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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 #LA23-017
Martin Dutton v. Minister of Housing, Land and Communities
Our File: LS25623

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1. I represent the Minister of Housing, Land and Communities (the “Minister”) in relation to the above noted appeal filed by Martin Dutton (the “Appellant”) on July 10, 2023 (the “Appeal”). The Appeal arises from the Minister denying the Appellant’s July 22, 2022 application to subdivide PID#400929 located at 19398 Route 2, in Greenvale, Queens County (the “Subject Property”), into three (3) single-unit residential lots (the “Application”).
 2. The Minister’s position is that the new proposed lots on the Subject Property cannot receive legal access, directly or indirectly, from Route 2. As legal access is required to subdivide pursuant to the *Planning Act Subdivision and Development Regulations*, PEI Reg EC693/00 (as amended) (the “Regulations”), the Minister’s decision to deny the Application was in accordance with the *Planning Act*, RSPEI 1988, Cap. P-8 (the “Act”).

Background and Decision

3. On July 22, 2022, the Minister received the Application.
4. On completing a preliminary review, the Minister identified the proposed new lots in the Application on the Subject Property as being adjacent to Route 2, which is an arterial highway as prescribed by the *Roads Act Highway Access Regulations*, EC580/95 (as amended) (the “Highway Access Regulations”).

5. On June 19, 2023, the Department of Transportation advised the Minister pursuant to section 20(1)(e) of the *Highway Access Regulations* the requested subdivision could not be granted. Paraphrasing the foregoing section, it prohibits (subject to exceptions inapplicable in relation to the Application) authorizing “*a new entrance way or change of use of an existing entrance way*” on a parcel created after March 22, 1992, and which is adjacent to an arterial highway.
6. On June 19, 2023, the Minister denied the application pursuant to subsection 6(c) of the *Act* and subsections 3(1)(a), 5(d) and 25(2) of the *Regulations* (the “Decision”). As outlined in the Decision, the denial occurred as the Subject Property requires the Department of Transportation and Infrastructure to provide legal access to the proposed lots given it is located on Route 2. As the Department of Transportation and Infrastructure indicated such legal access could not be provided, the Application was denied.

Appeal

7. The Appeal is pursuant to section 28 of the *Act*.
8. The Appellant’s grounds of appeal are as follows:
 - “1 *No explanation given for denial other than ‘cannot have legal access’*
 - 2 *Several properties within 1 KM have shared access onto Route 2*
 - 3 *No one from either Department of Agriculture or Transportation contacted us to discuss. We can create separate access to property if required if departments can give guidance”*
9. The Appellant seeks the following relief from the Commission:
 - “1 *Either allow application as submitted*
 - or*
 - 2 *Instruct Department of Transportation to discuss/guide applicant to allow conformity with current regulation”*
10. The Minister is providing the Record of the Decision to the Appellant and filing same with the Commission on the same date as the within submissions are dated.
11. The Minister’s response to the Appellant’s grounds of appeal is outlined below. Should the Appellant expand on, provide further explanation for, and or otherwise provide submissions on his grounds of appeal, the Minister reserves the right to provide a further reply thereto.

The Legislation

12. Subsection 6(c) of the *Act* provides that the Minister shall generally administer and enforce the *Act* and its *Regulations*.

13. The *Regulations* apply to all areas of the province, except those municipalities with official plans and bylaws. The Subject Property is located in Greenvale, aforesaid, which is an area where land use and development are not regulated by a local official plan or zoning by-law. Therefore, the land use and development of the Subject Property is regulated by the *Act* and *Regulations*.

14. Subsection 3(1) of the *Regulations* provides:

“3. *General requirements - subdivisions*

(1) *No person shall be permitted to subdivide land where the proposed subdivision 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; or*

(d) *have a detrimental impact.” [Emphasis Added]*

15. In other words, the Minister *must deny* an application that contravenes any one (or more) of these general requirements.

16. Subsections 1(b), 5(d) and 25(2) of the *Regulations* provide as follows:

“1. *Definitions*

In these regulations

...

(b) *“arterial highway” means any highway that has been designated as an arterial highway under the provisions of the Roads Act Highway Access Regulations;*

...

5. *Other approvals required*

No approval shall be given pursuant to these regulations until the following permits or approvals have been obtained as appropriate:

...

(d) where, pursuant to the Roads Act, an entrance way permit or approval is required, the required permit or approval has been obtained; and

...
25.

...

Arterial highways

(2) No person shall subdivide a parcel of land that abuts, and requires access to, an arterial highway unless an entrance way permit, where required, has been issued by the Minister responsible for the Roads Act Highway Access Regulations.

