



**THE ISLAND REGULATORY AND  
APPEALS COMMISSION**

Prince Edward Island  
Île-du-Prince-Édouard  
CANADA

**Docket LA07012  
Order LA08-01**

**IN THE MATTER** of an appeal by  
Wanda Wood and Donald Wood of a decision  
of the Community of Victoria, dated October  
9, 2007.

**BEFORE THE COMMISSION**  
on Thursday, the 20th day of March, 2008.

Maurice Rodgerson, Chair  
Ernest Arsenault, Commissioner  
Chester MacNeill, Commissioner

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# Order

Compared and Certified a True Copy

(sgd.) Philip J. Rafuse

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Land and Appeals Officer  
Land, Corporate and Appellate Services Division

**IN THE MATTER** of an appeal by  
Wanda Wood and Donald Wood of a decision  
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# Appearances & Witnesses

**1. For the Appellants**

**Donald Wood**

**Wanda Wood**

**2. For the Respondent**

**Counsel:**

**Perlene Morrison**

**Witness:**

**Leonard Keefe**

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# Reasons for Order

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## 1. Introduction

[1] Wanda Wood and Donald Wood (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' appeal was received on October 29, 2007.

[2] This appeal concerns an October 9, 2007 decision of the Community of Victoria (the Respondent) to issue a development permit to Sauve Holdings Ltd. (the Developer) for renovations and an addition to the Landmark Café located on property number 207670 in Victoria.

[3] The hearing was originally scheduled for December 13, 2007. The Appellants requested a postponement due to illness in their family and the Commission granted this request. After due public notice and suitable scheduling for the parties, the appeal was heard by the Commission at a public hearing held on February 7 and 8, 2008.

## 2. Discussion

### Appellants' Position

[4] The Appellants filed written submissions with their Notice of Appeal (Exhibit A1). The Appellants also presented oral submissions at the hearing. A brief summary of the highlights of the Appellants' submissions follows.

- The Appellants contend that the Respondent has not followed proper procedures and has not complied with the requirements of the Official Plan and Development Bylaw for the Community of Victoria and/or the requirements of the *Planning Act* and *Planning Act* Regulations.
- At the October 9, 2007 meeting of the Respondent's Council, there was no recommendation from the Respondent's Planning Board because Planning Board did not have a quorum at their September 24, 2007 meeting.

- There is no evidence that Council on or prior to October 9, 2007 considered the requirements of the Official Plan and Zoning and Subdivision Control Bylaw as they pertain to the Developer's application for a development permit for the Landmark Café. There was no discussion concerning the requirement of buffer zones referred to in section 3.2 of the Official Plan.
- The Appellants contend that property number 207670 is not suited for expansion or intensification. It is a non-conforming lot on the corner of Main and Howard Streets which is probably the busiest intersection in the Community. The adjacent buildings are close together and therefore approval should have been obtained from the Provincial Fire Marshall before issuing a development permit.
- The Appellants contend that the proposed addition to the Landmark Café increases the level of non-compliance of the existing non-conforming use. Property number 207670 is a non-conforming lot and any application that would result in a reduction of lot requirements or intensify lot coverage should be construed as increasing the level of non-compliance.

[5] The Appellants request that the Commission allow this appeal and revoke the building permit granted to the Developer.

#### **Respondent's Position**

[6] A brief summary of the highlights of the Respondent's oral submissions follows.

- The **Planning Act** Regulations do not apply in this appeal as the Respondent has an Official Plan and a Zoning and Subdivision Control Bylaw (Bylaw).
- Planning Board is an advisory board only and it does not make a decision to approve or deny the issuance of a development permit. Members of Planning Board hold office until replacements are appointed. Several members had recently left the Province. The Respondent did its best under these circumstances.
- The central core of Victoria is unique, featuring small lot sizes. It is difficult to meet current development standards given these small lot sizes. Section 4.38 of the Bylaw provides for non-conforming uses and allows for the expansion of an existing building. The Developer's proposed addition to the Landmark Café does not increase the level of non-compliance. The buffer requirements of section 7.6 can be met with the removal of the baby barn and the driveway.
- In his letter of November 21, 2007, the Deputy Fire Marshall did grant approval in principle, subject to a list of conditions.

