via email to A.Rafuse @4:01 p.m Oct. 7/21 QA

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The Island Regulatory and Appeals Commission

Notice of Appeal

(Pursuant to Section 28 of the *Planning Act*)

TO: **The Island Regulatory and Appeals Commission**
National Bank Tower, Suite 501, 134 Kent Street
P.O. Box 577, Charlottetown PE C1A 7L1
Telephone: 902-892-3501 Toll free: 1-800-501-6268
Fax: 902-566-4076 Website: www.irac.pe.ca

NOTE:
Appeal process is a public process.

TAKE NOTICE that I/we hereby appeal the decision made by the Minister responsible for the administration of various development regulations of the ***Planning Act*** or the Municipal Council of _____ (name of City, Town or Community) on the 17th day of September, 2021, wherein the Minister/Community Council made a decision to: deny the Application for a 19 lot subdivision for residential use for PIDs known as #20300 and 808154.

AND FURTHER TAKE NOTICE that, in accordance with the provisions of Section 28.(5) of the ***Planning Act***, the grounds for this appeal are as follows: (use separate page(s) if necessary)
See attached Schedule "A".

AND FURTHER TAKE NOTICE that, in accordance with the provisions of Section 28.(5) of the ***Planning Act***, I/we seek the following relief: (use separate page(s) if necessary)
(1) an Order of the Commission overturning the decision of the Minister and approved the proposed subdivision
(2) such further and other relief as may be authorized under the Planning Act and the Island Regulatory and Appeals Commission Act.

Name(s) of Appellants Lucas & Jennie Arsenault/L&J Holdings Inc.
Please Print

Signature(s) of Appellant(s) [signature]

Mailing Address c/o Cox & Palmer City/Town Charlottetown
Province Prince Edward Island Postal Code C1A 4A9
Email Address dhooley@coxandpalmer.com or mmckenna@coxandpalmer.com
Telephone (902) 628-1033
Dated this 7th **day of** September, 2021

IMPORTANT

Under Section 28.(6) of the ***Planning Act***, the Appellant must, within seven days of filing an appeal with the Commission serve a copy of the notice of appeal on the municipal council or the Minister as the case may be. In addition, the Commission requires the Appellant to provide the Notice of Appeal to any parties directly affected by the Notice of Appeal on the same date the municipal council or Minister is notified.

Service of the Notice of Appeal is the responsibility of the Appellant

Information on this Form is collected pursuant to the ***Planning Act*** and will be used by the Commission in processing this appeal. For additional information, contact the Commission at 902-892-3501 or by email at info@irac.pe.ca.

Schedule "A"
Notice of Appeal – Particulars

The Appellants, Jennie & Lucas Arsenault/L&J Holdings Inc. (the "Appellants") are appealing the decision of the Minister of the Department of Agriculture and Land (the "Respondent") of September 17, 2021, whereby the Respondent denied the Appellants' application for a 19-lot subdivision at 110 Hennebury Road, Rice Point, Prince Edward Island (PIDs 203000 and 808154 – the "Properties") (the "Application").

The Appellant's grounds of appeal are as follows:

(1) The terms "premature development" and/or "detrimental impact" as employed in subsections 3(1)(b) and 3(1)(d) of the Regulations are too vague, arbitrary, and discriminatory in that they are left to be determined by public officials or the Minister without the safeguard of being based upon express objective criteria such as are required at law to govern the exercise of such a broad discretion as to what constitutes premature development" and/or "detrimental impact";

(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;

(3) Failure to make a decision in accordance with the applicable legislation;

(4) Failure to make a decision in accordance with sound planning principles and/or the principles of natural justice; and,

(5) Such further or other grounds as may be revealed upon review of the full record produced by the Respondent.

In the absence of the benefit of the Respondent's Record at this time, the Appellants reserve their right to provide the Commission with further particulars and documents, if necessary, on the above-noted grounds of appeal. Following a review of the Respondent's Record, the Appellants intend to marshal lay and expert evidence to demonstrate that the decision to deny the Application was not made in accordance with sound planning principles [see: *Queens County Condominium Corporation No. 40 v City of Charlottetown,* Order LA18-02] and/or the principles of natural justice. Alternately, that the exercise of At this time, the Appellants offer the following by way of particulars.

