



# Prince Edward Island Île-du-Prince-Édouard

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May 8, 2023

**VIA EMAIL – [pjrafuse@irac.pe.ca](mailto: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 LA22-012– *Linda MacMillan v. Minister of Housing, Land and Communities (formerly Minister of Agriculture and Land)***  
**Appeal #: LA23008**  
**Our File: LS 25308**

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Legal Services represents the Minister of Housing, Land and Communities (“Minister”) with respect of the above noted appeal filed by Linda MacMillan (MacPherson) on April 6, 2023 in relation to property #330308 (11 Polly Hill Road, Belfast, PE) (“Subject Property”) and two approvals recently granted by the Minister to the owner of the Subject Property, Alexander Docherty (“Owner”).

I am writing in response to the letter from Philip Rafuse, Appeals Administrator, for the Island Regulatory and Appeals Commission (“Commission”) of April 11, 2023 inviting submissions in response to the Notice of Appeal. The April 11, 2023 letter also invites the Minister to make any submissions regarding jurisdiction.

## **Background**

The Subject Property is located in the community of Belfast, PE which remains under the planning jurisdiction of the Minister.

In March 2023 there were two approvals granted by the Minister with respect of the Subject Property, namely, a change of use approval to change the use of the Subject Property from Residential to Residential/Commercial (rental cottages) and a development permit to construct a 320 square foot cabin. These approvals were granted after Applications had been made by the Owner. The Change of Use approval was granted on March 20, 2023 and the Development Permit was issued March 22, 2023.

## **The Applications**

A Building and Development Permit Application was submitted to the Minister on July 6, 2022 by the Owner of the Subject Property. The Application was for the construction of a 320 square foot

cabin to be used as a short-term year-round rental. The Application noted that there were currently two other structures on the property used for the same purpose.

Once it was determined that there was more than one residential structure on the Subject Property the Minister advised the Owner that he would be required to submit a Change of Use Application as only one structure was allowed on the Subject Property as it had been classified as “Residential”<sup>1</sup>.

On October 11, 2022 a Change of Use Application was submitted by the Owner of the Subject Property. The Application requested that a change of use for the Subject Property be granted to allow for “Rental accommodations”.

On March 20, 2023 the “Final Approval” was granted for the change of use from Residential to Residential/Commercial (rental cottages). Approval was granted for mixed land use being the existing single unit dwelling (Residential) and 3 cottages (Commercial). The Approval was granted subject to several conditions including:

- the use of the existing highway access driveway;
- requirements of the Provincial Fire Marshall;
- requirements of the Department of Environment, Energy and Climate Action regarding drinking water and developments near any watercourses/wetlands;
- the installation of a new on-site sewage disposal system; and
- that each cottage development and any new structures required separate development permits.

On March 22, 2023 a Development Permit was granted to the Owner of the Subject Property for construction of a seasonal rental cottage in accordance with the plans and information which had been submitted. The Development Permit was granted subject to conditions which included:

- monitoring of the sewage disposal systems;
- use of the existing highway access driveway as Right In and Right Out only;
- requirements of the Provincial Fire Marshal’s Office and Quality Tourism Services Inc; and
- buffer zone compliance for any development.

### **Notice of Appeal**

The Notice of Appeal was delivered to the Commission on April 6, 2023 and grounds the appeal in a “discrepancy surrounding legal access to the Docherty property”, and “location of the property is such ‘line of sight’ is not possible with access through the Docherty land.” The Appellant requests that there be a “delay in granting rezoning approval until survey of the MacPherson property is complete.” The “MacPherson property” is the neighboring property and is owned by Anne MacPherson (mother to the Appellant).

In the attached notes to the Notice of Appeal the Appellant expands upon the concerns with the “legal access to the property” and “line of sight” issues.

The Appellant alleges that the Owner does “not have legal access to their land” and that “because of the property’s location (on a hill and on a turn) the associated line of vision is such they cannot gain legal access to the property independently; they cannot legally access property #330308

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<sup>1</sup> *Planning Act Subdivision and Development Regulations*, PEI REG EC690/00 at s. 42

with their own driveway.” They provide no evidentiary support to lend credence to these allegations but rather state that they are in the process of having their property surveyed.

