PRINCE EDWARD ISLAND
Regulatory & Appeals Commission
Commission de réglementation et d'appels
ÎLE-DU-PRINCE-ÉDOUARD

Date Issued: **June 7, 2022**
Docket: LA21012
Type: **Planning Act Appeal**

INDEXED AS: Andy Gallant et al v. Minister of Agriculture and Land

Order No: LA22-08

BETWEEN:

Andy Gallant, Delma Good, Jim Good, Don Doucette, Carol Doucette, John Langdale, Martha Langdale, Audrey Gallant, Christine Gallant, Denis Gallant, Gladys Gallant, Joan Blacquiere, Hailey Blacquiere, Krista Dykstra, Ken Dykstra

Appellants

AND:

Minister of Agriculture and Land

Respondent

AND:

Atlantic Aqua Farms Ltd.

Developer

ORDER

Panel Members:

J. Scott MacKenzie, Chair
M. Douglas Clow, Vice-Chair

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Philip J. Rafuse,
Appeals Administrator
Prince Edward Island Regulatory & Appeals Commission

Contents

APPEARANCES & WITNESSES

1. **For the Appellants, represented by Andy Gallant:**

   Andy Gallant, Don Doucette, Denis Gallant, Joan Blacquiere and Haley Bacquiere

2. **For the Respondent, Minister of Agriculture and Land**

   Counsel:
   Mitchell O'Shea, Counsel for the Minister

3. **For the Developer, Atlantic Aqua Farms Ltd.**

   Counsel:
   David Hooley, Q.C. and Melanie McKenna, of Cox and Palmer

1. INTRODUCTION

1. This appeal was filed by Andy Gallant, Delma Good, Jim Good, Don Doucette, Carol Doucette, John Langdale, Martha Langdale, Audrey Gallant, Christine Gallant, Denis Gallant, Gladys Gallant, Joan Blacquiere, Hailey Blacquiere, Krista Dykstra, and Ken Dykstra (the "Appellants") and challenges a decision by the Minister of Agriculture and Land (the "Minister") to issue a development permit on May 18, 2021 (the "Permit") to Atlantic Aqua Farms Ltd. (the "Developer") to construct an addition to their existing shellfish processing facility in Rustico (the "Property"). The Appellants ask the Commission to reconsider the decision by the Minister.

2. BACKGROUND

2. On May 18, 2021, the Minister issued the Permit.

3. On June 9, 2021 the Appellants filed a Notice of Appeal.

4. On July 27, 2021, the Minister delivered the record to the Commission and the parties.

5. On August 12, 2021, written submissions were delivered by legal counsel for the Minister.

6. On August 12, 2021, written submissions were delivered by legal counsel for the Developer.

7. On September 24, 2021, a pre-hearing conference was held with staff of the Commission to attempt to resolve the appeal or narrow the issues in the appeal.

8. On October 6, 2021, the Commission notified the parties that the appeal would be heard on November 9, 2021.

9. On October 27, 2021, the Appellants filed an amended notice of appeal signed by one of its representatives. The amended notice of appeal restated the grounds of appeal.

10. On November 3, 2021, legal counsel for the Minister delivered supplementary submissions to the Commission regarding the amended notice of appeal.

11. On November 3, 2021, legal counsel for the Developer also delivered supplementary submissions to the Commission regarding the amended notice of appeal.

12. On November 4, 2021, the Commission cancelled the hearing scheduled for November 9, 2021 because the Appellants had not filed written submissions and had indicated to staff of the Commission that they did not intend to call any witnesses in support of the appeal.

13. In early 2022, the Commission requested contact information for all of the Appellants and, when the information was not received in a timely way, contacted the Appellants by mail to confirm their participation in the appeal. The Commission

then contacted the parties, including the Appellants, to notify them that the appeal hearing would be heard by teleconference on February 23, 2022.

