LA23002 – Betty Ann Bryanton v. Minister of Agriculture and Land

Appellant Submissions

October 15, 2024

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Introduction

1. I am not a lawyer; nor do I work in the Provincial Planning department, so my understanding and interpretation of process, legal terms, etc., is that of a lay person.

Overview

2. On June 15, 2022, the Appellant applied for Development Permits for three accessory buildings, designated A2, A3 and A4 (the "Applications").[1]

3. This Appeal concerns a decision issued on December 13, 2022 (the "Decision") by the Provincial Planning area of the Land Division of the Minister of Agriculture and Land (the "Minister" or the "Department") denying these three Permit Applications.

Past Applications and Approvals

4. The Permit Applications for each of A2, A3, and A4 were previously approved by the Minister, then subject to appeals, and then denied.

Permit Application #	Permit Application Filed Date	Minister Decision	Minister Decision Date	Appealed	Appealed Date	Appeal Decision
Accessory Building A2						
M-2015-0088	2015-07-29	Approved	2015-08-12	Stringers LA15010	2015-08-19	Order LA17-06. Quashed 2017-08-10
M-2017-0198	2017-08-26	*Not Processed*	2017-10-24	Bryanton LA17008	2017-11-11	Withdrawn 2023-03-01
M-2022-0160	2022-06-15	Denied	2022-12-13	Bryanton LA23002	2023-01-03	*Current*
Accessory Building A3						
M-2015-0088	2015-07-29	Approved	2015-08-12	Stringers LA15010	2015-08-19	Order LA17-06. Quashed 2017-08-10
M-2017-0199	2017-08-26	*Not Processed*	2017-10-24	Bryanton LA17008	2017-11-11	Withdrawn 2023-03-01
M-2022-0161	2022-06-15	Denied	2022-12-13	Bryanton LA23002	2023-01-03	*Current*
Accessory Building A4 (formerly N1)						
M-2017-0201	2017-08-28	Approved	2018-07-25	Stringers LA18014	2018-08-10	Withdrawn 2024-04-22
M-2022-0162	2022-06-15	Denied	2022-12-13	Bryanton LA23002	2023-01-03	*Current*

[1] Minister's Record, Tab C

Background

5. In July 2004, Betty Ann Bryanton (the "Appellant") and her husband bought Lot 12, Sub. Plan # 15756, at 158 Paradise Drive, Little Pond, Prince Edward Island, identified as PID # 931741 (the "Subject Property"). No land zoning was in effect. Subdivision regulations indicate 'summer cottage use only.' There are no restrictive covenants relevant to the terms of the applications currently under review. The lot is classified as a Category 1.

6. On June 15, 2022, on express direction of the Minister, the Appellant re-applied for Development Permit Applications to the Minister of Agriculture and Land.[2] Three of these applications were for three accessory buildings (A2, A3, and A4, the 'Sheds') on the Subject Property.

7. Two of the accessory buildings (A2 & A3), each with a size of 8' x 12', were on the property since 2015 and were approved by the Minister on August 12, 2015[3]. They were both subject to appeals. The Minister identifies A2 & A3 as "shelters/bunkees." Originally, the Appellant intended / hoped to use them occasionally as bunkies. But subject to appeals, neither have been used in this manner since 2015.

8. The third accessory building (A4), with a size of 7' x 7', is secured by in-ground posts and has been on the property since 2018. On express guidance from the Minister, it was initiated with the intention to house a composting toilet (with holding tank). The Minister granted approval for A4 on July 25, 2018[4]. Shed A4 was subject to an appeal that became frustrated. On express redirection from the Minister, in the Spring of 2024, a flush toilet was installed in the cottage. A4 has been, and is still, used additionally for extra storage.

9. On August 16, 2022, a site visit was conducted by Alex O'Hara and Eleanor Mohammed ('the Planners') employed at that time by the Provincial Planning area.

10. On July 20, 2022, the Appellant followed up with Eugene Lloyd, Manager (Acting) of the Provincial Planning Branch of the Department of Agriculture and Land, attempting to confirm that there were no issues with the permit applications based on past conversations and correspondence.[5]

11. On December 13, 2022, the Minister provided the Decision, denying the three accessory buildings indicated.

12. On January 4, 2023, the Appellant filed a Notice of Appeal, indicating that the Minister's Decision was not supported by the Planning Act and the Regulations, was arbitrary and biased, and was not based on factual evidence.

Decision and Reasons

13. Decision

    The Minister of Agriculture and Land is denying the applications for the three accessory structures (A2, A3 & A4 on the attached sketch) in Little Pond PEI as per the Planning Act, sections 2.1.(1)(h) & (l) and the Planning Act Subdivision and Development Regulations subsection 3.(2)(a), (d) & (e) and section 34.

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[2] Minister's Record, Tab C

[3] Appellant Exhibit 1.1

[4] Appellant Exhibit 1.2

[5] Appellant Exhibit 5.1

Reasons

The provincial interests, 2.1.(1) of the Planning Act, include 2 key sections relevant to this:

h) The effect of the proposed planning development on, and measures for the protection of public health and safety

l) The orderly and sustainable development of safe and healthy communities

- The two additional sheds (A2 & A3) are being used as apparent shelters/bunkees, with no toilets or running water. This would not meet typical health standards. It is also clear that they are not of a legal use that is incidental to the single dwelling unit.
- The very nature of the sheds (A2 & A3) being used as shelters/bunkees, and not for storage, indicates that only one shed is actually needed for storage.
- An average residential yard will have one garage and/or one shed.
- The placement of the structures (A2 & A3) on the property is not orderly for the use (as storage). Sheds generally are placed immediately beside or behind a dwelling unit.
- The use of illegal shelters/bunkees (A2 & A3) is unsafe and unhealthy.
- With the toilet being moved inside the dwelling unit, the current structure (A4) used for the former composting toilet should be removed. There is no rationale for this structure to remain.

Due to the risk to public health and safety of the apparent shelters/bunkees (A2 & A3), the placement of these structures is in violation of subsection 3.(2)(a), (d) and (e) of the Planning Act Subdivision and Development Regulations. As well, as these types of shelters/bunkees are not clearly defined in the Planning Act Subdivision and Development Regulations and could be construed as shelters for human occupancy, they are in violation of section 34 of the Planning Act Subdivision and Development Regulations as the use of the shelters/bunkees would not conform with the approved use of the lot for summer cottage use - 1.(v.2) "summer cottage" means a single-unit dwelling that is intended to be occupied primarily during the summer months.

Planning Act

2.1.(1) The Minister in carrying out the Minister's responsibilities in relation to planning matters and the effects of proposed development under this Act shall have regard but not be limited to matters of provincial interest, such as

(h) the effect of proposed planning development on, and measures for the protection of, public health and safety;

(l) the orderly and sustainable development of safe and healthy communities;

***Planning Act* Subdivision and Development Regulations**

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;

(d) have a detrimental impact; or

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

1.(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) viewscapes; or
(iv) development approved pursuant to subsection 9(1) of the Environmental Protection Act;

34. No development permit shall be issued where the proposed use of the building or structure is contrary to the use specified on an approved subdivision plan. (EC693/00)

Issues

14. The Appellant submits that the Decision raises the following issues for review by the Commission.

(a) Issue 1: Natural Justice and Fairness

Did the Minister's Decision follow proper process as outlined in the first part of the *Stringer* test?

(b) Issue 2: Sound Planning

Is the Minters' Decision consistent with sound planning principles as outlined in the second part of the *Stringer* test?

(c) Issue 3: A2 & A3 Substance

Did the Minister's Decision employ principled, objective, informed analysis and use scientific evidence? Did it consider relevant factors?

(d) Issue 4: A4 Substance

Did the Minister's Decision employ principled, objective, informed analysis and use scientific evidence? Did it consider relevant factors?

Law

15. The Commission has previously stated in Order LA17-06 that the following two-part test (the *Stringer* test") should be applied to Ministerial decisions made under the Planning Act and its Regulations:[6]

i. Whether the land use planning authority, in this case the Minister, followed the proper process and procedure as required in the Regulations, in the Planning Act and in the law in general, including the principles of natural justice and fairness, in making a decision on an application for a development permit, including a change of use permit; and

ii. Whether the Minister's decisions with respect to the applications for development and the change of use have merit based on sound planning principles within the field of land use planning and as identified in the objects of the Planning Act.

Arguments

16. Before speaking to each specific denial statement in the Decision, the Appellant will first speak to the overarching negation of natural justice, in general, and its principles.

[6] Order LA17-06, para 52

Issue: Natural Justice (1st part of test)

17. It is essential that decision makers, such as the Minister's delegates, comply with the principles of natural justice, i.e., the right to a fair procedure that is free from bias. The principles of natural justice exist as a safeguard for individuals. They stipulate that there is a duty to act in a procedurally fair manner.

18. It is essential that administrative decision makers, such as the Minister's delegates, follow processes set out in the statutes and regulations they interpret. This is a basic principle of procedural fairness. Process fosters predictability and, in the land planning context, provides developers with reasonable expectations that inform investment and development decisions. Process also limits the possibility of arbitrary or over-broad exercises of administrative discretion. Consistent adherence to statutory process is an important element of the rule of law and natural justice.

19. The Appellant submits that there was substantive failure by the Minister to comply with the Principles of Natural Justice, which has adversely affected the Decision. The Minister based the Decision on errors of fact, or by applying the wrong test, and improperly applied statutory law.

Process, Procedure, and Fairness

Lack of Transparency

20. The Province's website advises that an applicant can contact and meet with a Permit Coordinator.[7] The Appellant had the opportunity to speak to the Minister's delegates throughout the history of this file, as well as during the processing of the Applications.[8] The Appellant spoke with Eugene Lloyd many times both by phone and email.

21. The Appellant was very clear in expressing the desire to resolve any issues in advance, in order to move forward and the file resolved.[9]

22. The Appellant asked Eugene if he saw any potential issues that needed to be resolved in order to approve the applications, Eugene had previously advised by phone that he didn't see any issues; everything met the regulations. Thus, the Appellant had a legitimate expectation of the Decision.

23. The Decision was provided just prior to Christmas (December 13, 2022) which put the Appellant at a disadvantage, not able to have sufficient time or receive counsel due to the holidays. The Appellant submits this was administratively unfair.

24. The Appellant was shocked upon receiving the Decision since it was the opposite of what was expected, based on previous conversations with Eugene.

25. These passages below, though with respect to construction law, quoted from Kuhn Legal Counsel in British Columbia, have some relevancy to this matter.[10]

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[7] This is indicated in the 'How do I apply for a development permit from the Province?' section in https://www.princeedwardisland.ca/en/service/apply-for-a-development-permit

[8] Appellant Exhibit 5.2

[9] Appellant Exhibit 5.1

[10] https://kuhnco.net/construction-law/revoking-building-permits-and-being-reasonable/

Developers and businesses alike should be aware that municipal decisions may be unreasonable if an application is compliant with the bylaws and is subsequently revoked or rejected.

The court noted that a building inspector has very little discretion to deny a building permit application that complies with the relevant bylaws. A reasonable decision is one that demonstrates justification, transparency and intelligibility and falls within the range of possible and acceptable outcomes.

26. The Appellant submits the Decision was not reasonable.

27. The delivery of the Decision of the Minister on December 13, 2022 put the Appellant in an unfair position to not only ruin her holiday, but in addition to holiday plans, to file an appeal within the time period, and without the opportunity to seek guidance (since staff in any office were already on holiday).

28. The Appellant submits that this demonstrates the whole process of the Minister's duty was unreasonable and unfair.

Assumptions Used

29. The Minister's Decision indicates that sheds A2 and A3 are being used as "apparent shelters/ bunkees." (The "apparent" aspect will be discussed in the A2 and A3 Substance section.)

30. The Decision made a basis on something extraneous to the application. While the Minister is allowed to have an awareness of context, it is a fatal error to leap to a conclusion without evidence, rationale / argument to support it.

31. The Appellant was not provided a procedural avenue to provide any additional information to confirm or deny this assertion, either in advance of the Decision or after.

32. The process allowed the Minister's delegates to deny the applications based on assumptions that were not validated. The Minister's delegates applied a "could be" test, rather than actually assessing the adherence to the technical requirements of the law. The Minister denied the Applications without statutory authority to do so.

33. The Appellant was significantly prejudiced by this process and submits that this is a breach of procedural fairness.

34. The Appellant submits the Minister has a duty of care to follow the rules and make decisions in a prescribed way. The Minister has an obligation to validate assumptions and learn the truth. The Minister is obliged to make decisions based on fact.

35. When the Minister makes decisions not based on 100% fact, not only is he burdening administrative processes, causing delays, wasting resources, weakening the public trust and the Minister's reputation, but such decisions are significantly prejudicial to the applicant.

36. This places the applicant in a situation that breaches administrative fairness, since then, the applicant must engage in the appeal process which costs time, energy, money that should have been unnecessary, if only the Minister validated assumptions and based all decisions on fact. This is not appropriate or fair. Further, it prejudices people who may have a good case but are not lawyers and/or do not have the financial means.

Denial of A4 - Process Error and Reasonable Expectation

37. The Appellant already had an approval for A4. The Minister expressly asked the Appellant to re-apply. The Minister, by providing this direction and taking the permit application for the same structure, committed an error of process.

38. Further, the Minister reversed his previous decision in relation to A4. As per the first point in the Appellant's Schedule A of the Notice of Appeal, there is a long history of the Minister not adhering to the principles of administrative or procedural fairness.

> "Officials have acted unprofessionally, demonstrated in the many years (since 2015) of reversing their decisions, contradicting their verbal assurances made to me which cost me substantial energy and financial resources to the point where they now seemed to be guided by outside influences, not the facts at hand."

39. Constantly reversing decisions and providing new ones is unfair, a failure of process, possibly even an abuse of authority, particularly when not supported by statute. This restricts the Appellant's use of the free title of the Subject Property and undermines the Appellant in making holistic plans for the Subject Property. This is against the principle of reasonable expectation.

Reasonable Period of Time

40. The Decision of the Minister was not made within a reasonable period of time. The permit applications were filed on June 15, 2022 and the Decision was rendered on December 13, 2022. This is just shy of six months.

41. The Appellant works in a government organization and it is usual for policy and procedures to outline each process and its details. Where is the procedure or service level agreement to define what is a "reasonable period of time?"

42. On the Province's website[11], it states:

> "A decision as to whether a permit is denied or approved may be issued within 30 days for some routine residential developments. More complex applications require more time to process and collaboration with various other departments and agencies."

