File No. LA22002

BEFORE THE ISLAND REGULATORY AND APPEALS COMMISSION

IN THE MATTER OF an appeal pursuant to s.28 of the *Planning Act*, RSPEI 1988 c. P-8 by Parry Aftab and Allan McCullough with respect to the denial of an application for an Amended Development Permit at PID #877647 located at Bessie Willow Land, Point Prim, Queens County, Prince Edward Island

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APPELLANTS' SUBMISSION

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AUTHORITIES

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OVERVIEW

1. Parry Persia Aftab ("Ms. Aftab") and Carl Allan McCullough ("Mr. McCullough") (collectively referred to as the "Appellants"), applied for an amended Development Permit Application, designated Application M-2021-0200, on July 27, 2021, (the "2021 Permit Application") seeking to clarify and amend previous Development Permit Applications M-2017-0119 (the "2017 Permit Application") and M-2018-0280/M-2018-0281 (the "2018 Permit Applications") in relation to a property owned by them on Bessie Willow Lane, in Point Prim, Prince Edward Island, and identified as PID # 877647 (the "Subject Property").

   Record of Decision at Tab "1A" (2021 Permit Application)
   Record of Decision at Tab "3A" (2017 Permit Application)
   Record of Decision at Tab "3C" & "3D" (2018 Permit Applications)

2. This Appeal concerns a decision issued by the Department of Housing, Land and Communities (the "Department" or the "Respondent") on December 14, 2021, (the "Decision") denying the 2021 Permit Application.

3. The Appellants submit that the Respondent's Decision failed to correctly follow the provisions of the *Planning Act* (the "*Act*") and the applicable *Planning Act Subdivision and Development Regulations* (the "*Development Regulations*"), and that the Respondent otherwise erred in their interpretation and application of the *Act* and *Development Regulations.*

4. Specifically, the Respondent erred in concluding that the summer cottage contemplated by the Appellants' 2021 Permit Application would have a "detrimental impact" on surrounding land uses, as defined in the *Development Regulations*, and in doing so, failed to identify, follow, and apply sound planning principles in its consideration of the 2021 Permit Application, and the resulting Decision.

BACKGROUND

5. The Appellants are the owners of two lots located on Bessie Willow Lane in Point Prim, Prince Edward Island, identified as PIDs 877639 and 877647. This matter relates solely to PID 877647.

6. In 2017, the Appellants submitted the 2017 Permit Application seeking a development permit respecting the Subject Property to build a residential summer cottage structure. The application included required specifications, sketch, and other required materials. Ultimately, Development Permit No. M-2017-0119 was issued on July 13, 2017 (the "2017 Development Permit").

   Record of Decision at Tab "3B"

7. By letter dated July 19, 2018, which was incorrectly dated July 19, 2017, Departmental Standards Officer Eugene Lloyd wrote to the Appellants indicating that "construction of a structure has commenced on the above-noted Property without a building permit."

Record of Decision at Tab "5B"

8. The "cease construction" letter was issued in error. The Appellants had a valid and subsisting development permit (the 2017 Development Permit) as issued on July 13, 2017.

Record of Decision at Tab "3B"

9. Departmental Planning Manager, Dale McKeigan, and his associate, Karen White, attended at the Subject Property on July 20, 2018, and discussed the matter with the Appellants.

10. At that time, the Appellants advised that the cottage structure had been repositioned approximately 150 feet further back from the shoreline on the Subject Property from the original location described in the 2017 Permit Application. The Appellants undertook this change so as to avoid impacting their neighbours' view and privacy. The size and basement of the structure were also changed on the recommendation of the contractors assisting with the matter. The proper property setbacks and septic tile fields, etc. remained in order. The Appellants also explained that their intention was not to actively use the attic portion of the structure, which Mr. McKeigan subsequently described as "third storey" living quarters. Rather, the attic was to remain unfinished and was to be used for storage and mechanical purposes. While the attic portion of the structure has windows and an egress door for fire and emergency purposes, it was never intended for and has not been used as living space.

11. In early 2018, the Appellants provided Mr. McKeigan with a memorandum outlining the scope of the structure and its construction status.

Record of Decision at Tab "5A"

12. By undated letter received by the Appellants on August 29, 2018, Mr. McKeigan wrote to the Appellants summarizing his view of the matter and outlining proposed steps to resolve the situation. Mr. McKeigan recommended that the Appellants submit a new application and site plans for the Subject Property, and he further advised that he would forward an email outlining the required information and next steps in relation to submitting that application.

Record of Decision at Tab "5C"

13. Over the course of the summer and fall of 2018, the Appellants sought further information and guidance, including the further exchange of emails with the Department, and specifically, with Mr. McKeigan. Several of those emails, sourced from the Department's planning file for the period October to November 2018, are located in the Record of Decision.

Record of Decision at Tabs "5E - 5I"

14. Ultimately, the 2018 Permit Applications were submitted by the Appellants to the Department in respect of the Subject Property, on November 5, 2018, and the requisite fee paid.

Record of Decision at Tab "3C" & "3D"

15. The Appellants subsequently ceased construction of the summer cottage structure following the building's closing-in, in late 2018. The structure remains incomplete and uninhabitable, and the Appellants have not benefited from it in any material way to this day.

16. By letter dated March 15, 2019, contained in the planning file, and which was not received by the Appellants in a timely manner due to the Appellants being out of country, Mr. McKeigan wrote to the Appellants advising them that their previous permit, the 2017 Development Permit, had been revoked.

Record of Decision at Tab "5J"

17. This matter was subsequently the focus of various efforts to obtain approval for a path forward to allow the resumption of construction, which was not forthcoming from the Department.

18. By letter dated January 27, 2021, which was not received by the Appellants until an email enclosing same from Dale McKeigan dated February 18, 2021, Mr. McKeigan wrote to the Appellants proposing a resolution of the matter, failing which he indicated the government would file an application with the Supreme Court to have the matter addressed there. He provided a deadline of February 26, 2021, for response.

Record of Decision at Tab "5K", at page 205

19. In that letter, Mr. McKeigan acknowledged that the sole outstanding issue with respect to the 2018 Permit Applications was the "third storey" of the summer cottage structure. Mr. McKeigan stated that the Department was prepared to accept an alternative resolution, provided that the Appellants "agree to remove a storey of the summer cottage development" and the Appellants shall "submit professional plans for the new design of the cottage (minus one storey) for staff to review; upon review of the plans, staff will provide a written response to the landowners."

20. Mr. McKeigan set a deadline of May 31, 2021, to complete this proposed alternative resolution. Mr. McKeigan concluded that should the situation proceed in the aforementioned manner the Department would issue a development permit in relation to the 2018 Permit Applications in accordance with the *Act* and *Development Regulations*.

21. Counsel for the Appellants subsequently wrote to Mr. McKeigan requesting a copy of the Department's planning file respecting this matter, which was received on March 15, 2021. Mr. McKeigan extended the deadline for response to March 26, 2021, but declined a further extension for review as requested by the Appellants' counsel.

22. On March 26, 2021, counsel for the Appellants sent a letter to The Honourable Bloyce Thompson, Minister of Agriculture & Land (as he was then) pursuant to Section 9 of the *Development Regulations*, seeking alternative resolution of the matter without resorting to litigation in the Supreme Court of Prince Edward Island, as suggested by the Department in its correspondence dated January 27, 2021.

Record of Decision at Tab "5K"

23. On June 3, 2021, The Honourable Bloyce Thompson responded to the Appellants' Letter dated March 26, 2021. Minister Thompson indicated he was unable to grant the Appellants' request for inclusion of a third "storey" in the summer cottage, and that the parties should make arrangements to meet and resolve the dispute.

Appellants' Book of Exhibits at Tab "1A"

24. On July 27, 2021, the Appellants submitted the 2021 Permit Application in relation to the Subject Property, as advised by Departmental Standards Officer Eugene Lloyd during a meeting held between the Appellants and the Department in early July 2021.

Record of Decision at Tab "1A"

25. As noted previously, the Department issued its Decision to deny the 2021 Permit Application on December 14, 2021.

Record of Decision at Tab "1B"

ISSUES

26. The Appellants submit that the Decision raises the following issues for review by the Commission:

    a. In making the Decision, did the Respondent fail to follow, interpret, and correctly apply the applicable provisions of the *Planning Act* and the *Planning Act Subdivision and Development Regulations*, contrary to sound planning principles?

    b. Did the Respondent err in concluding that the 2021 Permit Application would have "detrimental impact" on surrounding land uses?

    c. Did the Respondent's Decision consider irrelevant factors and failed to consider relevant factors?

    d. Did the Respondent's Decision provide inadequate reasons?

LAW & ARGUMENT

The Applicable Test

27. 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 that the test to be applied in the context of its standard of review of planning and land-use related decisions, is 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*.

28. With respect to the first prong of the two-part test, the Appellants do not take issue with the process and procedure undertaken by the Respondent in processing the 2021 Permit Application. It is the second part of the two-part test which the Appellants submit was improperly conducted by the Respondent and resulted in a denial of the 2021 Permit Application.

Sound Planning Principles

29. 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 a black and white assessment, the Commission provided further guidance with the following comments:

> [64] …The *Planning Act* addresses not only municipalities with Official Plans and land use bylaws but also areas of the Province which do not have Official Plans and land use bylaws. Sound planning must be a common feature of development throughout Prince Edward Island and property owners located in areas of the Province for which there is no municipal government should not be subject to inferior land use planning rights and responsibilities. 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 [sic] 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. In order to ensure that sound planning principles have been followed in anomalous applications a professional land use planner must be consulted.
>
> ***Stringer (Re), 2017 CanLII 153317 (PE IRAC)*, at para 64 [Tab 1]**

30. In sum, the Appellants submit that the correct approach to a sound planning principles analysis is one which approaches discretionary provisions respecting land use planning in a principled and informed manner, to, in the words of the Commission, "guard against arbitrary decision making".

Planning Deficiencies in the Respondent's Decision

31. The Appellants submit that the Respondent's Record of Decision and subsequent Respondent Submission, dated March 2, 2022, identifies that an Internal Provincial Planning Report prepared by Alex O'Hara, Land Use and Planning Act Specialist for the Respondent, dated November 30, 2021, was heavily relied on by the Respondent in rendering the Decision.

32. It is the Appellants' understanding from the Commission's decision in *Lucas Arsenault, Jennie Arsenault and L&J Holdings Inc. v. Minister of Agriculture and Land*, 2023 PEIRAC 4 ("*Arsenault*"), that Mr. O'Hara was not at the times material to the Appellants' 2021 Permit Application and related Internal Provincial Planning Report (July – November 2021), an accredited member of any Canadian, Atlantic or PEI Planners organization. No accreditation is identified in the internal report prepared by Mr. O'Hara.

33. As was made clear by the Commission in *Arsenault*, the principles laid down in *Stringer* direct that the Respondent ought to have consulted a professional land use planner with respect to assessing 2021 Permit Application to weigh and balance the important considerations associated with sound planning principles, especially given the requirement to interpret discretionary legislative provisions. A key excerpt from *Arsenault*, follows:

> <u>Sound Planning Principles</u>
>
> 43. Throughout the submissions advanced by both parties, reference to Commission Order LA17-06 ("*Stringer*") is made. In *Stringer*, the Commission provided commentary on the importance of sound planning principles in decision making.
>
> Specifically, the Commission stated:
>
> > "…Sound planning principles require regulatory compliance but go beyond merely insuring [sic] 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. In order to ensure that sound planning principles have been followed in anomalous applications a professional land use planner must be consulted.[30]"
>
> 44. The Commission notes that in the present case, the Minister did not consult a professional land use planner in its review of the application. Rather, the Minister consulted Alex O'Hara, Land Use and Planning Act Specialist. Mr. O'Hara does not have a recognized professional accreditation in land use planning. He is not a member of the Canadian Institute of Planners or any other professional organization for professional planners. As set out in Stringer, the Minister ought to have consulted a professional land use planner with respect to the subject application to weigh and balance the important considerations associated with sound planning principles – particularly when it is dealing with the interpretation of discretionary legislative provisions.
>
> 45. The Commission and the Regulations stress the importance of decisions respecting subdivision applications being grounded by sound planning principles. Sound planning principles are, as stated by Ms. Tsang, an enhancement of the existing legal framework. Sound planning principles require a balancing of many objectives – but these objectives must be grounded in sound planning, engineering, and environmental principles, not policy papers or subjective opinion. The Commission understands the Minister may not have planning professionals on staff, but when interpreting discretionary interpretive provisions of the legislation, he 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.
>
> ***Lucas Arsenault, Jennie Arsenault and L&J Holdings Inc. v. Minister of Agriculture and Land*, 2023 PEIRAC 4, at paras 43-45. [Tab 2]**

34. The Appellants submit that the Respondent's analysis respecting the 2021 Permit Application and 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 Respondent, contrary to sound planning principles.

35. The conclusions contained within Mr. O'Hara's Internal Provincial Planning Report contend that approval of the Appellants' proposed structure should be denied due to its lack of integration into the "rural character" of the Point Prim area, and that the structure would create a "detrimental impact" on surrounding land uses—specifically citing concerns over visual impact (overlooking and loss of privacy), incongruity with the area's character, and potential adverse effects on visual amenity.

