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12 April 2024

VIA EMAIL

Island Regulatory and Appeals Commission
5th Floor, Suite 501
National Bank Tower
134 Kent Street
Charlottetown, PE

Attn: Philip J. Rafuse, Appeals Administrator

Dear Mr. Rafuse:

RE: Docket No. LA24003 Brian Thompson v Rural Municipality of North Shore
Docket No. LA24004 MacMillan Point HOA v Rural Municipality of North Shore
Docket No. LA24005 Joanne Cameron v Rural Municipality of North Shore

Further to the Commission's letters dated 23 and 26 February 2024, please accept what follows as the Rural Municipality of North Shore's ("**RMNS**") response to the Notices of Appeal (the "**Appeals**").

NATURE OF APPEALS

The Appeals relate to the issuance of an Amended Development Permit NS-23-025 (the "**Amended Development Permit**") issued by RMNS to Nicholas Jay (Craftsman Construction) (the "**Developer**") on or about 9 February 2024.

BACKGROUND

On 18 May 2023, RMNS issued a development permit (the "**Original Development Permit**") to the Developer to construct a single detached-dwelling on PID 926279, located at Lot 9A MacMillian Point Road, West Covehead (the "**Property**"). The Developer had previously sought and received approval from the appellant, MacMillan Point Homeowners Association (the "**HOA**") prior to RMNS issuing the Original Development Permit.

In or about August of 2023, residents, including the appellant, Brian Thompson ("**Thompson**"), and representatives of the HOA raised concerns with RMNS about the construction activities on the Property. The concerns included: proposed surface water management, grading, the provision of fill on the Property increasing the elevation of the proposed dwelling, and setbacks.

Upon reviewing the plans submitted at the time of the original application, RMNS issued a stop-work order on 22 August 2023 and directed the Developer to resubmit plans to correct noted deficiencies. Upon review of the re-submitted plans, the stop-work order was lifted on or about 29 August 2023.

Additional concerns were raised by residents during the late summer and fall of 2023. On or about 9 November 2023, RMNS issued a second stop-work order owing to additional deficiencies noted in the plans submitted by the Developer.

In late November of 2023, RMNS sought to bring the parties together to hear and understand all concerns being raised and to coordinate a resolution. The HOA declined the invitation to participate in the meeting. Instead, the HOA asserted that RMNS was prohibited from reinstating the development permit in the absence of prior HOA approval (**See:** RMNS Record, pg 271).

RMNS proceeded to hold a meeting with the Developer and an independent engineer/surveyor hired by RMNS to assist with the review of the proposed development. Following the meeting, the Developer submitted revised site plans. After several iterations and plan reviews, including a review by the independent engineer/surveyor, RMNS issued the Amended Development Permit at issue in the appeal on or about 9 February 2024.

GROUNDS OF APPEAL

The Appellants raise several grounds of appeal, ranging from generic concerns regarding process and sound planning principles, to more specific allegations of RMNS' failure to follow specific sections of its own bylaws.

- **Concerns regarding Environment, Health, and Safety**

The Appellants raise section 3.4(5)(e) and (f) of the RMNS 2021 *Land Use Bylaw*, which provide that an application for development permit shall be rejected if:

> e. The impact of the proposed development would be detrimental to the environment by reason of noise, dust, drainage, infilling or excavation which affects environmentally sensitive or residential areas;
>
> f. The proposed development would be detrimental to the convenience, health or safety of the occupants or residents of the development and/or in the vicinity or the general public.

The Appellant's have not as of this writing filed any objective and impartial evidence to support their assertion that the development is or will be detrimental to the environment or to the health and safety of residents. In RMNS respectful submission:

- The proposed development is a single-family residential dwelling located within a subdivision that was designed to accommodate single-family residential dwellings;
- The location of the proposed dwelling respects all legislated set-backs and buffer zones;
- The height of the proposed dwelling will not exceed the requirements of the 2021 *Land Use Bylaw* for residential dwellings;

- The infilling was necessary to mitigate the risk of flood damage; and
- The approved stormwater management plan includes features designed to ensure that surface water outflows will not exceed pre-development flows and meets best management practices.

- **Concerns Regarding Failure to Obtain HOA Prior Approval**

The HOA raises section 3.2(3)(d) of the 2021 *Land Use Bylaw*. This section provides that an application will be considered incomplete and a decision on it shall not be rendered until the applicant receives and submits:

> d. Approval(s) from other governments and/or agencies, as required; and

RMNS understands this ground of appeal to mean that in the HOA's view, a not-for-profit corporation self-styled as a "homeowner's association" qualifies as an "*other government and/or agency*" for the purposes of the 2021 *Land Use Bylaw*. The HOA's interpretation implies that such a non-profit corporation can block the issuance of any development application subject to HOA covenants, even if the application otherwise meets the requirements enacted by the municipal Council.

In RMNS respectful submission, a homeowner's association is not an "*other government and/or agency*" for the purposes of the 2021 *Land Use Bylaw*. Rather, the grammatical and ordinary sense of "*other governments and/or agencies*" calls to mind other governments and *government* agencies, rather than private individuals and corporations.

