Prince Edward Island

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March 15, 2024

Jessica M. Gillis & Philip Rafuse
The Island Regulatory and Appeals Commission
National Bank Tower, Suite 501
134 Kent Street, Charlottetown PE C1A 7L1

VIA EMAIL

Dear Ms. Gillis & Mr. Rafuse,

Re: LA23021 – *Currie & Currie v. Minister of Housing Land and Communities*
Minister's Submissions on Jurisdiction

Issues

The Island Regulatory and Appeals Commission ("Commission") has requested submissions on the following 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?*

Summary of Submissions

The Appellants' counsel provided submissions that the within matter can be appealed to the Commission, and that the Minister of Housing, Land and Communities ("Minister") did not lose jurisdiction regarding their subdivision application, respectively.

In short, the Minister's submissions on these questions of law are:

- No, his want of jurisdiction cannot be appealed to the Commission per section 28 of the *Planning Act*, RSPEI 1988, Cap. P-8 ("*Planning Act*").

- Yes, the Minister lost jurisdiction with respect to the Appellants' subdivision application.

Background

A brief background to these issues and the procedural history of this appeal is as follows:

- From 2019 to 2022, the Appellants submitted 5 subdivision applications and at least 5 survey plans showing various proposed subdivisions of PID#201509/201517 (collectively the "Property"). Other than two lots approved in 2019, none of the various iterations of a larger subdivision were approved verbally, in writing, preliminarily, finally, or otherwise.

- On October 6, 2022, the Rural Municipality of West River ("RMWR") Council approved the *Official Plan* ("*Official Plan*") and 2022 *Land Use Bylaw – Bylaw #2022-04* ("*Bylaw*").

- On July 17, 2023, the Appellants submitted a Subdivision and Change of Use Application (File #56807) ("Application") regarding the Property, which is within RMWR's boundaries.

- On July 20, 2023, the Minister approved the *Bylaw* and the *Official Plan*, in accordance with the *Planning Act*.

- On August 5, 2023, the Minister's approvals of the *Bylaw* and the *Official Plan* were each published in the Royal Gazette

- In a letter dated August 16, 2023, Senior Development Officer, Dean Lewis, advised the Appellants that the Minister no longer has jurisdiction over the Application ("Letter").

- On September 6, 2023, the Appellants filed the within appeal.

- On September 14, 2023, the Commission flagged a jurisdictional question regarding its jurisdiction under the *Planning Act* to hear the within appeal.

- On October 24, 2023, the Minister provided documents relating to the preliminary issue.

- On November 17, 2023, and after the Appellants requested further documentation; the parties provided submissions on the request; and the Commission directed same, the Minister provided the complete Record with respect to the Application.

- On December 21, 2024, and after the Appellants requested further documentation and the parties provided submissions, and Commission directed the Minister to provide additional documentation. Additionally, at this time the Commission invited the parties to provide written submissions in response the jurisdictional issues noted herein.

- On March 1, 2024, the Minister provided additional documentation relating to various subdivision applications relating to the Property and that pre-dated the Application.

- On March 8, 2024, the Appellants provided submissions on the jurisdictional issues.

Question 1 – Commission's Jurisdiction

- **No Decision Rendered**

The Minister's communication in the Letter that it no longer has jurisdiction is arguably not a decision at all, and rather confirms what the legal circumstances are. As of July 20, 2023, the Minister did not have a choice whether to process the Application, or other similar applications, as he no longer is the planning authority with the jurisdiction to do so. The Minister cannot give himself jurisdiction over the Application or other similar applications, unless the legislation provides for same, and it does not.

Sara Blake's *Administrative Law in Canada*[1] reads in part:

> "*Any right to appeal a tribunal's decision must be found in the statute governing that tribunal. If none is found, the tribunal's decisions cannot be appealed. A tribunal cannot create a right to appeal its decisions.*
>
> *Most statutes grant a right of appeal from a "decision" or "order". This permits only appeals of final decisions. Interim rulings on bias or on jurisdictional, procedural or evidentiary issues may not be appealed, nor may a refusal to initiate a proceeding. A decision is regarded as final if it finally decides the merits of the case, even though methods of implementation remain to be decided, or if it finally disposes of the case, even if it does not decide the merits.*"

- **The Commission is a Creature of Statute**

Even if the Minister's confirmation in the Letter can be viewed as a decision, that does not mean there is an ability to appeal this want of jurisdiction to the Commission.

