SUNROSE

Sunrose Land Use Consulting

Halifax, Nova Scotia

Jenifer Tsang, MCIP, LPP
Principal

Establishing her private consulting practice in February 2005, Ms. Tsang is a senior land use planner with over 32 years experience in both the public and private sectors. She has a thorough knowledge of municipal and provincial regulations throughout Atlantic Canada and familiar with land use planning approaches used in areas of the United States and Canada. Ms. Tsang has proven expertise in municipal, environmental, and physical land use planning. Her consulting practice includes on-going project management for large and small scale developments in urban, suburban and rural resource areas. She understands the responsibilities of being a public servant as well as the needs of developers, business owners and non-profit groups. Ms. Tsang is a recognized expert in land use planning matters by the Nova Scotia Utility and Review Board.

Professional Qualifications

Bachelor of Arts in Land Use Planning 1987
School of Environmental Studies
University of Vermont in Burlington, Vermont USA

Relevant Experience

Sunrose Land Use Consluting 2005 – present. Halifax, NS
Founder and Owner

- Land use planning services for public and private sector Clients.
- Negotiation between parties, public consultation, and interpretation of By-law and Statutes.
- Advising Clients on various regulatory tools and processes.
- Due dilligence research for property owners.

Terrain Group Inc.
2000 – 2005 Bedford, NS
Senior Planner

- Project management of various residential, commercial and mixed-use projects.
- Represented large format retail commercial Clients through various public planning processes, multiple permit approvals, and construction phases.
- Represented Clients in interacting with public interest groups and the media.
- Involved in master planning projects and drafting of planning policy and by-law documents.
- Economic development and land use value impact study for development projects.
- Spearheaded projects involving development agreements, re-zonings, and planning strategy amendments throughout Atlantic Canada.
- Research and advisor on Application for the Incorporation of an Area of Chester as a Town.
- Proposal writing for a variety of development projects.
- Represented the firm in Client contacts and marketing endeavors.

Pictou County District Planning Commission,
1998 – 2000. Stellarton, NS
Senior Planner and Manager of the Planning Division

- Responsible for provision of professional planning advice to five Town Councils and Planning Advisory Committees ranging in size from five to thirty-five.
- Led public planning reviews of various Municipal Planning Strategies, Land Use By-laws, and Subdivision By-laws.

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- Member of team to establish a Public Private Partnering policy for Town of New Glasgow.
- Involved with efforts to establish the Pictou Caribou Well Field as a Provincially designated protected area.
- Professional planning support to New Glasgow Heritage Advisory Committee.

Halifax Regional Municipality (HRM)
1996 – 1998. Bedford/Sackville, NS
Planner II
- Provided professional planning advice to the HRM Regional Council, Community Councils, Planning Advisory Committees, specialized HRM committees, and the public.
- Member of harmonization team evaluating four former administrative planning processes and recommending one set of processes for HRM.
- Member of team evaluating existing Planning Advisory Committee structures and recommending new structure for HRM.
- Involvement with HRM proposal to identify a regional transportation and servicing boundary.

PBR Hawaii
1997. Honolulu, Hawaii
Planner
- Edited Environmental Impact Statements to confirm compliance with both State and local planning regulations.
- Revised architectural design guidelines for downtown Wailuku, Maui.
- Member of team creating Master Plan for Hawaiian Home Lands Humuula/Piihonua 53,000 acre parcel on Big Island to balance the needs of indigenous farmers and development demands.

Town of Bedford
1992 – 1996. Bedford NS
Land Use Planner
- Provided planning services to Town Council, Planning Advisory Committee and other advisory committees.
- Professional planner member to the Sackville River Walkway Committee in the acquisition, legal processing, approvals, and construction of the Fort Sackville Trail.
- Lead planner for Comprehensive Development District (CDD) Master Plan projects.
- Involvement with the review of the Municipal Planning Strategy & Land Use By-law.

Pictou County District Planning Commission
1989 – 1992. Stellarton, NS
Municipal Land Use Planner
- Planner for five Towns of New Glasgow, Stellarton, Westville, Trenton, Pictou.
- Led review of Municipal Planning Strategies and Land Use By-laws.
- Responsible to five Town Councils totaling 35 elected representatives.
- Liaison with the Pictou County Economic Development group.

Memberships
CIP – Canadian Institute of Planners
API – Atlantic Planners Institute
LPPANS – Licensed Professional Planners Association of Nova Scotia (LPP)

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File No. LA21024

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 Lucas and Jennie Arsenault/L&J Holdings Inc. with respect to the denial of an application for lot subdivision at PID #203000 and 808154 located at Hennebury Road, Rice Point, Prince Edward Island

ACKNOWLEDGEMENT OF EXPERT'S DUTY

1. My name is Jenifer Tsang, MCIP, LPP, and I live in Nova Scotia, Canada.

2. I have been engaged by or on behalf of the Appellant, Lucas & Jennie Arsenault/L&J Holdings Inc. to provide evidence in relation to the above-noted appeal before the Island Regulatory and Appeals Commission.

3. I acknowledge that it is my duty to:

   (a) Advise the Commission impartially on matters within my area of expertise; and

   (b) The duty referred to in subsection (a) prevails over any obligation which I may owe to any party by whom or on whose behalf I am engaged.

DATED: Nov. 24/21, 2021

Jenifer Tsang, MCIP, LPP

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SUNROSE

Sunrose Land Use Consulting
Halifax, Nova Scotia

LAND USE PLANNING OPINION REPORT

By
Jenifer Tsang, MCIP, LPP

IN THE MATTER OF an appeal pursuant to s.28 of the Planning Act, RSPEI 1988 c. P-8 by Lucas and Jennie Arsenault/L&J Holdings Inc. with respect to the denial of an application for lot subdivision at PID #203000 and 808154 located at Hennebury Road, Rice Point, Prince Edward Island

Before the Island Regulatory and Appeals Commission
(IRAC)
File No. LA21024

April 16, 2022

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INTRODUCTION

I am a professional municipal land use planner with over 30 years in the industry having worked in both the public and private sectors. I have been asked by Cox & Palmer to provide my professional land use planning opinion with regard to this appeal that is being heard by the Island Regulatory and Appeals Commission (IRAC). I have been provided by Cox & Palmer copies of the Notice of Appeal, the Province's Response to the Notice of Appeal, the Province's Record (file), the Amended Notice of Appeal, and background documents.

The steps I took to formulate my opinion in this report included: reading background material; researching information; meeting with the appellants; conducting a site visit; watching drone footage of the surrounding land area; interviewing a professional municipal planner, Greg Morrison RPP MCIP, who has experience in both the private and public sectors of Prince Edward Island (PEI); interviewing the current owners of the property; interviewing a real estate agent in the Province; reviewing information from Joose Environmental; reviewing information from Todd Stokes, AACI, P.App; relying on my practical knowledge from my experience as a professional municipal land use planner; and applying sound planning principles.

This report summarizes my review of the subdivision application ("The Proposal") affecting lands located in Rice Point, PEI in the context of the Province's denial and applicable sections of The Planning Act Subdivision and Development Regulations (The Act) for the Province of Prince Edward Island. The Proposal is to consolidate two vacant parcels of land and to subdivide the consolidated parcel into 25 residential lots.

The subdivision application (dated July 8, 2021) has some conflicting references, in that it identifies a range of lots to be 20-24, it proposes to be built in one phase even though there is a limit of 20 lots per phase as per The Act, and there is a handwritten note that says fees will be paid for 19 lots with the ability to pay for additional lots at a later date. The subdivision plan that is attached to the application is also dated July 8, 2021 and shows a layout of 24 residential lots. A second plan was submitted after the first plan (dated August 17, 2021) which proposes a 25 lot layout and a revision to the proposed open space. It is this second plan that is attached to the Province's denial letter, which refers to The Proposal as being an "Application for a 19 lot subdivision" which is the number of lots the applicant paid for as Phase 1.

In the context of this report, I am reviewing The Proposal as a subdivision for 25 lots as shown on the August 17, 2021 subdivision plan, regardless of the conflicting information on the application form. The second subdivision plan is an accurate depiction of the full development proposal from the applicant. The phasing for the proposed 25 lots is governed by sections 14 and 18 of The Act.

The current appeal centers around four sections of The Act as stated in the denial letter dated September 17, 2021 from Eugene Lloyd, Manager (Acting) of Provincial Planning from The Department of Agriculture and Land quoted below:

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"Pursuant to clause 6(c) of the *Planning Act* and subsections 3.(1)(b) & (d) and 13.(a) & 0) of the *Planning Act* Subdivision and Development Regulations, the above noted application is Denied."

The Provincial letter further quotes those sections of the Act, includes the Act's definition of "detrimental impact" and underlines the applicable portions of clause 3(1)(b) and the definition as shown in italics below.

3.(1) No person shall be permitted to subdivide land where the proposed subdivision would
(b) precipitate premature development or unnecessary public expenditure;
(d) have a detrimental impact

13. Subdivision designs shall be based on sound planning, engineering, and environmental principles, and shall demonstrate that the proposed subdivision is suited to the intended use, having due regard for
(a) compatibility with surrounding uses;
(j) natural features.

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"

The Province's denial ("Denial Letter") relied on information from a report submitted by Alex O'Hara, Land Use and Panning Act Specialist ("Province's Report"). There are submissions from the Respondent, the Minister of the Department of Agriculture and Land, dated November 10, 2021, which is a response to the appellant's Notice of Appeal ("Minister's Submissions"). This November 10, 2021 letter represents the Province's legal position and provides some comments on planning matters in the context of the four reasons for denial. I will address the relevant planning comments from each of these three documents as they relate to the four reasons for denial.

There is also some discussion in the Province's denial about the overall concept of "sound planning principles" beyond the context of it in section 13 (a) and (j) of The Act as their reasons for denial. It is being suggested that the Province has the responsibility to review a proposal against additional random "sound planning principles" and to provide an opinion on whether a proposal "should" be approved, even if a proposal meets all of the prescribed technical requirements set out in The Act. I will address these concepts as well.

The Province suggests that the concept of "detrimental impact" should be further reviewed based on a 1996 IRAC decision by including a review of "social, economic and fiscal considerations". I address this concept and other matters from the same IRAC decision in this report.

It is my understanding that the Province is satisfied that all other prescribed criteria for subdivision approval for The Proposal as per The Act have been met. Therefore, I will not be reviewing The Proposal against the other criteria of The Act.

DENIAL REASON ONE:

3.(1) No person shall be permitted to subdivide land where the proposed subdivision would (b) precipitate premature development or unnecessary public expenditure;

The first part of this clause has been underlined in the Denial Letter, which indicates that the Province views the underlined words of the sentence as independent from the remaining part of the sentence. The use of the word "or" can be interpreted to mean the two components of the sentence are two separate parts, however, from a planning point of view, the words "unnecessary public expenditure" would be an indication of what "premature development" is intended to mean. If "premature development" and "unnecessary public expenditure" were intended to be two separate concepts, then they may not be in the same sentence and more likely would be listed as individual criteria of this section of The Act.

A typical dictionary meaning of the word "premature" is something that occurs before the usual, proper or intended time or something that occurs too early. To regulate based on a concept is subjective if there are no guidance or quantifiable parameters on which to base one's decision. From a planner's point of view, it would make sense to read the sentence as a whole, with the words "unnecessary public expenditure" as being the guidance for what "premature development" would be.

This interpretation would be in line with sound planning principles because it is common to prioritize new development in areas where there is already municipal infrastructure or on the edges of existing infrastructure as a way to minimize expenditures of public funds. This approach would not prohibit new development, because this concept is considered to be a general preferred approach for development yet there are always examples where public expenditures are warranted.

Usually this planning concept is expressed by identifying a growth or service boundary that would focus development in a specific urban area before extending services (i.e. piped water, sewer, stormwater) beyond what the Municipality has budgeted for. This would be measured against the acceptable level of public expenditure for providing normal services (i.e school bussing, emergency response, garbage collection, snow plowing etc.) in exchange for the tax revenue and positive economic impacts from having more people living and working in an area.

Using this analysis, the proposed subdivision does not impact the expansion of piped water and sewer infrastructure because it is in a rural area. The property is located off an existing public local road that already is being serviced which is the optimal location for new development. The developer is required to cover the cost to build the new road and there are little or no public expenditures to enable this proposal. Therefore, using this analysis, The Proposal would not be premature and should not be denied on this basis.

Interpreting "premature development" in isolation

Using the Province's interpretation of analyzing the proposal on the concept of "premature development" without using "unnecessary public expenditure" as guidance, the interpretation of "premature development" becomes open ended and subjective.

As a land use planner, I would look at the location and character of the area to determine how "premature" should be measured. I would ask, what is the character and development form of the area? Is there a need for additional low density residential development, is it appropriate to introduce new forms of housing, and should there be more mixed use development? One would look at the major transportation routes in and out of the area to determine if it would be better to direct new subdivisions away from highways and toward lower classification public roads or if new subdivisions should have direct access to highways for shorter commute times.

One would think about the specific planning issues in the area and try to determine how a proposal may impact those. A planner would look at the development pressures and housing needs for the area. A planner may review the number of comparable available vacant residential lots in the immediate and surrounding area within the context of how many landowner/developers are marketing those lots. This review should avoid creating a monopoly or a situation where there are too few landowner/developers who are selling lots in an area, to avoid creating overpriced lots. A planner would not normally make judgement calls about the market and would need some guidance on how many lots is considered to be too many. Normally this type of growth control is regulated through the use of a development boundary or growth management areas as opposed to relying on random lot counts at the time of each subdivision application.

I would also turn to The Act for guidance. The Act regulates subdivisions based on number of lots in section 14 where they are referred to as "Five or fewer lots" and "Six or more lots". Section 18 of The Act addresses phasing where preliminary approval can be given to more than 20 lots but only 20 lots are permitted for each phase. It goes on to say that 50% of lots must be sold within each phase before the next phase is approved. These sections would sufficiently regulate the number of lots on the market at any given time to prevent an oversupply of lots. As a Planner I would have to respect to this section of The Act and not apply different subjective standards in an attempt to regulate the number of vacant lots.

From my discussion with a real estate agent familiar with the area, Rice Point is a community that has no registered farmers living in the community even though there are some agricultural fields. There is a fishing wharf nearby and Rice Point has fishers living in the community. There

appear to be some vacant residential lots in the surrounding area but they were not listed for sale when I visited Rice Point on December 8, 2021. In fact, there were no properties listed for sale in Rice Point or the larger community of West River (with our without houses) on that day.