14. On February 23, 2022, the Commission heard the appeal by teleconference. Andy Gallant, Don Doucette, Denis Gallant, Joan Blacquiere, and Haley Blacquiere were present for the Appellants. Legal counsel and Eugene Lloyd were present on behalf of the Minister. Legal counsel, Terry Ennis, Jeff MacPherson, and Dana Drummond were present on behalf of the Developer. A decision on the appeal was reserved by the Commission.

3. SUBMISSIONS

Appellants

15. The Appellants called no witnesses and tendered no evidence to support their appeal. Instead, the Appellants relied on their notice of appeal, as amended, and made oral submissions to the Commission. The Appellants argue that the decision to issue the Permit was wrong for six (6) main grounds:

(i) a threat was made by the Developer to block the water view of nearby residents by planting a tree line;

(ii) the proposed construction is detrimental to the natural beauty of the area;

(iii) the proposed storage for the facility is located in a buffer zone and may potentially result in negative environmental effects;

(iv) the proposed construction is not consistent with orders previously issued by the Commission, being Orders LA95-15 and LA14-02;

(v) the Developer changed its plans for the development without notice to residents; and

(vi) the proposed construction will have detrimental effects, including significant noise pollution and devaluation of nearby properties.

While the Appellants did file an amended notice of appeal which substantially reduced the number of grounds listed for the appeal hearing, the Appellants were also not represented by legal counsel. In these circumstances, and in the interests of fairness and completeness, the Commission decided to consider all of the main arguments raised by the Appellants in this matter.

Minister

16. The Minister argues that the Permit was properly issued and the appeal ought to be dismissed. The Minister submits that grounds (i), (ii), and (vi) do not have merit because the definition of "detrimental effect" for the purpose of the *Planning Act* and its regulations excludes property values and viewscapes. As to grounds (iii)-(v), the Minister argues that the Appellants have not tendered evidence upon which the Commission can rely in order to set aside the decision made by the Minister.

Developer

17. The Developer also argues that the appeal ought to be dismissed. The Developer argues that there was no threat, as asserted in ground (i), and that the tree line discussed with nearby residents was part of discussions centred upon mitigating concerns expressed about the "look" of the proposed development. Like the Minister, the Developer argues that grounds (ii) and (vi) are without merit because s. 1(f.3) of the Regulations[1] specifically excludes property values and viewscapes from the definition of "detrimental impact." As for ground (iii) and the potential for negative environmental effects, the Developer relies on the environmental report prepared by Joose Environmental Consulting Inc. (the "Report") in full answer to this concern. The Developer also notes that the Appellants presented no objective or expert evidence to the contrary. The Developer also argues that Order LA95-15, as identified in ground (iv), has no application to the present appeal and the Permit issued by the Minister on May 18, 2021. Finally, the Appellant argues that there is no basis in fact for the assertion in ground (v) that the Developer changed its plans without notice to the residents because the Developer discussed the development on a number of occasions with interested officials and concerned residents. According to the Developer, it "went over and above what was required of them" by the legislation and regulations.[2]

4. ISSUE

18. The Commission has the legal authority to substitute its decision for one made by the Minister. However, the Commission does not lightly interfere with these types of decisions. Through its orders over time, the Commission has developed a guideline for exercising its appellate authority under the *Planning Act*.[3] The guideline involves two main considerations:

    (i) whether the Minister followed the proper procedure as required by the *Planning Act*, its regulations and the law in general, including the duty of procedural fairness; and

    (ii) whether the decision made by the Minister was based on sound planning principles in the field of land use planning.[4]

19. The issue in this appeal whether the Commission is satisfied, based on the record, that the Minister has discharged these obligations. As noted above, the Appellants chose to call no witnesses, and to tender no evidence, to support their appeal. The Commission was therefore left to consider the record filed by the Minister and the submissions presented by the parties.