43. For comparison, the City of Halifax[12] reports an average of 14 days to issue a Residential Building Permit over the period of July 1/24 - Sept 30/24. The province of Ontario[13], even for building permits (which are more complicated than development permits), employs a 10 day timeframe for a house, but for a more complex building permit such as for a hospital, the timeframe is 30 days.

> "Applications for a simple alteration or addition can be processed fairly quickly, but more complex proposals may take longer. The Building Code requires that a municipality review a complete permit application within a certain timeframe where the application meets the criteria set out in the Code. For example, the timeframe on a permit application for a house is 10 days. For a more complex building, such as a hospital, the timeframe is 30 days. Within this timeframe, a municipality must either issue the permit, or refuse it with full reasons for denial."

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[11] In the 'What happens after I apply for a development permit online?' section of https://www.princeedwardisland.ca/en/service/apply-for-a-development-permit

[12] https://www.halifax.ca/home-property/building-development-permits/permit-volume-processing-times

[13] As noted in the 'How your application is reviewed' section of https://www.ontario.ca/document/citizens-guide-land-use-planning/building-permits#section-4

44. In March 2024, the Minister introduced Instant Permits.[14] One must wonder why the Minister would introduce Instant Permits? It is suspected that there was pressure to reduce the administrative burden, the time required to review permit applications, and the lengthy delays to deliver decisions.

45. Additionally, the history of the Subject Property spans nine years. This is an unreasonable delay of resolution and justice, which has prejudiced the Appellant and breaches procedural fairness.

Procedural Inconsistencies

46. Where is the process defined for reviewing permit applications and the steps required? Where is the process to ensure decisions are made in a consistent manner and with objectivity?

47. In 2014, the Province of PEI released the Report on the Task Force on Land Use Policy (the "Task Force Report"). Though this Task Force Report is not represented in the statutes and not used for review of the Applications, it provides some overarching guidance that is relevant.

48. For example, therein, it states that, "**Decisions must be applied with consistency** and **common sense**."[15]

49. As noted in the Appellant's point 5 in her Notice of Appeal Schedule A[16], it states that the Minister is not determining decisions with consistency:

> 5. Officials are applying judgments inconsistently, thereby unfairly to me. The PEI Planning Decisions website proves this, for we can see other single PIDs that have had multiple development permits approved, and in some cases, those multiple development permits (for one PID) were for multiple accessory buildings / storage. Also, we see that permits were approved for a 'she shed' and a shipping container.

50. Refer to this analysis in the Exhibits.[17]

51. In the Minister's Decision, the following reason is provided for denial:

> "As well, types of shelters/bunkees are **not clearly defined** in the *Planning Act* Subdivision and Development Regulations and could be construed as shelters for human occupancy, they **are in violation of**…"

52. Based on the Minister's logic, anything that is "not clearly defined" must be "in violation." As stated above, the Appellant has seen permit application approvals for items such as "she-shed" and "container." — Neither of those terms are defined in the Regs, but yet, those permit applications were not deemed to be "in violation" of the Regs; they were approved.

53. The Appellant submits that this demonstrates that the Minister is taking a very narrow and biased view of the Subject Property.

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[14] https://www.princeedwardisland.ca/en/news/province-introduces-instant-permits-for-some-property-developments

[15] [15] https://www.princeedwardisland.ca/sites/default/files/publications/report_on_land_use_policy.pdf page 4

[16] Appellant Exhibit 8.2

[17] Appellant Exhibit 2.4 (and also 2.1, 2.2, 2.3)

54. Fairness in all aspects (natural justice) demands that procedures and rules must be fair, clear and transparent in the way they are organized and in their application, which must also be consistent and equitably applied to all applicants.

Improper Handling of Neighbour Complaints

55. The Appellant has long suspected that the neighbours simply do not like the aesthetic and minimalist nature of the Subject Property, and have been using his profession as a lawyer to bully and harass the Appellant litigiously and vexatiously through appeal after appeal when other, more reasonable and lower-level conflict resolution processes could have been employed, particularly considering the frivolous nature of the verbal complaint that precipitated this long history (a complaint that Shed A3 was blocking their view).

56. Does the Minister have a procedure in place to answer to neighbour complaints in a way that is fair but firm (i.e., not providing extra detail that could be used to undermine processes)? The Minister has an obligation to stand up to complaining neighbours, to honour his own approvals and agreements, and to be concise in the answer (i.e., answering without providing extra detail to which that person is not entitled).

57. The Appellant submits that, if true, the improper handling of the neighbour complaints would have led to an unfair handling of the permit applications, which is against procedural fairness.

Arbitrariness, Influence and Bias

58. The Appellant submits that the Applications were not provided a fair and unbiased assessment and were denied for arbitrary reasons that were not supported by the statutes.

Arbitrariness

59. The use of arbitrary reasoning will be demonstrated later in Issues 3 and 4 (issues with substance for the processing of A2 and A3, and with A4, respectively).

Individual Bias

60. Independence is the means to achieve impartiality.

> "The Supreme Court of Canada defined the test for determining whether there is a reasonable apprehension of bias as whether a reasonable person properly informed would apprehend that there was conscious or unconscious bias on the part of the judge or decision-makers."[18]

61. The test for adequate independence is whether a reasonable, well-informed person having thought the matter through would conclude that an administrative decision maker is sufficiently free of factors that could interfere with the ability to make impartial judgements (The " Reasonable Apprehension of Bias Test")

62. The Appellant is unaware if there is individual bias at the institutional level, i.e., if there is a personal relationship with the neighbours who started the dispute. But, the Appellant has the perception of the existence of individual bias.

Past Knowledge

63. The Minister's officials have prior knowledge about the matter in dispute and, thus, may have been focusing on the past history, rather than focusing on the current details. This is demonstrated in the Decision where it refers many times to old information of the Sheds A2 & A3 being used as bunkies.

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[18] Wewaykum Indian Band v Canada, [2003] 2 S.C.R. 259, at para. 66

64. Additionally, the Minister's denial reasons are extremely similar to the verbiage in paras 47-48[19] of the Order LA17-06. The 2022 Permit Applications represent a new process. This new process should be reviewed objectively with the information of the day. Instead, it appears the Minister chose to simply repackage the Commission's previous findings instead of doing their due diligence and proper duty.

65. The Appellant submits that this supports the grounds for reasonable apprehension of bias.

Lack of Impartiality

66. An impartial decision maker is one who is able to make judgements with an "open mind" without their mind being "already made up". The Minister is obligated to not grant undue preferential treatment or be driven by preconceived notions.[20]

67. In the Minister's Record of Decision at Tab F / Tab 3 there is an email from Eugene Lloyd to Eleanor Mohammed and Alex O'Hara (the Planners). It was sent on October 24, 2022 at 10:04 AM. In response to Mr O'Hara's site visit report, Mr. Lloyd states:

> "Can we discuss this a bit more? I'd like something more formal on the reasoning we discussed to allow the small cottage and one accessory structure and to deny the other 3 proposed accessory structures….
>
> …I will need something from a planner stating why such a structure is permitted and whether there are any detrimental impacts to surrounding land uses…
>
> As well, I also require some rationale regarding denial reasons for the other 3 structures either from the Act itself and/or the Regs…"

68. This demonstrates that Mr. Lloyd had already made up his mind. He made the decision first, then looked for rationale. He had an attitudinal predisposition toward an outcome.

69. The Appellant submits that Mr. Lloyd exceeded his authority in predetermining the outcome of the application, even before going to Planners[21].

70. This is clearly arbitrary and prejudicial to a fair determining on the application. It is incumbent upon the Minister to ensure that all applications are reviewed without bias or undue influence.

<u>Influenced</u>

71. The Decision appears to have been influenced by the neighbours.

72. This is evidenced in the Minister's Record of Decision, where Alex O'Hara sent an email to Eugene Lloyd, cc. to Eleanor Mohammed, on August 30, 2022. Of interest, the title of the email is:

> "M-2022-0158 - Bryenton (sic) **Stringer** Recommendation"[22] (emphasis added)

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[19] Appellant Exhibit 8.3

[20] https://legalaid.bc.ca/sites/default/files/2021-01/2020-11-10%20Procedural%20Fairness%20in%20Administrative%20Hearings.pdf, slide 21

[21] Minister's Record, Tab F / Tab 3

[22] Minister's Record, Tab F / Tab 3

73. The 2022 Permit Applications were a process de novo. The 2022 Permit Applications did not involve the Stringer neighbours. With a title like this, one might reasonably conclude that there was possible influence from the Stringer neighbours impacting the new 2022 Permit Applications.

74. This is further evidenced by referring to a letter from John Stringer on October 29, 2018. The letter was sent to IRAC with Eugene Lloyd copied.[23] In summary, he demanded the following (paraphrased):

    - The permit for A4 should be quashed because no longer needed
    - Relocation of Sheds A2 & A3 to be "in close proximity to… the cottage" so they can be "legitimately used"
    - Signed to agree that won't be used for sleeping

75. If a comparison is done of the above Stringer points to the Minister's denial of the 2022 Permit Applications and accompanying evidence, a clear overlap can be seen.

    - Stringer: The permit for A4 should be quashed because no longer needed
        - The Minister's Decision uses this.
        - Eleanor Mohammad stated this (Minister's Record of Decision ("Minister's Record), Tab F/Tab 3).
    - Stringer: Relocation of Sheds A2 & A3 to be "in close proximity to… the cottage" so they can be "legitimately used"
        - The Minister's Decision uses this.
        - Eleanor Mohammad suggested (Minister's Record, Tab F/Tab 3):
            - relocation of A2 & A3
            - placement wasn't orderly for use as storage
        - Alex O'Hara stated that A2 & A3 should be relocated (Minister's Record, Tab F/Tab 2).
    - Stringer: Signed to agree that won't be used for sleeping
        - Alex O'Hara suggested to sign an agreement for use (Minister's Record, Tab F/Tab 2).
        - Megan Williams suggested a condition that not intended for sleeping (Minister's Expert Opinion Report)

76. Would a reasonable person conclude that this is just coincidental? Or would a reasonable person conclude that this is just too coincidental to be considered a brand new independent assessment; that, instead, it appears the Minister was influenced by the neighbours, which biased the Minister's Decision for the 2022 Permit Applications?

77. The Appellant submits it is the latter. The Appellant submits that the Minister and its delegates were not impartial and, thus, does not pass the Reasonable Apprehension of Bias test.

Natural Justice Conclusion

78. The Appellant submits that the Minister did not follow the proper process in respect of the application, and, as such, is not owed deference.

79. The process did not adhere to the principles of administrative fairness, procedural fairness, or natural justice. The process of denying the applications on assumptions may also have brought the Minister into the territory of abuse of process.

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[23] Appellant Exhibit 8.1

80. The Appellant submits that the procedure she was subject to does not adhere to the appropriate processes provided for under the *Planning Act Subdivision and Development Regulations* (the, "Regulations"), and that the Minister was ultra vires their statutory authority.

81. The Appellant submits that this provides an informative lens on the type of over-broad, uninformed, arbitrary and biased decision-making employed by the Minister in order to reject the Appellant's application in the current case.

82. Based on all of the above, the Appellant submits that the Decision does not meet the first of the two-part test when the Minister made the Decision.

83. The Appellant submits that the Minister's decision must be quashed on the question of process alone.

Issue: Sound planning (2nd part of test)

84. The Appellant will demonstrate that the Minister's decision is not substantively sound or based on sound planning principles. The Decision was based on over-broad, generalized provisions of the Act and Regs, which were chosen in order to reach the finding that the Applications be denied.

85. The following should be noted:

- The Minister's Decision did not indicate "sound planning principles" in the denial reasons.
- The Minister's own planner, Megan Williams, in her Expert Opinion Report, indicated:

  > "(3) In your opinion, would the proposed development be in accordance with sound planning principles in the field of land use planning? … Irrelevant."

- The Appellant relies on the Expert Opinion provided by Licensed Professional Planner, Jenifer Tsang, who submitted that sound planning principles were not applied in the review of these Applications.

86. The Appellant will demonstrate the Minister did not make a decision in keeping with sound planning.

Sound Planning Principles

Objects

87. In Order LA17-06, the second part of the two-part test[24] requires the Minister to consider sound planning principles:

> Whether the Minister's decisions with respect to the applications for development and the change of use have merit based on sound planning principles within the field of land use planning and **as identified in the objects of the *Planning Act***. (emphasis added)

88. Order LA17-06 indicates that these are "as identified in the objects of the Planning Act." The Objects are listed in section 2 of the Act.

> OBJECTS
> 2. Purposes

[24] Order LA17-06, para. 52

The purposes of this Act are
(a) to provide for efficient planning at the provincial and municipal level;
(b) to promote sustainable and planned development;
(c) to protect the natural and built environment of the province;
(d) to encourage co-operation and co-ordination among stakeholders;
(e) to address potential conflicts regarding land use;
(f) to provide the opportunity for public participation in the planning process; and
(g) to ensure compatibility between land uses. *1988, c.4, s.2; 2021,c.42,s.1.*

89. These Objects refer to land use planning (which is to consider sound planning principles). These Objects exist to do proper planning for a proposed land use in an area, e.g., to convert farmland to a cottage subdivision. But once the land's use is decided (as is the case in this situation where the land use has been approved since Feb 1999, i.e., approved as a cottage subdivision), none of these Objects speak to how a landowner can use their land.

90. The context of land use planning as applying to land uses broadly versus an individual property is further supported in the 2014 Report of the Task Force on Land Use Policy (the "Task Force Report") where it was noted that, "Without sound policies to protect land, water, natural areas, viewscapes and the built environment, there are future risks and land use conflicts will increase."[25]

91. The protection of land, water, natural areas, viewscapes and the built environment must be strategically considered in land use planning to avoid future risks *to all of the island* — not to specific properties where land use has already been determined.

92. The Appellant submits that the reference to the Objects in the second part of the two-part test from Order LA17-06 is not intended for individual properties and, thus, is irrelevant in the decision-making of these permit applications.

Provincial Interest

93. The Minister quotes *Planning Act* 2.1.(1)(h) and (l) in the denial letter.

> 2.1.(1) The Minister in carrying out the Minister's responsibilities in relation to planning matters and the effects of proposed development under this Act shall have regard but not be limited to matters of **provincial interest**… (emphasis added).

94. Section 2.1.(1)(h) and (l) are:

> 2.1 Provincial interests
> (1) The Minister in carrying out the Minister's responsibilities in relation to planning matters and the effects of proposed development under this Act shall have regard but not be limited to matters of provincial interest, such as
>
> (h) the effect of proposed planning development on, and measures for the protection of, public health and safety;
> (l) the orderly and sustainable development of safe and healthy communities;

95. The Appellant respectfully submits that the Minister improperly used the Provincial Interest clauses for the denial of the Applications.

