



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

**Docket LA10001
Order LA10-04**

IN THE MATTER of an appeal by
Regional Properties Inc. of a decision of the
Town of Stratford, dated December 17, 2009.

BEFORE THE COMMISSION
on Friday, the 18th day of June, 2010.

Allan Rankin, Vice-Chair
David Holmes, Commissioner
Chester MacNeill, Commissioner

Order

Compared and Certified a True Copy

(Sgd.) Philip J. Rafuse

Appeals Administrator
Land, Corporate and Appellate Services Division

IN THE MATTER of an appeal by
Regional Properties Inc. of a decision of the
Town of Stratford, dated December 17, 2009.

Contents

<i>Contents</i> _____	<i>ii</i>
<i>Appearances & Witnesses</i> _____	<i>iii</i>
<i>Reasons for Order</i> _____	<i>1</i>
1. Introduction _____	1
2. Submissions _____	1
3. Findings _____	4
4. Disposition _____	15
<i>Order</i>	

IN THE MATTER of an appeal by
Regional Properties Inc. of a decision of the
Town of Stratford, dated December 17, 2009.

Appearances & Witnesses

1. For the Appellant Regional Properties Inc.

Counsel:

Lynn Murray, Q.C.
Michael Ramsey
Libby Shaw, summer law student

Witnesses:

Anna Paton
Ian Tillard
Hugh Paton
Christine Paton

2. For the Respondent Town of Stratford

Counsel:

Perlene Morrison

Witnesses:

Kevin Reynolds
Vahid Ghomoshchi

IN THE MATTER of an appeal by
Regional Properties Inc. of a decision of the
Town of Stratford, dated December 17, 2009.

Reasons for Order

1. Introduction

[1] The Appellant Regional Properties Inc. (Regional Properties) 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*). Regional Properties' Notice of Appeal was received on January 7, 2010.

[2] This appeal concerns a December 17, 2009 decision of the Respondent Town of Stratford (the Town) to approve, subject to conditions, a subdivision of property number 329508 located at Spinnaker Drive in Stratford.

[3] After due public notice and suitable scheduling for the parties, the appeal was heard on May 6, 7 and 11, 2010.

2. Submissions

Regional Properties' Position

[4] Counsel for Regional Properties presented extensive oral arguments and provided the Commission with a written text of these arguments. Counsel's Summary is reproduced below.

SUMMARY

94. It is the position of Regional Properties that the Stratford Town Council has not acted in good faith when it withheld subdivision approval until Regional properties agrees to:

- a) set aside 23 feet of land for a future public road, which Regional Properties would be required to convey to the Town of Stratford in the event it ever becomes a public road; and*
- b) set aside 5 metres of land along its western most boundary from Spinnaker Drive to the shore to be used for public use in the future when in fact all lots in the subdivision do have access to the coast.*

95. Stratford has failed to recognize that this is a private cottage subdivision with no public access at the present time and no indication that there will ever be public access to this Property.

96. Kevin Reynolds and Vahid Ghomoshchi have testified that Stratford Town Council is requesting that Regional Properties reserve beach access and 23 feet for a public road. Kevin Reynolds and Vahid Ghomoschi have both testified that the land which Stratford Town Council is seeking Regional Properties set aside is greater than 10% of the acreage of Regional Properties' Property. In fact, the evidence of Regional properties was that it was 15% of its Property. This is not authorized by the Bylaw.

97. In fact, the Town of Stratford has seen this as "an opportunity" to require Regional Properties to provide a certain amount of land adjacent to Spinnaker Drive which would eventually convert Spinnaker Drive into a public road in the future.

98. The proposal Regional Properties made in relation to the parkland dedication has never been responded to and presumably was satisfactory to the Town of Stratford at the time as it was not mentioned in its December 17, 2009 decision.

99. The Coastal Subdivision Bylaw does not require that there be access provided to the public. In fact, a plain reading of the Bylaw indicates that each of the lots in question do have access to the beach or watercourse.