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[1] *Subdivision and Development Regulations*, P.E.I. Reg. EC693/00 [Regulations].
[2] Response to the Notice of Appeal filed by the Developer at p. 7.
[3] R.S.P.E.I. 1988, c. P-8.
[4] See e.g. Order LA22-07, *Landfest Company Ltd. v. Town of Stratford* (March 29, 2022) at para. 32.

5. DISPOSITION

20. For the reasons that follow, the appeal is dismissed. The Commission is satisfied that the Minister followed the proper procedure as required by the *Planning Act* and the Regulations. Based on the record, the Commission is also satisfied that the decision made by the Minister was animated by sound planning principles and, in particular, the considerations expressed in s. 3(2) of the Regulations. At the hearing, the Appellants did raise a number of concerns about noise and other potential effects upon nearby residents. The Commission, however, does not have statutory authority to consider potential claims grounded in nuisance. Those types of claims fall within the exclusive jurisdiction of the Supreme Court of Prince Edward Island.

6. ANALYSIS

Alleged threat

21. While the Appellants amended their notice of appeal to delete the assertion that a threat was made by the Developer to obscure a water view by planting a tree line in the event an appeal was filed with the Commission, given the seriousness of that allegation, the Commission confirms that it is not satisfied any such threat was made by the Developer. The record and surrounding context are clear that the Developer and nearby residents were discussing ways to mitigate concerns arising from the proposed development.[5] Planting trees to mitigate the impact of the development was one of those potential options discussed by the parties. There was no threat.

Water view, natural beauty, diminished property values, and noise pollution

22. Subsection 3(2)(a) of the Regulations provides no development permit shall be granted by the Minister where the proposed structure would "have a detrimental impact." For the purpose of its application by the Minister, s. 1(f.3) of the Regulations defines "detrimental impact" and specifically excludes "potential effects of new subdivisions, buildings or developments with regard to (i) real property value; ... (iii) viewscapes; or (iv) developments approved pursuant to subsection 9(1) of the *Environmental Protection Act*." In other words, this regulatory definition excludes certain losses or harms from consideration by the Minister.

23. In this case, the Appellants expressed concerns in their original notice of appeal about the effect of the proposed development on water views, the natural beauty of the area, and property values. These types of considerations, however, have been excluded from the meaning of "detrimental impact" for the purpose of the *Planning Act* and its regulations. The Commission therefore agrees with the

[5] Response to the Notice of Appeal filed by the Developer at Tab A.

submissions by the Minister and the Developer that there is no merit to these grounds of appeal.

24. At the hearing of this appeal, the Appellants also expressed concerns about the existing facility of the Developer as well as a similar facility which was located nearby and owned or controlled by a third party. These concerns included noise pollution and potential environmental effects. They also included speculative concerns about what might occur in the future when the addition approved by the Permit is actually completed by the Developer.

25. These types of concerns are common amongst neighbouring properties. In some cases, they may also be legitimate concerns. However, they fall outside the statutory authority of the Commission. The concerns raised by the Appellants, which relate to potential relief grounded in nuisance, are outside the jurisdiction of the Commission. Any potential relief falls within the exclusive jurisdiction of the Supreme Court of Prince Edward Island and not the Commission.[6]

Potential environmental effects

26. In their original notice of appeal, the Appellants expressed concerns about potential environmental effects arising from the expansion of the existing facility operated by the Developer, including the fact that storage for the facility was proposed to be located in a buffer zone. The Appellants did not, however, present any objective evidence to substantiate these concerns. The record before the Commission stated that the application by the Developer was considered by not less than ten (10) divisions or officials within the Government of Prince Edward Island, including officials working in areas such as fire safety, environment, water, land use, and safety standards.[7] The record also included the Report – a detailed document prepared by an environmental consulting firm which recommended a number of mitigation and monitoring measures in relation to the proposed development.[8] None of this evidence was contradicted by the Appellants.

