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

Re: Appeal LA23020 – Environmental Coalition of PEI v. Minister of Housing, Land and Communities
Our File: LS 25716

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1. This supplementary reply is provided on behalf of the Minister of Housing, Land and Communities and his designates (the "Minister") in response to the submissions filed by the Environmental Coalition of PEI (the "Appellant") on December 15, 2023.

2. The Appeal is in relation to the approval of a Conditional Development Permit (file C-2023-0273) issued by the Minister for a residential (single unit dwelling) development located at PID 943241, Ocean Court, Greenwich, Kings County, PEI (the "Subject Property").[1]

3. On December 8, 2004, a resort development use subdivision approval with conditions (the "2004 Subdivision Approval") was issued for the St. Peters Estates Ltd. (the "Subdivision").[2] The Subject Property is one of the 70 lots approved for resort development use in the Subdivision.

4. The Minister's Initial Record of Decision was filed on September 15, 2023 (the "Initial Record"), a Supplementary Record of Decision on October 13, 2023 (the "Supplementary Record"), and a supplementary document on November 14, 2023.

Background and Decision

5. The background of the Appeal filed by the Appellant is as set out in the reply filed by the Minister on October 3, 2023 (the "Reply") and is summarized below for convenience.

6. The Appellant appealed a decision of the Minister dated July 24, 2023, approving a request by the Developer, Tim Banks (the "Developer"), for the issuance of a conditional development

[1] Tab 1, Initial Record
[2] Tab 5C, Initial Record

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permit as it relates to the development of Lot #2 within the Subdivision, being the Subject Property (the "Conditional Permit").[3] The application was for a "single family home" structure.[4] The Minister granted the application, on conditions, pursuant to the *Planning Act* (the "Act")[5] and the *Planning Act Subdivision and Development Regulations* (the "Regulations").[6]

7. The Appellant's initial grounds of appeal are as follows:

    1. The Appellant is "*questioning if the conditions the subdivision have been met (operational water system) to warrant development of a lot";*

    2. The Appellant is questioning *"if conditions of the 'Resort Development Use' survey have been met*"; and

    3. The Appellant is questioning "*Why this development has been approved after 18+ years of other development permit requests in the subdivision have been denied (including an active appeal)".*[7]

8. On December 15, 2023, the Appellant filed submissions (the "Appellant's Submissions"). The Appellant's Submissions set forth the following three issues to support their position that the Conditional Permit for the Subject Property be quashed:

    1. Interpretation of the Planning Act and Subdivision and Development Regulations;

    2. Arbitrary Decision by the Minister and Procedural Errors; and

    3. Appeal Process and Procedural Concerns.

9. The Minister's response to the Appellant's Submissions is set forth below.

<u>The Law</u>

10. The Commission has previously held in Order LA17-06 that the following test should be applied to Ministerial decisions made under the Act and the Regulations:

[3] Tab 1, Initial Record
[4] Tab 3, Initial Record
[5] *Planning Act*, RSPEI 1988, c P-8. [Act]
[6] Subdivision and Development Regulations, PEI Reg EC693/00 [Regulations]
[7] Tab 2, Initial Record

- Whether the land use planning authority, in this case the Minister, followed the proper process and procedure as required in the Regulations, in the 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 Act.[8]

11. The Commission does not lightly interfere with reviewable decisions as noted in Order LA12-02 as follows:

> *[9] In previous appeals, the Commission has found that it does have the power to substitute its decision for that of the municipal or ministerial decision maker. Such discretion should be exercised carefully. The Commission ought not to interfere with a decision merely because it disagrees with the end result. However, if the decision maker did not follow the proper procedures or apply sound planning principles in considering an application made under a bylaw made pursuant to the powers conferred by the Planning Act, then the Commission must proceed to review the evidence before it to determine whether or not the application should succeed*.[9]

12. In this Appeal, deference has been earned. As explained below, the Minister followed the proper process and procedure as set out in the Act, the Regulations, and the law in general.

Scope of Appeal

13. Much of the Appellant's submissions relate to the 2004 Subdivision Approval conditions. The subject property was created as a result of a subdivision approved in 2004. The decision to create the subject property was not challenged on an appeal and therefore the subject property already stands as an approved lot for Resort Development use (Summer Cottage). The Minister's predecessors have already completed significant planning analysis with respect to the subject property at the subdivision approval stage.

