THE ISLAND REGULATORY AND APPEALS COMMISSION
Prince Edward Island
Île-du-Prince-Édouard
CANADA

Docket LA16003
Order LA17-07

IN THE MATTER of an appeal by Kevin Moerike, Bob Doherty, and Joanne Doherty of a decision of the Minister of Communities, Land and Environment, dated April 29, 2015.

BEFORE THE COMMISSION

on Wednesday, the 15th day of November, 2017.

J. Scott MacKenzie, Q.C., Chair
M. Douglas Clow, Vice-Chair
Jean Tingley, Commissioner

Order

Compared and Certified a True Copy

Philip J. Rafuse
Appeals Administrator
Corporate Services and Appeals Division

IN THE MATTER of an appeal by Kevin Moerike, Bob Doherty, and Joanne Doherty of a decision of the Minister of Communities, Land and Environment, dated April 29, 2015.

Contents

Contents ii

Appearances & Witnesses iii

Reasons for Order 1

1. Introduction 1
2. Discussion 2
3. Findings 7
4. Disposition 13

Order

IN THE MATTER of an appeal by Kevin Moerike, Bob Doherty, and Joanne Doherty of a decision of the Minister of Communities, Land and Environment, dated April 29, 2015.

Appearances & Witnesses

1. For the Appellants Kevin Moerike, Bob Doherty, and Joanne Doherty

Witnesses:

Kevin Moerike
Bob Doherty
Joanne Doherty

2. For the Respondent Minister of Communities, Land and Environment

Counsel:

Robert MacNevin, Departmental Solicitor

Witnesses:

Jay Carr
Eugene Lloyd

3. For the Developers Allan and Pamela Tierney

Counsel:

Nicole McKenna, Barrister and Solicitor, Carr, Stevenson & MacKay

4. For the Commission

Counsel:

Jonathan Coady, Barrister and Solicitor, Stewart McKelvey

IN THE MATTER of an appeal by Kevin Moerike, Bob Doherty, and Joanne Doherty of a decision of the Minister of Communities, Land and Environment, dated April 29, 2015.

Reasons for Order

1. Introduction

(1) Kevin Moerike, Bob Doherty, and Joanne Doherty (the "Appellants") filed an appeal with the Island Regulatory and Appeals Commission (the "Commission") under section 28(1) of the ***Planning Act***, R.S.P.E.I. 1988, Cap. P-8 ("***Planning Act")***. The notice of appeal was received by the Commission on March 1, 2016.

(2) This appeal concerns a decision made by the Minister of Communities, Land and Environment (the "Minister") on April 29, 2015 where the Minister granted preliminary approval for an application by Allan Tierney and Pamela Tierney (the "Developers") to subdivide one lot for "rural tourism use" from provincial parcel number 557652 (the "Property") located in South Winsloe, Prince Edward Island.

(3) Due to technical problems with the PEI Planning Decisions website, the Minister's decision was not posted online for the public until February 5, 2016.

(4) On February 16, 2016, Mr. Moerike sent an email to Jay Carr, who is an employee of the Minister, enquiring about the Minister's decision. Mr. Carr responded by email on February 26, 2016 at 4:07 p.m., referred to technical problems on the PEI Planning Decisions website and advised that February 26, 2016 would be the last day to file an appeal. Mr. Carr also advised Mr. Moerike that he expected that the Commission could extend the deadline for filing an appeal.

(5) On March 1, 2016, Mr. Moerike responded to Mr. Carr's email of February 26, 2016 and copied his response to an employee of the Commission. Mr. Moerike asked the Commission to confirm the deadline for filing an appeal. The employee of the Commission promptly replied by email and stated that Mr. Moerike should file his appeal without further delay, specifically on March 1, 2016 prior to 4:30 p.m. for hand delivery or 11:59 p.m. for email delivery. The Commission received the notice of appeal by email on the evening of March 1, 2016.