The Commission is an administrative tribunal that is a creature of statute and is without inherent jurisdiction. It cannot expand its jurisdiction beyond what the legislation provides. Either it has jurisdiction or it does not.

In Order LA22-01[2][3][4], the Commission recently addressed the scope of its jurisdiction as it pertains to section 28(1.1) of the *Planning Act*, which deals with appeals from municipalities. The Commission provided in part as follows:

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[1] Sara Blake's *Administrative Law in Canada*,[1] 5 ed (Markham: LexisNexis Canada Inc., 2011), at page 165
[2] *Woolridge et al v. City of Charlottetown*, 2022 PEIRAC 1. https://canlii.ca/t/jswkz
[3] See also: *ibid* at paras 22-24
[4] See also: *MacArthur v. City of Charlottetown*, 2022 PEIRAC 6 at paras 15-17, https://canlii.ca/t/jswl4

> "*14. The appeals are dismissed**. For the reasons that follow, the Commission, as a statutory tribunal without inherent authority, does not have the jurisdiction to hear an appeal from the first reading of a bylaw amendment. Approval of a bylaw amendment at first reading is not one of the appealable decisions listed by the Legislature in s. 28(1.1) of the Planning Act.** The appealable decision occurred when council for the City adopted the amendment to the Bylaw on October 12, 2021. No appeal was filed in the 21 days which followed that decision as required by s. 28(1.3) of the Planning Act. The Commission does not have statutory authority to extend the time limit prescribed by the Legislature. **The Commission also cannot assume jurisdiction by the consent or acquiescence of the parties. The authority to hear and decide an appeal has to be granted by the Legislature in the Planning Act.**" **[Emphasis Added]**

Section 28(1) of the *Planning Act* outlines which planning related decisions made by the Minister can be appealed to the Commission. Although section 28(1) of the *Planning Act* was recently amended, at the time the within appeal was filed it read as follows:

> "*28. Appeals from decisions of Minister*
>
> *(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 for*
>
> *(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*
> *(e) any other authorization or approval that the Minister may grant or issue under the regulations,*
>
> *may appeal the decision to the Commission by filing with the Commission a notice of appeal.*"[5]

On a plain reading of section 28(1), challenging the Minister's want of jurisdiction as planning authority for the Property is not appealable to the Commission as it is not a decision listed therein.

Further support of this interpretation is that the focus of section 28(1) of the *Planning Act* is decisions made pursuant to regulations, not the *Planning Act* itself. The Minister lost jurisdiction by operation of provisions of the *Planning Act*, not the *Subdivision and Development Regulations*, EC 693/00 as amended ("*Regulations*"), or other regulations made pursuant to the *Planning Act.*

[5] *Planning Act,* RSPEI 1988, Cap. P-8*,* at section 28(1). Record - Tab 18.

- **The Letter is not an Authorization**

The Appellants argue 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.*"

The "*authorization or approval*" referred to therein relates to items the Minister has discretion to "*grant or issue*" to an applicant. The exercise of discretion by the Minister must be authorized "*…under the regulations.*" For example, in section 10 of the *Regulations* the Minister has discretion to grant variances of certain requirements in the said *Regulations* in certain situations.

Subsection 28(1)(e) does not provide an unlimited range of appeal for any authorization by the Minister.

Whether the Minister has jurisdiction in the first place to "*grant or issue*" an *"authorization or approval*" is not what is contemplated by subsection 28(1)(e) of the *Planning Act*. For the Appellants' interpretation of subsection 28(1)(e) of the *Planning Act* to succeed the *Planning Act* would need to authorize the Minister to empower himself with jurisdiction in respect of subdivision applications for which another planning authority has jurisdiction.[6]

Furthermore, expanding subsection 28(1)(e) of the *Planning Act* beyond its intended scope does not support that legislation's principles but rather risks inefficient planning, and conflict amongst stakeholders. The Appellants' desired result is that the Commission has jurisdiction to hear the within appeal, the Minister has jurisdiction to apply the *Planning Act* and *Regulations*, all of which conflicts with the planning authority with current and prospective jurisdiction and the planning scheme it has chosen to implement.

