June 10, 2022

VIA EMAIL: pjrafuse@irac.pe.ca

Island Regulatory and Appeals Commission
134 Kent Street
National Bank Tower, Suite 501
Charlottetown, PE C1A 7L1

Attention: Philip Rafuse, Appeals Administrator

Dear Mr. Rafuse:

RE: LA21024 – Lucas & Jennie Arsenault/L. & J. Holdings Inc. v Minister of Agriculture and Land

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On behalf of the Appellants, Lucas & Jennie Arsenault / L. & J. Holdings Inc. (the "Appellants"), please accept the following submissions as the Appellant's closing submissions in the above-noted matter.

Background

The Appellants are appealing a decision of the Respondent, the Minister of the Department of Agriculture and Land (the "Respondent") dated September 17, 2021, whereby the Respondent denied the Appellants' application for a lot consolidation and a 19-25 lot subdivision at 110 Hennebury Road, Rice Point, Prince Edward Island, being more particularly identified as PIDs 203000 and 808154 (the "Property") (the "Application").

The Appellants filed a Notice of Appeal on or about October 7, 2021 and an Amended Notice of Appeal on or about March 24, 2022.

The Appellants request an Order from the Island Regulatory and Appeals Commission (the "Commission") allowing the Appellant's appeal, thereby approving the Application.

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The Hearing

The appeal hearing was scheduled and heard on May 16, 17, and 18, 2022. On behalf of the Appellants, the Commission heard evidence from the Appellants themselves, Peter Joostema, FEC, P. Eng., CESA, an expert in environmental engineering and hydrogeology, Todd Stokes, AACI. P. App., an expert in real estate appraisal and Jenifer Tsang, MCIP, LPP, an expert qualified as a professional land use planner.

The Respondent replied with evidence from Tobin Stetson, P. Eng., an expert in soil and water conservation engineering, Alex O'Hara, Land Use and Planning Act Specialist for the Respondent and Eugene Lloyd, Acting Manager of Planning for the Respondent. Mr. O'Hara was not at the times material to the Appellants' application (July – September, 2021 nor is he as yet an accredited member of any Canadian, Atlantic or PEI planners organization. He remains early in the process of seeking Atlantic Canadian qualifications but has yet to file (and have approved) all the background credentials to put him on what will be a two (2) year track towards membership and accreditation.

The Test

The Appellants rely on the two-part test set out by the Commission in Order LA17-06, *Stringer v Minister of Communities, Land and Environment* ("*Stringer*"). In *Stringer*, the Commission outlined this test to be used in the context of its standard of review of planning and land-use related decisions, which reads as follows:

> (1) 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,
>
> (2) Whether the Minister's decision with respect to the application for development and 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*.

With respect to the first part of the two-part test, the Appellants do not take issue with the process and procedure undertaken by the Minister in processing the Application. It is the

second part of the two-part test which the Appellants submit was erroneously carried out by the Minister and resulted in a denial of the Application.

In the Respondent's denial letter **[Tab 1, page 8]**, Mr. O'Hara referred to a threshold test initiated by him and applied by him in his role as a Land Use and Planning Act Specialist when processing applications before him, which reads:

> Applicants must satisfy the question of "can you?" under the provincial subdivision and development regulations. <u>Planning Comments address the question "should you?" in preparing a recommendation for the proposal.</u>

There was no indication in the Minister's evidence that such a test was reviewed by legal counsel. The Appellants submit that the use of the question "should you" is highly subjective, vague and arbitrary. In this matter, this test led the Respondent to the improper application of sound planning principles, which was used as the only reason for denial of the Application. The Minister acknowledged that all of the so called "technical" requirements were satisfied.