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[25] https://www.princeedwardisland.ca/sites/default/files/publications/report_on_land_use_policy.pdf, page 3

96. Section 2.1 is a list of undefined, broad, and interpretive principles. The section provides no objective criteria on which to assess the Applications. The Objects are not formulated as tests, or as technical requirements. There are no rules for development permits on a private property. Rather, the section sets out principles to instruct the Minister's exercise of its discretion in interpreting the Act.

97. The Task Force Report supports that Section 2.1 is broad.

> "Land use policies, by their nature, are general and **cannot account for all local situations, special circumstances and exceptions**. In recognition of this variability, Prince Edward Island's land use policies should allow for a degree of variance sufficient to accommodate local needs, **so long as provincial interests are not undermined**."[26] (emphasis added)

98. The very title of "Provincial Interests" provides the necessary context for use. This criteria is not intended to be applied to specific properties, but to land use planning *for the entire province*, e.g., farms vs residential subdivisions vs cottage development vs transport vs business, etc., in order to achieve public health and safety and safe and healthy communities.

99. The Appellant notes that the Subject Property does not infringe on any of the Task Force Report's top areas of concern:

> "Top areas of concern identified in survey:
> 1. Soil erosion and soil quality
> 2. Pollution of water
> 3. Coastal erosion
> 4. Loss of natural areas/habitat
> 5. Development of prime agricultural land"[27]

100. The Minister relied on the scant, generalized provincial interest clauses, at section 2.1(1)(h) and (l) which states the Minister shall have regard to "public health and safety" and "safe and healthy communities."

101. The Subject Property is not a publicly accessible property; it is a privately owned seasonal residence.

102. The Appellant submits that denial based on Section 2.1.(1)(h) and (l) is a stretch of the intent of the statute and is an unreasonable basis for denial.

103. The Appellant submits that the reference to the Objects in the second part of the two-part test from Order LA17-06 are intended for strategic consideration of land use *in all of PEI*; that, in their overarching manner, they are not intended for any application so discreet as to deal with development permits for standalone buildings or individual properties.

104. The Appellant submits that section 2.1 was improperly used by the Minister's delegates to arbitrarily deny the applications.

105. Nonetheless, for completeness, in the later A2 & A3 Substance section, the Appellant will demonstrate that Section 2.1.(1)(h) and (l) were not contravened.

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[26] The Task Force Report, page 30

[27] Task Force Report, page 11

Principled and Informed

106.The Appellant highlights the Commission's findings in Order LA17-06 that sound planning principles are "a guard against arbitrary decision making." The Commission stated:[28]

> "Sound planning principles … require discretion to be exercised in a **principled and informed manner."** (emphasis added)

107.This is supported in the Task Force Report where it was noted that,

> "Decisions must be made carefully, **based on scientific evidence**, **relevant data and analysis**,…"[29]

108.The context of this statement is in making decisions for broad land use, but the Appellant submits that these points should be an overarching guideline for any decision.

109.The Appellant was at the Subject Property when the Planners came for their site visit August 16, 2022. They didn't appear to be principled in their manner or even professional. They parked on the side of the road and entered the property quietly. They didn't announce themselves. The Appellant had to approach them and ask who they were. The Appellant felt, by their manner, that they appeared surreptitious; certainly they did not appear professional or objective.

110.They said what they were there for. They didn't ask any questions. The Appellant watched as they walked a straight line down the centre of the property and then back up the length. When they were there, A2 and A3 were in clear view.

111.When they reached the top of the property and seemed ready to depart, the Appellant asked if they had any questions or concerns. No was their reply. They didn't ask to see in buildings or ask any questions at all.

112.Referring to the Minister's denial letter, it states,

> "The very nature of the sheds (A2 & A3) being used as shelters/bunkees…"

113.One must ask how this "very nature" was determined?

114.Referring to the Minister's Record (Tab F / Tab 3), Eleanor emailed,

> "When we were onsite it was clear that 2 sheds were not being used for storage, they were being used as bunkees."

115.As seen in the photos in the Planner's site visit report[30], the door to A3 was closed. Thus, how could Eleanor or the Minister possibly make the "clear" decision that A3 was a bunkie? There is no evidence in the Minister's Record to support this.

116.The door of A2 was open. How was it determined that this was a bunkie? Did they see any beds or mattresses in there? The answer can only be no because these was no bed or mattress in there. It's egregiously unclear how Eleanor could come to a "clear" decision that A2 was being used as a bunkie. Further, there is no evidence in the Minister's Record to support this decision.

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[28] Order LA17-06, para 64

[29] Task Force Report, page 4

[30] Minister's Record, Tab F / Tab 2

117. In the report, you will also note two tents: a screen tent and a tent. Typically, a screen tent is used for outdoor dining and, in most cases, a tent is used for temporary outside sleeping.

118. As per the Task Force Report, "The provincial land use policies can be general in nature and cannot account for all local situations. Therefore, the policies must be applied **with common sense** so that local needs are met, and the general intent of the policies and public interests are not undermined."[31]

119. Analyzing that tent, a common sense person might wonder about the need for a tent if, indeed, the property owner had a bunkie?

120. The Minister's denial reasons note,

> "The two additional sheds (A2 & A3) are being used as **apparent** shelters/bunkees…" (emphasis added)

121. The Planner's site visit report[32] uses the words "seem" and "appear." The Planners had the opportunity to confirm their allegations. They did not ask, or want, to be informed. Words like "seem" and "appear" indicate speculation and clearly indicate they were not exercising discretion in an informed manner.

122. In the Professional Code of Ethics[33] of the Atlantic Planners Institute (of which PEI is a member), it states:

> 1.2 They must have integrity. This means:
>
> b) They must retain a sense of independence that will enable them to exercise their professional judgment independently and without bias.
>
> 2.5 Offer objective and informed planning advice;

123. The Professional Code of Conduct[34] of the Atlantic Planners Institute (of which PEI is a member), states:

> 2.1 impart independent professional opinion to clients, employers, the public, and tribunals;

124. These two codes use words such as "integrity," "independence," "without bias," "objective," and "informed." To a lay person, these words might be considered to represent the seeking of truth.

125. Were the characteristics referred to in the Codes of Ethics and Conduct above used to make this Decision? Did the Planners seek the truth? They did not ask to be informed.

126. Did someone else inform them what was in the Sheds? That would be clearly biased, unobjective, and speculative hearsay.

127. There does appear that there may have at least been some outside influence. This is evidenced in the Minister's Record of Decision, where Alex O'Hara sent an email to Eugene Lloyd, cc. to Eleanor Mohammed, on August 30, 2022. Of interest, the title of the email is:

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[31] Task Force Report, page 16

[32] Minister's Record, Tab F / Tab 2

[33] https://atlanticplanners.org/member-services/professional-conduct/professional-code-of-ethics/

[34] https://atlanticplanners.org/member-services/professional-conduct/professional-code-of-conduct/

"M-2022-0158 - Bryenton (sic) **Stringer** Recommendation"[35] (emphasis added)

128. The Appellant claims that these purported analyses have been used by the delegates of the Minister to make decisions based on internal, unpublished policy, or alternatively based on their personal preferences or beliefs or that of their superiors or outside influences.

129. The Minister's delegates made inappropriate and over-broad findings. The findings made by the Minister's delegates were arbitrary exercises of discretion which were not supported by adequate process or analysis to support them.

130. The Appellant submits that the Minister and his delegates improperly made an assumption. They made the assumption that A2 & A3 were bunkies. This is not principled.

131. The Minister's delegates did not ask to be informed, in order to correct that assumption. The Appellant submits that the Minister, thus, did not meet his obligations and duty and did not exercise discretion in a principled and informed manner.

132. The Minster denied the permits on an assumption, which was an improper administration of The Regs.

Broader Implications

133. The Order LA17-06 states the following:

> (64) Sound planning principles require the decision maker to **take into consideration the broader implications** of their decisions. [36]

134. "Taking into consideration the broader implications" may include that if arbitrary or subjective opinion will be used to deny applications, then this same subjectivity can / should be applied to all other permit applications.

135. It is presumed that the Minister is not desiring to introduce additional inconsistency and difficulty in applying the statutes in a prescribed way.

136. The Appellant submits that the broader implications were not considered, and that the denial reasons are specifically biased to this Subject Property, not with the intention of applying this same subjectivity to other properties.

Anomalous Applications

137. The Appellant submits that he Decision Maker unnecessarily burdened the process by consulting land use planners when not required. The Commission stated in Order LA17-06:[37]

> "In order to ensure that sound planning principles have been followed in **anomalous** applications a professional land use planner must be consulted." (emphasis added)

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[35] Minister's Record of Decision, Tab F / Tab 3

[36] Order LA17-06, para 64

[37] Order LA17-06, para 64

138. "Anomalous" means deviating from what is standard, normal, or expected. The Appellant filed permit applications for storage sheds and previously withdrew the idea to use A2 & A3 as bunkies.[38]

139. The permit application indicates "must be true."

140. This appeal is not about bunkies; it is about sheds. There is nothing unusual about sheds and, thus, the 2022 Permit Applications should not have been treated as anomalous.

141. The Appellant submits that consultation with a planner should not have been required and burdened the process unfairly.

Professional Land Use Planner

142. The Appellant submitted in the above section that the 2022 Permit Applications were not anomalous and, thus, consultation with a planner should not have been required. However, since the Minister did consult a planner, an analysis will be done.

143. Alex O'Hara performed a site visit of the Subject Property on August 16, 2022 and wrote a report of that visit on August 30, 2022.

144. The Appellant submits that the Minister contravened the Order. The Commission stated in Order LA17-06:[39]

> "…a **professional land use planner** must be consulted." (emphasis added)

145. Mr. O'Hara wrote the report but was not a professional land use planner at that time[40]. The PEI Registry of Planners lists Mr. O'Hara as a candidate only, i.e., not yet a Registered Professional Planner (RPP) and, referring to the Minister's Will Say Statements submitted on October 8, 2024, Mr. O'Hara's post-nominal letters still do not show RPP. Thus, Mr. O'Hara was not authorized to submit a report towards the Decision.

146. The Appellant submits that Mr. O'Hara's site visit report was heavily relied on by the Minister in rendering the Decision.

147. As was made clear by the Commission in *Arsenault*, the principles laid down in *Stringer* direct that if the Minister was consulting a planner, they ought to have consulted a professional land use planner to weigh and balance the important considerations associated with sound planning principles, especially given the requirement to interpret discretionary legislative provisions.

148. The Appellant submits that when interpreting discretionary interpretive provisions of the legislation, the Minister must solicit advice from accredited professionals to ensure decisions are made in accordance with the Act, Regulations and sound planning principles. The public are entitled to decisions that are rooted in these principles.

149. The Appellant submits that the Minister's analysis respecting the 2022 Permit Applications and the Subject Property, was flawed in that it was not performed by a "professional land use planner" thus

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[38] Appellant Exhibit 5.4

[39] Order LA17-06, para 64

[40] Order LA23-04 concluded this. *Lucas Arsenault, Jennie Arsenault and L&J Holdings Inc v Minister of Agriculture and Land*, Order LA23-04 at paras 43 to 46.

allowing for subjective and arbitrary decision making by Mr. O'Hara, and by extension the Minister, contrary to sound planning principles.

150. The reasoning outlined in Mr. O'Hara's report improperly interprets established planning standards set out in the *Act* and the Regs. Rather, Mr. O'Hara's conclusions were primarily based upon subjective opinion (his own or that of his peers/superiors), which are unsupported by the facts, and as will be discussed in detail in the following sections of this submission, do not accord with sound planning principles.

151. Accordingly, to the extent that the Decision relies on the analysis provided by Mr. O'Hara's report, the Appellant submits that the Decision is without merit, in that it fails part two of the *Stringer* test and does not comply with sound planning principals as identified in the objects of the *Planning Act*.

Sound Planning Conclusion

152. The Appellant submits that the Objects and Provincial Interest clauses are too broad to be of objective use for the discreet case of the 2022 Permit Applications. On this basis, the Minister improperly used this clause to achieve the desired denial.

153. The Appellant submits, as sound planning principles are supposed to guard against arbitrary decision-making, that sound planning principles, then, were not applied at all. (Further evidence of arbitrary decision-making will be seen in upcoming sections.)

154. The Appellant submits that the Minister's delegates (both the Planners and Mr. Lloyd) were not principled or informed, and did not provide their assessment in an independent, objective way.

155. The Appellant submits that the Minister failed to consider sound planning principles from a qualified expert in interpreting these clauses.

156. The Minister acted improperly when they failed to seek or consider information or advice from a qualified land use planner. The Appellant submits that Alex O'Hara is not a qualified land use planner.

157. The Appellant submits that Mr. O'Hara's site visit report does not reference or provide guidance on sound planning principles. He provides no recommendation to approve or deny the application based on sound planning principles.

158. The Appellant submits that the second part of the two-part test has failed.

159. The Appellant submits that the Decision is not based on sound planning principles and therefore should not be used to deny the 2022 Permit Applications for sheds A2, A3 & A4.

Issue: A2 & A3 Substance

Introduction

160. The Decision was based on over-broad, generalized provisions of the Act and Regulations, which were chosen in order to reach the finding that the Applications be denied.

161. A2 & A3 are accessory buildings ("Sheds"). Looking at the denial letter, the Minister denied the permit applications claiming that the Sheds pose threats to the following:

> Public Health and Safety
> Orderly and Sustainable Development of Safe and Healthy Communities

Average # of Sheds
Orderly Placement
Illegal Use
Not Conforming to the Regs
Detrimental Impact
Fire Hazard
Approved Use of the Lot

162. Referring back to the issue of natural justice, does this seem to be common sense? Or does it seem that a whole smattering of broad denial reasons was used to ensure that A2 & A3 could not ever be approved?

163. One might wonder if these nine reasons were chosen to make it difficult to challenge the Decision, to burden the Appellant to proof against each one of these, or to possibly miss something in rebuttal?

164. The Minister is thwarting the Appellant from a fair process by overwhelming her with arbitrary, endless, bureaucratic red tape. The Minister is counting on justice to remember past history, which is no longer relevant, and to turn a blind eye.

165. The Appellant submits that the Minister is over-complicating the process to achieve the desired goal of denial.

166. The Appellant submits that this denial by the Minister is against all principles of natural justice, sound planning, and procedural fairness.

