



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

**Docket LA09014
Order LA11-05**

IN THE MATTER of an appeal by
Wanda Wood and Heather McBeath of two
decisions of the Community of Victoria,
dated July 17, 2009 and July 21, 2009.

BEFORE THE COMMISSION
on Thursday, the 7th day of April, 2011.

Maurice Rodgerson, Chair
John Broderick, 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
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Wanda Wood and Heather McBeath of two
decisions of the Community of Victoria,
dated July 17, 2009 and July 21, 2009.

Appearances & Witnesses

Written Submissions filed by:

1. For the Appellants Wanda Wood and Heather McBeath

Wanda Wood
Heather McBeath

2. For the Respondent Community of Victoria

Counsel:

David W. Hooley, Q.C.

IN THE MATTER of an appeal by
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dated July 17, 2009 and July 21, 2009.

Reasons for Order

1. Introduction

[1] The Appellants Wanda Wood and Heather McBeath (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 July 28, 2009.

[2] This appeal concerns two related decisions of the Community of Victoria (the Community). On July 17, 2009, the Community made a decision to approve the Community of Victoria 2009 Official Plan (the 2009 Official Plan) and to submit said Plan to the Minister of Communities, Cultural Affairs and Labour [currently the Minister of Finance and Municipal Affairs] (the Minister) for the Minister's approval. On July 21, 2009, the Community made a decision to approve the Community of Victoria 2009 Zoning and Subdivision Control Bylaw (the 2009 Bylaw) and to submit said Bylaw to the Minister for approval.

[3] By letter dated August 5, 2009 addressed to the Appellants and the Community, Commission staff identified a jurisdictional issue. A deadline for written submissions on the jurisdictional issue was established and later extended. The Appellants submitted their written submissions on the jurisdictional issue on September 15, 2009. The Community retained legal counsel, and Counsel for the Community filed written submissions on September 18, 2009.

2. Discussion

Background

[4] In a series of earlier appeals filed by various appellants [LA09003 to LA09007 inclusive] in respect of previous decisions of the Community with respect to the 2009 Official Plan and the 2009 Bylaw, said appellants which included the Appellants of the present appeal, Commission staff referred those various appellants to earlier Orders of the Commission, namely Order LA00-01 *Arthur Jennings et al v. City of Charlottetown* and Order LA04-11 *Andre J. Darville v. Town of Cornwall*. These earlier appeals were consolidated and submissions on the jurisdictional issue were sought. On July 7, 2009 Commission staff advised all parties to these earlier appeals that the Community "...confirms that the [previous] motions to approve and adopt the 2009 Official Plan and 2009 Zoning and Subdivision Control Bylaw have been rescinded". On July 8, 2009, the appellants filed written submissions on the earlier appeals. On July 13, these appellants filed a letter advising the Commission that they intended to withdraw those appeals on a 'without prejudice basis' thus reserving the right to file a future appeal. On July 17, 2009, Commission staff advised these appellants of certain amendments to the **Planning Act** which were proclaimed on June 30, 2009 and published in the July 11, 2009 Royal Gazette. On July 20, 2009, the appellants formally withdrew their earlier appeals.

The Jurisdictional Issue

[5] The Commission has previously addressed the matter of appealing decisions to adopt new or revised official plans and implementing bylaws. A review of two decisions is helpful in setting the context for the Commission's approach in considering whether it has jurisdiction to hear the present appeal.

[6] In Order LA00-01 the Commission concluded:

So that the conclusion arrived at herein is clear, the Commission hastens to reiterate its previous position that a dissatisfied person does have the right to appeal a decision by Council to approve or deny a rezoning or bylaw amendment because that is a decision of Council in the administration of the Bylaw. Contrary to that situation, what the Commission has found in this case is that the City developed a new Official Plan and Bylaw pursuant to statutory authority and these decisions are not appealable to the Commission.

[7] In Order LA04-11 the Commission states:

WHEREAS Andre J. Darville (the Appellant) filed a Notice of Appeal, dated June 30, 2004 and received by the Commission on July 5, 2004, appealing the June 16, 2004 decision of the Town of Cornwall (the Respondent) to rezone the By-Ways Trailer Park from RM1 (Mobile Home) to R3 (Multiple Family Residential);

AND WHEREAS the Commission has been advised by the Respondent that the change in the zoning designation of the By-Ways Trailer Park occurred as a result of the Respondent's new Development Bylaw, Bylaw #403, which received second reading and was adopted by the Respondent's Council on June 16, 2004 and

received the approval of the Minister of Community and Cultural Affairs on July 26, 2004;

