



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

**Docket LA09008 and  
LA09009  
Order LA09-08**

**IN THE MATTER** of appeals by Morgan  
Eisenhour and Les Zielinski of a decision of  
the Resort Municipality, dated April 15, 2009.

**BEFORE THE COMMISSION**  
on Wednesday, the 22nd day of July, 2009.

Brian J. McKenna, Vice-Chair  
John Broderick, Commissioner  
Anne Petley, Commissioner

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# Order

Compared and Certified a True Copy

(Sgd.) Philip J. Rafuse

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Appeals Administrator  
Land, Corporate and Appellate Services Division

**IN THE MATTER** of appeals by Morgan  
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# **Appearances & Witnesses**

1. **For the Appellant Morgan Eisenhour**  
**Morgan Eisenhour**  
**Also Present: Debbie Eisenhour**
  
2. **For the Appellant Les Zielinski**  
**Les Zielinski**
  
3. **For the Respondent Resort Municipality**  
**Counsel: Scott Dickieson**  
**Witness: Brenda MacDonald**  
**Also Present: Mel Gass**
  
4. **For the Developer Green Village Accommodations Ltd.**  
**Stephen Oickle**

**IN THE MATTER of appeals by Morgan Eisenhour and Les Zielinski of a decision of the Resort Municipality, dated April 15, 2009.**

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# Reasons for Order

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## 1. Introduction

[1] The Appellants Morgan Eisenhour (Mr. Eisenhour) and Les Zielinski (Mr. Zielinski) have filed 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*). Mr. Eisenhour's Notice of Appeal was received on April 21, 2009. Mr. Zielinski's Notice of Appeal was received on April 30, 2009.

[2] These appeals concern an April 15, 2009 decision of the Respondent Resort Municipality (the Resort Municipality) to issue a building permit to Green Village Accommodations Ltd. (Green Village) to construct a one storey vacant land condominium development, consisting of 13 cottage units of 28 feet by 32 feet with a deck as well as to move the existing farmhouse closer to the road located on Route 6 (Cavendish Road) at property #694745 (the subject property) in the Resort Municipality.

[3] After due public notice and suitable scheduling for the parties, the appeal was heard by the Commission at a public hearing on June 12, 2009.

## 2. Discussion

### Mr. Eisenhour's Position

[4] Mr. Eisenhour's submissions may be briefly summarized as follows:

- He stated that he operates Driftwood Landing, a vacant land condominium development. Driftwood Landing shares a common property line with the subject property. He noted that section 7.3 of the Resort Municipality's Zoning and Subdivision Control (Development) Bylaw (the Bylaw) requires condominiums to be physically separate from existing residential development. He submitted that the subject property is not physically separate from Driftwood Landing and therefore the Resort Municipality's decision to issue a permit to allow a vacant land condominium development on the subject property is contrary to the requirements set out in section 7.3 of the Bylaw.

- Mr. Eisenhaur also stated that section 7.3 of the Bylaw requires a condominium development to be “appropriate”. He submitted that, given the current economic climate, it is inappropriate to issue a permit for an additional vacant land condominium development in the Resort Municipality. He submitted that granting a permit for such a development is inconsistent with orderly development as there is insufficient demand for this type of residential development at the present time.
- He submitted that Green Village’s comprehensive site plan for the subject property did not provide all the necessary details required under section 7.6 of the Bylaw. He submitted that this plan does not show contours and adjacent roads. He further submitted that the plan does not provide for turning areas necessary for waste trucks and other large vehicles.
- He submitted that there are unresolved right of way issues between the subject property and Mr. Zielinski’s property.
- He submitted that the Resort Municipality’s Official Plan requires a development to follow the standards set by previous developments. He submitted that Driftwood Landing set the standard for vacant land condominium developments and the proposed development of the subject property does not meet this standard.
- He submitted that the Resort Municipality did not check the Condominium Act prior to issuing the permit for a vacant land condominium development on the subject property.

[5] Mr. Eisenhaur requests that the Commission allow his appeal and quash the permit for the subject property issued by the Resort Municipality.