167. The Appellant submits that, based on everything that has been and will be revealed, this appeal hearing should be completely dropped and the Minister's decision to deny the permit applications should be quashed and replaced with approval on the basis of the evidence, the record, and the expert opinions.

Apparent Shelters

168. Referring to the Minister's denial letter, it states, "The two additional sheds (A2 & A3) are being used as **apparent** shelters/bunkees…" (emphasis added)

169. Looking to the word "apparent," it can be used in two ways.

1 clearly visible or understood; obvious
2 seeming real or true, but not necessarily so

Clearly Visible

170. If the Minister intended the first meaning, how was this apparent use clearly visible or obvious to the Minister? There is nothing in the Record that substantiate this 'clearly visible' use.

171. Further, as was submitted in the Principled and Informed section, during the site visit, based on what could have been seen, it was not possible to make the determination that the sheds were clearly visible or obvious as shelters.

Clearly Understood

172. Did the Minister mean 'clearly understood' and was, thus, basing that conclusion on past information from the Order LA17-06?

173. If so, in that Order, the Minister's own legal counsel, submitted:

> "…as these non-commercial storage buildings are not hooked up to water or sewer systems, they are not considered to be "dwellings"."[41]

174. Later he testified:

> "It would be absurd to consider these structures to be dwellings. By way of example, if someone fell asleep in a gazebo, would that fact make the gazebo a dwelling?"

175. and later,

> ""Bunkies" cannot be considered to be dwellings as defined in the Act."[42]

176. The Minister's own Safety Standards Officer (the staff that manage permit applications):

> "When asked whether you could live in a "bunkie" he replied "No"."[43]

177. Although the Appellant (the Stringers) tried to make the case that bunkies were dwellings and dwelling units, the Commission did not make that determination in the Order's Findings section.[44]

178. Did the Minister mean 'clearly understood' when he used the word "apparent"? It is unknown, as the evidence to corroborate the determination of being 'clearly understood' is not provided in the Minister's Record.

Seemingly Real but Not Necessarily

179. If the Minister intended the second meaning, this shows that a denial based on "apparent" is inappropriate, as according to this meaning, it is not a known fact, 'not necessarily so.'

180. Is the Minister taking the position that the sheds are seemingly bunkies because of past intent? As per the 2015 and 2017 permit applications for A2 and A3, the Appellant did originally intend to use the sheds as "mixed use — storage building (95% of year and occasional guest sleeping accommodation (5% of year)." (This was intended to be 5% of the time the Appellant was at the property; thus, for the average of 2-3 weeks per year, 5% of 3 weeks is just over 1 day.)

181. At that time, instead of consulting a professional land use planner for the anomalous use, as was directed in para 64 of Order LA17-06, the Minister refused to process the 2017 permit applications. The Minister was stonewalling; the process was frustrated.

182. Unable to move forward, or have any reasonable communication, in 2018 the Appellant put in writing to the Minister's staff to process the applications as sheds only (instead of as mixed use).[45] As a result, the abandonment of the originally intended use as bunkies was known by the Minister.

183. Since that time, the Appellant and Eugene Lloyd have had several conversations about A2 and A3[46] being fully compliant and that he didn't see a reason for denial.

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[41] Order LA17-06, para 4

[42] Order LA17-06, para 33

[43] Order LA17-06, para 20

[44] Order LA17-06, paras 60-66

[45] Appellant Exhibit 5.4

[46] Appellant Exhibit 5.2

184.The 2022 Permit Applications do not indicate ‘bunkie’ in any way.

185.If the Minister forgot the 2018 change in intention, he stlil does not have the right to assume that the Appellant is using the sheds as bunkies.

186.If an assumption was made, the Minister’s staff has the opportunity to validate this assumption by contacting the Appellant to confirm details on the application, as had been done in the past. This was not done.

187.In the Declaration section of the A2 & A3 applications, where the Appellant signed, it states,

> “…hereby affirm that all statements contained within this application are complete and true, and I make this declaration conscientiously believing it to be true.”

188.The Appellant affirmed on the 2022 Permit Applications that the accessory buildings would be used for storage.

189.The Appellant submits that if the Minister took the meaning of “apparent” to mean ‘seemingly true,’ they ought to have known that it was ‘not necessarily so’ based on the 2018 email to the Minister’s staff and the affirmation of the new 2022 Permit Applications.

Actual Use

190.A2 and A3 are not used as “shelters/bunkees”. The Minister did not take any care to review the 2022 Permit Applications de novo. Instead, the Minister relied on assumptions. Thus, the Minister is not owed deference.

191.Instant Permits were introduced in March 2024. The criteria for sheds to gain an Instant Permit is:

Sheds must:
- Be 215 square feet (20 square metres) or less in total floor area
- Be exempt from requiring a permit under the Building Codes Act Regulations
- Not be used for human occupancy in any manner or form
- Not be connected to heating, electrical and/or plumbing services
- Not be rented or leased out
- Not include a car port, pergola, gazebo, dog house, trellis, or arbour

192.The Appellant submits that the Minister’s own introduction of Instant Permits shows that the permit applications for these sheds should be approved forthwith and asks the Commission to intervene.

Public Health and Safety

193.It was stated by the Minister that the provincial interests, 2.1.(1)(h) of the Act is relevant to the Decision:

h) The effect of the proposed planning development on, and measures for the protection of **public health and safety**

Reasons
- The two additional sheds (A2 & A3) are being used as **apparent shelters/bunkees, with no toilets or running water. This would not meet typical health standards.**
- The use of illegal shelters/bunkees (A2 & A3) is **unsafe and unhealthy.**

194.This denial reason is based on an assumption that sheds A2 & A3 are “shelters/bunkees. “The Minister has provided no evidence to support this, only subjective opinion not based in sound planning.

195.As stated throughout this submission, denying permit applications based on opinion is a breach of process. The Minister has a duty to review permit applications objectively and to validate assumptions.

196.The Appellant submits the Decision-Maker is burdening the appeal process and wasting taxpayer dollars by not doing the job properly, i.e., by using assumptions rather than objectivity and scientific evidence. This is highly prejudicial and a clear breach of natural justice.

197.With respect to “shelters/bunkees, with no toilets or running water,” there is no definition in the Regs for “shelter” or for “bunkee,” but typically, a shelter or bunkie is a place giving temporary protection from bad weather.

198.One could search online to find out about bunkies; typically, they do not have bathrooms or kitchens — as that would be considered a ‘dwelling unit’ and they originated as ‘bunkhouses,’ small buildings built by farmers to shelter seasonal employees, i.e., providing sleeping accommodation only.

199.Looking to the Order LA17-06, the Minister’s own Safety Standards Chief (the Manager of the permit application area at that time) provided direction to his staff to “approve the “bunkies” as non-commercial storage buildings with the condition attached to Permit 88 that they were not to be connected to water or sewer.”[47]

200.If one could *principally* live in a shelter or bunkie, i.e., then, it stands to reason they would require all the benefits of a dwelling unit, i.e., all the infrastructure necessary to live in a home year round. But that is not what a “shelter/bunkee” is intended for.

201.If sheds A2 and A3 were proven as being “shelters/bunkees” and if “shelters/bunkees” were proven as “dwelling units,” then the Minister’s argument that they would be unsafe and unhealthy without toilet and running water would be reasonable. But that is not what is provided on the 2022 Permit Applications, or in the Act or Regs, or in the Minister’s evidence.

202.In order for the Minister to say shelters/bunkees are unsafe and unhealthy without toilet or running water, they would have to first prove shelters/bunkees are “dwelling units.” That is not contemplated by the Regs and is not supported by the Minister’s own staff’s statements or the Commission’s finding in Order LA17-06.

203.Sheds A2 and A3 are “accessory buildings.” As accessory buildings, they do not pose a threat to public health and safety. They are less a threat to public health and safety than a garage would be or a farm.

204.Further, according to the Canadian Public Health Agency (CPHA):

> Public health is the organized societal effort to keep people healthy and prevent injury, illness and premature death. Strengthening the nationwide systems that organize and deliver public

[47] Order LA17-06, para 23

health services, must begin with an updated shared vision of what services these systems are mandated to deliver and the outcomes they should aim to achieve for Canadian populations.[48]

205. The Public Health Agency of Canada states:

> Our activities focus on protecting against threats to public health, preventing and reducing diseases and injury, and promoting health, well-being and equity.[49]

206. How/when does what someone do on their personal and private property become "public" health & safety? If the actions affect the public, e.g., throwing trash in the public roadway, an argument could possibly be made. But that's not the scenario here.

207. Whether sheds A2 and A3 are shelters/bunkees, or whether they are accessory buildings, they would not seem to pose a threat to public health or to prevent (or increase) diseases. Over the last 9 years, there have no life-threatening acts from the Sheds. The Decision-maker is being sensationalist and extremist, which is inappropriate and unobjective.

208. The Minister improperly ruled on the appropriateness of "shelters/bunkees" without confirming the "apparent" use and without support from the Act.

209. As has / will be submitted throughout, the Minister has made an invalid assumption on what the sheds are. Then the Minister used that assumption to choose a number of denial reasons and unsound opinion based on that. That is not proper process or fair. This is against all principles of natural justice, sound planning, and procedural fairness.

Orderly and Sustainable Development of Safe and Healthy Communities

210. The Minister has stated that the following from the Provincial Interests, 2.1.(1)(l) of the *Planning Act,* is relevant:

> (l) The orderly and sustainable development of safe and healthy communities

211. The Appellant submits this is not a relevant reason. Like all the other reasons the Minister provided, it is based on an incorrect, unvalidated assumption, and on subjective opinion.

212. As was discussed in the above Public Health and Safety section, whether the sheds A2 and A3 are accessory buildings, or whether they are shelters/bunkees, these is nothing in the Act, the Regs, or the Minister's evidence to support that either sheds or shelters/bunkees would undermine the "orderly and sustainable development of safe and healthy communities."

213. In the Order LA17-06, the neighbour, Donna Stringer, testified that the sheds were not a safety issue to her:

> "Under cross-examination, Mrs. Stringer acknowledged …that, to date, her safety and security were not compromised by the presence of the sheds.[50]"

214. These sheds are on a private lot. They are "buildings" and not impacting safe and healthy communities or the sustainable development of such.

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[48] https://www.cpha.ca/sites/default/files/uploads/advocacy/strengthen/cpha-what-public-health-does-e.pdf

[49] https://www.canada.ca/en/public-health.html

[50] Order LA17-06, para 17

215.In land use planning, sustainable development of safe and healthy communities would need to be considered. But, in this case, the land use planning in this community has already been done. The land use planning for this community was decided when the cottage subdivision permit was approved in February 1999.

216.Presumably at that time, there was an analysis of what would make this cottage subdivision sustainable, orderly, safe, and healthy. Presumably that might have included infrastructure such as roadways, power lines, access to highways, etc.

217.The Appellant relies on the Expert Opinion provided by Licensed Professional Planner, Jenifer Tsang. Ms. Tsang indicated explains that "orderly" in land use planning would typically mean that the proposed development should:

> "not put undue pressure on various land use factors such as the transportation network, the provision of water and sanitary services, are reasonably compatible with other land uses, and respect the environment to the extent that development."[51]

218.In addition, Ms. Tsang states:

> Accessory buildings are normal and incidental to many land uses. Accessory buildings for residential properties are considered to be a low intensity land use that help keep a community orderly and sustainable by providing structures to store various items normally associated with home ownership.[52]

219.The Appellant submits that 2.1.(1)(l) is irrelevant for this situation and, further, is an over-reaching of the Minister to burden this process (both the permit review process and the appeal process).

Average # of Sheds

220.The Minister has provided the following additional 'reasons' as rationale for the denials.

- The very nature of the sheds (A2 & A3) being used as shelters/bunkees, and not for storage, indicates that only one shed is actually needed for storage.
- An average residential yard will have one garage and/or one shed.

221.What cogent evidence is the Minister relying on in this regard? The Appellant surmises that this is a combination of speculation (i.e., not storage sheds but bunkies — and even supposing they were bunkies, what provision of the Regs does that contravene?) and a very broad, over-reaching, rose-coloured interpretation of the Regs.

222.The proposed accessory buildings conform to the Regs, which do not restrict their number, size or placement.

223.These 'reasons' are based on subjective opinion. There is nothing in the Act or the Regs to support these assertions. Further, the first bullet is, again, based on an assumption that sheds A2 and A3 are shelters/bunkees.

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[51] Expert Opinion Report, Jenifer Tsang, page 5

[52] Expert Opinion Report, Jenifer Tsang, page 18

224.Where in the Act or Regs does it indicate the number of sheds required for a property owner, that "only one shed is actually needed"? Where does it indicate "will have one garage and/or one shed"?

225.The Appellant submits that these statements are not in the Act or in the Regs, and therefore, cannot be used as rationale to deny the applications.

226.This is supported by statements made in Order LA17-06 by the Minister's own staff:

> When asked if 20 "bunkies" would be permitted on the subject property, Mr. Wood [Safety Standards Officer] replied that approving that many would be questionable as that would be a large number for one building lot. He acknowledged that the Regulations do not specify how many would be permissible and noted that the number allowed is "discretionary". He stated that "lots of people have four storage sheds". [53]

227.The Minister's own legal counsel testified:

> Having this number of storage sheds on a property is not unusual, twenty such sheds would be unusual, but here the number involved was not enough to trigger any kind of a planning review.[54]

228.The Appellant does not have 20 bunkies or even 20 sheds on the Subject Property, and would agree that if that were the case, it might not meet sound planning principles. But that is not the case.

229.Considering the number of buildings, the Appellant submits that there are many properties in the surrounding area that have more than one shed, or even more than one garage and/or shed. Also, there are several that have more accessory buildings than the Subject Property, and in most cases, the accessory buildings are larger in size than the ones on the Subject Property.[55]

230.In the interest of sound planning, the Minister and his staff have a duty of care and a duty of process to perform a thorough review and analysis of situations, not simply to make up their minds in advance by relying on past information, arbitrary decisions, or bias.

231.If the Minister were to apply that duty, then he could not only support his decisions and assertions, but make a fair judgement that would apply equitably to all. This was not done.

232.There is nothing in the Act or Regs to prohibit these sheds or the number of them or the placement of them or what can be stored in them. Further, a review of nearby locations demonstrates that, as the Minister's staff testified in Order LA17-06, there are many rural properties that have many outbuildings.

233.The Appellant submits these 'reasons' are purely subjective, based on aesthetic opinion rather than on informed analysis or scientific evidence. They are not supported by sound planning principles, nor natural justice and, thus, the decision to deny Sheds A2, A3 and A4 should be overturned.

