June 30, 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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Please accept the following submissions in reply to the submissions of the Respondent, the Minister of Agriculture and Land (the "Respondent"), dated June 24, 2022. For ease of reference, we have referenced the headers utilized by the Respondent in addressing their submissions.

Application of the Relevant Test

The Respondent, at paragraph 27 of their closing submissions, refers to the two-part test identified by the Commission in *Stringer v Minister of Communities, Land and Environment,* which is to be applied in assessing planning and land use related matters. There is no dispute amongst the parties that this case establishes the applicable test. Similarly, the parties are in agreement that the first step of the test is satisfied. However, the Appellants submit that the Respondent, in evaluating the Appellant's Application, failed to consider the full context in which the second step of the test ought to be interpreted and applied.

In particular, in *Stringer* the Commission was careful to articulate that discretion, in the context of assessing sound planning principles, must be exercised in a "principled and

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informed manner" and that the "principled and informed" exercise of discretion becomes especially important when the regulatory checklist does not specifically address a particular planning concern[1]. This is where the parties diverge on the correct and complete interpretation and application of the proper test. The Appellants contend that:

i. Mr. O'Hara did not possess the necessary qualifications as a "professional" land use planner needed in order to make the required exercise of discretion in a "principled and informed" manner. On this tenet alone, the Minister's decision cannot be upheld (more on this point later herein).

ii. Mr. O'Hara's creation, interpretation and application of the "should you" test (which he himself devised) was a mis-interpretation and application of the *Stringer* test. And, is indicative of the highly subjective / arbitrary application of the test he employed in the purported application of sound planning principles.

iii. Furthermore, *Stringer* stipulates that a "professional" land use planner is one who is both *principled and informed.* Mr. O'Hara 'mis-informed' himself by considering policy recommendations from past land use reports prepared by or for the Province which have never been enacted as law[2].

iv. Mr. O'Hara largely focused selectively on these past policy recommendations and on his subjective interpretation of certain generic provisions of the Act & Regulations (i.e. "premature development" and "detrimental impact"). Both of these generic terms were applied in the context of these policy recommendations that were never enacted; and, without him paying due regard to the so called "technical requirements" that were enacted to safeguard these objectives. *The result was to superimpose a subjective and arbitrary test on top of the duly enacted – and objective – safeguards.*

[1] *Stringer v Minister of Communities, Land and Environment*, Order LA17-06 at paras. 51, 62, 64 and 66.
[2] With the exception identified in paragraph 49 of the Respondent's submissions, whereby the 1991 GLUP is supported by a 31 year old generally worded Order in Council.

v. Two salient examples will illustrate: Mr. O'Hara deemed the Appellant's S/D to constitute "premature development." Yet, the Regulations specifically address this policy objective in ss. 6 and 18 re phasing restrictions. Similarly, as regards "detrimental development", Mr. O'Hara was concerned about climate change, coastal erosion and coastal flooding. Pursuant to the so called "technical requirements", the subject property was objectively assessed for coastal erosion and coastal flooding. The risk was "low" or "minimal" on both counts. Sound planning principles should be applied consistently and in resonance with the Regulations – not so as to add a subjective higher standard for approval to the assessment of a proposed S/D.

vi. Mr. O'Hara arbitrarily fettered his exercise of discretion by reliance on certain policy recommendations that have never been adopted by Governments of different political stripes. On the other hand, he neglected to consider Government policy respecting, for example, immigration, population growth and housing supply.

vii. The *Planning Act & Regulations* have adopted objective criteria which specifically and measurably regulate rural subdivision size and phasing; lot sizes, setbacks and configuration; on site water and sewage disposal; roads; open space; and, to a very limited extent, views which would have been supportive of the Application.

viii. Furthermore, as to weighting of sometimes competing policy considerations, there is no evidence or law to say that the preservation of agricultural land is a consideration by Government that "trumps" the other positive aspects or underpinnings of the Application. *Indeed, Mr. Lloyd, who has many years experience as a development officer with the Province, testified that this application was the very first ever turned down due to changing the land use from agricultural to residential*.

The Respondent set the standard for the Appellants to meet over and above what was set out in the *Act* and the *Regulations*. Unlike Stringer, there was no regulatory gap or hiatus to address, as there was in *Stringer* - where multiple on site "bunkies" necessitated invocation of sound planning principles to fill the regulatory gap. In effect, Mr. O'Hara set the bar at an unattainable level for the Appellants from the very beginning.

Section 13 of the Regulations

The Respondent, in paragraph 58, refers to the evidence heard by the Commission from Mr. Todd Stokes that the subdivision would be compatible with the surrounding area but contends that the Appellants' proposed development would be incompatible with the surrounding executive style homes, as described and shown by Mr. Stokes, as they would not be secluded, located away from the main road and hidden from the view by trees.