100. There are provisions for municipalities to expropriate. If the Town of Stratford is seeking to expropriate, it has not followed the provisions allowing it to do so.

101. The entire subdivision that we are talking about is private and Spinnaker Drive is owned by Keppoch Beach Hotels. Regional properties have indicated it is willing to enter into an agreement with the Town of Stratford that the Town will not [sic] responsible for the maintenance of the right of way.

Relief Requested

102. Regional Properties respectfully requests that this Commission vary the December 17, 2009 decision of Stratford Town Council by granting subdivision approval with the conditions deleted requiring Regional Properties to reserve a designated 23 feet wide parcel of land along the front of the 4 proposed lots and adjacent to the existing 20 feet R.O.W. [right of way] currently owned by Keppoch Beach Hotel (for a potential public road) and to provide a 5 metre wide access to the waterfront along the western corner lot of the proposed subdivision.

The Town's Position

[5] Counsel for the Town presented extensive oral arguments and provided the Commission with a written text of these arguments. A portion of Counsel's concluding arguments are reproduced below.

CONCLUSION ON THE ISSUES

51. *Municipal zoning, along with subdivision and development requirements, effectively regulate and limit the rights of private land owners to deal with their land as they see fit. When the Town evaluates a subdivision proposal it is under an obligation to consider whether it meets the future planning needs of the Town. Planning is not about reacting – it is about looking to the future. Mr. Ghomoshchi explained this in his evidence.*

52. *Regional Properties maintains that the development of the adjacent Keppoch Beach Hotels property is a matter for another day and it is not its responsibility to ensure that sufficient lands are in place for their subdivision. While the development itself is a matter for another day, in the sense that we don't know what, if any, development will be brought forward, that doesn't mean that the Town can ignore the fact that development can take place on this parcel. The Town has to think about what happens if Keppoch Beach Hotels sells that land or decides to develop it. The company may have no intention of developing the property now, but that does not mean a future owner or the next generation will share the same vision. Now is the time to plan for this possibility. If the Town allows a private road for Regional Properties now, without making provision for a public road in the future, it loses its ability to achieve connectivity of the road system within the Town.*

...

55. *Regional Properties is looking for a privately held cottage subdivision with no public access. The reality, however, is that they are part of a municipality that does not recognize the right to create a new private cottage subdivision. The cottage area is [sic] Stratford is in a stage of transitional development. The status quo can remain in effect until the owners initiate a change in the character of the area. Once change is initiated the Bylaw's development requirements must be applied. The Director of Planning [Mr. Ghomoshchi] testified that Regional Properties' proposal will result in a 100% increase in the property's density. This changes the character of the area from a low-density, unserviced area to a higher density, serviced area.*

56. *There is a statement in the Official Plan that **existing** summer cottages will be protected, but **new** cottage developments are not similarly protected. What is protected in the Regional Properties' case is the two cottages on their two existing lots. Their right to further subdivide these lots for additional cottages is not given special privilege and their subdivision must comply with the bylaw requirements just like any other subdivision. The subdivision requirements apply to all subdivisions within the Town – there are no special provisions for lots fronting on private roads.*

ADDITIONAL ISSUES RAISED BY THE APPELLANT

FAIRNESS/BAD FAITH

57. *The Appellant has made a serious allegation – that the Town has acted in bad faith. The Town disputes this assertion. ...*

58. *The Town believes it has acted fairly. It did not treat Regional Properties any differently than it would any other property owner in the Town. ...*

59. *The Town's interpretation of its Bylaw is fair in this case. It could have insisted on a public road as a condition to subdivision approval. It could have asked for parkland and/or the beach access now. Instead it tried to work with the family to achieve a result that was fair to everyone.*

EXPROPRIATION

60. *Regional Properties is arguing that the request to designate lands for the future public road and beach access amounts to an expropriation. This is not expropriation. The Town is not approaching Regional Properties and asking for its land. Regional Properties is approaching the Town to ask for a subdivision. Development is a privilege, not a right. If you want to exercise that privilege, you have to comply with the requirements set forth in the Bylaw. Road frontage and beach access are two such requirements under the Bylaw.*

...

