



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

**Docket LA09013  
Order LA09-14**

**IN THE MATTER** of an appeal by Nils  
Connor of a decision of the Minister of  
Communities, Cultural Affairs and Labour,  
dated July 9, 2009.

**BEFORE THE COMMISSION**  
on Wednesday, the 23rd day of December,  
2009.

John Broderick, Commissioner  
David Holmes, 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 an appeal by Nils  
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**IN THE MATTER** of an appeal by Nils Connor of a decision of the Minister of Communities, Cultural Affairs and Labour, dated July 9, 2009.

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# **Appearances & Witnesses**

**1. For the Appellant Nils Connor**

**Hans Connor  
Kirsten Connor**

**2. For the Respondent Minister of Communities, Cultural Affairs and Labour**

**Garth Carragher  
Sharlene Quinn**

**3. For the Developer Abraham Hamming**

**Abraham Hamming  
Wilhelmina Hamming**

**IN THE MATTER** of an appeal by Nils Connor of a decision of the Minister of Communities, Cultural Affairs and Labour, dated July 9, 2009.

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# Reasons for Order

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## 1. Introduction

[1] The Appellant Nils Connor (Mr. Connor) 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. Connor's Notice of Appeal was received on July 27, 2009.

[2] This appeal concerns the July 9, 2009 decision of the Respondent Minister of Communities, Cultural Affairs and Labour (the Minister), to grant approval date stamping to the Developer Abraham Hamming (Mr. Hamming) for a subdivision of five summer cottage lots from property number 204362 (the subject property) located at Long Creek.

[3] After due public notice and suitable scheduling for the parties, the appeal was set down for a public hearing by the Commission on September 23, 2009. At that hearing, a representative of the Minister informed the Commission that, due to unforeseen circumstances, the Minister's main representative was unable to attend the hearing. With the consent of all parties, the Commission adjourned the hearing until October 16, 2009.

## 2. Discussion

### Mr. Connor's Position

[4] The submissions presented on behalf of Mr. Connor may be briefly summarized as follows:

- The Connor family owns agricultural land adjacent to the subject property. They purchased their farm land in 1975. They have used their land for an orchard, cropland and forestry. The Connor family believes that Mr. Hamming's development is incompatible with the surrounding uses and thus will impede their ability to farm their own land.
- The Connor family is concerned that, although the lots are approved for summer cottage use, the residences constructed on these lots might be used year-round.

- The Connor family submitted that the development of the subject property constitutes premature development.
- Kirsten Connor advised the Commission that she first became aware of the extent of the development of the subject property when subdivision markers appeared. The Connor family then contacted the Minister's staff and thereafter promptly filed their appeal with the Commission.

[5] The Connor family requests that the Commission attach conditions to the development of the subject property to eliminate the potential for neighbouring farms to experience negative effects from the development. In the alternative, the Connor family requests that the subdivision permit be quashed or rescinded.

### The Minister's Position

[6] The Minister's representative noted that the subject property is within a community that has a community council. There is no official plan for that community and therefore, the **Planning Act** Subdivision and Development Regulations apply. The subject property is not within a special planning area. The Minister's representative reviewed, in chronological order, the process followed by the Minister's staff. The Minister's representative noted that Mr. Hamming's application for a subdivision of the subject property met all requirements set out in the **Planning Act** and its regulations. As all requirements were met, the application for subdivision of the subject property received preliminary approval in May 2009 and final approval in July 2009.

[7] The Minister requests that the Commission deny this appeal.

### Mr. Hamming's Position

[8] Mr. Hamming submitted that the Connor family has not been actively farming their land for the last several years. He noted that the Connor family did not approach him with their concerns.

[9] Mr. Hamming requests that the Commission deny this appeal.

## 3. Findings

[10] 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.

[11] Subsection 28(1) of the **Planning Act** reads as follows:

*28. (1) Subject to subsections (1.2) to (4), any person who is dissatisfied by a decision of the Minister that is made in respect of an application by the person, or any other person, pursuant to the regulations for*

*(a) a development permit;*

*(b) a preliminary approval of a subdivision or a resort development;*

*(c) a final approval of a subdivision;*

*(d) the approval of a change of use; or*

*(e) any other authorization or approval that the Minister may grant or issue under the regulations,*

*may appeal the decision to the Commission by filing with the Commission a notice of appeal.*

[12] Subsection 28(1.3) reads as follows:

*(1.3) A notice of appeal must be filed with the Commission within 21 days after the date of the decision being appealed.*

[13] The Commission finds that Mr. Connor filed his Notice of Appeal within 21 days of the Ministers decision to issue approval date stamping or final approval of the subdivision of the subject property.

[14] With respect to the Minister's decision to issue preliminary approval on May 20, 2009, the Commission notes that Mr. Connor's appeal was filed well beyond the 21 day appeal period. This is significant given the wording of subsection 28(4) which reads:

*28.(4) No appeal lies from a decision of the council or the Minister respecting*

*(a) the final approval of a subdivision where the grounds for the appeal are matters that could have been heard and determined at the stage of preliminary approval of the subdivision; or*

*(b) the final approval of a subdivision or development permit within a resort development, where the grounds for the appeal are matters that could have been heard and determined at the stage of preliminary approval of that subdivision or development. 2001, c.47,s.1.*

[15] However, the Commission accepts the evidence of Kirsten Connor that the Connor family only learned of the subdivision of the subject property when they happened to notice the presence of survey markers. Accordingly, the Commission accepts the Notice of Appeal as an appeal of both the May 20, 2009 preliminary approval and the July 9, 2009 final approval decisions of the Minister.

