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

Date Issued: **April 10, 2025**
Docket: **LA22002**
Type: **Planning Act Appeal**

INDEXED AS: Parry Aftab and Allan McCullough v. Minister of Housing, Land and Communities
2025 PEIRAC 16 (CanLII)
Order No: LA25-02

BETWEEN:

Parry Aftab and Allan McCullough

Appellants

AND:

Minister of Housing, Land and Communities

Respondent

AND:

Brian Gillis and Elaine MacKenzie

Interveners

REASONS FOR DECISION

Panel Members:

Kerri Carpenter, Vice Chair, Panel Chair
Terry McKenna, Commissioner

Compared and Certified a True Copy

(Sgd.) Michelle Walsh-Doucette

Commission Clerk
Island Regulatory and Appeals Commission

Contents

Appearances & Witnesses

1. For the Appellants:

Counsel:

Tom Keeler, McInnes Cooper

Witnesses:

Parry Aftab

Allan McCullough

Chris Markides, MCIP, LPP

2. For the Respondent:

Counsel:

Christiana Tweedy, Legal Services, Department of Justice and Public Safety

Witnesses:

Alex O'Hara, MRTPI, MIPI, Land Use and Planning Act Specialist, Department of Housing, Land and Communities

Eugene Lloyd, Manager of Provincial Planning, Department of Housing, Land and Communities

3. Interveners:

Brian Gillis

Elaine MacKenzie

1. INTRODUCTION

1. This is an appeal of the decision of the Minister of Housing, Land and Communities (the "Minister")[1] dated December 14, 2021, to deny the Appellants' Amended Development Permit Application for a development permit for single-unit dwelling on PID 877647 located in Point Prim, Prince Edward Island.

2. The Appellants' Amended Development Permit Application was filed to clarify and amend two previous Development Permits[2] and sought permission to construct a three-storey cottage (including attic), measuring 40ft x 60ft, and totaling 7,200 square feet (including attic).

3. The Minister denied the Amended Development Permit Application because of their assessment that the proposed development would have a detrimental impact on surrounding land uses, primarily due to the development's height, size and location.

2. BACKGROUND

4. The decision under appeal was made on December 14, 2021; however, the full history of this matter dates back to June 2017.

5. The Appellants are the owners of PIDs 877639 and 877647 located on Bessie Willow Lane in Point Prim, Prince Edward Island. The property at issue in this matter is PID 877647 (the "Subject Property").

6. In June 2017, the Appellants submitted an Application for Development Permit to the Minister[3] (the "2017 Application"). The 2017 Application was for the construction of two structures: one accessory building; and one two-storey summer cottage, measuring 36ft x 48ft, and totaling 3,456 square feet. The Minister granted a development permit for the 2017 Application on July 13, 2017 (the "2017 Permit").

7. By July 2018, the Department of Housing, Land and Communities (the "Department")[4] had received a number of calls and complaints regarding the Structure being constructed on the Subject Property. On July 19, 2018, the Minister issued a cease construction letter to the Appellants.

8. On July 20, 2018, employees of the Minister (also referred to herein as the "Department") attended the Property to conduct a site visit. The Appellants advised them that the Structure had been repositioned approximately 150ft from the location described in the 2017 Application. The Appellants explained that they undertook this change so as to avoid impacting their neighbours' view and privacy. The dimensions of the Structure and the basement were also larger than those approved by the 2017 Permit. The Appellants explained this was done at the recommendation of their contractors. The Structure also included a third-storey or attic, not described in the 2017 Application. (The structure as constructed will be referred to herein as the "Structure").

[1] Formerly the Minister of Agriculture and Land at the material time.
[2] Appeal Record, Tab 1A.
[3] The Minister of Communities, Land and Environment, at the material time.
[4] The Department of Communities, Land and Environment, at the material time.

9. The Department sent a letter to the Appellants on or about August 29, 2018, detailing the issues with the Structure. In particular, the letter noted that the Structure was not being constructed in accordance with the 2017 Permit with respect to its location, square footage, and the number of storeys. The letter also advised the Appellants to submit a new application and site plan for the Structure with updated and accurate information to reflect what was actually being constructed.

10. Over the next several months, throughout the summer and fall of 2018, there were considerable discussions between the Appellants and the Department respecting the Structure and the 2017 Permit.

11. Ultimately, after further meetings and discussions with the Department, the Appellants submitted a subsequent application in early November 2018 (the "2018 Application"). This application described the Structure as a two-storey summer cottage, measuring 40ft x 60ft, and totaling 4,800 square feet.

