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

Docket LA10003 and LA10004
Order LA10-08

IN THE MATTER of appeals by Ian Cray and Paul Christensen of a decision of the Minister of Finance and Municipal Affairs, dated February 3, 2010.

BEFORE THE COMMISSION
on Friday, the 27th day of August, 2010.

Maurice Rodgerson, Chair
Allan Rankin, Vice-Chair

Order

Compared and Certified a True Copy

(Sgd.) Philip J. Rafuse

Appeals Administrator
Land, Corporate and Appellate Services Division

IN THE MATTER of appeals by Ian Cray and Paul Christensen of a decision of the Minister of Finance and Municipal Affairs, dated February 3, 2010.

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IN THE MATTER of appeals by Ian Cray and Paul Christensen of a decision of the Minister of Finance and Municipal Affairs, dated February 3, 2010.

Appearances & Witnesses

1. For the Appellants Ian Cray and Paul Christensen

Representative:

Christopher Callbeck

Witnesses:

Ian Cray
Paul Christensen

2. For the Respondent Minister of Finance and Municipal Affairs

Garth Carragher

3. For the Developer Myles Hickey

Myles Hickey
James Hickey

IN THE MATTER of appeals by Ian Cray and Paul Christensen of a decision of the Minister of Finance and Municipal Affairs, dated February 3, 2010.

Reasons for Order

1. Introduction

[1] The Appellants Ian Cray and Paul Christensen (the Appellants) 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. Cray's Notice of Appeal was received on February 23, 2010. Mr. Christensen's Notice of Appeal was received on February 24, 2010.

[2] These consolidated appeals (the appeal) concern the February 3, 2010 decision of the Respondent Minister of Finance and Municipal Affairs (the Minister), to grant to Myles Hickey (the Developer) preliminary subdivision approval, summer cottage use only, of 9 lots [later amended after the appeal was filed to 10 lots] from property number 872473 and 15 lots from property number 795732 in Seaview.

[3] After due public notice and suitable scheduling for the parties, the appeal was heard on July 8, 2010.

2. Discussion

The Appellants' Position

[4] The submissions presented on behalf of the Appellants may be summarized as follows:

- The Appellants submit that the proposed subdivision does not meet the beach access requirements set out in subsections 16(1) and 26(2) of the Planning Act Subdivision and Development Regulations (the Regulations). The Appellants note that the Developer is promoting beach access to potential purchasers and, without specific provisions for such access, there is a risk of trespass over properties owned by other nearby land owners.

- The Appellants submit that the proposed subdivision does not meet the road requirements set out in subsection 17(2) of the Regulations.

- The Appellants submit that the lot density in the proposed subdivision is too high for the area and a lower density of development is necessary for such a development to be environmentally sustainable.

[5] The Appellants request that the proposed subdivision, if it proceeds, be revised to a picturesque low density development consistent with other nearby properties and that provisions for safe beach access and parking be provided to reduce trespassing on private property and minimize damage to the environment.

The Minister's Position

[6] The submissions presented on behalf of the Minister may be summarized as follows:

- The Developer's application was received on March 25, 2009. However, the Developer had been engaged in releasing the properties from a land identification agreement as early as 2007. The lots are to be subdivided from two distinct parcels of land.

- The Developer's application was circulated to the Department of Environment, Energy and Forestry, the Department of Transportation and Infrastructure Renewal, the Fire Marshall and the Malpeque Bay Community Council. It was also considered pursuant to section 56 to 58 inclusive of the Regulations pursuant to the Princetown Point – Stanley Bridge Special Planning area.

- It is not part of the Minister's mandate to design beach access. It is, however, part of the Minister's mandate to ensure protection of the environment through the establishment of buffer zones.

- With respect to subsection 17(2) of the Regulations, the Minister submits that the Developer's application was grandfathered, especially as the application could not proceed until the parcels were released in 2007, and then further in 2009, from the land identification agreement. Further, the subdivision involves the subdivision of 15 lots from one parcel and 10 lots from another parcel, as opposed to 25 lots from a single parcel, and therefore it is submitted that the requirements of subsection 17(2) of the Regulations do not affect this subdivision as a mandatory public road is required where there are over 20 lots off the same parent parcel.

- With respect to subsection 26(2)(b)(i), conditions relating to the allocation of land for the provision of shore access is discretionary, as evidenced by the use of the term "may".

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

The Developer's Submission

[8] The Developer addressed the issue of beach access and noted that beaches are public. Access to a beach, however, may be public or private. The Developer may, subject to the approval of the Department of Environment, Energy and Forestry, establish private access for the benefit of purchasers of the lots via stairs to the beach. If stairs are not installed, purchasers of lots will be expected to drive to a public beach access point.

3. Findings

[9] 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.