It is a known fact that Canada is facing a severe housing shortage. PEI has been encouraging immigration since 1980 and with new immigrants coming from other parts of the world now is a time to encourage new development rather than restrict it. New residential subdivisions and housing should be encouraged, provided that proposals meet the applicable regulations.

Rice Point consists of low density single unit dwellings who's residents would typically travel to West River, Cornwall and Charlottetown for work and shopping. There is a market for new homes in the area and it is a desirable place to live. The Proposal could bring 25 lots onto the market that would be regulated via the phasing restrictions of The Act. The road network can accommodate The Proposal, the residential lots are consistent with low density housing in the area, there have been no planning issues raised that are unique to Rice Point that cannot be addressed via The Act, and The Proposal does not require any unnecessary public expenditures. It is my professional opinion that The Proposal is not premature based on a planning analysis applied in isolation without specific guidance and therefore, should not be denied on this basis.

Discussion of Lot Availability

My understanding of how the Province's Report is structured is that the first paragraph is Provincial guidance for the subject line and the second paragraph is the professional planning opinion that follows that guidance. The section of the report regarding "Premature land subdivision" is quoted below:

> *"1) Premature land subdivision*
>
> *Premature land subdivision occurs when a landowner subdivides a parcel of land into lots for sale in an area, or market, with an oversupply of approved lots. P.E.I has currently a surplus of between 25,000 to 30,000 approved, vacant residential lots dispersed across the Island. Not all lots may be available for purchase as often the landowner subdivides the land with the intent to sell in the future and has simply subdivided the land to increase the lands value while maintaining its current use. Provincial planning will consider the appropriateness of proposed rural subdivision against the presence and vacancy rate of approved subdivisions in the immediate vicinity.*
>
> *Comment- The proposed development site is located within a span of 5 km between two existing subdivisions to the east and west. This proposal would not be deemed as infilling due to the distance between the two existing developments. Mapping indicates that existing subdivisions to the east and west remain largely undeveloped."*

The first paragraph, being the guidance for "Premature land subdivision", does not provide any supporting data to explain why 25,000 – 30,000 vacant lots is considered to be an "oversupply". It is not clear if it is measured against the Island population or the immigration targets that the

Province is striving to achieve in the coming years. It is true that the existence of "approved vacant residential lots" does not necessarily mean that those lots are available for sale. The final sentence makes it clear that the measurement to be analyzed is the "presence and vacancy rate of approved subdivisions in the immediate vicinity" although there is no quantifiable numbers to guide one's decision nor guidance on how to determine "immediate vicinity".

The second paragraph, which is Mr. O'Hara's response to the guidance from the first paragraph, identifies two existing subdivisions in the area. The statement says that the two subdivisions are five kilometers apart with the subject lands located in between them. There are two points being made here for his recommendation for denial: 1) that The Proposal would not be deemed infilling, and 2) that the two subdivisions remain "largely undeveloped". I will address each of these points below.

Discussion of Infilling

In addition to Mr. O'Hara's remarks regarding infilling, page two of the Denial Letter states:

> *"This area of Rice Point is primarily Resource Agriculture use with some residential use and small cottage development in the area. This proposal would be considered incompatible for the area and precipitate premature development in the area, as well as, using valuable agricultural land if a subdivision was permitted. The proposed use is better suited for other areas where development is of a higher density and/or in a community/municipality with proper servicing in place."*

Paragraph 38 of the Minister's Submissions says:

> *"In addition, it is Mr. O'Hara's opinion that approval of this subdivision would not contribute to "infilling". Infilling is the use of land within a built-up area for further development. Because Rice Point is not yet "built-up", development of the Subject Property would be premature. "*

There are some conflicting statements in these three documents with regard to infilling. Typically, the land use planning term "infill" is used in the context of an urban area. It is considered to be a desirable form of development because it directs new development to vacant lots located within a serviced area. The vacant lots are usually located in between developed properties and their development typically does not require the installation of new municipal infrastructure such as piped water, sanitary, storm services. This aligns with this report's previous discussion about "unnecessary public expenditure".

The Denial Letter that says this proposal should be located in a "higher density" location where there is "proper servicing" is suggesting that the Province should refuse rural low density residential development in favour of high density residential development in an urban area. This position is not supported in the prescribed provisions of The Act, which clearly allows for

low density residential development in rural areas. Therefore, this should not be used for a reason for the denial of The Proposal.

The Ministers Submissions suggests that the subject application should be refused until Rice Point becomes "built up", at which time the property could be considered infill and approved at that time. It is not expected that Rice Point will become "built up" in the urban context and this position is not supported by The Act which allows for low density rural development within clearly prescribed parameters. Therefore, this should not be used for a reason for denial of The Proposal.

The Province's Report indicates that infill development is desirable, but because The Proposal is located between two subdivisions that are 5 kilometres apart from one another, it is not considered to be infill and therefore should be denied. There is nothing in The Act that uses "infill" as a criterion for subdivision applications and therefore, this should not be used as a reason for denial of The Proposal.

In order to be thorough in this report, I will address "infill" in a rural context which is what it appears the Province's Report is addressing. To review "infill" in a rural context, I would have to determine how to apply the concept of infill within a rural context as opposed to an urban context for which it is normally used. I would review the rural area to determine if there are any properties large enough to accommodate a new rural residential subdivision that is located in between existing subdivisions. One would not look for individual vacant lots (as one would in an urban setting) that are located between existing subdivisions because that would not be an equitable comparison. One would want new subdivisions to fill the areas between subdivisions rather than locating them on the periphery of the community or located significantly farther away from existing development i.e. "leapfrogging" over several large tracts of land. One would also look at the road network because it is usually preferable to locate new subdivision roads where they can access existing local roads rather than highways. It is also efficient planning to utilize both sides of roads.

My research and additional information provided to me by Greg Morrison, RPP, MCIP and Todd Stokes, AACI, P.App, identify several small subdivisions in the area. I am not certain how these align with the two subdivisions that are referred to in the Province's Report, but it is reasonable to say that there are subdivisions to the east and west of The Proposal. I looked for large vacant tracts of land that are located to the south and east of Route 19 because that area is similar in character to the subject lands. I also reviewed these large tracts of land in terms of whether they were located in between existing subdivisions. These potential rural infill properties would have to be wide enough to accommodate a new local road with residential lots on both sides and be large enough to meet various required setbacks and on-site servicing requirements. My research shows that there may be three or four potential properties, including The Proposal site, that may meet these conditions. Therefore, using this analysis, The Proposal would carry out the concept of "infill" in a rural context because it is located between existing subdivisions and is one of only a few available large tracts of land capable of

accommodating a new local road for new rural residential lots. In this context, The Proposal would be a desirable form of rural infill development.

The Minister's Submissions at paragraph 39 states:

> *"This is well demonstrated when one looks at the map attached at Appendix A. The map depicts lots available to be developed in orange. If the Subject Property was subdivided and approved for development, it would be shaded orange on the attached map. Imagining this scenario, it can easily be seen that future development of PIDs 790683 and 202994 would be appropriate for infilling. Before long, the entire area would be available for residential development."*

The PIDs that are identified in the statement above refer to the two lots adjacent to the subject property, located to the rear and farther away from the ocean. This statement implies that if The Proposal were approved, it would create an infill situation for the two adjacent properties to the rear and that that would be considered as negative.

This is somewhat conflicting from the earlier Provincial statements that imply that infill is a positive and that until Rice Point is "built up" The Proposal would be premature. If rural infill is a positive, then one would want to allow infill on these few vacant tracts of land that can accommodate it. If rural infill is a negative, then The Act should be amended to be more restrictive in terms of rural subdivisions.

The two adjacent parcels are already possibilities for rural infill whether The Proposal is approved or denied. This is because they are located between existing rural subdivisions and they do not contribute to scattered or leapfrog type development.

There is no planning basis to deny The Proposal as a way to avoid a possible subdivision application that may be applied for in the future from the adjacent landowner. The concept of trying to avoid having one subdivision open up land for another subdivision in the context of trying to control sprawl is done through the use of development boundaries. This matter can arise in a situation when there are parcels of land on the outskirts of a developed area that do not have road frontage until the first subdivision is developed. In fact, most subdivision rules would require that the first subdivision grant road access to the adjacent land so that the adjacent parcel does not become land locked. This scenario is not the situation in this case. The lands adjacent to The Proposal already have road frontage on Hennebury Road and the landowner could apply for a subdivision with or without The Proposal being approved or denied. The Act requires that each subdivision application be reviewed on its own merits and not be used as a tool to prevent future subdivision applications by others.

It is my professional planning opinion that The Proposal should not be denied based on the concept of "infilling".

Discussion of "largely undeveloped" in the "immediate vicinity"

The guidance from the Province in the Province's Report is to consider "... *the presence and vacancy rate of approved subdivisions in the immediate vicinity...*". The response to this guidance is, *"...Mapping indicates that existing subdivisions to the east and west remain largely undeveloped."* There is no indication in the report as to what "largely undeveloped" or "immediate vicinity" means.

An appropriate way to measure the "...the presence and vacancy rate of approved subdivisions in the immediate vicinity" would be to find out if any of the lots in approved subdivisions are for sale. This is because the objective of this exercise is to try to determine if an area can accommodate additional subdivided rural residential lots or if there are already enough subdivided rural residential lots available to the market. The word "presence" means that they would be available for residential construction (i.e. have road frontage, utilities, are serviceable) and the word "vacancy" would mean that they do not have a residential dwelling built on them. From this point of view, It would be a more accurate measurement to look at subdivided rural residential lots available for sale than it would be to look at every single vacant property when trying to determine the "presence and vacancy rate" of lots in an area.

As a professional planner, if I had to review the "presence and vacancy rate of approved lots in the immediate vicinity" I would first look at the lands that are immediately adjacent to the subject property. The lands immediately adjacent to The Proposal are large properties and would not be considered comparable as being an available residential lot. The adjacent property to the rear may accommodate a residential subdivision if it were consolidated with its neighouring lot, as discussed previously in this report, but in its current state it would not be considered an available residential lot. The immediately adjacent lot to the west is larger than a standard rural residential lot and has a home on it. There are no adjacent lots to the east because The Proposal abuts Hennebury Road on its eastern border.

Secondly, I would look at a slightly larger surrounding area, such as across Hennebury Road and a few properties beyond the immediately adjacent properties. The properties beyond the adjacent properties to the north and west are not residential lots that have been created from rural residential subdivisions. They are larger than a standard rural residential lot yet too small to accommodate a new rural residential subdivision so they would not qualify as a comparable. Across Hennebury Road there are a few subdivisions which appear to have some vacant rural residential lots. The number of vacant lots appear to be less than half of all the lots in that area. I would also research to see if any of the vacant lots were listed for sale because the objective of the Provincial guidance on this point appears to be wanting to avoid having too many vacant rural residential lots available on the market at any given time, regardless of the fact that The Act specifically regulates phasing of subdivisions to address this matter.

If I were to go even further out from the subject property, but still considered to be within a reasonable definition of "immediate vicinity", I may extend my review to lands on both sides of Route 19, to the east of Hennebury Road, and to the west where there are some approved rural residential subdivisions. Lots that appear to be larger than your standard rural residential lot

and not part of a residential subdivision should not factor into the calculation. There appear to be some vacant rural residential lots among these subdivisions, the number of which appear to be less than half of the total number of approved lots. None of these lots were listed for sale on December 8, 2021.

Relying solely on the fact that a property is vacant is not an accurate representation of market demand. The research provided by Todd Stokes AACI, P.App, looked at a much broader surrounding area of 12 kilometers for comparable rural residential lots. His research found 14 lots for sale within a 12 kilometre radius, none of which were waterfront lots and none of which were located in Rice Point. This research makes it clear that there are no comparable available rural residential lots within the immediate vicinity of The Proposal.

I would not look at the number of properties or rural residential subdivided lots across an entire Province, because that is clearly not in the "immediate vicinity". However, to get a sense of the market I asked a Real Estate Agent how many lots were typically for sale in the Province of PEI and was told that there were between 300 and 450 lots for sale across PEI on random days in December 2021. This is much fewer than the "...25,000 - 30,000 approved, vacant residential lots dispersed across the island" that is quoted in the Province's Report. These numbers send a clear message that the existence of vacant lots does not mean they are available for sale or development.

In paragraphs 36 and 37 of the Minister's Submissions and in reference to a map identified as "Appendix A", they state:

> *"In the opinion of Mr. O'Hara, approval of this 19-lot subdivision would be a catalyst for increased development in the Rice Point area.*
>
> *There are currently (at least) forty-three (43) lots available to be developed in the immediate vicinity of the Subject Property.*[13] *If the Minister were to approve this subdivision, it would increase the number of lots available for development in Rice Point by almost fifty percent (from 43 approved lots to 62 approved lots). This would result in an oversupply of lots approved for development in Rice Point.*

"Paragraph 40 says:

> *"This particular subdivision development would, therefore, be premature because there are currently 43 vacant lots in the immediate vicinity and a further supply of additional residential lots would be in advance of market demand. "*

The map referred to in Appendix A includes properties that are not the result of approved rural residential subdivisions comparable to The Proposal. Appendix A appears to include large tracts of land that are in their original state. As discussed above, this type of vacant property

would not be considered as available for sale in the context of determining comparability to the rural residential lots of The Proposal.

The presence of comparable existing vacant lots is not necessarily an accurate reflection of lot availability on the market. There could be any number of reasons why the "presence and vacancy rate of approved lots in the immediate vicinity" do not corelate to the number of lots listed for sale. It could mean that the road and services and other preparatory work has not been completed so the lots are not available to the market. It could be a response to higher development costs and the shortage of trades people. There could be any number of personal reasons why the landowner has not put the lots on the market for sale.

Even if there were some comparable vacant lots for sale, it is also important not to limit the number of available subdivided rural residential lots to just a handful of developers because that can lead to higher lot prices if there is not enough competition between sellers. It can also give an unfair advantage to some landowners/developers over others.