In terms of context, homeowner's associations are mentioned twice in the RMNS Official Plan, but nowhere are referred to as "*agencies*", nor are they referenced in terms of having decision-making authority in planning matters. For additional context, the Province of PEI hosts a website entitled "*Agencies, Boards, and Commissions*"[1] [Emphasis Added], which states that such organizations provide "*advisory, operational and regulatory services to PEI residents and the provincial government.*" This supports RMNS interpretation of the words "*agencies*" as meaning "*government* agencies".

In terms of legislative purpose, Section 3.2(3)(d) is intended to ensure that decisions are not rendered without required permission "*from other governments and/or agencies, as required*", such as the Department of Environment in relation to buffer zone activity permits.

RMNS submits that the HOA's interpretation would overturn settled precedent whereby municipalities are not bound by private restrictive covenants. Indeed, as this Commission wrote in *Caseley Farms Ltd. v. Town of Kensington*, 2011 PEIRAC Order LA11-03:

> *[17] The Commission notes that the residents who appeared as members of the public relied heavily on the fact that they were required to sign a* ***restrictive covenant*** *which, among other points, only permitted single family homes. While it is understandable that such a covenant would give residents the impression that the neighbourhood is single*

[1] See: "Agencies, Boards and Commissions" Online: https://www.princeedwardisland.ca/en/topic/agencies-boards-and-commissions <accessed: 9 April 2024>.

family, ***these covenants are a contract between the residents and the developer and, unlike a zoning bylaw, do not bind the Town.*** [Emphasis added]

Under the HOA's interpretation, RMNS would not be entitled to entertain a rezoning application on MacMillan Point to multi-unit residential, due to a restrictive covenant restricting the use of the lands to private single-family dwellings (**See:** RMNS Record, pg 402 at s. 1(a)).

The covenants are the sole source of the HOA's ostensible control over development on MacMillan Point. It is the covenants – and only the covenants – that elevate the HOA in its own view to the status of an "*other government and/or agency*". Thus, there is no practical difference between a requirement for RMNS to enforce the HOA's covenants and a requirement that RMNS enforce a rule that no development applications will be considered until an applicant receives prior HOA approval.

Further, a decision of this Commission which required municipalities to obtain sign-off from a private entity such as a homeowner's association prior to the issuance of planning decisions would have significant practical implications on planning law in this Province, including the requirement for municipalities to conduct title searches prior to the issuance of all planning decisions in an effort to determine whether any such covenants applied to any proposed development.

Regarding the issue of past practice, RMNS acknowledges that it has in some cases requested applicants to provide approval from the local HOA when it is aware of the existence of one. This is not a legislated requirement, but a cooperative approach undertaken by RMNS' Development Officer.

The sub-delegation of planning authority to private entities alleged by the HOA was clearly not the intention of RMNS in enacting section 3.2(3)(d) or (e) of the 2021 *Land Use Bylaw*. The HOA may be entitled to enforce its covenants – but not through an appeal under the *Planning Act*.

- **General Process / Sound Planning Concerns**

The review of a development permit is a highly technical matter. Generally, there is no public right of notice or participation in the review of a development permit application except through the right of appeal to this Commission. There are no public participatory rights provided under the 2021 *Land Use Bylaw*.

This is to be distinguished from rezoning applications, which provide broad public participatory rights. A development permit is generally the final stage of a development process, after matters such as rezonings and subdivisions have already been decided. On the spectrum of public participatory rights in planning matters, development permit applications fall on the low end.

Notice of the present Amended Development Permit was provided in accordance with section 23.1 of the *Planning Act*, which provided the Appellants with notice of the decision and confirmed their right of appeal to this Commission. In this way, the Appellant's procedural fairness rights have been fully respected.

In terms of sound planning concerns, RMNS has heard the appellant's concerns, which relate generally to infilling, environmental concerns, and stormwater management. In light of these concerns raised by residents, RMNS investigated the matter, recognized the issues with Original

Development Permit, and stopped work on-site. It sought and received a third-party opinion from an engineer/surveyor prior to the issuance of the Amended Development Permit at issue in this appeal. This opinion confirmed that the revised site plan met best management practices.

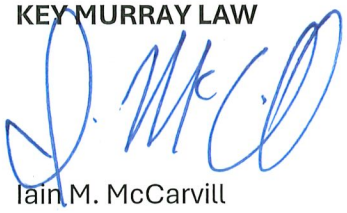
To date, the Appellants have not filed an independent and impartial expert opinion in writing to support their assertions. RMNS reserves the right to respond to any such information provided by any of the Appellants.

CONCLUSION

RMNS reserves the right to present additional evidence and argument at a hearing of this matter.

After a hearing of this matter, RMNS will respectfully request that the Commission uphold its decision to issue the Amended Development Permit and dismiss the Appeals.

Yours very truly,
KEY MURRAY LAW



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cc. M. Lynn Murray, KC
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Brian Thompson
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