

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 2nd day of June, 2023, wherein the Minister/Community Council made a decision to deny the Application of Dwayne and Virginia Higginbotham to change the use of PID #891549 from Open Space to Residential (Single-Unit) Dwelling use (Case #63999).

(attach a copy of the decision).

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 approving the proposed change of use; and
- 2) such further and other relief as may be authorized under the Planning Act and the Island Regulatory and Appeals Commission Act.

EACH APPELLANT MUST COMPLETE THE FOLLOWING: (print separate sheets as necessary)

Name(s) of Appellant(s): Dwayne & Virginia Higginbotham
Please Print

Signature(s) of Appellant(s):

Mailing Address: c/o Key Murray Law

City/Town: Charlottetown

Province: Prince Edward Island

Postal Code: C1A 1K7

Email Address: ryan.macdonald@keymurraylaw.com

Telephone: 902-894-7051

Dated this 21 day of June, 2023.
day month year

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.

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, Dwayne and Virginia Higginbotham (the “Appellants”) appeal the decision of the Minister of Housing, Land and Communities (the “Respondent”) dated June 2, 2023, whereby the Respondent denied the Appellants’ application to change the use of PID #891549 (the “Property”) from Open Space to Residential (Single-Unit) Dwelling use (the “Application”).

The Appellants’ grounds of appeal are as follows:

- a) There is a lack of evidence to indicate that the Property was ever intended to be used as an “open space” as that term is defined in s. 1(m.2) and used in s. 15(1) of the *Subdivision and Development Regulations*, PEI Reg EC693/00 (the “*Regulations*”);
- b) Changing the use of the Property would not negatively affect the “*general welfare, health, safety and convenience of persons*” for the purposes of s. 8(a) of the *Planning Act*, RSPEI 1988 c P-8 (the “*Act*”);
- c) Section 28(1)(d) of the *Act*; and
- d) Such further or other grounds as may be revealed and as this Commission deems appropriate.

The Appellants reserve the right to provide the Commission with further particulars and documents, if necessary, on the above-noted grounds of appeal.

Respondent’s Decision

In its letter of June 2, 2023 (attached hereto), the Respondent provided the following reason for denying the Application:

“C. *Reasons*

This parcel is identified as “Tree Plantation (Open Space)” on the approved subdivision plans for this area. This Open Space was required as part of the original lot approvals and is intended to be held in common by the owners of lots in the subdivision. Due to these provisions within the Regulations, we have no choice but to deny this proposal at this time.”

The Respondent also cited clause 8(a) of the *Planning Act*, RSPEI 1988, c P-8, as well as subsections 1(m.2), 3(2)(a), 15(1), 15(2), 28, 29(1), and 34 of the *Regulations*, in support of its decision.

Use of the Property

The Appellants dispute that the Property is, or has ever been, an “open space” as that term is defined in s. 1(m.2) and used in s. 15(1) of the *Regulations* based on publicly available documents through the Prince Edward Island Land Registry offices.

Deeds to the Property, as well as deeds to neighbouring parcels of land, do not appear to indicate that the Property is an open space. In reviewing deeds of other properties neighbouring the

Property, there is no mention of it being open space or that it is "*held in common by the owners of lots in the subdivision.*"

While the Property may have been a literal "open space" at the time of the latest approved subdivision plan for this area, the Appellants submit that the use of the phrase "open space" in the context of this subdivision plan does not imply the existence of an "open space" as that term is defined in s. 1(m.2) and used in s. 15(1) of the *Regulations*.

Other than the phrase "open use" being written on the subdivision plan, the Appellants submit that there is no publicly available evidence to support the existence of an "*open space*" or common ownership for the purposes of the *Planning Act* at the Property.

Impact of Change of Use

The Appellants submit that their Application to construct a single-unit residential dwelling at the Property would not negatively affect the "*general welfare, health, safety and convenience of persons in any area*" for the purposes of s. 8(a) of the *Planning Act, supra*.

The Appellants note that the Respondent indicated that it would send letters to neighbouring landowners to see if there were any objections to the proposed change of use, but it appears that the Respondent unilaterally determined that it would not be doing so prior to denying this Application, and contrary to what proper procedure dictates.