(6) The Commission requested a copy of the file from the Minister, and the file was received on March 21, 2016. The file was disclosed to the Appellants and the Developers. Written submissions were requested from all three parties regarding the late filing of the notice of appeal. The Commission received a written submission from the Appellants on April 7, 2016 addressing this jurisdictional issue. The Commission forwarded a copy of this submission to the Minister and to the Developer. Following an extension of the deadline for filing submissions, a written submission was received from Robert MacNevin, solicitor for the Minister; however, this submission did not address the jurisdictional issue. No submission was received from the Developers.

(7) On August 10, 2016, the Commission reviewed the file, considered the submissions regarding the jurisdictional issue, and concluded that the appeal should be set down for a hearing. All issues would be considered at that time.

(8) On August 31, 2016, the Commission sent notice of the hearing to all parties by email. The notice stated that the appeal would be heard on September 28, 2016.

(9) On September 9, 2016, the Commission was advised by Nicole McKenna that she was now representing the Developers.

(10) On September 15, 2016, the Minister filed a pre-hearing written submission. On September 21, 2016, the Appellants filed a pre-hearing written submission. On September 21, 2016, the Developers filed a pre-hearing written submission.

(11) The Commission heard the appeal on September 28, 2016. During the hearing, the Commission raised section 13 of the *Planning Act Subdivision and Development Regulations* with the parties and requested written submissions. Later that day, the Commission requested that the parties file written submissions with respect to the following question:

> What consideration, if any, can the Minister give to s. 13 of the *Subdivision and Development Regulations* after final subdivision approval has already been granted by the Minister for a "rural tourism use" and an application for a development permit has been made by the property owner for such a use?

(12) On October 12, 2016, the Minister filed a brief written submission in response to that question. On October 18, 2016, the Developers advised that they would be providing no reply to the question from the Commission or to the submission made by the Minister. The Appellants also filed no response.

2. Discussion

Appellants' Testimony and Submissions

(13) Mr. Moerike testified that he first learned of the Minister's decision during the second week of February 2016, which was approximately seven to ten days after it had been posted on the PEI Planning Decisions website. He emailed Mr. Carr to find out if he could still appeal the decision. Mr. Moerike testified that it was only by chance that he saw the decision because it was only visible when he clicked on the website button for archival decisions. Mr. Moerike testified that he first saw the posting "just a few days" before emailing Mr. Carr on February 16, 2016.

(14) Mr. Moerike testified that, in May 2012, the Developers had applied to subdivide five lots. The Minister had approved the subdivision of one lot, but did not approve the subdivision of the other four proposed lots. As a result of this decision, Mr. Moerike testified that he regularly checked the PEI Planning Decisions website. In April 2015, the Minister approved one of the previously rejected lots for a "rural tourism use." This decision was not posted on an Internet website within seven days, contrary to the requirements of section 23.1(1)(c) of the ***Planning Act***. In fact, the Minister's decision on April 29, 2015 was not posted until February 5, 2016 – some nine months later.

(15) Mr. Moerike contends that the Commission has jurisdiction to hear this appeal because the late filing of the appeal resulted from the late posting of the decision.

(16) With respect to the merits of the appeal, Mr. Moerike submitted the following:

- The Minister did not consult with, or seek input from, the Community of Winsloe South.
- There are soil permeability issues in the area.
- There were numerous corrections – lower numbers crossed out and higher numbers substituted – on the Figure B4 Field Permeability Data Sheet for the Property.
- The contour map with the test pit locations explains the run-off problems onto the Appellants' land.
- One of the Developers also served as the soil assessor for the Property, which could potentially be a conflict of interest.
- Mr. Moerike has water issues at his property every Spring due to run-off.
- Other neighbours in the area also have surface water issues.
- The Property is on a hill.

