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

Docket LA13006
Order LA14-02

IN THE MATTER of an appeal by Gary McLure of two decisions of the Minister of Finance, Energy and Municipal Affairs, dated June 26, 2013 and July 3, 2013.

BEFORE THE COMMISSION
on Monday, the 17th day of March, 2014.

Maurice Rodgerson, Chair
Ferne MacPhail, Commissioner
Peter McCloskey, Commissioner

Order

Compared and Certified a True Copy

Philip J. Rafuse
Appeals Administrator
Corporate Services and Appeals Division

IN THE MATTER of an appeal by Gary McLure of two decisions of the Minister of Finance, Energy and Municipal Affairs, dated June 26, 2013 and July 3, 2013.

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IN THE MATTER of an appeal by Gary McLure of two decisions of the Minister of Finance, Energy and Municipal Affairs, dated June 26, 2013 and July 3, 2013.

Appearances & Witnesses

1. **For the Appellant Gary McLure**

   Gary McLure
   Sandy Foy

2. **For the Respondent Minister of Finance, energy and Municipal Affairs**

   Counsel:

   Robert MacNevin

   Witnesses:

   Alan Robison
   Eugene Lloyd
   Glenda MacKinnon-Peters

3. **For the Developers Tian Fey and David Wu**

   John Mantha

IN THE MATTER of an appeal by Gary McLure of two decisions of the Minister of Finance, Energy and Municipal Affairs, dated June 26, 2013 and July 3, 2013.

Reasons for Order

1. Introduction

[1] On July 23, 2013, the Appellant Gary McLure (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***).

[2] As identified in Commission Order LA13-10, the Appellant appealed two decisions of the Respondent Minister of Finance, Energy and Municipal Affairs (the Minister) granting preliminary approval and granting a development permit to the Developers David Wu and Tian Fey (the Developers):

- a June 26, 2013 decision of the Minister to grant preliminary approval to the Developer David Wu's application to append parcel number 1008986 (Lot06-2, Plan #52120A) to parcel number 1008978 (Plan #10252B) and

- a July 3, 2013 Development Permit C-2013-2060 issued to the Developer Tian Fei to renovate and relocate existing rental cottages and locate nine additional rental cottages on parcel number 1008978, Sub. Plan #10252B and located at 31 Blue Spruces Way in the community of Hampton.

[3] The appeal was heard on October 9, 2013 and pursuant to Order LA13-10, the hearing was reconvened on January 17, 2014 to hear additional evidence and submissions from all parties.

2. Discussion

The Appellant's Position

[4] The Appellant's oral submissions are summarized as follows:

- The Appellant submitted that there is no authority under the ***Planning Act*** or the Regulations to append a lot.

- He also submitted that section 30 of the Regulations would not apply to allow the subdivision to be rescinded as the Developer is not the original owner.

- The Appellant also submitted that there is nothing in the Minister's file to establish that an entranceway permit was issued by the Minister of Transportation and Infrastructure Renewal.

- The Appellant also submitted that the development permit would create a detrimental impact with respect to safety at the highway access point and with respect to surrounding land uses.

- He submitted that parking and drainage matters were not considered, and the Minister's decisions reflect approval of a premature development with a lack of sound land use planning.

- The Appellant believes that the Minister, in making both the June 26, 2013 and July 3, 2013 decisions, failed to follow the requirements of the ***Planning Act*** and the Planning Act Subdivision and Development Regulations (the Regulations).

[5] Mr. Foy echoed the Appellant's concerns and expressed particular concern over highway access issues associated with the development permit and possible future development. Mr. Foy also raised the concern that the Minister may not have addressed issues under the Lands Protection Act.

The Minister's Position

[6] At the hearing on January 17, 2014, legal counsel for the Minister requested an opportunity to file a written submission following the hearing. The Commission granted that request. Mr. MacNevin's written submission follows.