AND WHEREAS the Commission on August 31, 2004 invited the parties to file written submissions, said submissions due on or before September 14, 2004 on the preliminary issue of whether the Commission has the jurisdiction to hear this appeal;

AND WHEREAS the Commission on September 8, 2004 received written submissions from the Appellant on the preliminary issue of jurisdiction concerning this appeal;

AND WHEREAS the Commission on September 9, 2004 received written submissions from the Respondent on the preliminary issue of jurisdiction concerning this appeal;

AND WHEREAS the Commission has not received a written submission from MacLennan Holdings Ltd. (the Developer)

AND WHEREAS the Commission reviewed all the information on file for this appeal;

AND WHEREAS the Commission takes notice of the decision of the Commission Order LA00-01 Arthur Jennings et al v. The City of Charlottetown;

AND WHEREAS the Commission held in Order LA00-01 that where a municipality has developed a new Official Plan and Bylaw, the Commission does not have the jurisdiction to hear an appeal of these decisions and the Commission also does not have the jurisdiction to hear an appeal of the decision of the Minister to approve a bylaw under section 17 of the **Planning Act** and an Official Plan under subsection 14(2) of the **Planning Act**;

AND WHEREAS the Commission finds, based on the information before it, that the reasoning of the Commission in Order LA00-01 is applicable to the present appeal;

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

IT IS ORDERED THAT

1. The Commission is without jurisdiction to hear this appeal.

DATED at Charlottetown, Prince Edward Island, this 20th day of October, 2004.

Emphasis added.

[8] In an August 5, 2009 letter to the parties to the present appeal, Commission staff noted in part:

Dear Parties:

Subject: Appeal #LA09014 Wanda Wood and Heather McBeath v. Community of Victoria

I acknowledge receipt of the above captioned appeal, filed on July 28, 2009 while I was out of the office. It is my understanding that the Community has a copy of the Notice of Appeal.

I would note that there is a jurisdictional issue which will have to be considered by the Commission. This jurisdictional issue was raised with the earlier appeals LA09003 to LA09007 inclusive that were recently withdrawn.

An additional dimension to the jurisdictional issue now exists. On July 17, 2009, I first learned that various amendments to the **Planning Act** were proclaimed on June 30, 2009 and published in the July 11, 2009 Royal Gazette. The amendments consist of a notice requirement contained in a new section 23.1 and amendments to section 28 [the appeals section] of the **Planning Act**. The new subsection 28 (1.1) is germane to this appeal and reads 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.

Subsections (1.2) to (1.4) read as follows:

(1.2) In subsection (1.1) and subsection (1.4) "bylaw" means a bylaw made under this Act.

(1.3) A notice of appeal must be filed with the Commission within 21 days after the date of the decision being appealed.

(1.4) For greater certainty, where a person is dissatisfied by the decision of a council of a municipality to adopt an amendment to a bylaw, the 21-day period for filing a notice of appeal under this section commences on the date that the council gave final reading to the amendment to the bylaw.

I would ask the parties to file written submissions on the issue of whether the Commission has the jurisdiction to hear this appeal.

The Appellants' Submissions

[9] The Appellants filed a very detailed written submission with the Commission. The pith and substance of the Appellants submissions, pertaining to the question of the Commission's jurisdiction, follows.

We further contend that the proposed 2009 Official Plan and Zoning & Subdivision Control Bylaws is not a new/replacement for the existing 2002 Official Plan and Development Bylaw. Once again there is no documentation to show that Council requested or was given ministerial permission to revoke or replace the existing Plan and Development Bylaw.

We, therefore, contend that the documents adopted on July 17 and 21 and sent to the Minister for approval are amendments to the 2002 Official Plan and Development Bylaw and that the Commission has the jurisdiction to hear this appeal concerning them.

[10] The Appellants request that the Commission declare that the Community's decisions to approve the 2009 Official Plan and the 2009 Bylaw are null and void.

The Community's Submissions

[11] Counsel for the Community also filed a very detailed written submission with the Commission. A portion of this submission follows.

17. It is submitted that the adoption of the new 2009 Official Plan and the making of the new 2009 Bylaws to implement that Plan are decisions by Council pursuant to the statutory powers given to all municipalities to carry out these functions under sections 11-20 of the Planning Act. The municipal council of the Community of Victoria was very diligent in adhering to all of the procedural requirements found therein in an effort to allow this process to run as smoothly as possible and it is our submission that they did so correctly and effectively.

18. As such, initially adopting an Official Plan and enacting a Bylaw to implement that Plan is a statutorily authorized legislative act by the duly elected Council, not a judicial or quasi-judicial act that is subject to an appeal under section 28 of the Planning Act.

