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Docket: LA20-014
Type: Planning Act Appeal

INDEXED AS: Prince Edward Island Energy Corporation v. Rural Municipality of Eastern Kings,
2023 PEIRAC 02 (CanLII)

Order No: LA23-02

BETWEEN:

Prince Edward Island Energy Corporation

Appellant

AND:

Rural Municipality of Eastern Kings

Respondent

AND:

Fred Cheverie and Don Humphrey

Intervenors

ORDER

Panel Members:

J. Scott MacKenzie, K.C., Chair

M. Douglas Clow, Vice-Chair

Erin T. Mitchell, Commissioner

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

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Appearances & Witnesses

1. **For the Appellant, Prince Edward Island Energy Corporation**

Counsel:

- **J. Gordon MacKay, K.C.**, and
- **Susan Johnston**, of Carr, Stevenson & MacKay

Witnesses:

- **Kim Horrelt**, PEI Energy Corporation
- **Heather MacLeod**, PEI Energy Corporation
- **Spencer Long**, PEI Energy Corporation
- **Carl Brothers**, Frontier Systems Inc.
- **Greg Wilson**, PEI Department of Environment, Energy & Climate Action; and
- **John Heseltine**, Stantec Consulting (virtually)

2. **For the Respondent, Rural Municipality of Eastern Kings**

Counsel:

- **Hilary Newman**, of Stewart McKelvey.

Witnesses:

- **Sonya Martin**, Chief Administrator Officer

1. INTRODUCTION

1. This appeal concerns the decision of the Rural Municipality of Eastern Kings (the “Council” or “Municipality” or “RMEK”), dated October 20, 2020, to deny an application for a Special Permit Use to permit the development of a wind farm in Eastern Kings by the Prince Edward Island Energy Corporation (“PEIEC”).¹

2. DISPOSITION

2. For the reasons that follow, the appeal is allowed and the decision made by the Municipality is quashed. The Commission remits the Special Permit Use Application back to the Municipality to have the application duly processed in the proper manner with the Municipality engaging the appropriate planning professionals to assist in its assessment of the application.

3. BACKGROUND

3. On May 14, 2019, PEIEC presented, at a regularly scheduled meeting of the Council of the Municipality (“Council”), its plan to develop Phase 2 of the Eastern Kings Wind Farm, and develop a new 30-MegaWatt wind farm in Eastern Kings.²
4. On June 10, 2019, PEIEC submitted a Preliminary Special Development Permit Application to the Municipality, proposing to develop seven (7) turbines in a development area south of the existing wind farm in Eastern Kings.³
5. On July 31, 2019, Council held a public meeting to hear community feedback on the PEIEC preliminary permit application. Staff of the PEIEC attended and spoke at that meeting, as did members of the public.⁴
6. On August 14, 2019, Council passed a resolution that the Municipality would not consider any variance to the Bylaw in relation to the preliminary application.⁵
7. On November 1, 2019, PEIEC submitted the final Special Development Permit Application (the “Application”) to the Municipality for the 30-MegaWatt wind farm expansion.⁶
8. On November 12, 2019, Council held a regularly scheduled meeting. PEIEC attended the meeting and held a question-and-answer session regarding the Application.⁷

¹ R-2, Record, Volume II, Tab 19.

² R-1, Record, Volume I, Tab 8, pg. 12; and R-1, Record, Volume I, Tab 9.

³ R-3, Record, Volume III, Tab 6.

⁴ R-1, Record, Volume I, Tabs 18 and 19.

⁵ R-1, Record, Volume I, Tab 21, pg. 72.

⁶ R-2, Record, Volume II, Tabs 7A to 7K, pgs. 760 to 1048.

⁷ R-1, Record, Volume I, Tabs 26 and 27.

9. On November 19, 2019, the Department of Environment, Water and Climate Change (the “Department”) held a public meeting in the Municipality as part of the Environmental Impact Assessment (“EIA”) process for the proposed wind farm pursuant to the *Environmental Protection Act*, RSPEI 1988, E-9.⁸ The Department continued to accept written comments from members of the public for a further 30 days.⁹
10. On December 4, 2019, Council held a public meeting on the Application and the Environmental Impact Assessment.¹⁰ Several members of the public spoke at the meeting, as well as PEIEC staff.¹¹
11. On January 15, 2020, the Municipality requested further information from PEIEC prior to the Application’s review by Council.¹² This information was provided by PEIEC on January 29, 2020.¹³
12. On September 2, 2020, the Minister of Environment, Water and Climate Change (the “Minister”) granted approval to PEIEC to proceed with the construction and operation of the wind farm, pursuant to the *Environmental Protection Act*. The Minister imposed several terms and conditions on the approval.¹⁴
13. On October 22, 2020, a Special Meeting of the Council for the Municipality was held to consider and vote on the Application.¹⁵ At that meeting, a resolution to approve the Application was tabled for discussion. After input from the councillors present, three out of four councillors voted to deny PEIEC’s application. Council declined to approve PEIEC’s Special Permit Use Application.¹⁶
14. On October 27, 2020, the Municipality advised PEIEC, via letter, that the Application had been denied as it was not in the best interests of the residents of Eastern Kings.¹⁷
15. On November 12, 2020, PEIEC filed a Notice of Appeal with this Commission appealing the decision of Council to deny the Application.
16. The Appeal was heard April 7th, 8th, and 9th, 2021.
17. Written submissions from the Intervenors were received on April 16, 2021. Written replies to the submissions from Counsel for the Appellant and Counsel for the Respondent were received on April 21, 2021.

