



September 21, 2022

**VIA EMAIL – [pjrafuse@irac.pe.ca](mailto:pjrafuse@irac.pe.ca)**

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

**Re: Appeal Docket LA22016 – *Marley Kingston and ots. v. Minister of Agriculture and Land***  
**Our File: 24691**

- 
1. I write on behalf of the Minister of Agriculture and Land (the “Minister”) to provide the Minister’s submissions in relation to this appeal. These submissions respond to the Notice of Appeal received by the Island Regulatory and Appeals Commission (“Commission”) on August 18, 2022.
  2. The Record of Decision prepared by the Minister and filed with the Commission in this matter establishes that, in making this decision, the proper process and procedure was followed and the decision was made on the basis of sound planning principles within the field of land use planning and as identified in the objects of the *Planning Act*, RSPEI 1988, c. P-8, and the provisions of the *Planning Act Subdivision and Development Regulations*, EC693/00, in force at the material time.
  3. Therefore, the appeal must be dismissed.

### **Background and Decision**

4. On December 21, 2021 the Minister received an application to subdivide 5 residential lots from PID 1111137 (“Application”) which is located on the Black Creek Road in Nine Mile Creek, Prince Edward Island (“Subject Property”). The Subject Property is approximately 18 acres and the subdivided residential lots were to be between 0.85 to 1 acre in size. Leaving approximately 13 acres remaining for PID 1111137.
5. At the time of the application, the existing land use of the Subject Property was agriculture, farmed for cereal crops, hay and potatoes.
6. The Applicant later decided to amend the Application to 10 lots rather than the original 5 but then reverted to the original Application to subdivide only 5 lots.

7. The Application included the construction of a cul-de-sac for at least 3 of the 5 lots to be accessed from.
8. On July 27, 2022 the Application was given preliminary approval by the Minister subject to certain conditions being met, including as summarized:
  - 1) That the lots be surveyed by a qualified surveyor and 8 copies of the survey plan to be filed;
  - 2) Minimum lots sizes and frontages to be in accordance with the legislation;
  - 3) Open space;
  - 4) Entrance way permits required for any accesses off of the Black Creek Road (a seasonal road);
  - 5) Any roads to be named and approved by the 911 Administration Office;
  - 6) Safe stopping distances to be adhered to; and
  - 7) Any requirements of the Department of Transportation and Infrastructure to be met.
9. This preliminary approval was granted after the Minister received comments from the Provincial Fire Marshall, Environment, Water, Transportation and Planning<sup>1</sup> divisions of Government.
10. On August 18, 2022 an appeal of the preliminary approval was commenced by several surrounding residents.

### **The Legislation**

11. Pursuant to clause 8(1)(d) of the *Planning Act*, RSPEI 1988, c. P-8 ("Act"), the Lieutenant Governor in Council has the authority to make regulations in respect of subdivisions.
12. Subsection 3(1) of the *Planning Act Subdivision and Development Regulations*, EC693/00 (the "Regulations"), in force at the material time, provides that 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.
13. Section 14 of the Regulations sets out the process by which someone may apply to the Minister for a subdivision. The requirements for an application for subdivision of 5 or fewer lots is different than an application for a subdivision of 6 or more lots.

---

<sup>1</sup> Note: the recommendation from Planning was for the denial of 10 lots but later amended to recommend approval of the 5 lot subdivision.

14. In considering an application for subdivision the Minister must consider whether the subdivision design is based on sound planning principles, engineering principles, and environmental principles. The application for subdivision must also demonstrate that the proposed subdivision is suited to the intended use, having due regard for:

- (a) compatibility with surrounding uses;
- (b) the topography of the site;
- (c) surface drainage on the site and its impact on adjacent parcels of land;
- (d) traffic generation onto adjacent highways;
- (e) availability, adequacy and the economical provision of utilities and services;
- (f) the ability to further subdivide the land or adjoining land;
- (g) the provision of lots suitable for the intended use;
- (h) waste water management;
- (i) water supply; and
- (j) natural features.

15. There are several technical requirements that a subdivision must meet which are further detailed in Part III-B of the Regulations.

16. Preliminary Approval of a subdivision may be granted pursuant to section 26 of the Regulations and may include conditions to be met prior to final approval. Preliminary approval of a subdivision may be issued for 24 months.

17. The Commission has the jurisdiction to accept an appeal of a decision of the Minister that is made in respect of an application for preliminary approval of a subdivision. The Minister does not take issue with the Commission's jurisdiction with respect of this appeal.

### **The Appeal**

18. The Appellants filed a Notice of Appeal on August 18, 2022. The Appellants have sought an order from the Commission overturning the decision of the Minister which granted preliminary approval for the subdivision Application of 5 lots.

19. The Appellants state that the Application should have been denied pursuant to sections 3(1)(b), 3(1)(c), 3(1)(d), 13(a), 13(h), 13(i), 13(j), 14(5) and 25(5) of the Regulations and also pursuant to sections 2.1(1)(a), 2.1(1)(c), 2.1(1)(d), 2.1(1)(e), 2.1(1)(g), 2.1(1)(j), and 2.1(1)(l) of the Act.

