



# Prince Edward Island Île-du-Prince-Édouard

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**VIA EMAIL – pjrufuse@irac.pe.ca**

Philip J. Rafuse  
Appeals Administrator  
The Island Regulatory and Appeals Commission  
National Bank Tower, Suite 501  
134 Kent Street, Charlottetown PE C1A 7L1

**Re: Appeal Docket LA21024 – Lucas & Jennie Arsenault and L&J Holdings Inc. v.  
Minister of Agriculture and Land  
Our File: LS 023876**

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1. We represent the Minister of Agriculture and Land (the “Minister”) in relation to the above noted appeal filed by Lucas and Jennie Arsenault and L&J Holdings Inc. on October 7, 2021. We are writing in response to the Appellants’ submissions included with their appeal.
  2. The Minister’s position is that the required proper process and procedure was followed in making this decision, and that the decision was made on the basis of sound planning principles within the field of land use planning and as identified in the objects of the *Planning Act*, RSPEI 1988, P-8. Therefore, the appeal must be dismissed.

## Background and Decision

3. On July 9, 2021, the Minister received an application to consolidate two parcels (PIDs 808154 and 203000) and then subdivide the new 44-acre parcel into 19 lots for residential use (the “Subject Property”). The Subject Property is located off the Hennebury Road in Rice Point, Prince Edward Island. The Subject Property is currently (or formerly) used for resource agriculture use. The application was for a 19-lot subdivision consisting of a single road with access off the Hennebury Road with half of the lots fronting the shore of the Northumberland Strait.<sup>1</sup>
4. On September 17, 2021, the Minister denied the application pursuant to subsections 3(1)(b) and (d), and 13(a) and (j) of the *Planning Act Subdivision and Development Regulations*, EC693/00 (the “Decision”).

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<sup>1</sup> Record – **Tab 1**, Decision, pg. 1 of 3,

5. The reasons for the Decision include that the area of Rice Point in which the Subject Property is located is primarily resource agriculture use with some residential use and small cottage development in the area. The Appellants' proposed subdivision is considered incompatible for the area and would precipitate premature development in the area. In addition, approval of a subdivision would use valuable agriculture land.
6. Additional reasons for the Minister's denial are contained in the report of Alex O'Hara, Land Use and Planning Act Specialist with the Department of Agriculture and Land.<sup>2</sup> Those detailed reasons will be discussed below.

## **Appeal**

7. The Appellants have sought an order from the Commission overturning the Decision of the Minister and approving the subdivision application. The Appellants' grounds of appeal are (some are paraphrased):
  - (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;
  - (2) Failure to abide by the processes and procedures as set out in the *Planning Act* and *Planning Act Subdivision and Development Regulations*;
  - (3) Failure to make a decision in accordance with the applicable legislation; and
  - (4) Failure to make a decision in accordance with sound planning principles and/or the principles of natural justice.
8. The Minister's response to the Appellants' submissions on these grounds of appeal is below.

## **Minister's Position**

9. The Commission has previously stated (Order LA17-06) that it is of the view that the following test should be applied to Ministerial decisions made under the *Planning Act* and its Subdivision and Development Regulations (the "Regulations"):<sup>3</sup>
  - Whether the land use planning authority, in this case the Minister, followed the proper process and procedure as required in the Regulations, in the *Planning Act* and in the law in general, including the principles of natural justice and fairness, in making a decision on an application for a development permit, including a change of use permit; and
  - Whether the Minister's decisions with respect to the applications for development and the change of use have merit based on sound planning principles within the field of land use planning and as identified in the objects of the *Planning Act*.
10. The Minister followed the proper process and procedure required in making this Decision, and that the Decision was made on the basis of sound planning principles within the field of land use planning.

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<sup>2</sup> Record – **Tab 1**, Report of Alex O'Hara

<sup>3</sup> Order LA17-06, para 52.