⁸ R-1, Record, Volume I, Tab 28.

⁹ R-1, Record, Volume I, Tabs 29, 30, 45-47, 49-51, 53, 54, 57-64; and R-2, Record, Volume II, Tab 9.

¹⁰ R-1, Record, Volume I, Tab 35.

¹¹ R-1, Record, Volume I, Tab 36.

¹² R-2, Record, Volume II, Tab 14.

¹³ R-2, Record, Volume II, Tab 15.

¹⁴ R-2, Record, Volume II, Tab 18.

¹⁵ R-1, Record, Volume I, Tab 81.

¹⁶ R-1, Record, Volume I, Tab 82.

¹⁷ R-2, Record, Volume II, Tab 19.

4. INTERVENTION ORDER

18. On February 18, 2021, the Commission posted public notice of the hearing in this matter and invited applications for intervenor status to be filed with the Commission in accordance with rules 14 to 20 of the Commission's *Rules of Practice & Procedure for Commission Hearings* (the "Rules"). The Commission received two applications to intervene. One from Fred Cheverie and one from Don Humphrey.
19. On March 29, 2021, upon consideration of the applications and submissions of PEIEC and the Municipality, and in accordance with rules 14 to 20 of the Rules, the Commission granted Mr. Cheverie and Mr. Humphrey "Friend of the Commission" Intervenor status, subject to conditions.
20. Both Mr. Cheverie and Mr. Humphrey were permitted to file brief written submissions with the Commission within seven (7) days of the conclusion of the hearing. These written submissions were limited to addressing the submissions and evidence tendered by PEIEC and the Municipality and the Record filed with the Commission. PEIEC and the Municipality were both given an opportunity to reply. A summary of the Intervenor's submissions is provided below.

5. ISSUES

21. The appeal raises two main questions for the Commission. First, the Commission must determine whether, in processing the Application, the Municipality and Council followed the proper process and procedure as required in its Bylaw and discharged its duty of procedural fairness. Second, the Commission must consider whether the decision made by the Council to deny the Application has merit and accords with sound planning principles.

6. POSITIONS OF THE PARTIES

22. According to the Appellant,
 - i) Council did not follow the intent and objectives of the Community of Eastern Kings 2013 Official Plan and the Rural Municipality of Eastern Kings Subdivision & Development Control Bylaw, and failed to properly consider the public interest and the law in general; and
 - ii) Council's decision to deny the Appellant's Application did not have merit based on sound planning principles within the field of land use planning.
23. The Appellant requested that the Commission substitute its own decision for the one of Council and approve the Special Development Permit Application.
24. The Municipality contends that a detailed review of the evidentiary record, including the minutes of all Council meetings, correspondence between the parties, and the reasons provided by Council at the October 22, 2020, special meeting (where the Application was denied), reflect Council's careful examination and consideration of the intent and purpose of its Bylaw, Official Plan, and the

public interest. The Municipality requested that the Commission deny the appeal and confirm Council's October 22, 2020, decision to deny the Application.

25. The Intervenor, Fred Cheverie, submitted that the Municipality carefully considered all of the evidence put to it by both residents and experts in the context of the Official Plan, and decided what was in the public interest for the residents of the Municipality. He submitted that the Official Plan reflects the desire to enhance and protect the natural environmental qualities of Eastern Kings and the intent to limit and control future windmill expansion. Mr. Cheverie also submitted that the existing wind farm has negatively affected the quality of life in the community, and he raised concerns about the EIA, calling the process "seriously flawed" and PEIEC's Environmental Impact Statement "woefully inadequate."
26. The Intervenor, Don Humphrey, submitted that the decision of the Municipality was in conformity with the Official Plan and was procedurally fair. He raised issues of financial and political pressure, and political interference from the Minister. Finally, he submitted that many submissions opposed to the development were for good reasons in relation to the environment and the character and rural lifestyle of Eastern Kings.