12. In a letter dated March 15, 2019, the Minister reminded the Appellants that as of February 15, 2019, the 2017 Permit was revoked and that the Appellants no longer had "legal approval to continue with construction/work to the subject building".

13. By January 2021, the Department wrote to the Appellants seeking resolution of the matter. The primary outstanding issue was the "third storey" of the Structure and that it was not acknowledged in the 2018 Application. Essentially, the letter stated that the Department was prepared to process the 2018 Application if the third-storey was removed from the Structure. It is worth noting here that throughout discussions between the parties, beginning in 2018, the Appellants insisted that the "third storey" was, in fact, an "attic" that would be unfinished and used only for storage.

14. On July 27, 2021, the Appellants submitted a further amended application for a three-storey cottage (including attic), measuring 40ft x 60ft, and totaling 7,200 square feet (including attic) (the "2021 Application").

15. The 2021 Application was denied by the Minister on December 14, 2021, pursuant to subsection 3(2)(d) of the *Planning Act Subdivision and Development Regulations* (the "*Regulations*").[5] It was denied because the development would have a detrimental impact on surrounding land uses (the "Decision"). In particular, the denial letter raised concerns with the visual integration of the Structure with the surrounding landscape, and that "the subject structure would not be deemed congruous with its surrounding development." The letter outlined three "material considerations": (i) overlooking and loss of privacy; (ii) the design, appearance and materials of the proposed development; and (iii) impact on visual amenity (but not the loss of a private view).

16. The Appellants filed a Notice of Appeal with the Commission, appealing the Minister's denial, on January 4, 2022.

[5] The Decision was made by Eugene Lloyd. Mr. Lloyd testified that the Minister has delegated decision-making authority to him pursuant to the *Planning Act.*

17. On April 15, 2024, Brian Gillis and Elaine MacKenzie (collectively, the "Interveners") made application to the Commission to intervene in the proceedings. The Interveners are the owners of the properties adjacent to PID 877647. After inviting submissions on the application from the Appellants and Minister, on May 8, 2024, the Commission ruled that the Interveners would be granted limited intervener status as Friends of the Commission Interveners, and would be permitted to file brief written submissions following the conclusion of the hearing.

18. The Commission heard the appeal at a public hearing on May 22 and 23, 2024.

19. Intervener submissions were received by the Commission on May 29, 2024, to which the Appellants responded on June 3, 2024.

3. ISSUES

20. The appeal raises two main questions for the Commission to consider. The first issue is procedural and asks the Commission to determine whether the Minister followed the proper procedure as required by the *Planning Act*, the *Regulations* and the duty of procedural fairness, in making the Decision. The second is whether the Minister's Decision to deny the 2021 Application was made in accordance with the *Planning Act*, the *Regulations*, and was based on sound planning principles.

4. DISPOSITION

21. The appeal is denied. The Commission is satisfied that the Minister followed the proper process in reviewing and processing the 2021 Application, and that the Decision was made in accordance with the *Planning Act*, the *Regulations*, and was based on sound planning principles.

5. EVIDENCE

22. The documentary evidence before the Commission consisted of the Minister's Appeal Record, totalling over 200 pages, and including (but not limited to): the 2021 Application and Decision; the Appellants' previous applications and decisions; Departmental documents and correspondence; communications between the Department and Appellants; and communications with surrounding landowners.

23. At the hearing, the Commission heard oral testimony from five witnesses.

24. The Appellants both testified at the hearing about their personal knowledge respecting the history of the matter and the filing of the 2021 Application. The Appellants also called Chris Markides, MCIP, LPP, Senior Planner with ZZap Consulting Inc., to speak to his Expert Opinion Report and provide expert opinion evidence regarding the Minister's Decision and application of sound planning principles. At the hearing, Mr. Markides was formally qualified as an expert in land use matters per Rule 59 of the Commission's Rules of Practice and Procedure.

25. The Minister called two witnesses: Alex O'Hara, MRTPI, MIPI, who is a Land Use and Planning Act Specialist with the Department, and Eugene Lloyd, the Manager of Development Control with the Department.

26. We also note that, at the hearing, the Minister submitted into the Record several photographs of the Structure, the Subject Property, and the surrounding area.[6]

6. ANALYSIS

A. Authority and Guideline

27. The Commission has a two-part guideline it uses when exercising its appellate authority under the *Planning Act.*[7] The guideline involves two main considerations: [8]

    i. Whether the Minister followed the proper procedure as required by the *Planning Act*, the Regulations and the law in general, including the duty of procedural fairness, in making the decision; and

    ii. Whether the Minister's decision was made in accordance with the *Planning Act,* the *Regulations* and was based on sound planning principles in the field of land use planning.

