



**THE ISLAND REGULATORY AND
APPEALS COMMISSION**

Prince Edward Island
Île-du-Prince-Édouard
CANADA

**Docket LA13005
Order LA13-05**

IN THE MATTER of an appeal by Wood
Wheeler Inc. of a decision of the Resort
Municipality, dated May 21, 2013.

BEFORE THE COMMISSION
on Thursday, the 17th day of October, 2013.

Maurice Rodgerson, Chair
Michael Campbell, Commissioner
Jean Tingley, Commissioner

Order

Compared and Certified a True Copy

A handwritten signature in blue ink, appearing to read "Philip J. Rafuse", is written over a horizontal line.

Philip J. Rafuse
Appeals Administrator
Corporate Services and Appeals Division

IN THE MATTER of an appeal by Wood
Wheeler Inc. of a decision of the Resort
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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. Discussion _____	1
3. Findings _____	2
4. Disposition _____	4
<i>Order</i>	

IN THE MATTER of an appeal by Wood
Wheeler Inc. of a decision of the Resort
Municipality, dated May 21, 2013.

Appearances & Witnesses

Written Submission filed by:

1. **For the Appellant Wood Wheeler Inc.**
Michael Wheeler

2. **For the Respondent Resort Municipality**
Counsel:
Jonathan M. Coady

**IN THE MATTER of an appeal by Wood
Wheeler Inc. of a decision of the Resort
Municipality, dated May 21, 2013.**

Reasons for Order

1. Introduction

(1) The Appellant Wood Wheeler Inc. (the Appellant) 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**). The Appellant's Notice of Appeal was dated June 24, 2013 and was served the same day via email on the Respondent Resort Municipality (the Respondent). However, the Appellant neglected to file the Notice of Appeal with the Commission. The Commission did not actually receive the Notice of Appeal until July 18, 2013, when a copy was forwarded by the Respondent. However, due to an email misdirection error, the Commission deems receipt of the Notice of Appeal on July 3, 2013.

(2) In a letter to the Appellant and the Respondent dated July 19, 2013, Commission staff identified a jurisdictional issue as to whether the Commission has the jurisdiction to hear an appeal dealing with a request for a return of a performance bond under a development agreement. The Commission invited the parties to file written submissions on the issue.

(3) Written submissions were received on August 15, 2013 from Michael Wheeler for the Appellant and from Jonathan M. Coady, legal counsel for the Respondent.

2. Discussion

(4) In his August 15, 2013 submission, the Appellant quoted from section 28 of the **Planning Act** and submitted that:

Section 28(1.1) of the Planning Act states specifically that “any person that is dissatisfied by a decision by the council of a municipality” may appeal the decision to the Commission by filing with the Commission a notice of appeal. A decision was made by the Resort Municipality regarding a “building permit”. A building permit is specifically listed in section 28 1.1 a(i).

The Resort Municipality Zoning and Subdivision Control (Development) Bylaws

4.9 DEVELOPMENT AGREEMENT

Council may require any applicant to enter into a Development Agreement. This Agreement shall be a contract binding on both parties, containing all conditions which were attached to the building permit and any additional conditions as may be imposed by Council. Failure to comply with a Development Agreement shall constitute an offense under this Bylaw. The Development Agreement may include a performance bond as determined by Council, to be posted by the Developer ensuring that the development will be carried out in conformance with the provisions of the Development Agreement.

Wood Wheeler Inc. was told by the Municipality that a building permit would not be issued until a Development Agreement was signed and a one thousand dollar performance bond was provided. As stated in the Resort Municipality bylaws "Failure to comply with a Development Agreement shall constitute an offense under this bylaw." "This Bylaw is made under the authority of the Planning Act, R.S.P.E.I. 1988, Cap. 4." In this case as the building permit could not be issued without the development agreement, and the development agreement contains "all conditions attached to the building permit". The development agreement is simply one part of the building permit. This, along with the fact that the development agreement is enforced by the Resort Municipalities bylaws that were made under the authority of the PEI Planning Act, in my humble opinion, the Commission does have the jurisdiction to hear an appeal regarding the refusal of the council of the Resort Municipality to return Wood Wheeler Inc's performance bond of one thousand dollars.

(5) In his August 15, 2013 submission, Counsel for the Respondent reviewed the facts, quoted from section 28 of the **Planning Act** and referred to several past decisions of the Commission. Counsel then noted in part:

In summary, the decision in relation to the performance bond was contractual in nature and separate and apart from the decision made in respect of the application for a building permit.

