

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 MINISTER OF AGRICULTURE AND LAND**

Mitchell O'Shea
Legal Services
Justice and Public Safety
95 Rochford Street, PO Box 2000
Charlottetown, PE

**Solicitor for the Department of
Agriculture and Land**

Tom Keeler
McInnes Cooper
141 Kent Street, Suite 300
Charlottetown, PE C1A 1N3

Counsel for the Appellants,
Parry Aftab and Allan McCullough

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Introduction

1. We represent the Minister of Agriculture and Land (“Minister”) in relation to the appeal filed by Parry Aftab and Allan McCulloch (“Appellants”) on January 4, 2021. We are writing in response to the Appellants’ submissions included with their appeal.
2. The Minister’s position is that the decision followed the proper process and procedure required in making this decision, and that the decision was made on the basis of sound planning principles within the field of land use planning and as identified in the objects of the *Planning Act*, RSPEI 1988, P-8.

Background and Decision

3. On June 29, 2017 the Appellants submitted an Application for Development Permit to the Minister of Communities, Land and Environment (“Application 2017-0119”).¹ Application 2017-0119 was for the construction of two structures on PID 877647. 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 story measuring 36’ x 48’.
4. The Development Permit for 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.”² Permit 2017-0119 was issued subject to the “structure being erected in accordance with the approved application sketch.”³ The approved application sketch noted that the base of the cottage was to be 36’ x 48’.⁴
5. 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.⁵
6. Similar complaints followed.⁶
7. On July 19, 2018 there was a cease construction letter delivered to the Appellants, via an individual who was doing work on PID 877647. The letter indicated that the location of the cottage 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.

¹ Record Tab 3A.

² Record Tab 3B.

³ Record Tab 3B.

⁴ Record Tab 3A page 3.

⁵ Record Tab 6 page 2.

⁶ Record Tab 6.

8. 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 Development Permit 2017-0119.
9. 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 2017-0119.⁷
10. On August 29, 2018 a letter was sent to the Appellants from Dale McKeigan which details the issues with the development.⁸ 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 story and additional square footage.
11. 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*.⁹
12. Construction on the project continued throughout the summer of 2018 without the proper development permits in place.
13. 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.
14. 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").¹⁰ Application 2018-0281 listed the size of the summer cottage now as being two stories and each story being 40' x 60'. Application 2018-0281 did not include the third story which was observed in the October 2018 site visit.
15. 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.¹¹

⁷ Record Tab 5C.

⁸ Record Tab 5C.

⁹ Record Tab 5C page 3.

¹⁰ Record Tab 3D.

¹¹ Record Tab 5J.

16. 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.
17. Communications continued between the Minister and the Appellants and the Minister and surrounding landowners.
18. 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”).¹² Application 2021-200 indicated that the summer cottage structure is three stories with each story measuring 40’ x 60’ the total floor area being 7200 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 double the size that was originally applied for and granted.
19. 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*, EC693/00.¹³
20. The reasons for the decision indicate 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.”¹⁴ 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.

Appeal

21. The Appellants have sought an order from the Commission overturning the decision of the Minister and approving the development application. The Appellants’ grounds of appeal are that:
 - a. The Department failed to correctly follow, interpret and apply the provisions of the Planning Act and the Subdivision and Development Regulations;
 - b. The Department erred in concluding that the Application would have a detrimental impact based on sound planning principles;
 - c. The Department considered irrelevant factors and failed to consider relevant factors; and

¹² Record Tab 1A.

¹³ Record Tab 1B.

¹⁴ Record Tab 1B.

- d. The Department failed to provide adequate reasons.¹⁵
22. The Minister notes that the Appellants have not identified what irrelevant factors were considered or what relevant factors were not considered by the Minister in making the decision.

Minister's Position

23. The Commission has previously stated (Order LA17-06) that the following test should be applied to Ministerial decisions made under the *Planning Act* and its Regulations:¹⁶
- a. 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
 - b. 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*.
24. Below, the Minister will demonstrate that the proper process and procedure was followed in making this decision, and that the decision was made based on sound planning principles within the field of land use planning.

Interpretation and Application of Planning Act and Regulations

25. The Minister submits that the applicable sections of the *Planning Act* and Subdivision and Development Regulations have been followed in first granting Permit 2017-0119, the subsequent revocation of Permit 2017-0119 and finally the denial of Application 2021-200.
26. Subsection 6(c) of the *Planning Act* provides that the Minister shall generally administer and enforce the Act and its Regulations. This includes the *Planning Act Subdivision and Development Regulations* (the "Regulations"). These Regulations apply to all areas of the province, except those municipalities with official plans and bylaws.¹⁷
27. PID 877647 is located in Point Prim. This area does not have an official plan or bylaws, and therefore falls under the Regulations.

¹⁵ Record Tab 2.

¹⁶ Order LA17-06, para 52.

¹⁷ Regulations, s. 2(1).

28. A development permit, issued by the Minister pursuant to section 31(1) of the Regulations is required in several situations including:

- a. Prior to the commencement of the construction of any building or structure;
- b. Prior to changing the location of any building or structure on a lot; or
- c. Prior to making any structural alterations which change the exterior dimensions of any building or structure.¹⁸

29. A development permit 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.”¹⁹ It was this provision that the Minister relied on in revoking Permit 2017-0119 on February 15, 2019. The structure being constructed in the summer of 2018 was larger than what the application indicated and was not located in the same location as was indicated on the site plan.

