

March 8, 2024

VIA EMAIL

Island Regulatory & Appeals Commission
5th Floor, Suite 501
134 Kent Street
Charlottetown, PE C1A 7L1

Attention: Jessica M. Gillis & Philip Rafuse

Dear Ms. Gillis and Mr. Rafuse:

RE: LA23021 – Currie & Currie v. Minister of Housing, Land & Communities

We are writing pursuant to your correspondence to the parties on December 21, 2023, requesting the Appellants', Kris, Carl and Karen Currie (the "Appellants"), submissions regarding the following two questions:

- 1) Can the Minister's decision respecting lack of jurisdiction to approve or deny the application be appealed to the Commission per s. 28 of the *Planning Act*?; and
- 2) Did the Minister lose jurisdiction to process the Appellants' subdivision application upon Ministerial approval of the Rural Municipality of West River's Official Plan?

Notice of Appeal

The Notice of Appeal was filed with the Island Regulatory and Appeals Commission (the "Commission") on September 6, 2023. The Appellants are appealing a decision of the Minister of Housing, Land and Communities (the "Minister") on August 16, 2023, whereby the Minister determined that it no longer held jurisdiction to approve or deny "Application Case 56807" and that, as the Rural Municipality of West River ("West River") had jurisdiction over the matter, the Appellants had two options on how to proceed (the "Appeal"):

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- (1) submit a new application to West River and the Minister will forward their file to West River; or
- (2) withdraw your application from the Minister and re-submit to West River (the “Letter”).

The Letter also advised the Appellants that they could appeal the decision to the Commission.

The Appellants’ Application was a Subdivision Application, dated July 17, 2023, seeking preliminary approval for the first ten (10) lots to be subdivided on PIDs 201509 and 201517 (the “Properties”) (the “Application”).

Upon receipt of the Notice of Appeal, the Commission identified two questions herein to be addressed on a preliminary basis. Please accept the submissions herein as the Appellants’ response to same.

1) Can the Minister’s decision respecting lack of jurisdiction to approve or deny the application be appealed to the Commission per s. 28 of the *Planning Act*?

The Commission is a body of statute (*Island Regulatory and Appeals Commission*, RSPEI 1988, c I-11) which means that their authority to regulate and govern is statute based. With respect to planning related matters, the Commission’s authority is prescribed by section 28 of the *Planning Act*, RSPEI 1988, c P-8 (“*Planning Act*”), which reads as follows:

- 28(1) Subject to subsections (1.2) to (4), any person who is dissatisfied by a decision of the Minister that is made in respect of an application by the person, or any other person, pursuant to the regulations for¹
- (a) a development permit;
 - (b) a preliminary approval of a subdivision or a resort development;
 - (c) a final approval of a subdivision;
 - (d) the approval of a change of use; or

¹ The first portion of section 28(1.1) was amended on November 29, 2023 but this is the version that was in place at the time the Appellant received the Letter and at the time the Appeal was filed.

- (e) any other authorization that the Minister may grant or issue under the Regulations.

The Appellants submit that the Letter is an authorization from the Minister and as such, the Commission, pursuant to subsection 28(1)(e), has jurisdiction to hear the Appeal.

'Authorization' is not a term defined in the *Planning Act*, nor the regulations. It is defined in the *Shorter Oxford English Dictionary*² as follows:

Authorization [...] the conferment of legality; formal warrant or sanction

The ordinary English meaning of the word authorization means the *conferment of legality*, and in the Appellants' submission, supports a broad and purposeful scope of the Commission's jurisdiction under subsection 28(1)(e). As you are aware, when interpreting a term or phrase from Prince Edward Island legislation, we refer to the *Interpretation Act*, RSPEI 1988, c I-8.1 (the "*Interpretation Act*"). Section 11(2) reads as follows:

Remedial construction

- (2) Acts and regulations shall be construed as being remedial and shall be given the fair, large and liberal interpretation that best ensures the attainment of their objects.

To assist in interpreting subsection 28(1)(e), with guidance from the *Interpretation Act*, we refer to the objects of the *Planning Act* at section 2:

- (a) to provide for efficient planning at the provincial and municipal level;
- (b) to promote sustainable and planned development;
- (c) to protect the natural and built environment of the province;
- (d) to encourage co-operation and co-ordination among stakeholders;
- (e) to address potential conflicts regarding land use;
- (f) to provide the opportunity for public participation in the planning process; and
- (g) to ensure compatibility between land uses.