19. It is a trite principle of common law that, - aside from an infraction of the Canadian Charter of Rights & Freedoms, - a legislative action is not a matter that the courts or administrative tribunals have jurisdiction to review. An aggrieved person's remedy for a legislative action with which they are unhappy is at the electoral polls, not in the courts, nor before administrative tribunals such as the Commission. Section 28 of the Planning Act thus defined and continues to define the Commission's limited jurisdiction in a manner consistent with this longstanding principle of constitutional law and at common law.

[12] The Community requests that the Commission dismiss the appeal as the Commission has no jurisdiction to hear the appeal.

3. Findings

[13] 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.

[14] In Order LA00-01, *Arthur Jennings et al v. City of Charlottown*, the Commission observed:

*Having considered all of the arguments advanced by all the parties, it is the Commission's opinion that the decisions by the City in this case were not decisions in respect of the administration of regulations or bylaws, but were decisions made pursuant to specific statutory provisions of the **Planning Act**.*

*The City's Official Plan and Bylaw must be viewed as something greater than merely an amendment or series of amendments to those official plans and bylaws which previously existed. On the contrary, the Commission views Charlottetown and its Official Plan and Bylaw as a new City with a new Official Plan and Bylaw, albeit an amalgamation of many parts consisting of the former municipalities which had their own official plans and bylaws. Further, the Commission views the adoption of the Official Plan and the making of the Bylaw, decisions by Council under the statutory powers given to all municipalities to carry out these functions under the **Planning Act**, and not decisions within the administration of bylaws as provided in subsection 28(1) of the **Planning Act**.*

*The City's decisions to adopt the Official Plan and make the Bylaw are therefore, quite distinct from those decisions undertaken by a municipality where it decides to rezone a parcel of land or amend its bylaw. Typically, municipal bylaws specifically provide for zoning and bylaw amendments by application. The Commission is of the opinion that decisions made under a specific bylaw provision are clearly made by a municipality in the administration of its existing bylaw and, as such, are appealable to the Commission under Section 28 of the **Planning Act**. In these cases, the Commission will also consider the implications for the official plan. The Commission and its predecessor, the Land Use Commission, have a long-standing history of considering such matters.*

...

*In considering all of this, the Commission is of the opinion that there clearly has been a revocation of what previously existed in the way of official plans and bylaws, and that the City has adopted a new Official Plan and made a new Bylaw – and the statutory authority to do so is under the provisions of the **Planning Act**. As such, the Commission finds these not to be decisions in respect to the administration of*

*bylaws, but decisions made pursuant to other specific provisions of the **Planning Act**. The Commission therefore concludes that as these decisions are not of the nature contemplated under the provisions of Section 28 of the **Planning Act**, they are ultra vires the Commission's jurisdiction.*

[15] A careful review of sections 11 to 20 inclusive of the **Planning Act** is helpful to determine whether the Commission has the jurisdiction to hear the present appeal. The Commission notes the following:

- Subsection 11(1) refers to the adoption of an official plan or any review of an official plan. No distinction is made between the initial adoption of the official plan and its subsequent review.
- Subsection 11(2) sets out a process required prior to the adoption of an official plan or a review of an official plan. This process includes public consultation and also includes and refers to proposed implementing bylaws.
- The official plan must be recommended for adoption by planning board, adopted by council and approved by the Minister. Following approval by the Minister, the official plan becomes the official plan for the municipality. [sections 13, 14 and 15]
- Section 15.1 requires a review of the official plan and bylaws at intervals of not more than five years. Where a municipal council fails to comply with this requirement, the Lieutenant Governor in Council (LGC) may, by order, declare the official plan and the bylaws or parts of these documents null and void. The use of the word “may” gives discretion to the LGC. It is important to note that the LGC is not obligated to declare the official plan and bylaws null and void.
- Section 16 gives a municipal council the authority to make bylaws implementing the official plan. Section 17 requires that the bylaws be approved by the Minister. Section 18 requires a public consultation process before a council may make a bylaw.
- Section 19 sets out the process to make a bylaw.
- Section 20 sets out the matters for which bylaws may be made.

[16] The present wording of section 28 of the **Planning Act** became law as a result of proclamation on June 30, 2009. The previous wording of subsection 28(1) of the **Planning Act**, which was the same wording under consideration in Order LA00-01 *Arthur Jennings et al*, was 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.

Emphasis added.

