



INTEGRITY COMMISSION

Corporate Office
3rd to 6th Floors, Sagcor-Sigma Building, 63-67 Knutsford Boulevard
Kingston 5, Jamaica W.I.
Tel: (876)-929-6460, (876)-929-8560, (876)-929-6466
Fax: (876)-929-7335
Website: www.integrity.gov.jm

Media Release

Integrity Commission Publishes Ruling of the Director of Public Prosecutions Concerning the Commission's #11 Charlemont Drive, Kingston 6 Investigation Report

January 11, 2024 – The Learned Director of Public Prosecutions (DPP), Ms. Paula Llewellyn, KC, has issued a ruling in the matter of the Integrity Commission's 'Report of Investigation Concerning Allegations of Irregularities in the approval processes which led to the Construction of a Residential Development Located at #11 Charlemont Drive, Kingston 6.'

The ruling, dated January 10, 2024, was conveyed to the Integrity Commission's Director of Investigation, Mr. Kevon Stephenson, on Wednesday afternoon.

The Commission's Director of Investigation had referred his Report of Investigation to the DPP "for appropriate action" in keeping with the provisions of the Integrity Commission Act (ICA). Under the ICA, the Commission's Director of Corruption Prosecution has no jurisdiction in the matter.

In the interest of full public transparency, the Commission is now making the entire 12-page ruling of the DPP public by appending same to this media release.

END

Contact: Mrs. Gillian Haughton, Communications Officer, Communications Department, Integrity Commission
E-mail: communications@integrity.gov.jm
Tel: (876)572-1081 (876)929-6460/ (876) 929-8560/ (876)929-6466, Fax: (876)929-7335



ANY REPLY OR SUBSEQUENT REFERENCE TO THIS COMMUNICATION SHOULD BE ADDRESSED TO THE DIRECTOR OF PUBLIC PROSECUTIONS AND NOT TO ANY OFFICER BY NAME AND THE FOLLOWING REFERENCE QUOTED: -

TELEPHONE: 922-6321-5
TELE. FAX: (876) 922-4318

**OFFICE OF THE DIRECTOR OF PUBLIC
PROSECUTIONS**

P.O. BOX 633
KINGSTON
JAMAICA

Our Ref.

January 10, 2024

Mr. Kevon Stephenson
Director of Investigation
Integrity Commission
1st Floor PIOJ Building
16 Oxford Road
Kingston 5

CONFIDENTIAL

Dear Mr. Stephenson:

Re: Report of Investigation-Concerning Allegations of Irregularities in the Approval Processes which led to the Construction of a Residential Development Located at # 11 Charlemont Drive, Kingston 6

1. Reference is made to the captioned matter in your letter dated October 11, 2023 and the contents therein.

RULING

2. It is the considered view of the Office of the Director of Public Prosecutions (ODPP) that:
 - a. though the allegations support the laying of criminal charges against Mr. Mark Barnett and Mrs. Annette Francis-Barnett for breaching the environmental permit which is an offence under the Natural Resources Conservation Authority Act (NRCA); the initiation of the prosecution is time sensitive and it having not been initiated within twelve months of the breach being identified, the criminal action is now statute barred. Therefore, there can be no prosecution.
 - b. the matter be referred to the Kingston and St. Andrew Municipal Corporation (KSAMC) to conduct an administrative review in accordance with the provisions of the Building Act. Consequent upon the result of this administrative review, it would be a matter purely within the remit of the KSAMC to decide whether an invitation is to be issued to the Jamaica Constabulary Force (JCF) to conduct an investigation into possible breaches of the said Building Act.

