

BEFORE THE ISLAND REGULATORY AND APPEALS COMMISSION

IN THE MATTER OF an appeal pursuant to s.28 of the *Planning Act*, RSPEI 1988 c. P-8 by Parry Aftab and Allan McCullough with respect to the denial of an application for an Amended Development Permit at PID #877647 located at Bessie Willow Land, Point Prim, Queens County, Prince Edward Island

SUBMISSIONS OF THE RESPONDENT

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Introduction

1. This supplementary reply is provided on behalf of the Minister of Housing, Land and Communities, formerly the Minister of Agriculture and Land, (the “Minister”) in response to the submissions filed by Parry Aftab and Allan McCullough (the “Appellants”) on April 22, 2024 (the “Appellants’ Submissions”).
2. The Appeal is in relation to the denial of an application for an Amended Development Permit at PID #877647 located at Bessie Willow Land, Point Prim, Queens County, Prince Edward Island (the “Subject Property”).¹
3. The Minister’s Record of Decision was filed on March 1, 2022 (the “Record”).

Background and Decision

4. The background of the Appeal filed by the Appellants is as set out in the reply previously filed by the Minister of March 2, 2022 (the “Reply”), but for ease of reference, is reproduced below.
5. On June 29, 2017 the Appellants submitted an Application for Development Permit to the Minister of Communities, Land and Environment (“Application 2017-0119”).² Application 2017-0119 was for the construction of two structures on the Subject Property. One of the structures was to be an accessory building with a size of 14’ x 20’. The other structure was for a summer cottage that was to be two stories with each storey measuring 36’ x 48’.
6. The Development Permit in relation to Application 2017-0119 was granted on July 13, 2017, and indicated that approval was granted for the construction of a summer cottage “in accordance with the plans and information submitted.”³ Permit 2017-0119 was issued subject to the “structure being erected in accordance with the approved application sketch.”⁴ The approved application sketch noted that the base of the cottage was to be 36’ x 48’.⁵ The Minister submits that had the Appellants constructed the summer cottage in accordance with Permit 2017-0119, the herein Appeal would have been unnecessary.
7. On July 18, 2018 the Minister received the first of many complaints with respect to the construction occurring on PID 877647. The complaint was that a large building construction was occurring and that it seemed to be close to the private road and to the property boundary.⁶ Similar complaints then followed.⁷

¹ Record Tab 1B.

² Record Tab 3A.

³ Record Tab 3B.

⁴ Record Tab 3B.

⁵ Record Tab 3A page 3.

⁶ Record Tab 6 page 2.

⁷ Record Tab 6.

8. On July 19, 2018, there was a cease construction letter delivered to the Appellants, via an individual who was doing work on the Subject Property. The letter indicated that the location of the summer cottage structure was not in the location shown on the site plan and that there was no permit issued for one of the structures that was observed on the property.⁸
9. On July 20, 2018, there was a site visit conducted by employees of the Minister. The Appellants were present for this site visit. Several development infractions were observed, including that the dimensions of the cottage were significantly larger than the dimensions included in Application 2017-0119 and approved in Permit 2017-0119.
10. At the July 20, 2018 site visit, the Appellants were advised that they would have to submit a new application for the cottage being constructed due to the increase in size and the different location from what was identified on the site plan included with Application 2017-0119.⁹
11. On August 29, 2018, a letter was sent to the Appellants from Dale McKeigan which detailed the issues with the development.¹⁰ In particular it noted that the summer cottage being constructed was not in compliance with Permit 2017-0119 as the location of the structure was different and there was an extra storey and additional square footage.
12. The Appellants were instructed to submit a new application for development permit with updated and accurate information to reflect what was actually being constructed on the property. **The Appellants were aware that deviation from what was approved in Permit 2017-0119 was a violation of the *Planning Act*, RSPEI 1988 c. P-8 (the “*Planning Act*”).**¹¹
13. Construction on the project continued throughout the summer of 2018 despite the proper development permits not being in place.
14. In October 2018, there was a second site visit conducted by employees of the Minister who observed that the largely completed cottage structure was three stories and approximately 46’ tall.
15. On November 5, 2018, the Appellants submitted a new Application for Development Permit for the construction of the cottage already present on the parcel, having been constructed throughout the summer of 2018 (“Application 2018-0281”).¹² Application 2018-0281 listed the size of the summer cottage now as being two stories and each storey being 40’ x 60’. Application 2018-0281 did not include the third storey, which was observed in the October 2018 site visit.