<u>Technical Requirements</u>

The Appellants submit that the technical requirements of the Application were all satisfied at the time the Application was processed. In support of this position is the "Pre-Development and Subdivision Inspection Report" found at **[Tab 6 pages 81-82]** of the Respondent's Record. In that document, which the Appellants refer to as a "checklist", the Respondent had gathered and summarized all of the comments received on the Application **[Tab 4A-F]** from the various government departments to which it was circulated for feedback. In particular, the following 'technical' information was outlined:

- Department of Transportation and Infrastructure outlined the road requirements, which would be met by the Appellants;
- No comments from the Provincial Fire Marshal;
- Department of Environment, Energy and Climate Action recommends a central water supply or a sufficient buffer from the shoreline if individual wells are installed;
- Department of Environment, Energy and Climate Action declared a '<u>low</u> erosion hazard' and <u>minimal</u> flood hazard';

- Department of Environment, Energy and Climate Action confirmed that the swale intersecting the Properties is not a watercourse or wetland; and
- The soil is Category 2.

None of the comments received on the technical requirements of the Application were of concern to the Minister's officials, nor were they not all normal and readily attainable requirements for the Appellants. This fact was confirmed in evidence by Mr. Lloyd as he indicated that the denial was based solely on the planning principles recommendation from Mr. O'Hara, which is as indicated in Mr. Lloyds' handwritten note on the 2nd page of the checklist. Record Tab 6 pages 81-82.

As further confirmed in evidence by Mr. Lloyd and in the denial issued by the Respondent **[Tab 1 Page 5-7]**, the reason for denying the Application was that it was (erroneously the Appellant contends) concluded that the Application did not satisfy sound planning principles in that the subdivision and development of the Properties was determined by Mr. O'Hara to constitute "premature development", resulted in "detrimental impact", removed "prime" agricultural land and would be "incompatible" with the surrounding land uses.

Sound Planning Principles

In *Stringer*, the Commission confirmed that development in the Province of Prince Edward Island must have merit based on sound planning principles. Given that the application of sound planning principles is not black and white, the Commission provided further guidance with the following comments:

> "Sound planning principles are a guard against arbitrary decision making *especially where a regulatory checklist does not address a concern."*
>
> "Sound planning principles require regulatory compliance but go beyond merely insuring such compliance and *require discretion to be exercised in a principled and informed manner*."
>
> "Sound planning principles require the decision maker to take into consideration the broader implications of their decisions."

> "From a review of the file and the testimony of Mr. Carr, it is clear that the Minister did not consult with a *professional land use planner* prior to issuing either Permit 87 or Permit 88. This causes the Commission concern, especially where there are compelling reasons to seek the expertise of a professional planner." (see also paragraphs 62, 64 and 66 which also consistently reference the need for a "professional land use planner") [1]

The Commission was crystal clear that in order to ensure adherence to sound planning principles, a "professional land use planner" must be consulted. (See footnote 1.) But, Mr. O'Hara, who undertook the sound planning principles analysis for the Respondent, is <u>not</u> qualified as a "professional land use planner"; and, he was not qualified as such by the Commission but rather as an individual "having expertise in the area of land use planning".

The Appellants submit that the Respondent's analysis of sound planning principles was flawed in that it was not performed by a "professional land use planner", it was not done in a "principled and informed manner" and thus allowed for arbitrary decision making by Mr. O'Hara even when the regulatory checklists did in this particular instance already objectively / specifically address all potential planning concerns with the Application. These were based upon clear, objective empirical criteria.

By contrast, Mr. O'Hara's self initiated "*should you* test" - was based largely upon general recommendations found in past PEI land use studies - which were never enacted into law by statute or regulations resulted in an adverse decision based upon one individual – as yet still not a formal candidate planners - application of an arbitrary and highly subjective test. The Commission has made it clear in Stringer that only a "professional land use planner" actuated by a "*discretion to be exercised in a principled and informed manner*" could perform a proper planning principles review.

Ms. Tsang, who is a professional land use planner, submitted a methodical and well reasoned report and gave oral evidence regarding her concerns and issues with respect to Mr. O'Hara's analysis; - and how, in her view and expertise, a proper sound planning principles analysis would have resulted in approval of the Application.

