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

**Docket LA05028**
**Order LA06-10**

**IN THE MATTER of an appeal by Marion Bernard of a decision of the Minister of Community and Cultural Affairs, dated November 10, 2005.**

**BEFORE THE COMMISSION**
**on Wednesday, the 15th day of November, 2006.**

**Brian J. McKenna, Vice-Chair**
**Weston Rose, Commissioner**
**Kathy Kennedy, Commissioner**

# Order

Compared and Certified a True Copy

(sgd.) Philip J. Rafuse

Land and Appeals Officer
Land, Corporate and Appellate Services Division

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# Appearances & Witnesses

**1. For the Appellant**

**Elwyn Herlihy**

**Witness:**

**Marion Bernard**

**2. For the Respondent**

**Don Walters**

**IN THE MATTER of an appeal by Marion Bernard of a decision of the Minister of Community and Cultural Affairs, dated November 10, 2005.**

# Reasons for Order

## 1. Introduction

[1] This is an appeal filed on November 25, 2005 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***) by Marion Bernard (the Appellant) concerning a decision of the Minister of Community and Cultural Affairs (the Respondent) on November 10, 2005 where it was determined, following a site suitability assessment, that parcel number 497495 (the subject parcel) located at West Point is not suitable for development.

[2] After due public notice and suitable scheduling for the parties, this appeal was heard by the Commission on January 18, 2006. At that time the Respondent requested an abeyance in order to review the suitability of the site in the spring of 2005. The Appellant consented to this abeyance.

[3] On June 20, 2006 the Respondent received a memorandum from the Department of Environment, Energy and Forestry noting that, following a re-examination, the subject parcel and the neighbouring parcel number 632620 (the adjacent parcel) were not suitable for development.

[4] On June 27, 2006 the Appellant requested that the Commission terminate the abeyance and hear the matter in August 2006.

[5] After due public notice and suitable scheduling for the parties, the hearing of this appeal resumed on August 22, 2006.

## 2. Discussion

[6] The Appellant takes the position that the subject parcel and the adjacent parcel were approved lots as the plan of subdivision was approved in 1973. A memo from the Respondent's staff in 1973 indicated that there were no problems with these lots. There was no expiry date for this approval. The Appellant has paid property taxes on the subject parcel since its purchase in 1981. The Appellant submits that other people have built on other lots in the same subdivision and that, therefore, these lots should also be able to be developed.

[7] The Appellant requests that the Commission determine that the subject parcel is suitable for development and order that a building permit be issued. In the alternative, there should be no property taxes payable on the subject parcel, past taxes should be refunded and the government should purchase the subject parcel and the adjacent parcel.

[8] The Respondent states that the subdivision containing the subject parcel and the adjacent parcel was approved in 1973. A review of the file indicates that there were no expressed environmental concerns at that time. In September, 2005, an assessment was performed and it was determined that the subject parcel was not suitable for sewage disposal in the area of the test bed pit. In November, 2005, it was determined that the site was not suitable for development.

[9] On May 25, 2006, the Respondent's staff completed an assessment and the test pit indicated that it was a category I which would be suitable for a sewage disposal system. As well, the Respondent's staff believed that the site was part of a tertiary dune system. This information was sent to the Department of Environment, Energy and Forestry and that Department advised in its June 20, 2006 report that the subject parcel and the adjacent parcel were not suitable for development.

[10] The Respondent submits that it cannot issue a building permit for either the subject parcel or the adjacent parcel as the Department of Environment, Energy and Forestry has determined that the lands are protected under the ***Environmental Protection Act*** and, thus, the parcels are not suitable for development.

# 3. Findings

[11] After a careful review of the evidence, the submissions of the parties, and the applicable law, it is the decision of the Commission to deny this appeal. The reasons for the Commission's decision follow.

[12] In ***Gallant*** v. ***Prince Edward Island (Island Regulatory & Appeals Commission)*** (1997), 155 Nfld. & P.E.I.R. 218 (P.E.I. A.D.) the Prince Edward Island Supreme Court Appeal Division considered the issue of whether a building permit could be issued for a lot in an approved subdivision when the proposed access did not comply with the minimum sight distance requirements. Chief Justice Carruthers considered the legislation, evidence and the submissions of the parties and then stated:

> *15 The appellant relies on Regulation 50(c)(i) and submits the Commission erred in denying him a building permit as the lot in question is an existing parcel of land which is deemed to have an access driveway. This submission raises the issue whether subdivision approval carries with it a vested right to a building permit.*

> *16 This issue was dealt with by Chief Justice MacDonald of the Prince Edward Island Supreme Court Trial Division in Eric D. McLaine Construction Ltd. v. Southport (Community) (1990), 85 Nfld. & P.E.I.R. 168 (P.E.I. T.D.) where he followed the decision of the Supreme Court of Canada in Gauthier v. Quebec (Commission de protection du territoire agricole), [1989] 1 S.C.R. 859 (S.C.C.). He held that approval of a subdivision plan for single family dwellings constitutes a use but such use only pertains to the use of being allowed to erect single family dwellings if all other requirements are met.*
>
> *17 The subdivision plan now before the Court was approved for single family dwelling use but such approval does not entitle a lot owner to receive a building permit without conforming to certain requirements. A building permit authorizing the construction of a single family dwelling on a lot in an approved subdivision is not the same thing as the approval for the subdivision itself.*

[13] In the present appeal, the subject parcel and the adjacent parcel were created in a 1973 plan of subdivision. At the time of approval, it would appear that all the necessary requirements to build on these lots could be met. However, in the intervening years new legislation has been enacted, specifically the Environmental ***Protection Act***.