## **(1) Interpretation of Discretionary Provisions**

11. The Appellants' first ground of appeal alleges that the terms "premature development" and "detrimental impact" found at clauses 3(1)(b) and (d) of the Regulations are too vague and discriminatory and lack objective criteria to make determinations. However, the Minister submits that these terms are well-known in the context of land-use planning, and that section 13 of the Regulations guides the discretion of decision-makers in applying them in respect of subdivision designs.
12. Section 13 provides that subdivision designs shall be based on sound planning principles and shall demonstrate that the proposed subdivision is suited to the intended use, having due regard for ten separate factors, including compatibility with surrounding uses and natural features:

### **13. Principles**

Subdivision designs shall be based on sound planning, engineering, and environmental principles, and shall demonstrate that the proposed subdivision is suited to the intended use, having due regard for

- (a) compatibility with surrounding uses;
- (b) the topography of the site;
- (c) surface drainage on the site and its impact on adjacent parcels of land;
- (d) traffic generation onto adjacent highways;
- (e) availability, adequacy and the economical provision of utilities and services;
- (f) the ability to further subdivide the land or adjoining land;
- (g) the provision of lots suitable for the intended use;
- (h) waste water management;
- (i) water supply; and
- (j) natural features.

13. In Order LA17-07, the Commission described section 13 as imposing mandatory obligations on the Minister when considering use suitability and sound planning principles in reviewing subdivision designs. The Commission commented that section 13 sets out required design considerations and relevant factors when the discretion of the Minister is being exercised to approve the subdivision of land.<sup>4</sup>
14. The Minister submits, therefore, that section 13 provides decision-makers with relevant, consistent and objective criteria to consider when making determinations about subdivision applications pursuant to subsections 3(1) and 12(1).

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<sup>4</sup> Order LA17-07, paras 50-51.

## **(2) Process and Procedure**

15. In respect of the Appellants' second and third grounds of appeal, the Minister submits that the Decision meets the first part of the two-part test in that the Minister followed the proper process and procedure, and the applicable legislation, when making the Decision.
16. Subsection 6(c) of the *Planning Act* provides that the Minister shall generally administer and enforce the Act and its Regulations. The Subdivision and Development Regulations apply to all areas of the province, except those municipalities with official plans and bylaws.<sup>5</sup>
17. The subject property is located in Rice Point, which is a shared planning area. The community of Rice Point does not have an official plan or bylaws, and therefore the Subject Property falls under the Regulations.
18. Part III – B of the Regulations sets out the standards specific to subdivision approvals. Subsection 12(1) provides that no person shall subdivide land without first obtaining final approval of the subdivision from the Minister.
19. Subsection 3(1) of the Regulations provides that no person shall be permitted to subdivide land where the proposed subdivision would:
  - (a) not conform to these regulations or any other regulations made pursuant to the Act;
  - (b) precipitate premature development or unnecessary public expenditure;
  - (c) in the opinion of the Minister, place pressure on a municipality or the province to provide services; or
  - (d) have a detrimental impact.
20. In this case, the Minister found that the appellants' proposed subdivision design would precipitate premature development and have a detrimental impact on the surrounding area (these findings will be discussed in greater detail below at the second stage of the test). Therefore, the Minister denied the application pursuant to subsections 3(1)(b) and (d), and 13(a) and (j) of the Regulations.
21. The Minister submits that a review of the Decision and the Record demonstrates that the statutory requirements and principles set out in the *Planning Act* and its Subdivision and Development Regulations were considered and applied during the Minister's assessment of the Appellants' subdivision application.
22. The Record demonstrates that upon receipt of the application, Danny Cusack, Senior Development Officer with the Provincial Planning Branch, sought input on the proposed subdivision from the following Divisions/Departments within Government:<sup>6</sup>
  - Provincial Fire Marshall (David Rossiter)
  - Civic Address Coordinator, Public Safety (Steven Dickie)

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<sup>5</sup> Regulations, s. 2(1).