(17) Joanne Doherty testified that she and her husband, Bob Doherty, built their home thirty-nine years ago with a regulation size septic system. Because of local soil drainage conditions and water issues, she and her husband had to double the drain tile field one year after they built their home. Mrs. Doherty testified that their sump pump runs "all the time". They also had a ditch made between their property and a neighbouring property.

(18) The Appellants request that the Minister's decision be set aside and that no further unserviced development be permitted on the Property. In the alternative, they submit that any new subdivision requests be submitted with independent soil testing. The Appellants also request that the Minister notify them directly of any future applications pertaining to the Property.

Testimony and Submissions on behalf of the Minister

(19) At the time of the Minister's decision and at the time of the hearing, Jay Carr was the Chief Safety Standards Officer for the Minister. Mr. Carr's background is in the field of environmental matters. Mr. Carr is not a land use planner. He testified that he becomes involved in a file when matters are not straightforward. Mr. Carr acknowledged that a major "glitch" occurred with the PEI Planning Decisions website and the decision in question was not posted until nine months after it had been made. He also testified that there was a discrepancy on the PEI Planning Decisions website as to the proper name of the Community of Winsloe South.

(20) Under cross-examination, Mr. Carr acknowledged that it is not common for a developer to perform their own soil testing, but it does happen occasionally. He acknowledged that Allan Tierney, who is one of the Developers, is a licensed soil assessor qualified to perform percolation tests. Mr. Carr testified that, on February 26, 2016, he tried to call Mr. Moerike at 4:00 p.m., but there was no answer.

(21) Under questioning from the Commission, Mr. Carr testified that:

- The Community of Winsloe South has no jurisdiction over subdivision decisions made by the Minister and, for that reason, employees of the Minister do not generally seek input from communities. The Minister may, however, consult with a community when a proposed development is very large.

- If a landowner or developer, who was also a qualified soil assessor, was ever found to have misled the Minister or his employees, that assessor would lose their soil assessment license. Mr. Carr noted that audits are performed from time to time, especially if there has been a system failure.

- This particular subdivision application was not referred to the planning staff of the Minister and planning principles were not applied to the decision. He acknowledged the employees of the Minister are now more focused on land use planning and frequently seek and obtain comments from planning-related staff employed by the Minister.

- A paper copy of the Minister's decision would have been posted in a binder at the office located in the J. Elmer Blanchard Building in May or June of 2015 and again in February 2016.

(22) At the time of the Minister's decision and at the time of the hearing, Eugene Lloyd was the Senior Subdivision Officer for the Minister. Mr. Lloyd testified that the 2012 application was processed by his predecessor. With respect to the 2015 application, which is the subject of this appeal, much of the application work was previously done. Mr. Lloyd testified that the Property is considered to be an existing parcel under section 63 of the *Planning Act Subdivision and Development Regulations*. Section 63 is frequently referred to as the *Special Planning Area Regulations*. According to Mr. Lloyd, the lot on the Property was approved as a "rural tourism use" because there was no reason not to allow it to be subdivided.

(23) Mr. Lloyd testified that, generally speaking, planning staff employed by the Minister would not likely have comments until an application is filed for a development permit. He testified that comments are only sought from communities for large developments. Mr. Lloyd also testified that, if a landowner directed water to an adjacent property that resulted in some harm, that landowner could be the subject of civil litigation.

(24) Under cross-examination, Mr. Lloyd testified that it is his understanding that there is now an employee of the Minister who checks the PEI Planning Decisions website on a regular basis to ensure that decisions are being posted for the public. Mr. Lloyd also testified that he is a soil assessor. He offered a possible explanation for the figures being crossed out on the Figure B4 Field Permeability Data Sheet for the Property. Mr. Lloyd suggested that they could have resulted from a mathematical error. He also testified that run-off may not be an issue depending upon what is built on the Property. Mr. Lloyd testified that he did not view a licensed soil assessor testing his own lot as a potential conflict of interest. He testified that Mr. Tierney's license is valid and that he is not aware of any issues with Mr. Tierney's assessments. Mr. Lloyd also testified that no development application has been received for the Property and, given the information that surface water is an issue, that will probably be taken into account by the Minister when making any future decision related to a development permit.