28. The Commission does not lightly interfere with decisions made by a planning authority.[9] The Commission will typically be deferential toward planning decisions that are properly made, and will generally be reluctant to interfere with a decision on the basis that it is not consistent with sound planning principles where that decision is supported by objective and reliable evidence. This evidence must come from planning professionals confirming that the decision is based on the applicable official plan and bylaw, and sound planning principles.[10]

B. Procedural Issue

29. In their written submissions, the Appellants submit that, with respect to the first prong of the two-part test, they do not take issue with the process and procedure undertaken by the Minister in processing the 2021 Application. However, the Appellants have raised an issue that the Commission considers to be procedural.

30. The Appellants have argued that the Minister's analysis respecting the 2021 Application was flawed because it was not performed by a "professional land use planner". In the Commission's opinion, this is an issue with the process and procedure followed by the Minister, and is best addressed as such. While there will undoubtedly be some substantive sound planning issues that flow from a failure to engage a professional land use planner,

---

[6] Exhibits R-6 and R-7.
[7] RSPEI 1988, P-8.
[8] See, for example: Order LA23-03, *New Homes Plus v. City of Charlottetown*, at para 34; Order LA22-07, *Landfest Company Ltd. v. Town of Stratford,* at para 32 [*Landfest*]; and Order LA17-02, *APM Construction Services Inc. v. Community of Brackley,* at para 21.
[9] *Landfest* at para 32.
[10] Order LA18-02, *Queens County Condominium Corporation No. 40 v. City of Charlottetown*, at para 41 [*QCC No. 40*].

we are of the opinion that an alleged failure to seek and consider advice from a planning professional in assessing an application is a process error.[11] We will consider the substantive question with respect to sound planning principles in the section that follows.

31. In this case, the Appellants rely on the Commission's decision in Order LA23-04 ("*Arsenault*")[12] to assert that Mr. O'Hara is not a professional land use planner. Their position is that the Minister did not consult a professional land use planner in reviewing the 2021 Application. Perhaps unsurprisingly, the Minister disagrees and asserts that Mr. O'Hara is a professional land use planner.

32. In *Stringer,* the Commission said that "in order to ensure that sound planning principles have been followed in anomalous applications, a professional land use planner must be consulted."[13] We note that in *Stringer,* the permits the Minister was asked to review were for "bunkies"— a type of structure and land use that was not specifically contemplated by the *Regulations.*

33. More recently, the Commission stated as follows, in *Arsenault*:[14]

> … As set out in *Stringer*, the minister ought to have consulted a professional land use planner with respect to the subject application to weigh and balance the important considerations associated with sound planning principles – particularly when it is dealing with the interpretation of discretionary legislative provisions.
>
> […]
>
> The Commission and the Regulations stress the importance of decisions respecting subdivision applications being ground by sound planning principles…

34. In our opinion, there are noteworthy differences between the circumstances in *Arsenault* and the present matter. First, *Arsenault* involved an application to subdivide two parcels to permit a 19-lot subdivision for residential use at a property that had previously been used for agriculture. The comments of the Commission in *Arsenault* reflect this. In the present case, however, Mr. O'Hara was reviewing a development permit application for a single-unit residential dwelling in a summer cottage subdivision. This is a distinguishing factor between this case and *Arsenault* that we consider to be relevant.

35. Further, the Appellants' own expert, Mr. Markides, testified that he has been a "professional planner" since receiving his Master's Degree of Planning in 2018, prior to having the official professional designation of LPP or MCIP.

36. Mr. O'Hara told the Commission that, since 2013, he has held an Integrated Master's Degree of Science in Planning and Property Development from the University of Ulster, in

---

[11] See, for example: Order LA23-02, *Prince Edward Island Energy Corporation v. Rural Municipality of Eastern Kings*, at paras 69-70.

[12] Order LA23-04, *Lucas Arsenault, Jennie Arsenault and L&J Holdings v. Minister of Agriculture and Land* [*Arsenault*].

[13] Order LA17-06, *Stringer v. Minister of Communities, Land and Environment*, at para 64 [*Stringer*].

[14] *Arsenault*, at paras 44-45.

Newtownabbey, Northern Ireland. Therefore, considering Mr. Markides' testimony about becoming a professional planning upon graduation, Mr. O'Hara can similarly have been considered a "professional planner" within the industry since obtaining his Master's degree in 2013.

37. In view of these two distinguishing factors from *Arsenault*, we are satisfied that at the material time, Mr. O'Hara was qualified as a professional planner to review, assess and opine on a development permit application for a single-unit residential dwelling. We find, therefore, that the Minister followed the proper process and procedure in having the 2021 Application reviewed by a professional land use planner.

