



## Prince Edward Island

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## Île-du-Prince-Édouard

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July 26, 2023

**VIA EMAIL – [pjrafuse@irac.pe.ca](mailto: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 63999 – Virginia Higginbotham & Dwayne Higginbotham v. *Minister of Housing, Land and Communities***  
**Our File: 25547**

1. I represent the Minister of Housing, Land and Communities (“Minister”) in relation to the above noted appeal filed by Virginia and Dwayne Higginbotham (“Appellants”) on June 21<sup>st</sup>, 2023. The Appeal is in relation to the denial by the Minister to change the use of PID 891549 located in Murray Harbour, Kings County, (“the Subject Property”) from Open Space to (Single-Unit) Dwelling. I am writing in response to the Appellants’ Notice of Appeal.
2. The Minister’s position is that there is sufficient evidence to support the identification of the Subject Property as an “open space” as that term is defined in s.1(m.2) and used in s.15 of the *Subdivision and Development Regulations*, PEI Reg EC693/00, and that the decision was made in accordance with the provincial planning regulation requirements as identified in s.8(1)(a) of the *Planning Act*, RSPEI 1988 P-8.

### **Background and Decision**

3. On October 28, 2022 the Minister received an application for the change of use for PID 891549 (“Application”). The application noted that the survey plan for the lot indicated that it was an open area, and that the request was to build a single unit residential cottage on the lot.
4. After conducting a preliminary review, the subject property was identified as “Tree Plantation (Open Space)” on the latest approved subdivision plan for the subject area. The request from the Applicant was to consider changing the use of the subject property to Residential (single-unit) dwelling to allow for the construction of the cottage on the property.



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5. On June 2, 2023 the Minister denied the application pursuant to clause 8(a) *Planning Act* (“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* (“Regulations”). As provided in the reasons of the Decision, the identification of the subject property as open space was a requirement of subdivision approval for any subdivision consisting of more than five residential lots, and the proposed change of use was therefore, prohibited by the provisions within the regulations.
6. Potential purchasers of lots within this subdivision and existing lot owners would have had the opportunity to view the approved subdivision plan and be aware of this area being identified as open space. There would be a natural expectation that the open space would remain as open space as a requirement of the regulations and thus may be a very important consideration when purchasing a lot.

### Appeal

7. The Appeal was made pursuant to Section 28(1)(d) of the *Act*.
8. The Appellants have sought an Order from the Commission overturning the Decision of the Minister and approval of the proposed change of use.
9. The Appellants grounds of appeal are summarized and paraphrased as follows
  - a. That there is a lack of evidence with regards to the indication that the subject property is an Open Area as the term is defined in s.1(m.2) and used in s.15(1) of the *Regulations*.
  - b. That granting a change of use of the subject property would not negatively affect the general welfare, health, safety and convenience of persons for the purposes of s.8(a) of the *Act*.
  - c. Such further or other grounds as may be revealed.
10. Mr. Ryan MacDonald, in signing the Appendix “A” Notice of Appeal – Schedule A – Particulars states that, “The Appellants reserve the right to provide the Commission with further particulars and documents, if necessary, on the above noted grounds of appeal.”
11. The Minister provided the Record of the Decision to the Appellants and filed the same with the Commission on July 26, 2023. No further expansion of the grounds of appeal have been submitted by the Appellants.



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12. The Minister's response to the Appellants' submissions on these grounds of appeal is below.
13. Should the Appellants expand on their grounds of appeal, provide further explanation on their grounds of appeal or provide submissions on their grounds of appeal the Minister reserves the right to provide a further reply once particulars have been provided by the Appellants.

### The Law

14. The Commission has previously stated (Order LA17-06) that the following test should be applied to Ministerial decisions made under the *Planning Act* and its Subdivision and Development Regulations:<sup>1</sup>
  1. 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
  2. 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*.
15. With respect to step two of the test, the Commission states in LA17-06 that "sound planning principles require regulatory compliance".<sup>2</sup>

### Minister's Position

#### Two-part *Planning Act* Test

16. In this case, the Minister followed proper process as set out by law and applied sound planning principles, and therefore, deference has been earned.
17. The Minister submits that the first part of the test is satisfied. The Decision and supporting evidence demonstrate that the relevant sections of the *Act* and *Regulations* were considered and applied in this case, and that the Minister followed the proper process and

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

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



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procedure in making a decision on the Appellants' Change of Use application. The Decision was not overly broad or arbitrary and was grounded in the principles of natural justice.

