

**THE ISLAND REGULATORY AND
APPEALS COMMISSION**

Prince Edward Island
Île-du-Prince-Édouard
CANADA

**Docket LA13001
Order LA15-04**

IN THE MATTER of an appeal by
Andrew Inderwick of a decision of the
Minister of Finance, Energy and Municipal
Affairs, dated April 22, 2013.

BEFORE THE COMMISSION
on Thursday, the 2nd day of April, 2015.

John Broderick, Commissioner
Doug Clow, Vice-Chair
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
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IN THE MATTER of an appeal by
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Affairs, dated April 22, 2013.

Appearances & Witnesses

1. For the Appellant

Andrew Inderwick
Lisa Inderwick

2. For the Respondent

Counsel:

Robert MacNevin

Witnesses:

Jay Carr
Kevin Arsenault

IN THE MATTER of an appeal by Andrew Inderwick of a decision of the Minister of Finance, Energy and Municipal Affairs, dated April 22, 2013.

Reasons for Order

1. Introduction

[1] Andrew Inderwick 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*). Later in the appeal process, Mr. Inderwick was joined by his spouse Lisa Inderwick (the Appellants). The Notice of Appeal was received by the Commission on May 3, 2013.

[2] This appeal concerns an April 22, 2013 decision of the Respondent Minister of Finance, Energy and Municipal Affairs (the Respondent) to revoke Building Permit number S-2011-671 (the permit). The permit had granted permission to the Appellants to construct a summer cottage on parcel number 814616 (the subject property) in the Community of Maximville.

[3] After coordinating a suitable hearing date for the parties and issuing a public notice, a hearing commenced on August 21, 2014.

[4] Following initial post-hearing deliberations, the Commission requested that the Respondent provide a copy of Mr. Kevin Arsenault's file. The Respondent's Counsel provided a supplementary record to the Commission containing this information on September 5, 2014. A copy of the supplementary record was mailed to the Appellants. On September 29, 2014, the Appellants filed a written response to the supplementary record.

2. Discussion

The Appellants' Position

[5] The Appellants filed a detailed written submission [Exhibit A3]. The following is a brief summary of the Appellants' position, based on both their written submissions and their oral submissions presented at the hearing.

- In 2004, they purchased two nearby lots: the subject property (also known as lot 19) and lot 12. Their offer to purchase the lots was conditional on the lots receiving development approval; that condition was satisfied. They applied for and received building permits for both lots. They built a cottage on lot 12 in 2005 and it was always their intent to build on lot 19 to have a cottage for their children.
- In 2006 and 2008, the Appellants followed the advice of the Respondent's delegated staff and they reapplied for, and received, building permits for lot 19. They needed to reapply as a building permit expires after 24 months.
- In 2009, the Appellants began to prepare lot 19 for building in accordance with the 2008 building permit. The 2008 pre-development inspection report noted that wetland was "N/A" (not applicable) and four feet of fill would be required. The Appellants were informed by their contractor that they needed to contact Kevin Arsenault, an employee delegated by the Respondent. In July 2009, Mr. Arsenault advised the Appellants that he thought lot 19 contained wetland but this would need to be confirmed.
- The Appellants received a letter from Mr. Arsenault dated March 5, 2010 advising that lot 19 was most likely a wetland and an assessment would be conducted in the spring or summer of that year. The Appellants disagreed with this letter and wished to appeal. They were informed that they could not appeal until a permit was denied.
- In August 2011, the Appellants filed an application for a building permit. On October 7, 2011, a building permit was issued to the Appellants. The Appellants assumed that the matter had been re-evaluated and the previous assessments of 2004 to 2008 were upheld.
- In November 2012, the Appellants placed fill on lot 19 in accordance with the terms of the October 7, 2011 building permit that was still in effect. In December 2012, the Appellants received a letter from a Conservation Officer requiring them not to proceed with any further work.
- In 2013, the Appellants received an April 22, 2013 letter from an employee delegated by the Respondent. The April 22, 2013 letter revoked the October 7, 2011 building permit and requested that the Appellants remove the fill by June 15, 2013.
- The Appellants submit that the appearance of a wetland on lot 19 was due to pooled water caused by increased septic fill height requirements for neighbouring properties and by unmaintained ditches in the neighbourhood.
- The Appellants maintain that the only flooding occurred after they built their cottage on lot 12 and there was no culvert. They received a call alerting them to this, had a culvert installed, and the water flowed away.