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Reply Attention of: *Robert MacNevin*
Our File Reference: *17352*

January 29, 2014

Philip Rafuse
The Island Regulatory and Appeals Commission
National Bank Tower, Suite 501
134 Kent Street, PO Box 577
Charlottetown, PE C1A 7L1

Dear Mr. Rafuse:

Re: Gary McLure v. Minister of Finance, Energy & Municipal Affairs
Appeal #LA13006

The following is the pertinent history of this matter.

A development permit was issued to Tian Fei on parcel #1008978 in Hampton to renovate and relocate existing rental cottages on and to construct nine (9) new rental cottages. The parcel was approved as a commercial rental cottage property and the permit was issued for an expansion to that operation. Included in the process was the consolidation of an adjacent lot (PID#1008986).

The adjacent property was severed from the parcel in question seven (7) years previous (2006); however, no development had taken place on the property.

The parcel #1008978 and the adjacent property # 1008986 were now owned by the same person and the request to consolidate the parcels would require the rescinding of the previous subdivision from seven (7) years earlier.

Rescinding the subdivision caused for the adjacent lot to be returned to it's original use and when amalgamated back into the original parcel allowed for the development permit to be issued. This process is common and consistent with departmental procedure in these types of cases.

When development began, the appellant was upset with the appearance and felt the proposal was not conducive to the area and that several buildings were being placed on a lot approved for summer cottage use. Almost all of these new cottages have since been relocated and realigned on the property for a neater appearance.

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This appeal was heard on October 9, 2013 and also on January 17, 2014. The Commission heard from Alan Robison, formerly Safety Standards Chief as he recently retired, and Eugene Lloyd, Property Development officer, over the course of the hearing.

We heard that there was nothing particularly novel about the two permits that were issued. The issue of premature development and detrimental impact was considered, as it is with any application for development. However, because of the nature of what was being applied for, they did not trigger the sending of the file to a provincial planner for review. The Minister, by way of his agents, are the ones who determine what does or does not constitute premature development and detrimental impact.

To reiterate, all that was applied for and granted, was the consolidation of two lots back into one lot (as it had originally been), and allowing the placement of nine cottage units on the property. Many of the cottages have since been moved to other parcels, but the fact is that so long as the fire marshal does not object, and all required set backs are complied with, there was nothing preventing the developer from keeping all nine cottages on the one lot in question.

Section 5 of the *Planning Act* Subdivision Regulations states that:

> 5. *No approval shall be given pursuant to these regulations until the following permits or approvals have been obtained as appropriate:*
>
> *(a) where an environmental assessment or an environmental impact statement is required under the Environmental Protection Act, approval has been given pursuant to that Act;*

> *(b) where the Fire Marshal's approval is required pursuant to the Fire Prevention Act, approval has been given pursuant to that Act;*
>
> *(c) where approval is required pursuant to the Lands Protection Act, R.S.P.E.I. 1988, Cap. L-5 or regulations made pursuant to that Act, approval has been given pursuant to that Act and any applicable regulations made pursuant to that Act;*
>
> *(d) where, pursuant to the Roads Act, an entrance way permit or approval is required, the required permit or approval has been obtained; and*
>
> *(e) where a Quality Control Plan is required under the Barrier-Free Design Regulations (EC139/95) made under the Provincial Building Code Act, until the Quality Control Plan has been submitted and accepted in accordance with the regulations.*

In the case at hand, all of these were considered. The consolidation of the two parcels was done *vis a vis* subsection 30(b) of the Subdivision Regulations which states:

Philip Rafuse
January 29, 2014
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> 30(b) *the owner of the land has stated, in writing, that the conveyance of lots is no longer intended and has requested that the approval be rescinded.*

Rescind is comprehensively defined by Blacks Law Dictionary 1174 (5th ed. 1979) in part as:

> ***Rescind.*** *. . . annul, . . . cancel . . . void in its inception . . . to abrogate it from beginning and restore parties to relative positions which they would have occupied had no contract ever been made.*

In this context, "contract" can be supplanted with "decision", and in this case the Department did not consider the consolidation of the two lots to have been a change in use. Lot 1008986 was never developed when it was categorized as summer cottage, and so when it returned to the property parcel 1008978 categorization reverted back to commercial.

