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Justice and
Public Safety

Legal Services
PO Box 2000
Charlottetown PE
Canada C1A 7N8

Île-du-Prince-Édouard

Justice et
Sécurité publique

Services légaux
C.P. 2000
Charlottetown PE
Canada C1A 7N8

March 31, 2025

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 #25003
Roderick MacNeil v. Minister of Housing, Land and Communities
Our File: LS 27370

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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 Roderick MacNeil (the “Appellant”) on March 5, 2025 (the “Appeal”). The Appeal arises from the Minister denying the Appellant’s July 9, 2021, development permit application for a single-unit dwelling to be used a seasonal cottage on PID# 506899 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 and on-site septic system are located within the buffer zone on the Subject Property. Given the location of the structure and septic system 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. The Department of Housing, Land and Communities (the “Department”) previously completed an evaluation of the Subject Property as requested by the Subject Property’s previous owner in 2011 to 2012. On February 16, 2012, a Property Development Officer advised the previous owner that a cottage could not be located on the Subject Property due to noncompliance with the setback requirements in the Regulations.
4. On July 9, 2021, the Minister received the Application.

5. The structure that is the subject of the Application is presently located on the Subject Property without the necessary development permit. The Minister is unaware of the exact date on which the Appellant placed the structure on the Subject Property, but understands that the structure was placed on the Subject Property prior to the Application being submitted to the Department.
6. On February 12, 2025, the Department of Environment, Energy and Climate Action (the "Department of EECA") confirmed that there is insufficient area for the proposed development on the Subject Property outside of the 15-metre buffer zone taking into account the shoreline protection. As no development is permitted within the buffer zone, the Department of EECA 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 February 12, 2025, 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 single-unit dwelling is located within the buffer area on the Subject Property. The Appellant was also directed to the Department of EECA 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:

Lot is an approved lot in an approved subdivision and meets the requirements for development required for a lot subdivided prior to 1994. Buffer zone has been staked out by the department of environment and location for cottage is clearly outside this area. Lot depth to meet all requirements is 87', lot is in excess of 90' as measured from pin to top of bank / shoreline protection.

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

The Appellant would like the development permit to be approved as he has been waiting since 2021 for a response and at that time he received an approval permit for shoreline protection with the intention of developing which was done at a cost of \$27,500.

12. The Appellant references having previously received an approval permit for shoreline protection. The Department of EECA does not have a record of any approval (i.e. a

Watercourse, Wetland and Buffer Zone Activity Permit or Contractor Licensing Program Registration) for placement of the shoreline protection material on the Subject Property. The Minister therefore requests copies of any approvals received by the Appellant in relation to his shoreline protection on the Subject Property.

13. 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.
14. 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

Act and Regulations

15. Subsection 6(c) of the Act provides that the Minister shall generally administer and enforce the Act and its Regulations.
16. 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.
17. Pursuant to section 31(1) of the Regulations, no person shall, without first obtaining a development permit issued by the Minister:
 - a. Commence of the construction of any building or structure;
 - b. Locate any building or structure, or change the location of any building or structure on a lot; or
 - c. Make any structural alterations which change the exterior dimensions of any building or structure.
18. 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.

19. In other words, the Minister **must deny** an application that contravenes any one or more of these general requirements.
20. Subsections 1(b.3), 1(g), 5(a), 16(4), and 39(3) and (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.

...

Private road or right-of-way

(3) Along any private road or right-of-way in an approved subdivision for summer cottage use, no person shall locate a building or development closer than

(a) 50 feet (12.5 metres) to the centre line of a private road or right-of-way having a width of 66 feet (20.1 metres); or

(b) 17 feet (5.2 metres) to the boundary of a private road or right-of-way having a width of less than 66 feet (20.1 metres).

...

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.

Watercourse and Wetland Protection Regulations

21. 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

22. In Order LA17-06 ("*Stringer*")¹, the Commission outlined 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

23. In this matter, the Minister followed the proper process as set out by law, applied sound planning principles, and, therefore, the Decision requires deference.

Step 1: Processing of the Application

24. 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.
25. Subsection 5(a) of the Regulations prohibits the approval of a development permit until approval has been given pursuant to the *Environmental Protection Act*, RSPEI 1988, c E-9.
26. Section 3 of the *Watercourse and Wetland Protection Regulations*, *supra*, prohibits, unless with a license or a Buffer Zone Activity Permit, altering or disturbing the ground or soil, or 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.

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

27. Subsection 16(4) of the Regulations also 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.
28. In this matter, Senior Development Officer, Sarah MacVarish, sent the details of the Application to the Department of EECA 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 for the structure and septic system.
29. The Department of EECA confirmed that the Application should be denied as there is insufficient area for development on the Subject Property outside of the 15-metre buffer based on the desktop watercourse/wetland assessment, provincial GIS mapping and inspection of the Subject Property on July 4, 2024.
30. The Department of EECA also noted the following in relation to the Subject Property:
 - a. On July 4, 2024, a cottage was observed on the Subject Property without a corresponding development permit with said cottage being located inside the 15-metre buffer zone as measured from the top of the shoreline protection;
 - b. The proposed septic system is located within the 15-metre buffer zone; and
 - c. There appears to be insufficient area available for the installation of the septic system outside of the 15-metre buffer zone.
31. It was reasonable for the Property Development Officer to rely on the Department of EECCA's determination that the Subject Property does not have sufficient space outside of the buffer zone for the proposed development and recommendation to deny the Application.
32. The Minister notes that the Appellant has not obtained a license or Buffer Zone Activity Permit under the *Watercourse and Wetland Protection Regulations, supra*.
33. In addition, although not specifically referenced in the Decision, the Minister submits that the proposed development would not meet the minimum building or development setbacks required from the inland boundary of a watercourse and along any private road or right-of-way in accordance with subsections 39(3) and 39(5) of the Regulations.
34. The Minister acknowledges that the use of the proposed development is compatible with the use specified on the approved subdivision plan. However, the use not being contrary to the proposed plan, as required by section 34 of the Regulations, is only one consideration taken into account by the Minister when rendering a decision on a development permit application.

35. Further, the Minister acknowledges that the Subject Property is a lot that was in existence on June 12, 1993, and, therefore, attracts differing minimum frontage and area provisions as set forth at section 37 of the Regulations. Notwithstanding section 37 of the Regulations, sections 5(a), 16(4), and 39 apply to all development, including on lots existing on June 12, 1993.

Step 2: Sound Planning Principles

36. 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
37. Given the Application’s lack of regulatory compliance, the Decision satisfies both steps in the test.

Conclusion

38. For the reasons outlined above, the Minister submits that this appeal must be dismissed.
39. As set out in the Decision, the Minister encourages the Appellant to contact the Department of EECA to discuss and obtain more information as to where development may be suitable on the Subject Property or apply for necessary permits/approvals.
40. Trusting the foregoing is satisfactory; however, if you have questions about these submissions, please do not hesitate to contact the undersigned.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Yours truly,



Christiana Tweedy
Lawyer for the Minister of
Housing, Land and Communities

² *Stringer* at para 64.