[7] The Respondent requests that the appeal be dismissed.

### 3. Findings

[8] After a careful review of the submissions of the parties and the applicable law, it is the decision of the Commission to allow this appeal and replace the decision of the Respondent's Council with one made by the Commission. The reasons for the Commission's decision follow.

[9] Appeals under the **Act** generally take the form of a hearing de novo before the Commission. In an often cited decision which provides considerable guidance to the Commission, *In the matter of Section 14(1) of the Island Regulatory and Appeals Commission Act (Stated Case)*, [1997] 2 P.E.I.R. 40 (PEISCAD), Mitchell, J.A. states for the Court at page 7:

*it becomes apparent that the Legislature contemplated and intended that appeals under the Planning Act would take the form of a hearing de novo after which IRAC, if it so decided, could substitute its decision for the one appealed. The findings of the person or body appealed from are irrelevant. IRAC must hear and decide the matter anew as if it were the original decision-maker.*

[10] In previous appeals, the Commission has found that it does have the power to substitute its decision for that of the person or body appealed from. Such discretion should be exercised carefully. The Commission ought not to interfere with a decision merely because it disagrees with the end result. However, if the person or body appealed from did not follow the proper procedures or apply sound planning principles in considering an application made under a bylaw made pursuant to the powers conferred by the **Act**, then the Commission must proceed to review the evidence before it to determine whether or not the application should succeed.

[11] The Commission finds that the above-cited principle, originally applied to decisions concerning building or development permits, and later applied to applications for variances and applications for rezoning, is applicable to the facts of this case. A two-part test is invoked:

- whether the municipal authority, in this case the Respondent, followed the proper procedures as required in its Bylaw in making a decision to approve the development permit; and
- whether the proposed development for which a development permit has been sought has merit based on sound planning principles.

[12] Sections 1.5 and 6.1 of the Respondent's Official Plan read as follows:

#### **1.5 Legal Enablement**

*The Community of Victoria derives the majority of its powers from the Planning Act. The Planning Act empowers Council to appoint a Planning Board, adopt an Official Plan and to subsequently adopt implementing land use and development control bylaws.*

#### **6.1 Administration**

*Administration and implementation of this Official Plan is the responsibility of Council. The Council shall, however, seek the input of the Planning Board on matters pertaining to the Plan. The primary implementation tool for the Plan is the Development Bylaw. Aspects of the Plan may also be implemented through other municipal bylaws or regulations, Council's operating policies and procedures, the municipal budget and other appropriate Council actions. Council may also delegate aspects of the implementation of this Plan to a Development Officer appointed by Council.*

Emphasis added.

[13] Subsections 21(2) and 21(3) of the **Municipalities Act**, R.S.P.E.I. 1988, Cap. M-13 read as follows:

(2) *The quorum at any council meeting is*

(a) *the mayor or chairperson or, in his absence, the deputy mayor or vice-chairperson; and*

(b) *at least one-half of the councillors then holding office.*

(3) *No business shall be conducted at any meeting of a council unless a quorum is present.*

[14] The Appellants contend that the Respondent's Planning Board did not have a quorum at its September 24, 2007 meeting. As cited above, a quorum for a council meeting is defined in the **Municipalities Act**. In the context of a committee or a planning board, a quorum is not defined in the **Municipalities Act**, the **Planning Act**, the Official Plan or the Bylaw. However, this does not end the matter, as the **Interpretation Act**, R.S.P.E.I. 1988, Cap. I-8 steps in to fill the void.

[15] Paragraphs 1(c) and 1(e) of the **Interpretation Act** read as follows [with document references inserted by the Commission]:

1. *In this Act*

...