Respondent's Decision

The Respondent, in their letter of September 17, 2020 (annexed hereto) cites two subsections of the *Planning Act*, RSPEI 1988, c. P-1 (the "Act") Subdivision and Development Regulations (the "Regulations") as their main reasons for denying the Application. The subsections include

3(1)(b) and 3(1)(d), which provide that no subdivision shall be permitted where the proposed subdivision would *precipitate premature development* or *have a detrimental impact*.

Interpretation of Highly Discretionary Provisions

The *Act* delegates the power to regulate subdivision applications to the Lieutenant Governor in Council (where the municipality does not have an OP/Bylaws).[1] The power to administer and enforce the regulations is conferred to the Minister of Agriculture and Land, who is authorized to sub-delegate this function.[2]

The decision to deny the Application was sub-delegated to the Acting Manager of Provincial Planning, Eugene Lloyd, who cited the following subsections of the Regulations, among others, as a reason for denial:

> **3. General requirements – subdivision**
> (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

There is no criteria to determine what constitutes 'premature development'/'detrimental impact'. As such, the determination is based only on the opinion of apparently Mr. Lloyd although it could have been another of several Dept. of Land and Agriculture employees.

Where decision makers are not provided with relevant and objective criteria to make the determination, there is no way to ensure consistency. In other words, depending on who the power has been delegated to, the decision may differ. This may result in discrimination from one project to the next.[3] This principle has been articulated by several courts in this country, including in *Sun Oil Co. v Verdun (City)* and *MacArthur v. Charlottetown (City)*.[4]

Section 3(1) confers too much discretion to the individual tasked with relying on it to decide. A key principle arising from *MacArthur,* was the notion that bylaws (regulations are also subordinate legislation) should not allow decision makers to make arbitrary decisions. In other words, they should not confer too much discretion without providing guidance as to how discretion must be exercised.[5]

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[1] Section 8(d)(ii).
[2] Section 6(c) and (h).
[3] *MacArthur v Charlottetown (City),* 2005 PESCTD 37 at para 23.
[4] *Sun Oil Co. v Verdun (City),* [1952] 1 DLR 529, [1952] 1 SCR 222; *MacArthur, supra* at note 3.
[5] *MacArthur, supra* at note 3.

Although *Brant Dairy Co. v Ontario (Milk Commission),*[6] differs slightly from the case at hand,[7] the court struck the regulation in question, writing that the fact the powers conferred were to be carried out on the basis the Board "deem[s] proper" did not allow it to "keep its standards" out of the regulation, and it could not escape its obligations to establish criteria and policies in it.[8]

The Commission has recognized the difficulty in defining "premature development" given that the legislation provides zero guidance for same. As such, although the provision in question is within a regulation (and not a bylaw), the principles articulated in *MacArthur* apply.

Premature Development

The Respondent erroneously concluded that the 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 were permitted". The Appellant submits that this reasoning is not in accordance with good planning principles as it is inconsistent with the principles articulated by the Commission in its earlier decisions as to what constitutes 'premature development' in Prince Edward Island.

Premature development is a referenced but not a defined term in the Regulations. As a result, the Commission has, in the past, been tasked with interpretation of the term and found that it is multi-disciplinary 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 [see: *Meadowbank and Clyde River v Department of Provincial Affairs and AG*, Order LA96-05].

Demand and Supply of Existing Lots

The proposed subdivision development is located in Rice Point, Prince Edward Island, on forty-four (44) acres of land. Rice Point is not a part of a municipality and is *not part of the Province's special planning area*, which was designed to regulate development directly outside of a major municipality. The proposed lots are approximately one acre in size.

In considering this factor, the Respondent states that it will consider the appropriateness of proposed rural subdivision against the presence and vacancy rate of approved subdivisions in the *immediate* area. In this matter, the Respondent concluded that due to the fact that two largely undeveloped subdivisions were located within a 5km radius, that this subdivision would not be considered as infilling and was therefore not necessary.

