



Prince Edward Island

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 1, 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: LA23025 – *Mclsaac et al 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 provided pithy 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:

- 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 October 28, 2022, the Appellants submitted a Subdivision and Change of Use Application (“*Application*”) regarding a parcel bearing PID#201541 (“*Property*”) which is located within the RMWR’s municipal 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 October 8, 2023, Development Officer, Sarah MacVarish, advised the Appellants that the Minister no longer has jurisdiction over this matter.
- On October 26, 2023, the Appellants filed the within appeal.
- On November 2, 2023, the Commission advised it would be holding the Appeal in abeyance pending determining the preliminary question of jurisdiction on another Appeal that engages similar issues.
- On November 30, 2023, the Minister provided the Record.
- On January 10, 2024, the Commission invited the parties to provide written submissions in response to the jurisdictional issues.
- On February 9, 2024, the Appellants provided submissions on the jurisdictional issues.

Question 1 – Commission’s Jurisdiction

The Minister’s communication 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.

Even if the Minister’s confirmation 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 LA22-01¹²³, 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:

“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.”*⁴

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*.

¹ *Woolridge et al v. City of Charlottetown*, 2022 PEIRAC 1. <https://canlii.ca/t/jswkz>

² See also: *ibid* at paras 22-24

³ See also: *MacArthur v. City of Charlottetown*, 2022 PEIRAC 6 at paras 15-17, <https://canlii.ca/t/jswl4>

⁴ *Planning Act*, RSPEI 1988, Cap. P-8, at section 28(1). Record - Tab 18.

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.⁵

The Appellants argue that the Minister did not process the Application in a timely manner. Whether this is true or not, an unreasonable delay by the Minister in reviewing a subdivision application does not confer jurisdiction on the Commission to hear an appeal of the Minister confirming he does not have jurisdiction to determine a subdivision application.

Finally, our Court of Appeal⁶ 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.⁷ There is no such statutory appeal available in this matter.

In sum, 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 by 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*.⁸

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. That said, the Minister's position on his lack of continued jurisdiction is briefly outlined hereinafter.

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*, RSEI 1988, Cap. I-8.1.

Furthermore, the Minister will make a brief comment on the Appellants' submissions.

⁵ *MacLean and Lee v. Rural Municipality of North Shore*, 2023 PEIRAC 06 (CanLII), <https://canlii.ca/t/jz5l3>

⁶ *Miltonvale Park v IRAC & O'Halloran*, 2017 PECA 23 (CanLII) at para 52, <https://canlii.ca/t/hpb1b>

⁷ *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/q8xd0>

⁸ <https://www.courts.pe.ca/sites/www.courts.pe.ca/files/Forms%20and%20Rules/A-14.pdf>

- **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.”⁹

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, 2023.¹⁰

Further support for this immediate transition on the adoption of the *Official Plan* and *Bylaws*, is found in EC2020-485¹¹ which came into force on September 1, 2020, having been published in the Royal Gazette on August 11, 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:

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

¹⁰ Record. Tab 13

¹¹ *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

“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.”¹²*

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.”¹³

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.

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.”¹⁴

¹² *Planning Act*, at section 10(7). Record – Tab 10.

¹³ *Sullivan on the Construction of Statutes*, 5th ed (Markham, On: LexisNexis Canada, 2014) at page 244

¹⁴ *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, at para. 62 . <https://canlii.ca/t/1hblc>

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.”¹⁵
[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.

- ***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*.¹⁶

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) and (2) 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]

¹⁵ *Sullivan*, *supra* note 13, at page 698

¹⁶ *Ibid*, at pages 697 and 698

The *Interpretation Act* defines “*enactment*” to include a regulation, and “*regulation*” to include a bylaw.¹⁷ . 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.¹⁸

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.

- **Information Sessions**

The Appellants indicate that at a meeting regarding the transition of planning authority from the Minister to the RMWR, it was indicated that any applications in prior to said transition would be processed by the Minister. The Minister is unaware of such communications. That said, even if this direction was provided, it does not impact his loss of jurisdiction given the foregoing analysis.

- **Vested Rights**

The Appellants raise vested rights as a ground of appeal, although they do not explicitly mention in their submissions on jurisdiction. This argument does not impact the Commission’s jurisdiction under question 1. The Minister does not intend to make substantive comments on vested rights at this time beyond noting the following:

- As early as August 11, 2020, there was a clear indication that the planning authority and scheme applicable to the Property was to change and when that was to occur, namely when the *Official Plan* and *Bylaws* were to come into effect.
- At the time authority transitioned from the Minister to the RMWR, the Application was merely that. No approval, preliminary or final, had been granted.
- Even if the facts are supportive of a potential vested rights argument:
 - This common-law argument conflicts with the legislative interpretation argument outlined above.
 - A vested right may inform under what scheme the Application is to be decided, but it does not dictate who is to decide the Application. This is governed by the legislation as outlined above.

- **Conclusion**

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

¹⁷ *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

¹⁸ *Bylaw*, at section 13.11

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,

A handwritten signature in blue ink, consisting of several overlapping, sweeping strokes that form a cursive name.

**Richard A. Collier/
Caroline Davison**
Lawyers for the Applicant

cc: Leigh McIsaac,
one of the Appellants