[17] With the benefit of hindsight, it is perhaps unfortunate that the words underlined from the old subsection 28(1) were not included in the amended subsection. However, the Commission's decision in Order LA00-01 *Arthur Jennings et al* continues to guide the Commission as to the nature of its jurisdiction.

[18] Within the sector of land use planning decisions, the Commission is a quasi-judicial tribunal granted the authority to hear certain kinds of municipal planning decisions. These decisions have always related to administrative decisions. For example, the decision to issue, or not to issue, a building permit is an administrative decision. Such a decision may be made by a municipal council, or by a person, such as a development officer, delegated by a municipal council to make such a decision. Administrative decisions quite commonly may be appealed to an appropriate administrative tribunal or to the courts. An administrative decision frequently relates to a specific application, such as an application for a building permit.

[19] By contrast, a legislative decision is a decision to create, or amend, a law. While a tribunal or court may be called upon to interpret legislation, the validity of the legislation is usually beyond the reach of such tribunal or court. There are always exceptions, usually limited to issues of constitutionality and the *Charter of Rights and Freedoms*.

[20] As a result, administrative decisions of a wide range of decision makers, including elected municipalities, may be appealed to tribunals or the courts while the legislative decisions of elected bodies are normally free from such a challenge.

[21] Under the ***Planning Act***, there is a specific statutory process for the creation and review of an official plan and the creation of a bylaw to implement the official plan.

[22] Section 1 of the ***Interpretation Act*** reads as follows:

1. In this Act

- (a) "Act" means an Act of the Legislature;
- (b) "enact" includes to issue, make, establish or prescribe;
- (c) "enactment" means an Act or a regulation or any portion of an Act or regulation;
- (d) "public officer" includes any person in the public service of the province
 - (i) who is authorized by or under an enactment to do or enforce the doing of an act or thing or to exercise a power, or
 - (ii) upon whom a duty is imposed by or under an enactment;
- (e) "regulation" means a regulation, order, rule, form, tariff of costs or fees, proclamation or bylaw enacted

(i) in the execution of a power conferred by or under the authority of an Act, or

(ii) by or under the authority of the Lieutenant Governor in Council,

but does not include an order of a court or an order made by a public officer or administrative tribunal in a dispute between two or more persons;

(f) "repeal" includes revoke, cancel or rescind. 1981,c.18,s.1.

[23] Under the **Interpretation Act**, a bylaw enacted in the execution of a power conferred by an Act, in this case the **Planning Act**, has the same authority as a regulation. The Commission finds that the creation of an official plan or a bylaw implementing such official plan, or the statutorily required review of such documents, is a legislative process which may not be appealed to the Commission.

[24] The Commission has had the benefit of applying the present wording of section 28 of the **Planning Act** for over one and one half years. Based on this experience, it is the view of the Commission that the amendments to the **Planning Act** enacted in 2006 and proclaimed in 2009 were to codify the body of administrative law resting on past Orders of the Commission, rather than to enhance or restrict the Commission's jurisdiction.

[25] While clause 28(1.1)(b) of the **Planning Act** allows an appeal of a decision to amend a bylaw, the Commission interprets this clause as pertaining to bylaw amendments made as an administrative, rather than a legislative, function of a municipality. Thus an amendment to a bylaw, for example an amendment to a zoning map, along with any necessary consequential amendments to an official plan, for example an amendment to the future land use map, both of which were required to allow a specific development project to go ahead, are viewed as administrative decisions which may be appealed to the Commission. By contrast, a comprehensive review of the official plan and the accompanying review of the implementing bylaw, not pertaining solely to any one specific application, constitute a legislative enactment made by the municipality.

[26] The Commission finds that the principles contained in Order LA00-01 *Arthur Jennings et al* continue to apply and thus a decision to enact a new official plan, or a new implementing bylaw, or a statutory review of either document is a legislative decision and the Commission has no jurisdiction to hear an appeal of such a decision. Accordingly, the Commission finds that it has no jurisdiction to hear the present appeal.

4. Disposition

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

IN THE MATTER of an appeal by
Wanda Wood and Heather McBeath of two
decisions of the Community of Victoria,
dated July 17, 2009 and July 21, 2009.

Order

WHEREAS the Appellants Wanda Wood and Heather McBeath (the Appellants) appealed two decisions of the Community of Victoria (the Community), dated July 17, 2009 and July 21, 2009;

AND WHEREAS the Commission invited the Appellants and the Community to file written submissions on the issues of the Commission's jurisdiction to hear this appeal;

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 7th day of April, 2011.

BY THE COMMISSION:

(Sgd.) Maurice Rodgerson
Maurice Rodgerson, Chair

(Sgd.) John Broderick
John Broderick, 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)