⁸ Record Tab 5B.

⁹ Record Tab 5C.

¹⁰ Record Tab 5C.

¹¹ Record Tab 5C page 3.

¹² Record Tab 3D.

16. On February 15, 2019, the Appellants were advised that Permit 2017-0119 was revoked. This was followed up with a letter dated March 15, 2019 from Dale McKeigan.¹³
17. Throughout 2019 and 2020, the Minister was considering what action may be reasonable to take against the Appellants given that the development was now largely complete, but did not have the requisite development permit issued.
18. Communications continued between the Minister and the Appellants, as well as the Minister and surrounding landowners.
19. On July 27, 2021, more than three years after the project was commenced, an Amended Application for a Development Permit was submitted (“Application 2021-200”).¹⁴ Application 2021-200 indicated that the summer cottage structure is three stories with each storey measuring 40’ x 60’ the total floor area being 7,200 square feet over the three stories. Permit 2017-0119, when originally granted, was for a structure with a total floor area being 3456 square feet. The summer cottage which was constructed, and which stands on the property today, is more than double the size that was originally applied for and granted.
20. On December 14, 2021, the Minister denied Application 2021-200 pursuant to subsections 3(2)(d) and 6(c) of the *Planning Act Subdivision and Development Regulations*, EC693/00 (the “Regulations”) (the “Decision”).¹⁵
21. The Decision indicated that Application 2021-200 was denied because the development was not visually integrated into the surrounding landscape and was not an appropriate design for the area. The structure does not “blend in unobtrusively with its immediate and wider surroundings.”¹⁶ The Minister found that the structure was a prominent feature in the landscape and that the design of the structure was inappropriate for the site and its locality, being a seasonal residential community.

Grounds of Appeal

22. The Appellants have sought an order from the Commission overturning the Decision and approving the Application 2021-200. The Appellants’ grounds of appeal are as follows:
 - a. The Department failed to correctly follow, interpret and apply the provisions of the *Planning Act* and the *Planning Act Subdivision and Development Regulations*;
 - b. The Department erred in concluding that the Application would have a detrimental impact on surrounding land uses based on sound planning principles;

¹³ Record Tab 5J.

¹⁴ Record Tab 1A.

¹⁵ Record Tab 1B.

¹⁶ Record Tab 1B.

- c. The Department considered irrelevant factors and failed to consider relevant factors; and
- d. The Department failed to provide adequate reasons.¹⁷

23. The Minister notes that the Appellants' Submissions do not advance arguments with respect to the last ground of appeal, being that the Department failed to provide adequate reasons.

24. The Minister's response to the Appellants' Submissions is set forth below.

The Law

25. The Commission has previously stated (Order LA17-06) that it is of the view that the following test should be applied to Ministerial decisions made under the *Planning Act* and the Regulations:¹⁸

- Whether the land use planning authority, in this case the Minister, followed the proper process and procedure as required in the Regulations, in the *Planning Act* and in the law in general, including the principles of natural justice and fairness, in making a decision on an application for a development permit, including a change of use permit; and
- Whether the Minister's decisions with respect to the applications for development and the change of use have merit based on sound planning principles within the field of land use planning and as identified in the objects of the *Planning Act*.