(c) *"enactment" means an Act [e.g. Planning Act] or a regulation [see definition of regulation below] or any portion of an Act [e.g. section 9 of the Planning Act] or regulation [e.g. section 1.4 of the Bylaw];*

...

(e) *"regulation" means a regulation, order, rule, form, tariff of costs or fees, proclamation or bylaw [e.g. Respondent's Zoning and Subdivision Control 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,*

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

**17.** (1) *Where in an enactment an act or thing is required or authorized to be done by more than two persons, a majority of them may do it.*

(2) *Where an enactment establishes a board, commission or other body consisting of three or more members (in this section called the "association"),*

*(a) if the number of members of the association provided for by the enactment is a fixed number, then at least one-half of that number of members constitutes a quorum at a meeting of the association;*

*(b) if the number of members of the association provided for by the enactment is not a fixed number, then at least one-half of the number of members in office constitutes a quorum at a meeting of the association, provided the number of members is within the maximum or minimum number, if any, authorized by the enactment;*

*(c) an act or thing done by a majority of the members of the association present at a meeting, if the members present constitute a quorum, shall be deemed to have been done by the association;*

*(d) a vacancy in the membership of the association does not invalidate the constitution of the association or impair the right of the members in office to act, if the number of members in office is not less than a quorum;*

*(e) a member of the association whose term of office has expired may continue to act as, and shall be deemed to continue to be, a member of the association until such time as the appointment of his successor takes effect. 1981,c.18,s.17.*

Section 9 of the **Planning Act** sets out the role of a planning board and reads as follows:

**9.** (1) *The council of a municipality which has an official plan adopted under this Act or a previous Planning Act is responsible for administration of the official plan within the boundaries of the municipality.*

(1.1) *Where*

*(a) a provincial land use and development policy pursuant to clause 7(1)(a);*

*(b) minimum requirements applicable to official plans pursuant to clause 7(1)(b); or*

*(c) regulations pursuant to clause 7(1)(c) have been adopted, established or made, the land use policy of a council or the*



*official bylaws of a municipality shall, subject to subsection 7(2), be consistent with them.*

*(2) The council of a municipality may appoint a planning board to prepare an official plan.*

*(3) The planning board has the following powers and duties:*

*(a) to investigate and survey the physical, social and economic conditions in relation to the development of the municipality;*

*(b) to recommend to the council, for its adoption, an interim planning policy;*

*(c) to prepare and recommend to council for its adoption a proposed official plan;*

*(d) to prepare and recommend to the council proposed alterations and additions to the official plan;*

*(e) to recommend to the council bylaws in respect of the official plan;*

*(f) to hold public meetings;*

*(g) when requested by the council so to do, to prepare estimates of the cost of any public work, improvement, or other project; and*

*(h) to perform such other duties of a planning nature as may be requested by the council.*

*(4) A planning board shall consist of*

*(a) a chairman who shall be a member of the council; and*

*(b) not less than two other members who may be members of the council.*

*(5) Members of a planning board hold office until their successors are appointed.*

*(6) The council shall notify the Minister of the establishment of a planning board, give the names of the members thereof and notify the Minister of any changes in the membership of the board.*

*(7) The members of a board shall receive such remuneration and expenses as the council may determine.*

*(8) For the purpose of assisting a planning board to prepare an official plan, a council may*

*(a) employ staff;*

*(b) engage consultants;*

(c) incur expenditures;

(d) study, investigate and survey physical, social and economic matters relevant to the preparation, amendment or implementation of an official plan. 1988, c.4, s.9; 1991, c.30, s.3 {eff.} May 16/91; 1994, c.46, s.3 {eff.} July 14/94; 1995c.29, s.3 {eff.} Oct. 14/95.