[8] *Stringer (Re), Donna Stringer v Minster of Communities, Land and Environment*, Order LA17-06 at para 52
[9] *Atlantis Health Spa Ltd v City of Charlottetown*, Order LA12-02 at para 9

14. In Order LA 16-04[10], like in the matter herein, the appellants appealed the Minister of Communities, Land and Environment's decision to issue a development permit. The Commission denied the appellant's appeal and found that the permit met the requirements set forth in the Act and Regulations. Paras. 11 and 12 of the Commission's decision are particularly instructive to the herein issue:

> *(11) The Appellants have expressed concern that the conditions as set out in the development permit might not be followed.* ***The conditions are reasonable and is the responsibility of the Respondent, not this Commission, to ensure enforcement of the development permit, its attached conditions, and all of the relevant laws in the province that apply.***
>
> *(12)* ***The issuance of a development permit under the Planning Act works in tandem with other relevant laws of the Province, such as the Environmental Protection Act ("EPA") and the EPA's regulations. Compliance with these other relevant laws is assumed, expected and required.***

15. Likewise, in the matter at hand, the development permit incorporated the necessary conditions to ensure compliance with all laws of the Province.

Minister's Position

Issue #1: Interpretation of the Act and Regulations

Conditional Permits – Generally

16. The Conditional Permit requires satisfaction of certain conditions before development can occur. The central water system and environmental plans require approval of the Department of Environment, Energy and Climate Action ("EECA"). The Minister considered the statutory requirements set forth in the Act, the Regulations, and other governing legislation, by incorporating these into the Conditional Permit.

17. In *Morris v Westaskiwin (County)*, 2002 ABQB 906[11], a subdivision was approved subject to outlined conditions, including a water supply system as required by section 23(3) of their

[10] *Joseph Kopachevsky and Virginia Kopachevsky v Minister of Communities, Land and Environment*, Order LA16-04
[11] *Morris v Wetaskiwin (County)*, 2002 ABQB 906

Water Act. The applicants argued that the County breached a mandatory statutory requirement and improperly sub-delegated its authority by adding a statutory requirement as a condition to the subdivision approval.

18. In disposing of this issue, the Alberta Court of Queen's Bench provided the following reasons in support of the County adding statutory requirements as conditions at paras. 71 and 72:

> *71 **I find that there was no breach of statutory conditions precedent to the granting of subdivision approval. I am of the view that the wording of the approval, being subject to specific water supply conditions, complied with planning requirements. The approval would not become complete without the necessary water report indicating Water Act compliance. Otherwise, the approval would be void.** County Council addressed itself to the need to ensure water suitability before its approval could be completed and acted upon. In so doing, it committed no error of law and its grant of approval cannot be said to have been "clearly irrational."*
>
> *72 Nor do I hold that there was an improper sub-delegation of County Council's authority, in light of Figol, supra, and Kievit, supra. **County Council issued specific performance criteria in the form of technical testing requirements which, if unsuccessful, would render the approval void**. In so doing, the Council retained its decision-making authority over this important issue.*

19. The Minister submits that the same principles from *Morris v Westaskiwin (County)* may guide the Commission in the herein matter.

Application of the Act and the Regulations

20. The Minister is responsible to generally administer and enforce the Act and the Regulations[12].

21. The Minister may issue a conditional permit, subject to any conditions necessary to ensure regulatory compliance, pursuant to ss. 4(1) and (2) of the Regulations:

> *4 (1) An approved subdivision or development permit may be made **subject to any conditions necessary to ensure compliance with these regulations, other regulations made pursuant to the Act, or any relevant sections to the Environmental Protection Act, Roads***

[12] *Planning Act,* subsection 6(c)

> ***Act, Provincial Building Code Act R.S.P.E.I. 1988, Cap. P-24, or the Fire Prevention Act R.S.P.E.I. 1988, Cap. F-11.***
>
> *(2) Where an approved subdivision or development permit is granted subject to conditions in accordance with subsection (1), the owner shall ensure that the subdivision or development complies with the conditions.*

22. The Minister approved the Conditional Permit with ten conditions. Notably, conditions 1 and 3 (outlined below) related to the requirement for a central water system and the approval of various environmental plans, respectively:

> 1) Any dwelling on the lot cannot be occupied until the structure has been connected to a central water system that has been designed, constructed and approved in accordance with the conditions of subdivision approval and the requirements of the Department of Environment, Energy and Claim Action including complete compliance with the Certificate of Approval dated April 18, 2005; also in accordance with the Environmental Protection Plan Action, Environmental Management Plan and Human Use Management Plan that have all been approved by Department of Environment, Energy and Climate Action.
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> 3) The lot shall be developed and occupied in accordance with an Environmental Protection Plan, Environmental Management Plan and Human Use Management Plan that has been approved by Department of Environment, Energy and Climate Action….[13]

23. Condition #1 providing that the Subject Property be connected to the central water system, requires compliance with subsection 51(1) of the Regulations, which states:

> *51(1) A resort development shall be serviced by a central water supply system that complies with the Environmental Protection Act.*

24. In this case, there are a couple of options available to the Developer to demonstrate compliance with this condition:

> 1. A central water system has been installed in the subdivision. However, the Minister understands that the system needs to be "turned on".[14] It is "assumed, expected

[13] Tab 1, Initial Record
[14] Tabs 7C and 7F, Record of Decision Prepared by the Minister of Agriculture and Land, File No 22-024

and required" that the Developer would consult with the EECA and take the necessary actions to ensure that the lots are served by a compliant central water system.[15]

2. Alternatively, the Developer owns four lots in the Subdivision and could theoretically meet the conditions required in another manner. For example, to have a central water system that complies with the Regulations, the Developer only needs to connect five lots to the water system. If he had one additional lot to connect to his system to create his own – he would not necessarily have to rely on the existing central water system.

25. Regardless of *how* this condition is satisfied, the development cannot proceed until this condition is met. The Developer must work with EECA to satisfy this condition.[16]

26. Condition # 3 incorporates the feedback from EECA regarding an updated and approved Environmental Protection Plan, Environmental Management Plan and Human Use Management Plan.[17]

27. The Minister of Agriculture and Land's December 2022 decision originally characterized the condition for these approved plans as an "environmental assessment" under subsection 5(a) of the Regulations.[18] However, upon further consideration of this section and the provisions of the *Environmental Protection Act*, the Minister questions whether this subclause applies in this matter. For reference, subsection 5(a) states:

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

28. Although the Minister received feedback from EECA that the plans should be updated and approved, this request was not characterized to the Minister as part of an "undertaking" under the *Environmental Protection Act* which would necessitate an environmental assessment and environmental impact statement. Typically, the Minister would see "undertakings" required

[15] Tab 1F, Supplementary Record, and Tab 7C, Record of Decision Prepared by the Minister of Agriculture and Land, File No. 22-024
[16] Tab 1F, Supplementary Record, and Tab 7C, Record of Decision Prepared by the Minister of Agriculture and Land, File No. 22-024
[17] Tab 7D, Record of Decision Prepared by the Minister of Agriculture and Land, File No. 22-024
[18] Tabs 1 and 7G Record of Decision Prepared by the Minister of Agriculture and Land, File No. 22-024

for projects like large-scale livestock farming operations where excessive manure needs to be addressed, aquaculture processing and storage structures, large-scale development proposals along the coast or near wetlands/watercourses.

29. Even if the request for approved plans is interpreted as an environmental assessment or environmental impact statement, the Minister has given only *conditional* approval under the Conditional Permit. The Developer must satisfy the Conditions #1 and 3 before development can commence. Therefore, the Conditional Permit is not contrary to s. 5(a) of the Regulations.

30. With respect to the considerations of whether the development constitutes "premature development" or would have a "detrimental impact", the Minister disagrees with the Appellant's analysis. Considerable analysis was undertaken at the subdivision approval stage of this development to consider premature development or detrimental impact. The 2004 Subdivision Approval conditions – and ultimately the development permit conditions – reflect and incorporate these considerations. Further, developing existing approved lots alleviates the pressures of potential premature development.

Public Policy Reasons for the Issuance of a Conditional Permit

31. The Developer's fact situation is unique. The Minister issued the 2004 Subdivision Approval to the then subdivision developer who was to comply the conditions contained therein in accordance with subsection 4(2) of the Regulations. The original developer is no longer involved with the subdivision. The Appellant is correct in stating that some of the 2004 Subdivision approval conditions were not demonstrated to have been fulfilled by the original developer. Most notably, the central water system is installed but was never "turned on".

32. As noted above, the Developer's lots have been given an approved use. Issuing the Conditional Permit creates certainty for the Developer as to what exactly is required in pursuing this development, while respecting the legislative requirements. This is similar to issuing preliminary subdivision approval where certain conditions are provided to give the developer clarity that if certain investments into the property are made, final approval will be given.

Which Party can fulfill Statutory Conditions?

33. The Appellant is incorrect in their position that only the "owners" of the subdivision have the authority to fulfill said conditions. First, it is not accurate to equate the term "subdivision

owner" with "subdivision *developer*". The Developer is an "owner" for the purposes of the Act as he owns four lots within the subdivision.[19]

34. Although the Act places an obligation on a subdivision owner to fulfill certain conditions – and therefore assumes risk for noncompliance – the Act does not preclude an individual lot owner from satisfying conditions. The main objective is to ensure statutory compliance. A statutory interpretation that distinguishes between who satisfies those requirements would produce an absurd result and contravene the well-established principles of statutory interpretation.[20]

Issue #2: Arbitrary Decision by the Minister and Procedural Errors

Procedural Errors

35. The Minister would first like to acknowledge the issues relating to the PEI Planning Decision website at paragraph 27 of the Appellant's Submission. However, for the purpose of this Appeal, the Appellant's filed the Notice of Appeal within the timeframe provided for in the Act, so there is no argument regarding the Commission's jurisdiction to decide the matter.