30. All applications for a development permit must be considered in light of their conformation to the applicable regulations, their impact on the precipitation of premature development or unnecessary public expenditure, their impact on the pressure the development may place on a municipality or the province to provide services, their detrimental impact, and whether the development would result in a fire hazard to the occupants or to the neighboring buildings or structures.²⁰

31. In assessing Application 2021-0200 the Minister determined that the granting of the development permit would have a detrimental impact.

32. The definition of “detrimental impact” in the Regulations is 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;
- (iii) viewscales; or
- (iv) development approved pursuant to subsection 9(1) of the Environmental Protection Act.²¹

¹⁸ Regulations, s. 31(1).

¹⁹ Regulations, s. 33(2).

²⁰ Regulations, s. 3(2).

²¹ Regulations, s. 1(f.3).

33. The Department sought the opinion of a professional land use planner with respect to the proposed development.²² Alex O'Hara is a Land Use and Planning Act Specialist employed with the Provincial Planning Branch of the Department. Mr. O'Hara has a Master's degree in Planning and Property Development from the University of Ulster.
34. The Department submits that the first part of the test is satisfied. The Record of the Decision of the Minister demonstrates that the relevant sections of the *Planning Act* and its Subdivision and Development Regulations were considered and applied in this case, and that the Department followed the proper process and procedure in making a decision on the Appellants' development application.
35. As demonstrated below, the Minister determined that the development, as it is today, would cause harm to the surrounding land uses and was not in line with sound planning principles.

Detrimental Impact and Sound Planning Principles

36. The Minister submits that the decision was made in accordance with sound planning principles and that the development, as it is today, creates a detrimental impact to surrounding land uses.
37. In assessing Application 2021-0200 sound planning principles were required to be considered.
38. The Department highlights the Commission's findings in Order LA17-06 that sound planning principles are a guard against arbitrary decision making. The Commission stated:²³

Sound planning principles require regulatory compliance but go beyond merely ensuring 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 followed in anomalous applications a professional land use planner must be consulted.

39. The Commission has previously commented that sound planning must be a common feature of development throughout Prince Edward Island.²⁴ In determining whether or not a development permit should be granted the Minister must make an examination "beyond the strict conformity with the Regulations and must consider sound planning principles".²⁵

²² Record Tab 4J.

²³ Order LA17-06, para 64.

²⁴ Order LA17-06, para 64.

²⁵ Order LA17-06, para 58.

40. 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 principles.
41. The Regulations provide that no development permit shall be granted where the proposed development would have a detrimental impact.²⁶
42. Development permits shall be based on sound planning principles and shall demonstrate that the proposed development is suited to the intended use, having due regard for compatibility with surrounding uses.
43. In the Report of the Task Force on Land Use Policy, January 2014 it was noted that "planning principles serve as a foundational role in interpreting and applying land use policies and describe best practices for land use planning."²⁷ A couple examples of planning principles to be considered were suitability and compatibility.
44. PID 877647 is in a primarily residential seasonal use area with family cottages surrounding it.
45. 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 these factors are considered in determining whether the development is compatible with and has architectural harmony with the surrounding properties²⁸.
46. Sound planning principles encompasses an assessment of, the number of structures on a property, the size of the structures, the location of the structures and the appearance of the structures²⁹.
47. In considering these factors in conducting a sound planning principles analysis the Minister determined that the development was too prominent (or large) given the landscape and that its design was inappropriate given the surrounding properties. This created a situation where the structure did not integrate harmoniously with the surroundings and did not "protect the amenity and character of rural landscapes."³⁰ The cottage, as currently developed, is not congruous with surrounding development.
48. The objects of the *Planning Act* require: efficient planning, protection of the Province's unique environment, an effective means for resolving land use conflict and the opportunity for public participation in the planning process.³¹

²⁶ Regulations, s. 3(2)(d).

²⁷ https://www.princeedwardisland.ca/sites/default/files/publications/report_on_land_use_policy.pdf at page 16.

²⁸ Order LA17-08 at para 52.

²⁹ Order LA 17-06 at paras 63 and 64.

³⁰ Record Tab 1B.

³¹ *Planning Act*, s. 2.

49. The Minister submits that the decision in this case furthers the objects of efficient planning and protecting the Province's unique environment, including its residential coastlines. The Minister's decision is supported by sound planning principles within the field of land use planning.

Relevant and Irrelevant Factors Considered

50. The Minister submits that the Record of the Decision demonstrates that the factors that were taken into consideration were relevant and that no irrelevant factors were considered; however, the Minister requests the right to respond to the Appellant's submissions in this area once those factors have been identified.

Reasons Provided

51. As demonstrated in the Decision letter of December 14, 2021 the Minister submits that sufficient reasons were provided for the denial of Application 2021-200. The reasons identified the relevant sections of the Act pursuant to which the application was denied and the reasons for the decision were included.

Conclusion

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of March, 2022.



Mitchell O'Shea
Legal Services Section
Department of Justice and Public Safety
and Attorney General
4th Floor, 95 Rochford Street
Charlottetown, PE C1A 7N8
Counsel for the Minister