A more important factor in determining whether there are rural residential lots available for new housing would be to research how many lots are for sale in the area of the new proposal, if they in an area where people want to live, and if they are in an area where the public authority wants to direct new development. In this case, there are no lots listed for sale in Rice Point, the community of Rice Point is a desirable place to live, and The Proposal is in a location that does not impose additional public expenditure which means it would be a reasonable location to direct new development.

As mentioned previously, The Act provides growth controls in section 18 that addresses phasing. It states that a maximum of 20 lots can be approved per phase and 50% of a previous phase must be sold before a new phase is approved. To choose to regulate more stringently than the prescribed regulations of The Act, one should have quantifiable data to support one's position, otherwise, the credibility of The Act is diminished.

It is my professional planning opinion that the intent and meaning of the "presence and vacancy rate of approved lots in the immediate vicinity" is to measure The Proposal against how many lots from previously approved rural residential subdivisions are ready for development and for sale, but not yet sold. The idea being that the Province doesn't want to introduce new rural residential lots on the market if there is already an ample supply.

This direction to consider the supply does not give guidance as to how much supply would be enough to justify denying a subdivision application. There are no specific quantifiable numbers to guide what is considered to be too many vacant lots in Rice Point. The Province does not provide supporting data to explain why 43 vacant lots is enough or why any increase above 43 is "...in advance of market demand". It is a well-known fact that Canada is experiencing a housing shortage. In some areas it is at crisis point. Even if these 43 lots were actual lots from rural residential subdivisions and they were currently for sale, one could argue that there is a market demand for 25 additional lots.

The housing crisis is ongoing while Canada and many Provinces, including PEI, continue to actively encourage growth and immigration. It would be fair to say that, with the current housing shortage and the fact that there are no lots for sale in Rice Point, it would be acceptable to approve a new subdivision. It is my professional planning opinion that The Proposal should not be denied based on the number of vacant lots in the area.

Discussion of "social, economic and fiscal considerations" in the context of "premature development"

The Province has suggested that the review of The Proposal must follow guidelines as previously set out by IRAC in determining the meaning of "premature development" as quoted from paragraph 34 of the Minister's Submissions:

> *"Neither the Act nor Regulations specifically define premature development or explain the concept. However, the Minister submits that this is a familiar concept in the context of land use planning. In addition, the Commission has previously provided some guidance in applying this concept. In Order LA96-05, the Commission commented that the concept of prematurity is multi-disciplinary and imports social, economic and fiscal considerations.[12]"*

The Province's denial of The Proposal did not specifically identify any negative social, economic or fiscal impacts that the proposed subdivision may cause. Their concerns center around the number of vacant lots in the area and the loss of agricultural land. There was no clear explanation of these matters in how they are premature in terms of the social, economic and fiscal aspects of Rice Point.

As a planner, if I were to consider prematurity in the context of social, economic and fiscal implications of a proposal, I would look at the community where it is proposed. Rice Point contains a mix of residential, tourism commercial, and agricultural land uses. There is a fishing wharf within commuting distance, no large commercial farms, and some agricultural fields. The character is both farming and fishing and the residents likely commute to West River and beyond for business and shopping. It is a beautiful part of the Province. The Proposal does not have direct access to Route 19, a Provincial highway, but instead would have direct access to the underutilized Hennebury Road which connects to Route 19.

An increase in new home ownership in the community of Rice Point would be a positive social and economic impact to the area. The current housing crisis has created hardship to PEI residents and immigrants. Having up to 25 new waterfront/water view residential lots would potentially benefit more than 25 families if some buyers are upsizing and thereby making their previous homes available to others.

Having new residents living on an underutilized local road is typically seen as stabilizing the social structure in the area. This is because having people living along roadways is better than having roadways that are isolated. Isolated roadways and land areas can sometimes lead to

illegal dumping, trespassing, and other problems that could have negative social and fiscal impacts to the community. Public open spaces, like the one at the end of Hennebury Road, are safer when they are seen by the travelling public and nearby homes. The Proposal would bring a positive impact to this social concern.

It is an efficient use of land to locate housing on both sides of residential roads where infrastructure and services are already being provided. This section of Hennebury Road has residential housing on its east side, opposite The Proposal. The introduction of new residential lots on the west side of Hennebury Road would have positive economic and fiscal impacts by getting a larger return for the level of service already being provided.

DENIAL REASON TWO

3.(1) No person shall be permitted to subdivide land where the proposed subdivision would (d) have a detrimental impact

In the Denial Letter, the definition of "detrimental impact" from The Act is quoted with the specific criteria that is relevant to their denial underlined as follows:

> *"(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"*

The Denial Letter implies that the other items in this list are not a concern as they relate to the proposal. I would agree that the other criteria of public health and public safety are not an issue for The Proposal. I will review the items that the Province has underlined being: "protection of the natural environment" and "surrounding land uses".

Protection of the natural environment

To determine the detrimental impact in the context of "...any loss or harm suffered in person or property in matters related to...protection of the natural environment", I would review The Proposal against any regulations that are already in place to protect the natural environment. In this case, these include the lot size requirements for on-site well and septic systems and setbacks for the coastline to address both erosion and flooding.

The Proposal exceeds the lot size requirements for on-site well and septic systems. The Provincial mapping shows the property falls within the "low" category for coastal erosion hazard. A coastal flood hazard assessment was completed by the Department of Environment, Energy and Climate Action, which showed that 95% of the property is within the minimal flood

hazard area (over the 2100 elevation) and less than 5% of the property is in the moderate to high flood hazard which is the 2050 coastal floodplain. Neither flooding nor erosion are reasons used by the Province it's denial of The Proposal.

This information is supported by a report from Joose Environmental Consulting which found that:

> *"The proposed residential subdivision property has 796 m (2,612 ft.) of shorefront along the south shore of PEI based on the survey information from the subject site. Based on the Coastal Hazard Assessment completed by the PEIDEECA (Tab 4C in the Record of Decision), the subject site is classified as having a low coastal erosion hazard and falls almost entirely within the minimal flood hazard zone based on the overall elevation of the property (i.e., Shoreline Classification: Cliff Coast Exposure). It should also be noted that the proposed residential subdivision would adhere to the guidelines outlined in the Prince Edward Island Coastal Property Guide (2016)."*

A planner would also look at the land itself to see if there are any environmentally sensitive features that could be avoided, mitigated, or perhaps protected. Typically, this would include slopes that are steeper than 20%, old growth forests, watercourses, dunes, or coastlines. The swale that divides the property has been confirmed through the Provincial review process that it is not a watercourse but instead serves as a stormwater swale. These are typically dry much of the year and usually maintained for their continued stormwater management and are often also used for passive recreation uses, which is the case for The Proposal. The environmental feature on the subject property that should be considered is the coastline, which would need to be reviewed in the context of the definition of detrimental impact being: does the impact of The Proposal on the coastline cause "... any loss or harm suffered in person or property...".

The Act regulates development in coastal areas in section 16 by requiring a 60-foot buffer or 60 times the annual erosion rate, whichever is greater. These setbacks would help minimize the chances of "...loss or harm suffered in person or property...". Climate change and the loss of coastline and rising sea levels is a concern. Planning documents are being reviewed and amended in many jurisdictions to address this. The Proposal shows rural residential lots with significant depth that will enable the future homes to exceed the required setbacks from the coastline. It is reasonable to expect that these future homeowners will undertake appropriate measures to protect the coastline seeing as it is their home and property that they would be protecting. If the land remains in its current state, the coastline may not be attended to with the same diligence.

The Proposal does not propose a change to the coastline and there are no high intensity land uses proposed that could damage the coastline. The Proposal for low density single unit dwellings would be no more impactful on the coastline than the thousands of other residential coastal properties in PEI. It is my professional planning opinion that The Proposal's impact on the natural environment will not cause loss or harm to a person or property and should not be denied on this basis.

Surrounding land uses

The second criteria underlined in the Denial Letter is "*...any loss or harm suffered in person or property in matters related to ... surrounding land uses*". This is similar to the third reason for refusal regarding "*compatibility with surrounding uses*" so I will discuss it with Reason Three in the section below.

DENIAL REASON THREE:

13. Subdivision designs shall be based on sound planning, engineering, and environmental principles, and shall demonstrate that the proposed subdivision is suited to the intended use, having due regard for
(a) compatibility with surrounding uses;

The surrounding land uses are residential, agricultural, and some local commercial. In the profession of land use planning, these land uses are considered to be compatible with one another. The proposal is not introducing new land uses to the area and even if it were, "compatibility" can be achieved between conflicting land uses with the use of buffering, screening, bulk/scale, and site design. The term "compatibility" is not considered to mean "the same as". In this case, The Proposal is for low density residential which is the same type of land uses that exist in the area, and therefore it is compatible within the surrounding land uses.

The Denial Letter has a similar statement as Paragraph 44 of the Minister's Submissions, both quoted below:

> *"The reasons for the Decision include that the area of Rice Point in which the Subject Property is located is primarily resource agriculture use with some residential use and small cottage development in the area. The Appellants' proposed subdivision is considered incompatible for the area and would precipitate premature development in the area. In addition, approval of a subdivision would use valuable agriculture land."*

Paragraph 44 of the Minister's Submissions states:

> *"The Subject Property is considered prime agriculture land, and much of the surrounding area is currently used as such.*[17] *A residential subdivision in this area could create tension between agriculture and residential users, and would, therefore, be incompatible with the surrounding uses."*

The Province is expressing the opinion that the area is primarily agricultural land uses and it considers residential land uses as being incompatible with agriculture. In land use planning, agricultural land uses and low density residential land uses are not considered to be incompatible. This is supported in planning documents from nearby areas. Section 6.2 (Permitted Uses in the Rural East A1 and Rural West A2 Zone) of the Rural Municipality of Kingston Zoning and Subdivision Control (Development) Bylaw allows Single Family Dwellings

and Resource Uses/Agricultural Uses including barns and stables. Section 16.2 (Permitted Uses in the Agricultural Reserve A1 Zone) of the Town of Cornwall Zoning & Subdivision Control (Development) Bylaw #414 allows Single Family Dwellings and Agricultural Uses. In a rural setting, low density residential would be one of the most compatible land uses with agriculture.

It appears that the Province is trying to avoid a future case of "nimby" which is a common situation in land use planning. "Nimby" stands for "not in my back yard" and occurs when people buy property in an area and then fight against any land use that may be occurring near them or in their perceived back yard. It is not uncommon for people to complain about what is taking place on land that is next door to them, even if those land uses were in place prior to when they moved in. It is an unfortunate reality in land use planning and sometimes can minimized over time as people learn to live with and respect one another.

The administration of planning regulations should not be conducted from a position of trying to avoid potential future "nimby" situations. Land use planning has to balance many different goals and objectives to create stable and livable communities. Land use planning can try to anticipate land use conflicts and set rules in an attempt to minimize future conflicts through zoning, setbacks, buffers, and other regulatory tools. It is not standard planning practice to approve or refuse development applications based on an anticipation or probability of future "nimby" conflicts.

As a professional planner, I would expect that if this type of land use conflict is a serious enough problem in PEI, there would be regulations for buffers and setbacks to separate rural residential development from agricultural land uses in The Act. There are no such regulations, and for the Province to deny an application on this basis sends a significant message to all future landowners that subdivision is not likely to be approved even if you meet the rules. As a planner and regulator, I would look very closely at the site specific circumstances to be sure I could justify this position and not be setting a precedent for future subdivision applications.

Furthermore, my research indicates that Rice Point does not contain any large commercial farming operations. I interviewed the owners of the subject property and they indicated that for the past ten years the land has been maintained by a farmer who lives over 5 kilometres away and the agriculture production is for the purpose of land maintenance and is not significant to the farmer's overall economic livelihood. The maintenance is to prevent the land from being overgrown and consists of hay and occasionally soybeans. The neighouring land to the rear is owned by a family member and it too, is farmed by a farmer that drives in from several kilometers away. This may mean that there is less likelihood of "nimby" complaints since the adjacent agricultural property is not a large commercial farm that would use large scale machinery in its operation.

There is also an added benefit in that The Proposal has a natural separation buffer between it and the adjacent agricultural lands to the rear in the form of a driveway that runs the full length of the rear property line. This is an unusual feature that would not normally exist between a

proposed residential subdivision and adjacent farm land. This additional buffer may reduce the likelihood of future "nimby" complaints against the adjacent farmer.

For these reasons, it is my professional planning opinion that The Proposal is compatible with the surrounding land uses and there would not be "*...any loss or harm suffered in person or property in matters related to ... surrounding land uses*" and should not be denied on this basis.

DENIAL REASON FOUR:

13. Subdivision designs shall be based on sound planning, engineering, and environmental principles, and shall demonstrate that the proposed subdivision is suited to the intended use, having due regard for
(j) natural features.

This clause requires "due regard for" as opposed to prohibiting any impact on natural features. Development, by its very nature will have an impact on natural features. Planning and building communities will always impact the natural environment. This awareness is reflected in the use of the words "due regard" in that The Proposal's impact on natural features is to be reviewed and not overlooked, rather than meaning that any impact on natural features is prohibited, which would be impossible.

The Proposal's site does not contain any natural features that a planner would normally seek to have protected or mitigated such as steep slopes, watercourses, dunes, or old growth forests. The Province has identified the coastline as a natural feature that should be considered as quoted below from the Province's Report:

> *"3) Coastal Development*
>
> *Residential development and subdivision along the 1100 km coastline of Prince Edward Island has caused serious issues, particularly with regards to coastal erosion and scenic viewscapes that will have long-term economic and social consequences. Continued development will not be encouraged. However, it is encouraged, should coastal development continue, that open space be incorporated into the shore line of the proposed development site to protect the coastal area and increase public amenity by providing better access to shore front land.*
>
> *Comment- The proposed development would deplete approximately 3000' of shore frontage along the south shore. It is Provincial Planning's position that coastal development should be limited to areas of infilling, with open space integrated along the shore front, and not comprise of the entire shore frontage of the proposed parcel. This is suggested in order to reduce, as much as possible, the adverse impacts of coastal development on the coastal viewscapes and promote, as much as possible, public amenity and access to shorefront lands."*

Paragraph 42 of the Minister's Submissions elaborates on this statement as follows:

> *"As indicated in the report of Alex O'Hara, the proposed subdivision would deplete approximately 3000' of shore frontage along the south shore.*[15] *Protection of PEI's natural environment is important to the Province and avoiding developments such as this will reduce the adverse impacts of coastal development. "*

From these quotes, the Province is identifying "coastal development" as the "natural feature" of concern, regardless of the fact that coastal development is addressed in The Act and that The Proposal meets the requirements for coastal development. The Province is seeking to apply an additional level of importance to "coastal development" in the context of two matters, being: 1) the loss of "viewscapes" and 2) the loss of public access to "shore frontage". I will address each of these items individually below.