Instant Permits Criteria

234.The Minister's own new Instant Permits provides the following criteria to receive an Instant Permit.

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[53] Order LA17-06, para 20

[54] Order LA17-06, para 33

[55] Appellant Exhibits 3.1 and 3.2

Sheds must:

- Be 215 square feet (20 square metres) or less in total floor area
- Be exempt from requiring a permit under the Building Codes Act Regulations
- Not be used for human occupancy in any manner or form
- Not be connected to heating, electrical and/or plumbing services
- Not be rented or leased out
- Not include a car port, pergola, gazebo, dog house, trellis, or arbour

235. The criteria does not mention any limitation regarding the number of shed applications that can be filed.

Average

236. The word "average" is not defined in the Act or the Regs, and therefore, not supported. The word "average," by its very nature, means there are more and there are less.

237. The Subject Property is approximately 1 acre (43,560 sq. ft.). There are 4 accessory buildings totalling just over 305 sq. ft. Considering all four buildings, they represent 0.7% of the entire property.

238. The Appellant agrees this would be under the average density of what most property owners may have for accessory buildings.

239. It does not seem reasonable for the Minister to deny these sheds when they have such a minimum density impact on the Subject Property itself, let alone in comparison to other 'average' size requirements for storage.

240. Referring to the Order LA17-06, the Minister's own staff implied that the number of sheds did not seem unreasonable for the lot size:

> Mr. Carr [Safety Standards Chief] noted that the present matter involves three sheds on the subject property, which is a relatively large lot…[56]

241. The Appellant submits that the Minister is not being reasonable and is instead relying on past history, incorrect assumptions, influence and bias — clearly against the principles of natural justice, sound planning, and fairness of process and procedure.

242. There are no additional requirements in the Regs with regard to the size, height, number, or placement of accessory buildings.

243. Even if the Minister could impose his own judgement, he should provide appropriate planning analysis and rationale to support the position. There is no analysis or rationale to support these assertions. They are simply statements.

244. If the Minister chose to take this stance, to exercise these assertions, then the Minister should be prepared to apply this approach equitably to all other similar properties. This would be done via an update in the Regs. Otherwise, 'reasons' such as these would be seen to be biased, random and arbitrary. The Appellant submits that is what they are.

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[56] Order LA17-06, para 27

Not for Storage

245.The first bullet also mentions since they are “not for storage.” This is an assumption and completely unsupported by evidence.

246.As perviously stated, these buildings have not been used for sleeping since 2015. Notwithstanding this, referring to the Order LA17-06, even nine years ago when the Appellant wanted to use them for bunkies, they were still *principally* being used for storage, as was testified then by the current Appellant:

> When not used for sleeping, the bunkies are also used for seasonal storage of items such as a picnic table, wheel barrow, shovels, rakes, chairs etc.[57]

247.About 8 years has passed since that hearing. Due to the issues, the Appellant forewent the original intention to use the sheds as bunkies (as was discussed earlier), and, as might be expected, with time, more items have been accumulated which require storage.

248.The cottage is 168 sq. ft., so it would stand to reason that storage of items is not going to be afforded in that space, particularly large items. Thus, storage solutions are required.

249.There are 4 accessory buildings totalling just over 305 sq. ft. Even with 4 accessory buildings, at 305 sq. ft., this is less than a typical garage. Then consider that many year-round dwellings have multiple storage spaces, e.g., a large attic, basement, garage, shed, playhouse. Considering that, it is not unreasonable to require at least 305 sq. ft. for storage.

250.Regardless, looking to the Regs, it is important to note that the definition of “accessory building” does not explicitly say ‘must be used for storage.’ The definition is:

> (a) “accessory building” means a building whose use is incidental and subordinate to, and consistent with, the main or approved use of the lot upon which the building is located

251.There is no explicit mention of an accessory building needing to be for storage. This is supported by a statement by the Minister’s own Safety Standards Chief (aka Manager) in Order LA17-06:

> The Regulations do not state what non-commercial storage buildings may be used for…[58]

252.This is supported by a number of permit applications that the Minister approved for accessory buildings or sheds that were not indicated as “for storage,” but buildings for she-sheds and containers, for example.[59]

253.The Appellant submits that it is highly prejudicial for the Minister to deny her applications based on the false and unvalidated assumption that they will not be used for storage, when, in fact, the Minister has approved many permit applications that were “not for storage.”

254.This indicates bias and is against all principles of sound planning and natural justice. Overall, the Act or the Regs do not support this position.

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[57] Order LA17-06, para 40

[58] Order LA17-06, para 26

[59] Appellant Exhibit 2.6

"More than Enough"

255.In Eleanor Mohammad's email to Eugene Lloyd,[60] she states:

> "For a yard of that size, one shed should have more than enough space to accommodate a mower and other equipment for maintaining the landscape."

256.This is opinion, unsupported by the Act or Regs and without support from evidence.

257.It is a concern to both the Province and the public to find that an administrator is stepping outside of the legislation to impose their own judgement or personal opinion on what they deem to be "enough" of any land use or structure. Making the choice to step outside of the Regs to impose a more stringent requirement diminishes the effectiveness and credibility of the Act and the Regs.

258.Even if an administrator could impose their own judgement, they should provide appropriate planning analysis and rationale to support their position. This was not done.

259.The administrator should also be prepared to apply this approach equitably to all other similar properties, otherwise it would be seen as a biased, random and arbitrary.

260.This is supported by the Expert Opinion Report of Licensed Professional Planner, Jenifer Tsang.

> Planners do not get involved with measuring the size of mowers and other equipment to determine the appropriate size for a shed for any land use.[61]
>
> In the field of land use planning, lot coverage maximums for residential land uses is typically 35% for the main dwelling which does not normally include accessory buildings. In this case, the proposal is for a combined lot coverage for all buildings of 2%. There would have to be planning rationale to take such a strict approach on lot coverage and one would need to compare it to other properties that are one acre in size and larger. This would be particularly relevant in PEI where there are several rural properties, summer cottage properties, and agricultural properties.[62]

261.The Appellant submits it is not sound planning to take the position that one small shed, that has a very low lot coverage, is enough for a one acre property. Further, is the Minister intending to start measuring mowers to determine if they might fit in the size of shed being permitted?

262.Presumably, Ms. Mohammad is referring to the one shed that was approved, i.e., A1. That shed, though not in question for this appeal, with all the other things stored therein, would be hard-pressed to accommodate a mower.[63] Certainly, it would not be able to accommodate all the items that are in it currently, plus all the other items that are in Sheds A2, A3 and A4. Even if all those items could be stuffed into A1 (which is highly doubtful), the usability of the items would be incredibly difficult, to the point of impossible, since the Appellant would have difficultly accessing the items (because they would have to be piled on top of each other).

263.Ms. Mohammad's comment does not follow sound planning principles and is impractical to administer and enforce. Any restrictions on size, number, contents, or placement of accessory

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[60] Minister's Record, Tab F / Tab 3

[61] Expert Opinion Report of Jenifer Tsang, page 14

[62] Expert Opinion Report of Jenifer Tsang, page 15

[63] Appellant Exhibit 6.1 page 2

buildings should be adopted in the appropriate legislation and not left for an individual to decide on a random basis.

264. Further, in terms of the Minister taking the position that one shed is enough (regardless of size presumably), the Minister must then be prepared to deny other accessory buildings. Is the Minister prepared to review and decide for each residential property how many accessory buildings are needed for that particular property? Is the Minister prepared to base that decision on maintenance equipment for the size of the property, thereby excluding all other items that might be kept in a storage shed? Is the Minister prepared to deny accessary buildings that are used for other purposes such as a play house, food storage, animal shelters, she-sheds, car/truck/boat/camper storage?

265. Until The Regs are amended to address these matters, they must be administered as they are written which has no limits to the size, number, contents, or placement of accessory buildings. Further, the quantity of storage items is not regulated in the statutes. Thus, it is inappropriate for the Minister and his staff to provide opinion about what is enough or what is needed for storage.

Aesthetic vs Empirical

266. The Appellant submits the reason for these denials goes back to past history and is based on the influence of the original complaint by the neighbour that shed A3 was blocking his view.

267. The Appellant enjoys a minimal footprint, a soft impact on the environment, to be surrounded by trees to support ecology and preserve beauty, and to be in nature. This gives a nod to the traditional, small, rustic properties to which the Task Force Report refers.

268. It may be that the neighbours, or the Planners, or the Minister do not like the aesthetic of the Subject Property. They maybe would not consider, or enjoy, a minimal footprint such as the Subject Property provides.

269. If the aesthetic is the issue, this is not contemplated by the Regs or any covenants attached to the deed of the Subject Property. Additionally, after nine years of history, the evergreens that were planted almost 20 years ago (before others bought in the subdivision) have matured. This provides a landscape buffer to safeguard the public, or the neighbours, from not enjoying the same aesthetic as does the Appellant.

270. Presuming the Regulations are satisfied (which they are), just because something is different does not mean it is wrong. Just because the neighbours don't like something, does not mean it's wrong. Just because something is "atypical," does not mean it's wrong.

271. The Appellant believes that her minimalist imprint on the environment and surrounding ecology needs are to be encouraged, not discouraged, in both clear wording of the rules and in a common sense interpretation and application of those rules.

272. The Task Force Report supports this:

> "There is far too much development being approved. Large houses are being built on small lots. Once beautiful meadows and fields are being reduced to cookie cutter subdivisions. The pastoral beauty of the Island is quickly disappearing."[64]

[64] Task Force Report, page 15

273.The Appellant maintains that her property, with its extremely low lot coverage, vast open space, and beautiful trees and shrubs, is more in keeping with the pastoral beauty[65] than some neighbouring properties where there exists a 4,000 sq. ft. cottage[66] that occupies most of the land available.

274.The manner in which the Appellant has been using the Subject Property is uncommon in this province. Uncommon does not mean incorrect, nor does it mean illegal.

275.The Decision-maker's opinion of how they might like to setup their own property, or set up the Subject Property if it was theirs, is not relevant to this case.

Orderly Placement

276.The orderly and sustainable development of communities has been discussed earlier. Now, the Appellant will focus on the following denial reason.

> "The placement of the structures (A2 & A3) on the property is **not orderly for the use** (as storage). Sheds generally are placed immediately beside or behind a dwelling unit."

277.This is a highly subjective argument. It is an aesthetic argument rather than an empirical one.

278.Looking to the phrase, "not orderly for the use **(as storage)**," it appears that the Minister's staff is alleging the sheds are shelters/bunkees and is trying to prevent the sheds for that use by objecting to their location on the property. This is an improper use of an administrator's power and responsibility.

279.There is nothing in the Act or Regs to prohibit the placement of Sheds (A2, A3 or A4) or to direct them to be placed in certain spots, and there is no planning principle that speaks to the placement of sheds on rural properties or to what is considered "orderly."

280.A review of nearby locations demonstrates that, as the Minister's staff testified in Order LA17-06, there are many rural properties that have many outbuildings and these outbuildings are not always immediately beside or behind a dwelling unit.[67]

281.It is understood that the Minister is relying on past information, which may include a suggestion of a new placement for A3 to enhance the neighbour's viewscape. If true, that is no longer relevant, as A3 cannot be seen from the Stringers' neighbouring property due to mature evergreens.[68]

282.There are no covenants attached to the deed. The placement of the Sheds (A2, A3 and A4) meets technical requirements (e.g., minimum setbacks, etc.). There are no extraordinary circumstances in the subdivision that would require particular placement of buildings for either the public's benefit or on the Subject Property.

283.This is supported by the Expert Opinion Report of Peter Joostema:

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[65] Appellant Exhibit 6.2

[66] Appellant Exhibit 7.2, page 6

[67] Appellant Exhibit 3.2

[68] Appellant Exhibit 6.3

> “In relation to the placement of the onsite storage/accessory buildings, the subject site is private residential property within a seasonal cottage subdivision with no specific regulations in place (i.e., subdivision covenants), other than setbacks from the property lines and other infrastructure on site (e.g., well, septic system, etc.). In addition, the storage/accessory building appear to be well maintained and do not impact the viewscapes of the subject or neighbouring properties;”[69]

284. If the Minister wishes to impose such extraordinary circumstances, he would need to demonstrate a significant amount of evidence to establish the need for unusually burdensome limits. Then, the restrictions for placing accessory buildings (or the size, contents, number, etc.) must be set out in the proper legislation for it to be applied equitably to all land owners.

285. The Appellant submits this is an arbitrary subjective opinion. It is not defensible to say “not orderly.”

286. As per the Expert Opinion Report by Jenifer Tsang, it is submitted that the principles of sound planning were not followed or discretion exercised. Ms. Tsang states[70]:

> I viewed photos of many different properties in the subject area and PEI generally that showed sheds in locations that were not "*immediately beside or behind a dwelling unit*". My research and review of photos of similar properties in the area show a variety of accessory building placement. I saw photos of properties that have accessory buildings side by side near their rear property line, I saw photos of properties that have accessory buildings scattered across their property, I saw photos of properties with accessory buildings clustered together near their side property lines, and I saw photos of properties with accessory buildings in front of the main dwelling. I also saw accessory buildings that were much larger than sheds, that looked like garages and barns. I also saw properties with more than one camper parked on their property, boats on properties, and shipping containers on properties.
>
> In my experience as a land use planner, I can say that garages tend to be situated beside the dwelling unit which makes sense for the convenience of parking one's personal vehicle close to the home. In terms of other accessory buildings, such as sheds, I have seen them in all variety of locations on a residential property. Regardless of where people tend to place their accessory buildings, there are no requirements in The Regs that specify where accessory buildings have to be located in terms of their relationship to the main dwelling.
>
> There is no planning rationale provided for taking this more stringent position that is not supported in The Act or The Regs.

Illegal Use

287. The Minister states the following reasons as to why he believes sheds A2 & A3 are not of a legal use.

- The two additional sheds (A2 & A3) are being used as apparent shelters/bunkees, with no toilets or running water. This would not meet typical health standards. It is also clear that they are not of a legal use that is incidental to the single dwelling unit.
- The use of illegal shelters/bunkees (A2 & A3) is unsafe and unhealthy.

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[69] Expert Opinion Report, Peter Joostema

[70] Expert Opinion Report, Jenifer Tsang, page 6

> As well, as these types of shelters/bunkees are not clearly defined in the *Planning Act* Subdivision and Development Regulations and could be construed as shelters for human occupancy, they are in violation…

288.The Appellant will explore these reasons in the below sections.

Apparent Use

289.The Minister's basis for denying A2 & A3 is that the sheds are "apparent shelters/bunkees."

