

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 Andy Gallant et al. with respect to the approval of a Building and Development Permit by the Department of Agriculture and Land at PID #416693 located at Rustico, Prince Edward Island

**SUBMISSIONS OF
THE DEPARTMENT OF AGRICULTURE AND LAND**

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Representative of the Appellants

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RESPONDENT'S POSITION

Issue on Appeal

1. The Respondent, the Minister of Agriculture and Land ("Minister"), states that the Appeal raises the following issue for the Commission's consideration:

Was the Minister's decision to approve the building and development Application for parcel 416693 made in accordance with the *Planning Act* and *Subdivision and Development Regulations*?

2. The Appellants, Andy Gallant and others ("Appellants"), take the position that the Minister erred in granting the Development Permit, dated 18 May, 2021 ("Development Permit") on the grounds that:
 - a. Threats made by manager to block water view of nearby residents with a tree line if development is challenged through an IRAC appeal (sic);
 - b. Construction of an expansion will be detrimental to the natural natural (sic) beauty of the area;
 - c. Potential environmental effects as there is storage in the buffer zone;
 - d. Not consistent with IRAC order concerning the same property made September 28th, 1995;
 - e. Change of plans without notice to residents; and
 - f. Significant property devaluation to homes in the area.
3. With due respect to the Appellants, the Minister submits that grounds (a), (b) and (f) as enumerated above are not grounds for consideration by the Commission. As for grounds (c), (d) and (e) the Minister submits that there is no evidence before the Commission to determine that the Minister's decision to approve the Development Permit was wrong in law or was unreasonable.

Jurisdiction

4. Section 8(1)(g) of the *Planning Act*, RSPEI 1988, c. P-8 ("Act"), grants the Lieutenant Governor in Council authority to make regulations with respect to the use of development permits and section 8(1)(g)(ii) specifically authorizes,

8(1) The Lieutenant Governor in Council may make provincial planning regulations applicable to any area except a municipality with an official plan and bylaws

(g) with respect to the use of development permits and in particular

(ii) setting the terms and conditions under which development permits may be issued, refused, suspended, reinstated and revoked or may expire

5. Section 31(1) of the *Planning Act Subdivision and Development Regulations*, PEI Reg EC693/00 ("Regulations") requires a person to obtain a development permit from the Minister prior to, in part, commencing any construction of any building or structure.
6. Any person who is dissatisfied by a decision of the Minister with respect to a development permit being issued may appeal that decision to the Island Regulatory and Appeals Commission ("Commission") by filing a notice of appeal.

Background

7. The full background can be found in the Record of the Decision, filed with the Commission on July 27, 2021. The Department submits that a few of the pertinent facts are as follows:
 - a. On October 14, 2020 a Building and Development Application was submitted by Jeff MacPherson on behalf of Atlantic Aqua Farms Ltd. to construct a 50 foot by 180 foot building to be used for the purposes of processing shellfish, being a nursery for juvenile shellfish and for dry storage on PID 416693 ("Parcel"). Prior to the application there was a small structure already on the Parcel, for which a development permit had previously been granted.

- b. There were extensive interdepartmental consultations that occurred.
- c. On October 27, 2020 a letter was sent to property owners within 100m of the Parcel requesting comments or written submissions.
- d. After discussions with the Applicant (Jeff MacPherson, for Atlantic Aqua Farms Ltd.), the Building and Development Application was amended ("Amended Application"). The amended application was submitted as it mitigated some of the concerns raised by local residents.
- e. That on January 11, 2021 a second consultation letter was sent to property owners within 100m of the Parcel requesting comments or written submissions based on the Amended Application.
- f. That in May 2021 discussions regarding the Amended Application occurred between Minister Thompson, Minister Fox and Minister Trivers.
- g. On May 13, 2021 Deputy Minister of Agriculture and Land, Brian Matheson, informed Eugene Lloyd, Acting Manager of Provincial Planning for the Department, that the Amended Application was to be approved.
- h. That on May 18, 2021 Shawn MacFarlane, Senior Development Office for the Department granted the Development Permit, with conditions.

Decision

- 8. Shawn MacFarlane was tasked with assessing the application.
- 9. As is standard practice within the Department, Mr. MacFarlane engaged with the surrounding landowners by sending out correspondence to all those within 100 meters of PID 416693 requesting comments or written submissions with respect to the application and amended application.

