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

**Docket LA07006**
**Order LA07-09**

**IN THE MATTER of an appeal by Jane Dunphy et al of a decision of the Minister of Communities, Cultural Affairs and Labour, dated April 4, 2007.**

**BEFORE THE COMMISSION**
**on Thursday, the 18th day of October, 2007.**

**Maurice Rodgerson, Chair**
**Weston Rose, Commissioner**
**Anne Petley, 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

## Written Submissions Filed

**1. For the Appellant**

**Counsel:**

**M. Lynn Murray, Q.C.**

**2. For the Respondent**

**Counsel:**

**Robert MacNevin**

**3. For the Developer**

**Counsel:**

**James C. Travers, Q.C.**

**IN THE MATTER of an appeal by Jane Dunphy et al of a decision of the Minister of Communities, Cultural Affairs and Labour, dated April 4, 2007.**

# Reasons for Order

## 1. Introduction

[1] Jane Dunphy, Cyril MacKenzie, Kent MacDonald and Ronelda Victor (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 Appellant's Notice of Appeal was received on July 6, 2007.

[2] This appeal concerns the April 4, 2007 decision of the then Minister of Community and Cultural Affairs, now titled the Minister of Communities, Cultural Affairs and Labour (the Respondent), to grant The Inn at Spry Point Inc. (the Developer) preliminary subdivision approval of four lots from parcel number 153122 located in Little Pond, Kings County.

[3] The Commission provided the parties with an opportunity to file written submissions on the issue of jurisdiction with a deadline of September 10, 2007. The Commission received written submissions on behalf of the parties within the deadline.

[4] This Order deals solely with the preliminary issue of whether the Commission has the jurisdiction to hear the appeal.

## 2. Discussion

### Appellants' Position

[5] The Appellants' written submission may be briefly summarized as follows:

- The Respondent's April 4, 2007 decision was made without any notice to the public. If the appeal period ran twenty-one days from April 4, 2007 then the appeal period would be meaningless. The public did not have the opportunity to appeal during that period as they did not have knowledge of the decision.

- Sally's Beach Provincial Park (Sally's Beach) did not open for the 2007 year until June 15, 2007. There would have been no reason for any member of the public to visit the park before that date.

- On June 20, 2007 the Appellant Ronelda Victor visited Sally's Beach to look for missing buoys. She noticed "For Sale" signs on parcel number 153122. The Respondent was contacted and the Appellants were then advised that preliminary subdivision approval had been granted.

- The Respondents filed their appeal within twenty-one days after first learning of the Respondent's decision. Their appeal was filed on the twenty-first day following the date Sally's Beach opened for the 2007 season.

[6] Accordingly, the Appellants submit that the Commission has the jurisdiction to hear the present appeal.

## Respondent's Position

[7] The Respondent's written submission may be summarized as follows:

- Pursuant to the decision of the Supreme Court of Prince Edward Island Appeal Division in *Booth and Peake* v. *Island Regulatory and Appeals Commission* 2004 PESCAD 18 (Booth and Peake), it would appear in the present appeal that the appeal period started to run when the Appellants became aware that a decision of the Minister appeared to have been made. Upon reviewing the appeal documents, that date seems to have been June 20, 2007.

- The Notice of Appeal was filed with the Commission on July 6, 2007 which is within twenty-one days from June 20, 2007. As such, the circumstances would appear to support the contention that the Commission, as far as the time period for filing an appeal goes, does have the jurisdiction to hear this appeal.

[8] The Respondent, however, takes no position with respect to the jurisdictional issue.

## Developer's Position

[9] The Developer's written submission may be summarized as follows:

- The limitation period begins to run when the material facts are known to the Appellants, or in the alternative, these material facts ought to have been known to the Appellants with the exercise of reasonable diligence.

- The concept of the limitation period attaching to the individual and starting to run only on notice to that party is predicated on the specific context of these parties having been parties to the underlying proceedings which were then the subject matter of the appeal. This is not the case in the present appeal.

- The burden of proof lies on the party who seeks to avoid the statutory limitation period. The standard is an objective one. It is not a question of when the Appellants knew of the Respondent's decision. To rely on the knowledge of the Appellants to establish the commencement of the limitation period would be to substitute a subjective standard of personal notice for the Supreme Court of Canada's objective standard of when the material facts have been discovered or ought to have been discovered by the Appellants by the exercise of reasonable diligence. The question is not when did the Appellants notice these signs, but were these signs sufficient reasonable notice that a decision had been made?