...

It is obvious from the Notice of Appeal that his [Appellant's] grievance is contractual in nature. The proper forum for such grievances is the Supreme Court of Prince Edward Island and not the Commission.

3. Findings

(6) After a careful review of the evidence, the submissions of the parties, and the applicable law, it is the decision of the Commission that it does not have jurisdiction to hear this appeal. The reasons for the Commission's decision follow.

(7) In the Appellant's Notice of Appeal, it states that the appeal follows from a June 7, 2013 decision of the Respondent. However, from a review of the Record filed by the Respondent, it is apparent that the decision was made by the Respondent's Council at its monthly meeting on May 21, 2013 and this decision was communicated to the Appellant by letter dated May 24, 2013.

(8) The present appeal was dated beyond the 21 day appeal period set out in the **Planning Act** and it was received by the Commission some time later still. On this basis alone, the Commission would not have jurisdiction to hear the appeal.

(9) However, the Commission also wishes to address the issue of whether the Commission has the jurisdiction to deal with a municipal decision to decline to return a performance bond referenced in a Development Agreement.

(10) In Order LA04-10, the Commission held that a development agreement is a contract between the parties. The Commission stated that:

[14] The Commission also wishes to point out that the Development Agreement is a legal contract between the parties. This Development Agreement is in accordance with the requirements of the Respondent's Bylaw as amended. The Commission cannot interfere with a signed contract between the parties. In the event a party wishes to challenge the validity of that contract, the Commission is not the appropriate forum for such a challenge.

(11) In Order LA07-02 the Commission found that a development agreement by itself is not an appealable decision. The Commission stated that:

[13] The Appellants requested in their Notice of Appeal that the Commission, as part of the requested remedy, quash the development agreement related to building permit 2006-7-0189, as well as the building permit itself. The Respondent requested that the reference to the development agreement be struck out, as no appeal of that document was filed.

*[14] As a preliminary matter at the hearing, the Commission orally quashed the appeal of the development agreement. The development agreement, by itself, is not a "decision" within the meaning of subsection 28(1) of the **Planning Act**. Rather, a development agreement is a legally binding contract between parties, in this case between the Respondent and the Developer. However, each case must be considered on its own facts. In the present appeal, the development agreement is strongly linked to the building permit. Thus, in the event the building permit was to be quashed, the development agreement, operating in isolation, could not allow the proposed development to proceed.*

(12) In the present appeal, the Commission finds once again that a development agreement is a contract between the parties. Where there is a dispute between the parties as to the terms of the development agreement, the appropriate forum is the Supreme Court of Prince Edward Island. In fact, the Record shows that the Respondent had previously brought the development agreement before the Court in an effort to enforce its terms and was successful in doing so.

(13) There is no evidence that the Respondent revoked or suspended the building permit. Had the building permit been revoked or suspended, it is probable that the Commission would have found that it had the jurisdiction to hear an appeal of the revocation or suspension of the building permit as such action would have amounted to a decision of the municipality made in respect of an application for a building permit.

(14) As the Respondent's May 21, 2013 decision that the performance bond not be released was premised on the contract (the development agreement) between the parties, the Commission does not have the jurisdiction to hear this appeal.

4. Disposition

(15) An Order stating that the Commission has no jurisdiction to hear this appeal will be issued.

IN THE MATTER of an appeal by Wood
Wheeler Inc. of a decision of the Resort
Municipality, dated May 21, 2013.

Order

WHEREAS the Appellant Wood Wheeler Inc. appealed a decision of the Respondent Resort Municipality, dated May 21, 2013;

AND WHEREAS the Commission identified a jurisdictional issue and invited the parties to file written submissions on the jurisdictional issue;

AND WHEREAS the Commission reviewed the Record of the Respondent's May 21, 2013 decision and reviewed the written submissions filed by both parties and 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 Commission does not have the jurisdiction to hear this appeal.**

DATED at Charlottetown, Prince Edward Island, this 17th day of October, 2013.

BY THE COMMISSION:

(Sgd.) *Maurice Rodgerson*

Maurice Rodgerson, Chair

(Sgd.) *Michael Campbell*

Michael Campbell, Commissioner

(Sgd.) *Jean Tingley*

Jean Tingley, 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)