26. The Commission has commented that it does not lightly interfere with reviewable decisions.¹⁹ The Commission stated in Order LA12-02:²⁰

[9] In previous appeals, the Commission has found that it does have the power to substitute its decision for that of the municipal or ministerial decision maker. Such discretion should be exercised carefully. The Commission ought not to interfere with a decision merely because it disagrees with the end result. However, if the decision maker did not follow the proper procedures or apply sound planning principles in considering an application made under a bylaw made pursuant to the powers conferred by the *Planning Act*, then the Commission must proceed to review the evidence before it to determine whether or not the application should succeed.

¹⁷ Record Tab 2.

¹⁸ *Stringer (Re), Donna Stringer v Minister of Communities, Land and Environment*, Order LA17-06 at para 52 [Stringer].

¹⁹ *Landfest v Town of Stratford*, Order LA22-07, at para 32.

²⁰ *Atlantis Health Spa Ltd v City of Charlottetown*, Order LA12-02, at para 9.

27. In this case, the Minister did follow the proper process as set out by law and did apply sound planning principles, and therefore, we submit that deference has been earned.

Minister's Position

Step 1: Processing of the Applications

28. The Minister submits that the Decision meets the first part of the two-part test in that the Minister followed the proper process and procedure, and the applicable legislation, when making the Decision. The Decision was not overly broad nor arbitrary, and was grounded in the principles of natural justice. It is the Minister's understanding that the Appellants, as stated in paragraph 28 of the Appellants' Submissions, do not take issue with the Minister's processing of Application 2021-200.

29. Notwithstanding that the Minister followed the proper process and procedure, as well as the applicable legislation, the same cannot be said of the Appellants in relation to the Subject Property.

30. Subsection 6(c) of the *Planning Act* provides that the Minister shall generally administer and enforce the Planning Act and its Regulations.²¹ The Regulations apply to all areas of the province, except those municipalities with official plans and bylaws.²²

31. As the Subject Property is located in Point Prim, the Regulations apply.

32. Pursuant to section 31(1) of the Regulations, no person shall, without first obtaining a development permit issued by the Minister:²³

- a. Commence of the construction of any building or structure;
- b. Change the location of any building or structure on a lot; or
- c. Make any structural alterations which change the exterior dimensions of any building or structure.

33. Once the development permit is issued, it may be revoked within 24 months of it being issued, "if construction has commenced in a location or manner contrary to the application or these regulations."²⁴

²¹ Planning Act, s. 6(c).

²² Regulations, s. 2(1).

²³ Regulations, s. 31(1).

²⁴ Regulations, s. 33(2).

34. Since Permit 2017-0119 was granted on July 13, 2017, the Appellants have shown a blatant and intentional disregard to the Planning Act, the Regulations, and the Minister's authority granted thereunder, including, but not limited to, the following:
- a. The Appellants intentionally commenced construction of the summer cottage structure in a different location and with different dimensions than included in Application 2017-0119 and approved in Permit 2017-0119;
 - b. The Appellants continued to build the structure following a cease construction letter being issued and being informed that they were acting in contravention of the *Planning Act*;
 - c. The Appellants failed to apply for a new development permit accurately reflecting the structure within a timely manner of the Minister requesting same;
 - d. When the Appellants finally submitted Application 2018-0281, the summer cottage structure was not accurately depicted with only two stories listed on the application when the structure constructed was approximately 46' tall and three stories; and
 - e. The Appellants have erected two separate structures apart from the summer cottage structure on the Subject Property, which do not have corresponding development permits.

Step 2: Sound Planning Principles

Sound Planning Principles

35. The Decision also meets the second part of the test in that it is supported by objective and reliable evidence from a land use planner confirming that the decision is based on the *Planning Act*, the Regulations, and sound planning principles.
36. The assessment of this Application pursuant to the Planning Act, the Regulations and the application of sound planning principles ensured that the decision was neither arbitrary, nor overly broad.
37. The Minister highlights the Commission's findings in Order LA17-06 that sound planning principles are a guard against arbitrary decision making. The Commission stated:²⁵

Sound planning principles require regulatory compliance but go beyond merely insuring such compliance and require discretion to be exercised in a principled and informed manner. Sound planning principles require the decision maker to take into consideration the broader implications of their decisions. In order to ensure that sound planning principles have been

²⁵ Stringer at para 64.

followed in anomalous applications a professional land use planner must be consulted.