If the Respondent is concerned about the potential impact of the change of use of the Property on neighbouring landowners, the Appellant submits that these concerns are as of yet unfounded. The Appellants state that the owners of neighbouring properties have yet to be consulted regarding their views on changing the use of the Property.

Relief Sought

The Appellants respectfully request an Order overturning the decision of the Respondent and approving the proposed Application.



Housing, Land and
Communities

logement, terres et
communautés



Land Division
41 Wood Islands Road
PO Box 1500, Montague
Prince Edward Island
Canada C0A 1R0

Division de terres
41, chemin Wood Island
C.P. 1500, Montague
île-du-Prince-Édouard
Canada C0A 1R0

June 2, 2023

Dwayne and Virginia Higginbotham
2449 Cape Bear RD
Murray Harbour, PE C0A 1V0

Dear Mr./Mrs. Higginbotham:

Subject:	Application to Change the Use of the land.
Property ID #:	891549
Property Location:	Murray Harbour, Kings County
Our File References:	Case # 63999

The Department of Housing, Land and Communities has reviewed your application to change the use of PID# 891549 from Open Space to Residential (Single-Unit) Dwelling use.

A. The Application

Subdivision: The Subject Property is a parcel identified as “**Tree Plantation (Open Space)**” on the Latest approved subdivision plan for this area. The application was submitted to Change the Use of the subject property to Residential (single unit) dwelling use.

B. Decision

The Subject Property is within a geographic area where land use and development are not regulated by a local official plan or zoning by-law. Therefore, the Subject Property falls within the jurisdiction of this Department. Land use and development are regulated by the *Planning Act* Subdivision and Development Regulations and other provincial laws and regulations.

Pursuant to clause 8(a) of the *Planning Act* and subsections 1.(m.2), 3.(2)(a), 15.(1), 15.(2), 28, 29.(1), and 34. of the *Planning Act* Subdivision and Development Regulations, the above noted application is Denied. The reasons for this decision are explained in detail below.

C. Reasons

This parcel is identified as “**Tree Plantation (Open Space)**” on the approved subdivision plans for this area. This Open Space was required as part of the original lot approvals and is intended to be held in common by the owners of lots in the subdivision. Due to these provisions within the Regulations, we have no choice but to deny this proposal at this time.

Please refer to the *Planning Act* Subdivision and Development Regulations sections 1.(m.2), 3.(2)(a), 15.(1), 15.(2), 28, 29.(1), and 34.

1. (m.2)

“open space” means an outdoor amenity space for active or passive recreational use;

3. (2)(a)

No development permit shall be issued where a proposed building, structure, or its alteration, repair, location, or use or change of use would

(a) not conform to these regulations or any other regulations made pursuant to the Act;

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.

28. Designation of permitted uses

(1) Final approval of a subdivision application shall specify the permitted uses of each lot on the plan of subdivision.

Offence

(2) No person shall use a parcel for any purpose other than that which is specified on the approved plan of subdivision.

29. Change of Use

(1) No person shall deviate from an approved plan of subdivision, including changing the use of a lot from the approved use, unless a revised plan of subdivision or an application for a change of use has been submitted to, and has been approved by, the Minister.

34. Proposed use contrary to plan

No development permit shall be issued where the proposed use of the building or structure is contrary to the use specified on an approved subdivision plan.

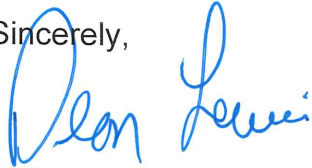
D. Right of Appeal

Notice of this decision will be posted on the PEI Planning Decisions website. We suggest typing "PEI Planning Decisions" into your internet search engine to link to the website.

Please be advised that pursuant to section 28 of the *Planning Act*, this decision may be appealed to the Island Regulatory & Appeals Commission ("IRAC") (PO Box 577, Charlottetown, PE, C1A 7L1: <http://www.irac.pe.ca>). An appeal must be filed within 21 days after the date of this letter or the Commission is under no obligation to hear the appeal. For more information about appeals, please contact IRAC.

If you have any questions in regard to this decision, contact me at (902) 838-0650 or dhlewis@gov.pe.ca.

Sincerely,



Dean Lewis
Senior Development Officer