COMMISSION'S JURISDICTION

...

68. *The Appellant has argued that the Official Plan does not have the force of law and has cited two cases from the 1970s in support of this position. These cases are outside our jurisdiction and deal with statutory regimes in other provinces. In Prince Edward Island, our Planning Act clearly spells out the importance of the plan. This is what the Commission needs to consider.*

69. *The official plan is akin to the Town's constitution – all of the Town's actions must be in accordance with this policy document. This document, and the bylaws that implement it, were adopted by the Town and its residents to guide the Town's development. It went through a public approval process. The Planning Act states in subsection 15(2) that in the event a bylaw is inconsistent with the Official Plan, the Official Plan prevails. This speaks to the importance of the plan.*

...

79. *The Town respectfully requests that this appeal be denied.*

3. Findings

[6] 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 in part. The reasons for the Commission's decision follow.

[7] Section 9 of the **Interpretation Act**, R.S.P.E.I. 1988, Cap. I-8 (the **Interpretation Act**), reads as follows:

9. Every enactment shall be construed as being remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. 1981,c.18,s.9.

[8] Clauses 1.(c) and 1.(e) of the **Interpretation Act** specify:

1. *In this Act*

...

(c) "enactment" means an Act or a regulation or any portion of an Act or regulation;

...

(e) "regulation" means a regulation, order, rule, form, tariff of costs or fees, proclamation or 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,

but does not include an order of a court or an order made by a public officer or administrative tribunal in a dispute between two or more persons;

[9] Section 2 of the **Planning Act** reads as follows:

2. *The objects of this Act are*

(a) to provide for efficient planning at the provincial and municipal level;

(b) to encourage the orderly and efficient development of public services;

(c) to protect the unique environment of the province;

(d) to provide effective means for resolving conflicts respecting land use;

(e) to provide the opportunity for public participation in the planning process. 1988,c.4,s.2.

[10] Subsection 20(1) of the **Planning Act** reads as follows:

20. (1) The powers of a council to make bylaws includes the power to make bylaws applicable within the municipality with respect to all of the matters set out in clauses 8(a) to (q) except clauses (i), (l) and (p) as if

(a) references to the Crown were references to the municipality;

(b) references to the Minister were references to the council.

[11] Subsection 8(1) of the **Planning Act** reads, in part, as follows:

8. (1) The Lieutenant Governor in Council may make provincial planning regulations applicable to any area except a municipality with an official plan and bylaws

(a) with respect to planning and land use matters affecting the general welfare, health, safety and convenience of persons in any area or municipality;

...

(e) *with respect to the development of land and the provision of services and in particular*

- (i) *governing the servicing of land with streets, sidewalks, and piped services,*
- (ii) *establishing standards and timetables for the servicing of land,*
- (iii) *establishing cost-sharing schedules for development and maintenance between the developer and the Crown or between vendors and purchasers,*
- (iv) *authorizing the Minister to negotiate development agreements with a developer;*

...

(n) *with respect to summer cottages and in particular*

- (i) *prescribing terms and conditions respecting their use, location, maintenance, design and construction,*
- (ii) *prescribing terms and conditions respecting the subdivision and development of land for summer cottage purposes,*
- (iii) *requiring permits for summer cottage construction and the subdivision of land for summer cottage use;*

[12] Policy PR-10 from the Town's Official Plan reads as follows:

Policy PR-10: Summer Cottages

It shall be the policy of Council to not permit the development of any further "summer cottage" subdivisions within the Town. Existing summer cottage lots shall only be developed with the assurance by the owner that the cottage shall only be used for seasonal habitation and that it is understood the Town will assume no responsibility for the cost of providing public roads or central services. Development of existing summer cottage lots shall be limited to a scale which can be adequately supported by on-site services.

