



## Prince Edward Island

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**VIA EMAIL – [mwalshdoucette@irac.pe.ca](mailto:mwalshdoucette@irac.pe.ca)**

Michelle Walsh-Doucette  
Commission Clerk  
Island Regulatory and Appeals Commission  
National Bank Tower, Suite 501  
134 Kent Street, Charlottetown PE C1A 7L1

**Re: Appeal Docket #LA26003**  
**Gary MacKinnon v. Minister of Land and Environment**  
**Our File: LS 28228**

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1. We represent the Minister of Land and Environment (formerly the Minister of Housing, Land and Communities) (the “Minister”) in relation to the above noted appeal filed by Gary MacKinnon (the “Appellant”) on March 4, 2026 (the “Appeal”). The Appeal arises from the Minister denying the Appellant’s development permit application to construct a new single unit dwelling on PID# 881458 located on Point Pleasant Road, Alma, Kings County, PEI (the “Subject Property”) (the “Application”). The Subject Property contains a wetland.
2. The Minister’s position is that the proposed location for the single unit dwelling is located within a wetland on the Subject Property. Given the location of the proposed dwelling being within a wetland, the Minister’s decision to deny the Application was in accordance with the *Planning Act*, RSPEI 1988, Cap P-8 (the “Act”) and the *Planning Act Subdivision and Development Regulations*, PEI Reg EC693/00 (as amended) (the “Regulations”).

### **Background and Decision**

3. On June 12, 2024, the Minister received the Application.
4. On completing a preliminary review of the Application, the Minister identified that the Subject Property has a wetland and, as a result, requested further information from the Environmental Land Management Section of the Department of Land and Environment (formerly the Department of Environment, Energy and Climate Action) (the “ELM Section”).

5. The Minister likewise requested further information from the Department of Transportation, Infrastructure and Energy (formerly the Department of Transportation and Infrastructure) and the Drinking Water and Wastewater Management Section of the Department of Land and Environment (formerly the Department of Environment, Energy and Climate Action). The comments provided by the Department of Transportation, Infrastructure and Energy and the Drinking Water and Wastewater Management Section were not factored into the Minister's decision to deny the Application.
6. On August 2, 2024, Dale Thompson, Environmental Assessment Officer, ELM Section ("Mr. Thompson"), confirmed that the entire Subject Property consists of wetland and is not suitable for development. This finding was made in consideration of the information provided, a desktop watercourse/wetland assessment (using provincial GIS mapping) and a site inspection by Environment Officer, David Dowling ("Mr. Dowling"). Mr. Dowling found that all soil samples taken on the Property were wet and all soil samples for marking the wetland edge contained gleying.
7. As no development is permitted in a watercourse, wetland or buffer zone without a Watercourse or Wetland Activity Permit or a Buffer Zone Activity Permit or a permit pertaining to a combination thereof, the ELM Section recommended that the Application be denied.
8. On February 23, 2026, the Minister denied the Application pursuant to subsections 1(f.3), 3(2)(a), 3(2)(d) and 5(a) of the Regulations (the "Decision"). As outlined in the Decision, the denial was issued as the area of the proposed development on the Subject Property is not suitable for development due to the presence of wetland, and therefore the Minister had no alternative but to deny the Application.

### **Appeal**

9. The Appeal is pursuant to section 28 of the Act.
10. The Appellant grounds for the Appeal are:

*Purchased land on Point Pleasant Road – Property ID: 881458 with the understanding that building permit was issued by previous owner to build warehouse. So had no issue that my developing permit would be denied.*

11. The Appellant seeks the following relief from the Commission:

*The culvert for my driveway is running across on a 45 degree angle. The Government has the culvert from the right side of the Point Pleasant Road hooking into a culvert crossing to the left side of the road. It diverts water to my driveway culvert and there is no culvert running down the ditch past my driveway to the bridge. Instead all the water from the ditching from both sides of the roads runs across my land resulting in wet areas.*

12. The Minister will provide the Record of the Decision to the Appellant and file same with the Commission as soon as possible.
13. The Minister's response to the Appellant's appeal is outlined below. The Minister requests that the Appellant particularize the grounds of appeal and relief sought. Should the Appellant expand on, provide further explanation for, and/or otherwise provide submissions on the grounds of appeal, the Minister reserves the right to provide a further reply thereto.

