MCINNES COOPER

Tom Keeler
Direct +1 (902) 629 8186
tom.keeler@mcinnescooper.com

141 Kent Street, Suite 300
Charlottetown PE
Canada C1A 1N3
Tel +1 (902) 368 8473 | Fax +1 (902) 368 8346

Our File: 182762
June 3, 2024

Michelle Walsh-Doucette
Commission Clerk
Prince Edward Island Regulatory & Appeals Commission
5th Floor, Suite 501,
National Bank Tower
134 Kent Street
Charlottetown, PE

Dear Ms. Walsh-Doucette:

RE: LA22002 – Parry Aftab and Allan McCullough v Minister of Agriculture and Land

These written reply submissions are delivered on behalf of the Appellants, further to the submissions delivered by the Intervenors on Wednesday, May 29, 2024.

Notwithstanding the significant amount of evidence heard in relation to this appeal, the legal issues raised are well settled matters of law which have previously been considered by this Commission. The Minister failed to correctly follow the provisions of the *Act* and *Regulations*, and undertook a decision making process which was not compliant with sound planning principles. Accordingly, the within appeal should be allowed, and the July 27, 2021 development permit application granted.

The Intervenors' submissions are primarily focused on factual issues which do not go to the heart of the legal issues to be determined by the Commission. To the extent they are relevant, these submissions are discussed in this reply. However, we note that the evidence at the hearing of this matter was very clear that Mr. McCullough and Ms. Aftab intended for this development to be a seasonal cottage. It is important to reiterate that at every stage they identified this building as being a seasonal cottage in their applications, documentation and interactions with staff.[1] In particular, the November 2, 2018 application for a development permit noted that this development was for use as a summer cottage.

It is understandable that neighbours would be concerned about a potential change of use. Of course, no such change of use was contemplated or applied for during the relevant period of time. Unfortunately, it appears that these concerns pervaded the considerations of planning officials, to the extent that even Mr. O'Hara, who only became involved with this file in October of 2021, mirrored these concerns in his evidence at this hearing.

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[1] The record at Tab 5(A) contains the last page of a memo provided by the Appellants to the Province in July of 2020. The first two pages of that memo are located at Tab 5(K) of the record, beginning at page 169 of the PDF, and clearly state that the property would not be used for any commercial purpose.

The evidence of Eugene Lloyd, who was the ultimate decision maker in relation to the development permit application, was that he relied upon the planning comments of Alex O'Hara. Mr. Lloyd acknowledged that his decision was effectively identical to the planning comments provided by Mr. O'Hara. Unfortunately, this reliance was misplaced, as Mr. O'Hara was not (and is not) a professional land use planner. In order to exercise their discretion in a principled and informed manner and to avoid the arbitrary use of discretion, the Minister was obligated to consult with a professional land use planner.

The evidence of Mr. O'Hara was that his November 30, 2021 planning report was on a form devised by himself, in the several months he had been acting in this position. He did not receive training in this role, and was tasked with considering statements of provincial interest in planning that were only enacted on November 17, 2021. As was acknowledged by Mr. O'Hara on cross-examination, he only became a candidate member of the Canadian Institute of Planners in 2022, and could not advise when he became a pre-candidate member of the Canadian Institute of Planners. While Mr. O'Hara advised that he would have been a licentiate member of the Royal Town Planning Institute as of November 30, 2021, this is only the first step towards achieving status as a chartered member, and does not qualify him as a professional land use planner in Prince Edward Island.

The Minister did not retain an expert in relation to this proceeding, either before or after the December 14, 2021 decision, instead choosing to rely solely on the evidence of Mr. O'Hara. The Commission has previously ruled that the Minister is required to consult a professional land use planner to weigh and balance the important considerations associated with sound planning principles, particularly when dealing with the interpretation of discretionary legislative provisions. In fact, the Commission in Order LA23-04 ("*Arsenault*") noted as follows in strikingly similar circumstances:

> 44. The Commission notes that in the present case, the Minister did not consult a professional land use planner in its review of the application. Rather, the Minister consulted Alex O'Hara, Land Use and Planning Act Specialist. Mr. O'Hara does not have a recognized professional accreditation in land use planning. He is not a member of the Canadian Institute of Planners or any other professional organization for professional planners. As set out in Stringer, the Minister ought to have consulted a professional land use planner with respect to the subject application to weigh and balance the important considerations associated with sound planning principles – particularly when it is dealing with the interpretation of discretionary legislative provisions.

