses 8(a) to (q) except clauses (i), (l) and (p) as if

(a) references to the Crown were references to the municipality;

(b) references to the Minister were references to the council.

...

8. (1) The Lieutenant Governor in Council may make provincial planning regulations applicable to any area except a municipality with an official plan and bylaws

...

(e) with respect to the development of land and the provision of services and in particular

(i) governing the servicing of land with streets, sidewalks, and piped services,

(ii) establishing standards and timetables for the servicing of land,

(iii) establishing cost-sharing schedules for development and maintenance between the developer and the Crown or between vendors and purchasers,

(iv) authorizing the Minister to negotiate development agreements with a developer;

...

(j) *with respect to access to streets and highways and in particular, subject to the provisions of the Roads Act R.S.P.E.I. 1988, Cap. R-15,*

(i) *regulating access roads and lanes and driveways having access to a street or highway in accordance with the laws of the province,*

(ii) *requiring a permit before the construction of such roads, lanes and driveways,*

(iii) *imposing limitations or conditions on a permit;*

[18] The Commission notes that the **Planning Act** does speak to a municipality's authority, within the context of the development of land, to make bylaws governing the servicing of land with streets, sidewalks and piped services. In a similar fashion, the **Planning Act** also authorizes a municipality to make bylaws regulating the servicing of land with access roads, lanes, driveways, vehicular parking, loading spaces etc. that have access to streets and highways.

[19] It is noteworthy that the **Planning Act** does not specifically address a municipality's role with respect to an authority to design, maintain or reconfigure public streets and roadways outside of the development process. In the Commission's view, municipal authority to make bylaws governing the servicing of land with streets and other municipal services is focused on developing the land and serves to benefit the landowner. Such authority is necessary in order to address land use planning issues. However, a general authority over public streets and roadways within the City is focused on the municipal infrastructure as a whole with the view of benefitting the public. This latter authority is necessary to provide essential public services to residents and visitors to the City.

[20] By contrast to the previously cited portions of the **Planning Act**, section 63.1 and subsection 63.2(1) of the **Charlottetown Area Municipalities Act** speak directly to the City's authority over public streets and municipal infrastructure:

63.1 All public streets and all sewers, drains and ditches located within the boundaries of the city are vested in the city and the council shall have full control over them. 1995,c.5,s.4 {eff.} Apr. 1/95.

63.2 (1) The council shall have the supervision and general control over the laying out, opening, altering, building, improving, maintenance and repair of all streets in the city.

[21] The Commission finds that the City's general authority to control, lay out, improve, alter, maintain and repair public streets is contained in the **Charlottetown Area Municipalities Act**, not the **Planning Act**. The Commission finds that the City's authority over public streets, including the authority to redesign an intersection, is an authority separate from its authority to make decisions on land use planning matters. As the **Charlottetown Area Municipalities Act** does not set out a right to appeal to the Commission, and as the City's June 15, 2009 decision to realign the Allen Street / Mount Edward Road intersection by utilizing a modern roundabout is not within the class of

decisions governed by the **Planning Act**, the Commission does not have the legal authority to hear this appeal.

[22] The remaining issues raised, namely whether the Notice of Appeal was filed within the 21 day appeal period set out in the **Planning Act** and whether the past or present wording of section 28 of the **Planning Act** applies to this appeal, have not been addressed in this Order as the Commission has found that the City's June 15, 2009 decision cited earlier is not a decision which can be appealed to the Commission under the **Planning Act**.

[23] For the above reasons, and in the absence of clear and specific legislative or judicial direction granting the necessary jurisdiction to the Commission, the Commission finds that it does not have the jurisdiction to hear this appeal.

4. Disposition

[24] An Order stating that the Commission has no jurisdiction to hear this appeal will be issued.

IN THE MATTER of an appeal by
629857 N.B. Inc. et al of a decision of the City
of Charlottetown, dated June 15, 2009.

Order

WHEREAS on August 3, 2009 the Appellants 629857 N.B. Inc. (dba Island Chevrolet Cadillac), City Collision Services, Reliable Motors Ltd., Brian Carmichael (dba Brian Carmichael Automotive), Blair Lapierre Inc. (dba Mr. Plumber), and Largo Fitness Center (the Appellants) filed an appeal with the Island Regulatory and Appeals Commission (the Commission) under section 28 of the *Planning Act*, R.S.P.E.I. 1988, Cap. P-8, (the *Planning Act*), said appeal pertaining to a decision of the Respondent City of Charlottetown (the City), dated June 15, 2009;

AND WHEREAS the Commission identified possible issues of jurisdiction and invited the Appellants and the City to file written submissions on the jurisdictional issues;

AND WHEREAS the Commission has issued its findings on jurisdiction with respect to this matter in accordance with the Reasons for Order issued with this Order;

NOW THEREFORE, pursuant to the *Island Regulatory and Appeals Commission Act* and the *Planning Act*

IT IS ORDERED THAT

1. **The Commission does not have the jurisdiction to hear this appeal.**

DATED at Charlottetown, Prince Edward Island, this 10th day of November, 2009.

BY THE COMMISSION:

(Sgd.) *Allan Rankin*
Allan Rankin, Vice-Chair

(Sgd.) *John Broderick*
John Broderick, Commissioner

(Sgd.) *Gordon McCarville*
Gordon McCarville, 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 Appeal Division of the Supreme Court upon a question of law or jurisdiction.

(2) The appeal shall be made by filing a notice of appeal in the Supreme Court within twenty days after the decision or order appealed from and the Civil Procedure Rules respecting appeals apply with the necessary changes.

IRAC141AA(2006/10)

NOTICE: IRAC File Retention

In accordance with the Commission'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.

IRAC141AA(2009/11)