C. Sound Planning Principles

38. Moving on to the second consideration under the Commission's two-part guideline, it is well-settled that the Commission must be satisfied that the Decision made by the Minister was made in accordance with the *Planning Act* and *Regulations*, and has merit based in sound planning principles.

39. The Appellants submit that the Minister's analysis respecting the 2021 Application was flawed in that it was not performed by a "professional land use planner" thus allowing for subjective and arbitrary decision making by Mr. O'Hara, and by extension the Minister, contrary to sound planning principles. As concluded above, we are satisfied that the 2021 Application was reviewed by a "professional planner", but we will now consider whether that review and the resulting Decision was contrary to sound planning principles.

40. Both parties reference the Commission's previous comments in *Stringer*[15] on the importance of sound planning principles:

> … Sound planning must be a common feature of development throughout Prince Edward Island and property owners located in areas of the province for which there is no municipal government should be not be subject to inferior land use planning rights and responsibilities. Sound planning principles are a guard against arbitrary decision making especially where a regulatory checklist does not address a concern. Sound planning principles require regulatory compliance but go beyond merely insuring [sic] such compliance and require discretion to be exercised in a principled and informed manner. Sound planning principles require the decision maker to take in 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.

41. The Commission, in *Stringer*, also said that in determining whether a development permit should be granted, the Minister must:[16]

> … make an examination beyond the strict conformity with the Regulations and must consider sound planning principles including, but not limited to, the quality of architectural design, compatibility with architectural character of adjacent development, site development principles for the placement of

[15] *Stringer*, at para 64.
[16] *Stringer*, at para 58.

> structures and a thorough assessment of whether the development is consistent with sound planning principles (*Atlantis Health Spa Ltd. V. City of Charlottetown*, Order LA12-02). The alteration of the character and appearance of the neighbourhood must also not be contrary to sound planning principles (*Compton v. Town of Stratford*, Order LA07-05).

42. The consideration of sound planning principles, beyond strict conformity with the *Planning Act* and *Regulations*, is an inherently discretionary exercise. Previous orders of the Commission have held that planning authorities maintain a measure of discretion to assess applications, provided that discretion is neither arbitrary nor subjective.[17] The Commission also distinguishes between the mere whim of arbitrary discretion and the principled discretion of a well-trained professional.[18]

43. In the present case, the Minister's Decision relied heavily on Mr. O'Hara's report and recommendation[19] and concludes that the development would have a detrimental impact on surrounding land uses, pursuant to clause 3(2)(d) of the *Regulations*.

44. Generally, the Appellants argue that the Minister's exercise of discretion to deny the 2021 Application on the basis of "detrimental impact" was both subjective and lacking in factual underpinning, and therefore contrary to sound planning principles. They submit that the reasoning outlined in Mr. O'Hara's report improperly interprets established planning standards set out in the *Act* and *Regulations*.

45. The Minister recognizes that the assessment of "detrimental impact" is, by its nature, discretionary but argues that the Decision was made based on sound planning principles and is consistent with the purposes and provincial interests as set out in the *Planning Act*. They argue that the Decision furthers the objects of efficient planning, the protection of the province's viewscapes, and the orderly and sustainable development of rural communities. In addition, the Minister says the Decision is supported by recognized sound planning principles within the field of land use planning in Canada.

46. Before moving onto our substantive analysis, we wish to make some general comments respecting our assessment of the overall reliability of the evidence of both Mr. Markides and Mr. O'Hara.

47. First, Mr. Markides is a member of the Canadian Institute of Planners and a Licensed Professional Planner in Nova Scotia and Prince Edward Island (though, we note Mr. Markides only became licensed in Prince Edward Island on May 15, 2024). Through his testimony, the Commission learned that Mr. Markides does not have experience in planning in Prince Edward Island, nor has he dealt with a matter under the *Planning Act* or *Regulations*. Mr. Markides did not visit the Subject Property, nor did he consult with any planners in Prince Edward Island before coming to his opinion. Rather, he relied on photographs and Google Earth to formulate his opinion. While the Commission does not believe it is mandatory to attend a subject property to provide an expert planning opinion, in the present case, Mr. Markides' opinion report lacked the context of the Subject Property and Structure as a whole. For example, Mr. Markides could not comment on the height of

[17] *Pine Cone*, paras 46-48.
[18] Pine Cone, at para 48.
[19] O'Hara Report, Appeal Record, Tab 4J, pg .88.

the Structure or the characteristics of the vegetative buffer. In our opinion, that context is highly relevant to the present appeal.