It is imperative that the Government of Prince Edward Island and Prince Edward Island's municipalities "*work co-operatively and collaboratively to advance the interests of Prince Edward Islanders generally*".[7] Acknowledging the jurisdictional boundaries between the two levels of government is an important way to give effect to the *Municipal Government Act*, which gives municipalities a legal role to play in creating "*healthy, orderly and viable communities* in Prince Edward Island.[8]

The Minister cannot "*grant or issue*" himself planning authority over a subdivision application that he does not have jurisdiction to determine. Neither are the Appellants left without recourse as they can argue that the former planning scheme is what is applicable to them via vested rights or otherwise, should the RMWR decline to issue a subdivision permit.

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[6] *Blake* at note 1
[7] *Municipal Government Act*, RSPEI 1988, Cap. M-12.1, Preamble https://www.princeedwardisland.ca/sites/default/files/legislation/m-12.1-municipal_government_act.pdf
[8] *ibid*

Finally, if there is any ambiguity in subsection 28(1)(e) of the *Planning Act*, it is a general provision that is narrowed by the words that precede it namely items such as approval for a subdivision or a development permit, not a determination as to which planning authority has jurisdiction. This catchall provision is intended to allow for appeals of Ministerial decisions made "*…under the regulations*…" [underline added] and not otherwise provided for in subsection 28(1).

- **Legislative Function**

Furthermore, the Minister lost jurisdiction by way of a legislative function, namely the enactment of the *Official Plan* and *Bylaws*, and not an administrative function. Even though the Appellants did not appeal the *Official Plan* and *Bylaws* being enacted, recently the Commission made it clear that this is a legislative function that cannot be appealed to the Commission.[9]

- **Improper Forum**

Finally, our Court of Appeal[10] has held that issues of whether a municipal council has exceeded its jurisdiction are properly dealt with by way of judicial review. The same is true where a party looks to review the Minister's exercise, or lack thereof, of jurisdiction under the *Planning Act*.

Jurisdiction is a question of law and the expertise for reviewing and deciding a question of law rests with the Courts. Our Supreme Court found as much when determining a judicial review was an appropriate avenue of redress despite there being a statutory appeal available in that case.[11] There is no such statutory appeal available in this matter.

- **Conclusion**

The Commission does not have jurisdiction to hear the within appeal per section 28(1) of the *Planning Act*. Rather, the question of law of whether the Minister lost jurisdiction to decide the Application is properly dealt with in the Courts, for example, by way of a judicial review, or an application pursuant to Rule 14.05(3)(d) of the *Rules of Civil Procedure.*[12]

Question 2 – Minister's Jurisdiction

The Minister does not intend to make full submissions on this issue, especially given the Minister's position that the Commission lacks jurisdiction to hear this matter as outlined above. Not having jurisdiction is the position the Minister has maintained, and is not impacted by the email referenced on page 5 of the Appellants' submission as the comment of a former employee does not change the legislation or bind the Minister to what was indicated therein. That said, the Minister's position on his lack of continued jurisdiction is briefly outlined hereinafter.

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[9] *MacLean and Lee v. Rural Municipality of North Shore*, 2023 PEIRAC 06 (CanLII), https://canlii.ca/t/jz5l3
[10] *Miltonvale Park v IRAC & O'Halloran*, 2017 PECA 23 (CanLII) at para 52, https://canlii.ca/t/hpb1b
[11] *McLaine (Eric D.) Construction Ltd. v. Community of Southport Inc. (No. 2)*, 1990 CanLII 7151 (PESC) at paras 17 and 18, https://canlii.ca/t/g8xd0
[12] https://www.courts.pe.ca/sites/www.courts.pe.ca/files/Forms%20and%20Rules/A-14.pdf

The Minister approved the *Official Plan* and *Bylaw* on July 20, 2023. When this occurred, the Minister lost jurisdiction to process the Application and the answer to Question 2 is, therefore, "Yes".