18. The Decision also meets the second part of the test in that it is supported by objective and reliable evidence and that the decision is based on the *Planning Act*, the Regulations, and sound planning principles, which requires regulatory compliance.<sup>3</sup>
19. Clause 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.
20. The Subject Property is located in Murray Harbour, Kings 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*.
21. 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. [Emphasis added]
22. In other words, the Minister *must deny* an application that contravenes any one (or more) of these general requirements.

### Ground 1: Lack of Evidence that Subject Property is an Open Area

23. The Decision was based on the information provided in three separate survey plans<sup>4</sup> for the subdivision in which the Subject Property is located identifying the area as open space. The Minister submits that this provides sufficient evidence to indicate that the property

<sup>3</sup> QCC No 40, at para 41

<sup>4</sup> Plan #15682B Approving Lot 72 Nov 27 1995; Plan #17453A Approved March 16 1998; Plan #18193B Approving Lot 84 April 26 1999



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was intended to be used as an open space as that term is defined and used in the *Regulations*.

24. Section 1(m.2) of the *Regulations* defines an open space as “an outdoor amenity space for active or passive recreational use.” Section 15 of the *Regulations* requires that in a residential subdivision of more than five lots, the owners of the lots being subdivided must set aside open space equal to a minimum of 10% of the total area of lots being subdivided, and that this space shall be held in common by the owners of the lots.
25. In this case, a 1995 survey plan (#15682B) identified the subject property as a “Tree Plantation” and an area between the existing public road and an existing right of way, was identified as “Open Area”. Subsequently, in a 1999 survey plan (#18193B), part of the former “Open Area” was approved as Lot 84. In the same survey, the subject property was reclassified as “Tree Plantation (Open Area)”. This plan indicated to the Minister that the required Open Area was moved to the parcel formerly referred to as the “Tree Plantation”.
26. As the subject property has been identified in the subdivision plan as an open space, the Minister concluded that issuing a change of use permit allowing the subject property to be used as a residential dwelling would be contrary to its specified used and pursuant to Section 34 of the *Regulations*, the Minister could not approve the Appellants’ application.
27. The Appellants have stated that “*Deeds to the Property, as well as deeds to neighboring parcels of land do not appear to indicate that the property is an open space.*” The Minister submits that the lack of reference to open space in the property deeds is of no consequence. The Decision was based on the *Regulations* governing the change of use application, which refer only to how the use of an area is described in the subdivision plans for the property.

### Ground 2 - Impact of Change of Use

28. The Appellants have stated that the impact of a change of use on the Subject Property would not negatively affect the “general welfare, health safety and convenience of persons in any area for the purposes of s.8(1)(a) of the *Planning Act*<sup>5</sup>. Section 8 provides authority to the Lieutenant Governor in Council to make provincial planning regulations.
29. The Appellants also claim that the Minister, in deciding not to send out letters to neighboring residents in the area of the Subject Property about the proposed change of

<sup>5</sup> Notice of Appeal, Record of Director Tab 2.



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use was acting contrary to proper procedure.<sup>6</sup> In this case, the Minister determined that the *Regulations* required the open space as a part of the subdivision, the subject property met the definition of open space, and therefore, the proposed change of use could not proceed. As a result, receiving comments from neighboring properties on the impact of the change of use was not required.

### Conclusion

30. For the reasons outlined above, the Minister submits that this appeal must be dismissed.
31. Trusting this is satisfactory, if you have questions about these submissions, please do not hesitate to contact the undersigned.

Yours very truly,

Meaghan Hughes  
Departmental Solicitor for Housing, Land and Communities

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<sup>6</sup> *Ibid.*