The Subdivision Regulations of the *Planning Act* are constantly evolving, and being amended to not only keep pace with new standards, but to remain current with public policy and to address any shortcomings or gaps that are discovered when development staff apply the Regulations. Department officers have implemented this practice of consolidation for the past 30 plus years, and as Mr. Lloyd pointed out, almost half of all applications his office receives involves a request for this action. The Regulations are going to be amended to more clearly reflect this practice, as well as other areas of the Regulations that could use some further enhancements. The issue of enforcement is also on the minds of departmental officials, and enforcement techniques are being considered to deal with the ten per cent or so of persons who do not comply with the terms or conditions of a permit that was granted.

Yours truly,

Robert MacNevin
Departmental Solicitor

RM/st

c: Client

The Developers' Position

[7] Mr. Mantha explained that the Developers have removed some of the cottages from the appended parcel to the main parcel. He explained that the Developers purchased a 50 year old rental cottage business. The water and sewer system needed to be upgraded and in the spring of 2013 the Developers were hard pressed to put up any of the cottages for rental for the summer of 2013. The Developers thus filed an application to append a parcel and place nine new units on that parcel on a temporary basis to allow their business to open for the summer 2013 season. Their intent was, and still is, to replace some of the old "blue" cottages with the new units which were temporarily positioned on the appended parcel. Mr. Mantha stated that for this first phase, the Developers were not really seeking to change the scope of the business; rather, they were upgrading the business with modern units and an appropriate water and sewer infrastructure.

The Appellant's Rebuttal

[8] In response to Mr. MacNevan's written submission, the Appellant filed two written rebuttal submissions, one prepared by him and one prepared by Mr. Foy at the Appellant's request. Mr. Foy's written rebuttal follows.

February 2, 2014

Phillip Rafuse
The Island Regulatory
and Appeals Commission
P.O. Box 577
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Dear Mr. Rafuse:

Subject: **Appeal #LA13006**—Gary McClure v. Minister of Finance, Energy & Municipal Affairs

Mr. McClure asked me to provide a rebuttal to Mr. MacNevin's January 29, 2014 submission.

The first issue I would like to address is the process that resulted Lot #06-2 becoming part of Parcel #1008978 again.

Lots #06-1 and #06-2 became independent lots at the time subdivision approval was granted in 2006. At that time the use of each lot was designated as "*Summer Cottage use only*". Subsequent to that many things happened, including several changes in ownership of the land involved; a summer cottage being built on Lot #06-1; and the acquisition by the present owners of both Lot #06-2 and Parcel #1008978. Then the Developer not only applied to consolidate the two into one parcel, but also filed a request to rescind the approval for Lot #06-2. Exhibit #2 granted approval to append Lot #06-2 to Parcel #1008978—something that wasn't even applied for. While appending and consolidating may be considered similar actions, rescinding is completely different from the other two. If the Minister rescinded, there'd be no need or authority to append or consolidate as rescinding would have returned the parcel to its original state.

At the hearing, Mr. Lloyd acknowledged that the Minister has no authority to append or consolidate but confirmed the Department has continued to append and consolidate parcels of land for years without amending the Regulations to rectify this deficiency. This action demonstrates the lack of will to produce and implement the Regulations in an appropriate manner. I submit the Minister does not have the authority to veer from the requirements of the Regulations as a matter of convenience. He has a legal obligation to implement the **Act** and Regulations as they are written. If there are deficiencies or errors in the Regulations, they should be amended accordingly and in a timely manner.