Plan Action:

- *The Development Bylaw shall prohibit the development of any further "summer cottage" subdivisions in the Town. Minor revisions to existing approved cottage lots may be permitted.*
- *The Development Bylaw shall clarify the definition of "summer cottages" as being for seasonal use only.*
- *All new summer cottage developers shall be required to execute a Development Agreement in which they shall commit to the seasonal use of the premise and assume full financial responsibility for any future provision of public roads and municipal or central services.*
- *The Development Bylaw shall establish maximum lot coverage standards and on-site servicing standards in order to limit over-*

development of undersized summer cottage lots and long term risks to ground water.

[13] Section 3.4.4 Physical of the Town's Official Plan reads as follows:

3.4.4 Physical

- *To encourage the development and maintenance of a safe and efficient vehicular and pedestrian circulation system in the Town.*

[14] Policy PP-1: General of the Town's Official Plan reads in part:

Policy PP-1: General

It shall be the policy of Council to develop and implement a long term approach to the provision of recreation facilities and programs which promotes healthy lifestyles and wellness for all groups in the Stratford area.

Plan Action:

- *Council shall continue to work with recreation groups, youth groups, seniors groups and others to implement and to provide input and develop a Parks and Recreation Master Plan*
...
- *The Master Plan shall address measures to maintain and where possible increase public access to the shoreline.*

[15] Section 5.6 of the Town's Zoning and Subdivision Control (Development) Bylaw (the Bylaw) reads as follows:

5.6 FRONTAGE ON A STREET

(1) No Development Permit shall be issued unless the Lot or Parcel of land intended to be used or upon which the Building or Structure is to be erected abuts and fronts upon a public Street.

(2) Notwithstanding Section 5.6(1) above, Council may approve a Development Permit for a residential or commercial Structure which fronts on a private Right-Of-Way, provided that the following criteria are met:

- (i) no reasonable provision can be made to provide access to a public Street;*
- (ii) safe ingress and egress from the Lot can be provided;*
- (iii) the residential or commercial Structure can be conveniently connected to municipal service(s), if required, at no cost to the Town or Utility; and*
- (iv) an agreement is registered in the Province's Land Registry Office, binding on all Property Owners abutting or fronting on a private Right-Of-Way providing for the long term ownership and maintenance of the Right-Of-Way, which agreement shall be binding on all heirs, successors and assigns of the parties to the agreement.*

[16] Section 9.4 of the Town's Bylaw reads as follows:

9.4 SUMMER COTTAGES

(1) Existing approved Summer Cottage Lots may be used for the purpose of developing a Seasonal Residence or Summer Cottage, subject to the following:

(i) the Development shall conform to the Lot requirements in Section 9.6.

(ii) the Property Owner shall agree to enter into a Development Agreement with the Town stipulating that:

(a) the Developer and/or Property Owner shall be responsible for the provision of any roads, sewer services and/or water supply;

(b) the Property Owner shall agree to pay all future costs related to the extension of the services noted in subsection (a) above;

(c) any on-site sewage systems shall be designed and certified by a professional engineer licensed to practice in the Province of Prince Edward Island and the Property Owner shall submit a Landscaping plan and/or grading plan to minimize the visual effect of the engineered on-site sewage system, if deemed necessary by the Development Officer;

(d) the Seasonal Residence or Summer Cottage not be occupied as a year round residence;

(e) the maximum Lot coverage shall not be greater than ten percent (10%) of the Lot;

(f) the Property Owner shall be responsible for the cost of registering the above noted Development Agreement in the Province's Land Registry Office.

[17] Section 25.3 of the Town's Bylaw reads in part:

25.3 PERMISSION TO SUBDIVIDE

(1) No Person shall subdivide land within the Town unless the Subdivision:

...

(v) has convenient Street access;

(vi) has adequate utilities and services available or can be conveniently provided with such utilities and services;

...

(viii) will provide for safe and convenient traffic flow;

...