Viewscapes as a natural feature

Viewscapes are specifically protected in certain parts of PEI under The Act, which do not apply to the subject property. Viewscapes are also specifically excluded in The Act's definition of "detrimental impact" as quoted below:

> *"(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"*

The Province is taking the position that the loss of viewscapes along the coastline of The Proposal is a reason for denial under section 13 (j). This position of re-categorizing a planning item (viewscapes) that has been specifically addressed in The Act is an incorrect administration of The Act. This renders The Act as unreliable as a tool for enabling and regulating development. It is my professional opinion that this position is not valid and The Proposal cannot be denied on this basis.

If there were the authority to do so, and I were responsible to review The Proposal in terms of section 13 (j) being, "Subdivision designs shall be based on sound planning, engineering, and environmental principles, and shall demonstrate that the proposed subdivision is suited to the intended use, having due regard for..." the natural feature of viewscapes, I would look at the property to determine what the view is and whether the view can be seen from public spaces.

It is important to keep in mind that this section does not prohibit development that may change a viewscape, but rather, requires that "due regard" be given to the impact the proposal may have on the viewscape.

From a planning point of view, viewscapes are sometimes protected when they are a view that is special and benefits the greater public. This means that there would be a location from which the public would be able to have a view that is worthy of protection. In this case, the view would be of the Northumberland Strait and Nova Scotia beyond. The public space would be the road system and the public open space at the end of Hennebury Road.

Route 19 runs parallel to the subject property and is approximately 412 meters from the nearest boundary of The Proposal's lands. The grade of Route 19 slopes from approximately the 32 meter elevation at the western end to approximately the 15 meter elevation at the eastern end. This means that Route 19 is higher than the subject lands which slopes from the 15 meter to 5 meter grade elevation. This grade difference in the range of 15 to 10 meters would theoretically allow a person to see the view from Route 19, having to look across a distance of nearly half a kilometer over four properties before seeing the viewscape of the subject lands.

One must then examine the physical characteristics of the land to determine if this theoretical view actually exists. The parallel alignment of Route 19 would require a person in a vehicle traveling on the road to turn their head to look toward the view of the subject lands. Approximately one third of this stretch of Route 19, (at the western end) has significant vegetation along the roadway that would block the view. The middle third of Route 19 does not have significant vegetation although there are some scattered trees. A person may see the view from this portion of Route 19. The last third of this portion of Route 19 (at the eastern end) curves toward its intersection with Hennebury Road. If a person were driving on Route 19 from west to east, it would be somewhat challenging to look over one's shoulder and behind them to see the view. Coming from the other direction (east to west) a person could see the view and would have to do so while navigating the curve in the road.

One must also review the actual view that is being seen from Route 19. Given the higher grade of Route 19 and the significant distance of Route 19 to the shoreline, any future houses on the subject property would appear small to the naked eye and would sit lower than a person's view line. The ocean could be seen above and between the houses, assuming that there is nothing obstructing the view on any of the properties in between. In this case, it is not a unobstructed view. There are existing trees between Route 19 and the shoreline, particularly along the driveway that runs along the rear property line of the subject property. Future residential houses would be lower in height than these trees. From this analysis, there would be no significant loss of the viewscape from Route 19 to justify a denial of The Proposal.

The next public space from which The Proposal's lands and view can be seen, is from Hennebury Road. Hennebury Road runs toward the coastline and the subject lands. This enables a person to see the view as one drives in the southern direction down Hennebury Road.

The view of the Northumberland Strait is unimpeded as one drives down Hennebury Road toward the coastline and is thereby protected for the viewing public. In addition, there is a parcel of public open space at the end of Hennebury Road that the public could use to enjoy the view.

A viewscape does not need to be without obstruction. Coastal views can be seen in between buildings and structures. The Proposal for low density residential homes located on large lots is one of the better forms of development for allowing views in between buildings. If a public entity wanted to preserve the viewscape across the entirety of a privately owned property, they would typically have to acquire the land within a reasonable time frame or have significant rationale to impose a protected viewscape.

In this case, The Act has addressed "scenic viewscapes" and there are none that apply to the subject property. Furthermore, viewscapes are excluded by definition from being a consideration under "detrimental impact". In this case, there is public access to the viewscape via Hennebury Road and the parcel of public open space. It is my professional planning opinion that due regard for the natural feature of viewscapes has been given and that The Proposal should not be denied on this basis.

Public Access to Shore Frontage as a Natural Feature

I have previously discussed the coastline in the context of *"detrimental impact"* being *"... any loss or harm suffered in person or property in matters related to ...., protection of the natural environment..."* in Denial Reason Two.

I will now address the coastline in the context of The Proposal being "... based on sound planning, engineering, and environmental principles, and shall demonstrate that the proposed subdivision is suited to the intended use, having due regard for..." the natural feature of "...public access to shorefront lands" as stated in the Province's Report.

The subject property has been surveyed to have 2622 feet (.79 km) of shoreline. If we use the estimate of 1100 kilometres of Provincial PEI shoreline (as quoted in the Province's Report) The Proposal has .77 km of shoreline which is .07% of the total PEI shoreline. If we use the quote provided by Hope Parnham, Senior Climate Change Policy Advisor, PEI Department of Environment, Energy and Climate Action, the PEI shoreline (including inner harbours and estuaries) is 2726 kilometres. Of those 2726 kilometers, only 970 kilometers of shoreline are considered to be developed properties. The 2622 feet (.8 km) of shore line of The Proposal is a very small percentage (.03%) of PEI's total shoreline of 2726 kilometres.

The Proposal's shoreline is not being "depleted" because it will continue to exist after development. The Proposal for low density rural residential will allow for significant setbacks from the shoreline. The desire to protect shore line from development does not mean you do not allow any development on the shoreline. There is no support in The Act that prohibits the development of shorefront land, and in fact, The Act enables coastal development and regulates setbacks to protect coastal areas as quoted in section 16 below:

> ***"16. Buffer inside coastal area***
> *(1) Where a subdivision is proposed within a coastal area, the proposed subdivision shall, where applicable, include the following:*
> *(a) where adjacent to a beach, a buffer having a minimum width of 60 feet (18.3 metres) or 60 times the annual erosion rate for the area, whichever is greater, measured from the top of the bank adjacent to the beach;*
> *(b) where adjacent to a sand dune, a buffer having a minimum width of 60 feet (18.3 metres) measured from the inland boundary of the dune;*
> *(c) where feasible and appropriate, access to the beach or watercourse for the use of the owners of the lots."*

These restrictions would have been adopted after careful consideration. It is not appropriate that the Province ignore these regulations in The Act to render land undevelopable that otherwise meets all the prescribed rules and regulations.

If the Province is speaking in terms of public shoreline that would be depleted from public reserves, the subject property's shoreline is not currently held in public ownership. If the Province's concern of "depleted" refers to the depletion of privately held vacant shorefront land, the land currently has one residential dwelling so it is not currently vacant. The existing residential dwelling it located away from the shoreline in among the treed area but the landowner could re-build closer to the shoreline, thereby changing the viewscape and not have to give any land for public access to the shoreline.

Paragraph 46 of the Minister's Submissions states:

> *"Similar to the submission above, the report of Alex O'Hara states that residential development and subdivision along PEI's coastline has caused serious issues regarding coastal erosion and scenic viewscapes that will have long-term economic and social consequences. This particular development would comprise the entire shore frontage of the Subject Property. "*

The Province does not provide specific examples of the economic and social consequences that The Proposal would have in terms of coastal erosion and scenic viewscapes due to it being comprised of the "entire shore frontage" in this statement. Taking this stance would mean that the Province should deny all future subdivisions that have shore frontage, which would be contrary to The Act which regulates but does not prohibit waterfront subdivisions.

Furthermore, The Proposal does not comprise of the entire shore frontage in the form of residential lots. The Proposal shows an open space parcel that provides access to the shore frontage which satisfies the first paragraph of the Province's Report that proports to be Provincial guidance which states that "... *it is encouraged, should coastal development continue, that open space be incorporated into the shore line of the proposed development site...*"

In terms of open space, The Act addresses this in section 15 quoted below:

> *"**15. Open space***
> *(1) Except for a residential subdivision having five or fewer lots, or a subdivision intended for commercial, industrial or other non-residential uses, the owner of lots being subdivided shall set aside open space in the subdivision for recreation or park use equal to a minimum of 10% of the total area of the lots being subdivided.*
>
> ***Idem, held in common***
> *(2) Open space set aside in accordance with subsection (1) shall be held in common by the owners of lots in the subdivision.*
>
> ***Common ownership***
> *(3) Where a buffer required under subsection 16(1) is included as permitted by subsection 16(5), the buffer may be counted as part of the open space required by this section. (EC693/00; 176/03; 655/10)"*

The Act does not require that the open space consist of the shoreline. Many developers would not want to set aside valuable shore front property as open space. In this case however, The Proposal allocates a portion of the 10% open space as access to the shoreline for its residents. This will allow the residents who buy the lots without shore frontage to have a shared access to the shoreline. The Proposal will allow 25 landowners access to this shorefront which is only accessible by one landowner today.

From a planning point of view, when there is already public access to the shoreline near a subdivsion application, (in this case being the public open space at the end of Hennebury Road) there would be a lower expectation for a developer to offer similar public open space. In fact, in some instances it would not be desirable to have too much public access to the shoreline because public use can have a detrimental impact to the shoreline with people walking down the slope which can cause erosion, the increased litter, and car fumes etc. Humans are probably the greatest negative impact to the environment.

Prince Edward Island is a beautiful place with an extensive shoreline with much of it held in private ownership. Owning a shorefront property is desirable by residents of PEI. There have been many subdivisions approved in the Province that are along the shoreline and The Act sets out the regulations for such development.

The Proposal has given due regard to public access to the shorefront lands. New access is being proposed as part of the required open space, the proposed lots are large enough to exceed the coastal setback requirements of The Act, and The Proposal affects .03% of PEI's shoreline. It is my professional planning opinion that The Proposal should not be denied based on a lack of public access to its shoreline.

General Discussion of "Sound Planning Principles"

Paragraph 27 - 32 of the Minister's Submissions provide as follows:

> *"The Minister, again, highlights the Commission's findings in Order LA17-06 that sound planning principles are a guard against arbitrary decision making. The Commission stated:*[8]
>
> > *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 Commission has previously commented that sound planning must be a common feature of development throughout Prince Edward Island.*[9] *In determining whether or not a subdivision proposal should go forward, the Minister must make an examination "beyond the strict conformity with the Regulations and must consider sound planning principles".*[10]
>
> *The report of Alex O'Hara acknowledges and responds to this guidance. In its opening comments, the report notes that while applicants must satisfy that an application can be approved under the Regulations, his planning comments address the question of whether it should be approved from a land-use planning perspective.*
>
> *In this case, the Minister acknowledges that neither the Provincial Fire Marshall, Public Safety, the Department of Transportation & Infrastructure nor the Department of Environment, Energy and Climate Action, were opposed to the subdivision proposal. In other words, the feedback received from other Departments/Divisions within Government suggested that the subdivision proposal could be approved from a technical perspective.*
>
> *However, Mr. O'Hara's planning report recommended that the proposal should not be approved on the basis of land use planning concerns and sound planning principles."*

These paragraphs seem to be saying that despite The Act, the Province can deny a subdivision based on "sound planning principles", even if a proposal meets all the technical requirements under The Act, as long as the Minister has had input from a professional planner. In the Denial Letter, on page one of the Province's Report, are two statements that seem to grant themselves the ability to step outside of The Act and apply subjective analysis to subdivision applications:

> *"In the absence of provincial land use policy, land use plans, land designations, and zoning in unincorporated areas of the Island, planning comments will be provided for each application based on sound planning principles and material considerations. "*

and

> *"Applicants must satisfy the question of "can you?" under the provincial subdivision and development regulations. Planning comments address the question" should you?" in preparing a recommendation for the proposal."*

As a professional planner with experience working in the public sector and being responsible for writing, administering and enforcing regulatory documents, I find this statement and position very concerning. It is giving themselves permission to step outside of the regulatory framework to make decisions without legal guidance or parameters.

Whenever an administrator applies subjective review criteria there is a good chance that inconsistency and unpredictability will occur. The people who are responsible for analyzing the subjective criteria will be different from time to time and this leads to inequitable application of the rules. It also creates confusion for applicants in reading The Act, which should be relatively easy to understand with an expectation that if one designs according to the rules, one would have a good chance of getting approval.

Using the reason that the subject property does not fall under a list of specific Provincial planning documents seem to ignore the fact that such properties are in fact, closely regulated by The Act. The Act is the regulatory document to be followed in reviewing proposed subdivision applications in Rice Point and other areas that do not have the planning documents mentioned in this letter. This letter suggests that comments regarding "sound planning principles" outside of those identified in The Act and "material considerations" are relevant in the review of The Proposal and presumably, other subdivision applications.

The concept of "sound planning principles" is addressed in Section 13 of The Act. The Province, in their denial, does not identify which additional sound planning principles should be reviewed. There is no definition of "material considerations" in The Act or in the Denial Letter which makes the interpretation and application of these two review concepts completely subjective.

As a professional land use planner, I would approach this concept in a way that enhances one's review of the regulatory framework that exists in The Act, rather than viewing it "instead of" or as a "replacement for" the regulatory framework. This means that an application must still be reviewed against the applicable criteria in The Act and if a proposal meets all of the criteria, there may be other criteria that fall under "sound planning principles" that should be considered. This approach should not be used to disregard or contradict the analysis of specific regulations of The Act because that would not be legally supported and would render provisions of The Act as ineffectual.

The Province's "areas of concern" are discussed in three categories: premature land development, development of agricultural land, and coastal development. The first item aligns with the first reason for denial, the third item aligns with the fourth reason for denial. The second item, being agricultural land, appears to be the item that does not align neatly with provisions in The Act, and is therefore considered to be an extra item under "sound planning principles" and "material considerations".

As a professional planner, I can accept that agricultural land is a reasonable matter to be considered within the context of The Act that enables rural residential subdivisions as discussed below.