Also, I submit that the Minister did not have authority to rescind the subdivision approval. The fact that, as Mr. MacNevin stated, *"The process is common and consistent with departmental procedure…"* is unacceptable if the Minister does not have the authority in the first instance.

In my view the Regulations give authority to the Minister to consider rescinding was intended to allow a developer the option to have a subdivision approval rescinded when he had decided he would not develop the subdivision.

This was not the case in this instance. "Too much water had passed under the bridge"—in other words too many events had happened by the time he received the request to rescind, including:

- the change in ownership of the involved parcels;
- Lots #06-1 and #06-2 being assigned separate Parcel Numbers;
- the change of use of Lots #06-1 and #06-2 to summer cottage use only; and
- the building of a cottage on Lot #06-1

for the Minister to even consider the request to rescind.

Mr. MacNevin's statement that "*rescinding the subdivision caused for the adjacent lot to be returned to it's* [sic] *original use …*" is correct. In other words, it "changed the use" of the lot from summer cottage use only to commercial. Clause 31(1)(d) of the regulations clearly triggers the requirement for the issuance of a development permit when a "change of use" is going to occur and the Minister is then obligated to consider if his decision will have a detrimental impact or be premature development.

For the Minister to consider a proposal to allow commercial development of this intensity to be located on a 0.6-acre lot that was formerly approved for "*Summer Cottage use only*" and surrounded on three sides by other summer cottage lots—two of which are developed—and not notify the nearby landowners, hold a public meeting pursuant to Section 11 of the Regulations or seek an opinion from a provincial planner regarding detrimental impact and further, not require any sort of protection to the neighbouring land owners other than the standard 15-foot setback is inappropriate.

At one point Mr. Lloyd's stated that the only consideration was that they needed to find a way to remove the lot line between Lot #06-2 and Parcel #1008978. Further, he stated that it is their practice to find solutions. When pressed, he said the decision was made by people further up the chain of command on his recommendation and finished by saying he didn't know why they reached the decision to rescind.

Mr. Lloyd was unable to explain how the Minister concluded that this would have no detrimental impact or not be premature development as he said he received direction from above. However, his superior, Glenda MacKinnon, did not shed much light on the matter either as she explained her role is focused more on administration.

I submit that, based on the tone of the evidence given by Mr. Lloyd and Mr. Robison, the Minister did not consider these issues appropriately. The Department's evidence was simply that they addressed it…without providing specifics. At the least, this made it difficult to understand how the Minister arrived at the decision and, at the worst, gave the appearance that the Department was not being transparent in the matter.

Mr. MacNevin talked about the movement of the units subsequent to the October hearing and seems to imply that this movement was fine with the Department. In fact, Clause 31(1)(b) of the Subdivision and Development Regulations clearly requires that a person, who is going to "*change the location of any building or structure on a lot*", shall first obtain a development permit. Evidence presented at the hearing showed that the Developer discussed the proposal to move the units around the parcel with Departmental officials and was not informed that a permit was required.

This wasn't a case of the Developer changing his mind soon after the permit was issued. Rather, the development was completed, the facilities used for a season and then the discussion between the Developer and Department to move the units commenced. Again, I submit the Minister does not have the authority to veer from the requirements of the Regulations as a matter of convenience.

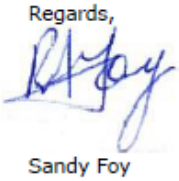
Mr. MacNevin states that the provisions of Section 5 of the Regulations were considered. However, Mr. Lloyd confirmed that, as a matter of practice, the Department checks the Commission's database to determine if a property has a development restriction, but they do not check to confirm that other requirements in the **Lands Protection Act** (e.g. Sections 4 and 5.1 of the **Act**). Clearly, the Minister failed to meet the complete requirements of subsection 5(c) of the **Act**. This is another instance of the Minister failing to do something that the regulations require that he do.

