IN THE MATTER OF an appeal by Carol-Ann McLaine and William McLaine of a decision by the Rural Municipality of Miltonvale Park to issue a development permit for a private utility structure (solar array) on July 15, 2020.

REPLY SUBMISSIONS OF THE APPELLANTS

PART I – OVERVIEW

1. The Municipality says the Appellants have found a conflict where there is not one. The Appellants say the Municipality ignores a clear and ever-present conflict. The Commission's finding on this issue is fundamental to the dispute.

2. At issue here is the definition of "private utility". It is not that this term is defined in an ambiguous manner. Rather, a definition is not found anywhere. The term is not defined in the Bylaw or any other legislation of Prince Edward Island. It is not found in legal dictionaries or lay dictionaries. No case appears to have ever defined the term, and particularly not in the context of a municipal bylaw.

3. The Appellants have been left to draw upon the other provisions in the Bylaw, particularly those dealing with satellites, solar collectors and wind energy conversion systems, to understand what "private utilities" may encompass. This review leads to the conclusion that if the term "private utilities" includes the Array, then the Bylaw is not coherent.

4. The Municipality argues that the Appellants have overstated their case by using hyperbolic language. The language of "contradiction" and "absurdity" is taken directly from the case law and the Sullivan textbook to characterize provisions of a law that are conflicting or incoherent.

5. This reply responds to the Municipality's submissions on whether a conflict exists and addresses the usage of dictionary definitions, the *Planning Act Regulations*, and the purpose of the Bylaw.

PART II – SUBMISSIONS

A. Conflict in the Bylaw

6. The Municipality states at paragraph 26 of its submissions that "Section 4.24(2) is only an exemption from 'zone standards'". The Municipality emphasizes at paragraphs 6-10 of its submissions that the Array meets the zoning standards because of its setback.

7. The issue is not whether the Array meets the zoning standards. The issue is whether the Array is permitted in the A1 Agricultural Zone in the first place.

8. Section 4.24(2) of the Bylaw is not only an exemption from zone standards. This section also permits a public or private utility to be located in any zone. It is the authorization to locate a utility in any zone that leads to much of the conflict with the provisions in the Bylaw dealing with wind energy conversion systems.

9. In the Appellants' original submission at paragraphs 51 and 52, an example is presented to illustrate the conflict. According to section 4.32(3)(i) of the Bylaw, wind turbines with capacity of more than 100 kilowatts are only permitted in the A1 zone. If wind turbines are utilities, then section 4.32(3)(i) stands in direct contradiction to the authorization from section 4.24(2) that utilities may locate in any zone. One provision prohibits what the other allows.

10. The Municipality points out at paragraph 27 of its submissions that a conflict "only exists between two seemingly contradictory provisions when that apparent contradiction 'cannot be avoided by interpretation'". This is precisely the point.

Section 4.24(2) and 4.32(3)(i) are seemingly contradictory unless the term "public and private utilities" is interpreted to not include wind turbines. If "public and private utilities" does not include wind turbines, it would also not include solar arrays.

11. The Municipality argues at paragraph 28 that the Appellants have failed to avoid the conflict by interpretation. The opposite is true. The Municipality insists that the Array is a private utility. This runs directly into the conflict. It is the interpretation of the Appellants, which does not include ground mounted solar structures within the definition of private utility, that avoids the conflict.

12. At paragraph 29, the Municipality asserts that even if there is a conflict, it can be resolved by the implied exception rule.

13. The implied exception rule is a rule of last resort. As pointed out in *Sullivan on the Construction of Statutes*:

> *If the provisions cannot both apply without conflict, the courts resort to one of the conflict resolution techniques at their disposal. These include…(4) implied exception…*
>
> **See: Ruth Sullivan, *Sullivan on the Construction of Statutes* (Markham: LexisNexis, 2014) at p. 338 [Tab A]**

14. In other words, the Court will first attempt to interpret a provision so as to avoid a conflict. Only if a conflict cannot be avoided will the Court turn to application of the implied exception rule. In this case, the conflict can be avoided by defining private utility so as not to include renewable energy systems that generate energy for use only by their owners.

15. Finally, absent from the Municipality's discussion on the alleged coherence of the Bylaw was a response to the Appellant's contention at paragraphs 56-57 of their original submission that the height exemption for solar collectors in the Bylaw

would be superfluous if solar structures are entirely exempt from zone standards as a result of section 4.24(2) of the Bylaw.

B. Usage of Dictionary Definition

16. The Municipality criticizes the Appellants' reference to Black's Law Dictionary and Merriam Webster Dictionary for guidance in defining "private utility" (see paragraphs 23 and 27 of Appellant's original submissions).

17. Decision-making bodies often refer to the dictionary definition of an ambiguous or undefined term. For instance, a search of the Commission's decisions demonstrates that it utilized the dictionary definition of undefined or amiguous terms in eleven different cases.