Record, Tabs 6(a), (b) and (c)

- 10. The Minister submits that while there were a great number of submissions made by the public that many of those were made by those who do not own property within 100m of

the Parcel. Many of those both who did provide submissions are not on the list of named Appellants submitted with the Notice of Appeal.

Record, Tab 6(e)

11. Mr. MacFarlane consulted with ten other divisions within Government, none of whom raised any substantial concerns, or raised concerns which were not mitigated by the Applicant. The following divisions were contacted:

- a. Dave Rossiter, Provincial Fire Marshal;
- b. Alan Aitken, Traffic Operations Engineer, Department of Transportation and Infrastructure;
- c. Matthew Langille, Building Official, Inspection Services;
- d. Sean Ledgerwood, Supervisor, Water and Air Monitoring;
- e. Dale Thompson, Environmental Assessment Officer, Department of Environment, Water and Climate Change;
- f. Qing Li, Environment, Hydrogeologist, Department of Environment, Water and Climate Change;
- g. Tanya O'Brien, Senior Environmental Health Officer, Department of Health and Wellness;
- h. Peter Nishimura, Senior Climate Change Adaptation Policy Advisor, Department of Environment, Water and Climate Change;
- i. Evan Brown, Land Use and Lands Protection Planning Strategist, Department of Agriculture and Land; and
- j. Scott Gamble, Safety Standards Officer, Department of Agriculture and Land.

Record, Tab 3

12. Mr. MacFarlane also engaged with the Applicant regarding the concerns raised by the surrounding property owners and the divisions of Government.

Record, Tab 5

13. Mr. MacFarlane noted that while the Parcel is surrounded by many residential properties it is on a property where there was already a structure and is directly adjacent

to an existing oyster processing facility that was approved approximately three years previously.

Record, Tab 4(c)

14. Throughout the evidence gathering stage, Mr. MacFarlane also consulted with Eugene Lloyd, Acting Manager of Provincial Planning, in making the decision to ultimately approve the application. The Minister for Fisheries and Communities, Jamie Fox and the local Member of the Legislative Assembly, Minister Brad Trivers, were also consulted throughout the process.

Record, Tab 2(b)

15. Mr. MacFarlane, took all of these submissions into consideration in ultimately recommending that the application be approved on April 20, 2021. The decision to recommend approval of the application was reviewed by the Minister and Deputy Minister given the extensive submissions by local residents. The decision was based on the applicable legislation as well as sound planning principles.

Record, Tab 4(a)

16. The Final Approval was subject to conditions including:
 - a. Use of the existing highway access driveway(s) only unless otherwise approved by the Department of Transportation and Infrastructure;
 - b. Structure being erected in accordance with the approved application sketch;
 - c. Obeying the requirements of the Provincial Fire Marshal's Office;
 - d. The sewage disposal system being designed in accordance with the Holding Tank requirements of the Sewage Disposal Systems Regulations ensuring adequate two phase alarm system with audio and visual queues;
 - e. Any additional approvals or permits required;
 - f. All parking being on-site and in accordance with the approved parking sketch unless otherwise approved by the Department of Transportation and Infrastructure;
 - g. Maintaining a 15 meter buffer zone adjacent to the watercourse/wetland located on and adjacent to the property as per the Environmental Protection Act;
 - h. Proper pest control, waste control and a plan to prevent unwanted/nuisance odors as per the Environmental Health Division of the Department of Health and Wellness; and

- i. All lighting on the addition and the existing structure to be modified/chosen/installed/operated to the downward facing/hooded/focused as to not negatively impact the adjacent surrounding properties.

Record, Tab 2(a)

The Law

- 17. The final approval was granted after considering the information above and the relevant sections in the *Planning Act Subdivision and Development Regulations* ("Regulations"),

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

- (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.

- 18. The definition of "detrimental impact" is found in the Regulations and means:

1(f.3)...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;

- 19. A determination was made to approve the building and development application for the Parcel as it: conformed with the regulations, would not place pressure on the province to provide services, would not precipitate premature development, would not result in a fire

hazard and it would not have a detrimental impact to the surrounding residents and land owners. The decision was based on sound planning principles.

