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VIA EMAIL – pjrafuse@irac.pe.ca

Philip J. Rafuse
Appeals Administrator
The Island Regulatory and Appeals Commission
National Bank Tower, Suite 501
134 Kent Street, Charlottetown PE C1A 7L1

Re: Appeal Docket LA2024 – Timothy Banks v. Minister of Agriculture and Land
Our File: LS 25021

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1. These submissions are provided on behalf of the Minister of Agriculture and Land (the "Minister") in relation to the above noted appeal filed by Timothy Banks on December 20, 2022.
 2. The Minister's position is that the required proper process and procedure was followed in making this decision, and that the decision was made pursuant to the applicable legislation. Therefore, the appeal must be dismissed.

Background and Decision

3. On December 8, 2004 there was an approved subdivision for Resort Development use in the Greenwich area which included 70 lots, known as the St. Peters Estates LTD. The resort development use subdivision approval was subject to several conditions including:
 - a. That all lots be serviced by a central water system that was designed and constructed in accordance with the requirements of the then Department of Environment, Energy and Forestry; and
 - b. That the subdivision was to be developed and occupied in accordance with an Environmental Protection Plan, Environmental Management Plan and Human Use Management Plan also to be approved by the then Department of Environment, Energy and Forestry.¹
4. It appears as though in July of 2005 Mr. Banks, the Appellant in this matter, purchased a number of lots within St. Peters Estates LTD including Lot #2² and Lot #30³.

¹ Tab 5 at page 35 of the Record.

² Page 3 of the Additional Documents submitted by the Minister.

³ Page 6 of the Additional Documents submitted by the Minister.

5. On October 4, 2022 Mr. Banks submitted two applications to the Minister for Building and Development permits, one for Lot #2 and one for Lot #30 within the resort development of St. Peters Estates LTD. Both applications were for a “New Two Storey Boathouse”.⁴
6. On December 15, 2022 the Minister denied both applications pursuant to sections 5(a) and 51(1) of the *Planning Act Subdivision and Development Regulations*, EC693/00 (the “Decision”).⁵
7. The reasons for the Decision included that the conditions of the 2004 resort development use subdivision had not been complied with as the former Department of Energy, Environment and Forestry (now the Department of Environment, Energy and Climate Action) did not receive the required documents in relation to the central water system and no approvals were granted by the Department of Energy, Environment and Forestry for the Environmental Management Plan or the Human Use Management Plan.⁶
8. Pursuant to section 5(a) of the *Planning Act Subdivision and Development Regulations*, EC693/00 (“Regulations”),

5(a) No approval shall be given pursuant to these regulations until the following permits or approvals have been obtained as appropriate where an environmental assessment of an environmental impact statement is required under the *Environmental Protection Act*, approval has been given pursuant to that Act.

The Minister confirms that this section of the Regulations was in force at the time of the subdivision approval on December 8, 2004.

9. Pursuant to section 51(1) of the Regulations where there is a resort development, as there is in this case, the “resort development shall be serviced by a central water system that complies with the *Environmental Protection Act*.” Again, the Minister confirms that this section was in force on December 8, 2004 when the resort development subdivision was granted.
10. The Minister had no choice but to deny the applications based on the proper approvals not having been granted pursuant to the *Environmental Protection Act*.

Appeal

11. On December 20, 2022 Mr. Banks appealed the Decision of the Minister.⁷ The Notice of Appeal does not provide any rationale for the grounds of appeal but simply lists the grounds as follows:
 - a. (that the Minister) breached her duty of procedural fairness;
 - b. (that the Minister) acted in an arbitrary manner;
 - c. (that there were) procedural errors;

⁴ Tabs 3 and 4 at pages 9 to 33 of the Record.

⁵ Tab 1 of the Record.

⁶ Tab 1 at pages 4 and 5 of the Record.

⁷ Tab 2 at page 7 of the Record.

