



ENVIRONMENTAL COALITION OF PRINCE EDWARD ISLAND

81 Prince St., Charlottetown, PEI C1A 4R3

December 15, 2023

The Island Regulatory and Appeals Commission
c/o Philip J. Rafuse and Jessica M. Gillis
National Bank Tower, Suite 501
134 Kent Street, Charlottetown, PE C1A 7L1

RE: IRAC Appeal LA23020 – *Environmental Coalition of PEI v. Minister of Housing, Land and Communities*

These submissions are provided on behalf of the Environmental Coalition of PEI (ECOPEI) in relation to IRAC appeal LA23020 *Environmental Coalition of PEI v. Minister of Housing, Land and Communities* filed on August 11, 2023. They are in response to a request from Jessica M. Gillis dated November 29, 2023, to file further particulars and detailed grounds of appeal by December 15, 2023.

Further, these submissions address the request on behalf of the Minister of Housing, Land and Communities (the “Minister”) dated October 3, 2023, that further particulars be provided of any specific contraventions of the *Planning Act*, RSPEI 1988, c P-8 (the “*Planning Act*”) and/or the applicable regulations (**Appellant’s Record of Decision and Minister’s Reply**), following notification from the Minister on November 14, 2023, that the Minister’s Record of Decision in this matter was complete.

ECOPEI’s position is that:

- the decision erred in applying the relevant legislation and regulations;
- the decision of the Minister was arbitrary, procedurally deficient, and raises concerns respecting reasonable apprehension of bias; and
- the procedural shortcomings of the appeal process itself has prejudiced a full and fair determination and hearing of the issues.

Therefore, ECOPEI maintains that the development permit for PID 943241 must be quashed.

Background and Minister's Decision

1. On December 8, 2004, there was an approved subdivision for resort development use in the Greenwich area which included 70 lots, known as the St. Peters Estates Ltd. (the "Resort Development" or "St. Peters Estates Ltd."). The resort development use subdivision approval was subject to several conditions including:
 - a. That all lots be serviced by a central water system that was to be designed and constructed in accordance with the requirements of the then Department of Environment, Energy and Forestry; and
 - b. That the subdivision was to be developed and occupied in accordance with an Environmental Protection Plan, Environmental Management Plan and Human Use Management Plan, also to be approved by the then Department of Environment, Energy and Forestry.
2. As the Respondent on behalf of the Minister acknowledged in her letter dated October 3, 2023, neither of the requisite conditions imposed on the subdivision developer in that 2004 subdivision approval have been satisfied (**Appellant's Record of Decision and Covering Letter Reply to Jessica Gillis, dated December 14, 2023**).
3. On October 4, 2022, Mr. Banks submitted two applications to the then Department of Agriculture and Land for building and development permits, for Lot #2 (also known as PID 943241) and another lot within the Resort Development. Each application was for a "New Two Storey Boathouse".
4. On December 15, 2022, the Minister denied both applications pursuant to subsections 5(a) and 51(1) of the *Planning Act Subdivision and Development Regulations*, PEI Reg EC693/00 (the "*Development Regulations*"). On December 20, 2022, Mr. Banks appealed the decision of the Minister (**Appellant's Record of Decision at TAB 1**).
5. A response to that appeal was filed on February 14, 2023, on behalf of the Minister of Agriculture and Land (**Appellant's Record of Decision at TAB 2**). The appeal was not heard and was ultimately withdrawn on August 15, 2023, after a development permit was issued for PID 943241 pursuant to a different application.
6. On July 18, 2023, Mr. Banks submitted a separate permit application for PID 943241, in the Resort Development (the "Building & Development Permit Application"). This time the application was for a "Single Family Home". Four working days after the date of submission, on July 24, 2023, a development permit was granted by the Minister to construct a "Single Unit Summer Cottage/Seasonal Dwelling" (the "Development Permit Decision").
7. While ECOPEI is not aware of the details, media statements made by Mr. Banks imply that a building permit was also issued between the Building & Development Permit Application date of July 18, 2023, and August 21, 2023 (the "Building Permit") (**Appellant's Record of Decision at TAB 3**). Further, in a Statement of Claim filed against ECOPEI October 30, 2023, Mr. Banks claims the Defendants (including ECOPEI): "...caused the Province to rescind a permit issued to Mr. Banks almost immediately after its issuance." (**Appellant's Record of Decision at TAB 4**).