27. Absent any challenge to the evidence in the record and without any new objective evidence to the contrary, the Commission is not satisfied that the concerns expressed by the Appellants reveal any material defect in procedure or sound planning principles.

Order LA95-15 and Order LA14-02

28. In their amended notice of appeal, the Appellants assert that the Permit is inconsistent with paragraphs 30 and 35 in Order LA14-02.[9] That order resulted from an appeal by Gary McLure of two planning-related decisions. The first decision related to the consolidation of two parcels of land. The second decision related to a development permit. In their original notice of appeal, the Appellants also contended that the Permit was inconsistent with an earlier order made by the

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[6] See e.g. Order LA22-03, *Brian R. MacKay v. Minister of Agriculture and Land* (February 10, 2022) at para. 14; and Order LA22-02, *Clare Fagan v. City of Summerside* (February 10, 2022) at para. 18.
[7] Submissions on behalf of the Minister at para. 11.
[8] Response to the Notice of Appeal filed by the Developer at Tab B.
[9] Order LA14-02, *McLure v. Minister of Finance, Energy and Municipal Affairs* (March 17, 2014).

Commission in relation to the same property, being Order LA95-15.[10] For the reasons which follow, neither ground of appeal has merit.

29. First, the Commission is an administrative decision-maker and not, strictly speaking, bound by its earlier decisions. Some prior decisions may be helpful or instructive. However, in order to be helpful or instructive, they must be on point and relate to a common principle or proposition. The facts of each case must therefore be reviewed carefully. Second, each application in the land use planning context (and each appeal arising from those applications) must be decided on its own merits. The contents of each individual application must therefore be examined and measured against the *Planning Act* and its regulations – not against other applications.

30. With these general principles in mind, the Commission is not persuaded that the Permit is inconsistent with either Order LA14-02 or Order LA95-15. The paragraphs relied upon by the Appellants in Order LA14-02 related to the decision to consolidate two parcels of land. The consolidation of these parcels resulted in a change of use. In this case, the application at issue is not one to consolidate parcels or change land use. The impugned application in this case was for a development permit. Order LA14-02 is therefore distinguishable and does not assist the Appellants.

31. Order LA95-15 also does not assist the Appellants. The permit at issue in that case was affirmed on appeal to the Commission. The conditions applicable to the permit in Order LA95-15 are immaterial to the appeal presently before the Commission. Each application must be decided by the Minister – and evaluated by the Commission – on its own record. The Permit is therefore a new and different matter subject to its own conditions based on the application placed before the Minister. Finally, any concerns related to the enforcement of conditions attached to a permit are matters falling within the discretion of the Minister and not the Commission.

Alleged changes in plans and public engagement

32. The Appellants asserted before the Commission that the Developer changed its plans without notice to nearby residents. However, no evidence was presented by the Appellants to substantiate this assertion to the satisfaction of the Commission.

33. A review of the record confirms that the original application for a development permit was submitted by the Developer on October 14, 2020.[11] The Minister then solicited comments on October 27, 2020 from nearby residents about the proposed development.[12] After some discussions around mitigating the concerns expressed by nearby residents, the Developer amended the application for a development permit.[13] A second opportunity to provide comments was extended to nearby residents by the Minister on January 11, 2021.[14] The letter delivered by the Minister

[10] Order LA95-15, *Blacquiere v. Dept. of Provincial Affairs & Attorney General* (September 28, 1995).
[11] Record at Tab 1A.
[12] Record at Tab 6A.
[13] See e.g. Record at Tab 4A and Page 119: "Original application to construct large standalone structure. Proponent altered proposal after public consultation. Significantly mitigated many concerns."
[14] Record at Tab 6B.

on January 11, 2021 included detailed drawings and also specifically noted (and underlined for emphasis) that the application submitted by the Developer had been amended.[15] The recommendation to approve the application by the Developer was not made until April 20, 2021.[16] The Permit was then issued by the Minister with conditions on May 18, 2021.[17]

34. Based on its review of the record, the Commission is not persuaded by this ground of appeal. Rather, the Commission is satisfied that the Minister consulted with nearby residents in a manner that was fair and reasonable in the circumstances. The Commission also accepts the submission made by the Developer that it discussed the proposed development on a number of occasions with interested officials and concerned residents.