### **Mr. Zielinski’s Position**

[6] Mr. Zielinski’s position was raised as a preliminary matter at the outset of the hearing. He noted that the Resort Municipality “quite properly” provided for a right of way as a condition attached to the permit for the vacant land condominium development. He noted that the Commission had previously ruled in Order LA01-02 that right of way disputes are a matter for the Supreme Court.

[7] Mr. Zielinski requested an adjournment of his appeal until after the Supreme Court of Prince Edward Island rules on the right of way issue between his property and the subject property. The Commission denied this request for an adjournment noting that Order LA01-02 previously addressed the right of way issue and the Resort Municipality made a 24 foot right of way a condition of the permit for the subject property. Mr. Zielinski requested permission to be excused from the hearing and the Commission granted that request.

### **The Resort Municipality’s Position**

[8] The Resort Municipality’s submissions may be briefly summarized as follows:

- The Resort Municipality followed the requirements of its Official Plan and Bylaw prior to issuing a development permit for the subject property.
- The Resort Municipality acknowledged that the wording “physically separated from existing residential development” contained in section 7.3 of the Bylaw is awkward. However, the Resort Municipality submits that the interpretation given to this phrase by Mr. Eisenhour would, in effect, require an undeveloped lot between each development contemplated by section 7.3. It was also suggested that such an interpretation would be problematic given that the subject property had an existing residence on it at the time a permit was issued to Mr. Eisenhour for his own Driftwood Landing development.
- The Resort Municipality submitted that the Condominium Act does not impose duties on municipal council. It was further submitted that it is not the role of the Resort Municipality to investigate the title of private landowners prior to issuing a development permit.
- With respect to Mr. Zielinski’s appeal, the Resort Municipality noted that the development permit issued for the subject property already contains an attached condition addressing Mr. Zielinski’s concerns.

[9] The Resort Municipality requests that the Commission deny both appeals.

### **Green Village’s Position**

[10] The submissions of Green Village may be briefly summarized as follows:

- Stephen Oickle, on behalf of Green Village, noted that his proposed development is relatively small at 14 units. He also noted that Driftwood Landing is also a relatively small development at 15 units. He submits that he believes that there is a market for 29 units of this type in Cavendish.
- He submitted that the right of way issue is before the Supreme Court and not the Commission. He also noted that the development permit already provides for a 24 foot right of way.
- With respect to the contention that the proposed development does not follow the standards set by Driftwood Landing, Mr. Oickle acknowledges that the roadway on Driftwood Landing is paved while the roadway on the proposed Green Village development will be gravel. However, Mr. Oickle noted that from an environmental perspective, gravel is superior as it does not result in as much runoff as pavement.
- He submitted that the 24 foot wide driveway on Driftwood Landing, combined with an additional 24 foot wide driveway on Green Village, provide plenty of separation between the two developments.

[11] Mr. Oickle requests that the Commission deny both appeals.

### 3. Findings

[12] After a careful review of 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.

[13] In Order LA01-02 *Les Zielinski v. Resort Municipality*, dated April 23, 2001, the Commission noted:

*While the Commission does possess the jurisdiction to hear and determine the appeal under the Act and the Bylaw, the Commission does not have the jurisdiction to determine the existence, location or width of a right of way, or disputes between parties concerning a right of way. Rather, the Commission's role is to determine whether or not the Respondent correctly administered its own Bylaw when it decided to issue building permit 00-C-56 to the Developer.*

...

*In reaching its decision in this case, the Commission reiterates that it is not determining a right of way as between the Appellant and the Developer. This is not the forum for such a determination.*

[14] In the present appeal, the right of way issue is properly a matter to be resolved by the Supreme Court of Prince Edward Island. The Resort Municipality attached a condition to the development permit addressing the right of way issue. According to Mr. Zielinski and Mr. Oickle, the right of way matter is before the Supreme Court. The Supreme Court has jurisdiction on that matter and the law as determined by the Supreme Court on the right of way issue will be fully respected by the Resort Municipality and the Commission. However, the right of way issue is not a valid reason to quash the Resort Municipality's decision to issue a development permit and accordingly, the Commission dismisses Mr. Zielinski's appeal.