Discussion of "prime" Agricultural land

The Province's Report states:

"2) Development of Agricultural Land

Agricultural activity forms the historical foundation of Prince Edward Island's identity and continues to be the largest economic driver. Population growth, demand for residential lots with lower property taxes, and a preference for space etc. have contributed to the intrusion into, and reduction of prime agricultural land through residential subdivision development. Provincial planning discourages such development on prime agricultural lands.

Comment - The subject land would be considered prime agriculture/resource land. Orientation, slope, proximity to other agricultural lands etc. are some factors which contribute to this conclusion. The proposed development would remove nearly 54 acres of prime agricultural farmland from PEIs land base. It should be noted, that due to the slope of the land, that wells installed within the proposed subdivision would be at risk of groundwater contaminants form the agricultural use of the subject parcel, and the agricultural lands of the higher elevation to the north that are active and long running arable farm operations."

The first paragraph, being the direction from the Province on the subject matter, identifies the desire to "discourage" development on prime agricultural land. The intent is to "discourage" rather than deny or prohibit because if that was desired, The Act should be amended accordingly. As a professional planner, I interpret this section to suggest that if a proposed subdivision is in an area that could be deemed an "intrusion" into "prime agricultural land" it should be discouraged.

The ability to "discourage" as an administrative function would have to be carried out in the form of a denial. This is because the task of administrating a law is to approve or deny something in accordance with the law. This direction to discourage such development on prime agricultural land puts pressure on an administrator to deny an application if it affects prime agricultural land even if a proposal meets all the other rules of The Act. There is no legal support in The Act to take this position.

The second paragraph, being the Province's professional planner's analysis, identifies the subject lands as "prime agricultural land" based on orientation, slope and proximity to other agricultural lands. These are reasons used to discourage, through the denial, a subdivision in this location. It is my opinion that these criteria are not adequate in determining if a property is prime agricultural land. My research leads me to conclude that the property is not prime agricultural land for the reasons that follow.

My first step in this analysis was to look in The Act to see if "prime agricultural land" is defined. It is not. I then looked for other relevant information in The Act to assist in my analysis. The Act defines farm parcel and farm dwelling as quoted below:

> *"(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;"*

I then wanted to determine if the subject properties would be defined as a "farm parcel" or "farm dwelling" and I researched the land to learn what type of agriculture is the property is or may have been used for. There are soil classifications that exist in PEI and the subject property is in the Charlottetown (Ch) classification which is medium quality suitable for agriculture.

My interview with the current land owners revealed that it has been used for growing hay and soybeans on occasion over the past several years. The land is maintained with hay and soybeans as a means to keep it from being overgrown with wild vegetation. The owners of the property do not farm the land, but instead they have an arrangement with a farmer who travels approximately 5 kilometers to get to the site to keep the land cultivated so it does not become overgrown. There is minimal financial benefit to either the owners of the land or the traveling farmer in terms of this agricultural use of the land.

I also examined the site characteristics of the subject property, the physical features of the land and the configuration of the property boundaries to get a sense of how important or valuable it may be as agricultural land. The property is oriented towards southern exposure, which is helpful for agriculture. The configuration of the lands is awkward for agriculture machinery with the curvature of the shoreline and the stormwater swale the divides the property. The stormwater swale that bisects the property in a north/south direction is usually dry but is deep enough that farm equipment cannot traverse it which results in the land having to be farmed as two separate fields rather than one field.

The subject properties are approximately 44 acres in size with approximately five acres being wooded and another two acres containing a homestead and orchard. There is a driveway along the length of the rear property line that is not farmed which is approximately one acre in size and the unfarmed setback from the coastline to allow the farmer to plant the land in a straight line is approximately 5 acres in size. This equates to approximately 31 acres that could be used for agriculture. These 31 acres are divided by the stormwater swale making the farming of the land inefficient. The subject properties do not meet the definition of "farm parcel" in The Act. When I spoke with the landowners, they confirmed that these factors mean that the subject property is difficult to farm. The land cannot be farmed as one tract of land, but instead has to be farmed as two tracts, of approximately 14 and 17 acres in size. This differs from the adjacent properties to the rear, which can be farmed as one tract of land of approximately 30 acres in size.

The Province's position is that the loss of 54 acres of prime agricultural land is a reason to deny The Proposal. The loss of agricultural land in this case would be closer to 31 acres, and it would not be considered "prime" based on soil type, land configuration, size and location. One has to consider how impactful a loss of 31 acres would be on the total agricultural acreage of PEI. The website "peifarmtour.ca" says that the total land area of PEI is 14 million acres, with farms representing 42.5 % which is 594,324 acres. The Proposal's 31 acres equates to .000052 of this total, which is not, in my opinion, significant. The Provincial website that lists their planning decsions, (PEI Planning Decisions (baselinegeo.com), identifies the subject property as "vacant, idle" which is different from other listings used for larger agricultural parcels as "agriculture under cultivation".

The Province suggests that protecting agricultural land is paramount because farming is PEI's "largest economic driver". This matter should not be considered in isolation. Sound planning entails balancing many and sometimes conflicting objectives. The Province is also promoting immigration, suffering from a critical lack of housing, and enables rural subdivisions under prescribed parameters in The Act. Land Use Planning is multidisciplinary. The desire to preserve agricultural land has to be balanced with the economics of farming, the need for population growth to support the community's economy, housing needs, the provision of services, and individual property owners' rights. This is a typical land use challenge that many farming communities face.

The Province's Report states:

> *"It should be noted, that due to the slope of the land, that wells installed within the proposed subdivision would be at risk of groundwater contaminants form the agricultural use of the subject parcel, and the agricultural lands of the higher elevation to the north that are active and long running arable farm operations."*

The issue of groundwater contaminants from agricultural land is not a matter that is regulated under The Act and it would be an improper use of The Act to deny a subdivision on this basis.

In response to this statement from the Province, the appellants commissioned Joose Environmental to undertake a study of the groundwater on the subject lands. The report included a thorough water test of the existing well on the property that serviced the original residential dwelling. The report concludes that:

> *"Groundwater resources would not be a concern in relation to the proposed development based on the information outlined above indicating an adequate supply of potable water, with no apparent current impacts from agricultural activity... "*

The report also states that due to the high erodibility of the soil type, a residential use of the land would result in less erosion than an agricultural use on the land:

> *"the majority of the property is currently being utilized as agricultural property with the proposed switch to residential use would logically be expected to result in less erosion and therefore less associated silt-laden runoff;"*

The Act does not require additional setbacks or separation distances between residential subdivisions and agricultural land for land use buffers or well water protection. The Act enables rural subdivisions and identifies appropriate regulations for site design characteristics. These include matters related to soil testing, highways, coastal development, setbacks from natural features (beach, sand dune, wetland, watercourse), resorts, phasing in terms of number of lots and percent of sold lots, etc.

There is already a residence on the property which has used a well for many years. There is no record of that well being contaminated by the agricultural land use nearly. The adjacent lands to the north are at an elevation of 20 to 25 meters, which is approximately five meters higher in grade than the existing well on the subject property. This gentle slope from the agricultural lands to the north toward the subject property is divided with a driveway that runs along the rear property line of The Proposal. This driveway forms a barrier to stormwater flow and directs the stormwater to the drainage swale that bisects the subject property. A free flow of stormwater from the adjacent agricultural land toward the location of future wells for The Proposal does not occur and will not occur after development.

The Province has approved other rural residential subdivisions in the area, which implies that subdivision in the area is acceptable. There is a reasonable chance that the soils of those other subdivisions are at least of medium quality for agriculture. I do not know what those other sudivisions would have been used for prior to the residential use, but because they are similar in nature to The Proposal, it is fair to surmise that at least some of them would have been used for agriculture or a similar low yield agriculture for maintenance as the subject property.

A previous IRAC decision (LA96-95) reviewed a proposed subdivision that is larger in size than our current application, and it was located in close proximity to a large farm operation. The IRAC decision found that the subdivision could create a conflict with the nearby agricultural lands yet upheld the Provincial approval because the application had met the requirements in

The Act including those related to coastal development. A portion of that decision is quoted below:

> *"The Commission believes, that through the adoption of the Coastal Development Policy and the Coastal Area Regulations, the Lieutenant Governor in Council has determined what is believed to be acceptable development parameters which in its view achieve an acceptable balance between development and resource use within the coastal area...*
>
> *At the same time, in Prince Edward Island, not only is the preservation of farmland an important public issue, but also its coastal resources. In this regard, Government has developed specific policies focusing on the coastal area and has adopted specific regulations to permit development to occur within the coastal area, with certain restrictions."*

This is the same IRAC decision that supports the review of "social, economic and fiscal considerations" as guidance for premature development. It also expresses concerns with the location of that development and the fact that there was no expert evidence regarding whether the first phase of 19 lots would be developed in a five year period. Even with these concerns, IRAC upheld the Provincial approval.

In the current appeal, The Proposal does not have the same characteristics as case LA96-05. This case has expert analysis and evidence to address many matters relevant to the interpretation and application of The Act and the housing market. In addition, this is twenty-five years after that 1996 decision and PEI is experiencing a housing crisis. It is my professional opinion that The Proposal should not be denied based on the removal of prime agricultural land.

CONCLUSION:

The current appeal is based on the Province's four reasons for denial under The Act. Within these reasons the Province introduces additional planning considerations, some of which reach beyond the scope of The Act.

The first reason for the Province's denial is in terms of "premature development" which is reviewed in the context of lot availability, infill development, and social, economic and fiscal impacts. The second reason for the Province's denial is with regard to The Proposal having a "detrimental impact" in terms of the protection of natural environment and surrounding land uses. The third reason for the Province's denial is with regard to the sound planning principle of compatibility with surrounding land uses. The fourth reason for the Province's denial is with regard to the sound planning principle of having impacts on natural features, which are identified as viewscapes and public access to the shoreline. The Province stresses the importance of "sound planning principles" and introduces an additional consideration that is not specifically addressed in The Act; being the loss of prime agricultural land.

I have examined The Proposal in the context of each of the Province's reasons for denial and several other matters raised by the Province. I have provided my independent analysis of The Proposal in terms of the applicable sections of The Act, as a professional land use planner. In formulating my opinion I reviewed the materials in the appeal record, did a site visit on December 8, 2021, and researched information. I spoke with the appellants, interviewed a professional land use planner in PEI, interviewed the current land owners and a real estate agent in the area. I watched drone footage of the area, reviewed technical studies, and relied on my 30+ years of experience in Land Use Planning.

The Proposal is located with access to an underutilized public road in Rice Point and will not have a negative fiscal impact on the Province. The land is not prime agricultural land, is not at high risk to flooding or erosion, and does not contribute to sprawl development. The Proposal provides large rural residential lots that enable homes to exceed the required setbacks from the coastline. There have been no residential lots for sale in Rice Point for some time. PEI is experiencing a housing crisis, as is most of North America. PEI continues to encourage immigration and needs to have adequate housing options in order to have a healthy economy.

The Proposal for large rural residential lots is consistent with the land uses in Rice Point. The subject property is not currently being used as a commercial farm, nor is it used for high yield agriculture production. There are no protected viewscapes on the property and viewscapes are, by definition, an excluded consideration. The Proposal will not block the view from Route 19, Hennebury Road or the nearby public open space. The Proposal offers additional open space with access to the coastline for its future residents.

Land use planning is multidisciplinary and involves balancing a number of goals and objectives. An administrator of planning law has the responsibility to interpret and administer the law in a consistent and equitable matter. Some criteria in law are easier to administer because they are technical or quantifiable. Other matters are more subjective and difficult to administer consistently. Any subjective analysis sought must be reasonably supported with facts and be reviewed in the context of The Act rather than as independent criteria outside of The Act.

It is my professional opinion as land use planner that The Proposal meets the requirements of The Act and should be approved. I recommend that IRAC quash the Province's denial of The Proposal (case #56341) and approve the 25 lot subdivision as shown in the August 17, 2021 subdivision plan in in accordance section "18 Phasing" of The Act.

Respectfully Submitted:

Jenifer Tsang, MCIP, LPP

Attachment:
Information report from Greg Morrison, RPP, MCIP

tel: 902.478.2541 email: sunrose@eastlink.ca

Land Use Planning Report

File No. LA21024

Subdivision of Hennebury Road (PID #808154 & PID #203000)

Greg Morrison, RPP, MCIP
5-16-2022

EXECUTIVE SUMMARY

An application was submitted to the Department of Agriculture and Land within the Province of Prince Edward Island by L & J Holdings Inc. on July 9, 2021. The application was to consolidate two parcels located on Hennebury Road in Rice Point, Prince Edward Island being PID #808154 and PID #203000, and to subdivide the new 44-acre parcel into 24 lots for residential use. This request was denied by the Minister of Agriculture and Land on September 17, 2021 pursuant to Section 3(1)(b), 3(1)(d), 13(a) and 13(j) of the Planning Act Subdivision and Development Regulations.

On September 18, 2021, Greg Morrison, RPP MCIP was retained by L & J Holdings Inc. to review the decision to reject the subdivision application and provide guidance and direction throughout the appeal to the Island Regulatory & Appeals Commission which was sequentially filed on October 7, 2021.

Greg Morrison is a Registered Professional Planner and a Member of the Canadian Institute of Planners. Mr. Morrison is the Director of Development for Arsenault Bros. Holdings Inc. The appellant, L & J Holdings Inc. is a minority owner of Arsenault Bros. Holdings Inc. It should be noted that Mr. Morrison has been accepted as an expert in Land Use Planning by the Island Regulatory & Appeals Commission on a number of occasions.

This report will serve as an attachment to the expert land use planning report submitted by Jenifer Tsang. The purpose of this report is to review the letter of denial written by Eugene Lloyd, Acting Manager of Provincial Planning, dated September 17, 2021 and provide factual evidence to support the position of the appellant that the subdivision application should have been approved by the Minister.

RATIONALE PROVIDED FOR REJECTION

In determining whether to approve or reject the application made by L & J Holdings Inc., the Minister sought the opinion of Alex O'Hara, Land Use and Planning Act Specialist with the Department of Agriculture and Land within the Province of Prince Edward Island. The report of Mr. O'Hara acknowledges that the applicant can be approved under the Regulations; however, his planning report recommended that the proposal should not be approved on the basis of land use planning concerns and sound planning principles. In this case, as outlined in the letter written by Eugene Lloyd, the Minister denied the Appellants' subdivision application pursuant to Section 3(1)(b), 3(1)(d), 13(a) and 13(j) of the Planning Act Subdivision and Development Regulations.