[17] The Commission finds that the quorum requirements of section 17 of the **Interpretation Act** apply to municipal planning boards in the absence of a statutory, regulatory or bylaw definition of a planning board quorum. Section 17 of the **Interpretation Act** applies to a planning board because the planning board is authorized by the **Planning Act**. Further, section 17 of the **Interpretation Act** also applies to a planning board because a planning board is required by the Respondent's Bylaw. Section 1.4 of the Respondent's Bylaw reads as follows:

#### 1.4 AUTHORITY OF PLANNING BOARD

*Council shall appoint a Planning Board, the duties of which shall be to review and recommend appropriate planning actions to Council.*

[18] The Commission finds that the Respondent's planning board did not have a quorum at its September 24, 2007 meeting. Accordingly, the Commission finds that the Respondent erred procedurally in that it did not have the benefit of the review and recommendation of its planning board when the Respondent's Council made its decision to approve the development permit for the Landmark Café on October 9, 2007.

[19] However, as noted earlier, the Commission is hearing this appeal *de novo* and has the benefit of the evidence provided by the Respondent at the hearing. The November 21, 2007 letter from the Deputy Fire Marshall provides evidence that the renovations and addition to the Landmark Café were granted approval in principle from the Fire Marshall's office, subject to a list of conditions. Mr. Keefe's testimony before the Commission identified the various provisions of the Official Plan and Bylaw that supported the application for a development permit. The Commission is satisfied that it is appropriate to substitute its decision for that of the Respondent.

[20] The Commission notes the following provisions of the Respondent's Official Plan:

#### 1.2 Official Plan goal

*To respond positively to change but respect the traditional values of village life while retaining our unique natural and cultural heritage resources. To encourage, protect and preserve the vital industries of farming, fishing and tourism which form an intricate part of Victoria's environment. Development within the village should be sustainable i.e. "Development that meets the needs of the present without compromising the ability of future generations to meet their own needs".*

#### 3.1 Introduction

*The Community of Victoria is concerned about protecting the character and integrity of its residential neighbourhood but it is also apparent that we have to develop a strong assessment base in order to support services. The Community of Victoria will support and encourage both business and residential development if it is sustainable, and does not affect the existing integrity and character of the village.*

#### **4.3 Commercial**

##### *Statement of intent*

*The Community of Victoria is committed to supporting commercial activity, either wholly commercial or as a home based business, with careful attention to its development and to support commercial development but not at the expense of the conversion of residential to commercial. The community is also committed to protect the heritage Buildings and ensure that the streetscape and “views” are retained and enhanced.*

[21] The Commission also notes the following sections of the Respondent's Bylaw:

##### **4.38 NON-CONFORMING USES**

*i) Subject to the provisions of this Bylaw, buildings or structures lawfully in existence on the effective date of approval of this Bylaw may continue to exist.*

*ii) A building or structure shall be deemed to exist on the effective date of approval of this Bylaw if it meets the following criteria:*

- a) it was lawfully under construction; or*
- b) the permit for its construction was in force and effect, but this clause shall not apply unless the construction is commenced within six (6) months after the date of the issue of the permit and is completed in conformity with the permit within a reasonable time; or*
- c) it is a designated Heritage Building in accordance with section 4.10 Policy PH-5 Heritage Buildings page 34 of the Official Plan.*

*iii) Where a building has been erected in accordance with clause ii) on a lot having less than the lot requirements of this Bylaw, the building may be enlarged, reconstructed, repaired, or renovated provided that*

- a) the enlargement, reconstruction, repair or renovation does not further reduce the front yard, rear yard, side yard or flankage yard which does not conform to this Bylaw; and*
- b) all other applicable provisions of this Bylaw are satisfied.*

*iv) Subject to plan review by the Planning Board and the issuing of a building permit, structural changes to buildings of non-conforming uses shall be allowed, and such structural additions or changes shall not constitute a legal change in the non-conforming status of said*

*building provided there is no alteration of the basic identified non-conforming use of the building.*

*v) Subject to plan review by the Planning Board and the issuing of a building permit, a building which does not conform to provisions of this Bylaw that is destroyed by fire or otherwise replaced to an extent of fifty percent (50%) or more of the assessed value of the building above its foundation, shall retain its nonconforming status if the building or repair work is done in harmony with the original design and use of the building, and such work would not be detrimental, in the opinion of the Planning Board, to the convenience, health or safety of residents in the vicinity or the general public.*