In support of his position in response to Question 2, the Minister relies on:

1. various provisions in the *Planning Act*;
2. the presumption of immediate application of procedural legislation; and
3. various provisions in the *Interpretation Act,* RSPEI 1988, Cap. I-8.1.

Furthermore, the Minister will comment on the Appellants' submissions.

- **The *Planning Act***

Sections 8(1) (in part), 9(1),16 and 17 of the *Planning Act* state:

> "*8. Provincial planning regulations*
>
> *(1) The Lieutenant Governor in Council may make provincial planning regulations applicable to any area except a municipality with an official plan and bylaws*
>
> *…*
>
> *9. Responsibility of council*
>
> *(1) The council of a municipality which has an official plan adopted under this Act or a previous Planning Act is responsible for administration of the official plan within the boundaries of the municipality.*
>
> *…*
>
> *16. Municipal planning bylaws*
>
> *A council may make bylaws implementing an official plan for the municipality.*
>
> *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."*[13]

These provisions make clear that, on July 20, 2023, the *Bylaw* became effective and West River became responsible for the administration of the *Official Plan* within its boundaries (which encompass the Property). The Minister's approvals of the *Bylaw* and the *Official Plan* were each published in the Royal Gazette on August 5, 2023.[14]

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[13] *Planning Act,* at sections 8(1), 9(1), 16 and 17. Record - Tab 18
[14] Record - Tab 13

Further support for this immediate transition on the adoption of the *Official Plan* and *Bylaws*, is found in EC2020-485[15] which came into force on September 1, 2020, having been published in the Royal Gazette on August 22, 2020. From that point on, there was clear notice that as soon as the *Official Plan* and *Bylaws* were approved, the Minister would cease to have jurisdiction on planning matters.

The *Planning Act* does not provide any guidance in the form of transitional provisions for scenarios such as this, namely where a municipality assumes responsibility for the administration of an official plan in an area previously governed by the *Regulations.*

Section 10(1) of the *Planning Act* does, however, permit a municipality's planning board to recommend to its council to establish an interim planning policy and section 10(7) governs what scheme applies in the transitional period:

> "*Application*
>
> *(7) Bylaws giving effect to an interim planning policy do not apply in respect of any development for which application is made prior to the date of the receipt by the council of the proposed interim planning policy from the planning board.*"[16]

If a provision equivalent to section 10(7) of the *Planning Act* applied to official plans, and bylaws implementing official plans, this would be determinative – as the Application was filed on October 28, 2022, and the *Bylaw* came into effect on July 20, 2023, the *Bylaw* would not apply to the Application and the interim planning policy would.

As a principle of statutory interpretation, the presumption of implied exclusion provides that:

> "*An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within its legislation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded.*"[17]

In enacting section 10(7) of the *Planning Act*, the Legislature clearly turned its mind to the implications for in-progress developments where land use planning authority transfers from the Minister to a municipality and an interim planning policy is established. For interim planning policies, the Legislature made the cut-off clear – if an application is made prior to council receiving an interim planning policy from the planning board, bylaws giving effect to that policy do not apply.

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[15] *Royal Gazette*, VOL. CXLVI – NO. 34, at page 857, paras 13h, and 13i https://www.princeedwardisland.ca/sites/default/files/publications/royal_gazette/rg_issue_34-august_22_2020_complete.pdf
[16] *Planning Act*, at section 10(7). Record – Tab 18
[17] Ruth Sullivan, *The Construction of Statutes*, 5th ed (Markham, On: LexisNexis Canada, 2014) at page 244

In not providing a similar provision with respect to section 9(1) of the *Planning Act*, the Legislature's intention was for the transfer of authority under section 9(1) to have immediate effect upon a municipality adopting an official plan.