REASONS FOR RULING

Background

3. The following information was gleaned from the material submitted:

- (1) By way of gazette, **the Building Act of 2018** came into operation on January 15, 2019;
- (2) On August 13, 2019, the National Environment and Planning Agency (NEPA) granted an environmental permit to Mr. Mark Barnett and Mrs. Annette Francis-Barnett (hereinafter referred to as "the Permittees") for the construction of housing projects 10 to 25 houses located at # 11 Charlemont Drive, Kingston 6 ("the development");
- (3) On August 14, 2019, the KSAMC granted a building permit to the Permittees as owners of the development. The permit was to build two (2) three (3) storey blocks consisting of twelve (12) one-bedroom units each making it twenty-four (24) units in total;
- (4) On July 30, 2020, NEPA granted another environmental permit to the Permittees which superseded the one dated August 13, 2019. A specific condition of this permit stipulated that "*The Permittee shall comply with the representations made in permit Application received and date stamped by the National Resources Conservation Authority 3 July 2019...*";
- (5) On November 10, 2020, David Clarke, Senior Building Officer at the KSAMC, visited the development and reported that the construction was in accordance with the approved plans "*with minor internal changes*";
- (6) On November 13, 2020, Mark Barnett applied to the KSAMC for an amendment to his previous building permit and submitted "*a markedly similar plan*" which still consisted only of twelve (12) one-bedroom units for each block;
- (7) On November 24, 2020, the KSAMC approved an amendment to modify the layout of the units in Block B and an expansion of the units in Block A by 60 square feet in accordance with plans submitted (date stamped November 13, 2020);
- (8) On November 25, 2020, the Permittees executed a Joint Venture Agreement with Phillip Smith with one of the mutual covenants stipulating that: "*The owners shall be entitled to retain ownership of four (4) units comprised in the development which shall consist of two (2) two (2) bedroom units and two (2) three (3) bedroom units.*";

- (9) On December 10, 2020 David Clarke conducted final inspections and found that all the requirements were in order. Additionally, in his statement dated November 29, 2022, he indicated that *“the building structure was compliant with the approved building plans issued by the KSAMC for the property located at #11 Charlemont Drive, Kinston 6 and that the number of rooms observed on the development was congruent with the number of rooms outlined in the approved building permit”*;
- (10) On December 17, 2020, Rhyan Henry, Inspector from NEPA, on his seventh visit to the development, observed that the layout of the development had deviated from the drawings that were approved, received and date stamped by the Authority 3 July 2019. As a result, Mr. Henry recommended that a warning letter be issued for the breach observed;
- (11) On February 10, 2021, a warning letter was prepared by Ms. Carlene Martin, Acting Manager, Enforcement Branch at NEPA which was addressed to Mr. Mark Barnett, the Permittee. The letter was entitled *“Breach of Environmental Permit for the construction of a housing project of 10 to 25 houses at #11 Charlemont Drive...”* This letter outlined one of the breaches observed by Mr. Henry from July 31, 2020, and the other breach from December 17, 2020;
- (12) On October 8, 2021, Jac-Wain Campbell, an Inspector from NEPA, visited the building works and noted that Block B contained 6 x 2 bedroom units whilst Block A contained 6 x 3 bedroom units. Further, he noted that *“based on the walk through of the site, there has been a change to the layout of the building and the number of habitable rooms”*. He recommended that *“an amendment is required for the changes made to the development”*;
- (13) On November 1, 2021, Ms. Morjorn Wallock, Director of Legal and Enforcement Division at NEPA wrote a letter addressed to the Permittees entitled *“PROJECT CONSTRUCTION OF HOUSING PROJECTS OF 10 TO 25 HOUSES, # 11 CHARLEMONT DRIVE, HOPE PASTURES, ST. ANDREW, KINGSTON 6 REF. NO. 2019-02017-EP00174 BREACH OF DESCRIPTION OF PERMITTED ACTIVITY*. In this letter, the Permittees were asked to submit the relevant applications to the NRCA/TCPA/NEPA seeking an amendment consequent to the project’s departure from what was approved. These amendments were required to be submitted to the Agency on or before November 8, 2021;
- (14) On November 10, 2021, Mrs. Francis-Barnett responded to Ms. Wallock stating she had received her letter by hand on November 8, 2021 and requested until November 22, 2021 to review and address the issues raised;