(25) In response to a question from counsel for the Commission, Mr. Lloyd testified that the employees of the Minister have always struggled with applying the requirements in section 13 of the *Planning Act Subdivision and Development Regulations*.

(26) Mr. MacNevin acknowledged that the Minister has had past problems with the PEI Planning Decisions website, that these problems have now been resolved, and that an employee of the Minister is now tasked with monitoring that Internet website to ensure it publishes decisions according to section 23.1 of the ***Planning Act***. For these reasons, the Minister did not take any position on the jurisdictional issue related to the filing of the notice of appeal.

(27) In his October 12, 2016 post-hearing submission filed with the Commission concerning the applicability of section 13 of the *Planning Act Subdivision and Development Regulations*, Mr. MacNevin states:

> Section 13 of the Subdivision and Development Regulations is not considered when processing a development permit application. The Department considers subsection 3(2) of those regulations, and in particular clause 3(2)(d) which addresses detrimental impact.
>
> **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.

Subsection 1(f.3) states:

> **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) viewscapes; or
> (iv) development approved pursuant to subsection 9(1) of the *Environmental Protection Act*;

In this particular case, applying clause 3(2)(d) would give the Minister the authority to require a surface water management plan, if deemed necessary.

(28) With respect to the merits of the appeal, the Minister submitted that the application to subdivide the Property meets the requirements of the ***Planning Act*** and the *Planning Act Subdivision and Development Regulations* and that any surface water issues could be addressed at the development permit stage. Accordingly, the Minister requests that the Commission deny the appeal.

Submissions on behalf of the Developers

(29) The Developers relied on the written submissions filed by their legal counsel on September 21, 2017 (Exhibit D1). It was submitted that Mr. Tierney is a licensed soil assessor, that his license is in good standing, and that there is no evidence of any past problems concerning his site assessments. The Developers submit that the Commission does not have jurisdiction to hear the appeal for the following reasons:

- The appeal period is twenty-one days from the date of decision.
- The decision was posted on February 5, 2016. Due to the delay in posting the decision, the appeal period would expire on February 26, 2016. However, the notice of appeal was not filed until March 1, 2016.
- The Commission has no jurisdiction to extend the appeal period.
- The matter of "archived decisions" is a red herring because section 23.1 of the ***Planning Act*** does not make any reference to archived decisions.
- Section 23.1 of the ***Planning Act*** does not require actual notice and simply directs that the decision be posted online.
- Mr. Carr had no authority to extend the appeal period. The Developers were not copied on the emails between Mr. Carr and Mr. Moerike, but the Developers were impacted by those emails.

(30) The Developers submit that the primary issue before the Commission is that the appeal was filed outside the 21-day appeal period. Therefore, the Commission lacks jurisdiction to hear the appeal and the appeal should be dismissed. In the alternative, the Developers submit that the Minister carefully followed the applicable regulations, made no error in his decision, and the appeal should be dismissed on its merits.

3. Findings

(31) After a careful review of all the documents, the oral testimony of the witnesses, the written and oral submissions of counsel for the parties and the applicable law, it is the decision of the Commission to allow the appeal.