<sup>6</sup> Record – **Tab 4**

- Traffic Operations, Department of Transportation & Infrastructure (Brett Wallace and Jeff Sampson)
- Environmental Land Management, Department of Environment, Energy and Climate Action (Dale Thompson)
- Hydrogeologist, Department of Environment, Energy and Climate Action (Qing Li)

23. The Minister also sought the opinion of a professional land use planner with respect to the proposed subdivision.<sup>7</sup> Alex O’Hara is a Land Use and Planning Act Specialist employed with the Provincial Planning Branch of the Department of Agriculture and Land. Mr. O’Hara has a Master’s degree in Planning and Property Development from the University of Ulster. In preparing his report, Mr. O’Hara carried out two site visits: one on July 9, 2021, and a second on September 7, 2021.
24. The Minister submits that the first part of the test is satisfied. The Decision and attached report of Alex O’Hara demonstrates that the relevant sections of the *Planning Act* and its Subdivision and Development Regulations were considered and applied in this case, and that the Minister followed the proper process and procedure in making a decision on the Appellants’ subdivision application.

### **(3) Sound Planning Principles**

25. Regarding the Appellants’ third ground of appeal, the Minister submits that the Decision also meets the second part of the test in that it has merit based on sound planning principles within the field of land use planning and as identified in the objects of the *Planning Act*.
26. Returning to the Appellants’ first ground of appeal, the Minister submits that the assessment of this subdivision proposal pursuant to sections 3 and 13 of the Regulations and the application of sound planning principles ensured that the decision was neither arbitrary nor based “only on the opinion of” the Manager of Provincial Planning, Eugene Lloyd.
27. The Minister, again, highlights the Commission’s findings in Order LA17-06 that sound planning principles are a guard against arbitrary decision making. The Commission stated:<sup>8</sup>

Sound planning principles require regulatory compliance but go beyond merely insuring such compliance and require discretion to be exercised in a principled and informed manner. Sound planning principles require the decision maker to take into consideration the broader implications of their decisions. In order to ensure that sound planning principles have been followed in anomalous applications a professional land use planner must be consulted.

28. The Commission has previously commented that sound planning must be a common feature of development throughout Prince Edward Island.<sup>9</sup> In determining whether or not a subdivision proposal should go forward, the Minister must make an examination “beyond the strict conformity with the Regulations and must consider sound planning principles”.<sup>10</sup>

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<sup>7</sup> Record – **Tab 1**, Report of Alex O’Hara

<sup>8</sup> Order LA17-06, para 64.

<sup>9</sup> Order LA17-06, para 64.

<sup>10</sup> Order LA17-06, para 58.

29. The report of Alex O'Hara acknowledges and responds to this guidance. In its opening comments, the report notes that while applicants must satisfy that an application *can* be approved under the Regulations, his planning comments address the question of whether it *should* be approved from a land-use planning perspective.
30. In this case, the Minister acknowledges that neither the Provincial Fire Marshall, Public Safety, the Department of Transportation & Infrastructure nor the Department of Environment, Energy and Climate Action, were opposed to the subdivision proposal. In other words, the feedback received from other Departments/Divisions within Government suggested that the subdivision proposal *could* be approved from a technical perspective.
31. However, Mr. O'Hara's planning report recommended that the proposal *should not* be approved on the basis of land use planning concerns and sound planning principles.
32. In this case, the application of sound planning principles required that the Minister deny the Appellants' subdivision application pursuant to subsections 3(1)(b) and (d), and 13(a) and (j) of the Regulations.

### 3(1)(b) – Premature Development

33. The Regulations provide that no person shall be permitted to subdivide land where the proposed subdivision would precipitate premature development.<sup>11</sup>
34. Neither the Act nor Regulations specifically define premature development or explain the concept. However, the Minister submits that this is a familiar concept in the context of land use planning. In addition, the Commission has previously provided some guidance in applying this concept. In Order LA96-05, the Commission commented that the concept of prematurity is multi-disciplinary and imports social, economic and fiscal considerations.<sup>12</sup>
35. The report of Alex O'Hara recommended the subdivision proposal be denied on the basis of, among other things, premature land subdivision.
36. In the opinion of Mr. O'Hara, approval of this 19-lot subdivision would be a catalyst for increased development in the Rice Point area.
37. There are currently (at least) forty-three (43) lots available to be developed in the immediate vicinity of the Subject Property.<sup>13</sup> If the Minister were to approve this subdivision, it would increase the number of lots available for development in Rice Point by almost fifty percent (from 43 approved lots to 62 approved lots). This would result in an oversupply of lots approved for development in Rice Point.
38. In addition, it is Mr. O'Hara's opinion that approval of this subdivision would not contribute to "infilling". Infilling is the use of land within a built-up area for further development. Because Rice Point is not yet "built-up", development of the Subject Property would be premature.
39. This is well demonstrated when one looks at the map attached at Appendix A. The map depicts lots available to be developed in orange. If the Subject Property was subdivided and

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<sup>11</sup> Planning Act Subdivision and Development Regulations, s. 3(1)(b).