8. Notice of the Development Permit Decision was posted on the PEI Planning Decisions webpage on July 24, 2023. ECOPEI learned of the posting on August 9, 2023. The Development Permit Decision was identified as “approved” and not “conditionally approved” (**Appellant’s Record of Decision TAB 5**). Full details of the approval were not immediately available, nonetheless ECOPEI was advised by IRAC to file an appeal to avoid missing the 21-day deadline of August 15, 2023, imposed in s.28(1.3) of the *Planning Act*. Further, ECOPEI was informed that any appeal had to be filed by August 14, 2023, not August 15, 2023, which was contrary to the date provided on the PEI Planning Decision website. This appeal (the “Appeal”) was filed by ECOPEI on August 11, 2023.
9. The full content of the Building & Development Permit Application were shared by the Department with ECOPEI in the Minister’s Record of Decision on October 3, 2023. A supplementary document was provided on November 14th, 2023, to complete the Minister’s Record.

Issue #1 Interpretation of the *Planning Act* and *Subdivision and Development Regulations*

10. The Appellant respectfully disagrees with the Minister’s October 3, 2023, interpretation of sections 4(1) and (2) of the *Development Regulations* as they relate to conditional approvals. We adopt the interpretation of the legislation provided by counsel for the Minister of Agriculture and Land in February of this year in a related appeal respecting the same property (**Appellant’s Record of Decision at TAB 2**).
11. Contrary to the argument of the current Minister of Housing, Land and Communities, ECOPEI submits that section 4 cannot be read in isolation but must be interpreted and applied with other relevant sections of the *Planning Act* and the *Development Regulations* within the context of statutory interpretation and sound planning principles.
12. Part III of the *Development Regulations* specifically (and separately) addresses general principles applicable to both subdivision and development approvals:

Subsection 3(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;

...

(d) have a detrimental impact.

Subsection 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:

- (a) not conform to these regulations or any other regulations made pursuant to the Act;
- (b) precipitate premature development or unnecessary public expenditure;
- ...
- (d) have a detrimental impact.

In 2004 conditions were attached to the subdivision approval. The pre-conditions imposed upon the subdivision owners required a common water system be built, operative, and approved within the subdivision, and that the necessary environmental planning documents relating to the entire subdivision be created and approved. Failure of the subdivision approval holders to complete these conditions before any further development on site would result in a failure to conform with the requirements of the *Environmental Protection Act* and the *Planning Act* and would “precipitate premature development” of individual lots within that subdivision thereby causing detrimental impacts—all of which violate subsection 3(1).

13. Moreover, the conditions in that December 2004 approval represent requirements that can only be undertaken by the owners of the subdivision who had/have the necessary authority to complete conditions fundamental to the orderly and environmentally acceptable development of each of the lots within St. Peters Estates Ltd.
14. Section 4 of the *Development Regulations* provides the authority necessary for issuance of a conditional approval. In the present case, the Minister has indicated that section 4 is the basis for the Lot 2 development permit for PID 943241. Section 4 states:

4 (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.

(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.