20. I will not attempt to summarize the position of the Appellants but rather refer the Commission to the Notice of Appeal.

## The Law

21. The Commission has previously commented that it does not lightly interfere with reviewable decisions.<sup>2</sup> The Commission has said:<sup>3</sup>

[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.

22. In this case, the Minister followed the proper process as set out by law and did apply sound planning principles, and therefore, deference has been earned. Subject to the conditions included in the preliminary approval of the Minister, the Application meets the requirements of the legislation. Further, the Minister notes that the Appellants have not alleged that proper process was not followed by the Minister in considering the Application.

23. In *Queens County Condo v. Charlottetown*, Order LA18-02, the Commission commented that it is “generally reluctant” to interfere with a decision on the basis that it is not consistent with sound planning principles “where that decision is supported by objective and reliable evidence from planning professionals confirming that the decision is based on the *Planning Act*, the applicable official plan and bylaw, and sound planning principles.”<sup>4</sup> In this case there were no concerns from planning professionals with respect of the 5-lot Application.

24. The soundness of a planning decision is measured by the Commission against the principles recognized within the field of land use planning, the official plan, the applicable bylaws and any relevant laws.<sup>5</sup>

25. In this case, the Minister’s Decision is supported by objective and reliable evidence and is based on the *Planning Act*, the Regulations, and sound planning principles.<sup>6</sup>

26. The Decision was not made based on an arbitrary whim<sup>7</sup> or influenced by the “hues and cries” of neighbors or politicians.<sup>8</sup>

---

<sup>2</sup> *Landfest v. Town of Stratford*, Order LA22-07, at para 32

<sup>3</sup> *Atlantis Health Spa Ltd. v. City of Charlottetown*, Order LA12-02, at para 9 (“*Atlantis Health Spa*”)

<sup>4</sup> *Queens County Condominium Corporation No. 40 v. Charlottetown*, Order LA18-02, at para 41 (“*QCC No. 40*”)

<sup>5</sup> *QCC No. 40*, at para 48

<sup>6</sup> *Stringer v. Minister of Communities, Land and Environment*, Order LA17-06 (“*Stringer*”); see also, *Pine Cone Developments Inc. v. City of Charlottetown*, Order LA17-08, para 47 (“*Pine Cone*”)

<sup>7</sup> *Pine Cone*, at para 48

<sup>8</sup> *Pine Cone*, at para 47

27. In many previous decisions, the Commission has outlined a two-step test to be applied to Ministerial decisions made under the *Planning Act* and its *Subdivision and Development Regulations* (the “Regulations”):<sup>9</sup>
- (1) 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
  - (2) Whether the Minister's decisions with respect to, [in this case the Application] have merit based on sound planning principles within the field of land use planning and as identified in the objects of the *Planning Act*.
28. The Minister submits that these two steps were met, and that the Minister’s decision should be accorded deference.
29. With respect of step one, the Record demonstrates that the Minister sought input on the Application from the necessary Divisions/Departments within Government, none of whom had issues with the Application.
30. The Minister submits that the first part of the test is satisfied. The Record and the Decision demonstrate that the relevant sections of the *Planning Act* and the Regulations were considered and applied in this case, and that the Minister followed the proper process and procedure in making the Decision.
31. The Decision also meets the second part of the test in that it is supported by objective and reliable evidence and that the decision is based on the *Planning Act*, the Regulations, and sound planning principles.<sup>10</sup>
32. Sound planning principles are a guard against arbitrary decision making and the Commission has previously commented that sound planning must be a common feature of development throughout Prince Edward Island.<sup>11</sup>
33. While the Planning Division had concerns with a 10-lot subdivision, and ultimately would have recommended denial of a 10-lot subdivision, they did not have concerns with the Application based on only a 5-lot subdivision.
34. The preliminary approval was granted in accordance with the legislation and included conditions to be completed prior to final approval to ensure compliance with the technical requirements.

---

<sup>9</sup> *Stringer*, at para 52 (see also, *Atlantis Health Spa*, para 11; *Moerike*, at para 47)

<sup>10</sup> *QCC No 40*, at para 41

<sup>11</sup> *Stringer*, at para 64

### **Conclusion and Order Sought**

35. The relevant sections of the *Planning Act* and its Subdivision and Development Regulations were considered and applied in making this Decision, and the Minister followed the proper process and procedure in assessing the Appellants' subdivision application. The Appellants have provided no concrete evidence that the Application must be denied based on the applicable legislation.
36. Finally, the Decision has merit based on sound planning principles within the field of land use planning and as identified in the objects of the *Planning Act*.
37. The Minister, therefore, requests an Order from the Commission dismissing the appeal and upholding the Minister's decision to grant preliminary approval to the Application.

Yours very truly,



Mitchell O'Shea  
Counsel for the Minister of Agriculture and Land