- (15) On September 7, 2022, Xavier Chevannes, Chief Engineering Officer for the KSAMC since April 2021 indicated in his statement that in May 2020 to April 2021 he acted as the Chief Engineering Officer. Further, he asserted that the requirement to issue certificates of stage of construction compliance and certificate of occupancy in accordance with section 34 of the Building Act was not yet law so no certificates were issued on completion of the development;
- (16) On December 6, 2022, the Director of Investigations (DI) from the Integrity Commission executed a warrant at the development and in the course of executing the warrant, the DI observed that the development consisted of 2-bedroom units and 3-bedroom units contrary to the building and environmental permits which were issued in respect of the development;
- (17) On February 7, 2023, the DI summoned Mrs. Francis-Barnett to a Judicial Hearing where she admitted on oath receiving approval to build *'two (2) three (3) storey blocks consisting of twelve (12) one-bedroom units'* in respect of the development. Further, Mrs. Francis-Barnett admitted that she owned a three (3) bedroom unit on one of the two (2) blocks. Further, Mrs. Francis-Barnett admitted that she did nothing having written to Ms. Wallock on November 8, 2021 requesting additional time. (Though applications were made by the permittees to the KSAMC for amendment to the original permit, which was approved, no such application was made to NEPA for an amendment to the environmental permit. Given that the breach was first identified by NEPA on the 17th of December, 2020, the date which prevented the initiation of prosecution would be December 17, 2021)

BREACH OF THE NATURAL CONSERVATION AUTHORITY ACT (NRCA)

4. The material submitted along with the relevant legislative provisions does support the laying of criminal charges against Mr. Mark Barnett and Mrs. Annette Francis-Barnett for breaching the **Natural Resources Conservation Authority Act (NRCA)**.
5. However, section 37 acts as a bar to the prosecution of any breach of the NRCA after the lapse of twelve (12) months from the date of commission of the alleged breach, where the infraction was known to the relevant authority. Section 37 states:
'All prosecutions for offences against this Act or any regulations made thereunder shall be commenced within twelve calendar months next after the commission of such offence or, if the Court is satisfied that the Authority with due diligence could not have been aware within that period that the offence had been committed, within such further period as the Court may allow'.

6. The circumstances previously outlined and noted in the report and investigation conducted by the Independent Commission highlights the failure of the functionaries responsible to treat with and escalate the observed breach of the NRCA; this inaction conclusively barred any sanction being effected consequent upon a successful prosecution.

THE RELEVANT PROVISIONS OF THE BUILDING ACT (2018)

7. The material submitted alludes to a breach of section 17 (1) (c) of the Building Act by Mark Barnett and Annette Francis-Barnett. Sections 17 (1) and (2) set out the offence as follows;

'17 (1) A person shall not carry out building work unless-

- (a) a building permit in respect of the building work has been issued to him;*
- (b) where applicable, a planning permit has been issued to him under the Town and Country Planning Act; and*
- (c) the building work is carried out in accordance with the building permit, this Act, the National Building Code or of any other regulations made under this Act.'*

17 (2) A person who contravenes subsection (1) commits an offence and shall be liable on conviction to the penalty specified in relation to that offence in the First Schedule."

8. The permit was issued to Mark Barnett and Annette Francis-Barnett jointly; this permit allowed them to build *'two three storey blocks consisting of twelve one bedroom units each..'* This permit was amended, however there is no indication that the amendment related to or increased the type of unit stipulated in the initial permit. The amendment only modified the layout of the units in Block B and an expanded the units in Block A by 60 square feet.
9. An assessment of section 17 of the Building Act against the available evidentiary material shows that there is ample information from which a relevant authority may conclude that the permittees were still in breach of the amended permit under the Building Act. This includes information from checks initially made by NEPA where they formed the view, having seen the building works, that the units in the development being constructed were not in accordance with the permit issued by the KSAMC.
10. Other material which tends to corroborate the view that the amended permit was breached, comes from the statement and attached valuation report of a valuator showing a two-bedroom unit at the location. Further probable evidentiary material which buttresses this view comes from the contract between the permittees and the builder, Mr. Phillip Smith, which states that they should retain two, two (2) bedrooms and two, three 3 bedrooms from the said development. The suggestion that the said builder had assumed the duties of the permittees under the permit is debunked by section 26 of the Building Act which states that a permit

issued under the Act '*shall not be transferable*'. It should be reiterated that the permit was issued to Mr. Barnett and Mrs. Francis-Barnett only.

HOW SHOULD A BREACH OF THE BUILDING ACT BE TREATED?