20. The Commission, in the decision cited by the Appellants in their Notice of Appeal, Order LA95-15, found that,

Generally, Section 15 calls upon the discretion of the Minister and to allow the appeal based on these arguments would require the Commission to substitute the Minister's opinion with its own. For the Commission to do so it must find that the Minister's opinion is unreasonable, erroneous, or based on the wrong factor.

21. In that decision, the Commission dismissed the appeal because the evidence that was heard with respect to "property values, truck traffic, odor and noise was not substantive enough to find that the Minister's decision was unreasonable or wrong."¹
22. The Minister submits that the Commission must find the same in the present appeal.
23. Some of the issues related to sound planning principles are addressed directly in the *New Foundations: Report of the Commission on Land and Local Governance* from December, 2009 ("Report"). Specifically the Commission noted, at page 28, when it comes to compatibility with surrounding areas that,

Land uses and developments that are planned and designed to be compatible with their surroundings will prevent or minimize conflicts and avoid dangers to public health, safety and the environment. When land uses are not compatible, they can result in negative impacts on people, property/investment and the environment, such as:

- Nuisances, including noise, dust, odours;
- Financial expenditures by both private operators and the public to deal with legal issues and complaints;
- Danger to human health and safety and damage to property and investments from hazards, such as flooding, and the resulting public expenditures for evacuation and compensation; and
- Unexpected development costs to mitigate conflict.

¹ Order LA95-15 *Blacquiére et al v Minister of Provinces Affairs and Attorney General*.

24. These factors were taken into consideration when making a determination about whether allowing the additional structure to be erected would be compatible with the parcels that surround the parcel in question.
25. The Minister submits that the grounds as set out by the Appellants do not provide sufficient evidence for the Commission to determine that the Minister did not comply with the applicable legislation, or that the decision was unreasonable based on sound planning principles.
26. A comprehensive decision must be made; the Commission stressed this in the Report stating that,

Land use decisions, policies and programs have impact on and are influenced by a number of interest areas. Planning must consider the interconnections between land use and elements like transportation, housing, social services and cultural differences. A comprehensive approach that considers a variety of elements, can address multiple issues while ensuring it does not ignore problems or create new ones.²

27. By taking into consideration a wide variety of factors and by making the decision based on sound planning principles the Minister was able to make a comprehensive decision on the Building and Development Application for the Parcel.

28. In considering a *Planning Act* appeal, the Commission normally relies on a two-part test:

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.³

² *New Foundations: Report of the Commission on Land and Local Governance* from December, 2009 at page 28.

³ Order LA17-06 *Stringer v. Minister of Communities, Land and Environment*, at paragraph 52

29. The Commission has often stressed the importance of the second part of the test and the consideration of sound planning principles,

This Commission has found, in numerous past decisions, that there must be evidence that a proposed development or change of use is consistent with sound planning principles (*Biovectra v. City of Charlottetown*, Order LA12-06). In determining whether or not a development proposal should go forward, the Minister must 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 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).⁴

30. The Minister submits that the approved development permit was authorized by the Regulations and was based on sound planning principles.
31. The Minister submits that, based on the principles at paragraph 64 of *Stringer, supra*, if the Commission concludes that there were procedural deficiencies with the decision of the Minister, the Commission must not just substitute its own decision. The Commission must first engage a professional land use planner to review the Amended Application, make the necessary inquiries, and form an opinion based on sound planning principles.

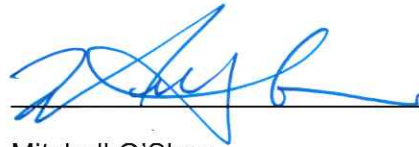
Conclusion

32. In conclusion, it is submitted that the decision of the Minister was made in compliance with the *Planning Act* and the Regulations. Further it is submitted that the Minister's decision was made pursuant to its legislative authority. On that basis, the Respondent requests that the Commission deny the Appeal.

⁴ Order LA17-06 *Stringer v. Minister of Communities, Land and Environment*, at paragraph 58.

33. In the alternative, if the Commission finds that the Minister has not made its decision in compliance with the *Planning Act* and the Regulations, the Minister requests that the Commission remit the decision back to the Minister to reconsider the application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of August, 2021.



Mitchell O'Shea
Departmental Solicitor