At the hearing of this matter, Mr. O'Hara expressed his disagreement with the decision of this Commission in *Arsenault*, stating that he would have been a pre-candidate member of the Canadian Institute of Planners at the time of that decision. He noted that his opinion with respect to the application in *Arsenault* remained unchanged, and that he disagreed with the substantive decision of the Commission.

It must be noted that in *Arsenault*, the Commission specifically rejected Mr. O'Hara's arguments that loss of visual amenity and scenic viewscapes were a relevant consideration from the standpoint of sound planning principles, noting that the definition of detrimental impact found in the Regulations specifically excluded viewscapes as a consideration.

It was apparent at the hearing of this matter that Mr. O'Hara placed significant reliance on the view that overlooking and loss of privacy were a central consideration in determining whether

there was a "detrimental impact" on neighbouring property owners as defined in the applicable *Regulations.* This is not supported by the definition of "detrimental impact", which is focused on 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 specifically excludes the impact of new development on real property value and viewscapes.

The Commission has previously found in Order LA00-15 ("*Mason*") that issues of privacy and enjoyment of view are not matters considered under the *Regulations*. The reasons of the Commission in *Mason* remain equally applicable today, and it is noteworthy that the chair of that hearing panel was Justice Wayne D. Cheverie, prior to his appointment as a justice of the Supreme Court of Prince Edward Island. The opinion of the expert planner retained by the Appellants, Chris Markides, was that issues of privacy and enjoyment of view were not relevant considerations, which is in accordance with the position of the Commission in *Mason*. However, Mr. Markides went on to explain that in either event, there was no reasonable basis to conclude that there was a material loss of privacy given the distance between the structures and the existence of mitigating factors such as vegetative buffers.

With respect to the Intervenors' submissions regarding the evidence of Mr. Markides, it is important to note that Mr. Markides had the benefit of reviewing the entire record, and made specific reference to the photographs provided as part of the record. His expert opinion based upon his review of the record was that the Minister erred in their interpretation and application of the *Act*, the *Regulations,* and in their consideration and application of sound planning principles. Both Mr. Lloyd and Mr. O'Hara acknowledged that there were no issues with the prescribed setbacks outlined in the *Planning Act Subdivision and Development Regulations*, as was noted in Mr. Markides' report.

Finally, the Intervenors made mention in their submissions as to the circumstances of their encroachment onto the Appellants property. At the time the Appellants entered into an agreement to purchase the properties, Malcolm MacKenzie approached the Appellants to advise that his garage may encroach by approximately six inches. He acknowledged that he would have to hire his own counsel and bear the legal and surveying costs of remedying this supposedly minor encroachment. For their part, the Appellants were represented in this transaction by John Carr, K.C., who requested a variety of information relating to the extent of the encroachment, and a copy of the development permit for the encroaching garage. Mr. MacKenzie was advised of this, and noted on the morning of May 16, 2013 that he did not wish to spend money on a surveyor or lawyer, and that he would be satisfied with an acknowledgment of the supposedly minor encroachment he had described rather than proceed with an easement.

As was noted by Mr. McCullough, he subsequently discovered with the help of a surveyor that the garage actually encroached by six feet onto the property. This is readily ascertainable from photographs in evidence, as the fence subsequently built by the Intervenors was built on the property line. It does not appear that a development permit was ever obtained by the Intervenors for the garage they built, and a subsequent request for a comfort letter from planning staff was rejected.

The Appellants respectfully urge the Commission to continue to apply prior precedent of this Commission with respect to sound planning principles, protection of viewscapes and loss of privacy, and to allow this appeal on the basis that the decision of the Minister failed to correctly follow the provisions of the *Act* and applicable *Regulations*, and on the basis that their decision did not comply with sound planning principles.