### **Jurisdiction of Commission**

The Minister takes the position that the Commission does not have jurisdiction to hear this appeal.

The Commission gets their jurisdiction to hear appeals, in relation to decisions of the Minister, pursuant to section 28(1) of 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<sup>2</sup>.

The Commission has stated in a recent order that their jurisdiction is not unlimited<sup>3</sup>. The Commission has no “inherent jurisdiction”<sup>4</sup> to hear and decide matters like a superior court does. The Commission must be “assigned the statutory jurisdiction”<sup>5</sup> in order to hear a matter. To hear a matter outside the Commission’s jurisdiction would be an abuse of process<sup>6</sup>.

The Notice of Appeal notes that the grounds for the appeal is that there is a “discrepancy surrounding legal access to the Docherty property”. Neither the Commission nor the Minister have the authority to decide legal access to a property or to settle or approve a boundary line dispute.

The Notice of Appeal has not raised any issues in relation to the procedure of the Minister in processing the application or deficiency in relation to sound planning principles.

The issue of a “legal access to the Docherty property” does not fall within the Commission’s jurisdiction under section 28(1) of the *Planning Act*.

If the Appellant wants the issue related to legal access settled, then they must bring the matter before the Supreme Court of Prince Edward Island for adjudication. As noted by the Prince Edward Island Court of Appeal in *MacKay v MacKenzie*, 2016 PECA 16 deciding a boundary is a legal issue to be decided by a court. The courts, as opposed to the Commission, have the jurisdiction to settle a boundary line dispute or a dispute related to legal access of a property.

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<sup>2</sup> Planning Act, RSPEI 1988, c. P-8 at s. 28(1).

<sup>3</sup> Brian R. MacKay v Minister of Agriculture and Land, Order No: LA22-03.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

The Minister submits that the appeal must be dismissed by the Commission as they do not have jurisdiction to hear a matter related to a legal access dispute between parties.

Both the Change of Use Final Approval and Development Permit were issued by the Minister contingent on the Subject Property being serviced by the “existing highway access driveway”. Should it be determined that the “existing highway access driveway” is not located on the Subject Property then the Owner would not be able to adhere to the Final Approval or the Development Permit. This issue must be decided by the Courts prior to proceeding further with this matter.

If the Commission does find that they have jurisdiction to hear this matter the Minister requests the opportunity to provide fulsome submissions on the merits of the appeal at that time. In the meantime, the Minister will provide a few additional comments regarding the content of the Record of the Decision of the Minister and the allegations made by the Appellants in the Notice of Appeal.

### **Additional Comments**

In considering and assessing the applications made by the Owner the Minister was provided with a survey of the Subject Property<sup>7</sup>. Colin Atkinson, PEILS, NSLS, BCLS, CLS, P.Eng certified the survey plan. The survey plan does show that part of the driveway leading to one of the structures on the Subject Property may encroach on the neighboring parcel of land; however, based on the survey it does appear that the driveway access off of the Polly Hill Road and onto the Subject Property is within the boundary of the Subject Property. Without a survey to contradict the one provided by the Owner the Minister has no evidence to suggest that the Owners do not have a legal access off of the Polly Hill Road and onto the Subject Property

On February 7, 2023 there was a letter sent from the Minister to the surrounding property owners inviting comments regarding the change of use application for the Subject Property<sup>8</sup>. The Appellant (on behalf of her mother) provided comments to the Minister in writing on February 20, 2023<sup>9</sup>. These comments from the Appellant were considered in making a decision related to the application.

The Department of Transportation and Infrastructure were invited to provide comments on access to the property as access would likely intensify if the change of use application was granted. The Department of Transportation did not note any concerns related to the location of the current driveway onto the Subject Property.



Mitch O'Shea  
Legal Counsel for the Minister

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<sup>7</sup> Record at Tab 6(b).

<sup>8</sup> Record at Tab 7(a).\_\_\_

<sup>9</sup> Record at Tab 7(c).