11. The issue of the treatment of breaches rest largely at the discretion of the Municipality. An overall assessment of the Building Act shows that the Local Authority/KSAMC not only has, as a part of its functions, the authority to issue permits for building works but also the mandate to ensure compliance with the permit, the Act and other relevant legislation. Parliament also saw it fit to give the local authority (the Municipality) expansive jurisdiction to act on and treat with any identified breaches of this nature.

FIXED PENALTY REGIME

12. In toto, the Act gives the Municipality a wide enforcement regime, to the extent that it allows the issuance of fixed penalty notices under section 78 of the Act.

78. — (1) This section applies to the offences specified in sections 17(2), 25(5), 31(3), 39, 44(7), 46(5) and such other offences as may be prescribed.

(2) Where a Local Authority finds that a person has committed an offence in relation to its area of jurisdiction and to which this section applies, the Local Authority may give that person the prescribed notice in writing offering the opportunity of the discharge of liability to conviction for that offence by payment to the Local Authority, within the period and in the manner specified in the notice, of the prescribed fixed penalty.

(3) A person shall not be liable to be convicted of any offence referred to in subsection (2) if the fixed penalty is paid in accordance with this section and any requirement in respect of which the offence was committed is complied with before the expiration of the period and in the manner specified in the notice referred to in subsection (2), which shall be a date not less than twenty-one days following the issue of the notice.

(4) Where any person pays the fixed penalty in accordance with subsection (3), the payment shall be complete satisfaction of any liability to conviction for the offence referred to in subsection (2).

(5) Payment of a fixed penalty under this section shall be made to the Local Authority, and the Local Authority may retain the amount paid as part of its funds.

(6) In any proceedings for an offence to which this section applies, a certificate that payment of the fixed penalty was or was not

made to the Local Authority by the date specified in the certificate shall, if the certificate purports to be signed by the Chief Executive Officer, be sufficient evidence of the facts stated, unless the contrary is proved.

13. The nature of a criminal prosecution in these types of circumstances necessitates the involvement, direction and unreserved co-operation of the Local Authority/KSAMC. Documents such as the application for the permit, the permit issued consequent on that application and all documents attached to the applications submitted to the KSAMC, must be made available in a format that is evidentially viable in a criminal prosecution.
14. Section 78 would oblige the KSAMC to spearhead the investigative process and make a determination whether they will follow up on the fruits of the investigation such that they are further mobilized to initiate prosecution in what would be a viable case. If they take the view that they are not minded to issue a fixed penalty notice, they may then invite the JCF to assist them in the administration of their investigative functions and place the matter before the court so the ingredients of the offence can be proved to the requisite standard.
15. It would therefore be open to the KSAMC and they alone, depending on the result of their administrative review, to initiate criminal proceedings or activate the fixed penalty regime in accordance with section 78 of the Building Act.

DUTIES OF THE LOCAL AUTHORITY AND THE CHIEF ENGINEERING OFFICER

16. The duties imposed on the Chief Engineering Officer are extensive; they are so significant that they warrant being outlined. Section 10 (1) states that:

*“For the purposes of this Act, a Chief Engineering Officer **shall**-*

(a) have superintendence over all buildings and building work within the area of jurisdiction of the Local Authority in which he holds office;

(b) ensure that building work is undertaken in accordance with this Act, the National Building Code and any other regulations made under this Act;

(c)...;

(d) take appropriate action to-

(i) identify any breach of this Act, the National Building Code and any other

- regulations made under this Act;

(ii) have the breach duly remedied in a timely manner; and

*(iii) **ensure that relevant sanctions for the breach are applied***

(e)...;

(f)...;

(g) ensure that compliance certificates of the stage of construction are issued in a timely manner and in accordance with such guidelines as are established by the Local Authority, from time to time, where the building work has been inspected and found to be in compliance with the relevant building permit;

17. The regulatory onus is not placed only on a specific public officer in the Local Authority (i.e. the Chief Engineering Officer), but the entire Local Authority for the parish would shoulder this responsibility.

Section 33 states that:

“The Local Authority shall monitor the progress of building work permitted under this Act, as often as may be necessary to cause the Local Authority to-

(a) secure the due observance of this Act, the National Building Code or any other regulations made under this Act or any term or condition subject to which the building permit is issued;

(b) survey any building or building work placed under its supervision;

(c) and issue certificates of stage construction compliance under section 34 at any stage of the building work.