15. This section does not, as the Minister’s Reply of October 3, 2023 suggests, enable the approval of any/all conditions, but limits such conditions to those “necessary to ensure compliance with these regulations...”.
16. The conditions placed upon the subdivision approval in the present case required the subdivision developer to thereafter complete both a water system and foundational planning documents to ensure compliance with the stated conditions included in the approval.
17. Ensuring completion of, and compliance with, those conditions was solely within the control—and was therefore the responsibility—of the subdivision owner: Subsection 4(2) specifically recognizes this and assigns the obligation to ensure compliance upon the owner of the conditional subdivision permit. The conditions run with title according to Subsection 8(3.1) of

the *Planning Act*. Subdivision-wide conditions cannot, and arguably should not, be assigned to individual “lot” owners as part of their own development permit. Moreover, there appears to be no provision for passing the responsibility to complete these prerequisites on to individual lot owners.

18. Clearly, the scope of the conditions in question is such that individual lot owners are not in a position to satisfy the conditions as they lack the necessary legal rights to act beyond their own property lines. To issue a Development Permit for PID 943241, subject to subdivision-wide conditions beyond the lot owners’ authority, is a failure to acknowledge the fact that the root subdivision approval respecting St. Peters Estates Ltd. has not been satisfied, as the subdivision developer failed to complete necessary conditions early in the subdivision development process.
19. Subsection 3(2) of the Regulations provides parameters and underlying principles for individual development approvals. In accordance with paragraph 3(2)(b), it is patently “premature” to approve individual applications when the conditions of the subdivision approval have not been satisfied by the responsible party. Moreover, the failure to complete the environmental conditions potentially places the natural environment in a sensitive ecosystem at risk (paragraph 3(2)(d)).
20. Paragraph 8(1)(h) of the *Planning Act* enables regulation with respect to environmental protection, and in particular:
 - (i) establishing as a precondition to issue of a permit that the provisions of the *Environmental Protection Act* R.S.P.E.I. 1988, Cap. E-9 and the regulations thereunder and the *Water Act* R.S.P.E.I. 1988, Cap. W-1.1 and the regulations thereunder be complied with,
 - (ii) that failure to comply be grounds for refusal or revocation of permits;

This precondition is reflected in in subsection 5(a) of the *Development Regulations*, which remained unchanged from December 2004 to the time of the Minister’s Decision in July 2023. The Minister’s Reply dated October 3, 2023, failed to consider subsection 5(a) of the *Development Regulations*, which provides that:

5(a) No approval shall be given pursuant to these regulations until the following permits or approvals have been obtained as appropriate where an environmental assessment of an environmental impact statement is required under the *Environmental Protection Act*, approval has been given pursuant to that Act.

21. In short, ECOPEI submits that the combined effect of these provisions is to preclude the approval of a development permit for individual lots, even on a conditional basis, where the approval preconditions imposed upon the parent subdivision have not been satisfied.
22. In February of 2023, the Minister stated that the proper requirements and approvals pursuant to the *Environmental Protection Act* had not been satisfied for the Resort Development. As a result, an individual development approval for Lot 2 (PID 943241) could not be granted. Those conditions have yet to be satisfied and approved. Nothing has changed.

23. Finally, this interpretation of the *Development Regulations* is also consistent with the purposes of the *Planning Act*. Section 2 of the Act states that:

2(1) The purposes of this Act are

- (c) to provide for efficient planning at the provincial and municipal level;
- (d) to promote sustainable and planned development;
- (e) to protect the natural and built environment of the province;

It is inefficient to cast responsibility for subdivision-wide conditions on individual lot owners. Determining whether the conditions have been met rests with the Minister in cooperation with the subdivision developer, not on a lot-by-lot basis with individual property owners within the subdivision. Moreover, efficiency and subdivision-wide environmental protection measures are better and more logically addressed at the subdivision approval level early in the development process.

24. The submission of the Minister in December of 2022 and reiterated by Department counsel in February of 2023 supports ECOPEI's interpretation. The Building & Development Permit Application submitted six months later in July 2023 should have been subject to the same parameters: the Minister should rescind the Development Permit issued to the owner of Lot 2 (PID 943241). The December 8, 2004, resort development use permit conditions have not been met. Any issues that arise as between Mr. Banks as the purchaser of several lots within St. Peters Estates Ltd. and the vendor of the lots within St. Peters Estates Ltd. are outside the purview of the Minister and the Commission.