7. OVERVIEW OF EVIDENCE

Appellant's Evidence

27. The Appellant called six witnesses, including one expert in land use planning. The Appellant witnesses were: Kim Horreлт, P.Eng.; Heather MacLeod, P.Eng.; Spencer Long, P.Eng.; Carl Brothers, P.Eng.; and Greg Wilson. Their expert witness was John Heseltine, LLP MCIP who provided a report.
28. Kim Horreлт is an engineer and, at the time, was the Director/Chief Executive Officer with PEIEC.¹⁸ Ms. Horreлт was directly involved with PEIEC's proposed wind farm in Eastern Kings. Ms. Horreлт testified about the history of PEIEC's discussions with the Municipality about the proposed wind farm dating back to 2017.¹⁹ She testified that the area was attractive to PEIEC for further development because the existing wind farm meant there was infrastructure in the area.²⁰ She testified that the new development would provide clean renewable energy to Islanders and help meet Provincial objectives to transition to renewable energy.²¹ Ms. Horreлт also spoke to the benefits of the development to the residents of Eastern Kings in the form of taxes, landowner compensation, compensation to the community from the wind farm itself, and jobs, both from the construction of the wind farm, and its ongoing operation.²²
29. Heather MacLeod is an engineer and the Director of Energy Policy and Assets with PEIEC and, over the life of the project, was directly involved with PEIEC's

¹⁸ Testimony of Kim Horreлт, Transcript - Day 1, pg. 38.

¹⁹ Testimony of Kim Horreлт, Transcript - Day 1, pg. 40.

²⁰ Testimony of Kim Horreлт, Transcript - Day 1, pg. 43.

²¹ Testimony of Kim Horreлт, Transcript - Day 1, pg. 46.

²² Testimony of Kim Horreлт, Transcript - Day 1, pg. 48-49.

proposed wind farm in Eastern Kings.²³ Ms. MacLeod testified about PEIEC's role in implementing some of the recommendations from the PEI Provincial Energy Strategy, which includes the further development of wind farms on PEI.²⁴ She said that Eastern Kings was identified for further development for several reasons, including the good wind in the area, the landowner support, and the prior experience and existing infrastructure in the area.²⁵ Ms. MacLeod also spoke to how the project was going to be configured²⁶ and the EIA process,²⁷ including a condition of the EIA approval requiring protection of 42 hectares of land in Kings County²⁸ to mitigate the impact of clear-cutting 14 hectares of woodland for the project. On cross-examination, Ms. MacLeod confirmed that the condition did not require the protected land to be within the boundaries of RMEK.²⁹

30. Ms. MacLeod further testified about her contact with the Municipality throughout the life of the project. She testified that PEIEC tried to be transparent with the Municipality and supply requested information as the project moved through the application process. Ms. MacLeod testified that initially her contact with the Municipality was with the CAO at the time, Ron Coffin. With the arrival of a new CAO, Sonya Martin, Mr. Coffin moved into the role of Development Officer, and PEIEC continued to have discussions with both. Eventually, sometime in October 2019, the main contact became the Deputy Mayor, Danelle Elliot. From this point, PEIEC and the Municipality did not have any meetings outside the public meeting process.³⁰ Ms. MacLeod testified that through the application process, PEIEC did not have any discussions with anyone who was an expert and/or proficient in land use planning from the Municipality.³¹

31. Spencer Long is the Engineering Project Manager with PEIEC and was directly involved with the proposed wind farm in Eastern Kings.³² Mr. Long testified about his role in the 'community engagement' aspect of the project, both at the community level and with specific landowners. He testified that he worked closely with Frontier Power Systems in consulting with participating landowners with respect to easements and compensation packages, and that the feedback he received from those people was favourable.³³ Mr. Long spoke generally about the design of the project itself, referring to the presentation by PEIEC to Council and members of the public on May 14, 2019.³⁴ He testified that PEIEC considered section 5.33 of the Bylaw and incorporated those aspects into the project design.³⁵

²³ Testimony of Heather MacLeod, Transcript - Day 1, pg. 55-56.

²⁴ Testimony of Heather MacLeod, Transcript - Day 1, pg. 56-58.

²⁵ Testimony of Heather MacLeod, Transcript - Day 1, pg. 58, 60.

²⁶ Testimony of Heather MacLeod, Transcript - Day 1, pg. 61.

²⁷ Testimony of Heather MacLeod, Transcript - Day 1, pg. 62.

²⁸ Testimony of Heather MacLeod, Transcript - Day 1, pg. 66.

²⁹ Testimony of Heather MacLeod, Transcript - Day 1, pg. 67, 68-69.

³⁰ Testimony of Heather MacLeod, Transcript - Day 1, pg. 63-64, 69-72.

³¹ Testimony of Heather MacLeod, Transcript - Day 1, pg. 72.

³² Testimony of Spencer Long, Transcript - Day 1, pg. 74-75.

³³ Testimony of Spencer Long, Transcript - Day 1, pg. 77-78.

³⁴ Testimony of Spencer Long, Transcript - Day 1, pg. 78; R-1, Record, Volume I, Tab 9.

³⁵ Testimony of Spencer Long, Transcript - Day 1, pg. 92-95; R-3, Record, Volume III, Tab 2, pg. 409.