Jurisdictional Issue

(32) Subsection 28(1) of the ***Planning Act*** sets out the Commission's jurisdiction to hear appeals from decisions made by the Minister under the ***Planning Act***:

> *28. (1) Subject to subsections (1.2) to (4), any person who is dissatisfied by a decision of the Minister that is made in respect of an application by the person, or any other person, pursuant to the regulations for*
>
> *(a) a development permit;*
> *(b) a preliminary approval of a subdivision or a resort development;*
> *(c) a final approval of a subdivision;*
> *(d) the approval of a change of use; or*
> *(e) any other authorization or approval that the Minister may grant or issue under the regulations,*
>
> *may appeal the decision to the Commission by filing with the Commission a notice of appeal.*
>
> [emphasis added]

(33) Subsection 28(1.3) of the ***Planning Act*** is also directly relevant to the timing of this notice of appeal:

> (*1.3) A notice of appeal must be filed with the Commission within 21 days after the date of the decision being appealed.*

(34) Before the Commission may proceed to consider the merits of this appeal, the Commission must determine whether it has the jurisdiction to hear this appeal. Ordinarily, a jurisdictional determination would be made before any hearing of the merits. In the present appeal, the Commission gave all parties an opportunity to file submissions on this issue and, despite deadline extensions, only the Appellants filed submissions at that time. Following the expiry of the final deadline extension, the Commission reviewed the file and advised the parties that the matter would be set down for a public hearing on September 28, 2016.

(35) Upon receiving notice of the hearing, it appears the Developers were prompted into action. The Developers retained legal counsel and filed written submissions (Exhibit D1) arguing that the Commission had no jurisdiction to hear the appeal. As the hearing had already been scheduled, the Commission agreed to hear arguments on the jurisdictional issue as well as testimony and arguments on the merits of the appeal. Evidence as to the surrounding factual circumstances would be helpful in deciding the jurisdictional issue in any event.

(36) The record before the Commission is clear that the Minister made his decision on April 29, 2015. However, this decision was not posted online by the Minister until February 5, 2016. This delay did not satisfy the condition in clause 23.1(1)(c) of the ***Planning Act***:

> *23.1(1) Where*
>
> > *(a) the Minister makes a decision of a type described in subsection 28(1);*
> > *…*
> > *the Minister or council, as the case may be, shall, within seven days of the date the decision is made, cause a written notice of the decision to be posted*
> >
> > *(c) on an Internet website accessible to the public;*
>
> [emphasis added]

(37) Prior to the proclamation of subsection 23.1 of the *Planning Act*, the issue of notice was frequently raised before the Commission. The issue was also considered by the Prince Edward Island Court of Appeal in *Booth and Peake v. Island Regulatory and Appeals Commission* 2004 PESCAD 18 [*Booth and Peake*]. In *Booth and Peake,* Madam Justice Webber stated at paragraphs 21 through 23:

> *[21] I find that Re Hache and Minister of Municipal Affairs (1969), 2 D.L.R. (3d) 186 (NBSCAD) applies in this province and the appeal period will begin to run when an appellant has received notice of the decision. This may be specific notice or general notice through posting or publication or by some other means. The bylaws of a community could establish the type of public notice that will be given upon the issuance of a building permit, e.g. publication in a newspaper or newsletter, posting in the community office. If the public can become aware of the decision by way of this public process then the process will likely satisfy the requirements of notice.*
>
> *[22] Where, as in this case there is no process of public notice set out in either the Planning Act or the bylaws of the community, then time can only begin to run when an appellant has actual notice of the decision. Just seeing the mobile home on the property would not be notice of the issuance of a building permit for that home. It might have been placed on the property without a permit.*
>
> *[23] Such notice of a decision is essential to give meaning to the appeal process. If this were not the case, the right to appeal would be illusory, rendering the statutory right of appeal meaningless. It would not be reasonable to interpret the statute in a way that renders a given right meaningless. …*

[emphasis added]

(38) The Commission has carefully reviewed the notice which was eventually posted on PEI Planning Decisions website and finds that this notice failed to comply with clause 23.1(1)(c) of the ***Planning Act***. It was not posted "within seven days" of the decision being made by the Minister. The notice was also deficient when measured against clause 23.1(2)(d) of the ***Planning Act***. It did not contain "the date on which the right to appeal the decision under section 28 expires." The evidence before the Commission also established a discrepancy in the description of the community where the Property was located. A proper description is required by clause 23.1(2)(a) of the ***Planning Act***. Finally, the distinction on the website between decisions made in the last month and "archived decisions" was tied to the date that the decision was made and not the date on which the decision was published. Given the lapse of some nine months between those dates, this distinction meant that only a search of archived decisions would have revealed the decision made by the Minister in this case.