48. On the contrary, Mr. O'Hara has experience in Prince Edward Island, and with the *Planning Act* and *Regulations* specifically. In particular, Mr. O'Hara visited the site several times, giving him firsthand knowledge of the features of the Structure and Subject Property. This informed his recommendation to the Minister.

49. It is also worth noting that Mr. O'Hara's experience and professional accreditation has changed since the decision in *Arsenault*. Since *Arsenault*, Mr. O'Hara has become a Candidate Member of the Canadian Institute of Planners. This membership is one step below a full member and requires him to follow the same standards for ethical and professional conduct as a member. At the time of *Arsenault*, Mr. O'Hara was a pre-candidate member. Further, Mr. O'Hara is taking his professional exam under the Candidate Institute of Planners in September of 2024. Mr. O'Hara is also a member of the Royaltown Planning Institute, which is the national body for planning in the United Kingdom and is internationally recognized.

50. At the hearing, the Commission did not qualify Mr. O'Hara as an "expert witness" per Rule 59 of the Commission's Rules of Practice and Procedure because is an employee of the decision-maker. However, we did accept that he could provide some measure of opinion evidence in the area of land use planning, particularly as it relates to the present appeal. Overall, the Commission found Mr. O'Hara's testimony to be credible and reliable; it was informed and principled and took into consideration the context of the Subject Property, the surrounding area, and the Structure as a whole. As will be seen in the analysis that follows, because Mr. Markides' assessment of the Structure lacked this important context, we have generally considered Mr. O'Hara's evidence with respect to his assessment of the Structure, Subject Property, and surrounding area, to be more reliable in the circumstances.

(i) Detrimental Impact

51. The Minister's Decision denied approval of the 2021 Application pursuant to clause 3(2)(d) of the *Regulations.* That clause states:

> **3(2)** No development permit shall be issued where a proposed building, structure, or its alteration, repair, location, or use or change of use would
>
> […]
>
> (d) have a detrimental impact;

52. Section 1(f.3) of the *Regulations* defines "detrimental impact" as follows:

> **1(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;

(i) viewscapes; or

(ii) development approved pursuant to subsection 9(1) of the *Environmental Protection Act*.

53. The Appellants point out that the legislation provides that "detrimental impact" means any "loss or harm" suffered in person or property in matters related to surrounding land uses (in this case), and that the Minister's detrimental impact analysis must, as a result, demonstrate how the Structure negatively impacts, or imposes loss or harm, upon persons or property in relation to surrounding land uses. They made submissions and provided opinion evidence from Mr. Markides challenging each of the three "aspects of impact", or "material considerations", raised in Mr. O'Hara's report.

54. Mr. Lloyd testified that he made the Decision based on his consultation with Mr. O'Hara and the "material considerations" in Mr. O'Hara's report. Those considerations were: (i) overlooking and loss of privacy; (ii) design, appearance, and materials of the proposed development; and (iii) impact on visual amenity (but not the loss of a private view), when concluding that the summer cottage structure creates a detrimental impact on surrounding land uses.

55. At the hearing, Mr. O'Hara testified that his use of the term "material considerations" in his report means considerations that are applicable to the particular application and that go beyond the text of the *Act* or *Regulations* and involve a comprehensive look at the proposal, keeping in mind social, environmental, or design impacts, for example. In other words, as the Commission understands it, "material considerations" are, in effect, the sound planning principles Mr. O'Hara considered.[20]

56. We will now consider each of the considerations raised by Mr. O'Hara in turn. However, before doing so, we think it is important here to contextualize the Structure, Subject Property, and the surrounding land uses.

57. The Subject Property is one of three neighboring lots approved for "summer cottage use" only, and located at the end of a 2,700ft, private right-of-way, which connects to the Point Prim Road (Rte 209).[21] The Structure, and in particular its prominent size, is visible from Point Prim Road.[22] The Subject Property is abutted by an existing, single-storey cottage structure on the lot to the east. On the lot to the west, the Appellants own an existing residential single-unit dwelling.

