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Subject: Atlantic Aqua response to Amended Notice of Appeal
Date: Wednesday, November 3, 2021 3:41:53 PM

Good afternoon All:

As we understand it, the grounds for this appeal as amended are as follows and Atlantic Aqua's response follows each ground of appeal:

1. With a tree line if development is challenged through an IRAC appeal.

The Commission has clearly stated in numerous decisions that justiciable grounds for an appeal under section 28 of the *Planning Act* are primarily as follows:

- The Minister failed to interpret / apply a provision(s) of the *Planning Act Subdivision & Development Regulations* properly;
- The Minister failed to adhere to the principles of natural justice i.e. the process / procedure did not adhere to due process of law; and/or
- The Minister's decision is contrary to good planning principles as per the testimony of an accredited expert witness.

We will require clarification as to the intent of this particular ground of appeal now that the alleged "threats" component has been removed. Is it simply an objection to Atlantic Aqua adding a possible tree line as a landscape buffer? If so, then it does not appear to fit under any of the three (3) potential grounds for an appeal. Mr. Gallant needs to explain / elaborate in his submissions at the hearing either in writing as the Commission previously directed be provided in advance or orally at the hearing.

2. There is storage in the buffer zone.

Again, this ground does not readily fit into one of the justiciable grounds for appeal as mandated by the Commission's previous decisions. IF there is storage in the buffer zone then specifically what provisions of the *Planning Act* or *Regulations* (or other applicable legislation) do the Appellant's contend is being violated? What's the chapter and verse of the alleged violation(s)? Again, perhaps Mr. Gallant's submissions need to specify any alleged violations and Atlantic Aqua can properly respond. If necessary, Atlantic Aqua can lead evidence at the hearing as to its understanding of the Province's requirements respecting the buffer zone which they understand are satisfactorily being met. That evidence will be that some buoys are being stored in a very small area of the buffer zone which was done so that the buoys were out of the residents sight line. Atlantic Aqua understand this particular use of a small area of the buffer zone is permissible.

3. Change of Plans without notice to residents

Again, this ground also does not readily appear to fit into one of the justiciable grounds for appeal as mandated by the Commission's previous decisions. What legislation or planning principle is alleged to be violated and specifically in what way? Mr. Gallant's submissions must specify any alleged violations and Atlantic Aqua can then properly respond. What change in what plans at what points in time are being challenged? Atlantic Aqua consulted widely during the application process and adjusted its plans to address any reasonable concerns brought forward by the residents. The footprint, height and location of the building on site were all adjusted from the original concept plan to accommodate resident concerns. The final plan which was approved reflects these changes. There are physical and economic limits to what accommodations were possible. Also, Atlantic Aqua's understanding is that the residents declined a public meeting.

4. Detrimental Impact to human health caused by noise pollution with respect to surrounding land uses

Mr. Gallant's email of October 27th elaborates on this ground of appeal. He states that the residents lack the resources to retain an expert witness to support their perceived concerns as to adverse health effects of noise pollution and invite the Commission to engage such a consultant to investigate. Mr. Gallant says that residents awaken at 5:45 am to the sounds of a loader across the street and expresses concern as the intensification of industrial activities. He concludes with an observation that "anything less than a restriction on hours of operation would only lead to a *possible* further disruption of sleep."

As the Commission will hear in evidence at the hearing, Atlantic Aqua is situated next door to a Raspberry Point seafood facility. There are also local and commercial fishers on the water at early hours. Atlantic Aqua's hours of operation begin at 7:00 am. Aside perhaps from an isolated and unavoidable off hours delivery or shipment of perishable product, what is being reportedly heard at 5:45 am may possibly be coming from Raspberry Points operation or from local and/or commercial fishers.

Regardless the factual underpinning to this ground, as a matter of law, there are currently no hours of business regulations applicable to commercial establishments in the Province. If there were such regulations they would have to apply to all business establishments on an equal and non-discriminatory manner. It would be unfair and illegal to single out Atlantic Aqua. Also, Atlantic Aqua's position is that the Minister simply does not presently have enabling legislation which expressly would empower any such regulations. Accordingly, the Minister's approval could not have been conditional on restrictions as to hours of business. It follows that the Commission has no such authority to impose hours of work – even assuming there was an expert report opining that the noise levels from Atlantic Aqua's operation were causing human health problems. There are common law remedies theoretically available for any activity that is found to constitute a legally actionable nuisance. That option is open to the Appellants if they chose to fund an expert and legal counsel to pursue such a claim. Oyster Bed Bridge is not in an organized

municipality. Some municipalities have Nuisance Bylaws which may or may not include provisions respecting noise restrictions, but typically such bylaws require expert evidence that scientifically acceptable expert evidence establishes that defined decibel measurements are being exceeded.

In short, *the onus is on the Appellant to adduce sufficient lay and expert evidence to prove their case on a preponderance of the evidence.* The Commission can speak for itself, but having the Commission fund an expert which the Appellant's themselves decline to fund would not appear to be either warranted nor appropriate in this case. On occasion, the Commission might retain an expert as a sort of *amicus curiae* to assist the Commissioner's in interpreting conflicting expert testimony proffered by the parties. That is not at all our situation here. The residents must lead credible empirical evidence and argument to support each ground of appeal. Mere anecdotal perceptions and lay opinions do not suffice.

5. Decision to approve industrial development onto an amended parcel originally considered residential is not consistent with 2014 IRAC ruling "McLure vs. Minister". (See findings 30 and 35)

The McLure case presented a very unique set of background factual circumstances. In that case the Minister had a past practice of granting lot consolidations ("appendages") even though no supporting regulation enabled this practice. This reason was sufficient to dispose of the case. (See paras. 21 and 34-36). Paragraph 30 simply says that there was a "change of use" which should have been processed as such. (See also para. 41) There is no indication in the record here of an unauthorized lot consolidation as was the case in McLure. The McLure case does not support the Appellant's case.

In closing, Atlantic Aqua's submission is that this appeal ought to be summarily dismissed due to a complete lack of credible evidence which could possibly support any justiciable issue which would warrant reversal of the Minister's decision.

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"Nothing in the world can take the place of persistence. Talent will not; nothing is more common than unsuccessful men with talent. Genius will not; unrewarded genius is almost a proverb. Education will not; the world is full of educated derelicts. Persistence and determination alone are omnipotent." Former US President Calvin Coolidge