He also testified about the benefit to Islanders of 30 megawatts of clean renewable energy and to the immediate community from a financial standpoint.³⁶ Mr. Long testified that various approvals for a project like this are required from different levels of government including provincial and municipal.³⁷ Mr. Long testified that the nature of the concerns heard from the public ranged from environmental issues to concerns about property values.³⁸ He said PEIEC took steps to mitigate negative outcomes related to those concerns, and that PEIEC was obligated to address many of the concerns in the Provincial EIA process.³⁹

32. Carl Brothers is the President and Senior Engineer of Frontier Systems Inc. ("Frontier").⁴⁰ Mr. Brothers explained that Frontier built the four wind energy projects that are owned by PEIEC, as well as other projects on Prince Edward Island.⁴¹ He testified that he was involved with this particular project since the beginning. Frontier first identified locations where the turbines might be placed, then conducted some wind resource assessments at the identified areas, and were the successful applicants to carry out the project and construction management.⁴² Mr. Brothers testified about the process undertaken to optimize the configuration of the turbines, the development of the site, and the specifications of the wind turbines.⁴³ He explained that the EIA process addresses how to mitigate negative outcomes, including environmental consequences, noise and flicker, and perceived health effects.⁴⁴ Mr. Brothers explained that while PEIEC had the responsibility to interface with the community, Frontier engaged with participating landowners. He spoke, generally, to the annual compensation that would be paid to participating landowners, and said they were all very supportive of the project.⁴⁵ He also spoke to the financial benefit the project would provide to the community of Eastern Kings: both to Council in the form of compensation, and the economic benefit to the community at large.⁴⁶ Mr. Brothers said that the seven turbines would generate approximately 8% of the Island's electricity, helping to cut PEI's greenhouse gas emissions.⁴⁷ In conclusion, Mr. Brothers shared his opinion that this project is fully compliant with the Bylaw.⁴⁸
33. Greg Wilson is a manager of Environmental Land Management with the Department of Environment, Water and Climate Change (the "Department"). As part of his duties, Mr. Wilson is the Environmental Impact Assessment

³⁶ Testimony of Spencer Long, Transcript - Day 1, pg. 87.

³⁷ Testimony of Spencer Long, Transcript - Day 1, pg. 88-90.

³⁸ Testimony of Spencer Long, Transcript - Day 1, pg. 103-104.

³⁹ Testimony of Spencer Long, Transcript - Day 1, pg. 104-105.

⁴⁰ Testimony of Carl Brothers, Transcript - Day 1, pg. 114.

⁴¹ Testimony of Carl Brothers, Transcript - Day 1, pg. 116.

⁴² Testimony of Carl Brothers, Transcript - Day 1, pg. 117-118.

⁴³ Testimony of Carl Brothers, Transcript - Day 1, pg. 125-135.

⁴⁴ Testimony of Carl Brothers, Transcript - Day 1, pg. 138-140.

⁴⁵ Testimony of Carl Brothers, Transcript - Day 1, pg. 119, 125.

⁴⁶ Testimony of Carl Brothers, Transcript - Day 1, pg. 135-137.

⁴⁷ Testimony of Carl Brothers, Transcript - Day 1, pg. 135, 137.

⁴⁸ Testimony of Carl Brothers, Transcript - Day 1, pg. 145.

Coordinator.⁴⁹ Mr. Wilson began his testimony by describing the EIA process, explaining it as a review by a number of different experts of all the possible environmental impacts of a proposal.⁵⁰ In this case, PEIEC prepared an Environmental Impact Statement (“EIS”)⁵¹ which outlined what impact the wind farm would have on the environment (including, for example, the impact on birds and bats, groundwater, surface water and the air, and the impact on people from noise and flicker). From there, a technical review committee reviewed the EIS.⁵²

34. Mr. Wilson testified that the Department received between 80 and 100 individual submissions from the public on this particular proposal.⁵³ He said that throughout the assessment process, there was much back and forth between the review committee and PEIEC to seek additional information and clarification about various concerns.⁵⁴ In this case, it took about ten (10) months from submission of the EIS to approval.⁵⁵ Approval was granted to PEIEC on September 2, 2020, from the Minister to proceed with the construction and operation of the wind farm.⁵⁶ The approval included seventeen (17) conditions. In his testimony, Mr. Wilson discussed each of the conditions and explained their purpose and intent.⁵⁷ Mr. Wilson testified that the Department approved the project based on their assessment and that it would have minimal impact on the people and environment in the area.⁵⁸

Appellant’s Expert Evidence

35. John Heseltine is a Senior Planner with Stantec Consulting, and a planning consultant with over 40 years of experience in urban and regional planning.⁵⁹ Mr. Heseltine was qualified as an expert to give opinion evidence with respect to issues of land use planning.⁶⁰
36. Mr. Heseltine prepared a report, at the request of PEIEC, in relation to the decision of the Municipality to deny PEIEC’s Special Permit Use Application for the wind farm expansion and if that decision accords with sound land use planning principles.⁶¹

⁴⁹ Testimony of Greg Wilson, Transcript - Day 1, pg. 156-157.

⁵⁰ Testimony of Greg Wilson, Transcript - Day 1, pg. 157-159.

⁵¹ R-2, Record, Volume II, Tabs 6 and 8.

⁵² Testimony of Greg Wilson, Transcript - Day 1, pg. 160.

⁵³ Testimony of Greg Wilson, Transcript - Day 1, pg. 163.