[14] Subsection 10(2) of the ***Environmental Protection Act*** reads as follows:

> *(2) No person shall, without a permit from the Minister, alter a watercourse, or wetland, or any part thereof, or water flow therein or the land within 10 metres of the watercourse boundary or wetland boundary, in any manner including* *2001,c.34,s.2.*
>
> *(a) constructing a control dam, river diversion or drainage diversion;* *2001,c.34,s.2*
>
> *(b) draining, pumping, dredging, excavating, or removing soil, water, mud, sand, gravel, aggregate of any kind, or litter from any watercourse or wetland;* *2001,c.34,s.2.*
>
> *(c) deliberately dumping, infilling, or depositing in any watercourse or on any wetland any soil, water, stones, sand, gravel, mud, rubbish, litter or material of any kind;* *2001,c.34,s.2.*
>
> *(d) placing or removing structures, including wharves, breakwaters, slipways, or placing or removing obstructions, including bridges, culverts, or dams;* *2001,c.34,s.2.*
>
> *(e) operating machinery on the bed of a watercourse or wetland;* *2001,c.34,s.2.*
>
> *(f) disturbing the ground, either by excavating or depositing earthen or other material, in or on a watercourse or wetland;* *2001,c.34,s.2.*
>
> *g) carrying out any type of instream activity, including debris removal, habitat development, or placement of instream structures.* *1988.19,s.10; 1991,c.10,s.4 {eff.} June 15/91; 1992,c.21,s.4; 1999,c.24,s.2; 2001,c.34,s.2.*

[15] Subsection 22(1) of the ***Environmental Protection Act*** reads as follows:

> ***22.****(1) No person shall, without written permission of the Minister,*
>
> *a) operate a motor vehicle on a beach or a sand dune;*
>
> *(b) carry out any activity that will or may*
>
> *(i) interfere with the natural supply or movement of sand to or within a beach or a sand dune,*
>
> *(ii) alter, remove, or destroy natural stabilizing features, including vegetation, of a beach or a sand dune.*

[16] In the June 20, 2006 memorandum from Jay Carr, Environmental Assessment Officer with the Department of Environment, Energy and Forestry to Don Walters of the Department of Community and Cultural Affairs it is noted that the adjacent parcel 632620 "is comprised entirely of wooded swamp and shrub swamp wetland complex". Wetlands are protected under subsection 10(2) of the ***Environmental Protection Act*** and thus the adjacent parcel "is not suitable for development".

[17] In the same memorandum referred to above, it is noted that:

> *Parcel #497495 is comprised partially of wooded swamp and shrub swamp wetland, with the remainder of the parcel classified as sand dune complex. The majority of the sand dune is classified as secondary dune with minimal tertiary dune present on the parcel. Sand dunes are protected under Section 22 (1) of the Environmental* ***Protection Act****, therefore this parcel is not suitable for development.*

[18] From a review of subsection 10(2) of the ***Environmental Protection Act***, it would appear that a Ministerial permit would be required for development to occur on the subject parcel and the adjacent parcel as both parcels are considered to contain wetlands. A review of subsection 22(1) of said ***Act*** suggests that "written permission of the Minister" is also required for development of the subject parcel as this parcel is considered to contain sand dunes in addition to wetlands. There is no evidence that the Minister of Environment, Energy and Forestry has issued such a permit or provided written permission to the Appellant.

[19] The Commission follows the reasoning of then Chief Justice Carruthers in ***Gallant*** v. ***Prince Edward Island (Island Regulatory & Appeals Commission)*** and finds that the subject parcel and the adjacent parcel may only be developed if "*all other requirements are met*". In the present appeal, the evidence indicates that the requirements of the ***Environmental Protection Act*** have not been met.

[20] The Appellant has requested, as an alternative remedy, an elimination and refund of property taxes on the subject parcel. The Commission does not have the jurisdiction to deal with this request within the context of a ***Planning Act*** appeal. The ***Real Property Assessment Act*** does provide for a referral and appeal process for owners of real property and the Appellant may wish to consider this process.

[21] The Appellant further requested, as an alternative remedy, that the government should purchase the subject parcel and the adjacent parcel. The Commission wishes to point out to the Appellant that it does not have the jurisdiction to order such action.

[22] For the above reasons, the appeal is hereby denied.

# 4. Disposition

[23] An Order denying the appeal will therefore issue.

**IN THE MATTER of an appeal by Marion Bernard of a decision of the Minister of Community and Cultural Affairs, dated November 10, 2005.**

# Order

**WHEREAS** Marion Bernard has appealed a decision of the Minister of Community and Cultural Affairs, dated November 10, 2005;

**AND WHEREAS** the Commission heard the appeal at public hearings conducted in Charlottetown on January 18, 2006 and August 22, 2006 after due public notice and suitable scheduling for the parties;

**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 appeal is denied.**

**DATED** at Charlottetown, Prince Edward Island, this 15th day of November, 2006.

**BY THE COMMISSION:**

Brian J. McKenna, Vice-Chair

Weston Rose, Commissioner

Kathy Kennedy, 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)**