(x) is suitable to the Use for which it is intended, and the future Use of adjacent lands; and

(xi) the Parcel of land in respect of which the permit is requested has Frontage on a public Road or a private Right-Of-Way established pursuant to Section 5.6 of this Bylaw.

[18] Section 25.6 of the Town's Bylaw reads as follows:

25.6 SPECIAL REQUIREMENTS - COASTAL SUBDIVISIONS

(1) Where a Subdivision is located along a Coastal Area or Watercourse, the Subdivision shall include the following:

- (i) access to the beach or Watercourse if the Property being subdivided includes Frontage on a beach or Watercourse, with at least one access to be located approximately every 200 metres (656 ft.) of Watercourse Frontage;*
- (ii) where appropriate, the area to be set aside as Parkland dedication shall be located at least in part along the Watercourse; and*
- (iii) beach and Watercourse accesses shall measure at least 5 metres (16.4 ft.) in width.*

[19] Section 25.9 of the Town's Bylaw reads as follows:

25.9 SUBDIVISION AGREEMENT

(1) Council may require an Applicant to enter into a Subdivision Agreement as a condition of Subdivision approval. The Subdivision Agreement may cover any matters as required by Council and may include, but not be limited to, the following:

- (i) design and construction costs of sidewalks, water supply, sanitary and storm sewers, roads, and Street lighting;*
- (ii) dedication of land for recreation and public Open Space Uses, or payment of a fee in lieu of land;*
- (iii) deeding of roads to the Department of Transportation and Public Works;*
- (iv) posting of a financial guarantee satisfactory to Council;*
- (v) provision of a controlled landscape plan and storm water management plan to facilitate the drainage of water and to guard against flooding of Lots within the Subdivision and adjacent properties;*
- (vi) provision of such services, facilities or actions as are necessary to ensure the satisfactory Development of the Subdivision;*
- (vii) provision for the phasing of the Subdivision;*
- (viii) preservation and enhancement of surface water drainage systems;*
- (ix) tree preservation and tree planting; and*
- (x) Parkland dedication which may require upgrading and/or improvement.*

[20] A December 17, 2010 email from Mr. Ghomoshchi to Mr. Paton contains the decision under appeal. The body of this email is reproduced below.

Dear Mr. Paton,

Thank you for taking the time to present your subdivision plan to the Planning Committee and the Committee of The Whole.

After considering your application very carefully, I am pleased to inform you that your application SD-015-09 to subdivide parcel number 329508 (from 2 lots into 4 lots) will be approved subject to the following conditions:

1. The applicant shall sign an agreement with the Town of Stratford to reserve a designated 23 feet wide parcel of land along the front of the 4 proposed lots and adjacent to the existing 20 feet R.O.W currently owned by Keppoch Beach Hotel. This designated parcel of land would be reserved for a potential public road and may be held private until the future development.
2. To provide a 5 metre wide access to the waterfront along the western corner lot of the proposed subdivision.
3. In order to respond to the applicant's concern regarding sufficient space between the future building in the western corner lot and the proposed waterfront access, the Town agrees to approve a minor variance to the bylaw requirements for minimum lot frontage and lot size in R1-L zone. This will allow the applicant to maintain the original size of the corner lot adjacent to the proposed access to the waterfront (as appeared in the concept design) and divide the 5 metres between the other three lots.
4. That all other provisions of the Town's bylaws are met.

I hope you will find this solution reasonable. A new concept plan needs to be submitted illustrating the above requirements.

If you have any questions please don't hesitate to contact planning department.

Kind regards

Vahid Ghomoshchi, PhD, MCIP
Director, Planning Department
Town of Stratford
234 Shakespeare Drive

[21] Regional Properties appeals conditions 1, 2 and 3 noted in the above email.

