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**VIA EMAIL: pjrafuse@irac.pe.ca**

The Island Regulatory and Appeals Commission
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**Re: Appeal Docket LA23-004; Sheldon Stewart and Mike James v. Minister of Housing, Land and Communities**

1. The following are respectfully submitted on behalf of Mike James and Sheldon Stewart, (the "Appellants"), in respect of their Notice of Appeal filed on February 15, 2023, and in response to the Minister of Housing, Land and Communities, (the "Respondent's", or, alternatively, the "Minister's") Record of Decision, filed on Mach 24, 2023, and further in response to the Respondent's position document filed on May 17, 2023.

2. The appeal is in respect of a decision of the Minister to deny an application for development of a parcel of land having PID # 88567, being approximately 40 acres of land located in the community of New London, Queens County, located on the Campbellton Road.

## Background

3. On March 29, 2023, the Appellants submitted a subdivision application to the Summerside office of the Department of Housing, Land, and Communities at Access PEI. Mr. Stewart will testify that shortly thereafter, Access PEI contacted him and told him there was a 'new process' and that he had to fill out a change of use application instead of the subdivision application.

4. On March 30, 2023, Mr. Stewart went to Access PEI in Summerside, where he met with Senior Development Officer, Shawn MacFarlane. Mr. Stewart brought a cheque for $2,195.00, for a subdivision application.[1] The cheque was not accepted.

5. Mr. MacFarlane told Mr. Stewart that the Minister would not consider an application for subdivision until they considered an application for change of use.

6. Mr. MacFarlane returned the physical copy of the Appellants' subdivision survey plan that was submitted with the application to Mr. Stewart. Mr. Stewart wrote a new cheque for $110.00 for the change of use application.[2]

7. Also on March 30, 2023, Mr. Stewart emailed a copy of the said subdivision survey plan to Mr. MacFarlane's email.[3] This was not requested by Mr. MacFarlane. If Mr. Stewart had not sent this email, the Minister would not have had a copy of the subdivision survey plan in their file.

8. The Appellants were provided no formal update on the application until September 6, 2023, when the Appellants met with Eugene Lloyd and Shawn MacFarlane. They were told that no decision was made, and that the matter was escalated to their senior management team from whom they were awaiting further direction.

9. The Appellants believe that prior to this meeting, Departmental planning specialist Alex O'Hara had already decided that the 40-acre parcel was not suitable for a 26-lot subdivision, notwithstanding the fact that he had not conducted a subdivision application assessment.

10. The application was not provided consideration for subdivision 'preliminary approval' or subdivision 'final approval'.

11. The Appellants completed a 'Perc Test' report, which was never requested for submission by the Minister, and did not form a basis of the decision.[4]

12. The application was denied outright without any of the following taking place:
    i. requests from the Minister for, or discussions about, possible subdivision-plan adjustments;
    ii. discussions with the Minister about shore access;
    iii. discussions with the Minister about preservation of the natural area;
    iv. discussions with the Minister about required buffers;
    v. discussions with the Minister about road construction or access;
    vi. discussions with the Minister about planned subdivision infrastructure;
    vii. discussions with the Minister about buffer or watercourse use or access;
    viii. discussions with the Minister about the interest in, or pending sales of, the proposed lots; or
    ix. any of the procedurally common-place requests for additional information, expert reports, percolation tests, etc.

[1] **Tab A**; Subdivision Application Cheque;
[2] **Tab B**; Change of Use Application Cheque;
[3] **Tab C**; Email From Sheldon Stewart to Shawn MacFarlane;
[4] **Tab D**; Stantec Perc Test, dated July 18, 2022;

13. The Appellants are appealing the decision to the Commission.

## The Law, and the Powers of the Commission

- **Ministerial Decisions Under the Planning Act**

14. The Commission set out a test for appeals relating to Ministerial decisions under the Act in in *Stringer (re)*[5]. The test is as follows:

    i. Whether the Minister, as the land use planning authority, followed the proper process and procedures as required in the Regulations, in the *Planning Act*, and in the law in general, including the principles of natural justice and procedural fairness, in deciding on an application; and

    ii. Whether the Minister's decision with respect to the application has merit based on sound planning principles within the field of land use planning.

15. The Appellants submit that the Minister failed both steps of this test.

- **The Commission's Powers on Appeal**

16. The *Planning Act* provides that decisions made by the Minister under the Act may be appealed to the Commission pursuant to section 28 of the Act.