- "The two additional sheds (A2 & A3) are being used as apparent shelters/bunkees…"

290.This is an assumption that was not validated, and has already been discussed in the Apparent Shelters section.

291.As stated in that section, the fact that the Appellant previously applied for development permits (see permits for A2 & A3 dated 2017-08-26) to use two of the sheds (A2 & A3) as "mixed use — storage building (95% of year and occasional guest sleeping accommodation (5% of year)" does not give the administrator the right to jump to the assumed conclusion that the landowner is using the sheds as bunkees, or that temporary sleeping accommodations is an illegal land use.

292.The Appellant submits that it is a breach of process to choose denial reasons that are based on an assumption and, so doing, prejudices the applicant.

Not of Legal Use

293.Looking at the entire first bullet in the Minister's provided 'reasons,' there are three statements.

- The two additional sheds (A2 & A3) are being used as apparent shelters/bunkees, with no toilets or running water. This would not meet typical health standards. It is also clear that they are **not of a legal use** that is incidental to the single dwelling unit.

294.Each of these statements builds upon the previous. That is:

1. They are apparent shelters.
2. Because they are apparent shelters, they would not meet health standards.
3. Because they are apparent shelters, that also don't meet health standards, they are not of a legal use incidental to a single dwelling unit.

295.In order for the third statement to be applicable, the first statement would have to be proven as truth. It was not. Thus, the third statement cannot apply.

296.The Appellant submits that it is a breach of process to choose denial reasons that are based on an assumption and, so doing, prejudices the applicant.

297."Legal" means permitted by law or required by the law. Based on this definition, in order for something to not be legal, it must be contravening statute law. Thus, what statute law is a shed — or even a bunkee — contravening? This will be explored in the next sections.

A2 & A3 as Sheds

298.When the Minister received the permit application, it was affirmed as truth by the applicant. Further, it was earlier submitted that the Appellant provided the Minister a written email about giving up on the original idea of bunkies and processing the applications as sheds.[71]

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[71] Appellant Exhibit 5.4

299. On page 8 of the 2022 Permit Applications for A2 & A3, it indicates “accessory buildings for storage.” Is an accessory building legal? Referring to the Regulations that were in effect at that time, “accessory building” is defined in the Regs as:

> 1.(a) “accessory building” means a building whose use is incidental and subordinate to, and consistent with, the main or approved use of the lot upon which the building is located;

300. Analyzing the word “accessory,” it could mean a thing which can be added to something else in order to make it more useful, versatile, or attractive, e.g., optional accessories include a battery charger and shoulder strap. It could also mean a small article or item of clothing carried or worn to complement a garment or outfit, e.g., matching accessories—hat, bag, shoes.

301. The Appellant submits that a shed is an accessory building. It is incidental (i.e., a minor accompaniment to something else) and subordinate (i.e., lower in rank) to the single dwelling unit. This is supported by Eleanor Mohammad’s statement:

> “Accessory structures are incidental to the main structure (in this case, single unit dwelling) and generally include garages or sheds for storage of vehicles and/or yard equipment. For a yard of that size, one shed should have more than enough space to accommodate a mower and other equipment for maintaining the landscape.”[72]

302. In this statement, Ms. Mohammed is categorizing the permit applications as “accessory structures,” which is in accordance with what is on the permit applications.

303. Having sheds on a lot approved for a single-unit residence (which now includes summer cottages) is consistent with that use, i.e., to be used as an accessory to the main approved use.

A shed makes the single dwelling unit more useful by enabling the property owner to organize items.

304. A shed is usually used to store equipment and tools that are used for various activities such as gardening and home improvement. Because of its nature as a storage unit, it cannot exist or do its function well without the principal. That is, its purpose is incidental or accessory to the purpose of the house.

305. This conclusion that a shed is an accessory building or accessory structure is further supported by the Minister’s statement when referring to its Instant Permits:

> “…to build **accessory structures** like decks or **sheds**…”[73] (emphasis added)

306. Since sheds are defined as, and are legal, as ‘accessory buildings,’ do these Sheds meet the minimum standards to exist? As per the permit applications that were approved, yes, they do meet the minimum standards (i.e., the minimum setback requirements). Further, the Minister cites no breach of the minimum standards. As the Sheds meet these minimum standards, which are prescribed by law, they are not ‘illegal.’

307. Sheds A2 & A3 are not prohibited by law and are fully compliant with the Regulations. The Appellant submits that the Minister denied these applications in a highly prejudicial way and the Minister’s handling of this file is against the principles of natural justice.

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[72] Minister’s Record, Tab F / Tab 3

[73] https://www.princeedwardisland.ca/en/news/province-introduces-instant-permits-for-some-property-developments

A2 & A3 as **Alleged** Shelters/Bunkees

308.The Minister did not perform a thorough analysis. The Minister made assumptions. The Minister did not apply a 'can you' test.

309.Earlier, it was asked what statute law is a shed — or even a bunkie — contravening? Considering the applications as sheds was discussed in the above section; now we will apply the 'can you' test to the Minister's assertion that A2 & A3 are shelters/bunkees and analyze if that is illegal.

310.Looking to the Act, there is no mention of "shelter" or "bunkee." Looking to the Regs, there is no definition for "shelter" or "bunkee" but there is a definition for building which references "shelter."

> 1.(c) "building" means any structure having a roof supported by columns or walls intended for the shelter, housing or enclosure of any person, animal, or chattel, and includes a mini home or mobile home;

311.The Oxford Dictionary of English defines "shelter" as the following:

> shelter | ˈʃɛltə |
> noun
> **1** a place giving temporary protection from bad weather or danger: *huts like this are used as a shelter during the winter* | *an air-raid shelter*.
>
> verb [with object]
> protect or shield from something harmful, especially bad weather: *the hut* ***sheltered*** *him* ***from*** *the cold wind*.
> • *[no object, with adverbial of place]* find refuge or take cover from bad weather or danger: *people were sheltering under store canopies and trees*.

312.The term "bunkie" originated from the word "bunkhouse," small buildings built by farmers to shelter seasonal employees in Ontario, Canada and other places in the world. The Oxford Dictionary of English defines bunkhouse as:

> bunkhouse | ˈbʌŋkhaʊs |
> noun
> a building offering basic sleeping accommodation for workers

313.Based on this analysis, the Appellant submits that even if Sheds A2 or A3 were used as "shelters" or "bunkies," a shelter or bunkie is not a 'dwelling unit.'

314.This is further supported by several statements in the Order LA17-06, where the Minister's own legal counsel, submitted:

> "…as these non-commercial storage buildings are not hooked up to water or sewer systems, they are not considered to be "dwellings"."[74]
>
> "…the use of non-commercial storage buildings as "bunkies" was not prohibited…"
>
> "There is nothing in the *Planning Act* or the Regulations to prohibit the storage of people…"

[74] Order LA17-06, para 4

> "It would be absurd to consider these structures to be dwellings. By way of example, if someone fell asleep in a gazebo, would that fact make the gazebo a dwelling?"
>
> ""Bunkies" cannot be considered to be dwellings as defined in the Act."[75]

315. The Minister's own Safety Standards Chief (aka Manager) testified:

> "nothing in the Regulations prevent sleeping in a non-commercial storage building"[76]

316. and from the Minister's own Safety Standards Officer (the staff that manage permit applications):

> "When asked whether you could live in a "bunkie" he replied "No"."[77]

317. Counsel for the Developer (now the Appellant) submitted:

> "Bunkies are not a prohibited use and there would need to be clear and express wording to prohibit using non-commercial storage buildings as bunkies."[78]

318. Of utmost importance, although the case was made that bunkies were dwellings and dwelling units, the Commission did not make that determination.[79]

319. The Appellant submits that even if sheds A2 & A3 were used as shelters/bunkees, they are not prohibited by law and therefore cannot be labelled "not of legal use."

320. In fact, the Northumberland Provincial Park campground also lists that they have "shelters." If these are prohibited by law, why is a PEI provincial park allowed to have them?

321. The Appellant submits, based on the above points, shelters/bunkees are not prohibited by law and, thus, cannot be labelled "not of legal use." As such, the Minister erred in denying permit applications for this reason.

Inconsistencies re Legal Use of Bunkies

322. The Minister denied the Appellant's applications for A2 & A3 since they are allegedly bunkies and bunkies are illegal according to **PEI law**.

323. In the previous section, it was shown that — even if the sheds were used as shelters — that is not a prohibited use according to the statutes, and thus, if not prohibited, must be allowed.

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[75] Order LA17-06, para 33

[76] Order LA17-06, para 26

[77] Order LA17-06, para 20

[78] Order LA17-06, para 43

[79] Order LA17-06, paras 60-66

324.This is supported by the fact that the PEI National Park[80] and PEI's Northumberland Provincial Park both have bunkies, or camp cabins (shelters without plumbing). The description for the bunkies at the PEI National Park is as follows:[81]

> "Enjoy a peaceful and extra-comfortable camping experience with a roof over your head in PEI National Park's new off-grid accommodation: the Bunkie!
>
> The Bunkie is a small cabin for 2 to 5 people. Each Bunkie includes one queen mattress bed, a double mattress loft, and a pull out single trundle bed. This space allows campers to fully relax and unwind without lugging much extra gear along with them.
>
> Six Bunkies are currently available, with 2 in Stanhope and 4 in Cavendish."

325.Further, doing a search of PEI accommodation reveals several mentions of bunkies, bunkhouses, sleeping cabins, etc. Some of these are for rent or sale, and some refer to bunkies in the media.[82] Not all of these are "shelters/bunkees" (i.e., without plumbing), but several are.

326.The Appellant submits that there are many "shelters/bunkees" existing already in PEI, and they have existed for many years (since at least 2016).[83]

327.The PEI National Park bunkie is a "shelter/bunkee;" the 'camp cabins' at the Northumberland Provincial Park are "shelters/bunkees" — the very same thing that the Minister said is illegal.

328.It is highly unfair and inconsistent for the Minister to deny A2 & A3 because of alleged shelter/bunkee use, that is quoted as "not of legal use" but yet, have their own set of bunkies.

329.This is flawed reasoning. The law must be applied consistently, to guard against arbitrary decision-making. If the PEI National Park and the Provincial Park can have shelters/bunkees, then others should be able to, as well.

330.Regardless, if the buildings are sheds or shelters/bunkees, the Appellant submits that the Minister applied the law arbitrarily, and denied these applications in a highly prejudicial way. The Minister's handling of this file is against the principles of natural justice.

Not Incidental to the Single Dwelling Unit

331.In the Minister's Decision, the following reason is provided for denial:

> "It is also clear that they are **not** of a legal use that is **incidental to the single dwelling unit."**

332.Again, this denial reason from the Minister appears to be based only on the assertion that the sheds are allegedly used as shelters/bunkees and that shelters/bunkees are not incidental because they are dwellings or dwelling units. This is an unproven assumption and is highly prejudicial.

333.It has already been submitted above, and proven, in the A2 & A3 as Sheds section that sheds are "incidental" to a single dwelling unit.

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[80] https://parks.canada.ca/pn-np/pe/pei-ipe/activ/camping/bunkie

[81] Appellant Exhibit 9.2

[82] Appellant Exhibit 9.1

[83] Appellant Exhibit 9.5

334.It has already been submitted above in the A2 & A3 as Shelters/Bunkees section that shelters/ bunkees are not prohibited by law and, by the definitions of both "shelters" and "bunkies," they are not dwelling units.

335.The definitions as per the Regs of 2018 (EC539/18) are:

> (g.1) "dwelling" means a building or portion thereof designed, arranged or intended for residential occupancy, **and**
>
> (i) "dwelling unit" means one or more rooms used or intended for domestic use of one or more individuals living as a single housekeeping unit with cooking and toilet facilities,

336.Sheds A2 & A3 do not meet the requirements of "dwelling unit" because:
- The sheds are not a single housekeeping unit.
- They are not a single housekeeping unit because they do not have cooking and toilet facilities.
- They are not used or intended for domestic use (to live in and run a household).

337.Sheds A2 & A3 do not meet the requirements of "dwelling" because, in addition to not being a dwelling unit, they are not intended for residential occupancy, i.e., not designed for people to live in, or take up residence in, or to reside in.

338.In the current Regs of 2022 (EC707/22), a new sub-definition to "dwelling unit" was added:

> (a.01) "accessory dwelling unit" means an independent dwelling unit, located on the same lot or parcel of land as an existing single-unit dwelling, that is
>
> (i) a garden suite,
>
> (ii) a secondary suite, or
>
> (iii) a supportive suite;

339.Sheds A2 & A3 do not meet this criteria because, as was shown above, they do not qualify as dwelling units.

340.Referring to the Order LA17-06, the Minister's own safety standards officer (the staff that manage permit applications), testified:

> "When asked whether you could live in a "bunkie" he replied "No"."84

341.In fact, in the Order LA17-06, in the Findings related to Permit 88 (Sheds A2 and A3), the Commission did not reference dwelling or dwelling unit in conjunction to sheds A2 and A3 at all.

342.The Appellant submits, again, that the Minister has purposely chosen a smattering of denial reasons to force the Appellant down the 'rabbit hole,' so to speak. It is, indeed, unfortunate and highly unfair that, instead of doing a proper de novo review of the applications (applications that the Minister requested), the Minister is rehashing old arguments that were already made, argued, and analyzed in Order LA17-06.

343.The Appellant had every intention, in these submissions, to stick to the current appeal, but unfortunately, in the Minister's Decision, the Minister decided to bring up everything and the kitchen sink, so to speak. It is submitted that this is highly unreasonable, highly unfair, unobjective, biased, abuse of process, and even an abuse of authority.

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[84] Order LA17-06, para 20

Illegal Shelters

344.In the Minister's Decision, the following reason is provided for denial:

> • The use of **illegal shelters/bunkees** (A2 & A3) is unsafe and unhealthy.

345.Again, this denial statement is based on an incorrect and unvalidated assumption. The Appellant submits that this should make the statement null and void, and is again a breach of process by the Minister.

346.This was already discussed above in the Not of Legal Use section where the Appellant submits there is no evidence to support that the sheds are shelters, and according to the statutes, they are not prohibited, and therefore, not illegal.

Not Clearly Defined

347.In the Minister's Decision, the following reason is provided for denial:

> As well, types of shelters/bunkees are **not clearly defined** in the *Planning Act* Subdivision and Development Regulations and could be construed as **shelters for human occupancy**, they are in violation of…

348.Referring to Order LA17-06, in the Introduction section it was indicated that the Minister's own legal counsel provided a letter to the Commission on December 9, 2015 in which he submitted:

> "…that there was a gap in the Subdivision and Development Regulations [re bunkies] that has been recognized by the Department and he advised that the Department "Will be creating Regulations to specifically address this issue in the near future, and he noted that the regulatory changes will be made in the new year…"[85]

349.Later in the Order, the Minister's own staff testified the same.