In the 'Additional Information' filed by Mr. O'Hara, on April 19, 2022, Mr. O'Hara states that an effective means of alleviating sprawl in rural areas is to "encourage nucleated or clustered settlement development by means of infilling"[3]. The Appellants agree; and, submit that this is line with the Appellants' proposed development as it is a low density 19-25 lot residential subdivision on approximately 44 acres of land. The proposed subdivision is an example of "infilling" in a rural context, as was described by Ms. Jenifer Tsang in her evidence and Mr. Stokes in his, and is thus a low-density "clustered settlement development" as described by Mr. O'Hara – which adheres to sound planning principles.

The purpose of Mr. Stokes' evidence on this point was to demonstrate to the Commission that there were plenty of existing residential uses in the surrounding areas of Rice Point, alongside agricultural uses, but which are still compatible with the proposed development. We agree with the Respondents that the proposed development would not necessarily have these same features of being secluded from other homes or far away from the road, but would argue that the proposed development is, in the words of Mr. O'Hara, an effective means of alleviating

[3] Additional Information Report (Alex O'Hara) at para. 5.2

urban sprawl in rural areas and avoiding ribbon development[4], both of which are not sound development from a planning perspective. Some examples of these types of development were identified by Mr. Stokes in his report as existing in Rice Point – see pages 35 and 39 of Mr. Stokes' report.

Professional Land Use Planner

The Respondent, in paragraph 72, suggests that the term "professional land use planner" is not synonymous with a Registered Professional Planner or Member of the Canadian Institute of Planners or a Licensed Professional Planner and that Mr. O'Hara is a professional given his specialized education and skill related to land use planning. Furthermore, the Respondent submits that to require this standard of planner's places too high of a burden on the Province and municipalities during a time where the Government is struggling to hire Registered Professional Planners[5].

Mr. O'Hara's qualifications, in combination with the direction from *Stringer* on the importance of properly involving a professional land use planner, were discussed during the hearing when he was being qualified. In the end, it was the decision of the Commission to decline to qualify Mr. O'Hara as a 'professional land use planner'. While Mr. O'Hara has training in the field of land use planning, *Stringer* is very clear that the requirement is for the Department to seek and obtain the opinion of a professional land use planner[6] who is duly qualified to make a "principled and informed" exercise of discretion.

Mr. Lloyd gave evidence to the Commission on the changes to the internal processes of the Department in assessing land use applications following the *Stringer* decision and the comments therein from the Commission on the failure of the Department to adequately/appropriately address sound planning principles. We applaud those changes by the Department but argue that the changes must fully adhere to the direction outlined by the Commission, which includes obtaining an opinion from a professional land use planner –

[4] Additional Information Report (Alex O'Hara) at Appendix H
[5] Respondent's Submissions at para. 74.
[6] *Stringer*, *supra* esp. at paras. 51, 62, 64 and 66

whether employed by the Department internally or by seeking the counsel of a qualified outside planner.

In fairness to Mr. O'Hara, he was tasked by the Minister to do the job prescribed in *Stringer* for which he was not fully equipped.

After almost a year on the job, his evidence was that he is a "pre-candidate" for candidacy intended to obtain his qualification as a professional planner. He has not yet filed all of his background information to qualify as a candidate. Assuming his background is accepted for candidacy, his evidence was that he is then on a 2 year path towards becoming a registered planner with the Atlantic Institute of Planners. By analogy, he is like a graduate law student who is in the process of filing their qualifying documents in support of their petition for articles of clerkship. The law graduate must then complete their articles / apprenticeship and bar admission course before qualifying for admission to the bar and the ability to practice law.

In the result, as regards the expert opinion evidence before the Commission on sound planning principles, we have the evidence of Mr. O'Hara – whom the Appellant's contend is not a "professional land use planner" both in the sense *Stringer* contemplated and in common sense. And, we have the evidence of Jenifer Tsang who is a duly qualified "professional land use planner." That is the totality of the expert evidence the Commission regarding whether or not the proposed S/D complies with sound planning principles.

Mr. O'Hara was opined as to why he believes the proposal does not satisfy sound planning principles. Ms. Tsang's detailed Report and oral evidence opines as to why she disagrees with Mr. O'Hara and concludes that the proposal does comply. *The Appellant's submit that given the wide discrepancy in professional qualifications, the Commission really has no alternative but to afford more weight to Ms. Tsang's evidence as to the second branch of the Stringer test and accordingly allow the appeal.*

Miscellaneous

As a point of clarification in response to the Respondent's submissions at paragraph 81 and 83, we incorrectly referenced Mr. O'Hara as residing in Rice Point when it was actually the Respondent's soils expert, Mr. Tobin Stetson, who resides in Rice Point. The purpose of this comment was not to question Mr. Stetson nor Mr. O'Shea's impartiality to the matter before the Commission, it was simply intended to point out that Rice Point is a desirable place to live.

For the reasons set out above, the Appellants request an Order from the Commission allowing the appeal.
Yours very truly,

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

DWH/MM

cc. Jessica Gillis & Mitchell O'Shea, Counsel for the Minister