[6] The Appellants request that the Commission find that lot 19 is not a wetland and re-instate the October 7, 2011 building permit. In the alternative, they request that the Respondent compensate the Appellants as outlined on page 9 of their written submission [Exhibit A3].

[7] On September 29, 2014, the Appellants provided the Commission with a written response to the disclosure of the supplementary record. While this submission addresses several points, the following paragraphs summarize the Appellants' frustration:

We are grateful to the Commission for requesting this further documentation. There seems to be communications which throw into question the process by which documents were selected for the first disclosure.

Although we cannot meaningfully comment on the elements that relate to the scientific discussion of wetland vegetation and watermarks, we believe the documents provided in the second disclosure prove, at the least, that we have been abused by the lack of internal process and accountability and that this abuse has resulted in significant financial expense and emotional strain.

...

We believe that the documents included in the second disclosure reveal the subjective and selective nature of the processes of Environment Labour and Justice (and specifically the individuals) tasked with identifying wetlands and significantly impacting the lives of PEI taxpayers. Those individuals have been given the solemn power to severely impact the lives of PEI Taxpayers without being accountable for their actions. While it would not seem right to burden the Commission with the complaints of every taxpayer who disagrees with the findings of these individuals, greater oversight of their work, decisions and the impact on taxpayers seems like a good idea.

Our confidence in the processes related to land purchasing and development have been shaken and we believe that this is true for many Islanders as well. As we said in our initial appeal, we believe that a ruling in our favour (or at least for full compensation) would not be thwarting the mandate and purpose of the Environmental Protection Act, it would restore faith in the strength of a building permit which is a cornerstone of economic sustainability.

The Respondent's Position

[8] Counsel for the Respondent presented evidence from Kevin Arsenault. Mr. Arsenault is a Wetland Watercourse Alteration Technician with the Department of Environment, Labour and Justice (Department of Environment).

[9] Mr. Arsenault explained that, prior to 2012; Property Development Officers had no special training in wetland identification. As of 2012, these officers have received two days of training in wetland identification.

[10] Mr. Arsenault gave detailed testimony that forms part of the recorded record of the hearing. Mr. Arsenault is of the opinion that lot 19 is a wetland as defined under the **Environmental Protection Act**, R.S.P.E.I. 1988, Cap. E-9 (**EPA**).

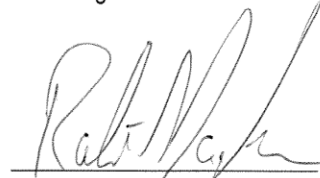
[11] In written submissions filed on behalf of the Respondent, Counsel for the Respondent identified succinctly the Respondent's position:

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II. POSITION OF THE RESPONDENT

21. I am advised that this wetland is a result of the high-water table, and at certain times of the year - in the drier months - the area can be fairly dry, but normally and after heavy rains, standing water is often present on the surface.
22. The wetland was identified in July 2010. The information in the Charlottetown file was inadvertently not initially noted in the file, and subsequently was not relayed to the Summerside office where the building permit in question was issued in error. If that information had been relayed or noted, the building permit would not have been issued unless Mr. Inderwick was issued a Watercourse, Wetland and Buffer Zone Activity Permit, which, for reasons I have just outlined, would not have occurred.
23. As noted, the wetland on the property was not confirmed until July 2010. The area was further analyzed and a wetland delineation was conducted in September 2012. The wetland delineation process is thorough, and in this instance, the area was positive for the three conclusive indicators of a wetland; hydric soils, hydrology (the presence of water), and the presence of hydrophytic vegetation, namely: Canada Blue Joint Grass (predominant in this case), Blue Flag, Bindweed, Rush, Marsh Fern and Sensitive Fern, and cattails.
24. The development permit in question was issued in error. To allow development to take place would be in contravention of the *Planning Act* Subdivision and Development Regulations and the *Environmental Protection Act*, R.S.P.E.I. 1988, Cap. E-9 Watercourse and Wetland Protection Regulations. I therefore request that this appeal be denied.