38. Again, in Order LA17-06, the Commission commented that sound planning must be a common feature of development throughout Prince Edward Island.²⁶ In determining whether a development permit should be granted, the Minister must make an examination:²⁷

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 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).

39. In assessing suitability and compatibility, a review of sound planning principles includes looking at the development's lot coverage, scale, height, massing, and unique lot features. All of these factors are to be considered in determining whether the development is compatible with and has architectural harmony with the surrounding properties.²⁸
40. In this case, the application of sound planning principles required that the Minister deny Application 2021-200.
41. At the time of the Decision being rendered, the following purposes and provincial interests were incorporated into the Planning Act:²⁹

2. Purposes

The purposes of this Act are

- (a) to provide for efficient planning at the provincial and municipal level;
- (b) to promote sustainable and planned development;**
- (c) to protect the natural and built environment of the province;
- (d) to encourage co-operation and co-ordination among stakeholders;
- (e) to address potential conflicts regarding land use;
- (f) to provide the opportunity for public participation in the planning process; and

²⁶ Stringer at para 64.

²⁷ Stringer at para 58.

²⁸ *Pine Cone Developments Inc v City of Charlottetown*, Order LA17-08 at para 52.

²⁹ Planning Act, ss. 2 and 2.1(1).

(g) to ensure compatibility between land uses. 1988, c.4, s.2;
2021,c.42,s.1.

2.1 Provincial interests

(1) The Minister in carrying out the Minister's responsibilities in relation to planning matters and the effects of proposed development under this Act shall have regard but not be limited to matters of provincial interest, such as

(a) the protection, conservation and management of resource lands;

(b) the protection, conservation and management of coastal areas;

(c) the protection, conservation and management of ecological systems;

(d) the prevention of fragmentation of land and of loss of natural habitat connectivity and biodiversity;

(e) the supply, efficient use and conservation of water;

(f) the supply, efficient use and conservation of energy;

(g) the adequate provision and efficient use of communication, transportation, sewage and water services, storm water management systems, waste management systems and other public services in relation to planning development, and the effect of planning development on those services;

(h) the effect of proposed planning development on, and measures for the protection of, public health and safety;

(i) the protection of features of significant archaeological, cultural, architectural, historical or scientific interest;

(j) the protection of viewsapes that contribute to the unique character of Prince Edward Island;

(k) the direction of development to areas designed to support servicing;

(l) the orderly and sustainable development of safe and healthy communities;

(m) the adequate provision of a full range of housing options;

(n) the promotion of a built environment that supports public transit and active transportation;

(o) the promotion of a built environment that incorporates the principles of conservation design;

(p) the adaptation of the built and natural environment to address the effects of climate change;

(q) the mitigation of greenhouse gas emissions; and

(r) adaptation to a changing climate.

42. These recently incorporated provisions into the Planning Act were in force and effect at the time of the Decision and guided the Minister in his sound planning principles analysis, as well as in the consideration of detrimental impact, which will be further discussed below.

43. In the opinion of Alex O'Hara, Land Use and Planning Act Specialist with the Land Use Planning Section of the Department's Land Division, and as set out in his report, the summer cottage structure does not protect the viewsapes that contribute to the province's unique character.³⁰

44. First, the structure as it stands today is a prominent feature in the landscape in an open and exposed landscape. Second, the design of the building is inappropriate for the site and its locality. The summer cottage structure stands at 46' tall with a collective 7,200 square feet. From critical views along the public road (being Route 209) and shared private laneways, the structure's height and density obstructs viewsapes that contribute to the province's unique character.³¹

45. His report further provided that:³²

It is important that care is exercised in the siting and design of new buildings to ensure they can integrate harmoniously with their 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 strongly influence its visual impact on the landscape. 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. The subject structure would not be deemed congruous with its surrounding development, particularly with the approved subdivision dwelling structures (lots 1 & 3).**

46. The Subject Property is located in a primarily residential seasonal use area with family cottages on neighbouring parcels. The Minister submits that the architectural design and size of the summer cottage structure fails to reinforce the character of the existing neighbourhood and its rural landscape; thereby, rendering the structure incompatible with the architectural character of adjacent development. Ultimately, the massing of the structure renders it too dominant or incongruous with the neighbourhood, which consists of smaller-scale detached cottages. As a result, the structure dwarfs over adjacent development.