36. The reasoning outlined in Mr. O'Hara's Internal Provincial Planning Report improperly interprets established planning standards set-out in the *Act* and related *Development Regulations*. Rather, Mr. O'Hara's conclusions were primarily based upon his own subjective opinion, which are unsupported by the facts, and as will be discussed in detail in the following section of this submission, do not accord with sound planning principles.

37. Accordingly, to the extent that the Decision relies on the analysis provided by Mr. O'Hara's Internal Provincial Planning Report, the Appellants submit that the Decision is without merit, in that it fails Part (2) of the *Stringer* test and does not comply with sound planning principals as identified in the objects of the *Planning Act*.

Analysis of the Respondent's Decision

38. As outlined in the Decision, the Subject Property is within a geographic area where land use and development are not regulated by a municipal official plan or zoning by-law. Accordingly, land use and development activities respecting the Subject Property are regulated by the *Planning Act* and *Development Regulations*.

39. The Respondent formally denied the 2021 Permit Application pursuant to subsection 6(c) of the *Act* and paragraph 3(2)(d) of the *Development Regulations*. The Respondent's Decision also referenced the applicable definition of "detrimental impact" which is a defined term found in subsection 1(f.3) of the *Development Regulations*. The aforementioned legislative provisions have been provided below:

Planning Act

> **6. Role of Minister**
>
> The Minister shall
>
> …
>
> (c) generally, administer and enforce this Act and the regulations,
>
> ***Planning Act*** **R.S.P.E.I. 1988, Cap. P-8 [Tab 3]**

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
>
> …
>
> (d) have a detrimental impact;

> **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*
>
> ***Subdivision and Development Regulations,*** **PEI Reg EC693/00 [Tab 4]**

40. The Respondent's Decision denying the 2021 Permit Application was rooted in the assessment that the Appellants' summer cottage structure would have a "detrimental impact" on surrounding land uses.

41. As canvassed previously, development permit decisions of the Respondent must be rooted in, and made in accordance with, applicable legislation. Further, discretionary provisions within the legislation must be interpreted using sound planning principles.

42. The Appellants submit that the definition of "detrimental impact" provided by the *Development Regulations* is discretionary in nature, and that the Respondent's exercise of discretion in this case was both subjective and lacking in factual underpinning, contrary to sound planning principles.

43. The Appellants rely on the Expert Planning Opinion prepared by Chris Markides, who is a member of the Canadian Institute of Planners, a Licensed Professional Planner of Nova Scotia, and who holds a Master of Planning Degree from Dalhousie University.

44. In his Opinion, Mr. Markides outlines a key flaw in the Respondent's Decision, in that the Decision relies heavily on the argument that the Appellants' summer cottage proposal impacts upon protected viewscapes in the Point Prim area. Despite the Decision's focus on this aspect of the 2021 Permit Application, Point Prim is not an area designated in the "Scenic Viewscape Zone" as outlined in section 58 of the *Development Regulations*.

45. Accordingly, the Decision's focus on preserving and enhancing the aesthetic appeal of the landscape in Point Prim is without statutory basis. As Mr. Markides correctly states in his Opinion, the summer cottage structure both aligns with the predominant land use in the area (residential summer cottages/residential dwellings), and the Decision's focus on protecting viewscapes in Point Prim where no statutory protections exist, calls both the objectivity of the Respondent's Decision and its sound planning principle analysis, into question. An excerpt from Mr. Markides' Opinion is provided below:

> The analysis of the “sound planning principles” used by the Minister to make their decision to refuse the development permit was flawed. The Minister's flawed rationale in refusing the development permit lies in a misinterpretation of the Planning Act's provisions. By not recognizing the absence of a designated Scenic Viewscape Zone in Point Prim, the decision incorrectly applies the principle of protecting viewscapes. It is imperative for decision-making to be grounded in accurate application of the relevant statutes to ensure that sustainable development is not hindered by errors in judgment. The implications of this decision extend beyond this single case, potentially affecting future applications and the overall approach to planning within the province.
>
> **Chris Markides, Expert Planning Opinion, at page 4. [Tab 5]**

46. With respect to the Decision’s cited “detrimental impact” reasoning, the legislation makes clear that "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.

47. Mr. Markides correctly concludes in his Opinion that, given that the detrimental impact factors of public health, public safety, and protection of the natural environment are not triggered by the residential summer cottage structure proposed by the 2021 Permit Application, the Respondent’s detrimental impact analysis must demonstrate how the Appellants’ 2021 Permit Application and summer cottage structure negatively impact (that is, the imposition of “loss or harm”) upon persons or property in relation to surrounding land uses.

48. Mr. Markides’ Opinion analyzes three “aspects of impact” which the Respondent identifies in the Decision as having “detrimental impact” on rural character of Point Prim. The three detrimental “aspects of impact” are as follow:

- Overlooking and loss of privacy;
- The design, appearance and materials of the proposed development; and
- Impact on visual amenity (but not the loss of a private view).

49. The Appellants will address each of these aspects of impact, in turn, to illustrate flaws in the Decision’s “detrimental impact” analysis, and specifically, the Respondent’s analysis of how the Appellants’ summer cottage structure imposes “harm or loss” to surrounding land uses.

Overlooking and Loss of Privacy

50. With respecting to overlooking and loss of privacy, the Appellants submit that the height and siting of the summer cottage structure, as well as the mature vegetive barrier on the eastern

perimeter of Subject Property, reasonably mitigate “harm or loss” to surrounding land uses, namely, other residential summer cottage structures on adjacent properties.

Building Height

51. As a primary point, neither the *Act* nor, the *Development Regulations*, impose a statutory maximum building height limit in the Point Prim area. Accordingly, no maximum height limit explicitly applies to the Subject Property. Further, the Appellants submit that the three-storey residential cottage structure in question is comparable to a three-story single-family dwelling, which is a standard structure height in other areas of this province where maximum building height limits are regulated. Put simply, from a height perspective, the Appellants’ summer cottage dwelling would comply with height maximums in regulated areas.

Building Location on the Lot

52. Summer cottage structure siting was considered carefully by the Appellants so as to meet, and exceed, the prescribed setbacks in the *Development Regulations*. In addition, the Appellants went to great lengths to accommodate neighbouring property owners by re-siting the structure further back from the shoreline, as compared to the location originally approved in original 2017 Permit Application. As Chris Markides points out in his Opinion, the summer cottage structure is strategically placed toward the rear of the Subject Property, so as to maximize the distance from the two neighbouring cottage dwellings and from any public viewpoints, thereby minimizing impact on surrounding land uses. Chris Markides’ Opinion also concludes that:

> … [At the estimated distance of 75m from the next closest neighbouring dwelling]… the summer cottage in question cannot reasonably be considered to be overlooking any adjacent dwellings. These siting features mitigate concerns of overlooking and privacy loss to the degree that can be reasonably expected. Furthermore, it is not likely that the structure as completed causes any loss or harm to surrounding land uses than the structure proposed and approved by the initial development permit.
>
> **Chris Markides, Expert Planning Opinion, at page 7. [Tab 5]**

Vegetative Buffer

53. Lastly, the Appellants note that, with respect to overlooking and loss of privacy concerns related to the summer cottage structure, a significant vegetative buffer, including mature trees, exists on the eastern permitter of the Subject Property between the summer cottage structure and the nearest neighbouring property (Parcel # 877654). This vegetative buffer not only provides privacy for adjacent properties, but also reduces the visual impact of neighbouring structures.

Design, Appearance, and Materials of the Proposed Development

Architectural Style

54. With respecting to design of the summer cottage structure and building materials, the Appellants submit that structure in question was designed to look like a historic PEI barn, so as to be in keeping with the rural character of the surrounding area. As Chris Markides points out in his Opinion, the summer cottage structure is compatible with regional architectural heritage:

> [The summer cottage structure] includes a gambrel roof, wood clapboard siding, and is three stories in height. Barns with a similar appearance can be found throughout rural Prince Edward Island, and the style of the structure is consistent with several historic buildings in the region., reasonably mitigate "harm or loss" to surrounding land uses, namely, other residential summer cottage structures on adjacent properties.
>
> **Chris Markides, Expert Planning Opinion, at page 8. [Tab 5]**

Impact on Visual Amenity (but not the loss of a private view)

55. Lastly, the Appellants submit that the Decision's focus on "impact on visual amenity", is not a valid planning criterion on which to assess "harm or loss" to surrounding land uses. In his Opinion, Chris Markides correctly identifies that "visual amenity" is not a defined term in the *Act* or *Development Regulations* and cannot be specifically regulated without excluding the development of <u>any</u> property which may interfere with the "visual amenity" of adjacent properties:

> In this sense, any new development could be said to be interfering with visual amenity, given that new development inherently introduces a new structure to a property that had either a different structure, or was a completely undeveloped. Furthermore, it is not likely that the structure as completed causes any loss or harm to surrounding land uses than the structure proposed and approved by the initial development permit.
>
> **Chris Markides, Expert Planning Opinion, at page 9. [Tab 5]**

<u>CONCLUSION</u>

56. In conclusion, the Appellants submit that the Respondent's Decision failed to correctly follow the provisions of the *Act* and applicable *Development Regulations*, and otherwise erred in their interpretation and application of the *Act* and *Development Regulations.*

57. The Appellants submit that the Respondent'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 Respondent.

58. The Respondent erred in concluding that the summer cottage structure Appellants' 2021 Permit Application would have a "detrimental impact" on surrounding land uses, as defined in the *Development Regulations*, and in doing so failed to identify, follow, and apply sound planning principles in its consideration of the 2021 Permit Application, and the resulting Decision.

59. The Appellants rely upon the Expert Opinion provided by Licensed Professional Planner Chris Markides and submit that summer cottage structure both aligns with the predominant land use in the area, and that the Decision's focus on protecting viewscapes in Point Prim where no statutory protections exist, calls both the objectivity of the Respondent's Decision, and its sound planning principle analysis in this case, into question.

60. Finally, the Appellants take the position that the "detrimental impact" analysis provided in the Respondent's Decision is without merit. The summer cottage structure does not impose unreasonable "harm or loss" on surrounding land uses and is in keeping with the region's established aesthetic and planning standards.

All of which is respectfully submitted this 22nd day of April, 2024.

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Counsel for the Appellants,
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File No. LA22002

BEFORE THE ISLAND REGULATORY AND APPEALS COMMISSION

IN THE MATTER OF an appeal pursuant to s.28 of the *Planning Act*, RSPEI 1988 c. P-8 by Parry Aftab and Allan McCullough with respect to the denial of an application for an Amended Development Permit at PID #877647 located at Bessie Willow Land, Point Prim, Queens County, Prince Edward Island

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TBK/mmm - 182762

Tab 1.

THE ISLAND REGULATORY AND APPEALS COMMISSION
Prince Edward Island
Île-du-Prince-Édouard
CANADA

Docket LA15010
Order LA17-06

IN THE MATTER of an appeal by Donna Stringer of a decision of the Minister of Communities, Land and Environment, dated August 12, 2015.

BEFORE THE COMMISSION
on Thursday, the 10th day of August, 2017.

J. Scott MacKenzie, Q.C., Chair
Douglas Clow, Vice-Chair
John Broderick, Commissioner

Order

IN THE MATTER of an appeal by Donna Stringer of a decision of the Minister of Communities, Land and Environment, dated August 12, 2015.

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IN THE MATTER of an appeal by Donna Stringer of a decision of the Minister of Communities, Land and Environment, dated August 12, 2015.

Appearances & Witnesses

1. **For the Appellant Donna Stringer**

   Counsel:

   John D. Stringer, Q.C.

   Witnesses:

   Donna Stringer

   Leland Wood

2. **For the Respondent Minister of Communities, Land and Environment**

   Counsel:

   Robert MacNevin

   Witness:

   Jay Carr

3. **For the Developers Betty Ann Bryanton and Gareth Llewelleyn**

   Counsel:

   Steven Forbes

   Witness:

   Betty Ann Bryanton

IN THE MATTER of an appeal by Donna Stringer of a decision of the Minister of Communities, Land and Environment, dated August 12, 2015.

Reasons for Order

1. Introduction

(1) On August 19, 2015, the Appellant Donna Stringer (the "Appellant") filed an appeal with the Island Regulatory and Appeals Commission (the "Commission") under section 28 of the ***Planning Act***, R.S.P.E.I. 1988, Cap. P-8, (the ***"Planning Act"***).

(2) The Appellant appealed an August 12, 2015 decision of the Respondent Minister of Communities, Land and Environment (the "Minister") granting Development Permit No. M-2015-0087 ("Permit 87") and Development Permit No. M-2015-0088 ("Permit 88") to the Developers Betty Ann Bryanton and Gareth Llewelleyn (the "Developers") to change the permitted use of an existing non-commercial storage building to a summer cottage (Permit 87) and to relocate three non-commercial storage buildings (Permit 88) on Provincial Parcel Number 931741, located on the south side of 158 Paradise Drive, in the Community of Little Pond (the "subject property").

(3) The Commission forwarded letters to the Minister and the Respondents advising of the Appeal and requesting that the Minister provide a copy of the development application file. On September 4, 2015 a copy of the application file was received and forwarded via email to the Appellant and the Developers.