58. The Structure is undoubtedly tall. In fact, the undisputed evidence of Mr. Lloyd and Mr. O'Hara is that it is approximately 46ft tall. This evidence was based upon their personal knowledge of the Structure. For context, Mr. O'Hara testified that the Point Prim Lighthouse, just down the road, is 60.1ft tall. The Minister's evidence contains several photographs of the Structure, and its height and size are, quite frankly, striking. In one photograph in particular,[23] an employee of the Minister is standing next to the Structure, and the top of his head barely reaches the threshold of a doorway into the first floor.[24] In

[20] *Stringer*, at paras 58 and 64.
[21] O'Hara Report, Appeal Record, Tab 4J, pg .88.
[22] O'Hara Report, Appeal Record, Tab 4J, pg .94; see colour photograph at Exhibit R-7.
[23] Exhibit R-6.
[24] Mr. Lloyd testified the employee in question is approximately 5ft 6in.

looking at the photographs of the Structure, it is hard to ignore just how big the Structure appears to be, particularly in comparison to the structures located on the surrounding properties.

a. Overlooking and loss of privacy

59. With respect to overlooking and loss of privacy, the Appellants argue that the height and siting of the Structure, as well as the mature vegetative barrier on the eastern perimeter of Subject Property, reasonably mitigate "harm or loss" to surrounding land uses, namely, other residential summer cottage structures on adjacent properties.

60. In particular, the Appellants submit that that neither the *Act* nor *Regulations* impose a statutory maximum building height in the Point Prim area. Therefore, from a height perspective, the Structure complies with the *Regulations.* Mr. Markides opined that the siting of the Structure on the Subject Property mitigates concerns of overlooking and privacy. He spoke to the Structure being strategically placed towards the rear of the Subject Property to maximize the distance from the two neighbouring dwellings. Finally, Mr. Markides opined that a "significant vegetative buffer" exists between the Structure and the lot to the east, that provides privacy and helps reduce the visual impact. Ultimately, Mr. Markides testified that it is difficult for him to determine how the Structure as constructed causes any more loss or harm to surrounding land uses than that which was approved in the 2017 Permit.

61. Mr. O'Hara testified that the height of the structure has a prominent overlooking effect into neighboring properties. He testified that the concept of overlooking is not limited to looking into a neighbouring dwelling, but also includes the loss of privacy of other spaces including patios and backyards. Mr. O'Hara testified that moving the Structure toward the back of the lot and increasing the height could actually result in more of a view over and into the neighbouring property. In Mr. O'Hara's opinion, the Structure provides a significant vantage point over the private space of the neighbours. With respect to the vegetative buffer, Mr. O'Hara opined that the 8-foot hedge between the properties would have little impact because of the height of the Structure.

62. The Commission accepts the Minister's determination that the Structure negatively impacts the neighboring property owner's as a result of overlooking and loss of privacy.

63. The Structure is 46 feet tall, with several large windows along the east and south facing sides (including one full-pane glass door). Mr. Markides testified about the siting of the Structure and a "significant vegetative buffer" that mitigated privacy concerns; however, he testified that he did not visit the Subject Property and relied on Google Earth to estimate the height and location of the Structure and the presence of the vegetative buffer. On the whole, we find the evidence of the Minister, including photographs taken on the Subject Property and the testimony of Mr. O'Hara and Mr. Lloyd who both actually visited the site, to be more compelling in respect of this consideration. We are satisfied that the height and size of the Structure would provide a significant vantage point over neighbouring properties, leading to loss or harm in respect of the surrounding land uses.

64. We note here that over the course of the hearing, the Commission heard conflicting positions about the characterization of the Structure's "third storey" or "attic." The Minister asserted that the upper level of the Structure constituted a storey, whereas the Appellants

insisted that it is an attic that will remain unfinished and be used for storage (i.e. not a living space). In our assessment, it is somewhat of an unnecessary distinction in this appeal whether the upper level is a storey or an attic. For example, the *Regulations* do not limit how many storeys a building can have in Point Prim. Nor do they regulate attic spaces in any way. That said, what we believe to be the relevant consideration is that the evidence discloses that the Structure is 46-feet tall with full windows and a glass door on the upper level.

b. Design, appearance and materials of proposed development

65. With respect to the design, appearance, and materials of the Structure, the Appellants submit that the Structure was designed to look like a historic PEI barn, so as to be in keeping with the rural character of the surrounding area. Mr. Markides opined that the Structure is compatible with regional architectural heritage, stating:

> [The structure in question] includes a gambrel roof, wood clapboard siding, and is three stories in height. Barns with a similar appearance can be found throughout rural Prince Edward Island, and the style of the structure is consistent with several historic buildings in the region.[25]

66. Mr. O'Hara's recommendation report, with respect to the design and appearance of the Structure, was primarily focused on the massing of the Structure. In his report, Mr. O'Hara commented that development permission is ordinarily granted for a structure in rural areas where it can be visually integrated into the surrounding landscape and is of an appropriate design. He goes on to say that the determination of whether a new building integrates into the landscape requires an assessment of the extent to which the development will blend in unobtrusively with its immediate and wider surroundings. According to Mr. O'Hara's report, reasons to deny a proposed structure based on integration and design would include it being a prominent feature in the landscape, and that the design of the building is inappropriate for the site and its locality.