August 20, 2014



Robert A. MacNevin
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Solicitor for the Respondent

3. Findings

[12] After a careful review of the evidence, 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.

[13] Section 1. (v) of the **EPA** defines wetlands for the purposes of said **Act**:
(v) "wetland" means

- (i) an area which contains hydric soil, aquatic or water-tolerant vegetation, and may or may not contain water, and includes any water therein and everything up to and including the wetland boundary, and*
- (ii) without limiting the generality of the foregoing, includes any area identified in the Prince Edward Island Wetland Inventory as open water, deep marsh, shallow marsh, salt marsh, seasonally flooded flats, brackish marsh, a shrub swamp, a wooded swamp, a bog or a meadow;*

[14] Subsections 4.(1) and (2) of the Planning Act Subdivision and Development Regulations (the Regulations) read as follows:

4. (1) An approved subdivision or development permit may be made subject to any conditions necessary to ensure compliance with these regulations, other regulations made pursuant to the Act, or any relevant sections to the Environmental Protection Act, Roads Act, Provincial Building Code Act R.S.P.E.I. 1988, Cap. P-24, or the Fire Prevention Act R.S.P.E.I. 1988, Cap. F-11.

(2) Where an approved subdivision or development permit is granted subject to conditions in accordance with subsection (1), the owner shall ensure that the subdivision or development complies with the conditions.

[15] Subsection 39.(5)(c) of the Regulations read as follows:

39.(5) The nearest exterior portion of a building or structure shall be located no closer than

...

(c) 75 feet (22.9 metres) to the inland boundary of a wetland or watercourse.

[16] The Commission has carefully reviewed the record, supplementary record, and the testimony of Kevin Arsenault. While Mr. Arsenault is not a biologist, he has successfully completed courses in wetland plant identification (June 2010), hydric soils properties and indicators (June 2010) and wetland delineation (July 2012). The Appellants have offered their own observations concerning lot 19; however, there is no evidence that either Appellant has formal education, training or experience in wetland identification.

[17] The events leading up to the April 22, 2013 decision to revoke permit S-2011-671 reveals that the Respondent repeatedly issued development permits for the subject property, thus establishing that the Respondent was satisfied on each occasion that the subject property was suitable for cottage development.

[18] What is especially troubling is that a permit was issued in October 2011 after Mr. Arsenault had identified the subject property as a wetland in his July 29, 2010 notes [see Tab 4 of the supplementary record]. A major error occurred and the Respondent concedes this error.

[19] That said, this appeal is concerned with the April 22, 2013 decision to revoke the development permit for the subject property rather than a previous error (or errors) of the Respondent. Mr. Arsenault's testimony, notes and photographs represent the best evidence before the Commission as to whether the subject property is a wetland as defined under the EPA. Accordingly, on the civil standard of a balance of probabilities, the Commission finds that a major portion of lot 19 is a wetland and the balance of that lot is not sufficiently large enough to meet the development requirements of subsection 39.(5)(c) of the Regulations. Accordingly, the Commission upholds the Respondent's decision to revoke building permit S-2011-671 and this appeal is hereby denied.

[20] While the Appellants have requested compensation as detailed in Exhibit A3, the Commission has no jurisdiction to assess or award compensation to a party.

4. Disposition

[21] An Order denying this appeal follows.

IN THE MATTER of an appeal by Andrew Inderwick of a decision of the Minister of Finance, Energy and Municipal Affairs, dated April 22, 2013.

Order

WHEREAS the Appellant Andrew Inderwick appealed a decision of the Respondent Minister of Finance, Energy and Municipal Affairs (the Minister) dated April 22, 2013;

AND WHEREAS the Commission heard the appeal at public hearings conducted in Charlottetown on August 21, 2014 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 2nd day of April, 2015.

BY THE COMMISSION:

(sgd.) *John Broderick*
John Broderick, Commissioner

(sgd.) *Doug Clow*
Doug Clow, Vice-Chair

(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)