18. The Appellants maintain that reliance on the dictionary definitions is a commonly utilized practice and can at least provide a starting point for the Commission's analysis in this particular case.

C. Application of the *Planning Act Regulations*

19. The Municipality relies upon the *Planning Act Regulations* to support its contention that the Array is a private utility. The term "private utility" is not defined in the *Planning Act Regulations*. However, the Municipality suggests that to define "private utility", one can transplant the definition of "public utility" into the Bylaw and restrict it so that the utility is used only by the owner.

20. The definition of "public utility" in the *Planning Act Regulations* is as follows:

> *Any person or corporation…who owns, operates, manages or controls…any plant or equipment*
> *(i) for the conveyance or transmission of telephone messages,*

(ii) for the production, transmission, distribution or furnishing of electric energy, or
(iii) for the provision of water or sewerage service,
either directly or indirectly, to or for the public.

21. This definition does not assist with defining "private utility" in the Bylaw for at least three reasons. First, a public utility is defined as a person or corporation in the *Planning Act Regulations*. This has no applicability to the Bylaw. Section 4.24 of the Bylaw is not authorizing a person or corporation to be located in any zone. Rather, the Bylaw is dealing with certain types of structures that can be located in any zone.

22. Second, the utilities referenced in the definition of public utility found in the *Planning Act Regulations* cannot be restricted to use by their owner. For instance, there can be no "distribution" of electric energy if in the case of a private utility that energy is only for use by the owner. Similar problems arise when one considers a sewerage service or the conveyance or transmission of telephone messages. By their very nature, the utilities referenced in the definition of "public utility" in the *Planning Act Regulations* are goods used and distributed throughout the community at large.

23. In other words, whether the utility is public or private, it is generating or distributing a good to the community (see also the dictionary definition of utility at Tab "K" in the Appellant's original submissions). The Array, which purports to only benefit its owners, does no such thing.

24. Third, section 4.25(2) of the Bylaw prohibits satellite dishes greater than two feet in diameter. If the satellite dishes were used for the conveyance or transmission of telephone messages, then once again, the Bylaw would be prohibiting with one section (4.25(2)) what it allows with another (section 4.24(2)).

D. Purpose of the Bylaw

25. As pointed out by the Municipality, section 9 of the *Interpretation Act*, R.S.P.E.I. 1988, c I-8 requires that the Bylaw be interpreted to provide such liberal interpretation as will meet its objectives.

26. With this in mind, it is necessary to consider the recognized "principal purpose" of zoning regulations. This purpose was described by I. M. Rogers, Canadian Law of Planning and Zoning (Toronto: Carswell, 1973) and cited with approval by numerous Courts, including the British Columbia Court of Appeal. The oft-cited quote is as follows:

> ***The principal purpose of zoning regulations, as with restrictive covenants, is to preserve property values by prohibiting uses which are believed to be deleterious to neighbourhoods mainly residential in character.*** *People living in an area of single family homes naturally want the same type of homes in the district, that is, a use that is compatible. They want to preserve the amenities of their locality. Thus from the standpoint of the rate payers it is the status quo that is sought to be maintained and build up residential areas which are figuratively rimmed with "keep out" signs. Industry, always an unwelcome intruder in a residential community, also favours a zoning wall that bars residential and other incompatible encroachments. [**emphasis added**]*
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> **See: *North Pender Island Local Trust Committee v. Conconi,* 2010 BCCA 494, at para. 14.**
> **[Tab B]**

27. The excerpts from the Official Plan cited at paragraph 35 of the Appellants' original submissions dovetails with the principal purpose of zoning regulations set out above. However, it is perhaps best encapsulated by section 6.2 of the Official Plan:

> *It is the policy of Council to establish residential development standards relating to density, architectural harmony, setbacks, parking, and land use buffers in order to enhance the health, safety and convenience of residents.*

28. The Bylaw takes heed of these "standards", "harmony", "setbacks" and "buffers" for the "health, safety and convenience of residents". It carefully delineates only the specific uses that are permissible in each zone.

29. Based on the foregoing, it is a restrictive rather than liberal interpretation of "private utility" that best achieves the Bylaw's principal purpose. Otherwise, a ground mounted solar array of any dimension, which could directly abut a neighbour's property line in any zone, would be permissible. This would detract from the explicit purposes of the Bylaw set out in the Official Plan and recognized by the jurisprudence.

30. While the Appellants have no right to a view, the Appellants, as well as the more than 100 people who signed the Petition, have a right to have the zoning bylaw of the municipality in which they live interpreted in a manner that preserves the amenities of their locality.

31. Until ground mounted solar arrays are regulated in the next iteration of the Bylaw, and that balance can be struck between encouraging small renewable energy systems with the other purposes laid out in the Bylaw (as was done with wind energy conversion systems), these arrays are not permissible in any zone.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 16th day of February, 2021.

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