[16] As a cautionary note, the Commission wishes to point out that the Minister, commencing in October 2009, appears to have implemented the statutory notice requirements set out in section 23.1 of the **Planning Act**. Accordingly, in the future, the test as to whether a **Planning Act** appeal of a decision of the Minister has been filed within the 21 day appeal period may very likely be of a different nature than that set out in this present Order.

[17] Mr. Connor raises similar issues to those raised in Order LA08-07 *George Kelly v. The Minister of Communities, Cultural Affairs and Labour*. In Order LA08-07 the Commission stated:

*[17] The primary thrust of Mr. Kelly's appeal appears to be that, for several reasons, the subject property should not be subdivided into residential building lots. Many of these issues were previously raised by Mr. Kelly in Order LA07-11 which dealt with a different parcel of land for which preliminary subdivision approval was granted by the Minister.*

[18] In Order LA07-11, the Commission noted:

[12] The Commission is a quasi-judicial administrative tribunal empowered by several statutes to perform various administrative, regulatory and appellate functions. In its appellate functions, it is the role of the Commission to consider the decisions of various municipal and ministerial decision makers to ensure that they have complied with the acts, regulations or bylaws which provide the legal foundation for their decision.

[13] The present matter is an appeal of a decision of the Minister of Communities, Cultural Affairs and Labour in respect of the regulations made pursuant to the powers conferred by the **Planning Act**. These regulations include the Subdivision and Development Regulations and the Province-wide Minimum Development Standards Regulations.

[14] Appeals under the **Planning 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.

[15] The Appellant has provided the Commission with forceful and articulate arguments concerning the broad issue of the subdivision of rural land, especially land with good agricultural capability. These arguments have been made with considerable thought and effort and the Commission is impressed with the Appellant's commitment to this issue.

[16] The Commission commends the members of the public who participated in the hearing for their comments which reflect a much broader concern than the subdivision approval under appeal.

[17] Regardless of the conviction or persuasive power of the Appellant's argument, the Commission's role is not to stand in judgment of existing public policy or to fashion new policy initiatives. That role properly belongs with the Legislative Assembly of Prince Edward Island. The role of the Commission is akin to the role of the Courts: to ensure that the law as currently written has been complied with. However, unlike the Supreme Court, the Commission is a creature of statute and accordingly its jurisdiction is thus more limited.

[18] The Commission notes that no breach of the **Planning Act** or its regulations was identified at the hearing of this matter. Rather, the Appellant focused on the need for reform of public policy relating to rural land use development.

[19] *Having reviewed the file disclosed by the Respondent, the Commission cannot find any error on the part of the Respondent. The Commission finds that the Respondent followed the **Planning Act** and its regulations in granting preliminary subdivision approval to the subject property.*

[20] *In the event that the Commission had found that the Respondent had breached the requirements of the **Planning Act** or its regulations, the most extensive remedy that the Commission could provide would have been to quash preliminary approval of the subdivision of the subject property. The Commission does not have the jurisdiction to order the relief requested by the Appellant.*

[21] *For the reasons stated throughout, the Commission hereby denies this appeal.*

[19] *In the present appeal, Mr. Kelly could not identify any error made by the Minister or her staff. Upon a review of the file disclosed by the Minister, the Commission could not identify any evidence of Ministerial error leading to the June 10, 2008 decision to grant preliminary subdivision approval to the subject property. Rather, Mr. Kelly's concerns would appear to be with public policy as it relates to rural land use on Prince Edward Island. As stated in Order LA07-11, the Commission's role is to decide whether or not the decision maker followed the present day law. In the present appeal, the Commission finds that the requirements of the **Planning Act** and its regulations were followed. Accordingly, the Commission denies this appeal.*

[18] Likewise, the Connor family has provided the Commission with thoughtful and insightful submissions focusing on the potential for land use conflict between the development of the subject property and the Connor family farm. As noted by the Connor family, and as noted in previous years by Mr. Kelly, these concerns are not limited to any one subdivision. Rather, the issue of the continued subdivision of agricultural land for residential building lots is an issue of concern for the entire Province.

[19] However, the Commission is not a legislative body entrusted with the creation of public policy. Rather, the Commission's role as a quasi-judicial body is to determine whether the May 20, 2009 and July 9, 2009 decisions of the Minister were made in accordance with the law as expressed in the **Planning Act** and its various regulations, most notably the Subdivision and Development Regulations. The **Planning Act**, and its regulations, do not provide for zoning requirements, or an approach similar to zoning, in areas of the Province which are not subject to an Official Plan and a land use bylaw.

[20] The Commission finds that, in the present appeal, there is no evidence that the Minister's May 20, 2009 and July 9, 2009 decisions were made in contravention to the **Planning Act** or its regulations. Accordingly, the appeal is denied.

## 4. Disposition

[21] An Order denying this appeal follows.



**IN THE MATTER** of an appeal by Nils Connor of a decision of the Minister of Communities, Cultural Affairs and Labour, dated July 9, 2009.

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# Order

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**WHEREAS** the Appellant Nils Connor has appealed a decision of the Respondent Minister of Communities, Cultural Affairs and Labour, dated July 9, 2009;

**AND WHEREAS** the Commission heard the appeal at public hearings conducted in Charlottetown on September 23, 2009 and October 16, 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 23rd day of December, 2009.

**BY THE COMMISSION:**

(Sgd.) *John Broderick*

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John Broderick, Commissioner

(Sgd.) *David Holmes*

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David Holmes, Commissioner

(Sgd.) *Anne Petley*

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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 rules of court respecting appeals apply with the necessary changes.*

## NOTICE: IRAC File Retention

In accordance with the Commission's Records Retention and Disposition Schedule, the material contained in the official file regarding this matter will be retained by the Commission for a period of 2 years.

IRAC141AA(2009/11)