Reservation of Land for Possible Future Public Road

[22] In her Notice of Appeal, Counsel cites the following ground for appeal:

1. **The Bylaws for the Town of Stratford do not give the Town of Stratford the right to require property owners to devote land to accommodate a future public right-of-way.**

The Town of Stratford has no jurisdiction to make it a condition that Regional Properties reserve a 23 foot wide right-of-way along the four proposed lots adjacent to the existing 20 foot wide right-of-way currently owned by Keppoch Beach Hotels Ltd. such that the right-of-way currently owned by Keppoch Beach Hotels Ltd. can become public at some point in time in the future.

[23] The Commission has thoroughly reviewed the **Planning Act**, the Town's Official Plan and the Town's Bylaw in considering whether the Town had the legal authority to require condition number 1 cited in Mr. Ghomoshchi's December 17, 2009 email.

[24] One of the objects of the **Planning Act** is to "encourage the orderly and efficient development of public services". The Town has authority "with respect to planning and land use matters affecting the general welfare, health, safety and convenience of persons in ... [the] municipality;". Clause 8.(1)(e) of the **Planning Act** addresses the servicing of the land with streets, standards and timetables for the servicing of land, cost sharing and development agreements.

[25] Upon a plain reading of Policy PR-10 of the Town's Official Plan, the Commission is left with a somewhat confusing picture. The Town has expressed a policy of not allowing any further summer cottage subdivisions in the Town. Development of existing lots is permitted. Minor revisions to existing lots are permitted. Notwithstanding the Town's policy not to allow future cottage subdivisions, what is referred to as "new summer cottage developers" are required to execute a development agreement and assume full financial responsibility for any future provision of public roads.

[26] Section 3.4.4 of the Official Plan encourages the development of a safe and efficient vehicular and pedestrian circulation system.

[27] Section 5.6 of the Town's Bylaw requires a lot, upon which a building or structure is to be erected, to front on a public street. However, Council has the discretion to approve a development permit for a structure where the lot fronts on a private right of way, provided certain criteria are met. Section 9.4 of the Bylaw deals with summer cottages. 9.4(1)(ii) requires a developer to enter into a development agreement. 9.4(1)(ii)(a) requires the developer to be responsible for the provision of any roads, sewer services and/or water supply and the developer under 9.4(1)(ii)(b) "shall agree to pay all future costs related to the extension of the services noted in subsection (a) above;".

[28] Section 25.3 of the Bylaw requires convenient street access and requires the subdivision to provide for safe and convenient traffic flow. Section 25.9 of the Bylaw permits the Town's Council to require a subdivision agreement as a condition of subdivision approval. Such agreement may include, but is not limited to, various enumerated clauses. One of these clauses is the "provision of such services, facilities or actions as are necessary to ensure the satisfactory Development of the Subdivision;".

[29] The Commission finds that the **Planning Act** gives the Town the authority to address the servicing of land with streets and utilize development agreements for this purpose. The Commission further finds that the Town's Official Plan discourages further summer cottage subdivision development, but provides for "minor revisions". The Commission further finds, however, that a new developer be required to commit, under a development agreement, to assume full financial responsibility for any future provision of public roads. The Town's Bylaw also speaks to a requirement to pay all future costs related to the provision of any roads.

[30] The Commission notes that the Town has not required Regional Properties to immediately upgrade the right of way to a public road. Nor has the Town insisted on demanding a future contribution to the cost of doing so. Rather, the Town has required Regional Properties to reserve a 23 foot swath of land to allow for the future upgrade, if needed, of the right of way to the status of a public road. The Commission finds that this request is a reasonable pre-condition to a developer's responsibility for any future public road.

[31] The Commission finds that the subdivision of 2 lots into 4 lots, as proposed by Regional Properties, constitutes a subdivision, or a re-development of an existing subdivision, and therefore Regional Properties may be characterized as a “new summer cottage developer”. Based on the broad jurisdictional parameters of the **Planning Act**, the policies of the Town’s Official Plan with respect to further subdivision for summer cottage use, and the requirements enunciated in the Bylaw, the Commission finds that the Town has the lawful authority to require Regional Properties, as one of the terms of a development agreement, to reserve a 23 foot wide strip of land on parcel number 329508 in order to facilitate the possible future upgrade of Spinnaker Drive to the status of a public road.