(4) On September 15, 2015, Commission received a letter submission from Robert MacNevin, legal counsel for the Minister. Mr. MacNevin acknowledged that "Evidently the non-commercial storage buildings are used, from time to time, to accommodate people who use them to sleep at night during the summer months". Mr. MacNevin further advised that as these "non-commercial storage buildings are not hooked up to water or sewer systems, they are not considered to be "dwellings". He further submitted that "There was nothing in the ***Planning Act*** Subdivision and Development Regulations that regulate either the number or use of non-commercial storage buildings". Mr. MacNevin submitted that "There was no basis for the appeal to be successful".

(5) On September 18, 2015, the Commission's Appeals Administrator emailed the parties to facilitate the filing of written submissions and noting that the Commission was prepared to hear the appeal as early as November 2015.

(6) Submissions from Appellant's Counsel were received by the Commission on October 13, 2015. Submissions were received from the Developers on November 2, 2015.

(7) On December 9, 2015 counsel for the Minister provided a further submission by letter, departing from the original position taken in his September 15, 2015 letter, now stating that "It is the Department's position that non-commercial storage buildings, which is what Permit No. N-2015-0088 allows, are not intended to be used as sleeping quarters, or "bunkies"." [emphasis added] He further submitted that there was a gap in the Subdivision and Development Regulations 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, and as such I suggest that this appeal be put on hold until the new Regulations come into force. At that time the Department officials will be in a position to determine if Ms. Bryanton's units are in compliance with the new Regulations." In response to this submission the Appellant's Counsel responded noting that statutes and Regulations are not to be construed as having retrospective operation unless they are expressly or by necessary implication required in the language of the regulation. He noted that "It is the view of the Appellant that any retroactive or retrospective future legislation would be prejudicial to the rights of the Appellant, thereby giving rise to a presumption against retroactivity." He requested that the appeal proceed to a public hearing to have the matter adjudicated.

(8) On January 15, 2016 the Commission advised the parties that the appeal would proceed to a hearing and invited the parties to indicate their available dates. After consulting with the parties, the Commission scheduled the appeal to be heard on June 9 and 10, 2016.

(9) On March 15, 2016, Steven Forbes advised the Commission that he would be representing the Developers. On March 18, 2016 the Commission received a letter from Mr. Forbes requesting a change in the hearing date to July 2016. Mr. Forbes also requested the opportunity to file written submissions. On March 22, 2016, John D. Stringer, Q.C., Counsel for the Appellant, advised the Commission that he did not object to a July or August hearing. On March 22, 2016 the Commission's Appeals Administrator contacted counsel for the three parties to encourage the parties to reflect on the possibility of alternative dispute resolution ("ADR") and offer the Commission's assistance in providing ADR services. Subsequently all parties and the Commission agreed to hearing dates of July 21 and 22, 2016. Dates for filing written submissions and rebuttal submissions were also agreed to.

(10) Following the receipt of the various written submissions, Counsel for the Appellant canvassed counsel for the other parties inquiring whether there was interest in pursuing ADR. By June 3, 2016 all counsel had expressed a willingness to participate in ADR.

(11) With the agreement of all parties and their legal counsel, ADR was held on the morning of July 21, 2016 with the Commission's Appeals Administrator as mediator. The parties were unable to reach a mediated solution and requested that the appeal be heard by the Commission.

(12) The Commission heard the appeal commencing on the afternoon of July 21, 2016. Legal counsel for all three parties filed an Agreed Book of Documents which was entered as Exhibit E-1. The hearing concluded on the morning of July 22, 2016.

2. Discussion

Appellant's Testimony and Submissions

(a) The Appellant Donna Stringer ("Mrs. Stringer") testified that she purchased her property in the autumn of 2007. Mrs. Stringer's property is located adjacent to the subject property. At the time Mrs. Stringer purchased her property, the Developers had a shed on their property and also placed a tent and a dining tent on the property for two to three weeks each year. In poor weather, the Developers slept in the shed.

(b) Mrs. Stringer testified that her cottage contains seven rooms including four bedrooms. The Appellant provided an aerial photo of the cottages on Paradise Drive (Tab 27 of Exhibit E-1). The aerial photo has been annotated to insert descriptions of the ownership of the cottages and the placement of the "bunkies". The photo shows a total of five cottages, three of which are the size of the Appellant's, one which is somewhat smaller and the Developer's converted shed cottage which is substantially smaller than the others.

(c) Mrs. Stringer testified that on July 20, 2015 a port-a-pottie or free standing portable outdoor toilet enclosure was delivered to the subject property. The next day a number of workers arrived with one shed and started putting in stakes where the shed was to be placed. The second shed arrived the next day. The sheds were put in place and windows were installed in the sheds to allow for a view of the water. Mrs. Stringer testified that the Developers informed her that they were just sheds. However, Mrs. Stringer could view the workers trying to put queen size air mattresses into the sheds. She stated that when she questioned the Developers on what permits they had obtained to be allowed to put the sheds on the property, the Developers responded that they did not need permits. The Appellant checked with Leland Wood of the Department of Communities, Land and Environment and he advised that no permits had been issued. Mrs. Stringer advised that a few days later after the initial installation the shed that was closest to the water was moved and the workmen began setting in pegs for the placement of a third shed. Pegs for a third shed were later removed.

(d) Mrs. Stringer testified that when she spoke to Leland Wood at a later time he advised her that the permits were in fact granted, directed her to the Planning website and told her that in order to get information on the permits issued to the Developers, she would have to launch an appeal to the Commission under the ***Planning Act***. When she received the file as part of the appeal process, she was surprised to learn that the original shed that had been on the property was now approved through Permit 87 as a cottage. Mrs. Stringer indicated that she has a concern over the number of accessory buildings being placed on this property and was concerned that more sheds were going to be placed on the property. She also noted that to her knowledge no septic system was ever installed on the Developers' property.

(e) 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. However, Mrs. Stringer did note that in her view the Developers and the Developers' guests did compromise safety and security as there were no sanitary facilities on the property and she questioned the cooking and other sanitary facilities where there was no proper disposal. Under cross-examination when she was questioned about her concerns about more sheds, she testified that originally there was pegging put in the ground for four sheds, but in the end only two sheds were actually put on the property.

(f) Leland Wood ("Mr. Wood"), is a safety standards officer employed by the Minister. Mr. Wood was called to testify by Appellant's Counsel. Mr. Wood testified that he has worked for the Minister first as a property development officer and then as a safety standards officer, for the past 13 years. He is licensed as a septic inspector. Mr. Wood is not a land use planner. He testified a summer student working at his office had taken a building permit application for two "bunkies" from Betty Ann Bryanton ("Ms. Bryanton") who is one of the Developers. Mr. Wood testified that he spoke with Ms. Bryanton who confirmed that she was seeking a permit for "bunkies". Mr. Wood testified that the original application for the "bunkies" was refused for the reason that there was no dwelling or cottage on the property at the time of the application.

(g) Mr. Wood testified that he informed Ms. Bryanton that unless the first storage shed on the property was subject to a change of use to a dwelling, there could not be any other accessory buildings placed on her property. Mr. Wood informed Ms. Bryanton that there could only be one dwelling per lot. Mr. Wood testified that he informed her that a septic permit would be required in order to change the original shed to a cottage. He noted that it was a paper application and he did not visit the subject property. He testified that without the original shed being approved through a change of use to a cottage the two additional sheds could not be approved as the "bunkies" were considered to be accessory buildings. He noted that the term "bunkies" was used in the Developer's application.

(h) When asked if 20 "bunkies" would be permitted on the subject property, Mr. Wood 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". Mr. Wood testified that "bunkies' are not permitted to be used as accommodations because there is no septic system connected to the "bunkies". When asked whether you could live in a "bunkie" he replied "No". Mr. Wood testified that the original application was for "bunkies" and he told the applicant that they could not have "bunkies" and he suggested that the application be changed to a request for two non-commercial storage buildings instead.

(i) Mr. Wood testified that a building may be approved as a cottage if there is a septic permit, that there is no time limit on septic approval, no system is first required and no occupancy permit is required. He stated that with regard to a septic system, staff do not know if its installed as the building is not inspected and the Department does not follow-up to determine whether a septic system has been installed. He stated that the Regulations do not specify a minimum size for a cottage.

(j) Under cross-examination from Counsel for the Minister, Mr. Wood clarified that site inspections are not performed for every development permit as resources are not sufficient to do so.

(k) Under cross-examination from Counsel for the Developers, Mr. Wood clarified that Jay Carr directed him 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.

(l) Counsel for the Appellant submitted that the appeal is against the Minister's decision to issue Permit 87 and Permit 88. He submitted that there is little disagreement with respect to the facts. He submitted that where the parties do differ is on the interpretation of the ***Planning Act*** and the ***Planning Act*** Subdivision and Development Regulations (the "Regulations"). He submitted that the Regulations do not support the issuance of either permit. Highlights of his oral submissions include the following:

- The June 26, 2006 permit application for the original storage shed had the annotation "future cottage many years from now". Exhibit E-1, Tab 19, page 4 contains a reference to "bona fide cottage" which suggests that the Developers do not consider the original shed to be a true cottage. The change of use application which resulted in the issuance of Permit 87 identified the original shed which was changed to a cottage as being 12 by 14 feet for a square footage of 168 square feet.
- The original shed, now deemed to be a cottage, does not have a sewage disposal system. All that was required was approval of a septic permit form. That paper approval was issued about one year ago yet no system has been installed and the Developer has no present intention of installing a septic system. However, such a system is the underpinning for the change of use application.
- Exhibit E-1, Tab 18, provides photographs of four structures: the original shed or "cottage", a small plastic storage shed, a shed used as a "bunkie" and another shed used as a "bunkie".
- No site inspection occurred for either the change of use Permit 87 or the approval of the "bunkies" Permit 88.
- Past decisions of the Commission have emphasized a need for clear wording, objective criteria and the avoidance of arbitrary discretion.
- The definition of "dwelling" under the Regulations is relevant while the definition of dwelling unit is not.
- Granting the permit after locating the structures on the property is a contravention of Sec. 31 of the Act.
- The government did not proceed properly, there is no current septic system on the property, there was no site inspection done to determine whether the structures met the cottage requirements, that both the Developers and government personnel seemed to take the position that, with septic systems, all that is required is a permit, not the installation of the system itself.
- The sewage disposal system to be installed must be the system that was approved and for which a permit was issued as this is the basis for granting a change of use to a cottage under Permit 87.

- Sec. 42(1) of the ***Planning Act*** states that there cannot be more than one building used as a dwelling on a lot and that these terms are defined in the Act. This provision limits the ability to construct multiple buildings and dwellings and have one lot sprinkled with numerous "bunkies".
- "Bunkies" meet the definition of dwelling as set out in the Act.

(m) Counsel for the Appellant requested that the Commission revoke both Permit 87 and Permit 88 and require the two "bunkies" to be removed.

Testimony and Submissions on behalf of the Minister

(n) Jay Carr ("Mr. Carr") is the Safety Standards Chief for the Minister. Mr. Carr is not a land use planner. Mr. Carr testified that he deals with the more "out of the ordinary" files. He testified that the Department will not issue permits for "bunkies", they can't, as they are not provided for in the Regulations. The Regulations do provide for permits for non-commercial storage buildings, that are not dwelling units. The Regulations do not state what non-commercial storage buildings may be used for and nothing in the Regulations prevent sleeping in a non-commercial storage building. Mr. Carr 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".

(o) 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. He advised that as of two months prior to the date of giving his testimony the Department now has the safety standards officers under the Planning Division and that the Department was recently instructed after a decision of this Commission in another matter to have their personnel consult more with land use planners in the Department. He stated that previously it was the environmental aspects that were the focus of the Department in approving such permit applications, but now land use planners are also brought in and the planning aspect to an application needs to be considered. He stated that having three sheds on one lot was, in hindsight, not properly based on sound planning principles and if the application were received today land use planners in the Department would be consulted.

(p) Mr. Carr testified that the Regulations do not set out minimum size standards for a cottage. He noted that to constitute a dwelling unit a kitchen and bathroom is typically required.

(q) Mr. Carr explained that licensed septic contractors design a system, buy registered documents, fill the documents out, send the documents back to the Minister's staff and are required to notify the minister's staff when the system is going to be installed. The Minister's staff does not inspect every system but do random inspection audits. He testified that if an audit is done and they find a system that has not been installed then they proceed to enforce the septic tank permit.

(r) Under cross-examination from Counsel for the Appellant, Mr. Carr testified that the application filed by the Developers was for "bunkies" but the permit issued was for non-commercial storage buildings. Mr. Carr stated that non-commercial storage buildings are accessory buildings and must be accessory to a main use. Mr. Carr also reiterated that there is no minimum size requirement for a building to be approved as a cottage. When asked what the Department would do if they determined that no septic system was installed as in accordance with the permit, Mr. Carr testified that a letter would be provided providing one month to install the system and that if nothing was done then the Department would issue an order providing one month to install the system. Further enforcement steps could be taken including pulling septic tank permit if the work was not conducted.

(s) Under cross-examination from Counsel for the Developers, Mr. Carr stated that the definitions of a "dwelling" and a "dwelling unit" are considered by the Minister's staff to be essentially the same but they are technically separate definitions.