- **Procedural Legislation – Presumption of Immediate Application**

This conclusion is supported by the common law presumption that procedural legislation is to be given immediate effect:

> "*62 At common law, procedural legislation presumptively applies immediately and generally to both pending and future acts. As Sullivan, supra, discusses at p. 582, the presumption of immediate application has been characterized in a number of ways: that there is no vested right in procedure; that the effect of a procedural change is deemed beneficial for all; that procedural provisions are an exception to the presumption against retrospectivity; and that procedural provisions are ordinarily intended to have immediate effect. The rule has long been formulated in the following terms:*
>
> *. . . where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act.*"[18]

Ruth Sullivan has defined procedural law, for the purposes of the presumption of immediate application, as:

> "*…law that governs the methods by which facts are proven and legal consequences are established in any type of proceedings.* ***This includes filings and applications to government offices*** *as well as more formal actions before tribunals and courts.*"[19] [emphasis added]

In the context of the within appeal, the ultimate legal consequence at issue is whether a proposed subdivision should be approved, or not. The *Regulations* and the *Bylaw* dictate the procedure a person must follow to obtain such an approval.

The Minister submits therefore that the presumption of immediate application applies to the enactment of the *Bylaw*. There is no provision in the *Act* that rebuts this presumption, and, when considering various other provisions in the *Act*, the opposite actually appears to be true [see above regarding section 10(7)]. As such, the *Bylaw* took immediate effect on July 20, 2023, and subdivision applications for properties in West River that were in-progress at that time, including the Application, ceased to be governed by the *Regulations,* at least from a jurisdictional and procedural perspective.

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[18] *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, at para. 62 https://canlii.ca/t/1hblc
[19] *Sullivan*, note 16, at page 698

- ***Interpretation Act***

In *Sullivan on the Construction of Statutes, 5th ed.*, Ruth Sullivan notes that the presumption of immediate application has been partially codified in various provincial interpretation statutes and in section 44 of the federal *Interpretation Act*.[20]

Section 9 of Prince Edward Island's *Interpretation Act* contains provisions that are substantially similar to those in section 44 of the federal *Interpretation Act*. Sections 9(1), (2) and (3) of the *Interpretation Act* state:

> **"***9. Definitions*
>
> *(1) In this section,*
> *(a) "former enactment" means an enactment that has been*
> *(i) repealed and replaced with a new enactment, or*
> *(ii) amended in a manner that changes its application or operation;*
> *(b) "new enactment" means an enactment that replaces a former enactment, and includes an amendment to a former enactment that changes the former enactment's application or operation.*
>
> *Person remains authorized*
>
> *(2) A person authorized to act under a former enactment may continue to act under the new enactment* ***until another person is authorized to do so****."* [emphasis added]

The *Interpretation Act* defines "*enactment*" to include a regulation, and "*regulation*" to include a bylaw.[21] . The *Regulations* and the *Bylaw* are both, therefore, enactments for the purposes of the *Interpretation Act*. With respect to section 9 specifically, the *Regulations* are the "*former enactment"* and the *Bylaw* is the "*new enactment"*.

Section 13.11 of the *Bylaw* provides that subdivision applications are to be made to West River's development officer, for approval by the development officer or Council, as appropriate.[22]

Pursuant to section 9(2) of the *Interpretation Act*, the Minister's authority to process the Application under the *Regulations* ceased when West River became authorized to administer the *Official Plan* and the *Bylaw* on July 20, 2023. From that point on, the Application could not legally or practically proceed under the *Regulations*, as the former decision-maker (the Minister) no longer held the authority to make a decision.