[32] Accordingly, the Commission denies the appeal of condition number 1 of the Town’s December 17, 2009.

Reservation of Land for Possible Future Public Access to the Beach

[33] In her Notice of Appeal, Counsel cites the following additional ground for appeal:

2. **The Town of Stratford has no jurisdiction to require the Appellant to reserve a 5 metre wide area to the waterfront along the western corner lot of the proposed subdivision to provide for public access to others who are not part of the Regional Properties subdivision**

The Town of Stratford appears to have interpreted its Bylaw in such a way that it is requiring the Applicant, Regional Properties Inc., the subdivision owner, to provide public access for property owners who are not part of the Regional Properties Inc. four lot subdivision, as all lots in the Regional Properties Inc.’s subdivision (the four lots) will have public access.

[34] The Commission has thoroughly reviewed the **Planning Act**, the Town’s Official Plan and the Town’s Bylaw in considering whether the Town had the legal authority to require condition number 2 cited in Mr. Ghomoshchi’s December 17, 2009 email.

[35] While the **Planning Act** does give the Town the clear authority under 8.(1)(d)(iv) to require a developer to convey to the Town an open space of up to 10 percent of the land being subdivided, or “apply the equivalent value thereof”, the **Planning Act** does not expressly give the Town authority to require Regional Properties to reserve land for the purpose of public access to the shore.

[36] Policy PP-1 of the Town’s Official Plan does contemplate an increase in public access to the shoreline. For ease of reference, the following bullets are reproduced again:

Plan Action:

- *Council shall continue to work with recreation groups, youth groups, seniors groups and others to implement and to provide input and develop a Parks and Recreation Master Plan*

...

- *The Master Plan shall address measures to maintain and where possible increase public access to the shoreline.*

[37] The Commission notes that it is the Master Plan, not the Bylaw, which has been selected by the Town for the implementation of this policy. Unlike the topic of the subdivision of summer cottage lots, the Official Plan does not, of itself, provide any specifics of how any increase in public access to the shoreline would be accomplished.

[38] There is no Master Plan in evidence before the Commission. The evidence before the Commission is that the Master Plan is a work-in-progress which has not yet received final approval. Accordingly, the draft Master Plan has no validity with respect to the present matter.

[39] The Town contends that section 25.6 of the Bylaw authorizes a reservation for future public access to the shoreline. The Town contends that the word “public” is implied in this section. Regional Properties contends that such access is for the benefit of lot owners in a proposed subdivision. Since each of the 4 lots in the proposed subdivision will have access, Regional Properties is of the view that the access requirement will be met without the need to reserve a specific strip of land for access to the shore.

[40] In Order LA09-11, *629857 N.B. Inc. et al v. City of Charlottetown*, the Commission observed:

[15] The Commission, like similar quasi-judicial tribunals in Canada and elsewhere, has the power to hear appeals of municipal decisions with respect to land use planning issues, and, where, appropriate, overturn a municipal decision. Municipal zoning, subdivision and development requirements effectively regulate and limit the rights of private landowners to deal with their own land as they see fit. Recognizing that such municipal requirements restrict landowner's property rights, municipal decisions affecting such rights are, in many jurisdictions, subject to a statutory appeal process before a quasi-judicial tribunal. However, unless otherwise specified by legislation, this appellate power to overrule municipal decisions should be confined strictly to municipal land use planning decisions and not be applied to broader municipal decisions.

Emphasis added.

[41] In *Re Butler* (1977), Carswell PEI 46, 20 Nfld. & P.E.I.R. 469 (P.E.I.S.C.) Chief Justice Nicholson noted:

9 At Common Law the owner of real property generally had the right to subdivide and develop that property so long as he did not injure his neighbor or his neighbor's property.

...

15 The Common Law right of a landowner such as Butler to deal with his property has been taken away by statute ... The subdivision, development and sale of land by the owner is no longer a right but a privilege which may or may not be granted. It is not for me to say whether such legislation is good or bad. I must interpret the law as I find it.