35. In summary, upon review of the record and in the absence of evidence from the Appellants to the contrary, the Commission is satisfied that the Minister followed the proper procedure as required by the *Planning Act* and the Regulations, and that the decision made by the Minister was animated by sound planning principles.

Other matters for future appeals

36. Having determined the merits of the appeal, the Commission wishes to briefly address in general terms the nature of, and the expectations around, an appeal to the Commission under the *Planning Act*. These reasons are intended to benefit future parties appearing before the Commission.

37. The Appellants were under the mistaken impression in this case that their role was merely to raise concerns about the development approved by the Minister, and the Commission would then investigate or inquire whether those concerns were founded. For example, the Appellants asked the Commission to hire an expert witness, at its expense, to determine whether noise from the existing facility of the Developer, and a nearby facility owned or controlled by a third party, was harmful to the health of nearby residents. This is not the legal role of the Commission. The Commission is an intermediate appellate tribunal which hears appeals presented by dissatisfied persons and decides those appeals in an impartial and quasi-judicial manner. The Commission is neither an advocate nor an agent of any party appearing on an appeal.

38. In addition, the decision by a dissatisfied person to file an appeal under s. 28 of the *Planning Act* carries with it a number of legal responsibilities and obligations. Those responsibilities and obligations include, but are not limited to, filing a notice of appeal which contains grounds that are recognized in law, communicating with the staff of the Commission in a timely way, following the rules of procedure published by the Commission, and advancing the appeal with evidence which, if accepted, may undermine the decision made by the impugned municipality or the Minister. This evidence may be contained in the record or it may take the form of documents, expert opinion, or testimony from witnesses. In short, the legal burden

[15] Record at Tab 6B.
[16] Record at Tab 4A.
[17] Record at Tab 2A.

of advancing an appeal rests with an appellant. It does not rest with the Commission. In this case, the Appellants chose to call no witnesses, tendered no exhibits, and did not test the contents of the record filed by the Minister. More is required of an appellant before the Commission.

7. CONCLUSION

39. For the reasons above, the appeal is dismissed and the Permit is confirmed. The Commission thanks the parties for their submissions.

IT IS ORDERED THAT

1. **The appeal is dismissed.**
2. **Development Permit C-2020-0448 issued on May 18, 2021 is hereby confirmed.**

DATED at Charlottetown, Prince Edward Island, Tuesday, June 7, 2022.

BY THE COMMISSION:

(sgd) J. Scott MacKenzie

J. Scott MacKenzie, Q.C., Chair

(sgd) M. Douglas Clow

M. Douglas Clow, Vice-Chair

NOTICE

Section 12 of the ***Island Regulatory and Appeals Commission Act*** reads as follows:

> *12. The Commission may, in its absolute discretion, review, rescind or vary any order or decision made by it, or rehear any application before deciding it.*

Parties to this proceeding seeking a review of the Commission's decision or order in this matter may do so by filing with the Commission, at the earliest date, a written Request for Review, which clearly states the reasons for the review and the nature of the relief sought.

Sections 13(1) and 13(2) of the ***Act*** provide as follows:

> *13(1) An appeal lies from a decision or order of the Commission to the Court of Appeal upon a question of law or jurisdiction.*
>
> *(2) The appeal shall be made by filing a notice of appeal in the Court of Appeal within twenty days after the decision or order appealed from and the rules of court respecting appeals apply with the necessary changes.*
>
> **NOTE:** In accordance with IRAC's *Records Retention and Disposition Schedule*, the material contained in the official file regarding this matter will be retained by the Commission for a period of 2 years.