A couple of Mr. Lloyd's statements during the hearing were especially troubling. They were that the Department attempts to "*help the developer as much as possible*" to "*Find solutions for us and them*" with "*us*" being the Department" and "*them*" being the developers with no mention of consideration of the nearby landowners and the general public. It is important to note that the role of a development officer is to implement the regulations in a manner that is considerate to all parties, including nearby land owners and the general public. Mr. Lloyd's comments clearly showed that, at least in this case, that was not done.

Finally, Mr. MacNevin's comments regarding the evolution of the Subdivision and Development Regulations would lead one to believe that these Regulations are state of the art and are keeping up with the times. However, the evidence at this hearing plainly illustrated that they are deficient in many regards and further, are not being properly applied.

I look forward to the Commission's decision.

Regards,



Sandy Foy

3. Findings

[9] After a careful review of the evidence, the submissions of the parties, and the applicable law, it is the decision of the Commission to allow this appeal and quash both the Minister's June 26, 2013 decision to grant preliminary approval to the application to append parcel number 1008986 (Lot06-2, Plan #52120A) to parcel number 1008978 (Plan #10252B) and the Minister's July 3, 2013 decision to issue Development Permit C-2013-2060 to renovate and relocate existing rental cottages and locate nine additional rental cottages on parcel number 1008978, Sub. Plan #10252B. The reasons for the Commission's decision follow.

[10] In review, the Commission had expressed its concerns over the issue of notice in Order LA13-10. The Commission still has concerns over the notice issue.

[11] The June 26, 2013 decision ended up before the Commission because the Minister failed to meet one of the requirements of Section 23.1 of the ***Planning Act***, a section which came into effect in 2009 a few years after the Court of Appeal's decision in *Booth and Peake v. IRAC* 2004 PESCAD 18. Regardless of whether it was an information technology glitch, an oversight, or another type of error the fact the decision was not posted as required by law opened it to appeal.

[12] The Commission makes this point because the Minister's failure to adhere to the requirements of Section 23.1 has been a significant factor in the delay and frustration of all parties with this appeal. Had the decision been properly noticed and appealed, the matter would have been dealt with to completion at the October 9, 2013 hearing, and Order LA13-10 would have been able to deal with the merits of the appeal. Alternatively, had full notice of the June 26, 2013 decision been given and no appeal filed for that decision, the appeal of the July 3, 2013 decision would have proceeded in a straight forward manner.

[13] The Commission remains concerned that the Decisions PEI website fails to fully comply with the requirements of clauses (2) (d) and (e) of Section 23.1. For ease of reference, subsection 23.1(2) is reproduced below, with the clauses of concern in italics:

> (2) A notice of a decision that is required to be posted under subsection (1) shall contain
>
> > (a) a description of the land that is the subject of the decision;
> >
> > (b) a description of the nature of the application in respect of which the decision is made;
> >
> > (c) the date of the decision;
> >
> > *(d) the date on which the right to appeal the decision under section 28 expires; and*
> >
> > *(e) the phone number of a person or an office at which the public may obtain more information about the decision. 2006,c.15,s.1*

[14] Rather than calculate and specify the appeal expiry date of each appealable Ministerial decision, the Decisions PEI website advises the reader:

> ***Calculating the appeal period:*** *Appeals to IRAC must be filed within 21 days of the decision in question. The calculation of the days included in the 21-day appeal period will be made in accordance with section 23 of the "Interpretation Act" and it is recommended that you contact IRAC to obtain confirmation of the last day of the appeal period.*

Emphasis added by the Commission.

[15] Rather than containing the phone number of a person or office within the Minister's department, or a department delegated by the Minister, the Decisions PEI website is silent on this, although it does offer the main phone number for a delegated department for the purposes of "Applying for a planning approval (subdivision, permit, etc.)".

[16] The Commission recommends that the Minister, or the Minister's delegated department, designate an information officer for appealable Ministerial decisions who could provide information to the public on these decisions upon request and who could ensure that the PEI Decisions website accurately reflects all appealable decisions.