(t) Under questioning from the Commission's Chair, Mr. Carr stated that internal policy now requires planners to be consulted in these type of circumstances. Mr. Carr acknowledged that sound planning principles apply to the ***Planning Act*** and the Regulations. Mr. Carr testified that previously sound planning principles were far down on the list of considerations with applications such as these. As of the date of the hearing he confirmed that sound planning principles are now on the top of the list of considerations that must be dealt with. With respect to the consideration of premature development, Mr. Carr stated that premature development mostly applies to subdivision matters but could also apply with respect to the building of rental cottages.

(u) Counsel for the Minister, departing again from the previous written submission of December 9, 2015 where it was clearly stated that commercial storage buildings were not intended to be used as sleeping quarters or "bunkies", submitted that the use of non-commercial storage buildings as "bunkies" was not prohibited and as such there was no basis to allow the appeal and rescind the permits. Counsel for the Minister presented further oral submissions in support of the Minister's decisions, highlights of which include the following:

- There is nothing in the ***Planning Act*** or the Regulations to prohibit the storage of people in non-commercial storage buildings.
- These bunkies might only be used a handful of times per twelve-month period.
- The bunkies were unfinished inside and provided protection from the rain.
- 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?
- It was not warranted to send the matter to the Minister's planners.
- "Bunkies" are a new phenomenon in Prince Edward Island and new Regulations are being considered to address them.
- Sound planning principles are now, as of the date of this hearing, being used in development applications by the Department.

- 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.
- "Bunkies" cannot be considered to be dwellings as defined in the Act.
- Sec. 9 of the Act is a saving provision that allows permits to be issued where development occurs and it is then determined that an application should have been applied for.

(v) Counsel for the Minister submitted that Permit 87 and Permit 88 should be upheld and the appeal denied.

Developers' Testimony and Submissions

(w) Betty Ann Bryanton ("Ms. Bryanton") is the co-owner of the subject property. She purchased the property in 2003-2004. Ms. Bryanton told the Commission that she resides in Ontario. Ms. Bryanton testified that she was born and raised on Prince Edward Island and wanted a summer cottage "spot". She visits the subject property a minimum of a week per year to a maximum of five weeks per year, with the average visit being two to three weeks.

(x) Ms. Bryanton told the Commission that at first she had a tent on the property and went to Sally's Beach to use the washroom facilities there. Ms. Bryanton stated that she needed a well and a building for the well. In 2006 storage shed #1 was placed on the property and she tented next to the building, with the building itself being used to store "our stuff" (e.g. camping gear). There is now a full kitchen in shed #1. One year prior to the application for Permit 87 and Permit 88 an eight foot by eight-foot shed was put up. Prior to receiving the septic permit a portable chemical toilet was used.

(y) Ms. Bryanton testified that Leland Wood helped her with the applications and that she met him to ensure that they complied with all of the set-back requirements and placements. After consulting him she ended up moving one of the placements of the "bunkie" further back up on the property as she was advised that it was not placed properly. Draft applications were prepared and they were then reviewed by Mr. Wood and that was when Mr. Wood told her to correct the placement for the lower "bunkie". She testified that she had told Mr. Wood that she bought sheds hoping that people would be able to stay in them. Mr. Wood, however, advised her that there are no "bunkies" permitted in PEI. She was told that only non-commercial accessory buildings could be used and that fit best for her as their plan was to use the "bunkies" as storage as well. She testified that when it came to the placement of the shed, she placed them on the left side of her property away from the Stringer's property and out of view of their cottage so that there would be privacy for anyone who stayed in the "bunkies". She testified that she never intended to have four "bunkies" on the property, only two "bunkies".

(z) Ms. Bryanton testified that the "bunkies" are small pre-built sheds that were placed on the subject property and were then upgraded with vinyl siding and windows. The "bunkies" would allow her guests to sleep in them rather than in tents when it was raining. The "bunkies" do not have running water or electricity. An air mattress is used for sleeping. The original shed has a kitchen and waste is taken care of. The change of use for the original shed is representative of what it is. In the summer of 2015 there were more people at the subject property due to the activity of placing and upgrading the sheds and an outside portable toilet was used. The "bunkies" are not presently rented out

and she testified that she has no intention to rent out the "bunkies". When questioned Ms. Bryanton testified that she did not anticipate putting anymore "bunkies" on the lot.

(aa) Under cross-examination by Counsel for the Appellant, Ms. Bryanton testified that she would consider using an outside portable toilet again as she had discovered that it was much more convenient than using the chemical toilet located in the original shed, now the cottage. She has not ordered an outside portable toilet so far this year. Ms. Bryanton testified that the cost of installing a septic system would exceed the benefit of such a system. She maintained that a septic system was not required; rather only a permit for such system. She stated that composting toilets were something she was looking into. Waste water from washing dishes, known as "greywater", goes through a trough and is drained underneath into gravel and goes into the ground.

(bb) Ms. Bryanton testified that the change of use for the original shed was filed at Mr. Wood's behest. 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.

(cc) Under re-direct examination from Counsel for the Developers, Ms. Bryanton testified that she is willing to investigate alternate waste disposal methods with the Minister's staff.

(dd) In response to questions from the Commission panel, Ms. Bryanton testified that she never had any intention of installing a septic system for two weeks per year use. She then added that she would install such a system if she had to, but she would prefer to utilize a composting toilet. Ms. Bryanton confirmed that the "bunkies" were unfinished on the inside and had standard shed type doors.

(ee) Counsel for the Developers presented oral submissions in favour of upholding Permit 87 and Permit 88. These oral submissions include the following points:

- With respect to Permit 87, the change of use permit for the original shed now a cottage, a change of use represents an authorization to do rather than a certification of what has been done. Ms. Bryanton has testified that she will consult with the Minister's staff to deal with alternative options to deal with waste and if necessary, she is open to installing a septic system.
- Both Permit 87 and Permit 88 exist for a period of twenty-four months from the date of issue. As that time period has not passed yet, there is no issue of non-compliance today.
- With respect to Permit 88, that permit is for three non-commercial storage buildings. Of these three buildings, two are used as "bunkies" for at most ten days per year. At all other times, they are used for storage. The mere fact that an air mattress is placed on the floor for a few days per year does not turn a shed into a dwelling.
- 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. Therefore, there is no need to have the application evaluated by the Minister's planning staff.

- 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. A right to restrict should be interpreted narrowly while a right to permit should be interpreted broadly. There is no clear wording to prohibit the use of these buildings as bunkies.
- With respect to the definitions of dwelling and dwelling unit: a dwelling is a home, apartment building, a duplex etc. while a dwelling unit is a base unit such as an apartment in an apartment building. Thus, the definition of dwelling and dwelling unit, which are found in the same section of the Regulations, should be applied in the same way.
- The Developers contend that both Permit 87 and Permit 88 were validly granted. However, in the event that the appeal was successful, what would be an appropriate remedy? Permit 87 is a matter of compliance only. As for Permit 88, if the two non-commercial storage buildings used as bunkies were considered to be dwellings, then the only proper remedy would be to prohibit their use for sleeping as there would be no reason not to use them for non-commercial storage.

(ff) Counsel for the Developers submit that Permit 87 and Permit 88 should be upheld by the Commission and the appeal dismissed.

3. Findings

(13) After a careful review of all documents in evidence, the oral testimony of the witnesses, the written and oral submissions of counsel for the parties and the applicable law, it is the decision of the Commission to allow the appeal.

(14) Subsection 28.(1) of the ***Planning Act*** sets out the Commission's jurisdiction to hear this appeal of both Permit 87 as a change of use permit and Permit 88 as a development permit:

> *28. (1) Subject to subsections (1.2) to (4), any person who is dissatisfied by a decision of the Minister that is made in respect of an application by the person, or any other person, pursuant to the Regulations for*
>
> *(a) a development permit;*
> *(b) a preliminary approval of a subdivision or a resort development;*
> *(c) a final approval of a subdivision;*
> *(d) the approval of a change of use; or*
>
> *(e) any other authorization or approval that the Minister may grant or issue under the Regulations,*
>
> *may appeal the decision to the Commission by filing with the Commission a notice of appeal.*
>
> Emphasis added.

(15) The objects of the ***Planning Act*** are set out in section 2:

> *2. The objects of this Act are*
>
> *(a) to provide for efficient planning at the provincial and municipal level;*
> *(b) to encourage the orderly and efficient development of public services;*
> *(c) to protect the unique environment of the province;*
> *(d) to provide effective means for resolving conflicts respecting land use;*

(e) to provide the opportunity for public participation in the planning process. 1988,c.4,s.2.

(16) The following definitions found within section 1 of the Regulations are noteworthy:

(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;

…

(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;

…

(d) "change of use" means

(i) altering the class of use of a parcel of land from one class to another, recognizing as standard classes residential, commercial, industrial, resource (including agriculture, forestry and fisheries), recreational and institutional uses, or

(ii) a material increase in the intensity of the use of a building, within a specific class of use as described in subclause (i), including an increase in the number of dwelling units within a building;

…

(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;
…

(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,

(ii) "single unit dwelling" means a building containing one dwelling unit and does not include mobile homes, but does include mini homes,

…

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

(17) At the hearing, Counsel for the Minister took the position that the Minister was correct in issuing both Permit 87 and Permit 88. However, Counsel for the Minister had taken a different position in his December 9, 2015 letter to the Commission, as he stated that it was the Department's position that non-commercial storage buildings are not intended to be used as sleeping quarters or bunkies. He advised that Regulations to address the issue would be prepared in the near future and requested that the appeal be put "on hold" until the new Regulations come into force.

(18) For the record, the appeal was not held in abeyance and there is no evidence before the Commission that such regulatory additions have been made.

(19) 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. The testimony of Mr. Carr also indicates that the Minister's internal policy now provides for staff planning professionals to be consulted on applications such as those filed by the Developers. The Commission commends the Minister for this change in policy to now use land use planners on these types of applications.

(20) In the context of municipal planning decisions, the Commission has often utilized a two-part test to guide its consideration of an appeal. The Commission is of the view that the same test should be applied to appealable Ministerial decisions made under the ***Planning Act*** and the Regulations. In the context of Ministerial decisions, that test is:

- 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
- 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***.

The Commission's Consideration of Permit 87

(a) Permit 87 grants permission to the Developers to change the use of a non-commercial storage building previously permitted by permit K-095-2006 to a summer cottage on parcel number 931741 located on the south side of 158 Paradise Drive in the Community of Little Pond. The permit is dated August 12, 2015 and expires twenty-four (24) months from the date of issue. The permit is subject to the structure being erected in accordance with the approved application sketch and compliance with the Environmental Protection Act's 15 metre watercourse/wetland buffer zone.

(b) Permit 87 is issued under the authority of the Regulations and purports to change an existing non-commercial storage building to a summer cottage. While a summer cottage is a defined term under the Regulations, a non-commercial storage building is not defined in the Regulations. The definition of a summer

cottage references the meaning of a single unit dwelling which in turn references a dwelling unit. The definition of dwelling unit specifies a single housekeeping unit with cooking and toilet facilities. The testimony of Ms. Bryanton indicates that there is a kitchen, with wastewater from washing dishes going through a trough into a graveled area and into the ground. There is also a chemical toilet and Ms. Bryanton has considered using an outside portable toilet in the future as having used it in the summer of 2015 proved more convenient than using a chemical toilet.

(c) The evidence given at the hearing was that although a septic system is required for a dwelling unit to be considered a cottage, such a system did not have to be installed, but that all that is required is that a septic permit be obtained. This is an absurdity. While possession of such a permit may facilitate proceeding with the construction of a cottage, mere possession of a septic system permit, without installing the septic system itself, does not legitimately allow for the use of a cottage. The septic system must be installed, inspected and approved before the landowners may occupy their cottage. The presence of an approved septic system is necessary to protect the environment. The absence of the installation of an approved septic system places the environment at risk.

(d) The Commission does not endorse the actions of a property owner taking it upon themselves to install a greywater drainage system that has not been inspected and approved by the Minister's environment experts. It should be the Minister's environmental experts, not the property owner, who decides what is acceptable. The septic system, which is a condition required under Permit 87, must be used for greywater disposal as well.

(e) The Minister's staff did not perform a site inspection of the original 12 by 14 foot building prior to issuing Permit 87. In the absence of such an inspection, and given the testimony of Ms. Bryanton, the Commission finds that the 12 by 14-foot converted shed does not meet the definition of a "cottage" or a "dwelling unit" as set out in the Regulations without the installation of toilet facilities in the unit itself and without the installation of an approved septic system. The Commission, therefore, finds that the Minister did not follow an acceptable proper process of procedure as required in the Regulations in ensuring that the building that was to be subject to a change of use, complied with and met the Regulations. The Minister therefore contravened the first part of the two-part test as enumerated in paragraph 52.

