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VIA EMAIL – mwalshdoucette@irac.pe.ca

Michelle Walsh-Doucette
Commission Clerk
Island Regulatory and Appeals Commission
National Bank Tower, Suite 501
134 Kent Street, Charlottetown PE C1A 7L1

Re: Appeal Docket #LA24017
Mark Frezell v. Minister of Housing, Land and Communities
Our File: LS 26935

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1. We represent the Minister of Housing, Land and Communities (the “Minister”) in relation to the above noted appeal filed by Mark Frezell (the “Appellant”) on October 4, 2024 (the “Appeal”). The Appeal arises from the Minister denying the Appellant’s August 14, 2024, development permit application for a new detached structure (summer seasonal cottage) on PID# 568220 located at Garden Lane, Donaldston, Queens County (the “Subject Property”) (the “Application”). The Subject Property abuts the Tracadie Bay.
 2. The Minister’s position is that the proposed structure is located within the buffer zone on the Subject Property. Given the location of the structure being within the buffer zone, the Minister’s decision to deny the Application was in accordance with the *Planning Act*, RSPEI 1988, Cap. P-8 (the “Act”) and the *Planning Act Subdivision and Development Regulations*, PEI Reg EC693/00 (as amended) (the “Regulations”).

Background and Decision

3. On August 14, 2024, the Minister received the Application.
4. On completing a preliminary review of the Application, the Minister identified the following:
 - a. the Subject Property had limited space for development given the buffer zone;
 - b. the Subject Property had poor soil; and
 - c. the Subject Property may not have sufficient space for the installation of a septic system.

5. On September 10, 2024, the Department of Environment, Energy and Climate Action confirmed that the Subject Property appeared to only have room for a holding tank. A holding tank is defined at subsection 1(1)(c) of the *Sewage Disposal Systems Regulations*, PEI Reg EC625/13, as meaning “a closed, water-tight receptacle that is designed and used to receive and store sewage or septic tank effluent and does not discharge waste water.”
6. On September 18, 2024, the Department of Environment, Energy and Climate Action confirmed that there did not appear to be sufficient area for development on the Subject Property outside of the 15 metre buffer zone. As no development is permitted within the buffer zone, if no other option existed, the Department of Environment, Energy and Climate Action recommended that the Application be denied.
7. Pursuant to subsection 16(4) of the Regulations, the requested development permit cannot be granted. Subsection 16(4) states “No person shall undertake any development, including a sewage disposal system, within a required buffer.”
8. On September 19, 2024, the Minister denied the application pursuant to subsections 3(2)(a), 5, and 16(4) of the Regulations (the “Decision”). As outlined in the Decision, the denial was issued as the proposed structure is located within the buffer area on the Subject Property, and there is no room for development outside the buffer area on the Subject Property. The Appellant was directed to the Department of Environment, Energy and Climate Action to discuss the Decision and obtain more details as to where development may be suitable.

Appeal

9. The Appeal is pursuant to section 28 of the Act.
10. The Appellant’s grounds of appeal are as follows:

The buffer zone GPS coordinates (as supplied by the Development Officer on behalf of The Ministry of The Environment) are incorrect and not aligned to the “top of the bank”. If the buffer is plotted and measured correctly from the top of the bank there is sufficient setback allowance for both the cottage structure and the septic system to meet the planning requirements.

11. The Appellant seeks the following relief from the Commission:

An order reversing the denial of the development permit.

12. 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.

13. The Minister’s response to the Appellant’s 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.

Legislation

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

15. The Regulations apply to all areas of the province, except those municipalities with official plans and bylaws. The Subject Property is located in Donaldston, 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.

16. Subsection 3(2) of the *Regulations* provides:

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.

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

18. Subsections 1(b.3), 1(g), 5(a), 16(4), and 39(5) of the *Regulations* provide as follows:

1. Definitions

In these regulations

...

(b.3) “buffer” means an area of land which serves to separate two or more different types of land use;

...

(g) “development” means

- (i) site alteration, including but not limited to
 - (A) altering the grade of the land,
 - (B) removing vegetation from the land,
 - (C) excavating the land,
 - (D) depositing or stockpiling soil or other material on the land, and
 - (E) establishing a parking lot,
- (ii) locating, placing, erecting, constructing, altering, repairing, removing, relocating, replacing, adding to or demolishing structures or buildings in, under, on or over the land,
- (iii) placing temporary or permanent mobile uses or structures in, under, on or over the land, or
- (iv) changing the use or intensity of use of a parcel of land or the use, intensity of use or size of a structure or building;

...

5. Other approvals required

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;

...

16.

...

Development prohibited in buffer

(4) No person shall undertake any development, including a sewage disposal system, within a required buffer.

...

39.

...

Setback from beach, sand dune, wetland or watercourse

(5) The nearest exterior portion of a building or structure shall be located no closer than

- (a) 75 feet (22.9 metres), or 60 times the annual rate of erosion, whichever is greater, to a beach, measured from the top of the bank;
- (b) 100 feet (30.5 metres) to a migrating primary or secondary sand dune, measured from the inland boundary of the dune;
- (c) 75 feet (22.9 metres) to the inland boundary of a wetland or watercourse.

