



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

**Docket LA09012  
Order LA09-09**

**IN THE MATTER** of an appeal by  
James A. Campbell of a decision of the  
Community of Eastern Kings, dated June 23,  
2009.

**BEFORE THE COMMISSION**  
on Monday, the 19th day of October, 2009.

Maurice Rodgerson, Chair  
Ernest Arsenault, 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

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# Appearances & Witnesses

1. **For the Appellant James A. Campbell**  
**James A. Campbell**
  
2. **For the Respondent Community of Eastern Kings**  
**Alfie Wakelin**  
**Witness:**  
**Morley Foy**

**IN THE MATTER** of an appeal by James A. Campbell of a decision of the Community of Eastern Kings, dated June 23, 2009.

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# Reasons for Order

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## 1. Introduction

[1] The Appellant James A. Campbell (Mr. Campbell) has 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**). Mr. Campbell's Notice of Appeal was received on June 25, 2009.

[2] This appeal concerns a June 23, 2009 decision of the Respondent Community of Eastern Kings (the Community) to deny preliminary approval for a four lot subdivision of property number 377259 located in Red Point (the subject property).

[3] After due public notice and suitable scheduling for the parties, the appeal was heard by the Commission at a public hearing on September 10, 2009.

## 2. Discussion

### Mr. Campbell's Position

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

- The development of the subject property began in 1971. The subject property was partly developed in phases with a few lots created at a time. As environmental requirements became more stringent over the years, the size of new lots increased.
- In 1989 the treatment lagoon was created for the nearby Provincial campground. The Department of Environment, Energy and Forestry (the Department) recommended to the Community that Mr. Campbell's current proposed lots 1 to 3 are not suitable for development due to the proximity of these lots to the treatment lagoon. As a result of this recommendation, he did not proceed with a site suitability assessment for the proposed lots.

[5] In his Notice of Appeal, Mr. Campbell seeks the following relief:

*Compensation for the 6 lots made unusable due to lagoon.*

## The Community's Position

[6] The Community's position may be briefly summarized as follows:

- In a July 3, 2008 letter, the Department recommended to the Community that lots 1 to 3 of Mr. Campbell's proposed subdivision development were not suitable for development due to the vicinity of the treatment lagoon. The basis of the Community's decision to deny preliminary approval of the subdivision of the subject property follows the Department's recommendations.
- Morley Foy, an approval and compliance engineer for the Department, testified on behalf of the Community. Mr. Foy noted that the Department's recommendation was based on the Atlantic Canada wastewater Guidelines Manual. These guidelines specify a minimum distance of 150 metres between a treatment lagoon and an isolated residential area. As this particular treatment lagoon is a seasonal one, the Department was comfortable in reducing the minimum separation distance to 100 metres. Mr. Foy noted that this treatment lagoon serves the campground. The contents are released once a year once the natural process has completed. The release usually occurs in the spring, but a fall release is possible if the standards have been met.
- Mr. Foy noted that it is possible for a treatment lagoon berm to be breached. He also noted that while other treatment lagoon berms within the Province have been breached, it is his understanding that the berm for this particular treatment lagoon has never breached.

[7] The Community requests that the Commission deny the appeal.

## 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 deny this appeal. The reasons for the Commission's decision follow.

[9] 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 **Act**, then the Commission must proceed to review the evidence before it to determine whether or not the application should succeed.

[10] 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 Community, followed the proper procedures as required in its Bylaw in making a decision on the application for a subdivision of the subject property; and
- Whether the Community's decision with respect to the proposed subdivision of the subject property has merit based on sound planning principles.

[11] In the present appeal, there is no evidence before the Commission that the Community failed to follow the procedures set out in its land use bylaw to be followed on a subdivision application.

[12] The Commission must consider whether the decision of the Community with respect to the proposed subdivision of the subject property has merit based on sound planning principles. In the present appeal, the Community made a decision to deny preliminary subdivision based on recommendations provided by the Department.

[13] The Community made a cautious decision when it denied preliminary approval of Mr. Campbell's subdivision application, as the Department's recommendation was based, not on legally binding regulations, but guidelines.

[14] However, the Commission agrees with the cautious approach followed by the Community. The potential for groundwater contamination is a serious matter, with great potential for harm to the health of persons living in the affected area. Such harm may also give rise to liability issues. According to the evidence before the Commission, one of the proposed lots was adjacent to the treatment lagoon berm. The Commission finds that the Community's decision to deny preliminary subdivision approval of the subject property was consistent with sound planning principles.

[15] The Commission wishes to point out to Mr. Campbell that it does not have the jurisdiction to award him compensation.

[16] Accordingly, the Commission denies this appeal.

## **4. Disposition**

[17] An Order denying the appeal will be issued.

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# Order

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**WHEREAS** the Appellant James A. Campbell has appealed a decision of the Community of Eastern Kings, dated June 23, 2009;

**AND WHEREAS** the Commission heard the appeal at public hearings conducted in Charlottetown on September 10, 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 appeal is hereby denied.

**DATED** at Charlottetown, Prince Edward Island, this 19th day of October, 2009.

**BY THE COMMISSION:**

\_\_\_\_\_  
(Sgd.) *Maurice Rodgerson*  
Maurice Rodgerson, Chair

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(Sgd.) *Ernest Arsenault*  
Ernest Arsenault, Commissioner

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(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 Court of Appeal upon a question of law or jurisdiction.*

*(2) The appeal shall be made by filing a notice of appeal in the Court of Appeal 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)