[17] Turning to the heart of the matter, the essential question regarding the June 26, 2013 lot consolidation and rescinding of the subdivision approval is whether or not this decision is legal. If the answer to that question is yes, then numerous factors regarding the later decision are removed from consideration. If the answer is no, then the entire development associated with lot 06-2 is in question.

[18] The Commission is well versed in its role as a creature of statute. Simply stated the Commission cannot exercise any authority that is not permitted by the enabling legislation. That authority flows from the Legislative Assembly through to the ***Planning Act***. The same principle applies to the Minister in exercising authority under the ***Planning Act***. The Minister can only do what the Legislative Assembly, though passage of the legislation, enables him to do. The Regulations give effect to the ***Planning Act***, but such Regulations must be based on clear authority. The Minister and staff must rely on the ***Planning Act*** and the Regulations in making planning related decisions.

[19] The first three clauses of Section 6 the ***Planning Act*** emphasize the authority of the Minister:

The Minister shall

(a) advise the Lieutenant Governor in Council on provincial land use and development policy;

(b) perform the functions conferred on him by this Act and the regulations;

(c) generally, administer and enforce this Act and the regulations,

[20] The objects of the ***Planning Act*** are set out in Section 2:

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.

[21] A review of the ***Planning Act*** and the Regulations does not offer any clear authority for the action undertaken in the June 26, 2013 decision, the appending of the Lot 06-2 to the larger commercial parcel and changing the designation from cottage use to commercial. The officer responsible for the decision under appeal, while noting that the practice has been utilized numerous times and for more than three decades could not point to a clear regulation supporting the action. The Minister's final submission, while thorough in other respects does not answer the authority question.

[22] The Commission, adhering to the direction of the Court of Appeal to conduct appeal hearings as a *hearing de novo*, places itself in the role of the original decision maker. To accept the appending of the lot or in the alternative the rescinding of the subdivision approval requires the Commission to satisfy itself that legal authority exists under the ***Planning Act*** and Regulations for such an action. The Commission is of the view that there is no such legal authority. If the Legislative Assembly wished the Minister to append lots then it could have been included directly in the ***Planning Act***. Alternatively, if Executive Council felt the Minister should have the authority to append lots this could be included in the Regulations. If the Minister saw value in such a provision to support the object to provide for efficient planning at the provincial and municipal level; then he had 30 years to develop a regulation covering the practice.

[23] The Minister's delegated department has an application form which includes as an option "Appendage to a parcel/lot" and "Lot consolidation" but other than a general reference to the ***Planning Act*** offers no specifics as to the authority to deal with the application. Mere inclusion in a form does not of itself grant legal authority. It should also be noted that the form itself is referenced as a "Change of Use Application." The mere fact that the Minister's officer stated on the inspection form that "Lot 06-2 shall assume the same use as 1000978 effectively superseding the approval in 2006 for summer cottage use" does not make it so if there is no legal authority for such a determination. No statutory or regulatory authority for the comment is referenced.

[24] The June 26, 2013 decision letter granting the approval for the appending of the lots makes no reference to the specific authority authorizing the decision. Further the note that states "The approval of this consolidation will effectively supersede the approval of Lot 06-2 as shown on Plan #52120A" offers no reference to any section of the ***Planning Act*** or the Regulations that would provide the authority for such a decision. The Commission believes the Minister acted beyond his authority in granting the appending and eliminating the "summer cottage" designation.

[25] The Commission does not believe that the decision to append the lot and change the designation from summer cottage only to commercial was a deliberate effort to avoid specific provisions of the ***Planning Act*** (notice to neighbours, highway access, parking, etc.), but the decision certainly did have that effect.

[26] The ***Planning Act*** does offer some authority for rescinding subdivision approvals, but frankly the Commission finds it an unacceptable stretch to apply that to this situation.