25. ECOPEI submits that the statutory requirements and principles set out in the *Planning Act* and the *Development Regulations* were selectively considered but were improperly applied by the Minister of Housing, Land and Communities' consideration of Mr. Banks' July of 2023 Building & Development Permit Application.

Issue #2 Arbitrary Decision by the Minister and Procedural Errors

26. In addition to systemic errors in the IRAC appeals process (see Issue #3) ECOPEI's position is that there were two errors in process specific to the actions of the Minister and the Department respecting the Development Permit Decision which deviated from the legislated approval process, raised a reasonable apprehension of bias, and compromised the overall integrity of the decision-making process.

27. Firstly, the deadline to appeal the Development Permit Decision was listed on the PEI Planning Decision website as August 15, 2023. However, a telephone call to IRAC revealed that the deadline was in fact August 14, 2023. If ECOPEI had not called to confirm the date, it might have missed the deadline. It would be beneficial if dates posted on the PEI Planning Decision website were accurate and aligned with IRAC's guidelines for the appeal filing period. Moreover, the PEI Planning Decision website was down and unavailable for viewing for a period of time during the appeal period. Timelines should run from public notification of the decision: the inability of the public (and in this case the Appellant) to view information respecting the Development Permit Decision due to technical outages should have resulted in a change in the deadlines to reflect the actual public notice of decision date.

28. Secondly, at the time that ECOPEI submitted its appeal (August 11, 2023) there was an active appeal of a development permit (LA22024) for the same property (PID 943241). It is unclear to ECOPEI how a development permit could have been issued for the same property when there was an active appeal. Neither ECOPEI nor any other interested party would or should have been expected to check development permit approval notices during that period of a “live” appeal before IRAC on the same property. The LA22024 appeal was only withdrawn on August 15, 2023, subsequent to ECOPEI’s appeal submission on a second development permit application for the same property.
29. The Appellant also questions the impartiality of the review of Building & Development Permit Application which were submitted by Mr. Banks on July 18, 2023. This is based on two documents shared in the Minister’s Record of Decision.
30. The Minister’s Record of Decision (Supplement) shows that upon receipt of the Building & Development Permit Application, Eugene Lloyd, Manager (Acting) of Development Control of the Provincial Planning Branch, pursuant to his “commitment” to expedite the approval, instructed Dean Carroll and Dean Lewis to simply incorporate the overarching conditions on the subdivision approval into the individual lot development approval of Mr. Banks. The July 19, 2023, correspondence states:

“Tim submitted a new application yesterday for Lot 2 in Greenwich. We have committed to providing an approved permit in short order, by the end of the week if possible.

The permit was put in under a Charlottetown number (C-2023-0273) but at this point, it doesn’t matter.

Can one of you find some time in the very near future to work on this and hopefully finalize as soon as possible? I’d use all the conditions created previously and ensure he signs off on those conditions. Once complete, I will ask him to withdraw the current appeal, as at that point it would be moot anyway.

Thank you and sorry for the short notice!”

(Appellant’s Record of Decision at TAB 7)

31. It is clearly prejudicial to a full and fair review of a development permit application to request that an “approval” be provided “in short order” and places the frontline development officers in an untenable position.
32. Moreover, ECOPEI would argue that Mr. Lloyd exceeded his authority in predetermining the outcome of the application and committing to both approval and turn-around time.
33. It is acknowledged that applicants may well reasonably inquire and receive guidance on development matters, including application procedures from the Department. However, “commitments” for an approval are not within the parameters of a fair and objective process. We do not know if such commitments constitute a “working policy” but believe such practises are nonetheless untenable.