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[1] *Stringer*, at paras. 51, 62, 64, and 66

In undertaking a sound planning principles analysis, Ms. Tsang stated that it is a contextual analysis, meaning that it is done in the context of the governing rules and regulations and not in ignorance of those rules and regulations:

> As professional land use planner, I would approach this concept in a way that enhances one's review of the regulatory framework that exists in The Act, rather than viewing it "instead of" or as a "replacement for" the regulatory framework. This means that an application must still be reviewed against the applicable criteria in the Act (sic. Regulations) and if a proposal meets all of the criteria, there may be other criteria that fall under "sound planning principles" that should be considered. This approach should not be used to disregard or contradict the analysis of specific regulations of The Act because that would not be legally supported and would render the provisions of the Act as ineffectual.[2]

The Appellants submit that Ms. Tsang's approach to a sound planning principles analysis is the correct approach as, in the words of the Commission, it guards "against arbitrary decision making" and provides for discretion to be exercised in a "*principled and informed manner*".

It is here where the Appellants submit that the sound planning principles analysis performed by Mr. O'Hara was fell into error. While Mr. O'Hara confirmed in evidence that as part of his analyses, including his analysis of the Application, he does consider the *Planning Act,* RSPEI 1988, c P-8 (the "*Act*") and the Subdivision and Development Regulations (the "Regulations"), his evidence was that in addition he considered and applied <u>recommendations</u> in various historic policy documents and studies (including, but not limited to, the Provincial Government (1991) '*General Land Use Policy*' and the Provincial Government (2016) '*Provincial Land Use Policy*') <u>most of which recommendations never made it into law</u>. Mr. O'Hara did not appear to be sensitive to the difference between recommended policy and law.

By considering and subjectively applying these policy recommendations and other statistics or information outside of the purview of the *Act* and the Regulations, the Appellants were faced with complying with policies that are not law and that they did not know about. This put the Appellants at an unfair and impossible disadvantage. It is plainly not the proper methodology for a sound planning principles analysis conducted by a "professional land use planner" in a 'principled and informed manner".

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[2] Jenifer Tsang Report, page. 24

The Respondent's Sound Planning Principles Analysis

Mr. O'Hara recommended denying the Application based on three (3) primary reasons in his sound planning principles analysis: (1) premature land subdivision; (2) development of agricultural land; and (3) coastal development **[Tab 1, pg. 9]**. He provided brief written reasons to support each of those points and gave oral evidence to similar effect.

In the Appellants view, his reasoning was not properly tempered by nor in the context of the *Act* and the Regulations;- rather it was based on his own subjective opinions, unsupported by the facts, and miscellaneous past government policy documents that the Appellants were not and could not have been aware of.

1. ***Premature Land Subdivision***

The Appellant's submit that approving the Application would not result in premature land subdivision.

As part of the evidence offered by the Appellants to support this position, the Appellants referred to Part III of the Regulations entitled Standards, which covers subdivisions from section 12 to section 30. These sections are the 'context' in which Ms. Tsang refers should form part of the sound planning principles analysis – they are, in the Appellants submission, largely a codification of sound planning principles, which guard against arbitrary decision making. With respect to Mr. O'Hara's written reasons and oral testimony on this point, the Appellants respectfully submit that he made an arbitrary and highly subjective decision that went beyond and differed from the regulatory checklist. It was inappropriate and unnecessary to do so given that the Regulations would have allowed a decision to be rendered on this point in a "principled and informed manner" and absent any unaddressed area of planning concern.

The Appellants submit that the Respondent ignored the Regulations when 'premature land subdivision' was used as a reason for denial as the Regulations contemplate premature land subdivision by having provisions that act as safeguards against premature land subdivision. For example, section 18 contemplates phasing of subdivision development, which requires a certain number of lots be sold before the second phase of development can continue. Section 19 specifically outlines minimum lot requirements and section 23 outlines lot categories – both of these sections help avoid any detrimental impact that may be a concern for the environment, the public and/or surrounding land owners as it may relate to premature development.

In support of the Appellants position that the Application does not constitute premature land development, written and oral evidence of Mr. Stokes and Ms. Tsang was also presented at the hearing on this point.