Yours very truly,

Tom Keeler

Cc:

Christiana Tweedy
Legal Services
Justice and Public Safety
95 Rochford Street, PO Box 2000
Charlottetown, PE

Counsel for the Respondent

Elaine MacKenzie
25 Strawberry Lane
Stratford, PE
C1B 0J3

Brian Gillis
1480 Point Prim Rd
Belfast, PE
C0A 1A0

THE ISLAND REGULATORY AND APPEALS COMMISSION
Prince Edward Island
Île-du-Prince-Edouard
CANADA

Docket: LA00116
Order LA00-15

IN THE MATTER of an appeal by Stuart Mason, et al. against a decision of the Minister of Community and Cultural Affairs, dated August 7, 2000.

BEFORE THE COMMISSION

on Wednesday, the 29th day of November, 2000.

Wayne D. Cheverie, Q.C., Chair
Maurice Rodgerson, Commissioner
Norman Gallant, Commissioner

Order

Contents

Appearances & Witnesses

1. For the Appellant

Stuart Mason
Hinman Barrett

2. For the Respondent

   Donald Walters

3. For the Developer

   Counsel:
   Spencer Campbell

   Witnesses:
   Fay MacKinnon
   Ernie Morello

Reasons for Order

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1. Introduction

This is an appeal under section 28 of the ***Planning Act***, R.S.P.E.I. 1988, Cap. P-8 (the ***Act***), by Stuart Mason, Dr. Vianne Timmons, Hinman Barrett, Nancy Barrett and Blair MacCallum (hereinafter referred to as the Appellants). By Notice of Appeal (Exhibit A1) dated August 23, 2000, the Appellants are appealing the decision of the Minister of Community and Cultural Affairs (the Respondent), dated August 7, 2000, to grant preliminary approval to Kel-Mac Inc. (the Developer) with respect to an application to revise portions of the subdivision, parcels #398040 and #398057, located at the community of Mermaid.

Referring to the plan of subdivision titled “Subdivision Case #18941A Site Plan Preliminary Approval August 7, 2000” (Exhibit R43.1), the focus of this appeal is the proposed creation of lots 53, 53A, 54, 55 and 56 (the proposed lots) along Birkallum Drive out of part of what was labeled “Open Area 11.20 Acres” in the previous plan of subdivision titled “Subdivision Case #11622I Approval in Principle June 6, 1990” (Exhibit R43.2).

After due public notice and suitable scheduling for the involved parties, the Commission proceeded to hear the appeal on November 8, 2000.

2. Discussion

While the Appellants are in favor of many of the changes to the subdivision which have received preliminary approval from the Respondent, they are opposed to the addition of the proposed lots. The Appellants submit the following points in argument:

- The addition of these lots will result in the elimination of the green space along Birkallum Drive, directly across the street from their homes. This open green space was a major factor which influenced the Appellants to purchase their lots.
- As a result of the development of the proposed lots, the Appellants will suffer a loss of privacy and also a loss of view; for example a good view of sunsets and the night sky.
- The earlier approved subdivision plans were a written commitment that an open green space would be maintained opposite their homes. By granting preliminary approval to the addition of the proposed lots, the Respondent is not protecting the interests of the residents on the other side of Birkallum Drive.
- The proposed lots will create additional driveways that will result in increased vehicle traffic backing out onto Birkallum Drive, thus reducing safety for the neighborhood's children.

The Appellants request that the Commission allow the appeal, order the retention, in its present location, of the open green space on Birkallum Drive, and deny preliminary approval of the proposed lots.

The Respondent expresses the position that the provisions of the ***Act*** and the *Planning Act Regulations* (the *Regulations*) were carefully followed prior to the granting of preliminary approval for revisions to the Developer's subdivision. The Respondent submits the following points in argument:

- The proposal for revisions to the Developer's subdivision is a redesign or a reconfiguration of the subdivision and not an extension of the subdivision, as no additional acreage is being approved. Accordingly, section 30 of the *Regulations* does not apply in this case.
- The Respondent considers the proposed redesign of the subdivision to be an improvement, in that there is more open space and greater accessibility to the open space.
- The Respondent is satisfied that the proposed redesign of the subdivision will not have any "detrimental impact", as that term is defined in section 3 of the *Regulations*. The Respondent sought input from the Department of Transportation and Public Works concerning the proposed revision (Exhibit R19). With respect to concerns regarding public safety, the Department of Transportation and Public Works notes that the proposed redesign of the subdivision incorporate streets with acceptable curves, intersections and cul-de-sacs, as noted in a July 7, 2000 letter from Jake Bartlett to John Pickard (Exhibit R22). The Respondent will not grant final approval to the proposed redesign of the subdivision until all conditions have been met. The Respondent does not see locating residential lots next to, or across from, other residential lots to be a safety issue in a residential subdivision.