(f) The second part of the two-part test enumerated in paragraph 52 requires that the Minister's decision for this change of use have merit based on sound planning principles within the field of land use planning as identified in the objects of the ***Planning Act***. The evidence of the Minister's staff is that at the time this application was dealt with sound planning principles were far down on the list of considerations. As of the date of the hearing, the staff confirmed that sound planning principles are now on the top of the list of considerations that must be dealt with. This Commission has found, in numerous past decisions, that there must be evidence that a proposed development or change of use is consistent with sound planning principles (*Biovectra v. City of Charlottetown*, Order LA12-06). In determining whether or not a development proposal should go forward, the Minister must make an examination beyond the strict conformity with the Regulations and must consider sound planning principles including, but not limited to, the quality of architectural design, compatibility with architectural character of adjacent development, site development principles for the placement of structures and a thorough assessment of whether the development

is consistent with sound planning principles (*Atlantis Health Spa Ltd. V. City of Charlottetown*, Order LA12-02). The alteration of the character and appearance of the neighbourhood must also not be contrary to sound planning principles (*Compton v. Town of Stratford*, Order LA07-05).

(g) The evidence is irrefutable and the Commission finds that the Minister did not consider whether sound planning principles supported a decision to approve the change of use of the 12 by 14 foot building from "non-commercial storage building" to a summer cottage. As such, the Minister failed to demonstrate adherence to a key object of the ***Planning Act***, namely efficient planning based on sound planning principles at the provincial level, and accordingly, the Commission hereby quashes Permit No. M-2015-0087.

The Commission's Consideration of Permit 88

(h) Permit 88 grants permission to the Developer Betty Ann Bryanton to relocate three non-commercial storage buildings located on parcel number 931741 located on the south side of 158 Paradise Drive in the Community of Little Pond. The permit is dated August 12, 2015 and expires twenty-four (24) months from the date of issue. The permit is subject to the structure being erected in accordance with the approved application sketch, compliance with the Environmental Protection Act's 15 metre watercourse/wetland buffer zone, and that none of the non-commercial storage buildings are to be serviced with sewer or water.

(61) Once again, the terminology of "non-commercial storage buildings" is neither defined nor referred to in the Regulations, although the term "accessory building" is both defined and referred to in the Regulations. It is not apparent from the face of Permit 88 that the non-commercial storage buildings are approved as sleeping quarters or "bunkies". It was clear from the evidence that the Minister's staff were well aware that these sheds were bought for and intended to be used so that people could stay in them. It was the Minister's staff that advised that this was not permissible, but that the shed could fall within the Regulations and be permitted to be placed on the property as a "non-commercial storage building". By accepting an application, knowing full well that the intended use is not what is stated on the application, the Minister therefore breached the first part of the two-part test and did not follow proper process and handling of the application.

(62) The evidence before the Commission is that at no time did anyone in the Department seek the opinion of a professional land use planner with respect to the application which resulted in Permit 88.

(63) The objects of the ***Planning Act*** require: efficient planning, protection of the Province's unique environment, an effective means for resolving land use conflict and to provide the opportunity for public participation in the planning process. The Commission expects decisions made under the ***Planning Act*** and the Regulations to not only follow the legislative requirements but also be in accordance with sound planning principles. Adherence to sound planning principles is especially important where, as here, the legislation has not addressed a particular type of development. Sound planning principles could consider not only whether "bunkies" would or would not be permitted, but also, if deemed to be permissible, determine the number permitted on a parcel, size, location, appearance, consultation with adjacent property owners and other such factors.

(64) The Commission reiterates, as set out in paragraph 58 herein, that this type of development must have merit based on sound planning principles. Adherence to sound planning principles is especially important where there are applications to place a number of buildings on a single lot all of which, for the most part, would be used as "bunkies". Sound planning principles would determine whether it is appropriate to have a sprinkling of sheds over a cottage lot property and, if so, what number, size and location, appearance would be permitted on the parcel, after consultation with adjacent property owners and consideration of other factors. (*Atlantis Health Spa Ltd. v. City of Charlottetown*, Order LA12-02). The ***Planning Act*** addresses not only municipalities with Official Plans and land use bylaws but also areas of the Province which do not have Official Plans and land use bylaws. Sound planning must be a common feature of development throughout Prince Edward Island and property owners located in areas of the Province for which there is no municipal government should not be subject to inferior land use planning rights and responsibilities. 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. In order to ensure that sound planning principles have been followed in anomalous applications a professional land use planner must be consulted. The Minister's staff admitted that, in hindsight, the decision to grant the permits for these applications allowing the placement of three sheds on one lot was not based on sound planning principles. The Minister's staff further acknowledged that the applications, if they were now received, would not have been processed without land use planners being consulted.

(65) The Commission notes that when the Appellant contacted the Minister's department to get information on the building permits that were issued she was advised that she would have to launch an appeal with this Commission in order to get that information. The Commission recommends that the Minister change this policy when dealing with inquiries with respect to applications or permits under the ***Planning Act***. No one should be forced to launch a quasi-judicial appeal simply to obtain information with respect to a permit issued by the Minister. As the Commission has seen in the past this results in numerous appeals being filed, only to be withdrawn after there is full disclosure to the Appellant with respect to the permit. The Commission recommends that the Minister develop an internal procedure to allow for the efficient dissemination of information on permits issued so that interested parties can then make a determination as to whether or not an appeal should be filed.

(66) The Developers' applications to designate a small storage shed a cottage and receive approval for "bunkies" were not contemplated by the Regulations and thus required consultation with a professional land use planner. As the Minister's staff did not consult with a professional planner, the Commission finds that the Minister failed to consider sound planning principles. Accordingly, the second part of the two-part test has not been met and the Commission hereby quashes Permit No. M-2015-0088.

4. Disposition

(67) An Order allowing the appeal and quashing Permit No. M-2015-0087 and Permit No. M-2015-0088 follows.

IN THE MATTER of an appeal by Donna Stringer of a decision of the Minister of Communities, Land and Environment, dated August 12, 2015.

Order

WHEREAS the Appellant Donna Stringer appealed the decision of the Minister of Communities, Land and Environment to issue two permits, both dated August 12, 2015;

AND WHEREAS the Commission heard the appeal at public hearings conducted in Charlottetown on July 21 and 22, 2016 after due public notice and suitable scheduling for the parties and their legal counsel;

AND WHEREAS the Commission has issued its findings in this matter in accordance with the Reasons for Order issued with this Order;

NOW THEREFORE, pursuant to the ***Island Regulatory and Appeals Commission Act*** and the ***Planning Act***

IT IS ORDERED THAT

1. **The appeal is allowed.**

2. **Permit No. M-2015-0087 and Permit No. M-2015-0088 issued by the Minister on August 12, 2015 are hereby quashed.**

DATED at Charlottetown, Prince Edward Island, this 10th day of August, 2017.

BY THE COMMISSION:

(sgd.) *J. Scott MacKenzie*
J. Scott MacKenzie, Q.C., Chair

(sgd.) *Douglas Clow*
Douglas Clow, Vice-Chair

(sgd.) *John Broderick*
John Broderick, Commissioner

NOTICE

Section 12 of the ***Island Regulatory and Appeals Commission Act*** reads as follows:

> *12. The Commission may, in its absolute discretion, review, rescind or vary any order or decision made by it or rehear any application before deciding it.*

Parties to this proceeding seeking a review of the Commission's decision or order in this matter may do so by filing with the Commission, at the earliest date, a written **Request for Review**, which clearly states the reasons for the review and the nature of the relief sought.

Sections 13(1) and 13(2) of the ***Act*** provide as follows:

> *13.(1) An appeal lies from a decision or order of the Commission to the Court of Appeal upon a question of law or jurisdiction.*
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NOTICE: IRAC File Retention

In accordance with the Commission's Records Retention and Disposition Schedule, the material contained in the official file regarding this matter will be retained by the Commission for a period of 2 years.

IRAC141AA(2009/11)

Tab 2.

PRINCE EDWARD ISLAND
Regulatory & Appeals Commission
Commission de réglementation et d'appels
ÎLE-DU-PRINCE-ÉDOUARD

Date Issued: **May 12, 2023**
Docket: **LA21-024**
Type: **Planning Appeal**

INDEXED AS:

Lucas Arsenault, Jennie Arsenault and L&J Holdings Inc. v. Minister of Agriculture and Land, 2023 PEIRAC 4 (CanLII)

Order No: LA23-04

BETWEEN:

Lucas Arsenault, Jennie Arsenault, and L&J Holdings Inc.

Appellants

AND:

Minister of Agriculture and Land

Respondent

ORDER

Panel Members:

J. Scott MacKenzie, K.C., Chair
M. Douglas Clow, Vice-Chair
Erin T. Mitchell, Commissioner

Contents

Appearances

For the Appellants, Lucas Arsenault, Jennie Arsenault, and L&J Holdings Inc.

Counsel:

David Hooley, K.C. and Melanie McKenna

For the Respondent, Minister of Agriculture and Land

Counsel:

Mitchell O'Shea and Jessica Gillis

1. INTRODUCTION

1. This is an appeal of the decision of the Minister of Agriculture and Land (the "Minister") by letter dated September 17, 2021, to deny an application by Lucas Arsenault, Jennie Arsenault, and L&J Holdings Inc. (the "Appellants") to subdivide PIDs 20300 and 808154 (the "Property") to permit a 19-lot subdivision for residential use (the "Application").

2. The Appellants filed a Notice of Appeal under Section 28 of the *Planning Act* (the "*Act*") on October 7, 2021.

3. The appeal was heard by the Commission on May 16, 17 and 18, 2022.

4. The Commission heard oral testimony from eight witnesses. Five witnesses testified on behalf of the Appellants: Lucas and Jennie Arsenault; Peter Joostema, FEC, P. Eng., CESA; Todd Stokes, AACI, P. App; and Jennifer Tsang, MCIP, LLP. Counsel for the Minister called three witnesses: Tobin Stetson, P. Eng; Alex O'Hara; and Eugene Lloyd.

5. Final written closing submissions were received by the Commission on June 30, 2022.

2. DISPOSITION

6. For the reasons that follow, the appeal is allowed. The decision made by the Minister is quashed. The Commission orders that the Property be consolidated and subdivided to permit a 19-lot subdivision for residential use.

3. ISSUE

7. The main issue before the Commission is whether the Minister's decision to deny the subdivision application was made in accordance with the *Planning Act*, the *Planning Act Subdivision and Development Regulations,* and sound planning principles.

4. AUTHORITY

8. Standards dealing with the subdivision of land are set out in Part III of the *Planning Act Subdivision and Development Regulations*. The Regulations describe general requirements for the subdivision of land. A subdivision is not allowed if the proposed subdivision would precipitate premature development or unnecessary public expenditure, place pressure on a municipality or have a detrimental impact[1]. These standards place a degree of interpretative discretion on the Minister. However, such discretion must be made in accordance with sound planning, engineering, and environmental principles[2].

[1] Regulations, s. 3(1)(b)-(d)
[2] Regulations, s. 13

9. When considering a subdivision application, the Minister must consider numerous factors, including but not limited to the compatibility with surrounding uses and natural features of the subject property.[3]

10. Parties dissatisfied by the Minister's decision relating to a request to subdivide land may appeal to the Commission by filing a notice of appeal with the Commission[4].

11. When tasked with determining the merits of an appeal, the Commission has the authority to substitute its decision for one made by the Minister. The Commission does not lightly interfere with such decisions and has developed guidelines for exercising its appellate authority.[5]

12. The Commission has previously set out a two-part test used in consideration of an appeal in Order LA17-06[6]. The Commission has described the test, in the context of Ministerial decisions, as:

    i) Whether the Minister, as the land use planning authority, 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 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.

13. In this case, the Appellants do not take issue with the procedure followed by the Minister[7]. The Commission will determine this appeal based on the second part of the test, being whether the Minister's decision to the deny the Appellants' application has merit and is grounded on sound planning principles.

5. ANALYSIS

14. The Appellants applied to consolidate two parcels (PIDs 808154 and 203000) and then subdivide the new 44-acre parcel into a 19-lot subdivision for residential use located in Rice Point. At the time of the application, the Property was used for agricultural use. Todd Stokes and Tobin Stetson gave lengthy testimony on whether this Property consisting of agricultural land was prime agricultural land. It was acknowledged that the Property had not been used for agricultural purposes for years. It was suggested this was due to a swale running down the middle of the Property that made farming more difficult. In Todd Stokes' opinion it was, therefore, not prime agricultural land. Tobin Stetson was of the opinion that the soil on the Property was good agricultural soil and, notwithstanding the swale and suggested problems of not being able to cross it with farm machinery, he was of the opinion that it was prime agricultural land. Regardless the type of farmland, that is not determinative on the Application.

[3] Regulations, s. 13(a) and (j)
[4] Act, s. 28
[5] See, for example, Order No. LA23-01, McLaine v. Rural Municipality of Miltonvale Park, at para. 11
[6] *Stringer v. Minister of Communities, Land and Environment* LA17-06
[7] Amended Notice of Appeal, at para 2.

15. The Minister denied the application pursuant to subsections 3(1)(b) and (d), and 13(a) and (j) of the Regulations[8].

16. The Minister determined that because the subject property was in an area used primarily for agricultural resource with some residential and small cottage development, the proposed subdivision would be incompatible for the area and would precipitate premature development[9]. Todd Stokes testimony confirmed there has been quite a lot of residential development adjacent to and closed to the Property.

17. In support of the reasons for denial, the Minister attached a two-page analysis prepared by Alex O'Hara, Land Use Planning Act Specialist, dated September 17, 2021[10]. This analysis lists three main areas of concern being 1) premature land subdivision, 2) development of prime agricultural land, and 3) coastal development.