67. Mr. O'Hara's report says that it is important that care is exercised in the siting and design of new buildings to ensure they can integrate harmoniously with the surroundings and thereby protect the amenity and character of rural landscapes. The form and proportions of a new building are key elements in the design and strong influence its visual impact on the landscape. The report says:

> If form and proportion are wrong, then little can be done with any other features to mitigate the impact of a poor design. Where the scale, form or massing of a building would make it dominant or incongruous in the local landscape, development permission should be refused.

68. Ultimately, Mr. O'Hara recommends the 2021 Application be denied, and as a final comment, he states:

> There are several different ways in which new development in rural areas can impact detrimentally on rural character. One building by itself could have a significant effect on an area if it is poorly sited or designed and would be unduly prominent, particularly in more open and exposed

[25] Chris Markides, Expert Planning Opinion, at page 8.

landscapes such as seen in this proposal where all three aspects of impact on rural character are present.

69. At the hearing, Mr. O'Hara testified that he considered the size, scale, height and mass of the Structure in making his recommendation. He testified that he assessed the immediate locale, determining that the structure was between two single-storey cottages, with one other two-storey single dwelling nearby. He also testified, as noted above, that the Structure is approximately 13 feet shorter than the Point Prim lighthouse, down the road, which he said is designed by its very nature to be a prominent feature in the landscape. Mr. O'Hara acknowledged that there are no prescribed height limits under the *Regulations*; however, he testified that without some kind of constraint, in theory, this could result in indefinite building heights – his words were "pick a number".

70. A key point of Mr. Markides' testimony and expert opinion report was that he failed to see how the Structure as constructed would have any greater "loss or harm" than that which was approved by the 2017 Permit or shown in the permit drawings. In response, Mr. Lloyd testified that the 2017 Permit was approved because the 2017 Application depicted a two-storey structure of reasonable size that could be said to be in keeping with the surrounding area. However, he testified that with respect to the 2021 Application, he had actual knowledge that the Structure was much larger than described, particularly with respect to its height and scale.

71. The Commission accepts the Minister's determination that the massing, size, and height of the Structure on the Subject Property results in a detrimental impact on the surrounding land uses. In particular, we are satisfied that the Structure is incongruous with the neighbouring properties, and that its prominence also negatively impacts the rural character of the immediate and wider surroundings.

72. With respect to Mr. Markides' evidence and opinion that the Structure is consistent with several historic buildings in the region, we are not compelled by this. Mr. Markides referenced four barns of "similar proportion and design" which are registered heritage properties. First, we note that Mr. Markides testified that, to his knowledge, none of the barns are residential properties. This alone makes them poor comparators, in our opinion. The barns were located on farm properties, where as the Subject Property is a two-acre cottage lot, abutted by two other cottage lots.[26] Further, Mr. O'Hara testified that he is familiar with each of these barns and that they are not in the area of Point Prim, nor are they in the vicinity of residential single-dwelling lots.

73. The Commission acknowledges that there is no height or size limitation in the *Regulations* that the Minister can point to in order to justify the Decision. However, the Commission has previously commented on the notion of "as of right" developments and has held that the decision-maker still has a measure of discretion to assess the proposed development, provided that discretion is exercised in a principled way, relying on objective evidence.[27] In *Pine Cone v. City of Charlottetown*, for example, the Commission commented that in addition to meeting the technical requirements of the Bylaw, the development must adhere to sound planning principles:[28]

[26] O'Hara Report, Appeal Record, Tab 4J, pg .88.

[27] *Pine Cone*, at paras 46-48; citing Order LA11-01, *Biovectra v. City of Charlottetown*. See also, *QCC No. 40*, at paras 36 and 40.

[28] *Pine Cone*, at para 52.

> … Lot coverage, scale, height, massing, and unique lot features must all be considered to ensure compatibility and architectural harmony with the surrounding neighbourhood, which is zoned R1 and consists of longstanding single family homes. These considerations must also be based on objective evidence and, in most cases, professional advice. In summary, there is a right to develop the Property; however, that right is not absolute.