19. Subsections 1(1)(e), 1(1)(ee), and 1(1)(ff), and section 3, in part, of the *Watercourse and Wetland Protection Regulations*, PEI Reg EC720/08, provide as follows:

1(1)(e) “buffer zone” means the 15-metre-wide area referred to in section 3;

...

1(1)(ee) “watercourse” means an area which has a sediment bed and may or may not contain water, and without limiting the generality of the foregoing, includes the full length and width of the sediment bed, bank and shore of any stream, spring, creek, brook, river, lake, pond, bay, estuary or coastal body, any water therein, and any part thereof, up to and including the watercourse boundary;

...

1(1)(ff) “watercourse boundary” means

(i) in a non-tidal watercourse, the edge of the sediment bed, and

(ii) in a tidal watercourse, the top of the bank of the watercourse, and where there is no discernible bank, means the mean high water mark of the watercourse;

...

PART III – BUFFER ZONES

...

3 (3) No person shall, without a license or a Buffer Zone Activity Permit, and other than in accordance with the conditions thereof, alter or disturb the ground or soil within 15 metres of a watercourse boundary or a wetland boundary, or cause or permit the alteration or disturbance of the ground or soil, therein, in any manner.

(4) No person shall, without a license or a Buffer Zone Activity Permit, and other than in accordance with the conditions thereof, engage in or cause or permit the engaging in any of the following activities within 15 metres of a watercourse boundary or a wetland boundary:

(a) drain, pump, dredge, excavate, or remove soil, water, mud, sand, gravel, stones, rocks, or aggregate;

(b) dump or infill, or deposit soil, water, mud, sand, gravel, stones, rubbish, litter, rocks, aggregate or material or objects of any kind;

(c) construct or place, repair or replace, demolish or remove, buildings or structures or obstructions of any kind, including but not limited to bridges, culverts, breakwaters, dams, wharves, docks, slipways, decks, or flood or erosion protection works;

(d) operate heavy equipment or a motor vehicle, other than

(i) upon a highway,

(ii) upon a private road, right-of-way, or driveway which was approved prior to the enactment of these regulations by the provincial government or a municipal government in a building permit or a subdivision plan, or

(iii) for the conduct of activities directly related to the legal harvesting of a fishery resource, the legal removal of beach material, or the cultivating of an agricultural crop;

(e) disturb, remove, alter, disrupt or destroy the ground in any manner;

- (f) cut down live trees or live shrubs;
- (g) cultivate an agricultural crop;
- (h) spray or apply pesticides in any manner.

(5) The land within 15 metres of a watercourse boundary or a wetland boundary referred to in subsections (3) and (4) shall be known as a buffer zone.

Test

20. 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 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.

Test Application

21. In this matter, the Minister followed the proper process as set out by law, applied sound planning principles, and, therefore, the Decision requires deference.
22. The Minister met the first part of the test. The Decision and supporting evidence demonstrate that the Minister followed the proper process and procedure, and the applicable legislation. The Decision was not overly broad or arbitrary and was grounded in the principles of natural justice.
23. Subsection 16(4) of the Regulations prohibits development within a required buffer. Subsection 1(b.3) of the Regulations defines buffer as an area of land which serves to separate two or more different types of land use. Subsection 1(g) of the Regulations defines development to include locating, placing, erecting, constructing, altering, repairing, removing, relocating, replacing, adding to or demolishing structures or buildings in, under, on or over the land.
24. Section 3 of the *Watercourse and Wetland Protection Regulations* also prohibits, unless with a license or a Buffer Zone Activity Permit, altering or disturbing the ground or soil, or

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

constructing or placing, repairing or replacing, demolishing or removing, buildings or structures or obstructions of any kind within 15 metres of a watercourse boundary or a wetland boundary.

25. In this matter, Property Development Officer, Sarah MacVarish, sent the details of the Application to the Department of Environment, Energy and Climate Action for confirmation that the Subject Property could accommodate development given the Subject Property abuts a watercourse boundary and has limited space available on the Subject Property outside of the designated 15 metre buffer zone.
26. The Department of Environment, Energy and Climate Action confirmed that the Application should be denied, unless other options exist, as there was insufficient area for development on the Subject Property outside of the 15 metre buffer based on the map and buffer zone coordinates relied upon by this Department.
27. It was reasonable for the Property Development Officer to rely on the Department of Environment, Energy and Climate Action's determination that the Subject Property did not appear to have sufficient space outside of the buffer zone for the proposed structure and recommendation to deny the Application.
28. The Minister notes that the Appellant has not obtained a license or Buffer Zone Activity Permit under the *Watercourse and Wetland Protection Regulations*.
29. Although not specifically referenced in the Decision, the Minister submits that a minimum building or structure setback of 75 feet (22.9 metres) is also required from the inland boundary of a wetland or watercourse in accordance with subsection 39(5) of the Regulations. As the Subject Property is approximately 87 feet wide, measured from the inland boundary of the watercourse to Garden Lane, the proposed development would not meet this setback requirement.
30. 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
31. Given the Application's lack of regulatory compliance, the Decision satisfies both steps in the test.

Conclusion

32. For the reasons outlined above, the Minister submits that this appeal must be dismissed.

² *Stringer* at para 64.

33. Trusting the foregoing is satisfactory; however, if you have questions about these submissions, please do not hesitate to contact us.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Yours truly,



Christiana Tweedy
Mitchell O'Shea
Lawyers for the Minister of
Housing, Land and Communities