17. The question of the scope of an appeal to the Commission has previously been considered in the Prince Edward Island Court of Appeal in both *Provincial Tax Commissioner v. Maritime Dredging Ltd.*[6] at para 23, and in *Reference Re: Island Regulatory and Appeals Commission Act and The Constitution Act*,[7] paras. 9 and 10.

18. The First case dealt with an appeal to the Commission of a decision under the *Revenue Administration Act*, 1990 c.54 R.S.P.E.I. 1988, R-13.2, and the second decision dealt with an appeal to the Commission of a decision under the *Planning Act*. In both cases, the Court of Appeal found that a decision to the Commission constituted a hearing de novo.

19. Under a hearing de novo, the Commission is not conducting an administrative review of a decision on the basis of reasonableness or correctness. The Commission is further not conducted a 're-hearing'. This is intuitive in respect of both the *Revenue Administration Act* and the *Planning Act*, because, as stated by McQuaid J.A. in Maritime Dredging, in discussing the Court's disposition in Reference Re: IRAC:

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[5] **Tab E** - *Stringer (re)*, Donna Stringer v. Minister of Communities, Land and Environment, Order LA 17-06 at para 52.
[6] **Tab F** - *Provincial Tax Commissioner v. Maritime Dredging Ltd.,* 1997 CanLII 4574 (PE SCAD), (Maritime Dredging")
[7] *Reference Re: Island Regulatory and Appeals Commission Act and The Constitution Act*, [1997] PEIJ No. 70 (QL) (PEISCAD) ("Reference Re: IRAC")

> *The issue of whether an appeal to the Commission is a hearing de novo was recently considered by this Court in the context of sections 28 and 37 of the Planning Act, R.S.P.E.I. 1988 Cap. P-8. The Court concluded that an appeal under those provisions was a hearing de novo primarily because the relevant legislation contemplated and intended that an appeal to the Commission would be the first opportunity for interested parties to participate before a tribunal. See: Reference Re: Island Regulatory and Appeals Commission Act and The Constitution Act, [1997] P.E.I.J. No. 70 (Q.L.) (P.E.I.S.C.A.D.), paras. 9 & 10.*[8]

20. The Commission's role in hearing appeals is to consider the relevant application materials, evidence, witnesses, and experts, as the case may be, and to make a decision that is appropriate on the merits in respect of the relevant law and regulations.

21. The Commission considered this question in *Charlottetown (City) v. Island Reg. & Appeals Com.*:

> *[38] In my opinion, it was also within the Commission's mandate to decide the application on its merits. Following a Reference in 1997, the Court of Appeal held that the Legislature contemplated and intended that appeals under the Planning Act would take the form of a hearing de novo, after which the Commission, if it so decided, could substitute its decision for the one appealed (Island Regulatory and Appeals Commission (Re) , [1997] 2 P.E.I.J. 70.*
>
> *[39] Following the Reference case, the Commission formalized a two-part test that summarized its previous analysis of its role. The Commission employs this test as a guideline in determining planning appeals. As it applies to the circumstances of this case, after carrying out step one and quashing the Council decision for failing to follow proper process and procedure, the Commission could and should move forward to step two. Here, the Commission considers whether the City's decision with respect to the proposed rezoning and bylaw amendment has merit based on sound planning principles within the field of land use and urban planning and as enumerated in the Official Plan.*[9]

22. The Commission issued a decision in 2023, in *Lucas Arsenault, Jennie Arsenault and L&J Holdings Inc. v. Minister of Agriculture and Land*,[10] where it quashed a decision of the Minister and substituted a new decision. In Rice Point, the Commission substituted the Minister's decision, even where the Commission had not made a finding that the Minister had erred in respect of process and procedure.

## Outline of Claims

- **Process**

23. The Appellants will demonstrate in their appeal that the Minister did not follow the proper process in respect of the application, and as such is not owed deference.

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[8] Maritime Dredging at para 22
[9] *Charlottetown (City) v. Island Reg. & Appeals Com.*, 2013 PECA 10 (CanLII), at paras 38 and 39.
[10] *Lucas Arsenault, Jennie Arsenault and L&J Holdings Inc. v. Minister of Agriculture and Land*, 2023 PEIRAC 4 (CanLII) ("Rice Point").

24. Further, the Appellants will demonstrate that the procedure they were 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.

25. Further, the Appellants will demonstrate that the 'new' process was administratively opaque and non-transparent, and was insufficiently explained by the Minister or the Ministers' delegates to the Appellants. This is especially significant, given that the new process purports to create a novel discretionary power for the minister, to determine the 'viability' of a subdivision without actually completing a subdivision application review. The process did not adhere to the principles of administrative fairness, procedural fairness, or natural justice. The process may also have brought the Minister into the territory of abuse of process.