The Respondent requests that the Commission deny the appeal, as the proposal for revisions to the Developer's subdivision meet all the requirements under the ***Act*** and the *Regulations* for preliminary approval.

The Developer articulates the position that the proposed redesign of the Developer's subdivision represents continuing advances in land use planning. The Developer submits the following points in argument:

- Neither the ***Act*** nor the Regulations prevent revisions to a subdivision. The evidence in fact suggests that this subdivision was revised several times. The proposed plan is the best it can be under the circumstances, given that this plan is for revisions to an existing subdivision, as opposed to a design of a new subdivision.
- Neither the ***Act*** nor the *Regulations* refer to protection of a right to privacy or to a right to a view. In fact, the potential effects on viewscapes and real property value are specifically excluded in the definition of "detrimental impact" under section 3 of the *Regulations*. The Developer seriously doubts that there will be any measurable loss of privacy if the proposed revisions to the subdivision are approved.
- There is no evidence before the Commission that the development of five single-family residential lots across the street from the Appellants' properties will affect the safety of children in the neighborhood.
- The proposed revisions to the subdivision reduce the number of long roads in favor of short streets and cul-de-sacs, in order to encourage a sense of neighborhood. These features also result in more intersections, which tend to reduce the speed of traffic and thereby enhance public safety.

3. Findings

After giving careful and full consideration to the evidence submitted in this case, the Commission has decided to deny the appeal. The reasons for the Commission's decision are as follows:

The Commission, as an appellate body, has the same decision making power as the tribunal at first instance, in this case the Respondent. The Commission is a creature of statute; it does not have absolute powers and is bound by the law, in this case the ***Act*** and the *Regulations*.

On appeal, the Commission has the power to hear the evidence and arguments as presented by the parties and decide whether to allow the appeal or dismiss it based on the evidence and arguments presented and within the applicable regulations.

Subsection 28(1) of the ***Act*** sets out the nature of an appeal to the Commission under the ***Act***:

> *28(1) Subject to subsections (2), (3) and (4), any person who is dissatisfied by a decision of a council or the Minister in respect of the administration of regulations or bylaws made pursuant to the powers conferred by this Act may, within twenty-one days of the decision appeal to the Commission.*

In this case, the Commission is bound by the *Regulations*, which set out the necessary requirements for subdivision and development.

The following sections of the *Regulations* are particularly germane to this case:

> *25(2)No person shall be permitted to subdivide land if the proposed subdivision*
>
> > *(a) does not conform to these regulations, other regulations adopted pursuant to the **Act**, or the relevant sections of the **Environmental Protection Act**, the **Fire Prevention Act**, the **Lands Protection Act**, the **Provincial Building Code Act**, or the **Roads Act**;*
> > *(b) would precipitate premature development or unnecessary public expenditure, or would place pressure on the municipality or the province to provide services; or*
> > *(c) would have a detrimental impact. (emphasis added)*

Detrimental impact is defined under section 3 of the ***Act***:

> *"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 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**, R.S.P.E.I. 1988, Cap. E-9; (emphasis added)*

Although not specifically mentioned in the Notice of Appeal (Exhibit A1), it became apparent from the evidence of the Appellants at the hearing that they were claiming that the proposed revision of the subdivision would have a "detrimental impact" on them. The Appellants argue that the creation of the proposed lots will reduce their privacy and interfere with their view. However, the *Regulations* do not specifically deal with the issue of privacy. The evidence before the Commission suggests that the Appellants will retain a reasonable standard of privacy, consistent with that expected in a residential subdivision. The Commission notes that "viewscapes" are specifically exempted from the definition of detrimental impact contained in the *Regulations*. Accordingly, the Commission finds that issues of privacy and enjoyment of view are not matters considered under the *Regulations*.