⁵⁴ Testimony of Greg Wilson, Transcript - Day 1, pg. 163-164.

⁵⁵ Testimony of Greg Wilson, Transcript - Day 1, pg. 169.

⁵⁶ Testimony of Greg Wilson, Transcript - Day 1, pg. 170; R-2, Record, Volume 2, Tab 18.

⁵⁷ Testimony of Greg Wilson, Transcript - Day 1, pg. 170-200.

⁵⁸ Testimony of Greg Wilson, Transcript - Day 1, pg. 200.

⁵⁹ A-3, J. Heseltine Curriculum Vitae; Testimony of John Heseltine, Transcript - Day 2, pg. 5.

⁶⁰ Transcript - Day 2, pg. 51.

⁶¹ A-2, J. Heseltine Report.

37. At the hearing, Mr. Heseltine gave fair and measured testimony, which the Commission accepts as credible.
38. Mr. Heseltine testified that, in his opinion, the Application should have been approved.⁶² He said the Application met the conditions of the Official Plan, every requirement of the Bylaw, and sound planning principles.⁶³ Further, all concerns and issues raised in objection to the project were responded to, in detail, by PEIEC.⁶⁴
39. Mr. Heseltine's report reviewed and highlighted what he determined to be the relevant provisions of the Official Plan and Bylaw relating to wind turbines, and concluded that while Council members recognized the importance of the Municipality's Official Plan and Bylaw in arriving at their decision, they did not effectively weigh the Plan's priorities.⁶⁵ He pointed out that although the three Councillors who voted against the application stated they were guided by the Official Plan, all three acknowledged that the Official Plan supported the development of wind energy.⁶⁶
40. At the hearing, Mr. Heseltine testified that the Official Plan and the Bylaw are the framework within which this decision was to be considered.⁶⁷ He said that the Official Plan supports the land use that PEIEC is proposing through this application and outlines the scope of considerations around such use.⁶⁸ Further, he spoke to the Bylaw including detailed specifications to regulate wind turbine developments.⁶⁹
41. For example, Mr. Heseltine spoke to the Official Plan being supportive of "regional resources", including wind turbines. He opined that while "regional resource" is not defined, in his opinion, these are resources that can be employed to provide benefits for a region or area beyond Eastern Kings.⁷⁰ Further, Mr. Heseltine expressed that PEIEC's proposed development was prepared in conformance with the Official Plan objectives, and that all conditions of section 5.33 of the Bylaw had been met and were thoroughly complied with.⁷¹
42. In terms of sound planning, Mr. Heseltine testified that the proposed development was appropriate for the proposed area, being largely forested and/or agricultural land, and compatible with the surrounding land.⁷² He opined that the Municipality did not follow sound planning principles in denying the Application. That said, he

⁶² Testimony of John Heseltine, Transcript - Day 2, pg. 30.

⁶³ Testimony of John Heseltine, Transcript - Day 2, pg. 39-40.

⁶⁴ Testimony of John Heseltine, Transcript - Day 2, pg. 30.

⁶⁵ A-2, J. Heseltine Report, pgs. 2-6, 13.

⁶⁶ A-2, J. Heseltine Report, pg. 10.

⁶⁷ Testimony of John Heseltine, Transcript - Day 2, pg. 11, 23, 39, 48.

⁶⁸ Testimony of John Heseltine, Transcript - Day 2, pg. 27, 39, 39-40, 42, 48.

⁶⁹ Testimony of John Heseltine, Transcript - Day 2, pg. 17-18, 29-30, 40.

⁷⁰ Testimony of John Heseltine, Transcript - Day 2, pg. 25.

⁷¹ Testimony of John Heseltine, Transcript - Day 2, pg. 11-12, 21.

⁷² Testimony of John Heseltine, Transcript - Day 2, pg. 45-47.

acknowledged that there were more than a thousand pages of material to consider in this Application, and that it was very difficult for Council members to acquaint themselves with all of the material, correlate it and interpret it in relation to the Official Plan and Bylaw with the time and experience that they had.⁷³

43. In his report, Mr. Heseltine opined that Council members overemphasized a small number of narrow concerns without considering information provided in PEIEC's submission and the EIS, and arrived at a decision to refuse the permit despite information that indicated the issues were minor and would be mitigated by actions required as conditions of the EIA approval.⁷⁴ For example, Mr. Heseltine commented that, while participants in consultation meetings raised many issues with the project, the EIS and direct responses from PEIEC staff addressed each concern (e.g. electromagnetic fields, aviation migration and bat protection, noise, etc.).⁷⁵
44. At the hearing, Mr. Heseltine opined that the EIS went into great detail in assessing issues raised as objections to the project, how well founded they were, and what could be done to mitigate them if they were matters of real concern.⁷⁶ He testified that, in his opinion, all concerns and objections were addressed by the EIS.⁷⁷
45. Ultimately, in his report and his testimony, Mr. Heseltine concluded that the decision of Council, and the manner in which it was reached, did not represent sound planning practice.⁷⁸