17. The Highway Access Regulations provide in part as follows:

"13. *Arterial highways*

(1) All highways or parts thereof described in Schedule "A-1" are designated as arterial highways.

...

20. *Issue of permit outside an infilling area*

(1) The Minister may issue an entrance way permit to authorize placement of a new entrance way or a change of use of an existing entrance way, to a portion of an arterial highway outside of an area that has been designated for infilling in Schedule "A-3", except no entrance way permit shall be issued

...

(e) to provide an entrance way to a parcel of land created after March 22, 1992 or the date upon which the adjacent highway was designated as an arterial highway, whichever is later, other than to enable

(i) the creation of a new farm;

(ii) the creation of a new parcel of land subdivided from a farm for the purpose of establishing one new single-family dwelling or the creation of a separate parcel of land that includes a single-family dwelling to allow the farmer to retain the dwelling and sell the remainder of the farm, provided that the existing entrance way to the farm is used for access to the new or separate parcel of land and any other entrance way to the new or separate parcel of land is removed, or

(iii) cultivation of a natural resource;

but where the existing parcel of land is served by more than one existing entrance way, no additional entrance way may be established to serve the new parcel of land; or

...

SCHEDULE A-1

ARTERIAL HIGHWAYS

1. The following highways and portions thereof designated as "arterial" highways in regulations proclaimed under the Planning Act, on February 3, 1979, are continued as arterial highways pursuant to these regulations, with effect from February 3, 1979:

...

(3) Route 2:

...

(b) re-commencing at the intersection of the Charlottetown Perimeter Highway in the City of Charlottetown (formerly in the Community of West Royalty) to the intersection of Route 153 in the Community of Tignish."

The Test

18. In Order LA17-06 ("*Stringer*")¹ the Commission outlines the applicable test for Ministerial decisions made under the *Act* and *Regulations*, namely:
- a. 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
 - b. 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*.

Applying the Test

19. In this case, the Minister followed the proper process as set out by law, applied sound planning principles, and therefore, the Decision requires deference.
20. The Minister met the first part of the test. The Decision and supporting evidence demonstrate the Minister followed the proper process and procedure, and the applicable

¹ *Stringer (Re), Donna Stringer v Minister of Communities, Land and Environment*, Order LA17-06 ("*Stringer*") at para 52

legislation. The Decision was not overly broad or arbitrary and was grounded in the principles of natural justice.

21. Subsection 5(d) of the *Regulations* states that where an entrance way permit or approval is required, no approval shall be given until it has been obtained under the *Roads Act*, RSPEI 1988, Cap. R-15. Likewise, subsection 25(2) of the *Regulations* prohibits subdivision of a parcel that abuts an arterial highway, absent an entrance way permit, where required.
22. In this case, Property Development Officer Sarah MacVarish sent the details of the Application to the Department of Transportation and Infrastructure for comment about whether such approval would be permitted.
23. The Subject Property is located on an arterial highway outside an area designated for infilling in the *Highway Access Regulations*. The intended use of the Subject Property does not fall under one of the exceptions in subsection 20(1)(e) of the *Highway Access Regulations*. As such, the Department of Transportation and Infrastructure advised that access cannot be provided to the proposed new lots.
24. While this is not an appeal of a *Roads Act* decision under section 12 of the *Highway Access Regulations*, it was reasonable for the Property Development Officer to rely on the Department of Transportation and Infrastructure's determination, that access cannot be provided, in denying the Application.
25. In sum, the Property Development Officer denied the Application having properly considered subsections 5(d) and 25(2) of the *Regulations* given the Department of Transportation and Infrastructure's position that the required permit or approval would not be obtained.
26. The Minister also met the second part of the test as the Decision is supported by objective and reliable evidence, and is based on the *Act*, the *Regulations*, and sound planning principles. The Commission states in *Stringer* that "*sound planning principles require regulatory compliance*".²
27. Given the Application's lack of regulatory compliance, the Decision meets both steps in the test.

² *Stringer* at para. 64

Conclusion

28. For the reasons outlined above, the Minister submits that this appeal must be dismissed.
29. In respect of the alternative relief sought by the Appellant, the Minister submits that the Commission does not have the jurisdiction to make such an Order in the within appeal, but encourages the Appellant to discuss same with the Department of Transportation and Infrastructure, as the Minister noted in the Decision that the Appellant could do.
30. Trusting the foregoing is satisfactory; however, if you have questions about these submissions, please do not hesitate to contact me.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Yours truly,



Richard A. Collier
Lawyer for the Minister of
Housing, Land and Communities

RAC/cc