26. Further, the Appellants will demonstrate that this 'new' process they were subject to was significantly prejudicial, and that it tainted the result of the Minister's decision. The Appellants will demonstrate that the decision the Minister made was based on insufficient information due to the limitations of this 'new' process, and that the Minister's decision must be thrown out on the question of process alone.

27. The Appellants will be filing detailed expert documentation on the appeal in advance of the hearing to furnish the record with the information the Minister should and would have had 'but for' the improper process they subjected the Appellants to. The Appellants will be asking that a new decision on the application and evidence filed on the appeal be substituted by the Commission.

- **Sound Planning**

28. The Appellants will demonstrate that the Minister's decision is not substantively sound. The decision to dismiss their application was based on over-broad, generalized provisions of the Act and Regulations, which were cherry-picked by the Minister's delegates in order to reach the finding that the subdivision plan was not 'viable'.

29. The Appellants will demonstrate that the Minister improperly employed a subjective 'should you' test for the viability of the subdivision, rather than actually assessing the subdivision plan's objective adherence to the technical requirements of the law.

30. The Appellants will demonstrate the Minister did not make a decision in keeping with sound planning, engineering, and environmental principles.

31. The Appellants will, subsequent to these submissions, file detailed expert evidence to furnish the record with appropriate information in consideration of the application the Appellants had intended to make to the Minister.

32. The Appellants propose that the Minister's decision must be thrown out, and that a new decision on the question of the 26-lot subdivision should be substituted by the Commission, based on the evidence and expert opinions that will be filed ahead of the hearing.

## Did the Minister Follow the Correct Process?

33. The Minister claims in their brief that they followed the correct process.

34. The Appellants claim the Minister did not follow the correct process, or any process provided for under the Act. The Minister conducted a change of use application aimed at assessing the 'viability of a subdivision'.

35. The Appellants propose the correct process for assessing the 'viability of a subdivision' is a subdivision application.

36. Change of use applications are not supported under the law or regulations to consider the question of the 'viability of a subdivision'.

- **Subdivision Process**

37. The subdivision application process is set out in detail in the *Planning Act Subdivision and Development Regulations*, under Part B of the Regulations, at sections 12 – 30, inclusive.

38. The subdivision process contains detailed guidance on the law that governs subdivisions.

39. 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.

40. In the context of the *Planning Act* and the Regulations, the subdivision application process also provides substantive direction and guidance. The process ensures decision makers maintain their focus on sound planning, engineering, and environmental principles. Section 13 of the Regulations sets out some of these principles.

41. Included in the list of issues that may need to be considered in a subdivision application is whether a change of use of the land is appropriate. The change of use provision falls inside the subdivision application process, at section 29 of the Regulations.

42. In an approved plan of subdivision, the Minister may make a number of changes to existing land use. The Minister may approve certain areas to be residential lots and other areas to be open spaces. The Subdivision will typically have some areas appointed as rights of way, or highway accesses, or buffers. A subdivision application process routinely preoccupies itself with land-use changes.

43. Pursuant to section 29(1) of the Regulations, an approved plan of subdivision is one of the legal sources of the approved land use for a given lot in the province.

44. Conversely, a change of use application on its own does not include subdivision considerations.

45. Change of use is a smaller administrative process, which answers the question of whether the use of a specific lot should be changed. For example, a change of use application might consider changing a designated ‘open area’ in an approved subdivision to ‘residential’ use, or it might consider changing a relatively large lot from resource use to industrial use.

46. Change of use applications are not supported under the law or regulations to answer the question of the ‘viability of a subdivision’. This is not the intent or the substance of the Regulations. The word “viable” does not appear in the Act or the Regulations.

47. The Minister claims in their own brief that the Minister did not have enough information to consider whether the proposed subdivision plan met the technical requirements set out in the Act. The Appellants propose this was a circumstance of design, by the delegates of the Minister.

48. The Appellants respectfully submit that the new ‘viability’ process provided the Minister’s delegates an avenue to reject the application outright on findings based in overbroadly-construed, improperly applied provisions of the Act. The Minister’s delegates used highly interpretive provisions to deny the application without running the application through the appropriate process.

49. The Appellants claim this procedure was ultra-vires the Minister’s statutory authority. The Appellants further believe the decision constitutes a foray by the delegates of the Minister into the territory of abuse of process.