[10] Subsections 16(1)(c) and 26(2) of the Regulations pertain to the shore access issue and read as follows:

> *16. (1) Where a subdivision is proposed within a coastal area, the proposed subdivision shall, where applicable, include the following:*
>
> *…*
>
> *(c) where feasible and appropriate, access to the beach or watercourse for the use of the owners of the lots.*
>
> *…*
>
> *26(2) Preliminary approval for all or a portion of a plan of subdivision may include conditions relating to:*
>
> *…*
>
> *(b) the allocation of land for any of the following purposes:*
>
> *(i) the provision of shore access,*
>
> Emphasis added.

[11] The Appellants submit that the proposed subdivision does not meet the beach access requirements set out in subsections 16(1)(c) and 26(2) of the Regulations. However, the Commission finds that a careful reading of these subsections reveals that access to the shore for the use of lot owners is required "where feasible and appropriate" and preliminary approval of a subdivision "may" include conditions relating to the provision of shore access. This rather qualified statutory wording makes specific enforceability difficult, if not impossible. Accordingly, the Commission finds that the proposed subdivision is not in breach of the beach access requirements set out in the Regulations.

[12] The Appellants also submit that the proposed subdivision does not meet the road requirement set out in subsection 17(2) of the regulations. The Minister contends that the Developer's application was grandfathered, as the application for the subdivision could not proceed until the parcels were released from the land identification agreement. The Minister also contends that subsection 17(2) does not apply, as the proposed subdivision is actually two subdivisions, one of 10 lots, the other of 15 lots, each subdivision taken off of a separate parent lot.

[13] Subsection 17(2) of the Regulations pertains to the road requirement issue and read as follows:

> *17(2) All roads serving 21 or more lots approved after March 21, 2009, shall be public roads.*

[14] Based on a reading of subsection 17(2), the Commission cannot *prima facie* [at first sight] accept the Minister's position with regard to the road requirement specified in subsection 17(2). Subsection 17(2) refers to a date of approval, not a date of application. The Developer's present application, while dated March 13, 2009, was received by the Minister on March 25, 2009, four days after subsection 17(2) came into effect. Preliminary approval was granted on February 3, 2010; over ten months after subsection 17(2) came into effect. Subsection 17(2) is not qualified or restricted in scope; it does not make an exception for lots approved from separate parent parcels. It is not followed by a "notwithstanding" subsection to exempt applications in process, but not yet approved, before the specified date.

[15] The Commission must therefore consider whether the Minister's contention, that subsection 17(2) does not apply to the particular circumstances in the present matter, is a reasonable construction and interpretation of the Regulations.

[16] 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.*

[17] 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.*

[18] Subsection 17(2) is part of a group of fairly recent amendments to the Regulations, approved by Executive Council on March 10, 2009 [see the Royal Gazette, March 21, 2009]. The Commission interprets subsection 17(2) as requiring any road or roads serving 21 or more lots approved after March 21, 2009, to be a public road or roads. This interpretation is consistent with one of the objects of the Planning Act, "… *to encourage the orderly and efficient development of public services;"* as public roads are a public service. The Commission is required to follow the law, that is to say, the ***Planning Act*** and the Regulations. The Minister's internal policies are not binding on the Commission. The Commission finds that the interpretation of subsection 17(2) suggested by the Minister is not supported by the ***Planning Act*** or the Regulations.

[19] The Commission does recognize that there is merit in the Minister's policy to apply the Regulations as they existed at the time of application. When regulations change after an application is filed, and these changes are to have almost immediate effect, it does make common sense that the matter proceed on the basis of the Regulations in effect at the time of application, in effect, a 'grandfathering'. However, as the Minister's 'grandfathering' policy has not been included in the Regulations, subsection 17(2) applies in this present matter, as the Commission must follow the Regulations. Simply put, a department's internal policies must be elevated to the status of Regulations to have the force of law.

[20] Accordingly, the Commission allows the appeal in part and orders that the February 3, 2010 decision of the Minister, as amended, be further amended to bring said decision into full compliance with the Regulations, as this decision did not include a condition requiring the proposed subdivision to be served by public roads.

4. Disposition

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

IN THE MATTER of appeals by Ian Cray and Paul Christensen of a decision of the Minister of Finance and Municipal Affairs, dated February 3, 2010.

Order

WHEREAS the Appellants Ian Cray and Paul Christensen appealed a decision of the Minister of Finance and Municipal Affairs, dated February 3, 2010;

AND WHEREAS the Commission heard the appeal at public hearings conducted in Charlottetown on July 8, 2010 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 in part.**

2. **The Minister's February 3, 2010 decision, as amended, granting preliminary subdivision approval for parcel numbers 872473 and 795732, be further amended to bring said decision into full compliance with the Planning Act Subdivision and Development Regulations.**

DATED at Charlottetown, Prince Edward Island, this 27th day of August, 2010.

BY THE COMMISSION:

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

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

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)