17. Section 34 states that:

“34 (3) Having received the notice of compliance referred to in subsection (1), a Local Authority may-

where it considers it appropriate, cause the building work at the particular stage to be inspected; and

issue a certificate of stage of construction compliance if it has reasonable grounds to be satisfied that the building work is in compliance with the building permit.

34 (4) The Local Authority shall issue a certificate of occupancy in relation to building work if, on an application by the owner, the Local Authority is satisfied that-

the building work has been completed in accordance with this Act, the National Building Code or any other regulations made under this Act; and the whole or part of the building, as the case may be, is suitable and ready for occupancy.”

18. Section 44 states that:

“44 (1) Where the Local Authority, has reasonable grounds to suspect that building work is “unauthorized” within the meaning specified in subsection (2), or is hazardous or is hazardous or dangerous to the public, the Local Authority shall serve on the responsible party in the prescribed form and manner-

- (a) stop notice requiring the responsible party to immediately cease the building work; and
- (b) an enforcement notice under section 45 before the end of fourteen days after the date of service of the stop notice.

44(2) Building work referred to in subsection (1) as being "unauthorized" is building work-

- (a) which is being carried out in breach of a term or condition subject to which a building permit was issued; or
- (b) which is being carried out without the issue of a building permit in respect of the building work."

19. Section 45 states that:

"45 (1) If it appears to a Local Authority that-

- (a) building work has been carried out, is being carried out, or is proposed to be carried out without the issue of a building permit; or
- (b) any condition subject to which a building permit was issued has not been complied with,

then, subject to subsection (3), the Local Authority shall serve an enforcement notice in the prescribed form and manner on each of the persons specified in subsection (2).

45 (2) The persons referred to in subsection (1) are the owner and occupier of the land where the building work has been carried out or is being carried out and-

- (a) a person who has supervised or is supervising the building work; or
- (b) any other person concerned in the management of the building work.

45(3) An enforcement notice-

(a) shall specify-

- (i) the building work which it is alleged has been carried out or is being carried out without a building permit; or
- (ii) the matters in respect of which it is alleged that any term or condition subject to which a building permit has been issued, have not been complied with; and

(b) may require such steps as may be specified in the enforcement notice for restoring the land, or as the case may be, the building to its condition before the building work was carried out, or for securing compliance with the term or condition subject to which a building permit has been issued within twenty-eight days."

20. The provisions outlined from paragraphs 16 – 19 above give a synopsis of the far reaching duties imposed on the Local Authority, including the Chief Engineering Officer, by the Act. The evidentiary material does not suggest that any use was made by the Local Authority, to include the Chief Engineering Officer, of the extensive regulatory measures under the Building Act, hence the need for an administrative review by the KSAMC and/or its parent Ministry. It is rather

alarming and quite surprising that in his statement Mr. Xavier Chevannes, the Chief Engineering Officer, said *'upon completion of the construction, there was no certificate of completion issued.* He further stated that, *'Regulations for the Building Act (2018), indicates that a certificate of occupancy and stages of completion be issued, however this is not yet law, so was not done at the time..'* It would appear that he would have benefitted from legal advice, as on even the most cursory reading of the Act shows that the duties imposed on him and the Local Authority, were at that time provided for in the Building Act. Neither he nor his department issued any of the required certificates under relevant sections.

21. There has been no allegation that any Building Officer from the KSAMC was prevented from entering the development to inspect its progress at any time. The failure of the KSAMC to enforce the terms and conditions in the amended building permit contained in the legislation is inexplicable and unfortunate. Ignorance of the law, which was claimed by the then Chief Engineering Officer, avails no person or institution and is no excuse, we submit, for the failure of the Chief Engineering Officer to discharge his duties as stated in the Building Act.
22. The previously outlined implied dereliction of duty by the KSAMC and its officers does not excuse the Barnetts as persons to whom the permit was granted; nor should it allow them to benefit from the inaction of the KSAMC.