Mr. Stokes provided extensive evidence on this point, in his role as a certified real estate appraiser who is intimately familiar with the area of Rice Point. Mr. Stokes' fact-based evidence confirmed that there is not an oversupply of vacant lots in Prince Edward Island and certainly not an oversupply of vacant lots available on the market in Rice Point. As part of this evidence, he noted the difference in approved vacant lots, a term used frequently by the Respondent to support their oversupply argument, and available vacant lots, - which is a real time statistic proving that there is not an oversupply. In addition, Mr. Stokes gave detailed evidence on surrounding homes and subdivisions, supporting the Appellants position that the Application would be considered compatible infill development.

Ms. Tsang, using the facts provided by Mr. Stokes and Mr. Greg Morrison, discussed infill in the rural context as infill is typically a term used in the context of an urban area. Her evidence is that development on the Properties would carry out the concept of *infill in a rural context* because it is located between and around existing subdivisions, is one of only a few available tracts of land capable of accommodating a new road and the Properties' proximity to a provincially serviced road. Ms. Tsang also supported the evidence of Mr. Stokes with respect to approved vacant lots vs. available vacant lots. Her evidence is that the most accurate representation of market demand is available vacant lots, which Mr. Stokes evidence confirmed were quite minimal.

One of the reasons for denial was that the proposed development was "incompatible" with surrounding uses. Mr. Stokes evidence included a drone video of the Rice Point area which the Appellants submit is a clear illustration that low density residential development is as predominant / prevalent as agricultural uses in Rice Point. It is an interesting coincidence that both Mr. O'Hara and Mr. O'Shea reside nearby in Rice Point. Messrs. Stokes and Morrison as well as Ms. Tsang all saw no issue with compatibility. It would almost appear as if Mr. O'Hara subconsciously conflated the proposed change of use of the subject property from what is now passive or low-level agricultural use to a higher end residential subdivision with incompatibility.

Finally, the Commission, in Order LA96-05, *Meadowbank and Clyde River v Department of Provincial Affairs and AG*, found that 'premature development' is a multi-disciplinary term that

imports social, economic and fiscal considerations and that a determination of same is based on several factors, including: the demand and supply of existing lots in close proximity to the proposed subdivision; the expenditure of public moneys and the ability to service proposed lots; and, the loss of productive agricultural land.

Based on the evidence presented by both the Appellants and the Respondent, the Appellants submit that there are no negative social, economic or fiscal considerations that would support denying the Application based on it being "premature development". There will never be central municipal services in this immediate area – certainly for many years. This development contemplates private well and septic at the owner's cost. The road will be built to public standards but at private cost. Ms. Tsang's report includes an overview of what constitutes 'premature development' from the perspective of a professional land use planner. There will be no pressure for public services or expenditure. Mr. O'Hara suggested that the development could possibly trigger a need for *off site* public expenditures to for example improve Hennebury Road. Mr. Stokes and Ms. Tsang's evidence was that as a practical matter and on the other side of the ledger the Province would be in receipt of substantial property tax revenue from the proposed higher end residential development that would more than offset any such need.

In short, there are no negative social, economic or fiscal considerations that would support the Minister's denial of the Application.

2. *Development of Agricultural Land*

The Appellant's position on this point is that the Properties are not "prime" (as stated by Mr. O'Hara) agriculture land and that the Application should not have been denied on this basis. This is particularly so given that nowhere in the *Act* or the Regulations does it explicitly state that "prime" – or even "productive" agriculture/resource land is a significant / primary consideration when processing subdivision applications – this is where, in the Appellants view, Mr. O'Hara erroneously placed significant emphasis on government policy documents that are not law.

It is also worthy noting that there are rural subdivisions too numerous to mention all across PEI many of which front on the water and many of which removed prime or productive agricultural land from production. These subdivisions were not denied. Why this one? *Indeed, Mr. Lloyd - who has worked for the Province as a development officer for over 20 years - testified in response to a question from Commissioner Mitchell - that the Appellants proposed*

subdivision was the <u>first one</u> ever denied by reason of moving agricultural land into a low density residential use.

In support of the Appellants position that the Properties are not prime agriculture land, the Appellants presented relevant evidence from the various perspectives of three (3) expert witnesses.

