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March 24, 2022

The Island Regulatory & Appeals Commission
Attention: Philip Rafuse
National Bank Tower, Suite 501
134 Kent Street
Charlottetown, PEI
C1A 7L1

Dear Mr. Rafuse:

Re: Appeal # LA 21024

Please find enclosed the Amended Notice of Appeal with respect to the above noted matter.

Trusting this is satisfactory.

Yours very truly,

for David W. Hooley, Q.C.

DWH/mwd
Enclosure

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

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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

Amended Notice of Appeal

The Appellants, Jennie & Lucas Arsenault/L&J Holdings Inc. (the "Appellants") amend the Notice of Appeal as follows.

The following ground of appeal is removed in its entirety:

(2) Failure to abide by the processes and procedures as set out in the applicable legislation, including, but not limited to, the *Planning Act* and the *Planning Act* Subdivision and Development Regulations

The other grounds of appeal remain and are incorporated by reference herein, but are supplemented as outlined in the particulars provided herein.

Overall, the decision of the Minister was not made in accordance with a proper interpretation and application of the applicable legislation, sound planning principles and/or the principles of natural justice. This is evidenced by the vague and arbitrary reliance on and application of sections 3(1)(b), 3(1)(d), 13(a) and 13(j) of the *Planning Act*, RSPEI 1988 P-8 (the "Act") Subdivision and Development Regulations (the "Regulations").

Section 3(1)(b) – Premature Development

The proposed Development would not precipitate premature development. Premature development is not a defined term within the Regulations. Previous decisions of the Commission, in particular *Meadowbank and Clyde River v Department of Provincial Affairs and AG*, Order LA96-05, provide us with direction on the interpretation of Premature Development. In that decision, the Commission found that 'premature development' is a multi-disciplinary term and imports social, economic and fiscal considerations and that a determination of same is based on several factors, including: the demand and supply of existing lots in close proximity to the proposed subdivision; the expenditure of public moneys and the ability to service proposed lots; and the loss of productive agricultural land.

The Minister's decision with respect to premature development is, in summary, that approving the proposed Development would result in an oversupply of vacant lots in an underdeveloped area and would result in the loss of valuable agricultural land within Rice Point. This decision is not supported by objective / factual evidence.

First, approving the proposed Development would not result in an oversupply of vacant lots given that there is a *fundamental* difference in lots *approved* for development and lots *approved and available* for development (i.e. for sale). Also, the unique features of the lots in the proposed Development, including, waterfront / waterview lot availability, private road built to public standards and on-site well and septic systems differentiate the proposed development. Second, given the natural characteristics of the Properties, including the relatively small acreages, the slope of the land, the irregular shoreline shape and the swale running down the eastern side of the Properties, these Properties are not as the Province determined "prime agricultural land".

Factual and opinion evidence from the perspective of an expert witness who is a qualified real estate appraiser and another expert witness whose perspective is as a qualified land use planner will demonstrate there is not an oversupply of *available* vacant lots and that the Development does not constitute premature development in the area. Evidence from the current owners of the Properties, who are farmers, will speak to the characteristics of the Properties which collectively prevent the Properties from being properly characterized as "prime agricultural land."

Section 3(1)(d) – Detrimental Impact

The proposed Development would not have a "detrimental impact" as defined in subsection 1(f.3) of the Regulations. Viewscapes are expressly excluded as a consideration. Furthermore, the Rice Point area is not one of a number of protected viewscapes under the Regulations.

The Minister's decision with respect to the proposed Development having a detrimental impact is for vague / arbitrary reasons related *anecdotally* to protection of the natural environment and the coastline. A review of the *empirical* evidence from the Department of Environment, Energy and Climate Action (the "Department"), makes it clear that there are, in fact, no environment-related concerns from their perspective. See: Tabs 4C and 4E of the Minister's Record.

The land-use planner for the Province opined anecdotally that the Development would deplete approximately 3000' of shore frontage and denial was appropriate given the Province's desire to reduce the adverse impacts of coastal development and promote public amenity and access to shorefront lands. This ignores the definition of "detrimental impact" and is tantamount to expropriation of the Properties to public use without compensation. The reasoning is arbitrary, lacking in logic and context and is disproportionate in that it ignores the meniscaly small portion of Island wide waterfront this particular 3000' represents.

The Appellants will offer expert opinion evidence to the Commission from a real estate appraiser and a land-use planner, opining that no "detrimental impact", within the meaning of the Regulations, would be caused by the Development. Given that the Appellants intend to reside in the Development, they will be making efforts to protect the coastline and other natural features of the Properties. The Properties are currently privately-owned meaning that the shore frontage along the Properties is not currently public. There is currently beach access and parking to the east of the Properties at the end of Hennebury Road.

Section 13(a) – Compatibility with Surrounding Uses

The proposed Development on the Properties in Rice Point is *in fact* compatible and consistent with extant surrounding land use patterns of development. This will be readily seen in a drone aerial video that will be introduced in evidence by an expert real estate appraiser. In a rural context, this is also in fact an "infill" development.

The Minister's decision with respect to compatibility with surrounding uses is also in part based on the premise that uses on surrounding properties are primarily agricultural and not residential. Therefore, the proposed Development would create tension between agricultural and residential users.

The Appellants will present evidence from a qualified real estate appraiser to demonstrate that Rice Point has an already existing mix of agriculture and residential land use; and, given the proximity to the greater Charlottetown area as time passes, residential uses is becoming increasingly sought after in this area. The Appellants' land-use planner will also present evidence to the Commission regarding the compatibility of agriculture and residential land-uses in areas such as Rice Point and how these land uses can work alongside each other, rather than having adverse impacts on one another. It is also noteworthy that many rural municipalities in PEI allow residential uses in agricultural zones "as of right".

Section 13(j) – Natural Features

The proposed Development is suited to the intended use of the Properties and appropriately considers the natural features on the Properties and the surrounding areas.

The Minister's decision with respect to "natural features" is that residential development and subdivision along PEI's coastline has caused serious issues regarding coastal erosion and impairing scenic viewscapes that will have long-term economic and social consequences. Further, there is a possibility that wells installed would be at risk of groundwater contaminants from surrounding agricultural properties.

This rationale for the Minister's decision is not supported by the empirical evidence from the responsible Department. See: Tabs 4C and 4E of the Minister's Record. In particular, the Department found that the Properties were classified as having 'Low Erosion Hazard'; are in a 'Minimal Flood Hazard Zone'; that neither of the Properties were found to meet the definition of a watercourse or wetland under the *Environmental Protection Act*; and therefore, do not require a buffer zone. Further, no negative finding was made with respect to possible groundwater contaminants. Finally, as outlined in subsection 1(f.3) of the Act, scenic viewscapes are <u>not</u> a protected interest and therefore cannot be used as a reason for denial of the Application.

To supplement the responsible Departments findings, the Appellants also intend to present evidence from a witness, who they will seek to qualify as an expert in Environmental Engineering and Hyrogeology, to confirm that the groundwater contaminants would not be a concern based on tests showing an adequate supply of potable water and that there are no current impacts from agricultural activity or saltwater intrusion. Furthermore, the Appellants may speak to the efforts

that they will make to preserve the coastline and natural features of the Properties and that they are open to working with the Minister and the Department to come up with the best possible solutions to protect the coastlines and the natural features of the Properties.

DATED the 24th day of March, 2022.

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