18. Prior to the hearing of this matter, the Minister filed with the Commission a report entitled "*Additional Information Hennebury Road Planning Decision*" prepared by Alex O'Hara (the "Report"). This report did not form part of the Minister's Record of Decision, rather it was created after the Notice of Appeal was filed by the Appellants as an after-the-fact justification for the decision made by the Minister.

19. The Report, which can be summarized as a largely subjective analysis of various planning concepts, is helpful in understanding some of the analysis and considerations used to guide the Minister's decision in this case; however, it is not without significant flaws. Many of the papers, recommendations, statements, and policies relied upon in the Minister's Report are not anchored in Act, Regulations, or sound planning principles. The authorities cited are reports and white papers that have been developed by or submitted to Government over decades. They consist of multiple land use reviews by various lay person panels who made proposals for future land use policy. They contain blue sky proposals and desires that amount to wishes, not law.

20. The Minister relies on certain interests, priorities, and objectives; however, many of these items were actually not found in the Act at the time of his decision. They were added to the Act after this decision. Additionally, some of the analysis in the Report is grounded by provisions of the Act or the Regulations that came into effect after the decision at issue[11] and do not have any force or effect in law when dealing with the Application or this Appeal.

21. Noting the significant issues with the Minister's Report, the Commission has placed very little evidentiary weight on it, and the related oral testimony of its author.

[8] Record, pg. 5

[9] Record, pg. 6

[10] Record, pgs 8-18

[11] See section 2.4, 3.1, 4.2 and 5.3 of the Report. These sections cite ss. 2(b), 2.1(1)(b), 2.1(1)(j), 2.1(1)(k), 2.1(1)(l) and 2.1(1)(n) of the Planning Act – each of which was added to the Planning Act by Royal Assent on November 17, 2021 (SPEI 2021, c. 42).

22. The Minister relies on various papers, recommendations, statements, and policies; however, missing is where these statements have actually been enacted into law in the Act or Regulations, or formally adopted as policy by the Lieutenant Governor in Council in accordance with the legislation.

23. Decisions of the Minister must be rooted in and made in accordance with the legislation. Discretionary provisions in the legislation must be interpreted using sound planning principles.

24. The Appellants filed a report prepared by Jennifer Tsang, MCIP, LPP[12] to rebut the Minister's decision. Jennifer Tsang was qualified and accepted by the Commission as an expert in land use planning. Ms. Tsang file a comprehensive expert report on the development. She provided expert oral opinion evidence to the Commission. The Commission finds Ms. Tsang's evidence to be credible and persuasive.

25. The Commission will comment on the four specific reasons for denial as set out in the Minister's decision being, premature development, detrimental impact, compatibility with surrounding uses, and natural features.

Precipitate Premature Development

26. The Minister describes premature development as occurring when a landowner subdivides land into lots for sale in an area with an oversupply of approved lots[13]. Premature development is noted as a concern of the Minister's as it can have a "significant detrimental impact on the Island via inflated property market values[14]". In the Minister's opinion, the proposed development will precipitate premature development in the area. This conclusion was reached based on a review of the number of approved, undeveloped lots in the nearby area[15].

27. Ms. Tsang characterizes the Minister's interpretation of "premature development" as being in isolation, without using "unnecessary public expenditure" to guide its analysis, as open ended and subjective. In Ms. Tsang's opinion, unnecessary public expenditure must be used as a guide for what is considered premature development. Ms. Tsang testified that this approach aligns with sound planning principles – new development is prioritized in areas where there is already municipal infrastructure, or near existing infrastructure, to minimize public expense.

28. Ms. Tsang provided evidence that when analyzing a proposal to determine how "premature" should be measured, sound planning principles would consider factors such as the location and character of the area. Certain considerations may include development pressures and housing needs in the area; a comparison of the of available vacant residential lots in the immediate and surrounding area; and how many landowners and/or developers are marketing those lots to avoid creating overpriced lots. Judgment calls about the market based solely on the

[12] Land Use Planning Opinion Report by Jennifer Tsang, MCIP, LPP dated April 16, 2022
[13] Record, pg. 9.
[14] Minister's Report, s. 2.8
[15] Minister's Report, s. 2; Minister's submissions, para. 40.

number of undeveloped lots in the area, as was done by the Minister, are not normally made by expert planners, and not based on sound planning principles.

29. Ms. Tsang further opined that the Proposal is not premature based on her professional planning analysis of the area[16]. The Commission agrees with Tsang's analysis and opinion.

30. The Commission finds the development would not precipitate premature development or unnecessary public expenditure in the area. The property is off an existing serviced, public local road. The developer is required to cover the cost to build the new road and there are minimal public expenditures to enable the proposal[17].

Detrimental Impact

31. The Minister's decision concludes this proposal would have a detrimental impact by causing loss or harm to the protection of the natural environment and surrounding land uses[18] because residential use is not compatible with the surrounding uses and the subdivision would deplete approximately 3000' of shore frontage[19].

32. Ms. Tsang correctly identifies the need to review the proposal against the existing regulations in place to protect the natural environment. This includes the lot size requirements for on-site well and septic systems, as well as setbacks from the coastline to address erosion and flooding.

33. From a technical perspective, the proposed development could be approved based on the regulations[20]. The development meets the minimum lot size requirements, and the Department of Environment, Energy and Climate Action did not raise any concerns with coastal erosion upon its review of the proposal[21]. Peter Joostema, submitted an expert report and testified at the hearing. Joostema opined that changing the current use of the property from agricultural to residential, as proposed, would actually result in less erosion[22]. In Joostema's opinion, the detrimental impacts related to the natural environment is considered to be minimal based on the current use of the land.

34. The Commission finds the evidence supports that the proposal would not have a detrimental impact.

Compatibility with Surrounding Uses - Development of Agricultural Land

35. The Minister references denial of the development as it would have a detrimental impact to the surrounding land uses because it would remove prime, agricultural

[16] Tsang Report, pg. 5
[17] Tsang Report, pg 4., Record, pgs. 70, 82,
[18] Record, pg. 6
[19] Minister's submissions, para. 42; Minister's Report
[20] Minister's submissions para 30.
[21] Record, pg. 58-63, pg. 65, 68; Minister's submissions para 30
[22] Joostema Report, pg. 4

land from resource use. The development, in the Minister's opinion, would not be compatible with surrounding uses[23]. The Minister suggests that protecting agricultural land is paramount to all[24].

36. Tsang provided testimonial evidence that sound planning principles require a balance between, among other things, preserving agricultural land, the need for population growth and housing needs. Tsang's expert evidence is that in the field of land use planning, agricultural land uses, and low-density residential land uses are not considered incompatible; rather, in a rural setting, low density residential would be one of the most compatible land uses with agriculture. Tsang's professional opinion is that the development is compatible with the surrounding land uses.

37. The Commission accepts and agrees with Tsang's expert opinion.

38. While the Commission recognizes the importance of preserving agricultural land in our province, denial of the application because it is "prime agricultural land" is not grounded in the Act, Regulations or sound planning principles. The proposed development is compatible with surrounding uses – evidenced by the residential subdivisions to the east and west of the subject area.

Natural Features

39. The Minister discusses "visual amenity" and "scenic viewscapes" throughout the rationale for denial of the application. The Minister's Report cites the priority interests of the *Act* to include "the protection of viewscapes"[25]. The Minister's position is that coastal development, which includes the loss of viewscapes along the coastline, is justification for denial of the application[26]. The Minister also notes approval of the application would deplete approximately 3000 feet of shore frontage.

40. The Commission notes that at the material time, the definition of detrimental impact found in the Regulations specifically excluded viewscapes as a consideration[27].

41. Ms. Tsang's evidence suggests the proposed development does not have any natural features that a planner would seek to protect or mitigate. She lists such features as: steep slopes, watercourses, dunes, or old growth forests[28]. Further, the proposed development meets the requirements for coastal development. She also counters the Minister's argument that the "proposed subdivision would deplete approximately 3000' of shore frontage[29]" because the shore frontage will not be depleted and will continue to exist as shore frontage after the development. The

[23] Record, pg. 9
[24] Record, pgs. 6, 9
[25] Report, s. 4.2
[26] Record, page 9, Minister's Submissions, para. 42 and 46
[27] Planning Act (f.3)
[28] Tsang Report, pg. 17
[29] Tsang Report, pg. 17

proposal will allow for appropriate setbacks from the shoreline as required by the legislation.

42. The Commission finds the proposed development is suited to the intended use, having regard for the surrounding uses and natural features. Sound planning principles support that development would not cause a detrimental impact. The Minister erred in determining otherwise.

Sound Planning Principles

43. Throughout the submissions advanced by both parties, reference to Commission Order LA17-06 ("*Stringer*") is made. In *Stringer*, the Commission provided commentary on the importance of sound planning principles in decision making. Specifically, the Commission stated:

> "…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. In order to ensure that sound planning principles have been followed in anomalous applications a professional land use planner must be consulted[30]."

44. The Commission notes that in the present case, the Minister did not consult a professional land use planner in its review of the application. Rather, the Minister consulted Alex O'Hara, Land Use and Planning Act Specialist. Mr. O'Hara does not have a recognized professional accreditation in land use planning. He is not a member of the Canadian Institute of Planners or any other professional organization for professional planners. As set out in *Stringer*, the Minister ought to have consulted a professional land use planner with respect to the subject application to weigh and balance the important considerations associated with sound planning principles – particularly when it is dealing with the interpretation of discretionary legislative provisions.

45. The Commission and the Regulations stress the importance of decisions respecting subdivision applications being grounded by sound planning principles. Sound planning principles are, as stated by Ms. Tsang, an enhancement of the existing legal framework. Sound planning principles require a balancing of many objectives – but these objectives must be grounded in sound planning, engineering, and environmental principles, not policy papers or subjective opinion. The Commission understands the Minister may not have planning professionals on staff, but when interpreting discretionary interpretive provisions of the legislation, he 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.

46. In *Stringer*, noted above, the Commission found that because the Minister's staff did not consult with a professional planner when it was prudent to do so, the Minister failed to consider sound planning principles. In this appeal, the

[30] LA17-06, para. 64

Commission finds the same – the Minister ought to have consulted with a professional planner to assist with reaching his decision on this subdivision application. The Minister did not follow sound planning principles in his review of the Appellants' application. The Minister made a substantive error when he based its decision on considerations other than sound planning principles.

6. CONCLUSION

47. For the reasons above, the appeal is allowed, and the decision of the Minister is quashed. The Commission orders that the Property be consolidated and subdivided to permit a 19-lot subdivision for residential use.

48. The Commission thanks the Appellants and the Minister for their submissions in this matter. Counsel for Appellants were helpful and did an excellent job in presenting the Appellant's case in to the Commission. Counsel for the Minister were also helpful to the Commission and did an excellent job representing the Minister before the Commission.

7. ORDER

49. The Appeal is allowed. The decision of the Minister is quashed. The Commission orders that the Property be subdivided to permit a 19-lot subdivision for residential use.

DATED at Charlottetown, Prince Edward Island, May 12, 2023.

BY THE COMMISSION:

(sgd. J. Scott MacKenzie)

J. Scott MacKenzie, K.C., Chair

(sgd. M. Douglas Clow)

M. Douglas Clow, Vice-Chair

(sgd. Erin T. Mitchell)

Erin T. Mitchell, Commissioner

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Tab 3.

PRINCE EDWARD ISLAND
ÎLE-DU-PRINCE-ÉDOUARD

PLANNING ACT

(d) the prevention of fragmentation of land and of loss of natural habitat connectivity and biodiversity;

(e) the supply, efficient use and conservation of water;

(f) the supply, efficient use and conservation of energy;

(g) the adequate provision and efficient use of communication, transportation, sewage and water services, storm water management systems, waste management systems and other public services in relation to planning development, and the effect of planning development on those services;

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

(i) the protection of features of significant archaeological, cultural, architectural, historical or scientific interest;

(j) the protection of viewscapes that contribute to the unique character of Prince Edward Island;

(k) the direction of development to areas designed to support servicing;

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

(m) the adequate provision of a full range of housing options;

(n) the promotion of a built environment that supports public transit and active transportation;

(o) the promotion of a built environment that incorporates the principles of conservation design;

(p) the adaptation of the built and natural environment to address the effects of climate change;

(q) the mitigation of greenhouse gas emissions; and

(r) adaptation to a changing climate.

Regulations

(2) The Lieutenant Governor in Council may make regulations to establish additional matters of provincial interest for the purposes of subsection (1). *2021,c.42,s.2.*

PART I — LAND USE COMMISSION

Sections 3 to 5 repealed by ***1991, c.18, s.22 {eff.} Nov. 4/91.***

PART II — PROVINCIAL PLANNING

6. Role of Minister

The Minister shall

(a) advise the Lieutenant Governor in Council on provincial land use and development policy;

(b) perform the functions conferred on him by this Act and the regulations;

(c) generally, administer and enforce this Act and the regulations,

and may

(d) provide planning advisory services;

(e) promote co-operation between municipalities with respect to inter-municipal or regional planning issues;

(f) promote public participation in the development of policies;

(g) establish organizations and groups which he may consult respecting the exercise of his functions;

(h) delegate any of his functions under this Act or the regulations. *1988, c.4, s.6.*

7. Role of cabinet

(1) The Lieutenant Governor in Council may

(a) adopt provincial land use development policies;

(b) establish minimum requirements applicable to official plans;

(c) make regulations establishing minimum development standards respecting

(i) public health and safety,

(ii) protection of the natural environment,

(iii) landscape features.