² (1973) 3rd ed/ at pg. 134

With all the foregoing in mind, we submit that to best ensure the objects and purposes of the *Planning Act* as set out at section 2, the Commission must interpret ‘authorization’, per section 28(1)(e), in line with the direction from subsection 11(2) of the *Interpretation Act* and in doing so, the Commission will find that they have authority to hear the Appeal.

The Letter from the Minister places the Appellants in a difficult situation in the sense that the effect of the Letter prohibits the Application from moving forward for deliberation unless the Appellants submit to the jurisdiction of West River, which they submit is not appropriate at law, and on a quick view, will not permit the subdivision to occur. In order to best attain the objects of the *Planning Act*, in particular, to provide for efficient planning, co-operation amongst stakeholders and to address potential conflicts regarding land use, it’s reasonable to suggest and declare that the Letter is an ‘authorization’ of the Minister. The Appellants take the position that a remedial, fair, large and liberal interpretation, that is necessary to guarantee the objectives and purposes of the *Planning Act* gives the Commission the authority to hear this Appeal. Any other interpretation of the word ‘authorization’ in section 28 would be tantamount to reading down the intended scope and ordinary English meaning of the word.

The Commission’s jurisdiction must be found within the parameters of the legislation, which, in this case, is the *Planning Act*. In our submission, the Commission’s jurisdiction to hear the Appeal is found in a straightforward and logical ordinary English reading of the word “authorization” in the context of section 28(1)(e). The *Planning Act* and Regulations deal with a broad array of approvals and “authorizations”.

2) Did the Minister lose jurisdiction to process the Appellants’ subdivision application upon Ministerial approval of the Rural Municipality of West River’s Official Plan?

The Appellants submit that the Minister did not lose jurisdiction to process the Application upon Ministerial approval of West River’s Official Plan (“OP”).

The Application for the 20-lot subdivision was submitted to the Department of Housing, Land and Communities (“Department”) on July 17, 2023. West River’s OP and Land Use Bylaw (“LUB”) were given Ministerial approval on July 20, 2023. Section 15 and 17 of the *Planning Act* are applicable and provide as follows:

15. Procedure following Minister approval

- (1) Following the approval of an official plan by the Minister

(a) the plan becomes the official plan for the area
[...]

17. Approval of Minister

The bylaws shall be subject to the approval of the Minister and shall be effective on the date of approval by the Minister.

Subsection 15(1)(a) and 17 clearly express that a municipality's official plan and bylaw are effective on the date of the approval and as the Application was submitted prior to the date of Ministerial approval, the Appellants have acquired a vested right for their Application to be governed by the *Planning Act* Subdivision and Development Regulations ("Regulations"), which are to be administered by the Minister. The Department knew this as is evidence by an email from Danny Jenkins, former manager of Municipal Affairs to several staff on June 6, 2023 where he states that the Application would be reviewed within the context of the *Planning Act* and Regulations as they are the relevant rules until the West Rivers's OP and LUB are approved [Tab 2, pg. 497]. A vested right is a well established principle at common law and has been considered by courts all across the Country, including the Supreme Court of Canada in *Dikranian c. Quebec*, 2005 SCC 73. Bastarache, J. provided the following general comments on vested rights:

[32] The principle against interference with vested rights has been long been accepted in Canadian law. It is one of the many intentions attributed to Parliament and the provincial legislatures. As E.A. Driedger states in *Construction of Statutes* (2nd ed. 1983), at p. 183, these presumptions

...were designed as protection against interference by the state with the liberty or property of the subject. Hence, it was "presumed", in the absence of a clear indication in the statute to the contrary, that Parliament did not intend prejudicially to affect the liberty or property of the subject.

This had already been accepted by Duff, J. in *Upper Canada v Smith* (1920), 61 SCR 413 (SCC), at p. 417:

...speaking generally it would not only be widely inconvenient but "a flagrant violation of natural justice" to deprive people of rights

acquired by transactions perfectly valid and regular according to the law of the time[...]

