



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

**Docket LA10002
Order LA10-05**

IN THE MATTER of an appeal by
Seawood Estates Inc. of a purported
decision of the Resort Municipality, dated
January 21, 2010.

BEFORE THE COMMISSION
on Friday, the 25th day of June, 2010.

Allan Rankin, Vice-Chair
Michael Campbell, 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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IN THE MATTER of an appeal by
Seawood Estates Inc. of a purported
decision of the Resort Municipality, dated
January 21, 2010.

Written Submissions Filed

1. **For the Appellant Seawood Estates Inc.**

Counsel:

Derek D. Key, Q.C.

2. **For the Respondent Resort Municipality**

Counsel:

Perlene J. Morrison

IN THE MATTER of an appeal by
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Reasons for Order

1. Introduction

[1] The Appellant Seawood Estates Inc. (Seawood) has 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*). Seawood's Notice of Appeal was received on February 10, 2010.

[2] This appeal concerns a January 21, 2010 letter from the Respondent Resort Municipality (the Resort Municipality) requiring Seawood to file a change of use application in addition to a subdivision application with respect to the subdivision of parcel numbers 897942 and 987934 located in the Seawood Estates Subdivision.

[3] The Commission notes, for the record, that although Seawood filed the appeal, the record filed by the Resort Municipality indicates that application for subdivision filed with the Resort Municipality notes the present land owner as "Torus Country Lands". Elsewhere in the record, the land owner/developer is referred to as Torus Country Lands Inc.

[4] In a letter dated March 19, 2010, Commission staff identified a potential jurisdictional issue and invited written submissions from the parties or their counsel, as noted in part below:

Upon a review of the file, the Commission is of the view that there is a preliminary question as to whether it has the necessary jurisdiction to hear this appeal. Prima facie, Ms. MacDonald's January 21, 2010 letter to Russell Rogers neither approves nor denies the request to subdivide Lots A and B into six lots in Seawood Estates. Rather, said letter appears to set out steps that the Resort Municipality requires in order to allow the subdivision application to proceed further. The preliminary issue for the Commission is whether said letter constitutes a "decision" within the meaning of the Planning Act.

*The Commission requests written submissions (six copies of each submission) from the parties on this preliminary matter. The deadline for the initial written submissions is **April 9, 2010**. The deadline for rebuttal submissions is **April 23, 2010**. Following the latter deadline, the Commission will review the file to determine whether it has the jurisdiction to hear this appeal on its merits.*

[5] The Commission received submissions from Counsel for the Resort Municipality on April 9, 2010, submissions from Counsel for Seawood on April 13, 2010 and rebuttal submissions from Counsel for Seawood on April 21, 2010. Counsel for the Resort Municipality elected to not file a rebuttal submission.

2. Submissions

Seawood's Position

[6] A brief summary of points raised by Seawood's Counsel follow.

- Seawood's subdivision request is in an area zoned for resort accommodations since the Official Plan was approved on January 27, 2000 and the Zoning and Subdivision Control (Development Bylaw) was approved on May 27, 2000.
- The Resort Municipality advised Seawood that further steps would be required before Seawood's subdivision application could proceed further. Seawood was specifically advised to submit a change of use application for each of Lot A and Lot B.
- It is submitted that the Resort Municipality is relying on the historic zoning of Seawood, ignoring its own Official Plan and ignoring the provisions of subsection 15(1) of the **Planning Act**.
- Seawood submits that the Resort Municipality's decision not to proceed further with Seawood's subdivision application until such time as a change of use application is also filed constitutes a decision within the meaning of section 28 of the **Planning Act** and therefore is subject to appeal. Section 28 of the Planning Act does not require an outright approval or denial of a subdivision application in order for it to constitute a "decision".
- It is submitted that Commission Orders LA09-13 and LA09-11, cited by Counsel for the Resort Municipality, can be distinguished from the present matter and are not applicable.
- It is submitted that the Resort Municipality's January 21, 2010 decision does not constitute a simple "operational or day-to-day decision". Rather, it is a decision made in respect to a specific application to subdivide previously filed in compliance with the current Official Plan and Bylaw.
- It is submitted that Seawood's appeal is not premature. It is submitted that the Resort Municipality's decision of January 21, 2010 is premature.

[7] Seawood requests that the Commission find that it has the jurisdiction to hear Seawood's appeal of the Resort Municipality's January 21, 2010 decision.

The Resort Municipality's Position

[8] A brief summary of points raised by Counsel for the Resort Municipality follow.

- The Commission's jurisdiction is limited to that granted by statute.
- The Resort Municipality's letter of January 21, 2010 was not a decision of Council. It was a letter from the Resort Municipality's Chief Administrative Officer that outlined the steps that Seawood must follow in order that the subdivision application is processed. No decision was made on the application itself.
- If a "decision" is not within the class of decisions governed by the **Planning Act** then the Commission has no jurisdiction to hear the appeal.
- The **Planning Act** does not provide a mechanism for appealing operational or day-to-day decisions made by a municipality, such as whether it is necessary to file a certain form or what information is required in order to process a subdivision application. Allowing such appeals to proceed would not only be inconsistent with the stated objects of the **Planning Act**, but would frustrate the delivery of basic public services by municipalities.
- Seawood's appeal is premature. The Resort Municipality has not even been given a chance to complete the process that will enable its Council to make a decision as to whether the subdivision will be granted. Once the process is complete there may be no reason for an appeal – Seawood could very well be given permission to subdivide in accordance with its application.
- Seawood is appealing a component of the Resort Municipality's application process; it is not appealing a decision of its Council. The Commission cannot intervene since the process is not yet complete and Council has not yet rendered a decision on Seawood's application. Once Council makes a decision, Seawood will then have the right to appeal to the Commission if it is dissatisfied with the decision and if grounds of appeal exist.