*vi) Any change of tenants or occupants of any premises or building shall not affect the status of the land for the purposes of this bylaw.*

*vii) Lot requirements for non-conforming uses within the central core of the community shall meet the following minimum criteria:*

- a) Minimum front yard: 17 feet (5.18 m.)*
- b) Minimum side yard: 8 feet (2.44 m.)*
- c) Minimum rear yard: 8 feet (2.44 m.)*
- d) Minimum flanking yard: 17 feet (5.18 m.)*

#### **7.6 SPECIAL REQUIREMENTS: COMMERCIAL ZONES ADJACENT TO RESIDENTIAL ZONES**

*Notwithstanding any other provision of this Bylaw, where a Commercial Development located on lands zoned Commercial (C1) directly abuts on any residential zone, the following conditions shall be complied with:*

- i) a strip of land not less than 15 feet (4.5 m.) in width along the lot line within the C1 zone and adjacent to the residential zone shall be maintained clear of any structure, driveway or parking area and shall be adequately landscaped to provide a visual buffer;*

[22] Having reviewed the Official Plan, the Bylaw and the file provided by the Respondent, and having heard the testimony of the witnesses called at the hearing, the Commission is satisfied that the issuance of a building permit, with conditions, to the Landmark Café for the renovations and addition, is consistent with the provisions of the Respondent's Official Plan and Bylaw and is also consistent with sound planning principles.

[23] The Commission hereby directs the Respondent to issue a new development permit to the Developer, listing all the conditions required by the Respondent (including any conditions added since October 9, 2007), incorporating by reference the conditions required by the Deputy Fire Marshall in his letter of November 21, 2007 and referencing this Order of the Commission, that is to say Commission Order LA08-01.

[24] The Commission is sympathetic to the situation experienced by many small communities in the Province of Prince Edward Island. These communities, with a very small population and limited financial and human resources, provide municipal government and land use planning services for

those who live in the community and those who wish to engage in development there. Many municipal services rely on community minded volunteers. Given this reality, it becomes even more important to follow procedures that are based on established principles and are fairly and universally applied because it is essential that public confidence be maintained.

[25] The Commission views the appeal process under the *Planning Act* as educational for all parties as well as remedial. It is hoped that through the appeal process those who participate and those who observe will gain additional insight into meaningful procedures and best practices.

[26] Knowledge of decisions is essential to keeping the public informed of actions and permitting input. The public's lack of awareness of planning related decisions has been an issue in several recent appeals before the Commission and the subject of an appeal to the Supreme Court a few years ago. The Respondent, by posting notices and decisions of its Council in the local post office, appears to be very effective in informing residents of Council actions. The Commission commends the Respondent for this low cost yet effective practice and considers it one that merits consideration by other communities.

## 4. Disposition

[27] An Order allowing the appeal and substituting the Commission's decision for that of the Respondent will therefore issue.

**IN THE MATTER** of an appeal by  
Wanda Wood and Donald Wood of a decision  
of the Community of Victoria, dated October  
9, 2007.

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# Order

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**WHEREAS** Wanda Wood and Donald Wood (the Appellants) have appealed a decision of the Community of Victoria (the Respondent), dated October 9, 2007;

**AND WHEREAS** the Commission heard the appeal at public hearings conducted in Charlottetown on February 7 and 8, 2008 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 allowed.
2. The Commission hereby directs the Respondent to issue a new development permit to the Developer,
  - (a) listing all the conditions required by the Respondent (including any conditions added since October 9, 2007),
  - (b) incorporating by reference the conditions required by the Deputy Fire Marshall in his letter of November 21, 2007 and
  - (c) referencing this Order of the Commission.

**DATED** at Charlottetown, Prince Edward Island, this 20th day of March, 2008.

**BY THE COMMISSION:**

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Maurice Rodgerson, Chair

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Ernest Arsenault, Commissioner

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Chester MacNeill, 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)