50. The Appellants were not provided an opportunity to submit supporting reports on their application addressing concerns of premature development or detrimental impact. The Appellants were not provided an opportunity to submit information relevant to soil, drainage, grade, or percolation assessments. The Appellants were not provided a procedural avenue to provide any additional information, or to make any subdivision plan adjustments, or infrastructure, roadway, or septic plan adjustments.

51. Ultimately, the process allowed the Minister’s delegates to deny the subdivision on the grounds that the decision maker felt, or believed, there should not be a subdivision on the parcel. The Minister’s delegates applied a “should you” rather than “can you” test and rejected the application without statutory authority to do so.

52. The Appellants were significantly prejudiced by this process.

53. The Minister has attempted in his brief filed on this appeal to rectify the procedural error retrospectively, by claiming that the Minister’s delegates conducted a subdivision assessment simultaneously with a change of use application.

54. The Minister’s record does not reflect this claim. Further, in the alternative, if this did occur, it was never communicated to the Appellants.

55. In the January 27, 2023 letter, the Minister at their analysis points marked as numbers "8" and "9" on page 6, determined that the proposal was of poor quality because no traffic study had been submitted and no topographic/ elevation contour plan had been provided.

56. The Appellants reiterate that the physical copy of the subdivision plan submitted with the application had been returned to them on March 30, 2023 at the Summerside Access PEI. The Appellants were told that no such information was being considered yet. The Appellants then suffered prejudice in their application, because they had not submitted all the technical information required to consider a subdivision application.

57. The Minister has demonstrated an inability to objectively and fairly assess the application. The Applicants believe the only way they can get a fair hearing of their intended proposal is to provide the technical information on appeal to the Island Regulatory and Appeals Commission for adjudication.

58. The Minister's decision should be thrown out and a new decision by the Commission should replace it, based on the application materials, and expert evidence to be filed prior to the hearing, and based on the in-person testimony at the hearing.

## Did the Minister make their decision in keeping with sound planning principles?

59. The Appellants claim the minister's decision is not based on sound planning, engineering, or environmental principles.

60. The Minister acted improperly when they failed to seek or consider information or advice from a qualified land use planner. The Appellants claim Alex O'Hara is not a qualified land use planner.

61. The Minister's delegates made inappropriate and overbroad 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.

- **Section 2.1 of the Planning Act, Provincial Interest**

62. The Appellants respectfully submit that the Minister improperly based most of the dismissal of the application on the provincial interest clauses recently added to the Act, at section 2.1.

63. Section 2.1 sets out a list of principles to which the Minister shall have regard but not be limited.

64. Section 2.1 is a list of undefined, broad, and interpretive principles. The section provides no objective criteria on which to assess them. They are not formulated as tests, or as technical requirements. There are no specific 'floors' or 'ceilings' in the section. Rather, the section sets out principles to instruct the Minister's exercise of its discretion in interpreting the Act.

65. The Appellants submit that section 2.1 was improperly used by the Minister's delegates to arbitrarily deny their application.

66. For example, the Minister found in his analysis point marked number "2", on page three of the denial letter, that pursuant to section 2.1(1)(b) the application contained poor management of coastal areas. This finding was made on the basis that the subdivision proposed "no viable provision … to provide communal access to the shore for all residents of the proposed subdivision."

67. The Commission considered this type of argument previously in Order LA 10-08:

> *The Appellants submit that the proposed subdivision does not meet the beach access requirements set out in subsections 16(1)(c) and 26(2) of the Regulations. However, the Commission finds that a careful reading of these subsections reveals that access to the shore for the use of lot owners is required "where feasible and appropriate" and preliminary approval of a subdivision "may" include conditions relating to the provision of shore access. This rather qualified statutory wording makes specific enforceability difficult, if not impossible. Accordingly, the Commission finds that the proposed subdivision is not in breach of the beach access requirements set out in the Regulations.*[11]

68. The Commission in LA10-08 reviewed the specific provision in the Regulations and determined that the language did not provide a strict adherence test. The Commission found that the developers were not in breach of the Regulation, and as such development was not restricted on the basis of communal coastal access.

69. The Appellants acknowledge that the Minister did later in their decision, at analysis point marked number 10 on page 7, rely on section 16 of the Act, which was the appropriate provision to consider coastal access. The Appellants submit that the Minister erred in this analysis point as well, pursuant to the precedent set down in LA 10-08. However, the Appellants raise this issue under section 2.1 because we feel that it is instructive on the type of improper exercise of Discretion the Minister has undertaken.