Respondent's Evidence

46. Prior to the hearing, the Municipality filed its record with the Commission. The record spanned three (3) volumes,⁷⁹ plus one supplemental record,⁸⁰ and totaled over two thousand (2000) pages. The record included all Council meeting agendas and minutes (including any submissions from the public) where this proposed development and/or the Application were discussed, dating back to June 2017. The record also contained the Application itself and all supporting material, including the EIS, a copy of the Official Plan and Bylaw, and all correspondence between the parties in relation to the development.
47. At the hearing, the Municipality called one witness, Sonya Martin, Chief Administrative Officer of the Rural Municipality of Eastern Kings. Ms. Martin testified that she became CAO on September 24, 2019.⁸¹ Ms. Martin's direct evidence focused on reviewing the record before the Commission and identifying the dates on which Council meetings were held on the topic of the Application and

⁷³ Testimony of John Heseltine, Transcript - Day 2, pg. 39.

⁷⁴ A-2, J. Heseltine Report, pg. 14.

⁷⁵ A-2, J. Heseltine Report, pgs. 10, 13.

⁷⁶ Testimony of John Heseltine, Transcript - Day 2, pg. 25-26.

⁷⁷ Testimony of John Heseltine, Transcript - Day 2, pg. 26.

⁷⁸ Testimony of John Heseltine, Transcript - Day 2, pg. 39; A-2, J. Heseltine Report, pg. 14.

⁷⁹ R-1, Record, Volume I; R-2, Record, Volume II; R-3, Record, Volume III.

⁸⁰ R-4, Supplementary Record; R-5, Letter to P. Rafuse April 6, 2021, with emails from D. Thompson.

⁸¹ Testimony of Sonya Martin, Transcript - Day 2, pg. 53.

what was discussed at those meetings, and provided a timeline of when the Municipality received the various pieces of PEIEC's application materials.⁸²

48. On cross-examination, Ms. Martin was asked whether, during her time as CAO, the Municipality ever consulted a land use planner with respect to the Application or whether Council hired anyone to review and comment on the EIA.⁸³ Ms. Martin answered that they had not as they did not have the budget. When asked about the \$18,200 application fee paid by PEIEC to the Municipality, Ms. Martin indicated that the money became part of the Municipality's general funds and had not been used. Ms. Martin agreed with Counsel for PEIEC that the application fee could have been used to retain a land use planner.⁸⁴ Ms. Martin testified that she did not recall any discussion or debate at Council about whether to hire a planner to deal with this Application.⁸⁵ Ms. Martin later testified that the Municipality did receive legal advice on the Application and its assessment of it.

8. ANALYSIS

49. While the Commission conducts *de novo* hearings from certain decisions made by municipal councils under the *Planning Act*, respect for the primary function of municipal councils still remains important. One of the significant general messages of the Supreme Court of Canada in *Vavilov*⁸⁶ was the need to respect the institutional design choices made by the Legislature when it has established an administrative decision-making scheme. In the *Planning Act*⁸⁷, primary planning responsibility has been assigned to municipal councils and, to date, no regulations have been made by the Lieutenant Governor in Council, under the *Renewable Energy Act*⁸⁸, to regulate the development of renewable energy generation facilities that utilize wind and have a name plate capacity greater than 100 kW. Primary responsibility for development in these types of cases therefore continues to rest with municipal councils.
50. Whether by failing to follow its process, or not discharging its duty of fairness, or making a decision that is not grounded in sound planning principles, the Commission is not required to show deference to the decision made by a municipal council. The Prince Edward Island Court of Appeal has also reiterated that the ability of the Commission to substitute its decision for that of a municipal council is not automatic:

*“the Legislature contemplated and intended that appeals under the Planning Act would take the form of a hearing de novo after which IRAC, if it so decided, could substitute its decision for the one appealed.”*⁸⁹

⁸² Testimony of Sonya Martin, Transcript - Day 2, pg. 55-87.

⁸³ Testimony of Sonya Martin, Transcript - Day 2, pg. 95.

⁸⁴ Testimony of Sonya Martin, Transcript - Day 2, pg. 96.

⁸⁵ Testimony of Sonya Martin, Transcript - Day 2, pg. 110.

⁸⁶ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.

⁸⁷ Planning Act, RSPEI 1988, P-8

⁸⁸ Renewable Energy Act, RSPEI 1988, c R-12.1

⁸⁹ See *Island Regulatory and Appeals Commission (Re)*, [1997] P.E.I.J. No. 70 at para. 9

