



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

**Docket LA08002 and  
LA08004  
Order LA08-03**

**IN THE MATTER** of an appeal by  
Sharon Ogawa of a decision of the  
Community of Lower Montague, dated March  
5, 2008.

**BEFORE THE COMMISSION**  
on Friday, the 30th day of May, 2008.

Brian J. McKenna, Vice-Chair  
John Broderick, Commissioner  
David G. Holmes, Commissioner

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# Order

Compared and Certified a True Copy

(Sgd.) Philip J. Rafuse  
\_\_\_\_\_  
Land and Appeals Officer  
Land, Corporate and Appellate Services Division

**IN THE MATTER** of an appeal by  
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# **Appearances & Witnesses**

**1. For the Appellant**

**Sharon Ogawa, Appellant  
David Hume, Appellant's representative**

**2. For the Respondent**

**No person was present at the hearing on behalf of the Community of Lower Montague**

**IN THE MATTER** of an appeal by Sharon Ogawa of a decision of the Community of Lower Montague, dated March 5, 2008.

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# Reasons for Order

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## 1. Introduction

[1] Sharon Ogawa (the Appellant) filed two appeals 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 for docket number LA08002 was received on February 18, 2008. The Appellant's Notice of Appeal for docket number LA08004 was received on March 13, 2008.

[2] Docket LA08002 concerns a purported decision of the Community of Lower Montague (the Respondent), dated February 6, 2008.

[3] Docket LA08004 concerns a decision of the Respondent, dated March 5, 2008, to deny an application for a building permit to reconstruct a cottage on property number 253336 on the St. Andrew's Point Road in Lower Montague (the subject property).

[4] After due public notice and suitable scheduling for the parties, appeal docket LA08004 was heard by the Commission at a public hearing on May 12, 2008.

[5] At the commencement of the hearing, the Appellant withdrew her appeal for docket LA08002.

## 2. Discussion

### Appellant's Position

[6] The Appellant's oral submissions may be briefly summarized as follows:

- The Appellant consulted with provincial government staff on the matters of environmental approval and the highway right of way. The Appellant understood that there would be no problem so long as any new building constructed on the subject property did not encroach any further on the highway right of way and was not built any closer to the bank (watercourse) than the existing building which was to be removed. On the strength of this understanding, the Appellant purchased the subject property.
- In January 2008, the Appellant applied for a building permit. The January meeting of the Respondent's Council was cancelled due to a snowstorm. At the February meeting, the Appellant understood that the Respondent denied her application. The Appellant then filed appeal docket LA08002. She then learned that no decision had actually been made because there was no quorum of the Respondent's Council. At the March 2008 meeting of the Respondent's Council there was a quorum and her application for a building permit was denied. She then filed appeal docket LA08004.
- The Appellant stated that she does not know why her application was denied. She is, however, aware of a letter, dated October 16, 2007, from the Manager of Provincial Lands to the Respondent's Administrator. The Appellant's representative suspects that the Respondent's decision to deny the building permit application was based on the October 16, 2007 letter.

The Respondent requests that the Commission allow the appeal, overturn the Respondent's March 5, 2008 decision and order the Respondent to issue a building permit to the Appellant to permit her to demolish the existing building and replace it with a new building of no greater footprint and in the same location on the subject property.

### Respondent's Position

The Respondent did not have a representative appear on its behalf at the hearing.

Following the hearing, Commission staff contacted the Respondent's Administrator to inquire as to the Respondent's bylaw definition of the term "reconstruct". Staff also requested copies of the Respondent's 2006 Official Plan and Zoning and Subdivision Control Bylaws, approved by the then Minister of the former Department of Community and Cultural Affairs [now known as the Department of Communities, Cultural Affairs and Labour] on January 2, 2007. In a letter from Beth Nicholson, the Respondent's Administrator, to Commission staff, it is noted in part:

*Reconstruct is not defined in our bylaws, however reconstruction of the building was not applied for. The application received from Ms. Ogawa is requesting construction of a new building, larger than is presently located on the property, that would encroach further into the public right of way and or the required buffer zone.*

### 3. Findings

[7] The Commission allows the appeal and orders that the Respondent reconsider the Appellant's application for a building permit on the subject property.

[8] This appeal appears to be unprecedented in the Commission's history as the Respondent was not represented at the appeal hearing. The Commission usually considers a failure of an appellant, or a representative of the appellant, to appear at the appeal hearing to constitute an abandonment of the appeal. The Commission does, however, allow for sudden illness, personal emergency and other factors beyond the appellant's control, provided this information is communicated to the Commission.

[9] However, in the present appeal the Appellant and her representative did attend the hearing. It was the Respondent that did not appear at the hearing. This left the Appellant and the Commission without an opportunity to understand the reasoning behind the Respondent's decision.

[10] In previous appeals, the Commission has found that it does have the power to substitute its decision for that of the decision maker 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 **Planning 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 deny the issuance of a building permit for the subject property; and
- whether the proposed development for which a building permit has been sought has merit based on sound planning principles.

[12] In the present appeal, the Commission is left in a quandary. It does not know the basis upon which the Respondent denied the application for a building permit. The Commission does not know whether or not the Respondent followed the proper procedures required in its Bylaw.

[13] Accordingly, the Commission allows the appeal. The Commission orders the Respondent to re-consider the Appellant's application for a building permit. The Respondent shall give full reasons for its decision and specifically refer to any documents or letters relied on. These reasons shall be transparent upon a review of the Respondent's file, whether by a written report presented to the Respondent's Council by its Administrator, Development Officer, Planner or other advisor to Council, detailed minutes of Council's discussion of the application, a detailed letter to the Appellant after the decision has been made or by a similar approach to ensure that the Respondent's reasoning is on record.

[14] For reasons of future clarity, the Commission wishes to make clear that appellants and respondents are required to attend or send an authorized representative to an appeal hearing involving an appeal filed by the appellant and a decision made by the respondent municipality or minister. Parties are free to choose their own representative. However, a failure to personally attend or send a representative, without notifying the Commission with just cause for absence [sudden illness, personal emergency or other factors beyond that person's control] is tantamount to contempt for the appeal process.

## **4. Disposition**

[15] An Order allowing the appeal and requiring the Respondent to reconsider the Appellants application, following the directives contained in the Reasons for Order, will therefore be issued.

**IN THE MATTER** of an appeal by Sharon Ogawa of a decision of the Community of Lower Montague, dated March 5, 2008.

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# Order

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**WHEREAS** Sharon Ogawa (the Appellant) has appealed a decision of the Community of Lower Montague (the Respondent), dated March 5, 2008;

**AND WHEREAS** the Commission heard the appeal at public hearings conducted in Charlottetown on May 12, 2008 after due public notice;

**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 Respondent is required to re-consider the Appellant's application for a building permit for parcel 253336.
3. The Respondent shall give full reasons for its decision and specifically refer to any documents or letters relied on. These reasons shall be transparent upon a review of the Respondent's file, whether by a written report presented to the Respondent's Council by its Administrator, Development Officer, Planner or other advisor to Council, detailed minutes of Council's discussion of the application, a detailed letter to the Appellant after the decision has been made or by a similar approach to ensure that the Respondent's reasoning is on record.



**DATED** at Charlottetown, Prince Edward Island, this 30th day of May, 2008.

**BY THE COMMISSION:**

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(Sgd.) Brian J. McKenna

Brian J. McKenna, Vice-Chair

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(Sgd.) John Broderick

John Broderick, Commissioner

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(Sgd.) David G. Holmes

David G. Holmes, 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)