- The "For Sale" signs were placed in the ground some time prior to May 14, 2007. This act objectively would cause a reasonable person to inquire as to whether a decision had been made. If the commencement of the limitation period is taken to run from May 13, 2007, the twenty-one day limitation period expired on June 4, 2007, a full month before the Notice of Appeal was filed with the Commission.

[10] The Developer submits that the Commission does not have the jurisdiction to hear the present appeal, as the limitation period has expired.

# 3. Findings

[11] After a careful review of the submissions of the parties and the applicable law, the Commission finds that it does have the jurisdiction to hear this appeal. The reasons for the Commission's decision follow.

[12] Subsection 28(1) of the ***Planning Act*** reads 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.*

[13] In ***Booth and Peak v. Island Regulatory and Appeals Commission*** 2004 PESCAD 18 (October 4, 2004) Justice Webber reviewed caselaw with respect to the issue of when an appeal period begins to run. She then stated the following commencing at paragraph 20:

> *[20] All these cases express a concern about ensuring that a right of appeal is a real rather than an illusory right.*
>
> *[21] I find that **Re Hache and Minister of Municipal Affairs** (1969), 2 D.L.R. (3d) 186 (NBSCAD) applies in this province and the appeal period will begin to run when an appellant has received notice of the decision. This may be specific notice or general notice through posting or publication or by some other means. The bylaws of a community could establish the type of public notice that will be given upon the issuance of a building permit, e.g. publication in a newspaper or newsletter, posting in the community office. If the public can become aware of the decision by way of this public process then the process will likely satisfy the requirements of notice.*

> *[22] Where, as in this case there is no process of public notice set out in either the **Planning Act** or the bylaws of the community, then time can only begin to run when an appellant has actual notice of the decision. Just seeing the mobile home on the property would not be notice of the issuance of a building permit for that home. It might have been placed on the property without a permit.*
>
> *[23] Such notice of a decision is essential to give meaning to the appeal process. If this were not the case, the right to appeal would be illusory, rendering the statutory right of appeal meaningless. It would not be reasonable to interpret the statute in a way that renders a given right meaningless. The law does not specify the manner in which notice to the public must be given but does state that there must be some public notice of a decision–or specific notice to persons affected by the development -- before an appeal period can be said to run. That being said, an appellant could not abuse this right by deliberately delaying inquiry after he/she had been put on notice that a decision appears to have been made. In the present case, the mobile home was placed on the property and the appellants became aware of that fact on June 24, 2003. There was then some responsibility on them to inquire about whether or not a permit had been issued.*

[14] In the present case, on April 4, 2007 the Respondent made a decision to issue preliminary approval for a small subdivision, but did not notify the public. Some time prior to May 14, 2007, the Developer placed signs on the property offering the lots for sale. The signs presumably could be viewed from a public right of way leading to Sally's Beach. Sally's Beach opened for the season on June 15, 2007. One of the Appellants actually saw the sign on June 20, 2007 and a prompt inquiry was then made to the Respondent.

[15] The Commission agrees with the Developer that the standard is an objective one. In Central Trust Co. v. Rafuse, [1986] 2 S.C.R. 147, Justice LeDain noted in paragraphs 73, 74 and 77:

> *73. It is necessary then to consider the appellant's alternative submission on the limitations issue. The question raised by this submission, as I see it, is whether there is any reason why the judgment of the majority in City of Kamloops v. Nielsen, [1984] S.C.R. 2, which applied the discoverability rule to the limitation period in s. 738(2) of the Municipal Act, R.S.B.C. 1960, c. 255, should not be followed with respect to the appellant's cause of action in tort under s. 2(1)(e) of the Nova Scotia Statute of Limitations, R.S.N.S. 1967, c. 168.*
>
> *74. Kamloops involved a claim against a municipality for negligent failure to prevent the construction of a house with defective foundations. Section 738(2) of the Municipal Act provided that such an action must be brought within one year "after the cause of such action shall have arisen", and s. 739 provided that notice of the damage must be given to the municipality within two months "from and after the date on which such damage was sustained". Counsel for the municipality conceded that time began to run under both sections from the date the plaintiff actually discovered the damage or ought to have discovered it by the exercise of reasonable diligence. The issue was when he should have discovered it. The British Columbia Court of Appeal accepted this view of the law, citing Sparham-Souter v. Town and Country Developments (Essex) Ltd., [1976] Q.B. 858 (C.A.), in support of the discoverability rule.*