[27] Section 30 states:

30. The Minister may alter or rescind a subdivision approval, in whole or in part, where

(a) the subdivision has been carried out contrary to the approved plan, any conditions of approval, or these regulations; or

(b) the owner of the land has stated, in writing, that the conveyance of lots is no longer intended and has requested that the approval be rescinded. (EC693/00; 176/03; 137/09)

[28] A key phrase is “that the conveyance of lots is no longer intended”. That speaks to a subdivision that has not been fully matured in that lots have not been conveyed. This was a mature subdivision. The lots had been conveyed to new owners. Numerous lots have structures placed upon them consistent with the summer cottage use designation.

[29] Some seven years prior to the decision under appeal the lot in question was created as the result of a legal subdivision. Lots were sold for summer cottage use only and cottages have been constructed on a number of the adjoining lots. At the time the present owners, the Developers in this matter, purchased lot 06-2 it was approved for summer cottage use only. It must not be overlooked that the lot was not only approved for summer cottage use but sold under that designation. The mere fact that the same person ultimately ended up owning both parcels does not give authority to rescind the subdivision approval.

[30] The Commission is also of the view that an appending of the lot and the changing of the designation to commercial was in fact a change of use and should have been dealt with as such. The very wording of the definition in the Regulations leads to this conclusion:

1. (d) "change of use" means

   (i) altering the class of use of a parcel of land from one class to another, recognizing as standard classes residential, commercial, industrial, resource (including agriculture, forestry and fisheries), recreational and institutional uses, or

   (ii) a material increase in the intensity of the use of a building, within a specific class of use as described in subclause (i), including an increase in the number of dwelling units within a building;

[31] The definition cited above states that altering the class of use of a parcel is a change of use and it then recognizes residential and commercial as standard classes. They are therefore obviously different and not intended to be interchangeable. The classing of lots is a standard planning action designed to ensure that the lots are suitable for the intended purpose, that conflicting uses are not introduced, and to give some comfort to adjacent land owners that the land is designated for a specific purpose.

[32] A geomatics view of the property area shows a reasonably logical subdivision existed prior to this decision. There is a relatively straight line running from the shore up to entryway to the Blue Spruces commercial property of about nine cottage lots. West of this line are cottage lots. To the north of the entryway are also a cluster of cottage lots. A decision was made to create lots 06-1 and 06-2 and designate them as cottage use only and they were sold for those purposes. To now append lot 06-2 to the commercial property breaks that logical delineation and thrusts the commercial property into the cottage area.

[33] Lot 06-2 was sold for summer cottage use only and was purchased with that understanding. It was not listed as commercial. There is no legislative basis for the Developers to assume that it could be changed to commercial simply by rescinding the subdivision approval and it would be reasonable for the surrounding land owners to expect that any such change would be open for their input prior to any such decision being made.

[34] The Commission does not accept the assertion of the Minister that the appending of the lot is both legal and resulted in it reverting back to commercial designation. Had the lots always remained in the ownership of the same person as a parent parcel the Commission might have been persuaded differently. However, the Commission finds that the designation of cottage use became concrete when it was first sold for that purpose and thus could not later be altered without a formal change of use process. The Commission cannot find any regulation that supports the Minister's position and the fact it was done that way many times before as a matter of departmental practice does nothing to support the action in this matter. It may well be that there is benefit in such abilities, but the authority to do so must exist either in the ***Planning Act*** or the Regulations in order to be lawful.

[35] In conclusion, the lot consolidation or appending process needs to be supported by the Regulations, however at the present time it is not. Even if the Regulations had supported the consolidation, a change of use application would still be necessary to allow the lot to be used by the Developers for commercial use because the lot was subdivided as a cottage lot and was sold as a cottage lot.

[36] Accordingly, the June 26, 2013 decision is quashed for lack of legal authority. Within the context of a lot approved for a summer cottage, the presence of nine commercial rental cottages is not permitted on one such lot and thus the July 3, 2013 decision is also quashed.