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[20] *Ibid*, at pages 697 and 698
[21] *Interpretation Act*, RSPEI 1988, Cap. I-8.1, at subsections 1(c) and (d) https://www.princeedwardisland.ca/sites/default/files/legislation/i-08-1-interpretation_act.pdf
[22] *Bylaw*, at section 13.11

- **Vested Rights**

The Appellants raise vested rights and argue they have acquired same. In part the Appellants' argue "*…as the Application was submitted prior to the date of Ministerial approval, the Appellants have acquire 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 Appellants' vested rights argument does not impact either jurisdiction question. As such, at this time the Minister will not argue his entire position thereon beyond commenting as follows:

- **Lack of Clear Intention**

In *The Construction of Statutes* (5th Edition), Ruth Sullivan considers what subject matter can and cannot properly be the subject of a vested right:

> "*It is clear that when the entitlement to a benefit depends on the free exercise of policy-based discretion, the courts do not recognize a vested right unless and until the discretion has been exercised in the claimant's favour.*"[23]

Sullivan then goes on to quote the Federal Court of Appeal in *Apotex Inc. v. Canada (Attorney General)* (C.A.), 1993 CanLII 3004 (FCA) [affirmed on appeal to the Supreme Court of Canada]:

> "*If a decision-maker has an unfettered discretion which he or she has not exercised as of the date a new law takes effect, then the applicant cannot successfully assert either a vested right or even the right to have the decision-maker render a decision.*"[24]

The Appellants rely on *Dikranian c. Quebec*, 2005 SCC 73[25] for establishing the vested rights background and "test" citing paragraphs 30 and 37, respectively. Paragraphs 39 and 40 may also of assistance and provide as follows:

> "*39* ***A court cannot therefore find that a vested right exists if the juridical situation under consideration is not tangible, concrete and distinctive.*** *The mere possibility of availing oneself of a specific statute is not a basis for arguing that a vested right exists: Côté, at p. 161. As Dickson J. (as he then was) clearly stated in Gustavson Drilling, at p. 283, the mere right existing in the members of the community or any class of them at the date of the repeal of a statute to take advantage of the repealed statute is not a right accrued (see also Abbott v. Minister for Lands, [1895] A.C. 425, at p. 431; Attorney General of Quebec, at p. 743; Massey-Ferguson Finance Co. of Canada v. Kluz, 1973 CanLII 150 (SCC), [1974] S.C.R. 474; Scott, at pp. 727-28). In other words, the right must be vested in a specific individual.*

[23] *Sullivan*, note 16, at page 716
[24] *Apotex Inc. v. Canada (Attorney General) (C.A.)*, 1993 CanLII 3004 (FCA), at page 772
[25] *Dikranian c. Quebec*, 2005 SCC 73

> *40 But there is more. The situation must also have materialized (Côté, at p. 163). When does a right become sufficiently concrete? This will vary depending on the juridical situation in question. I will come back to this point later. Suffice it to say for now that, just as the hopes or expectations of a person's heirs become rights the instant the person dies (see, for example, Marchand v. Duval, [1973] C.A. 635, at p. 637, and art. 625 C.C.Q.), and just as a tort or delict instantaneously gives rise to the right to compensation (see, for example, Holomis v. Dubuc (1974), 1974 CanLII 1254 (BC SC), 56 D.L.R. (3d) 351 (B.C.S.C.); Ishida v. Itterman, 1974 CanLII 1787 (BC SC), [1975] 2 W.W.R. 142 (B.C.S.C.); and arts. 1372 and 1457 C.C.Q.), rights and obligations resulting from a contract are usually created at the same time as the contract itself (see Côté, at p. 163).*" [emphasis added]

Prior to the Application, the Appellants made multiple applications to subdivide the Property which continually changed up to and including the most recent application submitted, namely the Application. The plan submitted with the Application has a notation that partial subdivisions of parts of the Property were approved or were pending approval, and yet a new application was submitted relating to the Property. The Minister confirms that the lots noted as approved, were not in fact so, neither were those noted pending. As the Appellants' intentions kept changing or required adjustment to accord with technical requirements and or planning principles, new applications supporting same were required.

Simply put, there was no clear direction as to what the Minister was being asked to approve.

Furthermore, by July 20, 2023, when the Minister lost jurisdiction over the Application, none of the usual steps assessing the Application had an opportunity to take place. Such steps included but were not limited to ensuring compliance with the technical aspects of *Regulations*, canvass with other departments and review whether the Appellants' newest proposed development aligned with sound planning principles. While some of the information from the prior applications may have assisted in reviewing the Application, the review process had yet to occur. Simply put, no substantive review of the Application's merits occurred, and no approval, preliminary or final, had been granted.