> "Mr. Carr [the Safety Standards Chief] noted that the Minister's staff now has one or two inquiries per year about "bunkies" and the matter is now on the Minister's "radar" and it is expected that in the future the Regulations will be amended to address "bunkies"."[86]

350.Then the Minister's own legal counsel stated:

> "Bunkies" are a new phenomenon in Prince Edward Island and new Regulations are being considered to address them.[87]

351.However, as of now (October 2024, nine years later), as has been discussed already, it's not that shelters/bunkees are not *cleary* defined; they are not defined at all in the Act and Regs.

352.Regardless, the fact that they are not defined does not make them in violation, as there is no statute to be in violation of… since one does not exist.

353.Again, this denial statement is based on an incorrect and unvalidated assumption that the sheds are shelters/bunkees and "could be construed as shelters." For the Minister to not just deny a permit

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[85] Order LA17-06, para 7

[86] Order LA17-06, para 26

[87] Order LA17-06, para 33

application, but to actually say it is "in violation of" something, or is "illegal," is beyond the authority of the permit review process and is a grandiose overreach to state such a claim when it is not only based on assumption, but also not defined in statute.

354. The Appellant submits that this is egregious and submits that this is against all principles of natural justice and procedural fairness.

Could be Construed As

355. In the Minister's Decision, the following reason is provided for denial:

> "As well, as these types of shelters/bunkees are not clearly defined in the *Planning Act* Subdivision and Development Regulations and **could be construed as** shelters for human occupancy, they are in violation…"

356. The "could be construed as" phrase has already been discussed above in many sections. The Minister has an obligation to review permit applications against the law, applying the two-part test — not to apply a subjective, arbitrary, unfounded, guessing 'could be' test. This is a clear abuse of process and highly prejudicial.

For Human Occupancy

357. The Appellant will now analyze the "for human occupancy" aspect in the below denial reason in the Minister's Decision.

> "As well, as these types of shelters/bunkees are not clearly defined in the *Planning Act* Subdivision and Development Regulations and could be construed as shelters **for human occupancy,** they are in violation…"

358. Instant Permits also refer to "human occupancy:"

> "Sheds must:
> • Not be used for human occupancy in any manner or form…"

359. These uses of "human occupancy" is concerning. On what basis is this defined? "Human occupancy" is not defined in the Act or Regs.

360. If a human steps foot in their shed, they are occupying that space. Is that human occupancy? Has the Minister overreached by getting around the Acts by having policy that says people cannot step into their own shed? Does the Minister have the legal authority to contemplate this, i.e., to constrain a person from stepping in to their shed on their own personal private property?

361. If that were the case, then no permit applications for any shed in PEI should be allowed since a human would have to step in them and that would be in violation.

362. In the Regs, there is this reference to "human occupancy:"

> (i.5) "habitable building" means any building designed **for human occupancy** in any manner or form;

363. The use of the word "habitable" is important because habitable, as per the Oxford English Dictionary, means 'suitable to live in.'

364. Did the Minister mean "residential occupancy"? This, too, is not defined in the Act or Regs but it is referenced in the dwelling definition.

(g.1) "dwelling" means a building or portion of a building designed, arranged or intended for **residential occupancy**, and …

365. "Residential" usually means 'to reside in' or 'to live in.' To live in something year round, as was discussed in the Public Health and Safety section, a human would need cooking and toilet facilities.

366. As was discussed in that section and others, a "shelter" is not contemplated in the Regs as being a "dwelling unit."

367. The Appellant submits that the Minister's whole basis for denial is on assumption that is not supported by the evidence.

368. Further, in the Minister's denial reason, the Minister is using terms that are not defined in the Regs (shelters) and then is assigning arbitrary meanings to them (for human, or possibly residential, occupancy), possibly hinting that they are 'dwelling units.' This is overreach around the Acts and is a breach of process.

369. The Minister is not permitted to make up new definitions and policies that are not supported by the statutes.

370. The Appellant submits that this denial reason based on "shelters for human occupancy" has no basis.

371. The Appellant further submits that this criterion used for the Minister's new Instant Permits is inappropriate given the arguments submitted.

Not Conforming to the Regs

372. The Minister's denial provided this reason:

> 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;

373. This reason for denial would only be valuable if the Minister could show that the sheds do not meet the minimum standards for setback requirements.

374. It is the Appellant's position that, based on the arguments herein, the applications did conform to the Regs.

Detrimental Impact

375. The Minister denied the applications as per *Planning Act* Subdivision and Development Regulations subsection 3.(2)(d).

> 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.

1.(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

(v) real property value;
(vi) competition with existing businesses;
(vii) viewscapes; or
(viii) development approved pursuant to subsection 9(1) of the Environmental Protection Act;

376. Referring back to Order LA17-06, it was stated by the Minister's own staff that they did not believe there was a detrimental impact:

> Mr. Carr noted that the present matter involves three sheds on the subject property, which is a relatively large lot, and in his opinion at the time it would not have been referred to Planning for consideration for detrimental impact.[88]

377. Also, the Counsel for the Developer (now the current Appellant) concurred:

> "In this matter there are only two small buildings being considered as bunkies and this would not be of a sufficient degree to constitute a detrimental impact."[89]

378. As was submitted in LA22002[90]by both the Appellant and the Minister, and also submitted LA21024[91], it is submitted herein that the definition of "detrimental impact" provided by the Regs is discretionary in nature; that there is no objective criteria on which to assess this.

379. In summary, before exploring this denial reason further, the Appellant submits that using this clause as grounds for refusal, particularly when not supported by cogent evidence, is unfair.

Public Health and Public Safety

380. The Minister's letter underlines the four words "public health, public safety" in the definition. This is understood to mean that the underlined words are the aspect of detrimental impact that the Minster uses as reason for his denial in the context of detrimental impact.

381. It would seem again that the Minister may be taking the position that sheds A2 & A3 are bunkies and, thus, are unhealthy and unsafe. This is an assumption that is not supported by the evidence and has already been discussed in the Public Health and Safety section and in the Orderly and Sustainable Development of Safe & Healthy Communities section.

382. In those sections it was concluded that the sheds, as inert lumps of wood, were not posing any threats to public health and safety.

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[88] Order LA17-06, para 27

[89] Order LA17-06, para 43

[90] LA22002 stated detrimental impact was discretionary in nature. *Parry Aftab & Allan McCullough v. Minister of Agriculture & Land*

[91] LA21024 stated 'detrimental impact' was too vague. *Lucas Arsenault, Jennie Arsenault and L&J Holdings Inc. v Minister of Agriculture and Land*, Order LA23-04. [Arsenault]

Water & Sewage Handling

383.Onsite water and sewage disposal facilities are provided by a septic system and tile field which was installed in the Fall of 2018.[92]

384.As was discussed previously, there is only one dwelling unit on the property. The dwelling unit contains a toilet that is connected to the septic system; the shower is also connected to the septic systems.[93]

385.

As a result of on-site facilities all connected to the septic system, there is no detrimental impact to public health or public safety or pressure on the municipality or the province to provide services.

Real Property Values and Viewscapes

386.For completeness, in the Minister's Record, Eleanor Mohammad states the following:

> "The provincial interests, 2.1. of the Planning Act, include 3 key sections relevant to this:
> …
> j) The protection of viewscapes that contribute to the unique character of Prince Edward Island." [94]

387.In the Regs, the definition for detrimental impact expressly *excludes* impacts on neighbours' real property values or viewscapes.

> 1.(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
>
> (v) **real property value**;
> (vi) competition with existing businesses;
> (vii) **viewscapes**; or
> (viii) development approved pursuant to subsection 9(1) of the Environmental Protection Act;

388.Further, referring to Order LA17-06 neighbour Donna Stringer testified that her view was not of question.

> "Under cross-examination, Mrs. Stringer acknowledged that the sheds did not impede her view of the water and that, to date, her safety and security were not compromised by the presence of the sheds."[95]

389.Referring to the Expert Opinion Report of Jenifer Tsang, Ms. Tsang states:

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[92] Appellant Exhibits 4.1, 4.2, 4.3

[93] Appellant Exhibits 4.4, 4.5

[94] Minister's Record, Tab F / Tab 3

[95] Order LA17-06, para 17

> For a planner or regulator to impose a higher standard for accessory buildings at this location (more restrictive than what is required in The Regs) for the purpose of preserving a non-legislated viewscape, does not follow sound planning principles.[96]

390. The Appellant submits that not only is Ms. Mohammad's comment not applicable, but it is outside the boundaries of sound planning principles and the Regs.

Expert Opinion Report of Peter Joostema

391. The Appellant submits that the Expert Opinion Report, provided by Peter Joostema, Principal Environmental Engineer of Joose Environmental, eliminates any purported concerns with the 2022 Permit Applications. It supports the Appellant's contention that there is no "detrimental impact" from the seasonal use of the property, environmentally speaking.

392. Mr. Joostema concludes that the Appellant's minimalist development poses no material risks to public health or safety, nor to the environment, or surrounding land uses. Of particular note, the following conclusion statements were made[97]:

- In relation to the placement of the onsite storage/accessory buildings, the subject site is private residential property within a seasonal cottage subdivision with no specific regulations in place (i.e., subdivision covenants), other than setbacks from the property lines and other infrastructure on site (e.g., well, septic system, etc.). In addition, the storage/accessory building appear to be well maintained and do not impact the viewscapes of the subject or neighbouring properties; and
- No detrimental impacts have been identified as the perceived risk to Public Health and Public Safety are no longer valid as the storage/accessory buildings are not being used as shelters/ bunkees and the Cottage is now serviced by an onsite sewage disposal system installed at the subject site by a licensed installer.

Detrimental Impact Conclusion

393. The Minister's grounds for refusal for detrimental impact is not supported by the Minister's evidence. In fact, referring to the Minister's Record, neither of his Planners indicated "detrimental impact" as a denial reason.

394. The Minister's exercise of discretion in this case was both subjective and lacking in factual underpinning, contrary to sound planning principles.

395. The Appellant submits, based on the above points, that the indicated detrimental impact factors are not triggered by the Sheds (A2, A3 or A4) proposed by the 2022 Permit Applications.

Fire Hazard

396. The Minister denied the applications as per *Planning Act* Subdivision and Development Regulations subsection 3.(2)(e).

> 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;

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[96] Expert Opinion Report, Jenifer Tsang, page 17

[97] Expert Opinion Report, Peter Joostema, page 4

(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.

397. The Appellant submits that the Minister did not provide any rationale in the denial letter to support this. Further, the Minister did not provide any evidence to support this claim. This is purely subjective opinion.

398. Sheds are generally not considered to result in a fire hazard. If that were the case, then no shed permit applications should be approved in all of PEI. But clearly, based on the public website[98] of permit results, that is, indeed, not true. Many accessory buildings are approved.[99]

399. The Appellant submits this is unfair and an abuse of process to deny the applications for reasons that aren't even backed up with any rationale or evidence. This further supports the Appellant's claim that the Minister purposely chose a smattering of reasons to burden this process and thwart the Appellant. This is egregious.

Contrary to the Approved Use of the Lot

400. The Minister provided the following denial reason:

> As well, as these types of shelters/bunkees are not clearly defined in the *Planning Act* Subdivision and Development Regulations and could be construed as shelters for human occupancy, they are in violation of section 34 of the *Planning Act* Subdivision and Development Regulations as **the use of the shelters/bunkees would not conform with the approved use of the lot for summer cottage use** - 1.(v.2) "summer cottage" means a single-unit dwelling that is intended to be occupied primarily during the summer months.
>
> *Planning Act* Subdivision and Development Regulations
>
> 34.No development permit shall be issued where the proposed use of the building or structure is contrary to the use specified on an approved subdivision plan. (EC693/00)

401. The Minister has stated in the reasons above that:

> "the use of the shelters/bunkees would not conform with the approved use of the lot for summer cottage use."

402. As has been previously discussed many times, the Sheds are not being used for shelters/bunkees.

403. Even if they were being used for shelters/bunkees, this would still not be against the approved use of the lot for summer cottage use. They would be accessory, or incidental, to the approved lot use.

404. This is supported by the following statements[100] from the Expert Opinion Report of Jenifer Tsang:

> I have reviewed the approved subdivision plan that created the subject property…It states that the subject lot is "for summer cottage use only''. The Regs allow accessory buildings to all land

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[98] https://www.princeedwardisland.ca/en/feature/pei-planning-decisions

[99] Appellant Exhibits 2.3, 2.4

[100] Expert Opinion Report, Jenifer Tsang, page 8

uses including summer cottages. Therefore, the proposed accessory buildings are not contrary to the use specified in the subdivision plan.

If the permit applications were actually proposed for "shelter/bunkees" the request would be to have them on the same property as the main summer cottage. … In this context of being on someone's personal residential property, a "shelter/bunkee" or "backyard shelter'' would be considered a type of accessory building which would align with a summer cottage.

405.The Appellant submits that the Minister is making an assumption that (1) the Sheds are “shelters/bunkees” and (2) that “shelters/bunkees” are contrary to a summer cottage lot. This is not supported in the Regs and is overreaching. It is assigning arbitrary, subjective opinion to what is actually in the Act.

406.The Minister is not permitted to make up new policies that are not supported by the statutes. The Appellant submits this is a breach of process.

407.The Minister maybe is implying that, not only does he believe that the sheds are shelters/bunkees, but that they are rented? The Appellant submits that the sheds are not used as shelters/bunkees and have never been rented.

408.Even if they were rented (as sheds or shelters/bunkees), obviously that is not contrary to the land use of the subdivision plan as there are several other properties on the same road that are advertised rentals via VRBO (vacation rental by owner) and/or AirBnB.[101]

Summer Cottage

409.It is interesting that the Minister quoted the definition for “summer cottage:”

1.(v.2) "summer cottage" means a single-unit dwelling that is intended to be occupied primarily during the summer months.

410.“Summer months” is not defined in the Act or Regs, but according to the Almanac[102], it indicates that the meteorological start of summer is June 1 and the meteorological start of Fall is September 1. Even if one considers the astronomical start (usually around June 20 and Sept 21, respectively), it is stated that each season is three months.

411.The Appellant submits that there are many people that stay in their cottages longer than the summer months of June, July and August. Many people, including the Appellant’s cottage neighbours, stay 5 or 6 months, e.g., May to October.