…

> *77. I am thus of the view that the judgment of the majority in Kamloops laid down a general rule that a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence, and that that rule should be followed and applied to the appellant's cause of action in tort against the respondents under the Nova Scotia Statute of Limitations, R.S.N.S. 1967, c. 168. There is no principled reason, in my opinion, for distinguishing in this regard between an action for injury to property and an action for the recovery of purely financial loss caused by professional negligence, as was suggested in Forster v. Outred, at pp. 765-66. Since the respondents gave the Nova Scotia Trust Company a certificate on January 17, 1969 that the mortgage was a first charge on the Stonehouse property, thereby implying that it was a valid mortgage, the earliest that it can be said that the appellant discovered or should have discovered the respondents' negligence by the exercise of reasonable diligence was in April or May 1977 when the validity of the mortgage was challenged in the action for foreclosure. Accordingly the appellant's cause of action in tort did not arise before that date and its action for negligence against the respondents is not statute-barred.*

[16] The Commission finds that from sometime prior to May 14, 2007 until June 14, 2007, "For Sale" signs were viewable from a public right of way leading to Sally's Beach. However, during this time Sally's Beach was closed to the public. The Commission finds that it would, in all likelihood, be quite unusual for a member of the public to be traveling on this road when the gates leading to the beach were closed. At this point there was no reasonable opportunity to trigger the exercise of reasonable diligence.

[17] All this changed on June 15, 2007. The gates opened and the public now had a reason to travel upon the right of way. Within a mere 5 days one of the Appellants saw the signs and prompt inquiries were made.

[18] The Commission finds that the twenty-one day appeal period commenced on June 15, 2007, the very earliest date that a member of the public could have, by reasonable diligence, learned of the Respondent's decision. The Appellants filed their appeal on July 6, 2007, within the twenty-one day appeal period and accordingly, the Commission finds that it has the jurisdiction to hear this appeal.

[19] However, the Commission wishes to stress that it was the actions of the Developer that ultimately provided notice to the public of the Respondent's decision. Providing notice of the Respondent's decisions is vital for the fair, just and efficient operation of the appeal process under the ***Planning Act***. Notice is necessary to allow potential appellants an opportunity to exercise their statutory right to appeal. Potential appellants, so notified, then have the responsibility to make inquiries and exercise reasonable diligence. Developers also benefit by the increased certainty of a finite and predictable end to the appeal period.

[20] In Order LA05-06, James G. Rumson v. Minister of Community and Cultural Affairs, the Commission wrote at paragraph 19:

> *While it is correct to say that the **Planning Act** and its regulations do not require the Respondent to notify the public or neighbours, the Supreme Court's decision in **Booth and Peak** has addressed the issue of when an*

> *appeal period begins to run and the* ***Commission expects that the Minister, as well as municipal decision makers, will now take full heed of the Supreme Court's decision when making decisions for matters within the scope of the Planning Act. Providing clear and adequate notice to neighbours and the general public is in the best interest of all parties in order to avoid appeals commencing weeks, months or years after a development has received approval.*** [Emphasis added]

[21] As the issue of Notice has surfaced yet again, the Commission hopes that the Court's ruling will serve as a clarion call for decision makers to provide the public with notice of all their decisions which are subject to the appeal provisions of the ***Planning Act***.

# 4. Disposition

[22] An Order stating that the Commission does have the jurisdiction to hear this appeal will therefore issue.

**IN THE MATTER of an appeal by Jane Dunphy et al of a decision of the Minister of Communities, Cultural Affairs and Labour, dated April 4, 2007.**

# Order

**WHEREAS** Jane Dunphy, Cyril MacKenzie, Kent MacDonald and Ronelda Victor (the Appellants) have appealed a decision of the Minister of Communities, Cultural Affairs and Labour, dated April 4, 2007;

**AND WHEREAS** the Commission provided the parties with an opportunity to file written submissions on the issue of whether the Commission has the jurisdiction to hear this appeal;

**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 has the jurisdiction to hear this appeal.**

**DATED** at Charlottetown, Prince Edward Island, this 18th day of October, 2007.

**BY THE COMMISSION:**

Maurice Rodgerson, Chair

Weston Rose, Commissioner

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 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.*

**IRAC141A(99/2)**