



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

**Docket LA09016
Order LA09-13**

IN THE MATTER of an appeal by John Mallory, Paul Currie, Sandra Williamson and Olumayokun Oluyede of a decision of the Town of Stratford, dated July 27, 2009.

BEFORE THE COMMISSION
on Tuesday, the 22nd day of December, 2009.

Allan Rankin, Vice-Chair
John Broderick, Commissioner
Anne Petley, 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 John Mallory, Paul Currie, Sandra Williamson and Olumayokun Oluyede of a decision of the Town of Stratford, dated July 27, 2009.

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IN THE MATTER of an appeal by John Mallory, Paul Currie, Sandra Williamson and Olumayokun Oluyede of a decision of the Town of Stratford, dated July 27, 2009.

Appearances & Witnesses

Written submissions filed by:

1. **For the Appellants John Mallory, Paul Currie, Sandra Williamson and Olumayokun Oluyede**

John Mallory

2. **For the Respondent Town of Stratford**

Brian L. Waddell, Q.C.

IN THE MATTER of an appeal by John Mallory, Paul Currie, Sandra Williamson and Olumayokun Oluyede of a decision of the Town of Stratford, dated July 27, 2009.

Reasons for Order

1. Introduction

[1] The Appellants John Mallory, Paul Currie, Sandra Williamson and Olumayokun Oluyede (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 14, 2009.

[2] This appeal concerns the installation of playground equipment by the Respondent Town of Stratford (the Town). The Appellants submit that, commencing July 27, 2009, the Town installed the playground equipment behind 54 Emmalee Drive.

[3] By faxed letter dated September 3, 2009, Counsel for the Town raised a preliminary objection to the Commission's jurisdiction to hear the appeal.

[4] By letter dated September 4, 2009, Commission staff invited the parties to file written submissions and written rebuttal submissions on the issue of whether the Commission has the jurisdiction to hear this appeal.

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

2. Discussion

The Jurisdictional Issue

[6] In the faxed letter of September 3, 2009, Counsel for the Town noted the following:

I am writing to confirm our exchange of voicemails of August 27, 2009, wherein I advised that the Town of Stratford wishes to make a preliminary objection on the basis that IRAC has no jurisdiction under section 28 of the Planning Act. We will take into position that IRAC is limited to appellate jurisdiction on permits issued by a municipality under the Planning Act but not with respect to placement of playground equipment on a public green space. We shall, on your direction, make further written submissions with the hope or expectation that it will not be necessary to go through a formal hearing on the issue.

The Appellants' Submissions

[7] The Appellants filed two written submissions and a written rebuttal submission. A very brief summary of these submissions follow.

- Following an August 17, 2005 meeting of its Council, the Town delegated the decision to develop the open space to the Town's Recreation Director. The Town's Chief Administrative Officer advised that the Recreation Director later "developed a plan for playground equipment in Emmalee Park".
- The Appellants noted that the Town's Recreation Director made a failed attempt to meet with residents in October 2008. The Appellants submitted that, prior to the start of construction, the Town did not consult with them or advise them that playground equipment would be located on the open space. The appeal was filed within twenty-one days of the Appellants learning that playground equipment was to be installed in the open space.
- The Appellants submitted that the installation of playground equipment represents a development as defined in the **Planning Act**. The Appellants are of the view that the Town's decision to erect the playground equipment falls within subsection 28(1.1)(a)(i) of the **Planning Act**.
- The Appellants noted that the open space is also used for part of the Stratford Trail. They submitted that by applying paragraph 5.18 of the Town's Bylaw, a conflict exists as to the lot size indicated in Paragraph 20.3(1) of the Town of Stratford Zoning and Subdivision Control (Development) Bylaw (the Bylaw). They submit that, as the open space is used for both the trail and the playground equipment, the most stringent standard for lot size shall apply.

[8] The Appellants request that the Commission find that it has the jurisdiction to hear this appeal.

The Town's Submissions

[9] The Town filed a written submission and a written rebuttal submission. A very brief summary of these submissions follow.

- The Town submitted that the installation of children's playground equipment in the park was not a "decision of the council" of the Town. It was an operational decision at the departmental level. No decision of council was made.