Modification of official plan and bylaws to conform with regulations

(2) Where regulations have been made pursuant to clause (1)(c) or section 8.1, the council of a municipality with an official plan or bylaws made under this Act shall, within one hundred and twenty days of the date of publication of the regulations in the Gazette, make such amendments to its official plan or bylaws as are necessary to ensure that any requirements imposed thereby are not less stringent than those imposed by the comparable provision of the regulations.

Procedure

(3) Sections 11, 13 and 18 do not apply to an amendment made pursuant to subsection (2).

Declaration nullifying municipal bylaws

(4) Where a council fails to comply with subsection (2), the Lieutenant Governor in Council may, by order, declare

(a) the official plan or bylaws, or any part thereof, made by that council to be null and void;

(b) which of the provisions of the regulations made pursuant to clause (1)(c) apply in their stead.

Effect of order

(5) Where an order is made under subsection (4),

(a) the regulations made under clause (1)(c), or such parts of them as are specified in the order, apply in the municipality in which the council has jurisdiction; and

(b) the Minister has exclusive jurisdiction with respect to subdivision approvals, development permits and building permits in the municipality, but any such approval or permit issued before the date of the order is valid if it complied with the official plan and bylaws in force at the time of issue. *1995, c.29, s.2 {eff.} Oct. 14/95.*

7.1 Land use policy regulations

(1) The Lieutenant Governor in Council may make regulations with respect to land use policies adopted pursuant to clause 7(1)(a) and, in particular, may make regulations that

Tab 4.

PRINCE EDWARD ISLAND
ÎLE-DU-PRINCE-ÉDOUARD

PLANNING ACT SUBDIVISION AND DEVELOPMENT REGULATIONS

PLANNING ACT
Chapter P-8

SUBDIVISION AND DEVELOPMENT REGULATIONS

Pursuant to sections 8 and 8.1 of the *Planning Act* R.S.P.E.I. 1988, Cap. P-8, Council made the following regulations:

PART I — INTERPRETATION

1. Definitions

In these regulations

(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;

(a.1) "**Act**" means the *Planning Act* R.S.P.E.I. 1988, Cap. P-8;

(a.2) "**alter**" means to make a change in the size, shape, bulk, or structure, whether interior or exterior, of a building or any part thereof, but does not include repairs carried out for the purposes of maintenance or non-structural renovation or improvement;

(a.3) "**amusement type attraction**" means a commercial or recreational establishment where buildings or structures have been erected or are proposed for the purpose of amusement in the form of a circus, carnival, midway show, sideshow, or similar exhibition where one of the following classes of recreation are provided:

(i) any mechanically or electrically operated amusement ride,

(ii) any mechanical or electronic machine or device intended for use as a game, entertainment or amusement, or

(iii) any petting zoo or farm;

(a.4) "**approved subdivision**" means a lot or lots for which final approval has been granted pursuant to section 27;

(b) "**arterial highway**" means any highway that has been designated as an arterial highway under the provisions of the *Roads Act* Highway Access Regulations;

(b.1) "**baymouth barrier sand dune**" revoked by EC137/09;

(b.2) "**beach**" means that portion of land between the ordinary or mean high water mark and the water's edge;

(b.3) "**buffer**" means an area of land which serves to separate two or more different types of land use;

(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;

(c.1) "**building height**" means the number of storeys contained between the roof and the floor of the first storey;

(c.2) "**campground or RV park**" means a parcel of land used or permitted to be used by the travelling public that provides sites for tents, trailers, or motor homes, but does not include industrial, work or construction camps or permanent mobile home parks;

(c.3) "**central waste treatment system**" means a waste treatment system as defined in the *Environmental Protection Act* R.S.P.E.I. 1988, Cap. E-9 and controlled by a public or private utility;

(c.4) "**central water supply system**" means a water works for the collection, treatment, purification, storage, supply or distribution of water to

(i) five or more households, or

(ii) a public building or place of assembly;

(d) "**change of use**" means

(i) altering the class of use of a parcel of land from one class to another, recognizing as standard classes residential, commercial, industrial, resource (including agriculture, forestry and fisheries), recreational and institutional uses, or

(ii) a material increase in the intensity of the use of a building, within a specific class of use as described in subclause (i), including an increase in the number of dwelling units within a building;

(d.1) "**child**" revoked by EC137/09;

(d.2) "**cluster subdivision**" revoked by EC137/09;

(d.3) "**coastal area**" means all the lands, including surface water bodies, streams, rivers, and off-shore islands in the province, lying within 1640 feet (500 metres) inland and seaward of the mean high water mark of all coastal and tidal waters;

(e) "**collector highway**" means any highway that has been designated as a collector highway under the provisions of the *Roads Act* Highway Access Regulations;

(e.1) "**commercial**" means the use of a building or lot for the storage, display or sale of goods or services, and includes hotels, motels, inns, or rental cottages;

(e.2) "**commercial eco-tourism use**" means the development and management of tourism within the Greenwich, Prince Edward Island National Park, through the use of any land or building for any retail or service use, except any amusement type attraction, so that the natural environment is preserved;

(e.3) "**commercial tourist use**" includes the use of any land, building, or structure for the storage, display, or sale of goods or services and includes hotels, motels, country inns, Bed & Breakfast establishments and rental cottages, but does not include campgrounds or RV parks, or amusement type attractions;

(f) "**common elements**" revoked by EC352/01;

(f.1) "**condominium**" revoked by EC352/01;

(f.2) "**deck**" revoked by EC137/09;

(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*;

(g) "**development**" means

(i) an excavation or stockpile, and includes the creation of either of them,

(ii) a building or an addition to, or replacement of a building, and includes the construction or placing in, on, over or under land of any of them,

(iii) a change of use of land or a building or an act done in relation to land or a building that results in or is likely to result in a change in use of the land or building, or

(iv) a change in the intensity of use of land or a building or an act done in relation to land or a building that results in or is likely to result in a change in the intensity of use of the land or building;

(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,

(ii) "**single-unit dwelling**" means a building containing one dwelling unit and does not include mobile homes, but does include mini homes, modular homes, single-family dwellings and summer cottages,

(iii) "**duplex dwelling**" means a building that is divided into two dwelling units,

(iv) "**multiple unit dwelling**" means a building containing three or more dwelling units,

(v) "**semi-detached dwelling**" means a residential dwelling unit within a semi-detached building;

(g.2) "**entrance way**" means a vehicular access to a parcel of land from a public road;

(g.3) "**estuary**" revoked by EC137/09;

(h) "**existing parcel of land**" means any parcel of land or lot in existence prior to February 3, 1979;

(h.1) "**farm parcel**" means land comprising an area of 50 acres (20.2 hectares) or more including any complementary buildings, utilized for the purpose of sowing, cultivation and harvesting of crops, rearing of livestock or production of raw dairy products, and may comprise a lesser area when operated as a farm enterprise by a *bona fide* farmer as defined in the *Real Property Assessment Act* R.S.P.E.I. 1988, Cap. R-4;

(h.2) "**farm dwelling**" means a single-unit dwelling that is located on a farm parcel, and is owned and occupied by the principal owner of the farm parcel, a person whose primary occupation is to work on the farm parcel, or the son or daughter of the principal owner of the farm parcel;

(h.3) "**first storey**" means the uppermost storey having its floor level not more than 6.5 feet (2 metres) above grade;

(i) "**floor area**" means the area provided on each of one or more levels, measured from the outside walls of the building;

(i.1) "**forested riparian zone**" revoked by EC137/09;

Exemption for acquisitions - Slemon Park future development area

(3) A parcel or part of a parcel, including a parcel or part of a parcel to which Part IV of these regulations applies, that is being acquired by the Minister responsible for the *Roads Act* for the purpose of taking ownership of a road within the Slemon Park future development area, as that area is described in Appendix B to these regulations, is exempt from the requirements of Part III, B - Subdivisions, of these regulations, and the provisions of Part IV of these regulations applicable to subdivision of land. *(EC539/18)*

2.2 Exemption for disposition from Part III, B - Subdivisions

(1) Where the government is disposing of a parcel or part of a parcel, other than a parcel or part of a parcel to which Part IV of these regulations applies, that parcel or part of it is exempt from the requirements of Part III, B - Subdivisions, of these regulations, where the parcel or part of it was

(a) acquired by the Minister responsible for the *Roads Act* for the purposes specified in subsection 2.1(1) or (3); or

(b) purchased by the Minister responsible for the *Real Property Tax Act* R.S.P.E.I. 1988, Cap. R-5, pursuant to subsection 19(1) of that Act.

Exemption for disposition from Part III, B - Subdivisions, and Part IV

(2) Where the government is disposing of a parcel or part of a parcel to which Part IV of these regulations applies, that parcel or part of it is exempt from the requirements of Part III, B - Subdivisions, and the provisions of Part IV of these regulations applicable to subdivision of land, where the parcel or part of it was

(a) acquired by the Minister responsible for the *Roads Act* for the purposes specified in subsection 2.1(2) or (3); or

(b) purchased by the Minister responsible for the *Real Property Tax Act* pursuant to subsection 19(1) of that Act. *(EC539/18)*

PART III — STANDARDS

A - GENERAL

3. General requirements - subdivisions

(1) No person shall be permitted to subdivide land where the proposed subdivision 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; or

(d) have a detrimental impact.

***Idem*, development permits**

(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.

Forested area adjacent to watercourse or wetland

(3) Revoked by EC137/09.

Entrance ways

(4) Notwithstanding any other provisions of these regulations, no development permit shall be issued in respect of a development involving the change of use of an entrance way or the creation of an entrance way to any highway where an entrance way permit is required unless an entrance way permit has first been granted by the Minister of Transportation and Public Works. *(EC693/00; 137/09)*

4. Approval with conditions

(1) An approved subdivision or development permit may be made subject to any conditions necessary to ensure compliance with these regulations, other regulations made pursuant to the Act, or any relevant sections of the *Environmental Protection Act*, *Roads Act*, *Provincial Building Code Act* R.S.P.E.I. 1988, Cap. P-24 , or the *Fire Prevention Act* R.S.P.E.I. 1988, Cap. F-11.

Owner ensures compliance

(2) Where an approved subdivision or development permit is granted subject to conditions in accordance with subsection (1), the owner shall ensure that the subdivision or development complies with the conditions.

Development agreement

(3) The conditions of approval may include a requirement that the owner enter into a development agreement specifying any special measures that must be carried out in order to ensure compliance with the regulations referred to in subsection (1). *(EC693/00)*

5. Other approvals required

No approval shall be given pursuant to these regulations until the following permits or approvals have been obtained as appropriate:

(a) where an environmental assessment or an environmental impact statement is required under the *Environmental Protection Act*, approval has been given pursuant to that Act;

(b) where the Fire Marshal's approval is required pursuant to the *Fire Prevention Act*, approval has been given pursuant to that Act;

(c) where approval is required pursuant to the *Lands Protection Act* R.S.P.E.I. 1988, Cap. L-5 or regulations made pursuant to that Act, approval has been given pursuant to that Act and any applicable regulations made pursuant to that Act;

(d) where, pursuant to the *Roads Act*, an entrance way permit or approval is required, the required permit or approval has been obtained; and

(e) where a Quality Control Plan is required under the Barrier-Free Design Regulations *(EC139/95)* made under the *Provincial Building Code Act*, until the Quality Control Plan has been submitted and accepted in accordance with the regulations. *(EC693/00)*

Tab 5.

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Point Prim Appeal Expert Opinion

Introduction

My name is Chris Markides, a member of the Canadian Institute of Planners, a Licensed Professional Planner of Nova Scotia, and I hold a Master of Planning Degree from Dalhousie University. I have six years of professional planning experience as a Professional Planner in Atlantic Canada, focusing on policy and regulation at the local government level. My recent work involves assisting Municipalities with the development of Municipal Planning Strategy (MPS) and Land Use By-Law (LUB) regulations and preparing applications for clients working under this type of regulation. My CV is attached as Appendix 1.

I have been retained by McInnes Cooper, on behalf of their client, to review a decision by the Minister of Agriculture and Land to refuse an amended development permit at PID #877647 located at Bessie Willow Land, Point Prim, Queens County, Prince Edward Island.

While I have been retained on behalf of the appellant, I acknowledge that my duty as an expert is to advise the Commission impartially on matters within my area of expertise (Land Use Planning and Development), and that this duty overrides any duty to the party that has retained my services.

The purpose of this review is to analyze the reasons for refusing the development permit for a summer cottage to determine if the application complies with, and is consistent with the PEI planning and regulatory framework.

To complete my analysis of the development permit refusal I reviewed the following documents:

- Planning Act and Subdivision and Development Regulations
- The decision document refusing the development permit
- The application for the development permit (Permit Application)
- Correspondence between the applicant and the planning authority
- Historic Places records for Profitt Barn, River Crest Acres Barn, Gillis Barn, and Ramsay Barn

The analysis of the Planning Act and Subdivision and Development Regulations, along with the decision document denying the development permit, sheds light on the factors influencing the refusal of the application for the summer cottage. Additionally, the correspondence between the applicant and the planning

authority, as well as the records of historic places, such as Profitt Barn, River Crest Acres Barn, Gillis Barn, and Ramsay Barn, provide valuable insights into the context surrounding the development permit application and its subsequent refusal.