Justice Bastarache went on to consider the ‘test’ for consideration as to whether an individual has a vested right:

37 Few authors have tried to define the concept of “vested rights”. The appellant cites Professor Cote in support of his arguments. Cote maintains that an individual must meet two criteria to have a vested right: (1) the individual’s legal (juridical) situation must be tangible and concrete rather than general and abstract; and (2) this legal situation must have been sufficiently constituted at the time of the new statute’s commencement [...]

In these particular circumstances, the Appellants had submitted a complete, and paid for, application to the Department in advance of Ministerial approval of West River’s OP and LUB, which Application was submitted pursuant to the Appellants’ rights under the *Planning Act* and the Regulations. Given that the OP and LUB were not in effect at that time, it’s clear, in the Appellants’ submission, that their rights were vested in the *Planning Act* and the Regulations, meaning that the Minister continues to maintain jurisdiction over the Application. To find otherwise would be contrary to section 15(1) and 17 of the *Planning Act* and would conflict with the common law principle of vested rights.

What is particularly concerning for the Appellants is the indication throughout the Minister’s Supplementary Record, provided on March 4, 2024, that the Minister and Department contemplated the predicament that the Appellants are currently faced with. **Tab 74, page 440** is an ‘Internal Planning Document’ which was created by the Acting Manager of Provincial Planning and a Senior Development Officer. It is a 3-page overview of the application, the process and the options available to the Department. On page 443, Option 3 is included and states:

“Await the approval and sign off [on] West River’s Official Plan and Bylaws to allow them to acquire planning jurisdiction in this area”

Furthermore at **page 582** is a text message from the Director of Land which states: “Sounds like the direction is to “not approve” the Currie subdivision and to work on getting the official plan and bylaws approved.” It’s clear from these two documents that the Appellant’s current

predicament is as a result of the actions of the Minister and the Department. The Appellants argue that these statements are further evidence of their vested rights in the *Planning Act*, the Regulations and administration of these rules by the Minister.

Clear Intention

The Appellants rely on *Ottawa (City) v Boyd Builders Ltd.*, 1965 CarswellOnt 66, *Dalhousie University v Halifax (City)*, 1974 CarswellNS 165 and *Smith's Field Manor Development Ltd v Halifax (City)*, 1988 CarswellNS 67 in support of the principle of vested rights and the fact that they had acquired a vested right to be governed by the *Planning Act* and the Regulations and thus have their Application administered by the Minister.

We recognize that part of the analysis in determining whether a vested right exists and has sufficiently materialized is whether there pre-existed an intent to make amendments, or in this case to enact an official plan and bylaw which affected the Appellants' rights. We don't dispute that prior to the OP and LUB receiving Ministerial approval, West River had taken certain public steps towards getting an official plan and land use bylaw in place. We do dispute any contention that West River's public steps included sufficient detail so as to demonstrate the details of their OP and LUB which would have caused the Appellants to be concerned as to their ability to develop on the Properties. We also dispute that these steps pre-existed the Appellants' public and known *intention* to subdivide the Properties into approximately 20 lots. This *intention* is clearly supported by the document produced by the Minister in their Supplementary Record filed on March 4, 2023 at **Tabs 12, 19, 22, 24, 32, 34, 44, 74, 76, 86, 89, 91 and 92.**

The Appellants submit that the case law supports that intention is two-sided, meaning that just as much as a municipality or the authority-having-jurisdiction can prove their pre-existing intention in an argument against an individual's vested right, an individual can demonstrate their pre-existing intention to do something with their property in advance of new rules or regulations to prove a vested right.

While we don't intend to argue our entire case in these submissions, the foregoing is included to respond to the Commission's second question and outline the Appellants' position, which is that the Minister has not lost jurisdiction to hear the Appeal as a result of West River's adoption and the Minister's approval of the West River and OP. The Appellants' rights have vested in the Provincial scheme, which includes the right to be governed by the *Planning Act* and the Regulations and to have those administered by the Minister.

The Appellants submitted a FOIPP request to the Minister in November, 2024 and have not received the results of that request to date. We respectfully request the right to make additional submissions on this matter within 10 days of receipt of the FOIPP request if new documents are discovered that are applicable.

We trust the foregoing to be of assistance and look forward to an Order from the Commission in this matter.

Yours very truly,

A handwritten signature in blue ink that reads "Melvin McKenna". The signature is written in a cursive style with a large, prominent initial "M".

For David W. Hooley, K.C.
DWH/MM