47. The Decision was made based on sound planning principles and in being consistent with the purposes and provincial interests as set out in the Planning Act. The Minister submits that the Decision furthers the objects of efficient planning, the protection of the province's viewsapes, and the orderly and sustainable development of rural communities. In

³⁰ Record Tab 4J.

³¹ Record Tab 4J.

³² Record Tab 4J.

addition, the Minister's decision is supported by recognized sound planning principles within the field of land use planning in Canada.³³

48. Further and in response to paragraphs 44 and 45 in particular of the Appellants' Submissions, the Minister submits that the Decision relies on the protection of viewscales that contribute to the unique character of Prince Edward Island. This statutory protection exists at section 2.1(j) of the Planning Act.³⁴

49. The Minister acknowledges that Point Prim is not a scenic viewscale zone as provided for in section 58 of the Regulations as the sole scenic viewscale zone on Prince Edward Island is located in the French River area (as shown at Appendix A of the Regulations).³⁵ As a matter of statutory interpretation, had the legislators intended for section 2.1(j) to only apply to the protection of the scenic viewscale zone, same would have been expressly stated in this subsection. Rather, the Planning Act provides for the protection of "viewscales that contribute to the unique character of Prince Edward Island". It is the Minister's position that the Point Prim viewscales contribute to the unique character of the province.

Detrimental Impact

50. The report of Alex O'Hara acknowledges and responds to this guidance in recommending that Application 2021-0200 *should not* be approved based on the creation of a detrimental impact as it is not in line with sound planning principles³⁶.

51. Pursuant to subsection 3(2) of the Regulations:³⁷

- (2) No development permit shall be issued where a proposed building, structure, or its alteration, repair, location, or use or change of use would
 - (a) not conform to these regulations or any other regulations made pursuant to the Act;
 - (b) precipitate premature development or unnecessary public expenditure;
 - (c) in the opinion of the Minister, place pressure on a municipality or the province to provide services;
 - (d) have a detrimental impact; or**
 - (e) result in a fire hazard to the occupants or to neighbouring buildings or structures.

52. The definition of "detrimental impact" in the Regulations is as follows:³⁸

³³ See for example: [2107639 Ontario Inc v Toronto \(City\) \(2010\)](#), 64 OMBR 352.

³⁴ Planning Act, s. 2.1(j).

³⁵ Regulations, s 58 and Appendix A.

³⁶ Record Tab 4J.

³⁷ Regulations, s. 3(2).

³⁸ Regulations, s. 1(f.3).

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;
- (iii) viewscales; or
- (iv) development approved pursuant to subsection 9(1) of the *Environmental Protection Act*.

53. The Minister restates and relies upon the report of Alex O’Hara and the material considerations considered, (i) being 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 opining that the summer cottage structure creates a detrimental impact on surrounding land uses.³⁹
54. The Minister also submits that the summer cottage structure creates a detrimental impact on public health and/or safety.
55. Given the size of the summer cottage structure, particularly the height of approximately 46’, the Minister has concerns in relation to health and safety risks should a fire unfortunately engulf the summer cottage structure. The Minister is concerned with the health and safety of any occupant on the third storey as the height of the structure will likely impede their ability to safely escape or be rescued. The Minister notes that the summer cottage structure does not currently have ladders erected to the third floor.
56. The Minister consulted the Fire Marshal’s Office in relation to Application 2021-200. In these consultations, the Fire Marshal’s Office provided that the development would meet the requirements of the *Fire Prevention Act*, RSPEI 1988, Cap F-11, but concerns in relation to the height of the structure would ultimately be an “insurance issue”. The Minister respectfully questions the health and safety of occupants in the summer cottage structure being left to insurance.
57. The Minister recognizes that the assessment of “detrimental impact” is by its nature discretionary. It is the Minister’s position that any discretion exercised by the Minister in this assessment was done in accordance with sound planning principles and the legislation.