- d. (that the Minister) failed or refused to apply or enforce the conditions of the subdivision approval to the original developer and the successors in title in order to deny the permits;
 - e. (that the Minister) erred in her interpretation of the Planning Act and associated Regulations;
 - f. (that the Minister) erred in her interpretation of the requirements of the Department of Environment, Energy and Climate Action; and
 - g. Such other grounds as may be relevant upon review of the full record produced by the Minister.
12. Mr. Banks requests that the Commission quash the Decision of the Minister and grant the permits as requested.
13. These submissions respond to each ground of appeal as drafted, however, should the Appellant expand on the grounds in their submissions the Minister requests the opportunity to provide a written reply.

Minister's Position

14. 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 its Subdivision and Development Regulations:⁸
- 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*.
15. The Minister followed the proper process and procedure required in making this Decision, and the Decision was made pursuant to the applicable legislation. The Minister's Decision should therefor be granted deference.

Ground #1- Procedural Fairness

16. The Minister submits that the Applications submitted by Mr. Banks were afforded procedural fairness. The Applications were provided a fair and unbiased assessment and ultimately denied based on non-compliance with the applicable legislation.
17. The Applications submitted by Mr. Banks were filed 11 days after Post Tropical Storm Fiona which may have contributed to the delay in the processing of the Applications. However, the Decision of the Minister was still made within a reasonable period of time and detailed reasons were provided as to why the Minister's decision was to deny the Applications.

⁸ *Stringer v Minister of Communities, Land and Environment*, Order LA17-06, para 52.

18. Mr. Banks was given opportunities to speak to the Minister's officials throughout the processing of the Applications.⁹

Ground #2- Arbitrariness

19. As detailed in these submissions, the Decision of the Minister was not arbitrary but rather was made in accordance with the applicable legislation.

20. The Decision of the Minister is also consistent with an inquiry from another owner of one of the lots in St. Peters Estates LTD from January 2021 where a request to install a private well on one of the lots was denied.¹⁰

21. The Decision of the Minister was not made on the basis of an arbitrary whim¹¹ or influenced by the "hues and cries" of neighbors or politicians.¹²

Ground #3- Process and Procedure

22. In respect of the third ground of appeal, 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.

23. Subsection 6(c) of the *Planning Act* provides that the Minister shall generally administer and enforce the Act and its Regulations. The Subdivision and Development Regulations apply to all areas of the province, except those municipalities with official plans and bylaws.¹³

24. The subject property is in Greenwich which is a special planning area and the lots which are the subject of this appeal are located within a resort development.

25. Part III- A of the Regulations sets out general provisions to be adhered to in relation to subdivision and development permits.

26. Section 5(a) of the Regulations provides that,

5(a) No approval shall be given pursuant to these regulations until the following permits or approvals have been obtained as appropriate where an environmental assessment of an environmental impact statement is required under the *Environmental Protection Act*, approval has been given pursuant to that Act.

This includes the approval for a development permit.

27. Part III – D of the Regulations sets out the standards specific to resort developments.

⁹ See for example Tab 8(C) at page 230, Tab 8(D) at page 232, Tab 8(F) at pages 239 to 240, and Tab 8(G) at page 242 of the Record.

¹⁰ Tab 7(C) at page 54 of the Record.

¹¹ *Pine Cone Developments Inc v City of Charlottetown*, Order LA16-08 at para 48

¹² *Pine Cone*, at para 47

¹³ Regulations, s. 2(1).

28. Section 51(1) of the Regulations requires that a resort development be serviced by a central water system.
29. In this case, the Minister found that the proper requirements and approvals pursuant to the *Environmental Protection Act* had not been granted for the resort development.
30. The Minister submits that a review of the Decision and the Record demonstrates that the statutory requirements and principles set out in the *Planning Act* and its Subdivision and Development Regulations were considered and applied during the Minister's consideration of the building and development permit applications of Mr. Banks.
31. The Record demonstrates that upon receipt of the application, Eugene Lloyd, Manager (Acting) of the Provincial Planning Branch of the Department of Agriculture and Land, sought input on whether there were approvals for the Human Use Management Plan, the Environmental Protection Plan and the Environmental Management Plan¹⁴.
32. It was determined that there was an approved Environmental Protection Plan dated March 29, 2005 and a draft Environmental Management Plan which included a Human Use Management Plan section had been submitted. However, the draft Environmental Management Plan was not given any approval.¹⁵
33. There were also inquiries made into approvals for the central water system.¹⁶ While it was determined that there was an approval to construct a central water system, and it is believed that the system was largely constructed, there is no approval for the central water system to be commissioned.¹⁷ There was also an approval issued for the construction and operation of a wastewater collection and treatment system. It is unknown as to whether this wastewater collection and treatment system has been installed.¹⁸
34. Both the approval for the central water system and the wastewater collection and treatment system required that the "as-built" plans had to be submitted to the then Department of Environment, Energy and Forestry. For the systems to be commissioned one of the conditions was that these "as-built" plans must have been submitted. Neither system has been given approval to be commissioned.¹⁹
35. The Minister submits that the first part of the test is satisfied. The Decision 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 Minister followed the proper process and procedure in deciding on the Applications.