<sup>12</sup> Order LA96-05.

<sup>13</sup> See attached map, **Appendix A** – lots approved for development are in orange

approved for development, it would be shaded orange on the attached map. Imagining this scenario, it can easily be seen that future development of PIDs 790683 and 202994 would be appropriate for infilling. Before long, the entire area would be available for residential development.

40. This particular subdivision development would, therefore, be premature because there are currently 43 vacant lots in the immediate vicinity and a further supply of additional residential lots would be in advance of market demand.

### 3(1)(b) – Detrimental Impact

41. The Regulations provide that no person shall be permitted to subdivide land where the proposed subdivision would have a detrimental impact.<sup>14</sup> The Regulations define “detrimental impact” as:

**(f.3) “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 subdivisions, buildings or developments with regard to

- (i) real property value;
- (ii) competition with existing businesses;
- (iii) viewscales; or
- (iv) development approved pursuant to subsection 9(1) of the Environmental Protection Act;

42. As indicated in the report of Alex O’Hara, the proposed subdivision would deplete approximately 3000’ of shore frontage along the south shore.<sup>15</sup> Protection of PEI’s natural environment is important to the Province and avoiding developments such as this will reduce the adverse impacts of coastal development.

### 13(a) – Compatibility with Surrounding Uses

43. Subdivision designs shall be based on sound planning principles and shall demonstrate that the proposed subdivision is suited to the intended use, having due regard for compatibility with surrounding uses.<sup>16</sup>

44. The Subject Property is considered prime agriculture land, and much of the surrounding area is currently used as such.<sup>17</sup> A residential subdivision in this area could create tension between agriculture and residential users, and would, therefore, be incompatible with the surrounding uses.

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<sup>14</sup> Planning Act Subdivision and Development Regulations, s. 3(1)(d).

<sup>15</sup> Record – **Tab 1**, Report of Alex O’Hara

<sup>16</sup> Planning Act Subdivision and Development Regulations, s. 13(a).

<sup>17</sup> Record – **Tab 1**, Report of Alex O’Hara

### 13(j) – Natural Features

45. Subdivision designs shall be based on sound planning principles and shall demonstrate that the proposed subdivision is suited to the intended use, having due regard for natural features.<sup>18</sup>
46. Similar to the submission above, the report of Alex O'Hara states that residential development and subdivision along PEI's coastline has caused serious issues regarding coastal erosion and scenic views that will have long-term economic and social consequences. This particular development would comprise the entire shore frontage of the Subject Property.

### Conclusion on Sound Planning Principles

47. The objects of the *Planning Act* require: efficient planning, protection of the Province's unique environment, an effective means for resolving land use conflict and the opportunity for public participation in the planning process.<sup>19</sup>
48. The Minister submits that the Decision in this case furthers the objects of efficient planning and protecting the Province's unique environment, including its coastline. The Minister's decision is supported by sound planning principles within the field of land use planning.

### **Conclusion**

49. For the reasons outlined above, the Minister submits that this appeal must be dismissed.
50. In assessing this subdivision proposal, the Minister considered relevant, consistent and objective criteria.
51. The relevant sections of the *Planning Act* and its Subdivision and Development Regulations were considered and applied in making this Decision, and the Minister followed the proper process and procedure in assessing the Appellants' subdivision application.
52. Finally, the Decision has merit based on sound planning principles within the field of land use planning and as identified in the objects of the *Planning Act*.
53. Trusting this is satisfactory, if you have questions about these submissions, please do not hesitate to contact the undersigned.

Yours very truly,



Jessica Gillis

cc. Melanie McKenna  
Counsel for the Appellants

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<sup>18</sup> Planning Act Subdivision and Development Regulations, s. 13(j).

<sup>19</sup> *Planning Act*, s. 2.