[42] As noted above, subdivision requirements and other land use planning bylaws effectively limit the rights of a land owner at common law to develop their property as they wish. Certain requirements, such as a general requirement that a lot front on a public road, are well established in municipal bylaws. They have a very essential and critical public interest. They may affect not just the convenience of the public, but their safety and access to police protection, fire protection and emergency medical services not only for the lot owners but the neighbourhood and even the whole community. Nonetheless, even such a fundamental requirement must be expressed in statute, plan or bylaw. Any exceptions to the general requirement must also be expressed.

[43] The Commission finds that section 25.6 of the Bylaw is ambiguous. It does not specify that the access be public. It does not specify who the access must be granted to. Such ambiguity is not clarified by a reference to the **Planning Act** or the Official Plan. Indeed, the Official Plan directs the Master Plan as the implementation document for maintaining and possibly enhancing public access to the shoreline. The Commission finds that the Town's interpretation cannot be viewed as being an essential or critical public interest.

[44] In order for the Commission to interpret section 25.6 in the manner advocated by the Town, the Commission would need at least one of the following: clear language in the Bylaw, specific direction in the Official Plan or specific language in an approved and legally binding Master Plan.

[45] However, the Commission cautions that the **Planning Act**, while specifically authorizing official plans and bylaws, does not at present refer to a "Master Plan" or a "Parks and Recreation Master Plan". As the Master Plan is not before the Commission, it is unknown whether it will in future be a stand alone document or fully incorporated as part of the Official Plan or the Bylaw. Accordingly, it remains an open question as to whether a Master Plan would, in fact, have the necessary authority under the **Planning Act**.

[46] Accordingly, the Commission finds that section 25.6 does not require Regional Properties to reserve any land on parcel number 329508 for the purpose of public access to the shoreline. Therefore, the Commission allows the appeal of condition number 2 of the Town's December 17, 2009.

[47] In its arguments before the Commission, Counsel for Regional Properties submitted that the Town has not acted in good faith when it withheld subdivision approval until Regional Properties agreed to conditions 1 and 2 set out in the December 17, 2009 email. Counsel referred the Commission to caselaw in support of this position.

[48] In the view of the Commission, there is no evidence that the Town acted in bad faith towards Regional Properties in this matter. On the contrary, the Commission is of the view that Town staff provided Regional Properties with helpful information and Town Council exercised discretion and common sense to minimize the burden of condition number 1. With respect to condition number 2, the Commission is of the view that the Town genuinely believed in its interpretation of section 25.6 of the Bylaw.

[49] As the Commission has allowed the appeal of condition number 2, and as condition number 3 is no longer relevant, the Commission orders that condition numbers 2 and 3 be deleted from the Town's December 17, 2009 decision, as identified in the email of the same date. Regional Properties will be required to agree to conditions 1 and 4 in order for parcel number 329508 to be subdivided into 4 lots.

4. Disposition

[50] An Order allowing the appeal in part follows.

IN THE MATTER of an appeal by
Regional Properties Inc. of a decision of the
Town of Stratford, dated December 17, 2009.

Order

WHEREAS the Appellant Regional Properties Inc. appealed a decision of the Respondent Town of Stratford, dated December 17, 2009;

AND WHEREAS the Commission heard the appeal at public hearings conducted in Charlottetown on May 6, 7 and 11, 2010 after due public notice and suitable scheduling for the parties and their counsel;

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 in part.
2. The decision of the Respondent Town of Stratford, expressed in a December 17, 2009 email, is hereby varied to delete condition numbers 2 and 3.

DATED at Charlottetown, Prince Edward Island, this 18th day of June, 2010.

BY THE COMMISSION:

(Sgd.) *Allan Rankin*
Allan Rankin, Vice-Chair

(Sgd.) *David Holmes*
David Holmes, Commissioner

(Sgd.) *Chester MacNeill*
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 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)