Ground #4- Subdivision Approval Conditions

36. It is the understanding of the Minister that Mr. Derek Key, K.C. represented the developer, Mr. Wayne Carew, who got the resort development use subdivision approval in December of 2004 and who subsequently sold several lots to Mr. Banks.

¹⁴ Tab 7(A) at page 42 of the Record.

¹⁵ Tab 7(D) at page 56 of the Record.

¹⁶ Tab 7(C) at page 52 of the Record.

¹⁷ Tab 7(F) at page 68 of the Record.

¹⁸ Tab 7(T) at page 176 of the Record.

¹⁹ Tab 7(T) at pages 184 to 187 of the Record.

37. It appears to be Mr. Carew's position that he fully complied with the December 8, 2004 Resort Development Use permit²⁰. The Minister takes the opposing position.
38. The Minister had no option other than to deny the Applications submitted by Mr. Banks based on the December 8, 2004 Resort Development Use permit conditions not being met.
39. Any issues that arise as between Mr. Banks as the purchaser of several lots within St. Peters Estates LTD and Mr. Carew as the vendor of the lots within St. Peters Estates LTD is outside the purview of the Minister and the Commission.

Ground #5- Interpretation of the Legislation

40. The Minister properly interpreted the legislation as it is now and as it was in December of 2004. The applicable sections, namely 5(a) and 51(1) of the Regulations remained unchanged from December 2004 to the time of the decision in December 2022.
41. There was no other interpretation available other than strict compliance with the wording of those sections available to the Minister.

Ground #6- Department of Environment, Energy and Climate Action Requirements

42. The Minister did not interpret the requirements of the Department of Environment, Energy and Climate Action (formerly the Department of Environment, Energy and Forestry). The Minister was informed of what approvals were and were not given pursuant to the *Environmental Protection Act*.
43. The December 8, 2004 Resort Development Use permit required:
 - a. That all lots be serviced by a central water system that was designed and constructed in accordance with the requirements of the then Department of Environment, Energy and Forestry; and
 - b. That the subdivision was to be developed and occupied in accordance with an Environmental Protection Plan, Environmental Management Plan and Human Use Management Plan also to be approved by the then Department of Environment, Energy and Forestry.²¹
44. It appears there may have been a central water system installed but no approval was granted for that system to be commissioned. There are outstanding items and conditions not complied with as per the Certificate of Approval dated April 18, 2005.
45. There was an approved Environmental Protection Plan dated March 29, 2005. No approved Environmental Management Plan or Human Use Management Plan have been issued for the St. Peters Estates LTD resort development.
46. Throughout many exchanges with employees in the Department of Environment, Energy and Climate Action the above was confirmed.

²⁰ Tab 7(A) at pages 43 and 44 of the Record.

²¹ Tab 5 at page 35 of the Record.

Conclusion

47. For the reasons outlined above, the Minister submits that this appeal must be dismissed.
48. In assessing these building and development Applications, the Minister considered relevant, consistent and objective criteria.
49. The relevant sections of the *Planning Act* and its Subdivision and Development Regulations were considered and applied in making this Decision, and the Minister followed the proper process and procedure in assessing the Appellants' applications.
50. Trusting this is satisfactory, if you have questions about these submissions, please do not hesitate to contact the undersigned.

A handwritten signature in blue ink, appearing to be 'M. O'Shea', written in a cursive style.

Mitch O'Shea

cc. Gary Demeulenaere, K.C.
Counsel for the Appellant