70. As stated above, we propose that this provides an informative lens on the type of overbroad and arbitrary decision making employed by the Minister in order to reject the Appellants' application in the current case.

71. The Minister relied on the scant, generalized provincial interest clause, at section 2.1(1)(b), which states the Minister shall have regard to "the protection, conservation and management of coastal areas."

72. The Appellants submit that it is logical to deduce that if the Minister cannot strictly enforce the relatively detailed section 16 of the Regulations, then they cannot enforce the generalized, undefined, and less-detailed section of the Act at 2.1(1)(b).

[11] **Tab G** – *Ian Cray and Paul Christensen v. Minister of Finance and Municipal Affairs*, Order LA-10-08

73. The Appellants propose that most, if not all, of the Minister's dispositions reached under section 2.1 of the Act fall under the same type of overbroad discretion couched in insufficient analysis or evidence.

74. The Appellants claim 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 of beliefs.

75. The Appellants claim that the Minister failed to consider sound planning principles from a qualified expert in interpreting these clauses. Instead, the Appellants claim that the Minister's delegates wielded the new provisions as a sword in order to reach their desired outcome without the backing of the law.

76. The Appellants will file detailed expert evidence on this appeal prior to the hearing to challenge each of the incorrect findings of the Minister based in section 2.1 of the Act.

77. The Appellants reserve the right to submit further legal submissions once the benefit of this expert evidence can be filed on the record.

- **Premature Development and Unnecessary Public Expenditure**

78. The Minister incorrectly applied section 3(1)(b) of the Regulations, in their decision. The Minister's decision is not rooted in sound planning, engineering, or environmental principles.

79. The Minister claims there are 712 approved lots in the area of New London Fire District, and 92 within the community of New London.

80. The Appellants claim the Minister has erred by not drawing a distinction between lots that are approved 'on the books' and lots that are actually developed, subdivided, or available for purchase.

81. The Minister concluded in his decision that it is "evident" that demand for the types of lots proposed is low. The Minister's analysis is inherently flawed, and as such his conclusion is unsupported.

82. The Appellants submit that they already have identified individuals who are interested in purchasing lots from the proposed subdivision.

83. The Appellants submit that the proposed use of the land is similar to past development on similar parcels in the same community and area.

- **Impact of Development**

84. The Minister claimed in the decision that the proposed plan was not the 'highest or best use' of the land. There is no 'highest and best use' test in the Act or Regulations. The concepts of 'highest use' and 'best use' are subjective and undefined. The proposition that one must meet the 'highest use' possible for a development plan is an arbitrary and unquestionably high threshold. This is not an appropriate or legally supportable test to impose as a manner of policy or course.

85. The Minister made no specific findings of detrimental impact in their decision.

86. However, the Minister claimed that it would be contrary to the Regulations to permit the land to be transitioned from agriculture/resource use and indicated this would "negatively impact the traditional character of the landscape".[12] The Minister further plead the Land Use Policy (1991) and the Coastal Area Policy (1992).

87. The Minister did not have the necessary evidence to make this finding.

88. The Appellants claim that the "Review of Agriculture Land" report dated November 10, 2022, authored by Tobin Stetson,[13] is the only reasonable evidence (apart from public geomatics information) the Minister reviewed in considering the application. The Appellants note that the report does not indicate dispositively that the land is 'prime', or 'high value' resource land.

89. The Report by Mr. Stetson indicates that the soil type in the area, assuming that the soil health and nutrient levels are suitable, and assuming proper management, *would be* "productive farm land".

90. The Appellants claim that the Minister cannot reject their application for subdivision on the sole evidence that the parcel might be productive farm land.

91. The Minister's decision is that the Appellant's land is not "viable for subdivision". The Appellants conclude the decision essentially states subdivision on the land is not possible, as it is not the highest possible use of the land.

92. The Appellants respectfully submit that when they filed their subdivision application, it was their reasonable expectation that the application would be adjudicated on the basis of the law and regulations.

93. The Appellants will file expert evidence that provides an alternative assessment of the impact of the proposed plan on public expenditure, development, and land use in the area, informed by reasonable and sound planning, engineering, and environmental principles.

94. The Appellants ask that the Commission quash the Minister's decision.

95. The Appellants ask the Commission to consider the relevant application materials, evidence, witnesses, and expert opinions that will be filed on the record, and to make a decision that is appropriate on the merits in respect of the relevant law and regulations.

[12] January 27, 2023 decision, at analysis point marked number 13.
[13] January 27, 2023 decision, appended to Minister's decision, page not marked.