The Appellants' did not have a right that became "sufficiently concrete" and crystalized" such that they could be enforced.[26] At the time authority transitioned from the Minister to the RMWR, the Application was merely that, an application. No substantive review of the Application's merits occurred, and no approval, preliminary or final, had been granted.

There is no identifiable "right" that was promised to or conferred upon the Appellant. As stated above, there is no vested right in procedure, which appears to be what the Appellants are arguing.

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[26] See *ibid* at para 30

- **Presumption Rebutted**

The Appellants cite *City of Ottawa et al. v. Boyd Builders Ltd*., 1965 CanLII 1 (SCC) ("*Boyd Builders*") in support of their argument that the presumption applies here and has not been rebutted. In *Boyd Builders*, the Supreme Court of Canada held that:

> "*An owner has a prima facie right to utilize his own property in whatever manner he deems fit subject only to the rights of surrounding owners, e.g., nuisance, etc.* ***This prima facie right may be defeated or superseded by rezoning if three prerequisites are established by the municipality, (a) a clear intent to restrict or zone existing before the application by the owner for a building permit, (b) that council has proceeded in good faith, and (c) that council has proceeded with dispatch****.*" [emphasis added][27]

If the common law presumption against interference with vested rights does apply here, and the Minister denies that it does for the reasons set out above, the Minister submits that the presumption is rebutted by the following series of events:

1. **April 6, 2020**: The Commission releases a report recommending the creation of the RMWR, wherein it provides in part that the RMWR *"…will provide land use planning services (including an official plan and bylaws)*" and that the "*The proponents intend for the updated official plan and bylaws to be in place by 2022.*[28]

2. **August 11, 2020**: Order-in-Council EC2020-485 was issued (published in the Royal Gazette on August 22, 2020), wherein it was ordered, in part, that upon approval of the Official Plan and Bylaws, authority for land use planning was to transfer from the Minister to the RMWR.[29]

3. **October 6, 2022:** The RMWR adopted its Official Plan on October 6, 2022.[30]

The foregoing establishes RMWR established a clear intention to acquire land-use planning jurisdiction within its boundaries as early as April 6, 2020. The RMWR acted with dispatch and in good faith and established the necessary intent under *Boyd Builders* at least eight (8) months prior to the Appellants filing their application with the Minister.

- **Summary on Vested Rights**

In sum, vested rights are inapplicable to the jurisdictional questions posed by the Commission. Even if vested rights do apply in this matter, it is not apparent what they are, whether they have crystalized and whether they have been rebutted. Finally, vested rights do not dictate that the Minister is the decision maker.

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[27] *City of Ottawa et al. v. Boyd Builders Ltd*., 1965 CanLII 1 (SCC), at page 410
[28] https://irac.pe.ca/infocentre/documents/Municipal-West_River-Final_Report_to_Minister-040620.pdf
[29] https://www.princeedwardisland.ca/sites/default/files/publications/royal_gazette/rg_issue_34-august_22_2020_complete.pdf, at page 587
[30] Record – Tab 1

- **Conclusion**

For the reasons set out above, the Minister submits that the answer to Question 2 is "Yes".

Additional Submissions

The Appellants have requested the ability to provide additional submissions upon receipt of a response to a *FOIPPA* request.

The Minister remains of the position that the additional documentation he provided in this manner is irrelevant to the preliminary questions the Commission has asked for submissions on. He takes a similar position regarding any documents arising from a FOIPPA request.

Both questions being asked are questions of jurisdiction which either the Commission and or the Minister have or do not.

However, if the Commission accedes to the Appellants request for an ability to provide further submissions upon receipt of the FOIPP request, the Minister would appreciate an ability to respond to any submissions the Appellants choose to make, within seven (7) days of receipt.

Closing Comments

We trust that these submissions assist the Commission in resolving these issues. We are happy to provide further submissions should the Commission require.

Yours Truly,

Richard A. Collier/
Caroline Davison
Lawyers for the Applicant

cc: David W. Hooley, KC and Melanie McKenna
Lawyers for the Appellants