## **Legislation**

14. Subsection 6(c) of the Act provides that the Minister shall generally administer and enforce the Act and the Regulations.
15. The Regulations apply to all areas of the province, except those municipalities with official plans and bylaws. The Subject Property is located in an area where land use and development are not regulated by a local official plan or zoning by-law. Therefore, the land use and development of the Subject Property is regulated by the Act and the Regulations.
16. Subsections 1(f.3), 1(g), 1(w.2) and 1(x) of the Regulations define detrimental impact, development, watercourse and wetland, respectively, as follows:

### *1. Definitions*

#### *In these regulations*

...

*(f.3) "detrimental impact" means any loss or harm suffered in person or property in matters related to public health, public safety, **protection of the natural environment and surrounding land uses**, but does not include potential effects of new subdivisions, buildings or developments with regard to*

- (i) real property value;*
- (ii) competition with existing businesses;*
- (iii) viewscales; or*
- (iv) development approved pursuant to subsection 9(1) of the Environmental Protection Act;*

...

*(g) "development" means*

- (i) site alteration, including but not limited to*
  - (A) altering the grade of the land,*
  - (B) removing vegetation from the land,*
  - (C) excavating the land,*
  - (D) depositing or stockpiling soil or other material on the land, and*

- (E) *establishing a parking lot,*
- (ii) *locating, placing, erecting, constructing, altering, repairing, removing, relocating, replacing, adding to or demolishing structures or buildings in, under, on or over the land,***
- (iii) placing temporary or permanent mobile uses or structures in, under, on or over the land, or*
- (iv) changing the use or intensity of use of a parcel of land or the use, intensity of use or size of a structure or building;*

...

*(w.2) “watercourse” means a watercourse as defined in the Environmental Protection Act Watercourse and Wetland Protection Regulations;*

*(x) “wetland” means a wetland as defined in the Environmental Protection Act Watercourse and Wetland Protection Regulations;*

...

[emphasis added]

17. Subsection 3(2) of the *Regulations* provides:

**3(2) No development permit shall be issued where a proposed building, structure, or its alteration, repair, location, or use or change of use would**

**(a) not conform to these regulations or any other regulations made pursuant to the Act;**

*(b) precipitate premature development or unnecessary public expenditure;*

*(c) in the opinion of the Minister, place pressure on a municipality or the province to provide services;*

**(d) have a detrimental impact; or**

*(e) result in a fire hazard to the occupants or to neighbouring buildings or structures.*

[emphasis added]

18. In other words, the Minister **must deny** an application that contravenes any one or more of these general requirements.

19. The Application contravenes sections 5(a) of the *Regulations*, which provides:

**5. Other approvals required**

*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;*

...

20. The *Environmental Protection Act Watercourse and Wetland Protection Regulations*, PEI Reg EC720/08, also apply to the Application. Subsections 1(1)(ee), 1(1)(ff), 1(1)(gg), 1(1)(hh) and section 2, in part, of the *Watercourse and Wetland Protection Regulations*, *supra*, provide as follows:

*1(1)(ee) “watercourse” means an area which has a sediment bed and may or may not contain water, and without limiting the generality of the foregoing, includes the full length and width of the sediment bed, bank and shore of any stream, spring, creek, brook, river, lake, pond, bay, estuary or coastal body, any water therein, and any part thereof, up to and including the watercourse boundary;*

...