The Appellants raise the issue of public safety, which is a factor considered under the definition of detrimental impact found in the *Regulations*. However, no evidence was provided at the hearing that the development of five single-unit residential lots across the road from the Appellants' properties would endanger public safety. In addition, the Department of Transportation and Public Works (Exhibit R22) have reviewed the proposal prior to the Respondent granting preliminary approval to the subdivision revisions. The Commission finds that there is insufficient evidence to deny preliminary approval to this proposal, based on detrimental impact in matters related to public safety.

The Commission finds that there are no provisions in the Regulations which would prevent a revision of a subdivision.

Section 30 of the *Regulations* state:

> *30 No extension to an existing subdivision shall be approved by the Minister until two-thirds of the existing subdivision lots have been sold by the subdivider. (emphasis added)*

The Commission finds that the proposal which has been granted preliminary approval in this case is a proposed revision of a subdivision, rather than an extension of the subdivision. The evidence before the Commission indicates that the overall size and shape of the subdivision as a whole will remain the same. In essence, the proposal reflects internal changes to the layout of streets, residential building lots and open spaces within the subdivision. In fact, it appears that the Developer went to great lengths to enhance the subdivision lots for sale, while at the same time preserving necessary "open" or "green" space.

While the Appellants apparently believed that the open space opposite their properties would be preserved indefinitely from future development, the ***Act*** does not guarantee this. Even if a contract or a covenant existed to support the Appellant's position, the Commission would lack the jurisdiction to enforce such agreements.

Ultimately, the Commission's role in this appeal is to determine whether the Respondent made its decision to grant preliminary approval to the subdivision in accordance with the provisions of the ***Act*** and *Regulations*. The evidence before the Commission suggests that the Respondent very carefully and thoroughly reviewed the proposal for subdivision revision in accordance with the ***Act*** and *Regulations* before making the decision to grant preliminary approval. Further, it appears to the Commission that the Respondent went out of their way to deal with the concerns of all those affected and ultimately came to the correct decision. There is no evidence before the Commission that the Respondent made an error in the administration of the *Regulations*.

While the Appellants may legitimately feel that they have suffered loss or harm as a result of the preliminary approval of these subdivision revisions, they have not established that the proposal would have a detrimental impact, as that term is defined in the Regulations. Accordingly, as the Respondent has fully and carefully applied the Regulations, the Respondent's decision in this matter to grant preliminary approval to the proposed revisions to the Developer's subdivision is affirmed and the appeal must be denied.

4. Disposition

An Order denying the appeal will therefore be issued.

Order

WHEREAS Stuart Mason, Dr. Vianne Timmons, Hinman Barrett and Blair MacCallum, the Appellants, have appealed a decision made by the Minister of Community and Cultural Affairs dated August 7, 2000;

AND WHEREAS the Commission heard the appeal at a public hearing conducted in Charlottetown on November 8, 2000 after due public notice;

AND WHEREAS the Commission has issued its findings in this matter in accordance with the Reasons for Order issued with this Order;

NOW THEREFORE, pursuant to the ***Island Regulatory and Appeals Commission Act*** and the ***Planning Act***

IT IS ORDERED THAT

1. **The appeal is denied.**

DATED at Charlottetown, Prince Edward Island, this 29th day of November, 2000.

BY THE COMMISSION:

Wayne D. Cheverie, Q.C. Chair

Maurice Rodgerson, Commissioner

Norman Gallant, Commissioner

NOTICE

Section 12 of the ***Island Regulatory and Appeals Commission Act*** reads as follows:

> *12. The Commission may, in its absolute discretion, review, rescind or vary any order or decision made by it or rehear any application before deciding it.*

Parties to this proceeding seeking a review of the Commission's decision or order in this matter may do so by filing with the Commission, at the earliest date, a written **Request for Review**, which clearly states the reasons for the review and the nature of the relief sought.

*Sections 13.(1) and 13(2) of the **Act** provide as follows:*

> *13.(1) An appeal lies from a decision or order of the Commission to the Appeal Division of the Supreme Court upon a question of law or jurisdiction.*
>
> *(2) The appeal shall be made by filing a notice of appeal in the Supreme Court within twenty days after the decision or order appealed from and the Civil Procedure Rules respecting appeals apply with the necessary changes.*