SECTION 3(1)(b) – PREMATURE DEVELOPMENT

No person shall be permitted to subdivide land where the proposed subdivision would precipitate premature development or unnecessary public expenditure.

Neither the Planning Act nor the Subdivision and Development Regulations specifically define premature development or explain the concept. The report of Alex O'Hara recommended the subdivision proposal be denied on the basis of, among other things, premature land subdivision.

In the opinion of Mr. O'Hara, approval of this subdivision would be a catalyst for increased development in the Rice Point area. Mr. O'Hara contests that there are currently (at least) forty-three (43) lots available to be developed in the immediate vicinity of the subject property and the approval of this subdivision would result in the number of lots available for development in Rice Point by almost fifty percent (from 43 approved lots to 62 approved lots). Appendix A of the submission by Jessica Gillis on November 10, 2021 illustrates a buffer of approximately 2,000 ft to 3,000 ft of the subject property which contains a total of 142 properties. She refers to this area as the immediate vicinity.

In order to properly analyze the immediate vicinity, a site inspection was conducted on January 7, 2022 to determine the existing uses of the properties within the immediate vicinity. I expanded the immediate vicinity to include the residential development to the west of the subject property. A map of the existing land uses is shown in Schedule 'A'.

I estimate the immediate vicinity to be approximately 661.5 acres of which 119.3 acres are vacant, meaning the parcel does not contain a dwelling, is not considered active agricultural and is not wooded. In light of the foregoing, approximately 18 % of the immediate vicinity is vacant.

Mr. O'Hara states that PEI currently has a surplus of between 25,000 to 30,000 approved, vacant residential lots dispersed across the Island. He notes that not all lots may be available for purchase as often the landowner subdivides the land with the intent to sell in the future and has simply subdivided the land to increase the lands value while maintaining its current use. It should be noted that there a number of these approved, undeveloped lots which do not meet the minimum lot area requirement for on-site septic systems or are not serviced by a public or private road. For the purpose of this report, three subdivisions were used as examples to illustrate subdivisions that have been approved but the lots have not been sold or developed in light of the fact that they do not have frontage on a developed street. While there are many more subdivisions of this nature, the

three examples identified for this report are all subdivisions over 20 lots and are adjacent to a watercourse, similar to the application which was denied by the Minister. The three examples are:

1. Wharf Road / Rocky Point Road (PID #200014) consisting of 74 properties without public or private street frontage (Schedule 'B').
2. Simpson Mill Road (PID #622779) consisting of 84 properties without public or private street frontage (Schedule 'C').
3. Phyllis Kennedy Road (PID #90001) consisting of 39 properties without public or private street frontage (Schedule 'D').

In the three examples above, 197 properties have been approved but are not developable. The statistic that PEI currently has a surplus of between 25,000 to 30,000 approved, vacant residential lots dispersed across the Island is misleading. Many more examples can be found throughout the Province to illustrate many properties may have been approved at one time by the Province but are undevelopable and there are a number of reasons as to why this is the case including, but not limited to, insufficient lot area, no frontage on a public street, do not adhere to Municipal regulations, and located in a wetland buffer.

In the City of Charlottetown, new private roads are not permitted and therefore all properties must have frontage on a public street. A subdivision within Melody Lane and Lower Malpeque Road was historically approved prior to amalgamation, lots were sold but the road was never constructed (Schedule 'E'). This has been a historical issue for the Planning & Heritage Department as 16 properties' owners have undevelopable building lots until the public road is constructed. It is the responsibility of the developer to do so, but since the lots have already been subdivided and sold, there is very little desire for the developer or lot owners to construct the road.

Mr. O'Hara suggests that development of 19 lots on the property would result in a total of 76 approved lots would result in an oversupply of lots approved for development in Rice Point. Rice Point falls inside the Statistics Canada census subdivision of Lot 65. According to 2016 census data (census data for 2021 is not available until February 9, 2022), the population of Lot 65 increased from 2,200 in 2011 to 2,347 in 2016. This represented a 6.7% population change compared to a provincial population change of 1.9%.

According to the Prince Edward Island Population Report 2021 released by the Province of Prince Edward Island on October 1, 2021, the population of PEI is 164,318 as of July 1, 2021 which is a yearly increase of 2,989. This increase represents the largest percentage of growth in Canada and PEI has had the highest growth rates among Canadian provinces for six consecutive years. International immigration continues to be the driver of population growth on Prince Edward Island.

It is Mr. O'Hara's opinion that approval of this subdivision would not contribute to "infilling". In his report, Mr. O'Hara indicates that the proposed development site is located within a span of 5 km between two existing subdivisions to the east and west. He states that this proposal would not be deemed as infilling due to the distance between the two existing developments. Neither the Planning Act nor the Subdivision and Development Regulations specifically define infill development or explain the concept.

My research has found that the subdivision containing 54 properties to the east containing Country View Drive, Southpoint Lane, Macks Place and Bethesda Way is located directly across Hennebury Road from the subject property. All lots in this subdivision are located within 710 m of the subject property. While there are a number of houses to the west, the subdivision containing 32 properties on Red Sunset Lane, Point of View Lane, Spruce Grove Lane, Bayberry Lane and Tatlock Lane is located with 1.05 km of the subject property.

SECTION 3(1)(b) – DETRIMENTAL IMPACT

No person shall be permitted to subdivide land where the proposed subdivision would have a detrimental impact.

The Planning Act Subdivision and Development Regulations define "detrimental impact" as:

> ***"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 subsection9(1) of the Environmental Protection Act;*

Mr. O'Hara has indicated that the proposed subdivision would deplete approximately 3,000 ft of shore frontage along the south shore. A survey completed by ISE confirmed that the shoreline is actually 2,622 ft, not 3,000 ft as previously stated (Schedule 'F'). He then states that protection of PEI's natural environment is important to the Province and avoiding developments such as what is being proposed will reduce the adverse impacts of coastal development.

As stated in the report by Alex O'Hara, the Province of Prince Edward Island has over 1,100 km of shoreline. Hope Parnham, the Climate Change Policy Advisor, with the Province of PEI indicated that including the inner harbours and estuaries, the total coastline is actually 2,726 km of which 970 km fronts on developed properties. In light of the foregoing, 35.6% of the coastline is already developed. The development of the subject property would represent an increase of approximately 0.029%.

Mr. O'Hara states that open space shall be integrated along the shore front, and not comprise of the entire shore frontage of the proposed parcel. This is suggested in order to reduce, as much as possible, the adverse impacts of coastal development on the coastal viewscapes and promote, as much as possible, public amenity and access to shorefront lands. The Province currently has a public access to the beach with a small public parking area immediately to the east encompassing approximately 100m of shorefront (identified as PID #426221 on Page 16 & 41 of the Record of Decision).

SECTION 13(a) – COMPATIBILITY WITH SURROUNDING USES

Subdivision designs shall be based on sound planning, engineering, and environmental principles, and shall demonstrate that the proposed subdivision is suited to the intended use, having due regard for compatibility with surrounding uses.

The report of Alex O'Hara suggests that the subject property is considered prime agriculture land, and much of the surrounding area is currently used as such. He states that orientation, slope, proximity to other agricultural lands etc. are some factors which contribute to this conclusion.

A letter was written by one of the current property owners, Fulton McLaine, and sent to L & J Holdings Inc. by the current property owners' lawyer, Horace Carver. The letter explained the current operation of the property:

> *Of the forty-three acres in question, approximately thirty-two acres would actually be under cultivation. There are five acres of woods, two acres tied up with the former building site and orchard. A large chunk is lost to a 60 ft (no cultivate zone) buffer along the entire shoreline imposed by conservation officers in 2016. The balance is credit to a gully that runs the full width of the property. The gully prevents cultivation of the acreage as one block.*
>
> *For farming purposes this gully divides the property in two sections, all equipment has to cross the culvert on the farm lane to get from one section to the other. With the small*

acreage in each section and the irregularity of the shoreline to deal with, farmers with the larger equipment of today consider this layout of land to be a nuisance and have no interest in cropping it.

For the last ten years we have been essentially subsidizing a smaller operator who was willing to take on the task of cropping the land to keep it from been overgrown and going wild. Just to give structure to the rental agreement, we each are compensated $200 annually. This exercise of course, is just a matter of maintaining the land as best we can for the time being.

Tim Hamel with Arsenault Bros. Construction Litd. Spoke with Brenton MacLaine on December 13, 2021 who is the owner of the adjacent property, PID #790683. Mr. MacLaine indicated that he receives $1,200 annually to allow the property to be farmed for hay and soybeans, which does not cover his property taxes of $2,939. Mr. Hamel asked Mr. MacLaine if he would be interested in purchasing the subject property to farm it and he indicated that he was not interested in the property for farmland as there is no inherit value.

The letter of denial written by Eugene Lloyd dated September 17, 2021, suggests that a residential subdivision in this area could create tension between agriculture and residential users, and would, therefore, be incompatible with the surrounding uses.

Municipalities throughout the Province of Prince Edward Island allow both single family dwellings and agricultural uses as permitted uses in agricultural zones. The two nearest Municipalities to West River with Official Plans is the Rural Municipality of Kingston and the Town of Cornwall.

As per Section 6.2 (Permitted Uses in the Rural East A1 and Rural West A2 Zone) of the Rural Municipality of Kingston Zoning and Subdivision Control (Development) Bylaw allows Single Family Dwellings and Resource Uses – Agricultural Uses including barns and stables. As per Section 16.2 (Permitted Uses in the Agricultural Reserve A1 Zone) of the Town of Cornwall Zoning & Subdivision Control (Development) Bylaw #414 allows Single Family Dwellings and Agricultural Uses.

That being said, if this was a concern of IRAC, they could recommend that L & J Holdings Inc. inform prospective buyers that the adjacent property to the north has farming activities on it and the farm is not required to change the way they operate their farm in light of the approved residential development.

Finally, Mr. O'Hara notes that due to the slope of the land, wells installed within the proposed subdivision would be at risk of ground water contaminants from the agricultural use of the subject parcel, and the agricultural lands of the higher elevation to the north that are active and long running arable farm operations.

In a report completed by Joose Environmental Consulting Inc. dated January 18, 2022, it stated that:

> *Groundwater resources would not be a concern in relation to the proposed development based on the information … indicating an adequate supply of potable water, with no apparent current impacts from agricultural activity …*

SECTION 13(j) – NATURAL FEATURES

Subdivision designs shall be based on sound planning, engineering, and environmental principles, and shall demonstrate that the proposed subdivision is suited to the intended use, having due regard for natural features.

The report of Alex O'Hara states that residential development and subdivision along PEI's coastline has caused serious issues regarding coastal erosion that will have long-term economic and social consequences.

That being said, the Department of Environment, Energy and Climate Action with the Province of Prince Edward Island completed a Coastal Erosion Hazard Assessment on September 1, 2021 for the subject property, 110 Hennebury Road (PID #808154). For this property, the Province determined that the coastal erosion hazard classification was LOW. The report notes:

> *Please note that this assessment is based on historical coastal change and is likely to be an underrepresentation of the future erosion rate (i.e., as the climate continues to change, the erosion rate is likely to increase). When the average historical rate of coastal change is between 0-30cm/yr it is considered low risk…*

A Coastal Flood Hazard Assessment was also completed by the Department of Environment, Energy and Climate Action. The assessment indicated that 95% of the property is within the minimal flood hazard area meaning that this portion of the property is elevated above the 2100 coastal floodplain. Less than 5% of the property is in the Moderate-High Flood Hazards meaning it is within the 2050 coastal floodplain. The report notes:

> *This property fall almost entirely within the Minimal Flood Hazard Zone. If available, local knowledge of previous occurrences of flooding with also help to inform the property owner regarding current and future flood risk.*

Qing Li, Hydrogeologist with the Department of Environment, Energy and Climate Action strongly recommended that a central water supply is recommended for the proposed lots; however, if an individual well is place for each lot, they should be kept a minimum of 50 m from the shoreline to minimize salt water intrusion in the long term. In light of the foregoing comments, L & J Holdings Inc. should include in the Restrictive Covenants for the subdivision that all wells must maintain a minimum setback of 50 m from the waterfront property line to minimize salt water intrusion.

In a report completed by Joose Environmental Consulting Inc. dated January 18, 2022, it stated that:

> *Discussions with Mr. Andy MacDonald of Watson MacDonald Well Drilling Limited indicated that their experience of drilling potable groundwater wells in the area of the subject site has not encountered any issues with regard to saltwater intrusion.*

CONCLUSION

The request to consolidate two parcels located on Hennebury Road in Rice Point, Prince Edward Island being PID #808154 and PID #203000, and to subdivide the new 44-acre parcel into 19 lots for residential use was denied by the Minister of Agriculture and Land on September 17, 2021 pursuant to Section 3(1)(b), 3(1)(d), 13(a) and 13(j) of the Planning Act Subdivision and Development Regulations.

As a point of clarification, the desire is to develop a 24-lot subdivision on the subject property as illustrated on the subdivision plan submitted to the Province. That being said, the Planning Act only allows up to 20 lots in the first phase so the applicant paid a fee based on a 19-lot subdivision with the understanding that an additional five lots (Phase 2) would be subdivided after 50% of the 19 lots are sold, as per the Planning Act.

This report provides factual evidence contradicting the rationale provided by the Province for each of the four categories; premature development, detrimental impact, compatibility with surrounding uses and natural features.

The Province suggested that development of this property would be considered premature development and there was not enough demand for this type of subdivision. Evidence was provided to illustrate the increase in population to the area of Rice Point based on census data. There are two major subdivision located within 1.05 km of the subject property. Because lots are approved throughout the Province does not mean that are developable and the market illustrates that there are no lots for sale in the immediate area.