First, Mr. Joostema confirmed that despite the Respondent's contention that the Properties may be at risk of groundwater contaminants due to its current use and neighbouring uses, his tests confirmed that there would be an adequate supply of potable water to support the subdivision and that there are no current impacts from agricultural activity or saltwater intrusion.

Mr. Stokes gave extensive evidence on the classification of the Properties by the Respondent as 'prime agriculture/resource land'. His evidence from the perspective of a real estate appraiser was that given the swale bisecting the Properties and the small size and topography of the Properties, economic use of the Properties for agricultural purposes is unlikely as it would be challenging for modern farming machinery and inefficient.

Ms. Tsang, as a professional land use planner, spoke of the constant need to balance "many and sometimes conflicting objectives" as part of a sound planning principles analysis. As a result, the desire to preserve agricultural land, whether it is considered prime or productive, must be balanced with "the economics of farming, the need for population growth to support the community's economy, housing needs, the provision of services, and individual property owners' rights[3]". While she is of the view that the Properties are not prime agricultural land, for reasons including the small acreage (one parcel of approximately 14 acres of arable land and one parcel of approximately 17 acres of arable land), the bisecting swale on the Properties and the current use of the Properties, Ms. Tsang also confirmed that prime agricultural land, in the context of the *Act* and the Regulations, cannot be a reason for denying the Application based on the multidisciplinary nature of all of the land use considerations and how the *Act* and Regulations account for this multidisciplinary approach.

Ms. Tsang also commented on the compatible natural of residential and agricultural land use given the Respondent's reliance on section 13(a) of the Regulations. She is of the opinion that residential, agricultural and commercial land uses are not conflicting land uses and if that

[3] Jenifer Tsang Report, page. 27

were the case, solutions would be included in the Regulations, such as additional buffers and setback requirements between these land uses, to address these conflicts. In this case, low density residential, which is what 19-25 single-family dwellings would be classified as, is one of the most compatible land uses with agriculture, which also surrounds the Properties.

Finally, Mr. Stetson, on behalf of the Respondent, provided a short written report and oral evidence, wherein he wrote that, in his opinion, the Properties would be considered a "productive" area for agriculture, subject to soil health and soil nutrient levels. On cross-examination, Mr. Stetson agreed that his conclusion was based on the three main consideration in his report – acreage, topography and soil category – and *he agreed that other considerations, such as the practical ability and economics of farming land, would be important in determining whether or not land should be considered 'productive' agricultural land.*

In short, t*here was no cogent reason to deny the Application due to it being prime or alternately productive agricultural land.*

3. *Coastal Development – detrimental impact & viewscapes*

Detrimental impact

The Appellants submit that the proposed development would have no "detrimental impact" on the coastline and that this position is supported by the evidence presented by the Appellant, - and also plainly in the Respondent's own "technical" evidence. See Record Tab 4C Pages 58-63.

The objective empirical evidence from the Department of Environment, Energy and Climate Action, in their reports, indicated that the Properties were considered a 'low erosion hazard' and 'minimal flood hazard'. It appears that Mr. O'Hara plainly ignored this fact when he indicated that this coastline should remain as it currently is in order to satisfy his subjective (should test) opinion as to perceived adverse impacts of coastal development. He set the bar above what the specific technical requirements mandated. This is arbitrary, uncertain and unfair.

Mr. Joostema and Mr. Stetson agreed that the soil on the Properties is Charlottetown (Ch) series soil, which is a common soil type in Prince Edward Island used for both residential and agricultural purposes. Mr. Joostema's evidence went one step further when he confirmed that

when Ch series soil is farmed it causes more erosion on a property than a developed residential use would. This evidence, in combination with the reports from the Department of Environment, Energy and Climate Action, are supportive of the proposed development on the Properties as there is low possibilities of detrimental impact along this coastline.

Viewscapes

Mr. O' Hara makes reference to the need to limit coastal development in order to reduce the impacts on coastal viewscapes and promote public amenity and access to shorelines. This subjective finding:

1. Contradicts the definition of "detrimental impact" in the Regulations, which expressly excludes 'viewscapes' as a protected type of loss. Mr. O'Hara suggested that the definition only applies to "private" and not "public" viewscapes. Possibly, in some instances the Department applies the definition in this fashion but the plain English meaning does not support such an interpretation.