(39) In light of these findings, the Commission concludes that the Minister did not discharge his public notice obligation pursuant to section 23.1 of the ***Planning Act***.

(40) Unlike the case of *Booth and Peake*, there was a statutory notice procedure in this case that, if followed, allowed Minister to dispense with the need for actual notice. General notice, when it satisfies the statutory criteria in section 23.1 of the ***Planning Act***, is deemed to be sufficient. However, a "glitch" in the PEI Planning Decisions website resulted in the impugned decision being posted some nine months after it was made by the Minister. This defect was also compounded by other deficiencies in the notice required by s. 23.1 of the ***Planning Act***.

(41) The Minister was solely responsible for ensuring that the requisite notice was posted on an Internet website accessible to the public and that the notice met the requirements set out in section 23.1 of the ***Planning Act***. Given that the statutory procedure for general notice was not followed by the Minister, the Commission must consider the common law direction of the Court of Appeal in *Booth and Peake*.

(42) In *Booth and Peake*, Madam Justice Webber explained at paragraph 22 that, absent a process for public notice, the time for filing an appeal will begin when a party has actual notice of the decision. By insisting on actual notice, the law aims to ensure that the statutory right of appeal conferred by the ***Planning Act*** is not meaningless:

> *[22] Where, as in this case there is no process of public notice set out in either the Planning Act or the bylaws of the community, then time can only begin to run when an appellant has actual notice of the decision. Just seeing the mobile home on the property would not be notice of the issuance of a building permit for that home. It might have been placed on the property without a permit.*
>
> [emphasis added]

The appeal period will therefore begin when, based on the evidence before the Commission, Mr. Moerike had actual notice of the Minister's decision.

(43) Mr. Moerike testified that he regularly reviewed the PEI Planning Decisions website and that it was only when he decided, by chance, to select the button for "archived decisions" that he found the decision by the Minister on April 29, 2015. The archiving function was based on the date of the decision and not the date that the decision was posted on the website. Mr. Moerike testified that he first saw the notice a few days before his email dated February 16, 2016. He also testified that notice occurred about a week to ten days after the date that the decision was posted on the website. The decision was posted on the PEI Planning Decisions website on February 5, 2016.

(44) The Developers called no witnesses at the hearing. Mr. Carr, who testified for the Minister on this subject, was forthright and candid. His evidence acknowledged the "glitch" in the PEI Planning Decisions website. Mr. Carr's evidence was also consistent with the experience described by Mr. Moerike.

(45) The Commission finds Mr. Moerike to be a credible witness. Based on his testimony, his email of February 16, 2016 and all of the surrounding evidence, including the testimony of Mr. Carr, the Commission finds that Mr. Moerike had actual notice of the Minister's decision one week after it was posted on the PEI Planning Decisions website. For the for the purpose of calculating the time to file a notice of appeal, the Commission finds that Mr. Moerike had actual notice as of February 12, 2016 and twenty-one days after that date to file his notice of appeal. The notice of appeal was filed with the Commission on March 1, 2016. In conclusion, the Commission finds that the notice of appeal was filed within twenty-one days of Mr. Moerike receiving actual notice of the decision by the Minister.

(46) Accordingly, the Commission finds that it has jurisdiction to determine this appeal on its merits.

Merits of the Appeal

(47) The Commission regularly uses a two-part test to guide its consideration of an appeal under section 28(1) of the ***Planning Act***. In the context of a decision by the Minister, those questions are:

- whether the Minister followed the proper process and procedure required by the ***Planning Act***, its regulations, and the law in general, including the principles of natural justice and fairness, when making a decision on the application; and

- whether the Minister's decision on the application has merit based on sound planning principles within the field of land use planning and as identified in the ***Planning Act*** and its regulations.