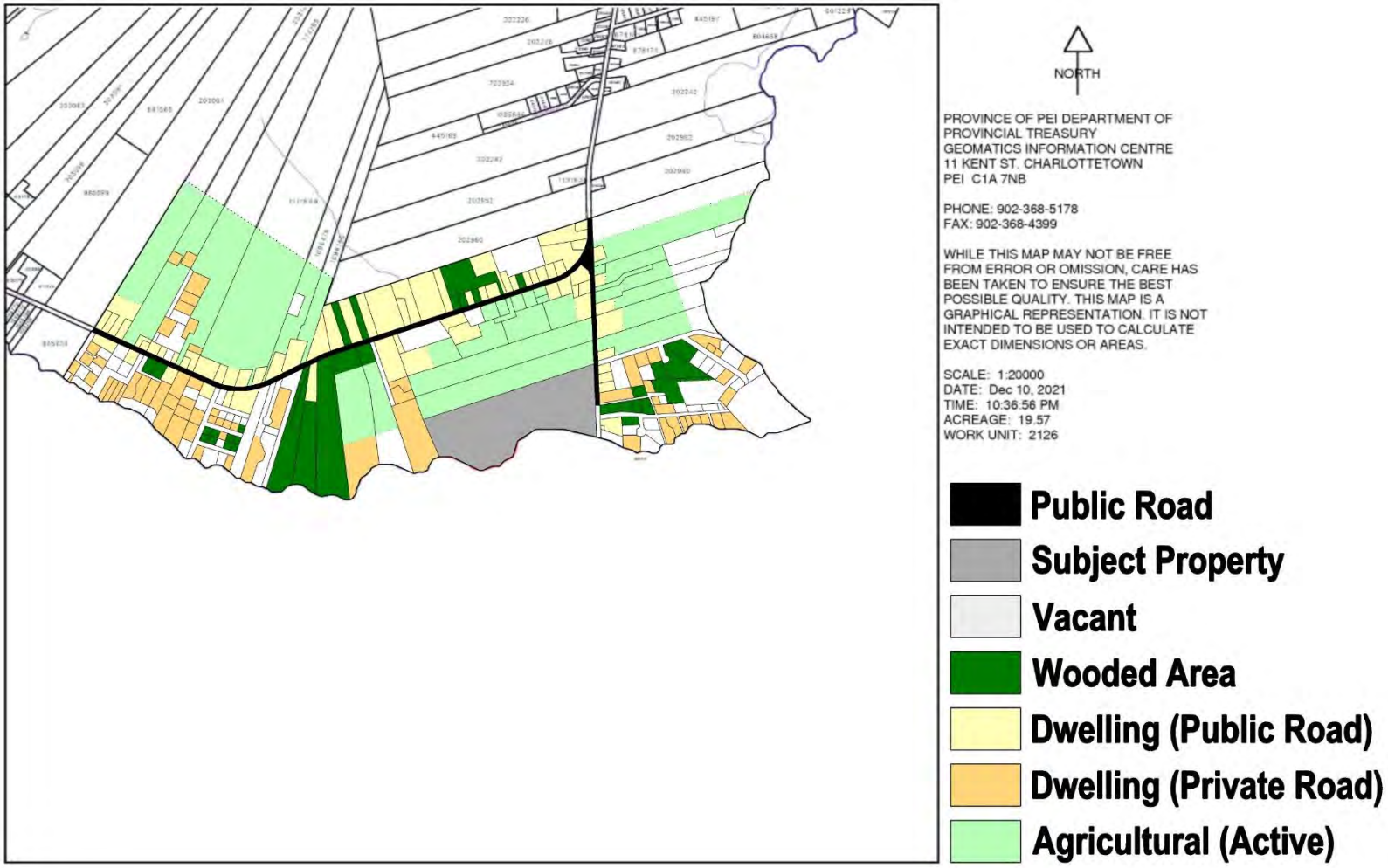
The development of this property was deemed to cause a detrimental impact and the Provincial intent was to limit development to infilling areas. All development will be located outside of any required buffer zones and would not have any impact on the public access to the beach. Further, as stated above, the proposed development is located adjacent to a 54 lot subdivision and within 1.05 km of a 32 lot subdivision.

It was discussed that a residential subdivision and an agricultural farm would be incompatible uses and the subject property would be better left as agricultural land. Throughout the Province, agricultural uses and residential uses operate in conjunction with each other and are compatible uses.

Finally, The Province suggested that development of this property would be susceptible to coastal erosion and coastal flooding. A report by the Province, as part of the record, demonstrates that the subject property has low risk in relation to both coastal flooding and coastal erosion.

Greg Morrison, RPP MCIP

SCHEDULE 'A'


NORTH
PROVINCE OF PEI DEPARTMENT OF
PROVINCIAL TREASURY
GEOMATICS INFORMATION CENTRE
11 KENT ST. CHARLOTTETOWN
PEI C1A 7NB
PHONE: 902-368-5178
FAX: 902-368-4399
WHILE THIS MAP MAY NOT BE FREE FROM ERROR OR OMISSION, CARE HAS BEEN TAKEN TO ENSURE THE BEST POSSIBLE QUALITY. THIS MAP IS A GRAPHICAL REPRESENTATION. IT IS NOT INTENDED TO BE USED TO CALCULATE EXACT DIMENSIONS OR AREAS.
SCALE: 1:20000
DATE: Dec 10, 2021
TIME: 10:36:56 PM
ACREAGE: 19.57
WORK UNIT: 2126
Public Road
Subject Property
Vacant
Wooded Area
Dwelling (Public Road)
Dwelling (Private Road)
Agricultural (Active)

SCHEDULE 'B'

PEI GEOMATICS
INFORMATION CENTRE

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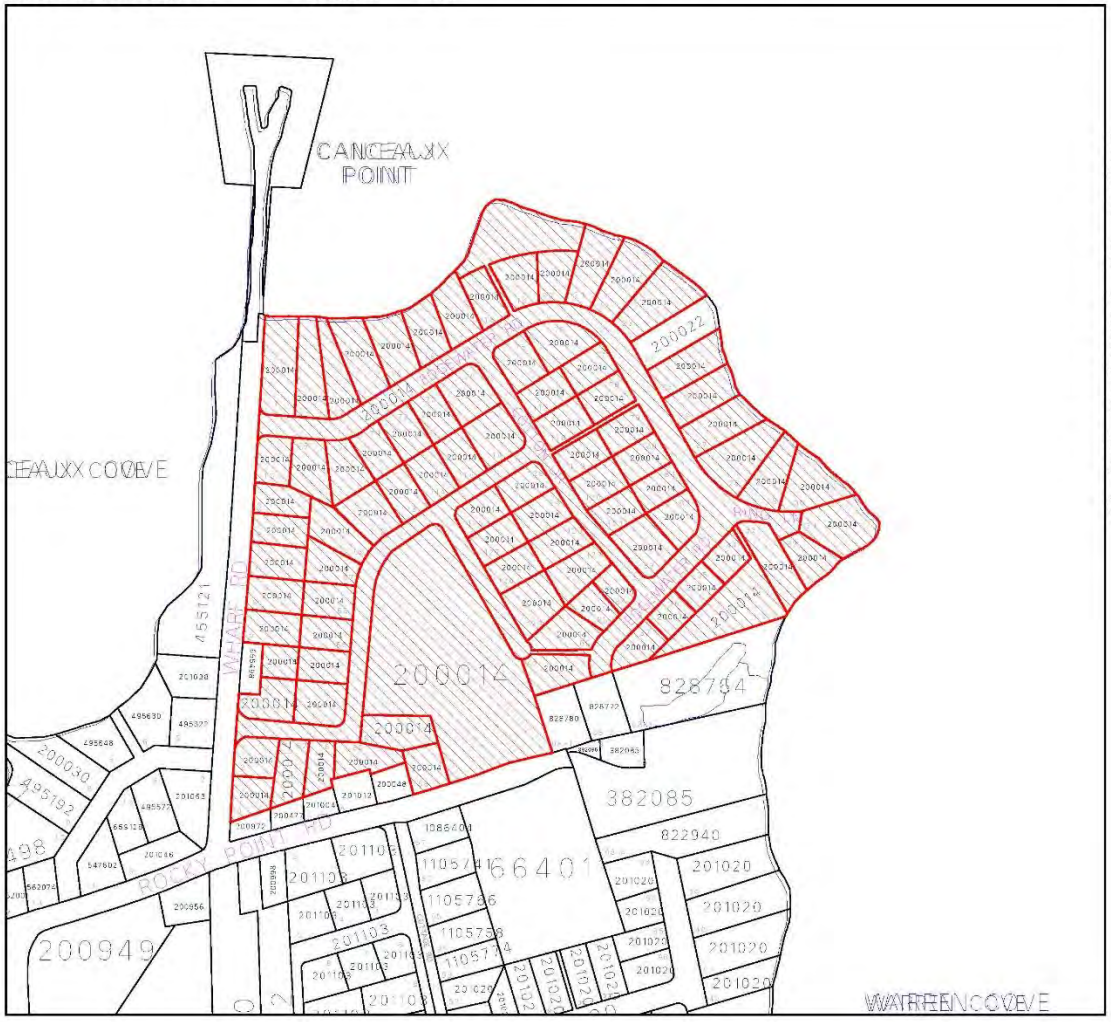
Location: null



NORTH

PROVINCE OF PEI DEPARTMENT OF
PROVINCIAL TREASURY
GEOMATICS INFORMATION CENTRE
11 KENT ST. CHARLOTTETOWN
PEI C1A 7NB

PHONE: 902-368-5178
FAX: 902-368-4399

WHILE THIS MAP MAY NOT BE FREE FROM ERROR OR OMISSION, CARE HAS BEEN TAKEN TO ENSURE THE BEST POSSIBLE QUALITY. THIS MAP IS A GRAPHICAL REPRESENTATION. IT IS NOT INTENDED TO BE USED TO CALCULATE EXACT DIMENSIONS OR AREAS.

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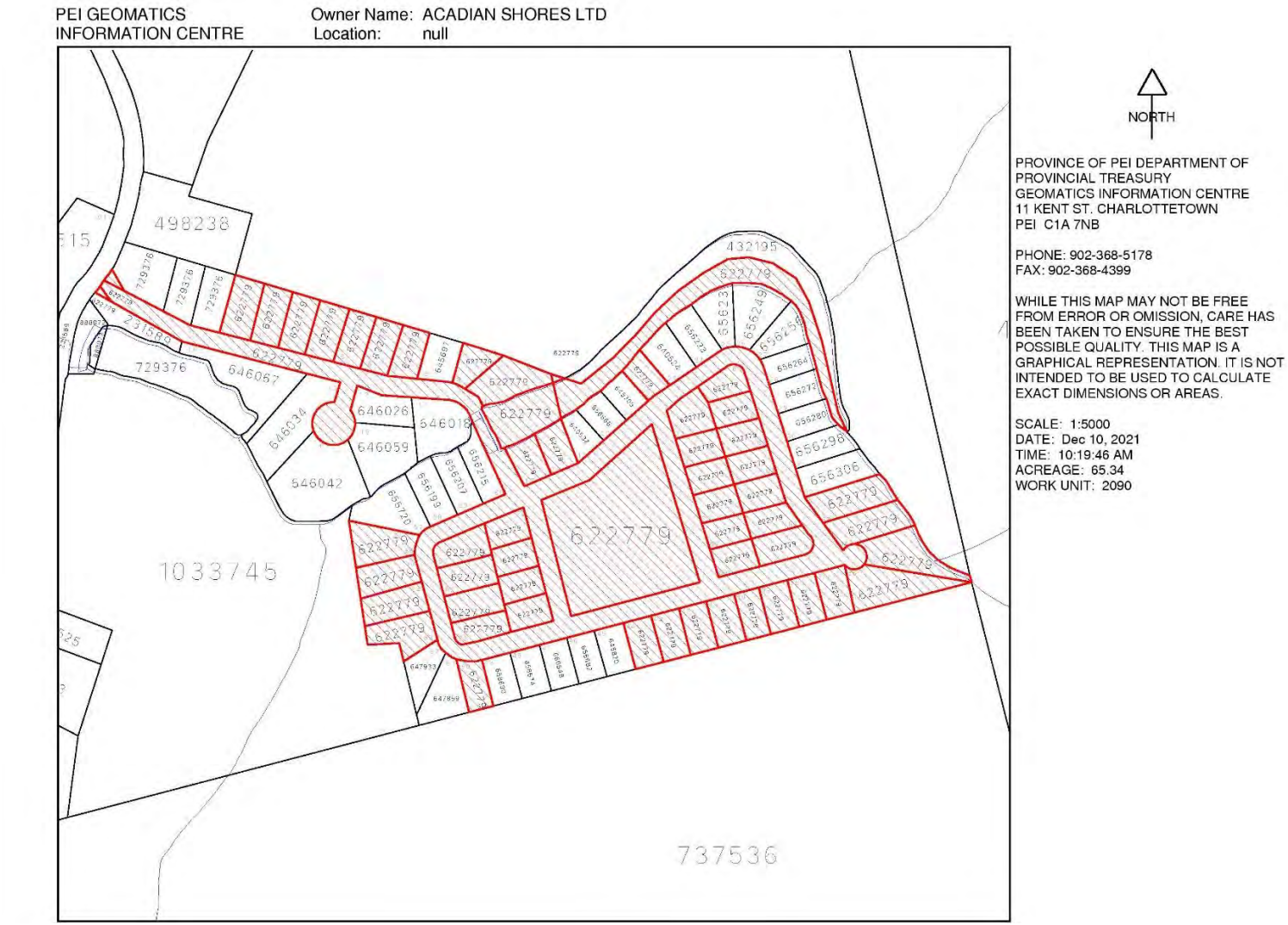
TIME: 10:19:39 AM
ACREAGE: 68.69
WORK UNIT: 2184

SCHEDULE 'C'


