



## Prince Edward Island

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## Île-du-Prince-Édouard

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August 30, 2023

**VIA EMAIL – pjrafuse@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 #LA23-015  
Gordon MacCallum v. Minister of Housing, Land and Communities  
Our File: LS25624**

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1. I represent the Minister of Housing, Land and Communities (the "Minister") in relation to the above noted appeal filed by Gordon MacCallum (the "Appellant") on July 11, 2023 (the "Appeal"). The Appeal arises from the Minister denying the Appellant's June 15, 2023 application to change the use of and subdivide a portion of PID#731307 located in Brackley Beach, Queens County (the "Subject Property"), into five (5) residential (single-unit) lots (the "Application").
  2. The Minister's position is that as the Subject Property is "Open Space" as that term is defined in subsection 1(m.2) and used in section 15 of the *Planning Act Subdivision and Development Regulations*, PEI Reg EC693/00 (as amended) (the "Regulations"), the subdivision sought in the Application is not permitted. As such, the Minister's decision to deny the Application accords with the *Planning Act*, RSPEI 1988, Cap. P-8 (the "Act").

### **Background and Decision**

3. On June 15, 2023, the Minister received the Application.
4. On completing a preliminary review, the Minister identified the Subject Property as "Open Space" with a wetland on the latest approved subdivision plan for the subject area. The Appellant sought to change the Subject Property's use to residential and subdivide it into multiple lots, but did not provide for the requisite "Open Space" in elsewhere the subdivision.



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5. On June 27, 2023, the Minister denied the application pursuant to subsection 8(1)(a) of the *Act* and subsections 1(m.2), 3(2)(a), 15(1), 15(2), 28, 29(1) and 34 of the *Regulations* (the "Decision"). As outlined in the Decision, the identification of the Subject Property as "Open Space" meant the lot was intended to be held in common by the owners of the lots in the subdivision, and the proposed change of use was thus prohibited by the provisions within the *Regulations*.

### **Appeal**

6. The Appeal is pursuant to section 28 of the *Act*.
7. The Appellant's grounds of appeal are summarized and paraphrased as follows:
  - a. The owners of the properties surrounding the Subject Property do not wish to take ownership of the Subject Property;
  - b. In its current use the Subject Property is being wasted; and
  - c. Once subdivided, the new lots could be developed thus increasing tax revenue.
8. The Appellant seeks an Order from the Commission overturning the Minister's decision denying subdivision and approving the proposed subdivision.
9. The Minister is providing the Record of the Decision to the Appellant and filing same with the Commission on the same date as the within submissions are dated.
10. The Minister's response to the Appellant's grounds of appeal is outlined below. Should the Appellant expand on, provide further explanation for, and or otherwise provide submissions on his grounds of appeal, the Minister reserves the right to provide a further reply thereto.

### **The Act and Regulations**

11. Subsection 6(c) of the *Act* provides that the Minister shall generally administer and enforce the *Act* and its *Regulations*.



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12. The *Regulations* apply to all areas of the province, except those municipalities with official plans and bylaws. The Subject Property is located in Brackley Beach, Queens County, which is an area where land use and development are not regulated by a local official plan or zoning by-law. Therefore, the land use and development of the Subject Property is regulated by the *Act* and *Regulations*.
13. Subsection 3(1) of the *Regulations* provides:
- “3. *General requirements - subdivisions*
- (1) ***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.” [Emphasis Added]*
14. In other words, the Minister *must deny* an application that contravenes any one (or more) of these general requirements.
15. Subsection 1(m.2) of the *Regulations* defines an “*Open Space*” as “*an outdoor amenity space for active or passive recreational use.*” Subsection 15(1) of the *Regulations* provides as follows:
- “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.”*





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16. Section 34 of the *Regulations* provides as follows:

“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.”*

### **The Test**

17. In Order LA17-06 (“*Stringer*”)<sup>1</sup> the Commission outlines the applicable test for Ministerial decisions made under the *Act* and *Regulations*, namely:
- a. 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
  - b. 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 *Act*.

### **Applying the Test**

18. In this case, the Minister followed the proper process as set out by law, applied sound planning principles, and therefore, the Decision requires deference.
19. The Minister met the first part of the test. The Decision and supporting evidence demonstrate the Minister followed the proper process and procedure, and the applicable legislation. The Decision was not overly broad or arbitrary and was grounded in the principles of natural justice.
20. The Minister also met the second part of the test as the Decision is supported by objective and reliable evidence, and is based on the *Act*, the *Regulations*, and sound planning principles.

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<sup>1</sup> *Stringer (Re), Donna Stringer v Minister of Communities, Land and Environment*, Order LA17-06 (“*Stringer*”) at para 52



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21. With respect to step two of the test, the Commission states in *Stringer* that “*sound planning principles require regulatory compliance*”.<sup>2</sup>
22. The Minister found that the Subject Property was identified as a “*park area*”, that included a pond or wetland, in various survey plans. The Minister determined that a “*park area*” is an “*Open Space*” as defined in the *Regulations*.
23. As the Subject Property is identified in the subdivision plan as a “*park area*” and thus is “*Open Space*”, the Minister concluded that permitting the Subject Property’s subdivision to be used for multiple residential lots, as requested in the Application, would be contrary to its specified use. Furthermore, the Application did not provide for the requisite “*Open Space*” to be found elsewhere in the subdivision. Pursuant to section 34 of the *Regulations*, the Minister could not approve the Application.
24. Given the Application’s lack of regulatory compliance, the Decision meets both steps in the test.

### **Conclusion**

25. For the reasons outlined above, the Minister submits that the Appeal must be dismissed.
26. Trusting the foregoing is satisfactory; however, if you have questions about these submissions, please do not hesitate to contact me.

### **ALL OF WHICH IS RESPECTFULLY SUBMITTED**

Yours truly,

Richard A. Collier  
Solicitor for the Minister of  
Housing, Land and Communities  
RAC/am

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<sup>2</sup> *Stringer* at para. 64