36. The second procedural issue at paragraph 28 of the Appellant's Submission concerned the issuance of a decision on a property when there was an active appeal. The Minister must deal with applications as they are submitted and has no authority to withdraw the Developer's Appeal in matter LA 22024. The ability to withdraw an appeal rests with the Developer.[21]

Decision-making of the Minister

37. The decision to issue the Conditional Permit was free from a reasonable apprehension of bias and was solely based on the statutory requirements and principles set forth in the Act and the Regulations for the following reasons.

38. During the Developer's appeal in matter LA 22024, the Minister engaged in settlement discussions with the Developer (appellant as he then was). This is a common practice in planning appeals before the Commission and is contemplated under the alternative dispute resolution options in IRAC's Rules of Procedure. In many appeals, the Minister engages in settlement discussions.

[19] Tab 5(a), Initial Record
[20] The Construction of Statutes, 7th Ed., Ruth Sullivan CHAPTER 10 Consequential Analysis – Avoiding Absurdity, § 10.01
[21] Rule 28 of the Commission's Rules of Practice and Procedure

39. Through settlement discussions in this matter - the details of which are subject to settlement privilege – the Planning Division took a second look at this subdivision, the outstanding conditions and the applicable statutory provisions. The Minister ultimately determined that a conditional permit could be issued which incorporated the 2004 Subdivision Approval conditions and all other relevant statutory requirements. Once this determination was made, a new application was needed from the Developer to review and consider.

40. The Developer is the only lot owner in the Subdivision who has formally applied for a development and building permit to date. As addressed above, only his applications have been presented to be considered by the Minister. Should other lot owners in the Subdivision apply for a development permit, the Minister would consider the application in the same impartial manner as the Developer's application.

41. With respect to the terms of the Conditional Permit, these also demonstrate that the Minister acted impartially and reasonably. Pursuant to the Conditional Permit, the Developer must not only satisfy the same conditions as found in the 2004 Subdivision Approval, but also is subject to additional approvals and/or permits that may be required prior to developing the Subject Property, including a building permit.

42. This was not a case where the Minister granted an unconditional development and building permits to the Developer. If development commenced in contravention of the permit, the Conditional Permit may be revoked.

43. In regard to paragraph 35 of the Appellant's Submissions, the handwritten note in response to question 5 of the Building and Development Permit application was authored by an employee of the Department of Housing, Land and Communities relaying the comments of the Developer.[22] The Minister submits that a note at the instruction of the Developer, and particularly the content of this note, would not unduly pressure or prejudice fair consideration of the application.

44. Based on the foregoing, an informed person, viewing the matter realistically and practically, would not apprehend that there was bias in issuing the Conditional Permit[23].

[22] Tab 3, Initial Record
[23] *R v S (RD)*, [1997] 3 SCR 484

Issue #3: Appeal Process and Procedural Concerns

45. In response to paragraphs 38 and 40 of the Appellant's Submissions, the Minister submits that the timelines provided for in the Act and the *Freedom of Information and Protection of Privacy Act*[24] are not within the purview of the Commission.

46. In response to paragraph 29 of the Appellant's Submissions, the Minister would like to clarify its statement in the Reply. The Minister intended to state that "the Minister has not officially denied permit applications from *other* lot owners within the resort development of St. Peters Estates Ltd., except for the Developer's permit applications. The Developer's applications were the first to be processed by the Minister in this subdivision."

Additional Comments

47. With respect to the applicability of the previous submissions filed by the Minister of Agriculture and Land (as it then was) dated February 14, 2023, in relation to an Appeal filed by the Developer in Appeal Docket LA22024 (the "Minister of Agriculture and Land's Submissions"), the submissions relate to a matter not currently before the Commission and are distinguishable from the herein Appeal. As a result, these submissions are not persuasive in this matter as the decision-maker was considering the issuance of an *unconditional* permit at that point in time.

Conclusion

48. The Minister submits that in issuing the Conditional Permit, the relevant sections of the Act and the Regulations were considered and applied in making the decision. Further, the Minister submits that the proper process and procedure was followed in assessing the development permit application, which permitted the Minister to render a sound and impartial decision.

Signed,

Meaghan Hughes & Christiana Tweedy
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Minister of Housing, Land and Communities

[24] *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, c F-15.01