51. Substitution is therefore a matter of the Commission's discretion. If it so decides, the Commission may substitute its own decision for that made by a municipal council.
52. The Appellant submits that the Municipal Council made a procedural error by failing to provide reasons for its decision to not allow the special permit application. This challenge is only with respect to the procedure and not with the merits or substance of the decision made by the Council on October 22, 2020⁹⁰. The Municipality maintains the Minutes of Council do set out the reasons for its denial, sufficient to allow the Appellant to know why the Application was denied. The Commission must therefore undertake a functional and contextual review of the reasons provided by Council in order to determine whether they are so deficient as to amount to a denial of procedural fairness.
53. As the Commission has previously stated, "Reasons are sufficient when they explain why a municipal council arrived at its decision."⁹¹ When reviewing for adequacy or sufficiency, the Commission must consider the reasons given as a whole in the context of the application before council and with an appreciation for the type of decision made".⁹²
54. Upon review of the minutes as a whole, although the reasons are scant and this Commission does not agree with the substance of the reasons given and conclusions reached by those Councillors who actually chose to speak, the Commission is satisfied that the minutes do set out the reasons why a majority of Council voted against the Application. Whether those reasons are grounded in sound planning principles is a separate and different question. In this case, the minutes of Council are sufficient in the procedural sense. The Appellant knows why the Application was denied. This ground of appeal, based on procedural error, is therefore not accepted by the Commission.
55. The reasons given by council must clearly demonstrate what factors were considered in making the final decision. Those factors must be based on sound planning principles. The Commission must be satisfied that the final decision made by the municipal council was animated by sound planning principles.⁹³
56. In most cases, the Commission determining an appeal has the benefit of hearing from the planning professional who advised the Municipality through the bylaw process. The Commission also has an opportunity to review and consider the written reports prepared by these planning professionals for the municipal councils. In this case, the record from the Municipality does not include this material, and the Municipality did not have the benefit of expert advice from any planning professionals in relation to this Application.

⁹⁰ R-1, Record, Volume 1, Tab 82.

⁹¹ Order LA17-08, *Pine Cone Developments Inc. v. City of Charlottetown* (November 15, 2017) at para. 56. See generally *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48 at para. 12.

⁹² Order LA22-07, *Landfest Company Ltd. v. Town of Stratford* at para. 46.

⁹³ See generally Order LA20-04, *Jessie Frost-Wicks et. al. v. City of Charlottetown* (October 7, 2020) at para. 36.

57. Counsel for PEIEC submitted that the wind farm was an important part of the Province's energy plan and that the Municipality, in assessing the public interest should consider the public interest of all Islanders. Counsel for the Municipality submitted that the public interest mentioned in section 4.5 of the Bylaw refers to the residents of the Municipality, not of the Province as a whole. In the particular context of this Application and the decisions to be made by the Council under the *Municipal Government Act* and *Planning Act*, this Commission is of the opinion that a municipality has the jurisdiction to assess what is in the public interest of the residents of the municipality and not the public interest of the general Island population.
58. As noted, the record contained thousands of pages of highly technical information, including a comprehensive Environmental Impact Assessment, an Environmental Impact Statement, and Ministerial approvals for the wind farm. The Municipality did not have any professional staff capable of assessing this information. Despite collecting an \$18,200 application fee that could have been used to hire external planning experts to advise the Municipality, nothing was done. The Council of this small community, while well intentioned, had no expertise in dealing with the type information before them, and made no effort to engage any planning experts to assist in their analysis of the Application and in the making of a decision to deny.
59. As previously stated, the reasons for denial of the application as set out in the Minutes of October 22, 2020, are scant. One councillor simply stated he had "studied the reports and had a lot of feedback from various individuals and taken all into consideration" so he was voting against the resolution. That is a simple statement of fact and nothing more. It does not constitute reasons for a denial of an application.
60. A second councillor referred to the positive financial benefits and employment opportunities to the community. She referred to provisions of the Official Plan at 3.4.5 dealing with environmental matters and the need to protect the ecological integrity of the community. However, she made no mention of (and did not tie these provisions to) the Application before her. In addition, she also had before her a comprehensive Environmental Impact Assessment that dealt with and displaced all of these concerns.
61. A third councillor gave the best, albeit cursory, reasons for his decision to deny the application. He stated he had read all of the documents carefully over the two years that the community dealt with the Application. He recounted he'd been on Council when the Bylaw was changed to allow for wind farms. He said the stated aim was "to address wind development appropriate in location, size and scale" and that "he did not believe that this has been met by this proposal and that it is in the best interests of the community not to be in favour of this resolution", a distinct statement of his position, but clearly not one animated by sound planning principles.
62. A fourth councillor voted to deny and made the same reference as the second councillor to the Official Plan and protection of the ecological integrity of the community to ensure environmental impacts and development do not compromise its ability to meet the needs of future generations to enjoy the quality of life "that we enjoy today". He also refers to the draw of "birding" to the area and old growth

forests. He makes no mention of the comprehensive EIA that addressed all of these issues. He rightly states “there’s a lot to consider for sure”. This counsellor would have been well served if the Municipality had engaged a planning professional to be a resource for him and to address his questions.