PEI GEOMATICS
INFORMATION CENTRE
Owner Name: ACADIAN SHORES LTD
Location: null
NORTH
PROVINCE OF PEI DEPARTMENT OF
PROVINCIAL TREASURY
GEOMATICS INFORMATION CENTRE
11 KENT ST. CHARLOTTETOWN
PEI C1A 7NB
PHONE: 902-368-5178
FAX: 902-368-4399
WHILE THIS MAP MAY NOT BE FREE FROM ERROR OR OMISSION, CARE HAS BEEN TAKEN TO ENSURE THE BEST POSSIBLE QUALITY. THIS MAP IS A GRAPHICAL REPRESENTATION. IT IS NOT INTENDED TO BE USED TO CALCULATE EXACT DIMENSIONS OR AREAS.
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DATE: Dec 10, 2021
TIME: 10:19:46 AM
ACREAGE: 65.34
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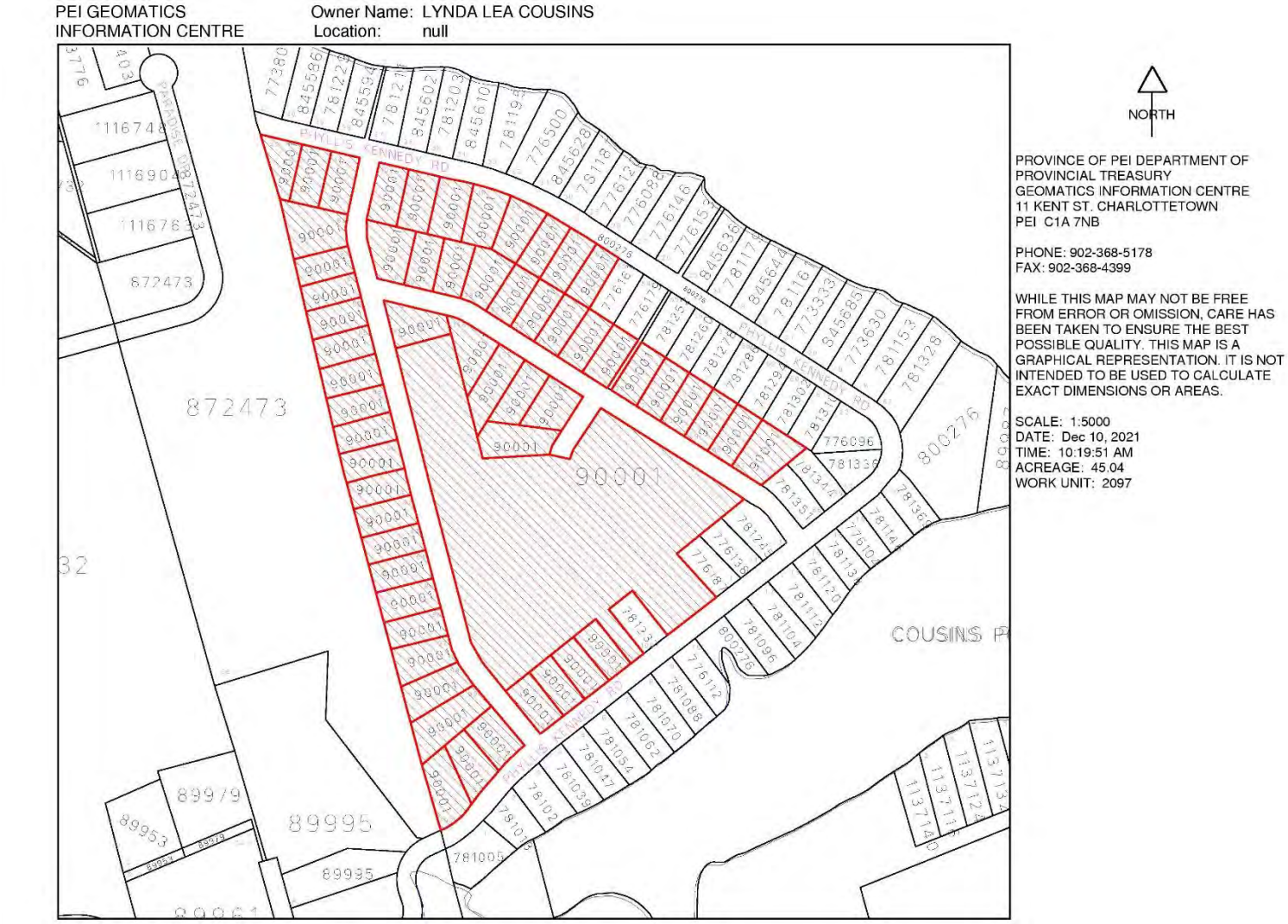
432195

SCHEDULE 'D'


PEI GEOMATICS
INFORMATION CENTRE
Owner Name: LYNDA LEA COUSINS
Location: null
NORTH
PROVINCE OF PEI DEPARTMENT OF
PROVINCIAL TREASURY
GEOMATICS INFORMATION CENTRE
11 KENT ST. CHARLOTTETOWN
PEI C1A 7NB
PHONE: 902-368-5178
FAX: 902-368-4399
WHILE THIS MAP MAY NOT BE FREE FROM ERROR OR OMISSION, CARE HAS BEEN TAKEN TO ENSURE THE BEST POSSIBLE QUALITY. THIS MAP IS A GRAPHICAL REPRESENTATION. IT IS NOT INTENDED TO BE USED TO CALCULATE EXACT DIMENSIONS OR AREAS.
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DATE: Dec 10, 2021
TIME: 10:19:51 AM
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WORK UNIT: 2097
PHILIP S KENNEDY RD
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90001
89995
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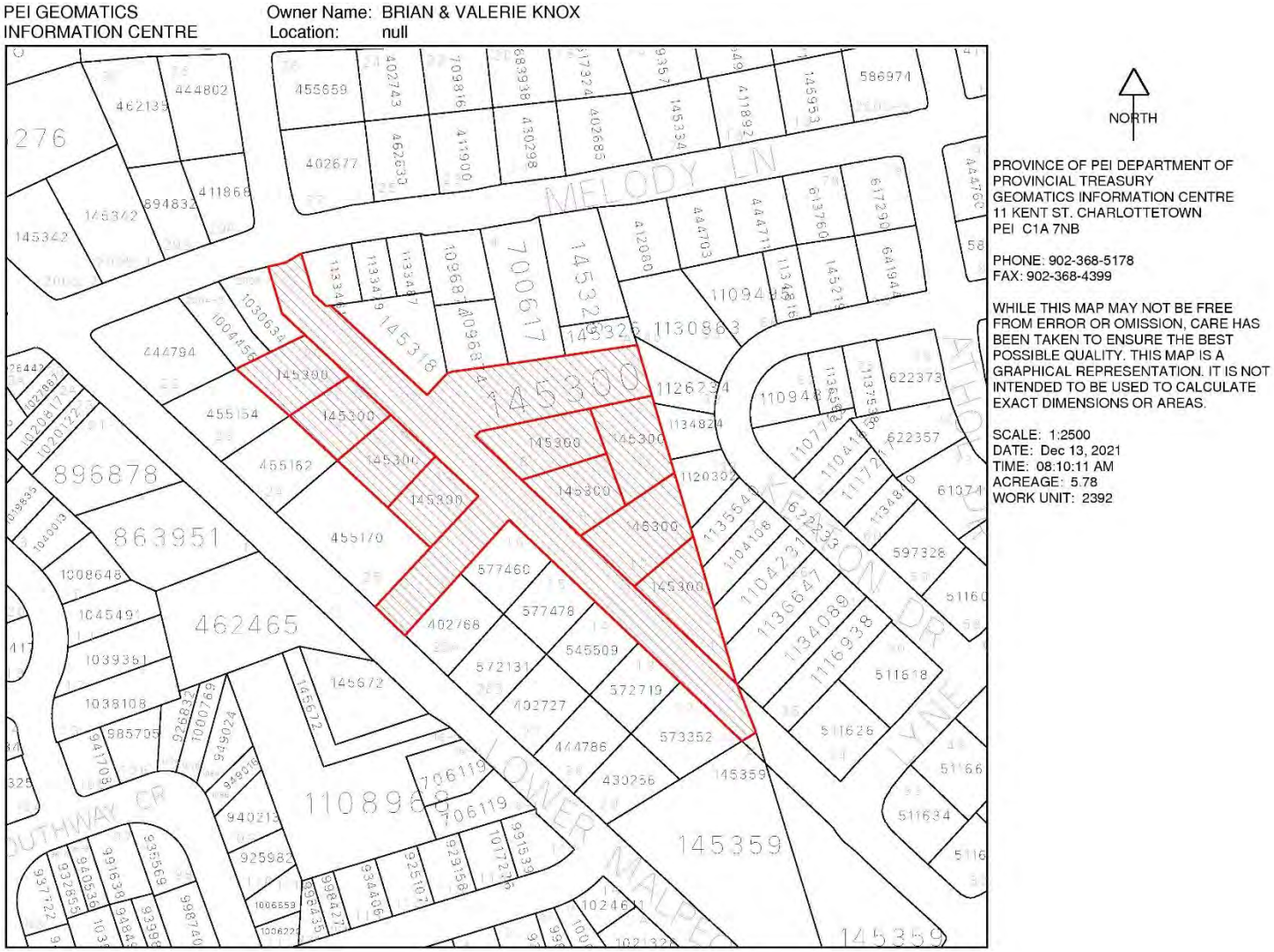
COUSINS

SCHEDULE 'E'


PEI GEOMATICS
INFORMATION CENTRE
Owner Name: BRIAN & VALERIE KNOX
Location: null
NORTH
PROVINCE OF PEI DEPARTMENT OF
PROVINCIAL TREASURY
GEOMATICS INFORMATION CENTRE
11 KENT ST. CHARLOTTETOWN
PEI C1A 7NB
PHONE: 902-368-5178
FAX: 902-368-4399
WHILE THIS MAP MAY NOT BE FREE FROM ERROR OR OMISSION, CARE HAS BEEN TAKEN TO ENSURE THE BEST POSSIBLE QUALITY. THIS MAP IS A GRAPHICAL REPRESENTATION. IT IS NOT INTENDED TO BE USED TO CALCULATE EXACT DIMENSIONS OR AREAS.
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TIME: 08:10:11 AM
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WORK UNIT: 2392
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462465
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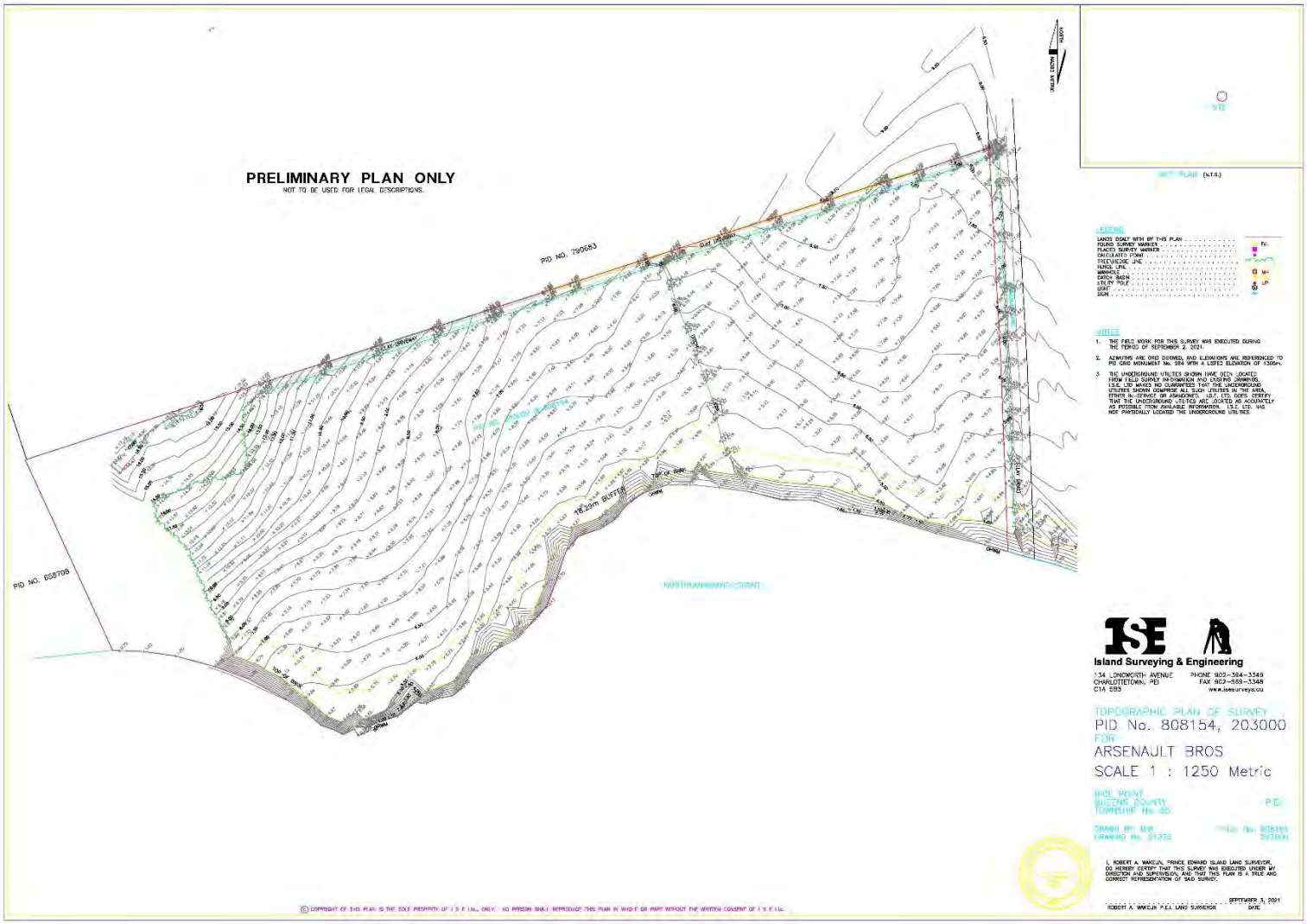
SCHEDULE 'F'


PRELIMINARY PLAN ONLY
NOT TO BE USED FOR LEGAL DESCRIPTIONS.
PID NO. 790683
PID NO. 658708
18.23m BUFFER
Island Surveying & Engineering
134 LONGWORTH AVENUE
CHARLOTTETOWN, PEI
C1A 5B3
PHONE 902-394-3349
FAX 902-566-3348
TOPOGRAPHIC PLAN OF SURVEY
PID No. 808154, 203000
FOR
ARSENAULT BROS
SCALE 1 : 1250 Metric
I, ROBERT A. MAKELIN, PRINCE EDWARD ISLAND LAND SURVEYOR, DO HEREBY CERTIFY THAT THIS SURVEY WAS EXECUTED UNDER MY DIRECTION AND SUPERVISION, AND THAT THIS PLAN IS A TRUE AND CORRECT REPRESENTATION OF SAID SURVEY.
SEPTEMBER 3, 2021
ROBERT A. MAKELIN P.E.I. LAND SURVEYOR
DATE