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[6] [1972] S.C.J. No. 82, [1973] S.C.R. 131.
[7] Differs in that *Brant* concerned the sub-delegation of creating regulations and the inability of statutory bodies to simply repeat the wording of the enabling provision in the *Act*.
[8] See para 22.

The Appellants submit that a review of the available vacant lots that are approximately one half acre to one acre in size in the *immediate* area show that there are only five such lots available. Given the significant, and continuously increasing, demand for housing in Prince Edward Island, only five lots in the immediate area, in the Appellants' submission, is not sufficient supply. The Appellants intend to present evidence of this fact to the Commission at the hearing.

Expenditure of Public Money and Servicing

The proposed subdivision will be entirely serviced by on-site water and sewage disposal systems approved by the Province. The Appellants are experienced and professional developers in Prince Edward Island and the purpose of the proposed subdivision is to enable them to develop a subdivision where they intend to build and live.

Roadway

The Appellants' plan is to construct the road to provincial standards and turn the road over in due course to the Province as a public road. There would be no capital expenditure of provincial funds in the development of the road.

The Loss of Productive Agricultural Land

The Respondent states that the proposed subdivision would remove nearly 54 acres of prime agricultural farmland. The fact is that the Properties consist of approximately 5 acres of woods, two acres for the existing building and orchard, a large portion is a 'no cultivate zone' for the buffer along the shoreline and the remaining land is naturally separated into two segments by a gully. Given that the total acreage is broken up in two segments and the irregular shape with the shoreline, the Appellants submit that this is not prime agricultural farm land as it would be extremely difficult to navigate any type of equipment on the Properties. The current owners have rented a portion of the land to a small farmer over the last ten years, for which the purpose was simply to maintain the land and prevent overgrowth. The Properties were listed by the current owners a few years ago, and listed most recently in July, 2020 with no interest from local farmers.

The Respondent further suggests that this type of subdivision should be reserved for infilling rather than along the shoreline. In the surrounding area, there are a number of zoned residential and zoned agricultural properties. As is shown on the attached ortho map, the surrounding subdivisions are located on similar land to the Properties, along the shoreline, and it is the agriculture land that is infilling. Furthermore, it is clear by viewing the ortho map that the proposed subdivision is entirely compatible with the surrounding uses.

Finally, in response to the Respondent's comments regarding coastal development, as mentioned, the Appellants intend to reside in the proposed subdivision. As such, they intend to take proper care of the shoreline for themselves and the residents of their subdivision.

Although the Respondent states that protecting the Properties from subdivision development may assist in increasing available public amenities by allowing public access to the shore front land, the Properties have historically been privately owned and there has not historically been public access to these lands.

Detrimental Impact

The Respondent further denied the Application on the basis of subsection 3(1)(d) of the *Act* which states that no land shall be subdivided where the proposed subdivision would have a detrimental impact. Section 1(f.3) of the Regulations defines *detrimental impact* as follows:

> "**detrimental impact**" means any loss or harm suffered in persons 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*.

In their reasoning, the Respondent has quoted the above-noted section and particularly the 'protection of the natural environment and surrounding land uses' as a reason to deny the Application. The Appellants respond in two ways:

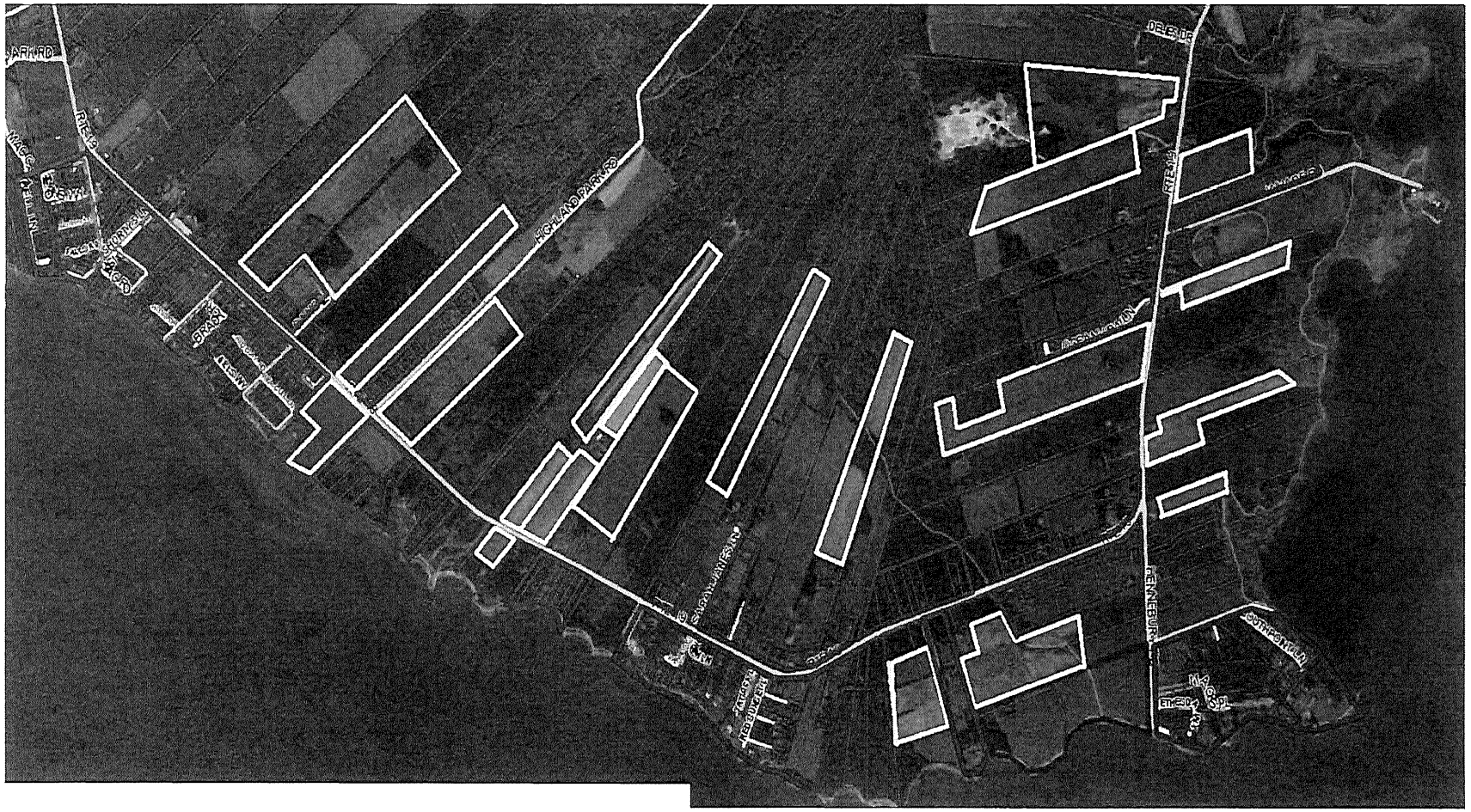
1. Firstly, the wording relied upon is again too vague, arbitrary an discriminatory and absent any objective factors or criteria governing the discretion; and,
2. Secondly, to the extent there is any specificity to the wording relied upon, - i.e. subsection (iv) provides that a subdivision is not considered to have a detrimental impact if it is a development approved pursuant to section 9(1) of the *Environmental Protection Act*, RSPEI 1988, C E-9.

The Department of Environment was consulted on the Application and while the Appellants have not seen the comments from Mr. Dale Thompson, they understand that he took no issue from an environmental concern perspective with the Application. Furthermore, on page 4 of the September 17, 2021 letter, the Department of Environment stated: "the low area that bisects current PID #203000 does not meet the definition of a watercourse or wetland under the *Environmental Protection Act*".

The Respondent is given broad powers to authorize and enforce the Act and the Regulations. The Appellants submit, however, that this broad and discretionary decision-making power must be exercised in accordance with Act and Regulations taking into consideration relevant and objective criteria. The Appellants submit that the foregoing submissions are examples of

the relevant and objective criteria that should have been considered by the Respondent. Additional evidence will be adduced at the hearing.

The Appellant respectfully requests an Order from the Commission overturning the decision of the Respondent.



Agricultural = Yellow

Subject Property =

Residential = Blue