(48) The position of the Appellants is that the proposed subdivision of the Property would permit a "rural tourism use" in an area known for surface water problems. The position of the Minister is that the *Planning Act Subdivision and Development Regulations* permit subdivision of the Property for rural tourism purposes and that surface water issues could be considered at the permit or development approval stage of the process. The Developers take the position that the Minister's decision is in full compliance with the ***Planning Act*** and all applicable regulations.

(49) Section 2 of the ***Planning Act*** sets its objectives. They include providing an effective mechanism for resolving land use conflicts and providing an opportunity for the public to participate in the planning process. In many cases involving subdivisions and development permits, until a municipal or ministerial decision is published and appealed to the Commission, there is no opportunity for public engagement and conflict resolution:

> *2. The objects of this Act are*
>
> *(a) to provide for efficient planning at the provincial and municipal level;*
> *(b) to encourage the orderly and efficient development of public services;*
> *(c) to protect the unique environment of the province;*
> *(d) to provide effective means for resolving conflicts respecting land use;*
> *(e) to provide the opportunity for public participation in the planning process.*
>
> [emphasis added]

(50) Section 13 of the *Planning Act Subdivision and Development Regulations* imposes a number of mandatory obligations on the Minister. It requires subdivision designs to be based on sound planning principles. It also requires use suitability to be demonstrated. Finally, the Minister must have regard to a number of prescribed factors:

> *13. Subdivision designs shall be based on sound planning, engineering, and environmental principles, and shall demonstrate that the proposed subdivision is suited to the intended use, having due regard for*
>
> *(a) compatibility with surrounding uses;*
> *(b) the topography of the site;*
> *(c) surface drainage on the site and its impact on adjacent parcels of land;*
> *(d) traffic generation onto adjacent highways;*
> *(e) availability, adequacy and the economical provision of utilities and services;*
> *(f) the ability to further subdivide the land or adjoining land;*
> *(g) the provision of lots suitable for the intended use;*
> *(h) waste water management;*
> *(i) water supply; and*
> *(j) natural features.*
>
> [emphasis added]

(51) Section 13 of the *Planning Act Subdivision and Development Regulations* is very clear. Subdivision designs are to be based on sound planning principles and must demonstrate suitability for the intended use. Compatibility with surrounding uses, topography, surface water drainage, and other factors are specifically and expressly listed for consideration. Given the use of the word "shall" in this provision, these are mandatory obligations for the Minister and his employees at the subdivision stage. In short, these are required design considerations and relevant factors when the discretion of the Minister is being exercised to approve the subdivision of land.

(52) In this case, there is no evidence that the Minister considered section 13 of the *Planning Act Subdivision and Development Regulations* before making the decision under appeal. Mr. Carr testified that this subdivision application was not referred to the planning staff of the Minister and planning principles were not applied. While it does appear, based on the testimony of Mr. Carr, that the employees of the Minister are now more focused on land use planning and frequently consult with planning-related staff, that was not the practice at the time that this application was considered by the Minister. This testimony was corroborated by Mr. Lloyd, who also acknowledged that employees of the Minister have struggled in applying section 13 of the *Planning Act Subdivision and Development Regulations*.

(53) While Mr. Lloyd did testify that planning considerations are generally taken into account when a development permit is sought, there are a number of concerns with the Minister taking that approach:

- First, that practice does not reflect the clear, unequivocal, and mandatory language in section 13 of the *Planning Act Subdivision and Development Regulations*. The Minister and his delegates are obligated to follow the law.

- Second, as the Commission has stated in previous decisions, the corridor of considerations for the Minister (and the Commission on appeal) narrows as a landowner moves through the development process from zoning and subdivision to development and construction. Relevant factors missed or ignored at the subdivision stage may be irrelevant at the development stage. This principle is reflected, for example, in section 28(4) of the ***Planning Act***. If sound planning principles are going to have any meaning, each step in the land use and development process must be followed.