*(ff) “watercourse boundary” means*

*(i) in a non-tidal watercourse, the edge of the sediment bed, and*

*(ii) in a tidal watercourse, the top of the bank of the watercourse, and where there is no discernible bank, means the mean high water mark of the watercourse;*

...

*(gg) “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;*

...

*(hh) “wetland boundary” means where the vegetation in a wetland changes from aquatic or water-tolerant vegetation to terrestrial vegetation or water-intolerant vegetation;*

...

## *Part II – WATERCOURSES AND WETLANDS*

### *2. Prohibition*

***(1) No person shall, without a license or a Watercourse or Wetland Activity Permit, and other than in accordance with the terms and conditions thereof, alter a watercourse or a wetland, or any part thereof, or water flow therein, in any manner, or engage in any of the following activities in or on a watercourse or a wetland:***

*(a) drain, pump, dredge, excavate, or remove soil, water, mud, sand, gravel, stones, rubbish, rocks, aggregate or material or objects of any kind;*

*(b) dump or infill, or deposit soil, water, mud, sand, gravel, stones, rubbish, litter, rocks, aggregate or material or objects of any kind;*

***(c) construct or place, repair or replace, demolish or remove, buildings or structures or obstructions of any kind, including but not limited to bridges, culverts, breakwaters, dams, wharves, docks, slipways, decks, or flood or erosion protection works;***

...

*(f) disturb, remove, alter, disrupt or destroy the ground in any manner;*

*(g) disturb, remove, alter, disrupt or destroy vegetation in any manner, including but not*

*limited to the cutting of live trees or live shrubs;*

*(h) carry out any type of watercourse or wetland enhancement activity, including but not limited to debris removal, habitat development, or placement of structures.*

[emphasis added]

## **Test**

21. In Order LA17-06 ("*Stringer*")<sup>1</sup>, the Commission established the applicable test for Ministerial decisions made under the Act and Regulation. This test was further clarified in Order LA25-02 ("*Aftab*") being described as a two-part guideline in exercising appellate authority:

- i. whether the Minister followed the proper procedure as required by the Planning Act, the Regulations and the law in general, including the duty of procedural fairness, in making the decision; and*
- ii. whether the Minister's decision was made in accordance with the Planning Act, the Regulations and was based on sound planning principles in the field of land use planning.*<sup>2</sup>

## **Test Application**

22. In this matter, the Minister followed the proper process as set out by law, applied sound planning principles, and, therefore, the Decision requires deference.

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<sup>1</sup> *Stringer (Re), Donna Stringer v Minister of Communities, Land and Environment*, Order LA17-06 ("*Stringer*") at para 52.

<sup>2</sup> *Parry Aftab and Allan McCullough v Minister of Housing, Land and Communities*, Order LA25-02 at para 27.

*Step 1: Processing of the Application*

23. The Minister met the first part of the test. The Decision and supporting evidence demonstrate that the Minister followed the proper process and procedure, and the applicable legislation. The Decision was not overly broad or arbitrary and was grounded in the principles of natural justice.
24. Subsections 3(2)(a) and 3(2)(d) of the Regulations prohibits the issuance of a development permit where the proposed building, structure, or its alteration, repair, location, or use or change of use would not conform to the Regulations or would have a detrimental impact.
25. Further, subsection 5(a) of the Regulations prohibits giving an approval until permits or approvals have been obtained as required in accordance with the *Environmental Protection Act*, RSPEI 1988, c E-9.
26. Section 2 of the *Watercourse and Wetland Protection Regulations, supra*, prohibits, unless with a license or a Watercourse or Wetland Activity Permit, altering or disturbing the ground or vegetation, or constructing or placing, repairing or replacing, demolishing or removing buildings or structures or obstructions of any kind in or on a watercourse or a wetland. The *Watercourse and Wetland Protection Regulations, supra*, make no distinction between wetlands that are manmade and those that occur naturally.
27. In this matter, Senior Development Officer, Dean Lewis (“Mr. Lewis”), sent the details of the Application to the ELM Section for confirmation that the Subject Property could accommodate development given the presence of wetland on the Subject Property. The Subject Property was confirmed to consist entirely of wetland and, thus, no space is available outside of the wetland to accommodate development.
28. The ELM Section confirmed that the Application should be denied.
29. It was reasonable for Mr. Lewis to rely on the ELM Section’s determination that the Subject Property did not appear to have sufficient space outside of the wetland for the proposed dwelling and corresponding recommendation to deny the Application.
30. In a letter to the Appellant’s lawyer, Kenneth Lecky, dated February 26, 2025, the Appellant was encouraged to contact the then Department of Environment, Energy and Climate Change to discuss and obtain more information as to if and where development may be suitable on the Subject Property and/or apply for Watercourse or Wetland Activity Permit or a Buffer Zone Activity Permit, as applicable.
31. The Minister understands that the Appellant, to date, has not canvassed potentially available options with the ELM Section, nor has obtained a Watercourse or Wetland Activity Permit or a Buffer Zone Activity Permit, or a permit pertaining to a combination