34. In the above memorandum dated Wednesday, July 19th, 2023, Mr. Lloyd stated: “We have committed to providing an approval in short order, by the end of the week if possible”. (**Appellant’s Record of Decision at TAB 7**). ECOPEI respectfully queries whether there is further background information or an explanation surrounding this commitment? Specifically, who made the commitment and the circumstances surrounding the promise? At minimum, these questions raise concerns respecting reasonable apprehension of bias in relation to the Minister’s conditional approval of the Development Permit.
35. Further to our concerns regarding the arbitrariness of the decision, ECOPEI questions the appropriateness of the Building & Development Permit Application (**Minister’s Record of Decision at TAB 3**), which includes a handwritten response to question 5 of that application:

“Was told by Minister to leave blank because it has been denied multiple times.”

The Building & Development Permit Application was signed by Mr. Banks, although it is not clear as to whether he or someone in the Development Office hand wrote the comment. In either case such a comment is inappropriate and unduly pressures or prejudices fair consideration of the Application. Ironically, a Building Permit was issued despite the unsatisfied conditions of both the lot Development Permit and the subdivision approval. Shortly thereafter, the reconsideration/review of those requirements resulted in the withdrawal of the Building Permit but the Development Permit subject to conditions remained.

36. PEI is a small province. As such it is incumbent upon the Minister and his Department to ensure that all applications are reviewed without bias or undue influence. Justice must not only be done but must be seen to be done.

Issue #3 Appeal Process and Procedural Concerns

37. ECOPEI would like to highlight several shortcomings with process and procedure that impeded our participation in this Appeal and may discourage other organizations or individuals from participating in this type of public process.
38. Notice: The timeline between ECOPEI learning of the approved development permit for PID 943241 on August 9, 2023, and the deadline for submitting an appeal on August 15, 2023, did not provide sufficient time to request a copy of the development permit. Requests for development permits require an application under PEI’s *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01. Even if ECOPEI was aware of the approved development permit on the posting date, 21 days may not have been sufficient to obtain a copy of the development permit to inform our appeal.
39. Meaningful Public Participation: In the October 3, 2023, Minister’s Reply, counsel states “the Minister has not officially denied other permit applications within the resort development of St. Peters Estates Ltd. The Developer’s application was the first to be processed by the Minister in this subdivision.” It is ECOPEI’s understanding that an application for two lots in the subdivision, including PID 943241 was made on October 4, 2022, denied on December 15, 2022, and appealed on December 22, 2023. If counsel for the Respondent was unaware of these applications, it begs the question as to the efficacy of existing processes designed to

inform the public and satisfy the stated purpose in section 2(f) of *Planning Act* to “provide the opportunity for public participation in the planning process”.

40. Time to File May Expire: Once a development permit is posted online, subsection 28(1.3) of the *Planning Act* allows 21 days to launch an appeal. The application requires that the Appellant include grounds for that appeal. In order to establish grounds, it is incumbent upon the appellant to review the details of the approval. However, in order to obtain the approval the party challenging the decision must file a freedom of information request. According to section 9 of PEI’s *Freedom of Information and Protection of Privacy Act*, and the commissioner has 30 days to respond. Consequently, time for filing under the *Planning Act* may expire before the necessary information is delivered to the individual who wishes to challenge the decision. Although IRAC has kindly attempted to alleviate this known anomaly by encouraging individuals to file even before this information is shared, in the absence of such *ad hoc* guidance, public participation may be effectively “timed-out” by a failure in the legislation to mandate a practically feasible process.

Conclusion

Based on the above noted discussion, ECOPEI’s position is that:

1. the decision erred in applying the relevant legislation and regulation;
2. the decision of the Minister was arbitrary, failed to meet process requirements, and raises concerns respecting reasonable apprehension of bias; and
3. the Appeal process has procedural shortcomings that result in systemic unfairness.

Accordingly, ECOPEI submits the Development Permit for PID 943241 should be quashed.

Signed,

Gary Schneider
Co-Chair
Environmental Coalition of PEI