[15] The crux of Mr. Eisenhour's arguments would appear to be that the proposed development of the subject property is not appropriate and that the proposed development is contrary to section 7.3 of the Bylaw as it is adjacent to a residential development.

[16] Section 7.3 of the Bylaw reads as follows:

#### 7.3 SPECIAL PERMIT USES

*Notwithstanding Section 7.2 above, Council may issue a special development permit for the following uses where it deems: the development is appropriate; the development is physically separated from existing residential development; the development is serviced by central sewer; and all other relevant provisions of this Bylaw are met; and subject to such conditions as Council may impose:*

- 1) duplex dwellings/semi-detached dwellings
- 2) neighbourhood convenience stores
- 3) multiple family dwellings
- 4) condominiums
- 5) group homes
- 6) day care centres or day nurseries

[17] With respect to the argument that the proposed vacant land condominium development is not appropriate at this time, given the current economic situation, the Commission finds that the role of a municipality is to ensure that new developments meet the requirements of the Official Plan and Bylaw. Thus, the term “appropriate” as noted within section 7.3 of the Bylaw is within the context of land use planning rather than economic development. The Commission finds that the evidence does not support a finding that the proposed development is inappropriate from a planning perspective.

[18] With respect to the argument that the proposed vacant land condominium development is not physically separated from existing residential development, the Commission agrees that Green Village’s property line abuts the property line of the Driftwood Landing development. However, section 7.3 of the Bylaw does not speak of abutting or adjacent property lines. Rather, it speaks of physical separation from existing residential development.

[19] If the Commission were to accept the interpretation offered by Mr. Eisenhour, a condominium development would not be permissible adjacent to a parcel of land with an existing residential development within the Resort Municipality. If that were indeed the case, it might call into question the validity of the Resort Municipality’s prior decision to allow Mr. Eisenhour to develop the vacant land condominium development, now known as Driftwood Landing, given that one or more properties adjacent to Mr. Eisenhour’s property already had residential development. Such an interpretation could also potentially result in every second lot within the Resort Municipality being required to remain undeveloped.

[20] While the wording “*the development is physically separated from existing residential development*” contained in section 7.3 of the Bylaw is rather vague, a more logical interpretation of that phrase would be to prevent the six uses listed in section 7.3 from being physically attached to or contained within an existing residential building.

[21] Accordingly, the Commission rejects the interpretation of section 7.3 offered by Mr. Eisenhour.

[22] In previous appeals, the Commission has found that it does have the power to substitute its decision for that of the municipal or ministerial decision maker. 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 decision maker 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.

[23] The Commission finds that the evidence provided by Mr. Eisenhour does not support a finding that the Resort Municipality failed to follow proper procedures or apply sound planning principles when it made the decision to issue a development permit to Green Village.

[24] The Commission finds that the evidence, on a balance of probabilities, supports a finding that the Resort Municipality, in making the decision to issue a development permit to Green Village for the proposed vacant land condominium development, followed the process set out in its Bylaw. Further, the Commission finds that the decision to issue said permit was consistent with the Resort Municipality’s Official Plan and Bylaw. Accordingly, the Commission denies Mr. Eisenhour’s appeal.



## **4. Disposition**

[25] An order denying Mr. Eisenhour's appeal and Mr. Zielinski's appeal follows.

**IN THE MATTER** of appeals by Morgan Eisenhour and Les Zielinski of a decision of the Resort Municipality, dated April 15, 2009.

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# Order

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**WHEREAS** the Appellants Morgan Eisenhour and Les Zielinski have appealed a decision of the Respondent Resort Municipality, dated April 15, 2009;

**AND WHEREAS** the Commission heard the appeal at public hearings conducted in Charlottetown on June 12, 2009 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 appeals are denied.

**DATED** at Charlottetown, Prince Edward Island, this 22nd day of July, 2009.

### BY THE COMMISSION:

(Sgd.) Brian J. McKenna

Brian J. McKenna, Vice-Chair

(Sgd.) John Broderick

John Broderick, Commissioner

(Sgd.) Anne Petley

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)