REPLY TO NOTICE OF APPEAL

INTRODUCTION

1. We ask the Island Regulatory and Appeals Commission (the "Commission") to accept the following submissions on behalf of the Rural Municipality of Eastern Kings (the "Municipality") in reply to the notice of appeal filed by Mr. Jeff Klein (the "Appellant").

REPLY

2. The Municipality did not deny the Appellant's "application" for a development permit. In fact, the Municipality has yet to receive a complete application from the Appellant. On September 15, 2023, the Municipality advised the Appellant – as the Appellant had been advised more than two years before – that the materials he had submitted to the Municipality on February 17, 2021 and April 7, 2021 in support of an application for a development permit was incomplete, and that the Municipality could not process his request until he submitted a complete application. This required the Appellant to satisfy certain requirements of the Municipality's Development Bylaw and the *Environmental Protection Act Watercourse and Wetland Protection Regulations*.[1]

A. The Commission does not have Jurisdiction to hear this Appeal.

3. First, the Municipality has not made a "decision" in respect of any "application" by the Appellant under a bylaw for a development permit. As a result, there is no "decision" made by the Municipality pursuant to section 28(1.1) of the *Planning Act* from which the Appellant may appeal. As noted above, the materials the Appellant submitted to the Municipality on April 7, 2023 – were incomplete. The Appellant acknowledged this in his April 7, 2021 letter to the Municipality enclosing materials in support of his proposed development, wherein the Appellant states "the Perc Test and Well Permit will be forwarded as soon as they are available."[2]

4. In past decisions the Commission has expressed that development permits should not be issued by a municipality until the applicant has "*provided a complete application containing all of the requisite information required to allow an informed decision as to whether a development permit should be issued or not.*"[3] Although a municipality may assist an applicant by providing direction on the necessary information required to complete an application for a development permit, responsibility for submitting a complete application lies with the applicant. Until the applicant does so, the person has not presented an "application" on which the Municipality may make a "decision" within the meaning of section 28(1.1) of the *Planning Act.*[4]

5. In this case, the Appellant has not presented an "application" to the Municipality. The Appellant failed to provide all the information required to assess his proposed development – despite being informed by the Municipality – more than two years ago – what information that was required. The Appellant's letter dated April 7, 2023 demonstrates that he is aware of outstanding information required by the Municipality to consider his proposed development: "the Perc Test and Well Permit will be forwarded as soon as they are available."[5]

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[1] *Environmental Protection Act Watercourse and Wetland Protection Regulations*, RSPEI 1988, c E-9 (the "*Environmental Protection Act Regulations*").

[2] Record of the Municipality, Tab 7, p. 18 and note that despite the Appellant's acknowledgment that a perc test and well permit would be forwarded, the form enclosed with the Appellant's April 7, 2021 letter to the Municipality – on which he sought a development permit – indicates that a septic/sewage site suitability test (perc test) and a well permit was included in the materials provided on April 7, 2021 (Record of the Municipality, Tab 7, p. 20).

[3] *PEI Energy Corporation (Re),* LA20-03, 2020 CanLII 125986 (PE IRAC), at para. 78.

[4] *Planning Act*, RSPEI 1988, c P-8, at s. 28(1.1) (the "*Planning Act*").

6. The Municipality's Development Permit Application Guide 2020 is clear that "[a]ll questions and clarifications with municipal staff are considered informal until a completed application has been submitted."[6] The communication the Appellant has had with the Municipality to date falls squarely within the scope of what was intended to be captured by informal "questions and clarifications" in the Application Guide. The Commission has no jurisdiction to hear this appeal without a "decision" of the Municipality with respect to an "application" by the Appellant.

7. Second, and in the alternative, even if the Commission were to accept that the materials the Appellant submitted to the Municipality form a complete "application", the Commission still does not have jurisdiction because the notice of appeal was filed outside the 21-day appeal period prescribed by the *Planning Act.*[7]

8. In or around June 2021, the Appellant was advised that the materials he submitted would not be considered until the Municipality received comments from the Department of Environment, Energy and Climate Action (the "Department") about whether his proposed development complied with the *Environmental Protection Act Regulations.* By letter dated June 10, 2021, the Department advised the Appellant, and the Municipality, that the proposed development contravened the *Environmental Protection Act Regulations,* and explained what steps would need to be taken by the Appellant to rectify environmental concerns with the proposed development. The Appellant was informed that, once the environmental concerns were rectified, "the Department can then pass along its comments to the [Municipality]" concerning the proposed development. [8]