Land Planning Professional

58. The Minister dutifully recognizes the Commission’s comments in relation to the Minister’s requirement to consult a professional land use planner to ensure discretionary provisions

³⁹ Record Tab 4J.

of the legislation are interpreted in accordance with the Planning Act, the Regulations and sound planning principles.⁴⁰ The Minister acknowledges that the public is entitled to decisions that are founded in sound planning principles and is committed to rendering decisions in accordance with these principles.

59. As stated herein, the Decision relied on Alex O'Hara's report and recommendations. With respect to Mr. O'Hara's professional accreditations in land use planning, these were before the Commission in Order LA23-04. The Commission found that Mr. O'Hara was not a professional land use planner as he did not have recognized professional accreditation(s) in land use planning.⁴¹

60. The Minister respectfully disagrees with the Commission's finding in Order LA23-04. Mr. O'Hara obtained his Master of Science in Planning and Property Development in July 2013. Following graduating with his Master of Science degree in July 2013, he has been employed in various planning and surveying positions. As a result, he has over ten years of experience in the planning field. Since July 2021, Mr. O'Hara has been employed by the Department as a Land Use and Planning Act Specialist.

61. Mr. O'Hara is a candidate member of the Canadian Institute of Planners, chartered member of the Royal Town Planning Institute, and corporate overseas member of the Irish Planning Institute. As a candidate member of the Canadian Institute of Planners, Mr. O'Hara must abide by the same Code of Professional Conduct and Statement of Values as "full" members of the Canadian Institute of Planners.⁴²

62. As a result of Mr. O'Hara's experience and memberships, the Minister submits that Mr. O'Hara is a professional land use planner who weighed and balanced the important considerations associated with sound planning principles in rendering his report. The conclusions contained therein were not subjective opinion, but anchored in the Planning Act, Regulations, and sound planning principles.

Relevant and Irrelevant Factors Considered

63. It is the Minister's position that the Record of the Decision demonstrates that the factors that were taken into consideration were relevant and that no irrelevant factors were considered.

Reasons Provided

64. The Commission addressed the failure to provide adequate reasons at paragraphs 42 and 43 of Order LA23-03 as follows:⁴³

⁴⁰ Stringer at para 64.

⁴¹ *Lucas Arsenault, Jennie Arsenault and L&J Holdings Inc v Minister of Agriculture and Land*, Order LA23-04 at paras 43 to 46.

⁴² [Code of Professional Conduct and Statement of Values](#).

⁴³ *New Homes Plus Inc v City of Charlottetown*, Order LA23-03, paras 42 and 43.

42. As the Commission has previously stated, “Reasons are sufficient when they explain why a municipal council arrived at its decision.[21] 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”.[22]

43. Upon review of the minutes as a whole, the Commission does not agree with the conclusions reached by Council. However, the Commission is satisfied that the minutes do set out the reasons why 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.

65. The Decision letter of December 14, 2021 clearly set forth the reasons behind the Minister’s decision to deny Application 2021-200. The reasons identified the relevant sections of the *Planning Act* under which the application was denied and the application of said sections to the denial of the Appellants’ application.

66. Therefore, the Minister requests that this ground of appeal not be accepted by the Commission.

Conclusion

67. For the reasons outlined above, the Minister submits that this appeal must be dismissed.

68. In the event the Commission grants the Appellants’ requested relief that Application 2021-200 be approved, the Minister submits that the Appellants must then apply for a Building Permit in accordance with the *Building Codes Act* and *Building Codes Regulations*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of April, 2024.



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