[9] The Resort Municipality requests that the Commission find that it does not have the jurisdiction to hear this present 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] Subsection 28(1.1) of the **Planning Act** 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.

[12] The Commission notes that the word “decision” is not defined in the **Planning Act**.

[13] *Black’s Law Dictionary, 6th Edition*, offers the following:

Decision. A determination arrived at after consideration of facts, and, in legal context, law. A popular rather than technical or legal word; a comprehensive term having no fixed, legal meaning. It may be employed as referring to ministerial acts as well as to those that are judicial or of a judicial character.

[14] In Order LA02-06 *Fran J. Whitlock-McGowan v. Community of Lower Montague*, the Commission found that a letter from the Community’s Chairman providing information did not constitute a decision of Council.

[15] In Order LA05-07 *Andre J. Darville v. Town of Cornwall*, the Commission found that a letter prepared by the Town’s staff was not a decision as it merely served to explain the Town’s Bylaw in response to concerns outlined in a letter from Mr. Darville.

[16] In the present appeal, the Resort Municipality’s January 21, 2010 letter may be characterized as a letter of procedure. It determines that Seawood “must submit a change of use application in addition to the subdivision application” and then sets out a process to be followed, which reads as follows:

The following are the steps required in order for your application to proceed any further:

1. *A Change of Use Application(s) shall be submitted from you as the Developer. Upon receipt of the Developer’s application to change the use of Lots A and B, notifications regarding the change of use and proposed subdivision according to Section 17.4(2) of the Bylaw must be sent to all adjacent property owners within 400’.*
2. *The Council will then consider comments provided by neighbouring property owners, applicable official plan provisions and applicable Bylaw provisions;*

3. *The Council has determined that a public meeting will be held at the developer's expense regarding the change of use in which property owners will be notified of the meeting and have a chance to voice any concerns or issues with this proposal. You, as the developer will be present at this meeting as well to provide your plans on the proposal.*

The Council looks forward to hearing from you regarding this matter.

If you have any questions, please do not hesitate to contact me.

[17] Section 9 of the **Interpretation Act** reads as follows:

9. Every enactment shall be construed as being remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. 1981,c.18,s.9.

[18] Section 2 of the **Planning Act** reads as follows:

2. The objects of this Act are

- (a) to provide for efficient planning at the provincial and municipal level;*
- (b) to encourage the orderly and efficient development of public services;*
- (c) to protect the unique environment of the province;*
- (d) to provide effective means for resolving conflicts respecting land use;*
- (e) to provide the opportunity for public participation in the planning process. 1988,c.4,s.2.*

[19] The Commission's jurisdiction to hear decisions, or purported decisions, of a municipality made under the **Planning Act**, needs to be considered on a case-by-case basis. Often jurisdiction is not at issue and all parties agree that the appeal is properly before the Commission. Where, however, a party is of the view that the Commission may not have the jurisdiction to hear an appeal, or the Commission itself has concerns about its jurisdiction, the issue of the Commission's jurisdiction must be determined after giving the parties an opportunity to address the jurisdictional issue.

[20] If the Commission finds that a letter from a municipal decision maker seeks to thwart or effectively deny a land use planning decision while not formally making such a decision, such letter may be viewed as an attempt to circumvent the appeal provisions in the **Planning Act** and thus deny the right of appeal. In such a scenario, the Commission will interpret the term "decision" set out in section 28 of the **Planning Act** in accordance with the **Interpretation Act**, the objects of the **Planning Act** and other relevant enactments. Under such circumstances, the Commission would, in all likelihood, find that it had the jurisdiction to hear the appeal.

[21] In the view of the Commission, the Resort Municipality's January 21, 2010 letter could be characterized as a decision within the meaning of section 28.1 of the *Planning Act*, if the effect of the January 21, 2010 letter was to effectively deny Seawood's subdivision application, or the intent of said letter was to deter such application. However, the Commission finds that no such mischief or ulterior motive is present in the present appeal matter. There is nothing particularly unusual in requiring notification to adjacent property owners and the holding of a public meeting to gain public input. It is appropriate for a municipal decision maker to consider comments from neighbouring property owners. It is essential for municipal decision maker to consider the applicable provisions in its official plan and bylaw.

[22] The Commission finds that the Resort Municipality has taken a cautious yet reasonable position that a change of use application is required. The Resort Municipality has set out the steps to be followed. These steps appear reasonable, are not unduly onerous, and appear to have a foundation in the Resort Municipality's Bylaw. If Seawood follows the requirements set out by the Resort Municipality and the Resort Municipality were to deny Seawood's application, Seawood will then be entitled to an appeal to the Commission so long as the requirements of section 28 of the *Planning Act* are met.

[23] Accordingly, the Commission finds that it does not have the jurisdiction to hear the present appeal.

4. Disposition

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

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WHEREAS the Appellant Seawood Estates Inc. filed an appeal of a letter from the Respondent Resort Municipality, dated January 21, 2010;

AND WHEREAS the Commission invited the Appellants and the Respondent to file written submissions on a possible jurisdictional issue identified by Commission staff;

AND WHEREAS the Commission has issued its findings in 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 25th day of June, 2010.

BY THE COMMISSION:

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

(Sgd.) *Michael Campbell*
Michael Campbell, 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)