9. As of September 14, 2023, the Appellant had not rectified the environmental concerns identified by the Department with respect to the proposed development.[9] During a meeting with the Municipality on September 15, 2023, the Appellant was advised – as he had been in or around June 2021 – that the materials he submitted would not be considered by the Municipality until comments were received from the Department about whether the proposed development complied with the *Environmental Protection Act Regulations.*

10. The *Planning Act* states that a person dissatisfied by a decision of a municipality made in respect of an "application" by the person under a bylaw for a development permit must file a notice of appeal with the Commission within 21 days after the date of the decision being appealed.[10] In this case, the Municipality properly exercised its discretion to wait until it had received a complete application by the Appellant before making any decision as to whether a development permit should be issued or not. There was no "decision" made with respect to the merits of the incomplete application. The only discretion exercised by the Municipality was to pause any consideration of the Appellant's proposed development until a complete application had been received.

11. This exercise of discretion by the Municipality, to pause consideration of the Appellant's proposed development, occurred in or around June 2021. Therefore, even if the Commission were to accept that the Municipality's exercise of discretion was a "decision" made in respect of an "application" – the 21-day appeal period started ticking after the "decision" was made – in or around June 2021. Had the Appellant wished to appeal the Municipality's "decision", he would have been required to do so no later than end of July 2021. The Appellant did not appeal the Municipality's "decision" by that time. The Appellant cannot be permitted to extend the time for filing an appeal under the *Planning Act* by prompting the Municipality to relay the same "decision" that the Municipality had made over two years before.

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[6] Rural Municipality of Eastern Kings Development Permit Application Guide 2020, p. 1.
[7] *Planning Act*, s. 28(1.3).
[8] Record of the Municipality, Tab 12, p. 34.
[9] Record of the Municipality, Tab 14, p. 38.
[10] *Planning Act*, ss. 28(1.1)(a)(i) and 28(1.3).

12. The Commission is a statutory tribunal without inherent authority, and does not have the jurisdiction to hear an appeal that has been filed out of time. The Commission is also without the statutory authority to extend the time for filing an appeal under the *Planning Act.* In this case, the appellant filed the notice of appeal with the Commission well outside the 21-day appeal period prescribed by the *Planning Act*. Accordingly, the Commission is without jurisdiction to hear the appeal and it must be dismissed.

B. The Municipality followed the proper procedure required in the Development Bylaw, and acted fairly, when considering the materials submitted by the Appellant.

13. Notwithstanding the Municipality's submission that the Commission does not have jurisdiction to hear this appeal, the Municipality will provide brief submissions on the procedure followed by the Municipality when considering the materials submitted by the Appellant.

14. Following the receipt of February 17, 2021 correspondence from the Appellant enclosing materials[11] – purportedly in support of the Appellant's August 2019 application for a development permit (which development permit had been quashed by the Commission) [12] – the Municipality met with representatives of the Appellant and requested, among other things, that the Appellant provide a percolation test and submit his application for a development permit on the Municipality's revised form.[13]

15. The Municipality received further materials from the Appellant on April 7, 2021.[14] These materials did not include a percolation test and well permit as required and as had been requested by the Municipality. Despite this, the Municipality sent the Appellant's materials to the Department for review. This was to facilitate the Department proving comments to the Municipality about whether the proposed development complied with setbacks prescribed from wetlands pursuant to the *Environmental Protection Act Regulations,* and was done to advance consideration of the Appellant's proposed development (so that when a completed application was received, it would be able to be processed immediately).

16. The Development Bylaw prescribes development setbacks from wetlands that mirror the setback requirements in the *Environmental Protection Act Regulations.* [15] However, if any setback requirements in the Development Bylaw are inconsistent with the *Environmental Protection Act Regulations,* the higher or more stringent provision shall prevail.[16] This is why the Municipality, as a matter of sound planning practice, defers to the Department for comments on whether the proposed development satisfies setback requirements prescribed in the *Environmental Protection Act Regulations.*

17. The Appellant proceeded to construct an access road to his proposed development in a wetland contrary to the *Environmental Protection Act Regulations.*[17] The Department advised the Appellant and the Municipality that it would be unable to pass along its comments to the Municipality until environmental concerns with the access road and proposed development were rectified. This, combined with the fact that the Appellant had yet to complete his proposed development application with a percolation test and a well permit, resulted in an incomplete development application.

18. The Municipality is unable to issue a development permit to the Appellant with knowledge that the access road and proposed development contravene the *Environmental Protection Act Regulations.*

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[11] Record of the Municipality, Tab 3.
[12] *PEI Energy Corporation (Re),* LA20-03, 2020 CanLII 125986 (PE IRAC).
[13] Record of the Municipality, Tabs 4 and 5.
[14] Record of the Municipality, Tab 7.
[15] Rural Municipality of Eastern Kings Development Bylaw, s. 5.3 and 5.16.
[16] Rural Municipality of Eastern Kings Development Bylaw, s. 5.16, 2.
[17] Record of the Municipality, Tab 12, p. 34.