Background

The case revolves around the development permit application by Parry Aftab and Allan McCullough (hereinafter referred to as "the applicants") for their property. The application underwent amendments and considerations, culminating in a decision by the Minister of Agriculture and Land (hereinafter referred to as "the Minister") that denied the permit, subsequently appealed by the applicants.

Development Permit Application Submission:

On July 27, 2021, the applicants submitted an Amended Development Permit Application to clarify and amend a previously approved development permit issued on July 13th, 2017 (Permit 02017-0119).

Minister's decision:

On December 14, 2021, the Minister denied the development permit application, citing that (a) the proposed structure did not align with "sound planning principles" due to its lack of integration into the rural character, and (b) it would create a "detrimental impact" on surrounding land uses, citing concerns over visual impact (overlooking and loss of privacy), incongruity with the area's character, and potential adverse effects on visual amenity.

Defining Sound Planning Principles and Detrimental Impact

The concept of "sound planning principles" are crucial in the Minister's decision to deny the Amended Development Permit Application for PID #877647 and the subsequent appeal by Parry Aftab and Allan McCullough.

As stated in the Submissions of The Minister of Agriculture and Land (File No. LA22002), sound planning principles in the context of this application are comprised of the Objects outlined in the Planning Act (para. 23(b), 48). The objects include the "Purposes" of the Act and the "Provincial Interests".

As identified in the appeal record (Tab 4(J)) in the land use planning report prepared by Alex O'Hara, the specific Objects that were reviewed in this application were:

- Purposes – to promote sustainable and planned development.
- Provincial Interests – the protection of viewscapes that contribute to the unique character of Prince Edward Island.

The appeal revolves around the "detrimental impact" mentioned in the Minister's decision to deny the development permit for the summer cottage. Concerns included potential privacy issues, visual amenity effects, and the impact on the rural character.

As defined in the Planning Act Subdivision and Development Regulations, "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:

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

Real property value, competition with existing businesses, and viewscapes are not considered under the definition of "detrimental impact" as per the Planning Act Subdivision and Development Regulations. Understanding these aspects is essential in addressing the concerns raised in the denial of the development permit application for the summer cottage.

Sound Planning Principles

When examined against the amended development permit application, the following can be said regarding the specific Objects that were reviewed:

Promote sustainable and planned development.

The proposed land use is consistent with the surrounding land uses, as per the Planning Act Subdivision and Development Regulations. When considering the plan's purpose, "to promote sustainable and planned development", it's important to differentiate between planning from a land use or group of land

use perspectives and site-specific development planning. Planned development refers to the process of designating lands for specific land uses or mix of land uses, such as residential, commercial, or industrial. This process creates comprehensive plans developed by planning authorities. The plans are informed by economic trends, environmental considerations, and community needs, with the goal of guiding the growth and development of a community in a sustainable and orderly manner. Given the high level nature of the Planning Act and its Purposes, it is not reasonable to apply this clause to a site-specific development where the land uses are compatible (summer cottage in an area where other summer cottages and single unit dwellings are the predominant land use).

Protecting viewscapes that contribute to the unique character of Prince Edward Island.

The Planning Act Subdivision and Development Regulations specify protected viewscapes, but none exist in the Point Prim area. Scenic viewscapes are protected by the Scenic Viewscape Zone outlined in Section 58 of the Planning Act Subdivision and Development Regulations. The importance of a specific Scenic Viewscape Zone cannot be understated. It is clear that the statement of provincial interest regarding the protection of viewscapes underscores the significance of preserving and enhancing the aesthetic appeal of the landscape. While the summer cottage proposal aligns with the predominant land use in the area, the absence of protected viewscapes in Point Prim raises questions about the Minister's emphasis on this aspect. Understanding the nuances of these planning principles is crucial in evaluating the decision to deny the development permit application and its implications on sustainable development and provincial interests.

The analysis of the “sound planning principles” used by the Minister to make their decision to refuse the development permit was flawed. The Minister's flawed rationale in refusing the development permit lies in a misinterpretation of the Planning Act's provisions. By not recognizing the absence of a designated Scenic Viewscape Zone in Point Prim, the decision incorrectly applies the principle of protecting viewscapes. It is imperative for decision-making to be grounded in accurate application of the relevant statutes to ensure that sustainable development is not hindered by errors in judgment. The implications of this decision extend beyond this single case, potentially affecting future applications and the overall approach to planning within the province.

This is further underscored when reviewing the reasons stated by the minister that the development causes a “detrimental impact” on the surrounding land uses.

In exploring the minister's assertion of "detrimental impact" on the neighboring properties, it's necessary to delve into the nature of these impacts. Concerns regarding public health, safety, and environmental protection are paramount in planning decisions. However, in this scenario, the speculative nature of the claimed impacts lacks substantial evidence, particularly when the current land use pattern in Point Prim does not contrast sharply with the proposed development of a summer cottage.

Analysis of Reasons deemed to cause a Detrimental Impact

In the Background section of this document, the term "Detrimental Impact" is introduced and defined as: "*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:*

- *real property value;*
- *competition with existing businesses;*
- *viewscapes; or*
- *development approved pursuant to subsection 9(1) of the Environmental Protection Act;*".

The rural single-family dwelling doesn't impact public health or safety. In terms of "protection of the natural environment," the applicant received approval for the construction of a building on the subject property. Despite the increased size of the subject building from the building shown in the permit drawings, it is unlikely that a significant increase in harm to the natural environment was incurred. Therefore, the only loss or harm that can reasonably result from the construction of the subject building is "loss or harm suffered in person or property in matters related to … surrounding land uses." However, the definition makes clear that considerations for loss or harm cannot include "real property value, … or viewscapes." The onus, then, is on the Minister to provide rationale as to how "loss or harm" are suffered by persons or property in surrounding land uses. The reasons provided by the Minister, as outlined below, relate to the relationship of the subject building to the adjacent property(ies) and appear to claim that the loss or harm incurred relate to privacy and the design/visual appearance of the subject building. It is unclear how the subject building, as constructed, differs so significantly from the building shown in the previous approved Development Permit that *more* loss of privacy and *more* impact on visual amenity would be incurred.

However, if it can be determined that the subject building does, in fact, increase the loss or harm incurred based on the three reasons given below, then this section can be used to determine whether those reasons can be reasonably defended using 'sound planning principles', when analyzing for the presence of "loss or harm".

In Section C of the Appeal Record Tab 1B, the Minister outlines three reasons for having determined that the proposal would have "Detrimental Impact" on surrounding land uses. The reasons given include "Overlooking and Loss of Privacy", "Design, Appearance and Materials", and "Impact on Visual Amenity". This section provides an analysis of each of these reasons and uses sound planning principles, as defined in the previous section, to outline a professional planning opinion as to whether "loss or harm" are likely to be incurred by "person or property in matters related to … surrounding land uses".

Reason one provided by the Minister: "Overlooking and Loss of Privacy"

This subsection evaluates whether "overlooking and loss of privacy" for the subject property has been reasonably mitigated to limit the "harm or loss" to "surrounding land uses", and whether this harm would be significantly greater than that of the proposed building.

1. **Building Height**

In this area, the Planning Act Regulations do not specify a height limit. However, in areas where height limits are specified in the Act, the regulation is the number of storeys. The structure in question can be considered a single-family dwelling or seasonal dwelling. In areas where there are height limits for such structures, the maximum height is three storeys. It can reasonably be assumed that if height restrictions did exist for the subject property, they would be in line with the existing regulations for other seasonal and single-family dwellings. Therefore, the subject building is in line with planning regulations for like dwellings in other areas and in line with expected regulations in the subject area, should they exist in the future. Furthermore, it is not likely that the structure as completed causes any loss or harm to surrounding land uses than the structure proposed and approved by the initial development permit.

2. **Location on the Lot**

Location on the lot, or "siting", is an important component of sound planning. Typically, ideal lot siting would set structures back from property lines, which can either be prescribed as a certain distance from a lot line or another structure, or

variable based on the height of the structure. On Prince Edward Island, the Planning Act Subdivision and Development Regulations outline setbacks from property lines, water courses, etc. It is my understanding based on the documents in the appeal record that the prescribed setbacks have been met or exceeded.

From the perspective of sound planning principles, a typical variable setback regulation would be approximately half the height of the building. In this case, the building well exceeds that best practice. Furthermore, the building is strategically placed toward the rear of the lot, maximizing the distance from the two neighbouring dwellings and from any public viewpoints. As well, the position of the building reduces direct sightlines into neighbouring yards and dwellings due both to its setback and the fact that it is linearly offset from the neighbouring buildings. While the exact distance from neighbouring properties is not known based on documents in the appeal record, based on a google earth measurement I've calculated that the structure is at least 75 metres away from the nearest adjacent dwelling. At this distance, the summer cottage in question cannot reasonably be considered to be overlooking any adjacent dwellings. These siting features mitigate concerns of overlooking and privacy loss to the degree that can be reasonably expected. Furthermore, it is not likely that the structure as completed causes any loss or harm to surrounding land uses than the structure proposed and approved by the initial development permit.

3. **Vegetative Buffer**

Vegetative buffers can be composed of trees or shrubbery that stand tall enough to provide visual shielding between properties. These buffers are frequently required in land use planning documents and are considered, based on sound planning principles, to provide privacy, shielding, and an increased visual separation between adjacent uses, properties, etc. On the subject property, a significant vegetative buffer including mature trees exists between the proposed structure and the nearest neighbouring property (Parcel 877654).

In this case, this buffer not only enhances privacy for neighbouring properties, but also contributes to the rural character of the area and helps to reduce the visual impact of neighbouring structures.

Design, Appearance, and Materials

This subsection examines whether the design, appearance, and materials of the subject building are out of character with the surrounding environment and

whether the "loss or harm" caused by these materials is greater than that which may have been caused by the building shown in the Permit Drawings.

4. **Architectural Style**

The structure in question is designed to look like a barn in keeping with the rural character of the surrounding area. It includes a gambrel roof, wood clapboard siding, and is three stories in height. Barns with a similar appearance can be found throughout rural Prince Edward Island, and the style of the structure is consistent with several historic buildings in the region. This includes the following examples of similar proportion and design which are Registered Heritage Properties:

- Profitt Barn https://www.historicplaces.ca/en/rep-reg/place-lieu.aspx?id=18474
- River Crest Acres Barn https://www.historicplaces.ca/en/rep-reg/place-lieu.aspx?id=18702
- Gillis Barn https://www.historicplaces.ca/en/rep-reg/place-lieu.aspx?id=20997&pid=0
- Ramsay Barn https://www.historicplaces.ca/en/rep-reg/place-lieu.aspx?id=20267

The above list is not exhaustive and many more such examples exist as this is a common historic form in rural PEI. It should be noted that while the subject building does not share exact dimensions as the listed historic structures, this is mainly due to the difference in the modern Building Code, which has requirements that far exceed those under which historic buildings were constructed. Nevertheless, these examples underscore the proposed structure's compatibility with regional architectural heritage. Furthermore, it is not likely that the structure as completed causes any loss or harm to surrounding land uses than the structure proposed and approved by the initial development permit.

Impact on Visual Amenity

This subsection examines whether "visual amenity" can be considered under sound planning principles and whether the "loss or harm" caused to "visual amenity" is greater than what may have been caused by the proposed building approved in the Building Permit.

The concern provided in the Decision of the Minister document (Tab 1B) which refers to "the impact on visual amenity" as a reason for refusal should be

questioned based on sound planning principles. Visual amenity is not defined in the Planning Act and cannot be specifically regulated without excluding the development of any property which may interfere with the "visual amenity" of adjacent properties. In this sense, any new development could be said to be interfering with visual amenity, given that new development inherently introduces a new structure to a property that had either a different structure, or was a completely undeveloped. Furthermore, it is not likely that the structure as completed causes any loss or harm to surrounding land uses than the structure proposed and approved by the initial development permit.

Conclusion

In assessing the overall impact of the structure on its surroundings, it is clear that the development is in keeping with the area's established aesthetic and planning standards. The existence of a robust vegetative buffer, adherence to the region's architectural vernacular, and compliance with modern Building Codes all demonstrate the project's alignment with the community's character. Additionally, any potential loss of privacy or visual amenity is minimized through thoughtful siting and landscape integration, ensuring compatibility with neighboring properties. It is my opinion that the Minister erred in their interpretation of and application of "Sound Planning Principles" and "Detrimental Impact" with respect to this development permit application.

Respectfully submitted,

Chris Markides MCIP, LPP
Senior Planner
ZZap Consulting

File No. LA22002

BEFORE THE ISLAND REGULATORY AND APPEALS COMMISSION

IN THE MATTER OF an appeal pursuant to s.28 of the *Planning Act*, RSPEI 1988 c. P-8 by Parry Aftab and Allan McCullough with respect to the denial of an application for an Amended Development Permit at PID #877647 located at Bessie Willow Land, Point Prim, Queens County, Prince Edward Island

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