- Third, the expectations of Mr. Lloyd were not consistent with the legal position taken by counsel to the Minister, who stated in his post-hearing written submission on October 12, 2016 that section 13 of the *Planning Act Subdivision and Development Regulations* is <u>not</u> considered when an application for a development permit is processed.

(54) In summary, if section 13 of the *Planning Act Subdivision and Development Regulations* was not considered when the Minister granted subdivision approval and it is not considered when the Minister processes a development permit, then section 13 of the *Planning Act Subdivision and Development Regulations* will have been ignored by the Minister in this case. That result is contrary to the express wording of the *Planning Act Subdivision and Development Regulations*. It is simply not open to the Minister to ignore – or even defer – regulatory considerations that "shall" apply to subdivision designs.

(55) Given the failure of the Minister to consider the relevant and mandatory criteria listed in section 13 of the *Planning Act Subdivision and Development Regulations*, the Commission allows the appeal and quashes the April 29, 2015 decision by the Minister. The grant of preliminary approval to subdivide one lot from the Property for "rural tourism use" is hereby set aside. Nothing in this decision by the Commission prevents, however, a future application by the Developers.

(56) The Commission observes that Mr. Moerike was advised in an email from Mr. Carr that Mr. Carr expected that the Commission could extend the deadline for filing an appeal. The Commission confirms that this is incorrect. When a notice of decision has been properly given, the Commission has no jurisdiction to extend the statutory time for the filing of a notice of appeal. Pursuant to subsection 28(1.3) of the ***Planning Act*** a notice of appeal must be filed within twenty-one (21) days after the date of the decision being appealed.

(57) Finally, the Commission observes that there was much discussion at the hearing about the practice of permitting a landowner, who is a licensed soil assessor, to test his or her own property when seeking subdivision approval from the Minister. While there is no evidence that anything improper occurred in this case, the appearance of a potential conflict of interest can sometimes raise the same questions and concerns as an actual conflict of interest. The policies or guidelines applicable to soil assessors in the province may be deserving of further review by the Minister.

4. Disposition

(58) An Order allowing the appeal and quashing the Minister's decision dated April 29, 2015 follows these Reasons for Order.

IN THE MATTER of an appeal by Kevin Moerike, Bob Doherty, and Joanne Doherty of a decision of the Minister of Communities, Land and Environment, dated April 29, 2015.

Order

WHEREAS the Appellants Kevin Moerike, Bob Doherty, and Joanne Doherty appealed the April 29, 2015 decision of the Minister of Communities, Land and Environment granting preliminary approval to subdivide one lot for rural tourism use from provincial parcel number 557652 located in South Winsloe, Prince Edward Island;

AND WHEREAS the Commission heard the appeal at a hearing conducted on September 28, 2016 after due public notice;

AND WHEREAS the Commission has issued its findings in this matter in accordance with the Reasons for Order issued with this Order;

NOW THEREFORE, pursuant to the ***Island Regulatory and Appeals Commission Act*** and the ***Planning Act***

IT IS ORDERED THAT

1. **The appeal is allowed.**

2. **The decision of the Minister dated April 29, 2015, which granted preliminary approval to subdivide one lot from provincial parcel number 557652 for rural tourism use, is hereby quashed.**

DATED at Charlottetown, Prince Edward Island, this 15th day of November, 2017.

BY THE COMMISSION:

(Sgd.*) J. Scott MacKenzie*
J. Scott MacKenzie, Q.C., Chair

(Sgd.) *M. Douglas Clow*
M. Douglas Clow, Vice-Chair

(Sgd.) *Jean Tingley*
Jean Tingley, 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.*

NOTICE: IRAC File Retention

In accordance with the Commission'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.

IRAC141AA(2009/11)