In fact, by doing so, the Municipality would be placing itself in contravention of section 2(2) of the *Environmental Protection Act Regulations,* which state that "[n]o person shall, without a license…permit the engaging in"[18] the alteration of a wetland in any manner.[19]

19. The Appellant was made aware of the reasons the materials submitted in support of his proposed development were not being processed by the Municipality. It was the Appellant's responsibility to ensure that provincial requirements were rectified and that all documentation required to complete an application for a proposed development were received by the Municipality. Over two years have passed since the Appellant became aware of what was required to complete his application, and to date, the Appellant has failed to do so. There is no further, or other, "proper procedure" that may be taken by the Municipality under the Development Bylaw with respect to the Appellant's proposed development. The only option for the Municipality is to await a complete application.

20. The Commission has previously found that a municipality follows proper procedure by ensuring the information required under a development bylaw is obtained prior to the issuance of a development permit.[20] In this case, steps taken by the Municipality to ensure the proposed development's compliance with setbacks in the *Environmental Protection Act Regulations* also ensure that the proposed development's compliance with the Development Bylaw. The Municipality followed proper procedure by waiting for all information required under the Development Bylaw before considering and issuing a development permit to the Appellant.

21. With respect to the Appellant's statement that no notice of the Municipality's "decision" was given in accordance with s. 23.1 of the *Planning Act* – as noted above, exercising discretion to wait until an application is complete before processing it, is not making a "decision" in respect of a "application". It most certainly is not a "decision" to deny the Appellant's proposed development, and is not a "decision" of a type described in section 28(1.1) of the *Planning Act.* Accordingly, no written notice section 23.1 of the *Planning Act* was required to be posted by the Municipality.

22. The Municipality's reliance on input from the Department with respect to the Appellant's proposed development – and all proposed developments in the Municipality – is not an "arbitrary" or "irrelevant" consideration. The Department is equipped with the relevant expertise to ensure that the buffer zone setback requirements from wetlands (in both the *Environmental Protection Relations* and the Development Bylaw) are satisfied. The Municipality's reliance on the Department in these circumstances is neither arbitrary or irrelevant.

23. With respect to the Appellant's suggestion that the Department is in a "conflict of interest" in this case - we wish to note that a decision maker is in a "conflict of interest" when he or she allows their personal interests to influence their exercise of statutory powers.[21] It is unclear how a personal interest of the Department or its employees arises "due to a proposed renewable energy project on neighbouring lands."

C. The Appellant has failed to provide the Municipality with sufficient information upon which it may review the proposed development against Sound Planning Principles.

24. The Municipality's record speaks for itself. The Appellant did not submit a complete application for a development permit upon which the Municipality could make an informed decision as to whether a development permit should be issued to the Appellant. The Commission has previously stated that:

> *Land use planning in this province has come a long way in the last 20 years. <u>The time of incomplete applications receiving approval and building permits being issued with the</u>*

[18] *Environmental Protection Act Regulations*, s. 2(2).
[19] *Environmental Protection Act Regulations,* s. 2(1).
[20] *PEI Energy Corporation (Re),* LA20-03, 2020 CanLII 125986 (PE IRAC), at para. 69.
[21] Sara Blake, *Administrative Law in Canada*, 7th ed. (Toronto: LexisNexis Inc., 2017) at s. 3.02, p. 108.

details being worked out later, or worse, just being implemented by a developer making the decision on their own – has long passed.

This Commission and the courts of this province have stated that this is no longer satisfactory. Planning and development must be approached in a professional manner, consistent with a process that provides for development permits to be issued only after all pertinent facts and information have been filed with a Municipal decision-maker. This allows for an informed decision to be made to approve or reject a building permit application and to ensure what is being proposed complies with the Bylaws, the official plan and sound planning principles.[22]

25. The materials the Appellant has submitted to the Municipality are, quite simply, incomplete. It is not appropriate for the Municipality to consider and approve an incomplete application with the details of wetland delineation, a percolation test, and a well permit being worked out later. The Appellant has failed to provide the Municipality with sufficient information upon which it may review the proposed development against sound planning principles.

RELIEF SOUGHT

26. The Municipality asks that the appeal be dismissed.

Dated at Charlottetown, Prince Edward Island, this 10th day of November, 2023.

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[22] *PEI Energy Corporation (Re),* LA20-03, 2020 CanLII 125986 (PE IRAC), at paras. 95-96.