thereof, pursuant to Part VI of the *Watercourse and Wetland Protection Regulations*, *supra*.

32. In reviewing the Subject Application, Mr. Lewis also determined the proposed development would have a detrimental impact as defined in the Regulations. Particularly, the proposed dwelling would cause loss or harm to the natural environment.

#### *Step 2: Sound Planning Principles*

33. The Minister also met the second part of the test as the Decision is supported by objective and reliable evidence, and is based on the Act, the Regulations, and sound planning principles. The Commission states in *Stringer* that “*sound planning principles require regulatory compliance*”.<sup>3</sup>
34. Given the Application’s lack of regulatory compliance, the Decision satisfies both steps in the test.

#### **Response to the Appeal**

35. In direct response to the Appellant’s Appeal, the Minister provides the following historical context of their involvement in relation to the Subject Property:
  - a. On July 23, 2008, Michael Hopkins and Rhonda Hopkins made an Application for Permission to Subdivide Land/Change of Use (the “2008 Subdivision Application”). The 2008 Subdivision Application sought to append a part of the neighboring parcel, PID# 289165, to the Subject Property to give the Subject Property the required road frontage to change the Subject Property’s use from Summer Cottage to Single Family Dwelling and to construct a driveway to access the Subject Property.
  - b. On August 11, 2008, Environmental Assessment Officer, Jay Carr (“Mr. Carr”), wrote in an Interoffice Memorandum that on review of the application for construction of a driveway:
    - i. The properties contain forested land adjacent to a watercourse and wetland with a slope of under 9 percent, and as such, any forested land within 20 meters of the watercourse/wetland is classified as a forested riparian zone; and
    - ii. Prior to constructing a crossing over the watercourse on PID# 289165, the developer must apply for and obtain a watercourse alteration permit from the applicable Department.

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<sup>3</sup> *Stringer* at para 64.

- c. On August 18, 2008, Mr. Hopkins advised Mr. Carr that the driveway would be constructed to the east of the watercourse on an area previously cleared. As a result, Mr. Carr determined no permits were required from the then Department of Environment, Energy and Forestry. Mr. Carr noted, however, that no further clearing adjacent to the watercourse would be allowed on the parcel.
- d. On October 20, 2008, the 2008 Subdivision Application was approved and the Subject Property was approved as Single Family Dwelling use only.
- e. On July 22, 2022, Development Permit No. M-2022-0182 was granted to construct a (12'x20') noncommercial storage structure on the Subject Property.
- f. No further development permits or building permits have been issued for the Subject Property.

**Conclusion**

- 36. For the reasons outlined above, the Minister submits that this appeal must be dismissed.
- 37. Trusting the foregoing is satisfactory; however, if you have questions about these submissions, please do not hesitate to contact us.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

Yours truly,



Christiana Tweedy  
Lawyer for the Minister of Land and Environment