412.The Appellant submits that ensuring the definition of “summer cottage” is applied to each and every property would not only be very difficult, but that the Minister does not do so; the Minister has exercised his discretion and taken a broad approach.

413.However, for the Subject Property, specifically, the Minister has taken a very narrow approach, choosing a number of regulations on which to deny the 2022 Permit Applications — regulations that are not applied with the same vigour to other properties. The Subject Property is not afforded the same broad, discretionary lens as the definition of “summer cottage” or even other properties.

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[101] Appellant Exhibit 7.1

[102] https://www.almanac.com/content/first-day-seasons

414.This inconsistency is certainly inequitable and should not be permitted. It further points to the narrow focus the Minister is taking with this particular property, and points to the failing of natural justice and sound planning.

Alex O'Hara's Report

415.The Appellant will demonstrate that Mr. O'Hara's "rudimentary report" is unsound and not based on sound planning principles or those of natural justice.

Commercial Campground

416.In the Minister's Record[103], Alex O'Hara made the following statement:

> "Property appears to be being used as a commercial (campground) with the subject structure A2 (accessory structure) and structure C (Cottage) both being used as dwelling units."

417.There is no definition of a "commercial campground" in the Regs.

418.On the Appellant's permits applications, take note that in 6b (re: what will the proposed development be used for), there is the option to indicate "commercial." This was not checked.

419.This is an improper administration of the Act since, technically, a person is allowed to seek a campground permit. Notwithstanding that, the Appellant has not done this and has no intention to do so.

420.With respect to the assumption of A2 and C both being used as dwelling units, as has been discussed several times in this submission, there is no evidence provided to support this. That is an incorrect and invalid assumption.

421.There is evidence of other rural properties in the general area that have tents and camper trailers on their properties and have buildings that look very much like bunkies.[104] There is also evidence of many islanders advertising they have bunkies (or a similar word).[105]

422.The Appellant submits that this is, again, a denial reason based on an incorrect and unvalidated assumption. It is a breach of process, not sound planning, and not based on natural justice.

Appears to be Contrary

423.Mr. O'Hara goes on to conclude:

> "Current use **appears to be contrary** to the approved use…"

424.The Appellant again submits that the use of word "appears" is not principled or informed. It is supposition and cannot be used to deny these applications.

425.It is a far reach to assume that the sheds, even if they were shelters/bunkees, constitute a commercial campground. This is certainly not principled and it is not sound planning.

Planning Considerations

426.Mr. O'Hara listed his planning considerations as the following.

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[103] Minister's Record, Tab F / Tab 2

[104] Appellant Exhibit 3.1

[105] Appellant Exhibits 9.1 and 9.5

"Planning considerations relevant include:
- Previous planning decision on the application site
- Noise and disturbance resulting from the proposed use/development;
- The layout and density of the buildings/development"

Previous Planning Decisions

427. The Minister is certainly allowed, and should, consult previous planning decisions. But that does not give the Minister the right to rely on these decisions and **assume** they are still relevant. Any previous history must be validated. By not doing so, the Minister's staff have not fulfilled their obligations to proper process.

Noise and Disturbance

428. The Appellant submits this is completely irrational and arbitrary to state that there is noise and disturbance coming from sheds (even if they were used as shelters/bunkees).

429. This assertion is not substantiated; there are no examples in evidence.

Layout and Density

430. As previously discussed, there are no Regs or covenants to prohibit the layout or density. Further, the density is about 0.7% of the entire lot and, as was discussed previously, there are many other properties that have larger, and multiple, outbuildings.

Detrimental Impact

431. It should be noted that Mr. O'Hara's report did not indicate "detrimental impact." This, again, demonstrates that the Minister seemed to have chosen a number of broad reasons to satisfy his goal of denying the applications.

Alex O'Hara's Conclusion

432. Mr. O'Hara ends his "rudimentary report" with the following:

> "Given the apparent use of the property, I would not recommend approval unless a development agreement is signed, stipulating the accessory structures use and that the accessory structures are relocated."

433. Mr. O'Hara is basing his whole report on assumption; on "appears" and "apparent." This is not sound planning or principled and informed.

434. Submissions on "apparent use" were previously provided. There is no cogent evidence to support the claim of "apparent use." Thus, there is no rational reasonable reason to "not recommend approval."

435. With respect to a requirement to sign a development agreement, previous submissions considered the 'can you' test, which is in the A2 & A3 as Shelters/Bunkees section, which also concluded that there was nothing to prohibit.

436. Do the sheds meet the technical requirements? Yes. It was already discussed that they do, and in the Expert Planning Report submitted by Megan Williams, the Minister's own staff agreed the same.

437. As the sheds are technically compliant, it is unjust to suggest that a signed development agreement is required. It is unjust to sign or agree to do something when that something is not specifically illegal, or that would preclude the property owner in the future or if the Regs change.

438.The Minister's staff are taking an extremely narrow focus of the Subject Property to suggest conditions and enforcement actions when (1) the sheds are technically compliant and not illegal; (2) the suggested possible conditions and possible enforcement is based on pure supposition; (3) there is nothing in the Act to define 'shelters/bunkees' and their use; and (4) cottages on the same road are being rented.

439.This is an extreme position for the Minister to take for one property. If the Minister is going to take this stance, then these conditions should be indicated for every permit application in PEI and a process should be in place to confirm such conditions are being met for every property on the island — not just for the Subject Property.

440.These statements, and those in Megan Williams' report, are highly prejudicial to the Appellant and unwarranted according to the actual usage and the law.

Approved Lot Use Conclusion

441.The Appellant submits that the Regs allow accessory buildings to land uses. Therefore, the sheds are not contrary to the use specified in the subdivision plan and the permits (A2, A3, & A4) should not be denied on this basis.

442.There is no evidence to demonstrate that the development is contrary to the intended use of the Subject Property.

443.The Minister and his staff have a duty of care to apply the Regs in a prescribed way and equitably to all permit applications. The Minister is obligated to validate assumption before using it to arbitrarily deny applications. By not doing so, the Minister has breached all principles of natural justice, procedural fairness, and sound planning.

Issue: A4 Substance

444.In regard to the Minister's denial of Shed A4, the following passages are bolded.

Decision

> The Minister of Agriculture and Land is denying the applications for the **three accessory structures (A2, A3 & A4 on the attached sketch)** in Little Pond PEI as per the *Planning Act,* sections 2.1.(1)(h) *& (l)* and the *Planning Act* Subdivision and Development Regulations subsection 3.(2)(a), (d) & (e) and section 34.

Reasons

> The provincial interests, 2.1.(1) of the *Planning Act,* include 2 key sections relevant to this:
>
> h) The effect of the proposed planning development on, and measures for the protection of public health and safety
>
> l) The orderly and sustainable development of safe and healthy communities
>
> - The two additional sheds (A2 & A3) are being used as apparent shelters/ bunkees, with no toilets or running water. This would not meet typical health standards. It is also clear that they are not of a legal use that is incidental to the single dwelling unit.
> - The very nature of the sheds (A2 & A3) being used as shelters/bunkees, and not for storage, indicates that only one shed is actually needed for storage.
> - An average residential yard will have one garage and/or one shed.

- The placement of the structures (A2 & A3) on the property is not orderly for the use (as storage). Sheds generally are placed immediately beside or behind a dwelling unit.
- The use of illegal shelters/bunkees (A2 & A3) is unsafe and unhealthy.
- **With the toilet being moved inside the dwelling unit, the current structure (A4) used for the former composting toilet should be removed. There is no rationale for this structure to remain.**

Planning Act

2.1.(1) The Minister in carrying out the Minister's responsibilities in relation to planning matters and the effects of proposed development under this Act shall have regard but not be limited to matters of provincial interest, such as
(h) the effect of proposed planning development on, and measures for the protection of, public health and safety;
(I) the orderly and sustainable development of safe and healthy communities;

Planning Act Subdivision and Development Regulations

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;
(d) have a detrimental impact; or
(e) result in a fire hazard to the occupants or to neighbouring buildings or structures.

445.The Decision indicates that Sheds A2, A3 **& A4** are denied as per "the *Planning Act*, sections 2.1.(1)(h) & (I) and the *Planning Act* Subdivision and Development Regulations subsection 3.(2)(a), (d) & (e) and section 34."

446.However, in the Reasons section, most of the focus is on A2 & A3 allegedly being used as "shelters/bunkees" and, thus, allegedly contravening "the *Planning Act*, sections 2.1.(1)(h) & (I) and the *Planning Act* Subdivision and Development Regulations subsection 3.(2)(a), (d) & (e) and section 34."

447.Rather than repeat the same arguments, the Appellant submits that the previous submissions in the A2 & A3 Substance section, though indicated primarily for A2 & A3 (as per the above Reasons), apply to A4, as well, if appropriate and necessary.

448.Therefore, this section will focus only on the following denial reason:

- **With the toilet being moved inside the dwelling unit, the current structure (A4) used for the former composting toilet should be removed. There is no rationale for this structure to remain.**

Not needed

449.The permit was for an accessory building — not for a 'building that must contain a toilet.'

450.This is also supported by the Expert Opinion of Jenifer Tsang, wherein it is stated:

> The historical fact that an earlier development permit application for building NI/A4 was to contain an approved composting toilet does not override the legislative framework for accessory buildings. It is not a proper interpretation or administration of The Act or The Regs to deny this accessory building because of what it may contain at some point in time.[106]

451. The Appellant submits there is no rationale for this structure to be prohibited. This structure is an accessory building, incidental and subordinate to the main dwelling.

452. There are no Regs to indicate how much storage a property owner is allowed or what items are allowed to be stored in an accessory building.

453. Regardless if A4 no longer requires the composting toilet, that is irrelevant to A4 being a valid accessory building.

454. Accessory buildings are permitted by the Regs.

455. There is nothing in the Regs to indicate the number of accessory buildings, the placement, or what is stored therein. On this basis, Shed A4 should not be denied.

Error of Process

456. Referring back to the Past Applications section, it should be noted that the Appellant was already in receipt of a valid approved permit for accessory building A4.

457. Thus, the Appellant should not have had to open a new application for A4, but was expressly asked by the Minister's staff to do so.

458. Since A4 met the minimum standards, and was previously approved, the Appellant had the reasonable expectation that it would be approved a second time.

459. It was a shock when the Minister made a new decision that denied A4.

460. The Appellant submits that it was unreasonable and inappropriate for the Minister to require a re-application.

461. The Appellant submits that this request was unfair, and may not have been in good faith, thereby, not following the principles of natural justice and procedural fairness.

Arbitrary and Biased

462. Previous history shows a letter from John Stringer wherein he stated:

> "…that since there will be no composting toilet, then there is no need to have the building in which it is housed and that the building should be removed from the property."

463. It should be noted that the Minister's denial reason is very much the same as this statement, and as discussed earlier in the Influenced and Bias sections, seems beyond coincidence.

464. As was submitted previously, past history and decisions should be considered, but new applications should receive due — and de novo — consideration.

465. The Appellant submits that it appears the Minister's decision was influenced or biased by the previous assertion of Mr. Stringer.

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[106] Expert Opinion Report, Jenifer Tsang, page 24

466.The Appellant submits that Mr. Stringer's opinion is not necessary or relevant.

467.The Appellant submits that the Minister did not properly review the application, and made an arbitrary and biased decision.

468.This process and decision does not represent natural justice, procedural fairness, or sound planning. As such, the Minister is not owed deference.

Conclusion and Order Sought

469.Since the date of the previous Order LA17-06[107], the circumstances of the Subject Property have changed. Sheds A2 & A3 are not used as shelters/bunkees. There is an installed septic system and tile field, which handles all on-site water and sewage. There is a toilet in the cottage.

As per the Commission's findings in Order LA20-03:

1.
"The Commission is only concerned with whether the Application was processed appropriately and that sound planning principles were followed coming to the determination on that Application and the resultant decision to issue a Development Permit."[108]

First Part of the Two-Part Test

470.The Appellant has demonstrated throughout these submissions that the Minister has demonstrated an inability to objectively and fairly assess the applications.

471.The Minister based the Decision on subjective, arbitrary, biased opinion and/or assumptions, as well as on factors that were not relevant.

472.The Appellant relies upon the Expert Opinion Report provided by Peter Joostema (and also upon the Expert Opinion Report by Licensed Professional Planner, Jenifer Tsang) and submits that the "detrimental impact" analysis provided in the Minister's Decision is without merit.

473.The Appellant has demonstrated throughout these submissions that the process used was flawed or in error entirely; fairness did not seem to form part of the review or process; and logic was flawed and/or inconsistent or irrelevant.

474.The Appellant has demonstrated that, based on the evidence cited, there are grounds for reasonable apprehension of bias.

475.The Appellant submits that the Minister failed in the first part of the two-part test. The principles of natural justice and procedure fairness were not applied.

Second Part of the Two-Part Test

476.Sound planning principles are supposed to guard against arbitrary decision-making, but that was not the case here.

477.Sound planning principles require discretion to be exercised in a principled and informed manner.

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[107] Order LA17-06 was rendered on August 10, 2017.

[108] Order LA20-03, para 93

478.The Appellant submits that the Minister's analysis of sound planning principles respecting the Subject Property was flawed, in that it was not performed by a "professional land use planner," thus allowing for subjective and arbitrary decision making by Mr. O'Hara and, by extension, the Minister.

479.The Appellant relies upon the Expert Opinion Report provided by Licensed Professional Planner, Jenifer Tsang (and also upon that of Environmental Engineer, Peter Joostema), and submits that Sheds A2, A3, and A4 align with the predominant land use in the area, and that the Decision's focus on assumption and arbitrary and/or biased reasons where no statutory reasons exist, calls into question both the objectivity of the Minster's Decision, and his sound planning principle analysis.

480.The Appellant, thereby, submits that the Minister failed in the second part of the two-part test. Sound planning principles were not applied and, as per the Minister's Expert Opinion by Megan Williams, might not have even been relevant to this case.

Order Sought

481.The Appellant has cited several times in these submissions that, based on the egregious handling of this case, the Minister is not owed deference.

482.The Minister's own introduction of Instant Permits shows that the permit applications for Sheds A2, A3 and A4 should be approved forthwith.

483.The Minister's decision to deny the permit applications should be quashed forthwith and replaced with approval on the basis of the evidence cited, the Record, and the expert opinions.

484.The Appellant submits, based on these submissions, the Minister's lack of cogent evidence, and the Decisions not being based on statutory legislation, that this entire appeal hearing should be completely dropped.