74. In this case, we are satisfied that the Minister's Decision was based on objective evidence, primarily being the firsthand knowledge of the size and height of the Structure of both Mr. Lloyd and Mr. O'Hara, and the opinion of a planning professional. As previously stated, we are satisfied that the size, mass and height of the Structure, in the context of the surrounding rural area, has a detrimental impact on the surrounding land uses. The Structure is incongruous with the neighbouring properties, and its prominence negatively impacts the rural character of the immediate and wider surroundings.

c. Visual Amenity (but not the loss of a private view)

75. The final "material consideration" relied on by the Minister was visual amenity.

76. The Appellants submit that the Decision's focus on "impact on visual amenity", is not a valid planning criterion on which to assess harm or loss to surrounding land uses. Mr. Markides opined that "visual amenity" is not a defined term in the *Act* or *Regulations* and cannot be specifically regulated without excluding the development of any property which may interfere with the "visual amenity" of adjacent properties:[29]

> In this sense, any new development could be said to be interfering with visual amenity, given that new development inherently introduces a new structure to a property that had either a different structure, or was a completely undeveloped. Furthermore, it is not likely that the structure as completed causes any loss or harm to surrounding land uses than the structure proposed and approved by the initial development permit.

77. Further, the Appellants submit that the Point Prim area is not designated in section 58 of the *Regulations* as a "Scenic Viewscape Zone" and as such, the Minister's focus on preserving and enhancing the aesthetic appeal of the landscape in Point Prim is without statutory basis. They argue that the Decision's focus on protecting viewscapes in Point Prim, where no statutory protections exist, calls into question both the objectivity of the Respondent's Decision and its sound planning principle analysis.

78. Mr. O'Hara testified that the visual impact of a structure is a planning consideration. He acknowledged that there is no right to a private view, but that a viewscape perceived from public roads is a different consideration. He testified that in assessing the 2021 Application, he traveled along the Point Prim Rd to determine the impact of the structure on visual amenity. He testified that the view toward the south and the coastline is a unique aesthetic when you see it along that drive. He pointed out a photograph that he had taken from Point Prim Road which depicts the top of the Structure just below the horizon line. In

[29] Chris Markides, Expert Planning Opinion, at page 9.

Mr. O'Hara's assessment, the Structure had a prominent impact on the visual amenity of the surrounding area.

79. As support for this consideration, the Minister relied on section 2.1 of the *Act*. This section lists a series of "provincial interest statements" and directs that in carrying out the Minister's responsibilities in relation to planning matters and the effects of proposed development, the Minister shall have regard to matters of provincial interest. One such matter is the "protection of viewscapes that contribute to the unique character of Prince Edward Island" (clause 2.1(1)(j)). The Minister has submitted that this, in part, formed the basis of the visual amenity consideration in the detrimental impact analysis. The Minister submits that this statement of provincial interest considers the broader provincial interest and how it impacts the viewscapes that contribute to the province's unique character, rather than protecting private viewscapes for neighboring properties (as referenced in the definition of detrimental impact).

80. In respect of this consideration, we note that the provincial interest statements at section 2.1 of the *Act* were not in force at the time the Appellants submitted their 2021 Application on July 27, 2021. Section 2.1 of the *Act* did not come into force until November 17, 2021.

81. In a decision of the Commission from 1992, the Commission said:[30]

> […] *However, before the formal application was made, changes were made to the Planning Act Regulations that effectively prohibited the proposed development. In the opinion of the Commission, if Triple K. Construction Inc. had a vested or accrued right to a building permit prior to the change in the Regulations, it would most likely be entitled to the permit, notwithstanding any other changes in the law not considered in this appeal.*

82. The Commission went on to say that an accrued or vested right crystallizes upon the filing of an application together with all other required documentation.

83. In this case, we accept the Appellants had filed a complete application by July 27, 2021, and the Appellants were entitled to the substantive rights that existed under the *Act* at the time which they applied – which, in this case, did not include clause 2.1(1)(j). Therefore, in our opinion, the Minister cannot rely on the interest of protecting unique PEI viewscapes to justify this denial.

84. Despite this finding, however, we nevertheless conclude that the balance of the planning considerations applied by the Minister in their determination of detrimental impact – particularly the design and appearance of the Structure due to its height and size – weigh in favour of and support the Minister's decision to deny the 2021 Application.

7. CONCLUSION

85. The appeal is denied. The Commission is satisfied that the Minister's Decision to deny the 2021 Application was made in accordance with the *Planning Act,* the *Regulations* and was based on sound planning principles.

[30] Order LL92-02, *Triple K. Construction Inc. v. Department of Community and Cultural Affairs.*

86. We thank the parties for their submissions in this matter.

8. ORDER

87. The appeal is denied.

DATED at Charlottetown, Prince Edward Island**, April 10, 2025**

BY THE COMMISSION:

[sgd. Kerri Carpenter]

Kerri Carpenter, Vice Chair, Panel Chair

[sgd. Terry McKenna]

Terry McKenna, Commissioner

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.