2. Furthermore, section 62(8) and (9) of the Regulations are the only provisions in the *Act* and Regulations that explicitly protect several particular scenic viewscapes in the entire Province by expressly limiting the types of land uses on those properties. Of note is that these provisions do not *prohibit* development (as in effect Mr. O'Hara would do in this instance); rather, these provisions merely *regulate* the type of development that can take place.

This is further support of the Appellants' position that the Application should not and could not have lawfully been denied on the basis of perceived "detrimental impact" to the coastline view. This is another clear example of where satisfying the prescribed "technical" regulatory requirement ought reasonably to have been sufficient. To overlay a subjective planning principle (utilizing his "should you" test)] at a higher threshold as Mr. O'Hara did was an error.

From a sound planning principles perspective, Ms. Tsang again referenced the need to conduct such an analysis *in the context of the Regulations*. Her evidence confirmed that no provision existed in the *Act* or the Regulations that would *prohibit* development along the coast. Rather, in her opinion, the Regulations, at section 16, enables and merely *regulates* coastal development by regulating setbacks to coastlines in order to protect coastal areas. She concluded that the Application should not have been denied based on possible detrimental impact to the coastline given that there was no substantive evidence presented

by the Respondent to support this position; and indeed where the Respondents objective evidence found the coastal environmental risks rated low / minimal.

Conclusion

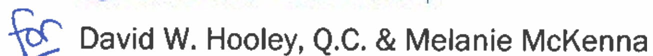
At the outset of the hearing, the Commission heard evidence from the Appellants. The Appellants are Islanders, with a young family, who come from a long line of family involved in the construction industry. They have searched Prince Edward Island for the right piece of the property and believe they have found the one of their dreams in Rice Point, Prince Edward Island. The Appellants expressed a desire to develop a higher end subdivision where they can plant roots to raise their family and contribute to growing the community in Rice Point with the addition of themselves and their neighbours.

In an effort to make this dream a reality, the Appellants submitted an Application to the Respondent that was in compliance with all the applicable technical requirements of the *Act* and the Regulations. Further, as was demonstrated by their qualified expert professional land use planners' evidence at the hearing and outlined herein, their Application adhered to sound planning principles read in context with the specifically prescribed technical requirements. The Respondent's planning principles evidence came from Mr. O'Hara, who is 2 years (plus how much longer it takes him to submit a complete application for candidacy) away from accreditation. He is not a "professional land use planner" as described in *Stringer*. He erred in applying policy recommendations from past land use reports that have never made it into law. He did not apply planning principles in a "principled and He applied a wrong headed self developed "should you" test. He did not apply planning principles in a "principled and informed manner" as is mandated in *Stringer*. His findings were the largely arbitrary and subjective opinions of one individual person. Unlike the facts in *Stringer*, there were no important planning principles unaddressed by the applicable Regulations technical requirements in issue. There were no "bunkies" concerns nor public health issues as in *Stringer*.

On the basis of the applicable Regulations and a principled and informed application of planning principles by a "professional land use planner" the Appellants satisfied the two-part test outlined by the Commission in *Stringer*. The Respondent's reasons for denial were subjective, vague and arbitrary and were erroneously based on policies that are not law – setting the bar for approval over and above what is required in the *Act* and Regulations. There was no discernable regulatory "gap" left open here as was the case in *Stringer*. The approach in this case is not the disciplined approach that was mandated by the Commission in *Stringer*.

As a result, the Appellants request an Order from the Commission allowing the Appellants appeal and reversing the Respondent's decision to deny the Application substituting a decision to approve a 19 lot first phase low density residential subdivision and a subsequent phase of up to 6 additional lots as per the phasing provisions of the Regulations.

Yours very truly,



David W. Hooley, Q.C. & Melanie McKenna

DWH/MM

c. Jessica Gillis
Mitchell O'Shea
client