- The installation of the playground equipment was not in respect of “an application ... under a bylaw” of the Town. The bylaws specifically exempt public parks from any development permit requirement. No application under a bylaw was made.
- The installation of the playground equipment was not in respect of “an amendment to a bylaw” of the Town. The bylaws clearly provide that public parks are permitted uses in all zones and exempt from any lot area or frontage requirements. No amendment to a bylaw was made.
- The **Planning Act** is, in pith and substance, legislation relating to land use planning. It provides no mechanism for appealing operational or day-to-day decisions made by a department of a municipality. Allowing such appeals to proceed would not only be inconsistent with the stated objects of the **Planning Act**, but also frustrate the delivery of basic public services by municipalities.

[10] The Town submitted that none of the elements required by subsection 28(1.1) of the **Planning Act** are present and therefore the Commission does not have the jurisdiction to hear this appeal.

3. Findings

[11] 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.

[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) 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] In Order LA09-11, *LA09015629857 N.B. Inc. et al. v. City of Charlottetown*, November 10, 2009, the Commission stated at paragraphs 14 and 15:

[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.*

[14] The Commission notes the following definitions from the Town's Bylaw:

OPEN SPACE - means that portion of a Lot which may be used for Landscaping, recreational space or leisure activities normally carried on outdoors; but does not include space used for service drive-ways or off-street parking but shall not include land used for open space including public trails.

PARK - means an area of land designated for public recreational use which may include play areas and structures and other amenities designed to enhance the passive or active enjoyment of the site.

PLAYGROUND - means a landscaped Open Space equipped with children's play equipment such as slides, swings and other similar equipment or facilities.

[15] Section 5.24 of the Town's Bylaw reads as follows:

5.24 PERMITTED USES IN ALL ZONES

(1) Notwithstanding any other provisions of this Bylaw, public utility Buildings and Structures and service facilities provided by the Municipality or the Stratford Utility Corporation such as, but not limited to, sewage treatment plants, pumping stations, transit transfer stations, public Streets, public parks, utility services, water storage reservoirs, and storm water management facilities may be located in any Zone and no Development Permit shall be required and no Zone standards shall apply.

(2) Private utility Buildings and Structures which are considered by Council to be necessary and appropriate to the Municipality shall be permitted in all zones.

(3) Parks and Open Spaces shall be a permitted Use in all Zones.

(4) Notwithstanding any other provisions of this Bylaw, Parks and Open Space Parcels shall be exempt from the minimum Lot area requirements and the minimum Lot Frontage requirement in any Zone.

[16] In the present appeal, no building or development permit for the installation of the playground equipment was issued. Section 5.24 specifies that development permits are not required for public parks. Parks are also exempt from minimum lot area and frontage requirements. Parks are a permitted use in all zones. From the definition of “Park” cited earlier, parks may include “...play areas and structures...” The Commission finds that the Bylaw effectively exempts the Town from the requirement of issuing a development permit to itself for various municipal service facilities, including parks.

[17] Subsection 28(1.1) of the **Planning Act** provides a right of appeal to certain specified municipal decisions. However, the decision by the Town’s recreation staff to install playground equipment in a public park did not involve an application under a bylaw for a building, development or occupancy permit, a preliminary or final approval of a subdivision, or an amendment to a bylaw. Rather, the decision of the Town’s recreation staff to install the playground equipment represented a decision to provide recreational services for the public within a municipal park.

[18] The Commission finds that the decision of the Town to install playground equipment behind 54 Emmalee Drive is not a decision which can be appealed under subsection 28(1.1) of the **Planning Act**. Accordingly, the Commission finds that it does not have the jurisdiction to hear this appeal.

4. Disposition

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

IN THE MATTER of an appeal by John Mallory, Paul Currie, Sandra Williamson and Olumayokun Oluyede of a decision of the Town of Stratford, dated July 27, 2009.

Order

WHEREAS the Appellants John Mallory, Paul Currie, Sandra Williamson and Olumayokun Oluyede (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 Town of Stratford (the Town), dated July 27, 2009;

AND WHEREAS the Commission invited the Appellants and the Town to file written submissions on the jurisdictional issues raised by the Town's legal counsel;

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 22nd day of December, 2009.

BY THE COMMISSION:

(Sgd.) *Allan Rankin*

Allan Rankin, Vice-Chair

(Sgd.) *John Broderick*

John Broderick, Commissioner

(Sgd.) *Anne Petley*

Anne Petley, 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.

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)