63. The councillor who voted in favour of the resolution did not give reasons for his decision to support the resolution.
64. As a whole, there’s a paucity of reasons for the denial. The denial is not rooted in the Official Plan or the By-laws and no attempt made by Council to follow sound planning principles. Council in this case made a substantive error when it based its decision on considerations other than sound planning principles This constitutes a palpable and overriding error on the part of the Council.
65. In summary, this ground of appeal is accepted by the Commission.
66. The decision cannot be supported and the Commission hereby quashes the decision of the Municipality to deny the Application.
67. PEIEC had an excellent Application to build the wind farm. Kim Horreht and all of her co-workers at PEIEC executed a well-designed plan to have this wind farm project approved and built. Significant effort was made to ensure all things were well-researched and carried out in a professional and respectful manner. Following the Municipal approval route was the only avenue to seek development of the wind farm. This Commission was impressed with the application as filed. The witnesses for PEIEC were forthright and their testimony was helpful to the Commission.
68. The Commission is mindful that it has had the benefit of the planning expert report and hearing the evidence of John Heseltine. The Commission agrees with his opinion.
69. However, in the particular context of this present case, the Commission and the public generally would benefit from a decision from the Council that has: considered the directions of the Commission; has benefitted from the advice of a planning professional; and has engaged with the residents of the municipality, in light of those directions and that advice. Quashing this decision and allowing this Application to be reheard with the By-law processes, with the benefit of these reasons and the advice of a planning professional, is the outcome that best respects the design choices made by the Legislature in the *Planning Act* and related legislation. Substitution of this decision by the Commission, without the benefit of an underlying decision from the Council which has had an opportunity to review and consider advice from a planning professional about the application, Official Plan, Bylaw, and sound planning principles, would not be appropriate in this particular case.
70. Therefore, the Commission remits the Special Permit Use Application back to the Municipality to have it duly processed in the proper manner with the Municipality engaging the appropriate planning professionals to assist it in its assessment of the application.

9. RENEWABLE ENERGY ACT

71. Although the Commission is ordering that the Application be remitted back to the Municipality, it always remains open to the Lieutenant Governor in Council to make regulations under the *Renewable Energy Act* to regulate the development of this renewable energy generation facility, and others.
72. It should be noted that a municipality has no jurisdiction to approve wind farms under the *Renewable Energy Act*. That jurisdiction is granted only to the Minister.
73. In the closing submissions on this hearing the Commission asked Counsel for the Parties about the ability of the Government to enact regulations to allow for this wind farm development. Counsel for the Respondent, the Municipality, stated:

“At the beginning of the hearing, the Respondent respectfully submitted that the Commission should hear this appeal with overarching consideration of the fact that legislature seemed fit to give municipalities authority over land use planning decisions within the boundaries of their - of Island municipalities. Legislature has the ability to displace the role of council and put decisions about where wind turbines should be placed in the hands of the Province. It can implement regulations under the Renewable Energy Act to do so at any time and can regulate placement of wind turbines in Eastern Kings if the Province so wishes.

In Section 9 of the Renewable Energy Act, the Lieutenant Governor in Council may regulate or prohibit the development in all or any area of the Province of renewable energy generation facilities, utilize the wind, and that have a name plate capacity greater than 100 kilowatts.

There’s been a lot of discussion in this hearing about the benefits this project would have on all Islanders. Provincial mandate aims to move towards lower emissions. If this is the case and there’s a legislative avenue for the Province to advance this goal, so the respondents in this, why is this before the Commission to consider and why is the Province not regulating it if it is such a provincial issue and a matter of interest to all Islanders? The Province can regulate it. It’s a matter of passing regulations.

We have a Planning Act giving planning authority to council, I mean municipalities, Municipal Government Act which states council’s jurisdiction is within municipal boundaries. And then the legislature has an additional option under the Renewable Energy Act to make regulations and put wind farms anywhere in the province.

The legislative structure in place for the Province to take over and push decisions about where windmills should go.

....

...Regulations under the Renewable Energy Act may permit wind turbines to be built in Eastern Kings.”⁹⁴

74. Counsel for PEIEC acknowledged the ability of the Government to enact regulations to approve the wind farm. It had not done so. Therefore, PEIEC followed the only process available to it to develop the wind farm – applying to the Municipality for a Special Use Permit.

10. CONCLUSION

75. For the reasons above, the appeal is allowed.
76. The Commission thanks the Appellant, the Municipality and the Intervenors for their submissions in this matter. Counsel for PEIEC was helpful and did an excellent job in presenting the Appellant’s case to the Commission. Counsel for the Municipality was also helpful to the Commission and did an excellent job representing the Respondent before the Commission.

11. ORDER

77. The decision of the Municipality is quashed. The Commission remits the Special Permit Use Application back to the Municipality to have the application duly processed in the proper manner with the Municipality engaging the appropriate planning professionals to assist in its assessment of the Application.

DATED at Charlottetown, Prince Edward Island, **Friday, April 28, 2023.**

BY THE COMMISSION:

(sgd.) J. Scott MacKenzie

J. Scott MacKenzie, K.C., Chair

(sgd.) M. Douglas Clow

M. Douglas Clow, Vice-Chair

(sgd.) Erin T. Mitchell

Erin T. Mitchell, Commissioner

⁹⁴ Closing Submissions of Hilary Newman, Transcript – Day 3, pgs. 58-60, and 65.

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.