[37] The testimony and file before the Commission revealed a process that causes some concern. For the benefit of future applications and decisions with respect to this parcel and with respect to land development generally within provincially regulated portions of the Province, the Commission makes the following observations in *obiter*.

[38] The Commission wishes to first point out that it holds the view that the various witnesses, legal counsel for the Minister and the representatives of the Appellant and Developers who appeared before the Commission at the hearing were very honest and sincere. The representatives and legal counsel gave the Commission well expressed submissions, both oral and written, that assisted the Commission in dealing with what could have been a particularly complex appeal. The Commission's concerns are not with the front line employees who apply the ***Planning Act*** and Regulations with hard work and dedication. Rather, the Commission is concerned with the policies, directives and statutory tools, or lack thereof, given to those who must deal with applications on a day-to-day basis and appear on the Minister's behalf before the Commission.

[39] It is unfortunate that the Developers feel they did everything correctly and yet have been subject to an appeal and various delays in the development of the project. Most of those delays rest on the shoulders of the Minister because of a failure to either properly follow the ***Planning Act*** and Regulations at the upper level of the chain of authority, or keep the Regulations current to give the Minister's staff the legal authority to fulfill their mandate. The Appellant merely exercised a right given him under the appeal provisions of the ***Planning Act***. The relatively costly process of judicial review would be the alternative.

[40] The matters of detrimental impact and highway access were also raised by the Appellant at the hearing. It is not the Commission's intention to go deeply into these matters other than to observe that the hearing revealed a very limited consideration of such matters and the Commission recommends that the Minister ensure that more attention be paid to the requirements of the ***Planning Act*** for such matters.

[41] It is regrettable that the review and inspection process did not make it clearer that all aspects of Section 3 of the Regulations were considered. It is not sufficient to state that they were considered; there should be evidence that the consideration was truly explored. The Commission believes that sound planning would demand that an application effectively requesting a change of use from summer cottage to commercial use would require some consideration of protection of surrounding land uses. Section 3 is in the Regulations for a reason and detrimental impact is defined in the definition section. These provisions must be followed.

[42] There appears to be a focus on specific technical requirements, minimum distances, setbacks and the like set out in the Regulations with the view to 'make development happen' so long as these minimum requirements can be met. There seems to be less emphasis on evaluating public policy objectives set out in the Regulations and the ***Planning Act*** itself. To be sure, technical parameters and a checklist approach are very necessary and are essential when considering the environmental requirements of development, but equally important is sound planning, to ensure that development is good development, and the rights of developers are balanced with the rights of existing residents.

4. Disposition

[43] An Order allowing the appeal and quashing the Minister's decisions follows.

IN THE MATTER of an appeal by Gary McLure of two decisions of the Minister of Finance, Energy and Municipal Affairs, dated June 26, 2013 and July 3, 2013.

Order

WHEREAS the Appellant Gary McLure (the Appellant) on July 23, 2013 appealed a decision of the Respondent Minister of Finance, Energy and Municipal Affairs (the Minister) dated July 3, 2013 and his appeal also pertained to a decision of the Minister dated June 26, 2013;

AND WHEREAS the Commission issued Order LA13-10 which required the hearing to be reconvened;

AND WHEREAS the Commission heard the appeal at public hearings conducted in Charlottetown on October 9, 2013 and further heard the appeal on January 17, 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 allowed.**

2. **The Minister's decision of June 26, 2013 pertaining to this matter is hereby quashed.**

3. **The Minister's decision of July 3, 2013 pertaining to this matter is hereby quashed.**

DATED at Charlottetown, Prince Edward Island, this 17th day of March, 2014.

BY THE COMMISSION:

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

(Sgd.) *Ferne MacPhail*
Ferne MacPhail, Commissioner

(Sgd.) *Peter McCloskey*
Peter McCloskey, 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)