DISPARITY BETWEEN THE FINDINGS OF KSAMC AND NEPA

23. It would be remiss of us not to address the information unearthed during the investigation concerning the seemingly discrepant views between the officer from the KSAMC and the officers from NEPA. The material suggests that the officer from NEPA observed and noted the breach on the 17th of December, 2020, however seven days prior, on the 10th of December, 2020, Mr. Clarke from the KSAMC visited the location and found that *"the building structure was compliant with the approved building plans issued by the KSAMC for the property located at #11 Charlemont Drive, Kingston 6 and that the number of rooms observed on the development was congruent with the number of rooms outlined in the approved building permit"*
24. This is concerning and raises a number of questions; we are not *au fait* with the skill set and expertise required in this arena, however we believe that it would be useful to ask these questions: -
 - Did the officer from NEPA observe a breach that the officer from the KSAMC did not see?
 - Were they looking for different things or using different criteria given their different remit?
 - Were they using different documents in their assessment of the building works?
 - Did the observed breach occur after the KSAMC officer visited the location?

- Could material discrepancy between the two bodies be attributed to some misunderstanding of what was being built?
- Is it that the amendment of the permit, sought by the Barnetts and obtained from the KSAMC, is capable of being construed as an amendment to the size and type of units that were to be built?

25. The disparity in the relevant observations of these two significant agencies is quite concerning; NEPA, that is responsible for seeing to the environmental concerns of the country and KSAMC, who has the responsibility of managing and maintaining high standards in the building code, cannot be overlooked. As public officers, basic governance principles dictate that with great power there must also come great responsibility.

The actions of public servants, in the performance of their functions ought to be beyond reproach in order to instil confidence of the public in the Local Authority/KSAMC. It is imperative that the actions of the office of the Chief Engineering Officer including the Senior Building Officer be assessed by the KSAMC and their parent ministry.

CONFLICT OF INTEREST

26. The matter of outstanding fees for water and sewage allegedly owed by Mr. Mark Barnett to the National Water Commission (NWC) is purely contractual in nature; the remedy for which lies in the Civil arena.

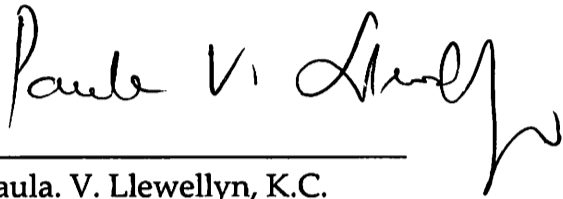
RECOMMENDATIONS

27. The following are recommendations which we think will assist to remedy some of the deficiencies observed.
- a. An amendment to section 37 of the Natural Resources Conservation Act which would enlarge the time within which prosecution should take place.
 - b. That there should be a review by NEPA of its administrative processes as to when and how the decision is taken to initiate prosecution in a timely manner under the NRCA once there has been a breach of that legislation.
 - c. That regulations be implemented under the Building Act. This would implement a precise documentary framework which will assist in the operations of the Municipality.
 - d. That the staff and officers be trained in the Building Act and other legislation relevant to local government. This may include training concerning the ethical parameters within which the execution of their remit under the various statutes should be conducted.

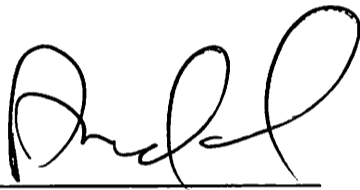
- e. That an administrative review be done by the KSAMC which would lead to the enhancement and strengthening of accountability procedures making them more robust. This should include considerations regarding the exercise of discretion in treating with an observed breach; this includes dealing with a breach by way of the fixed penalty regime or whether it would be in the public's interest that the issue be addressed through the courts.

Please be guided accordingly.

Yours truly,



Paula. V. Llewellyn, K.C.
Director of Public Prosecutions



Mr. Andre Wedderburn
Assistant Director of Public Prosecutions
For the Director of Public Prosecution

cc: Mr. Greg Christie, Executive Director
Integrity Commission

Mrs. Keisha Prince-Kameka, Director of Corruption Prosecution
Integrity Commission

Mrs. Marsha Henry-Martin, Permanent Secretary,
Ministry of Local Government and Community Development

Ms. Neidene Robinson, Director, Legal & Enforcement Division
National Environment & Planning Agency (NEPA)