

future events. Further, these matters are effectively moot as the remedy that Appellants seek results in a remand to the agency, which is the only result that this court could ultimately reach here. Additionally, Appellants' claim for Declaratory Judgment is barred by the doctrine of sovereign immunity.

MOTION TO DISMISS, DEMURRER AND PLEA IN BAR¹

1. The Appellants bring their Appeal under Virginia's Administrative Process Act ("VAPA") Va. Code § 2.2-4000 *et seq.* and their Complaint under Virginia's declaratory judgment statute, Va. Code § 8.01-184.

2. Before this Court may examine any substantive issues, it "must first determine whether, although falling within [its] subject matter jurisdiction, the matter is otherwise properly before it." Owens v. City of Va. Beach, 2018 Va. App. LEXIS 212 at *9–10 (Aug. 7, 2018). Here, there are four immediate problems: (1) the Appellants have not yet exhausted their administrative remedies; (2) this matter is not yet ripe for review; (3) the matter is moot; and (4) Appellants' claim for declaratory judgment is barred by the doctrine of sovereign immunity.

I. The Appellants' Appeal and Complaint are premature because the Appellants have not yet exhausted all administrative remedies.

3. A party may not appeal any decision under the VAPA until they have exhausted all administrative remedies. Fauquier Cnty. Dept. of Social Servs. v. Robinson, 20 Va. App. 142, 152–53 (1995) ("It is a long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.") (quoting Phillip Morris v. Block, 755 F.2d 368, 369 (4th Cir. 1985)).

4. Appellants allege that the September 6, 2019 letter from the Director to Tyrer was a case decision under the VAPA. See Petition for Appeal and Complaint for Declaratory

¹ A brief in support of this motion will be filed at a later time.

Judgment (hereinafter “Petition for Appeal”) ¶¶ 68, 76, 111, 135.

5. Under the VAPA, “[a]gencies shall ascertain the fact basis for their decisions of cases through informal conference or consultation proceedings unless the named party and the agency consent to waive such a conference or proceeding to go directly to a formal hearing [under Code § 2.2-4020].” Va. Code § 2.2-4019(A).

6. Here, the parties have not engaged in either an informal or formal hearing as required under the VAPA. Va. Code §§ 2.2-4019, 2.2-4020. The Petition for Appeal acknowledges, “no informal fact finding conference or consultation proceeding [has been] conducted.” *Id.* ¶ 73. Therefore, the Appellants have not yet exhausted their administrative remedies. *Id.*

7. Before this Court may rule on the issues raised in the Appellants’ Appeal and Complaint, the parties must undergo a Code § 2.2-4019 informal conference or a Code § 2.2-4020 formal hearing. *Country Vinter, Inc. v. Louis Latour, Inc.*, 272 Va. 402, 415 (2006) (“‘Exhaustion’ applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course.”) (quoting *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 63–64 (1956)).

II. Neither the Appellants’ Appeal nor the Complaint are ripe because both rest upon contingent future events.

8. Additionally, before examining the merits of this case, the Court must determine whether the Appellants’ Appeal and Complaint are “based upon present rather than future or speculative facts that are ripe for judicial adjustment.” *Virginia Historic Landmarks Com. v. Bd. Of Supervisors*, 217 Va. 468, 476 (1976) (quoting *Fairfax v. Shanklin*, 205 Va. 277, 229 (1964)).

9. A claim is not ripe and is unfit for judicial review when it “rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.” *Texas v. United*

States, 523 U.S. 296, 300 (1998).

10. Here, the Appellants claim is unripe because the parties have not yet undergone a Code § 2.2-4019 informal conference or a Code § 2.2-4020 formal hearing as required under the VAPA. These are prerequisites to court review and the outcome of these proceedings are yet to be determined.

III. The Appellants' Appeal and Complaint are Moot because, even if the Appeal is successful, this matter must be remanded to the Virginia Department of Historic Resources.

11. A case is moot when “the issues presented are no longer “live” or the parties lack a legally cognizable interest in the outcome.” City of Erie v. Pap’s A.M., 529 U.S. 277, 287 (2000).

12. Appellants allege that the Director and the Commonwealth denied them due process protections under the U.S. Constitution and the Virginia Constitution. See Petition for Appeal and Complaint for Declaratory Judgment (hereinafter “Petition for Appeal”) ¶¶ 97–109.

13. If Appellants successfully prove that they were not given appropriate due process, the appropriate remedy would be to remand this matter back to the Department of Historic Resources, and direct the parties to undergo a Code § 2.2-4019 informal conference or a Code § 2.2-4020 formal hearing. See e.g., Loudoun Hosp. Ctr. V. Stroube, 68 Va. Cir. 271, 272–73 (Loudoun County 2005) (explaining that [e]ven if Plaintiff was denied due process in the Commissioner’s handling of the case decision, its access to the administrative appeal process is a means to obtain the process which is due.”); see also Code § 2.2-4029 (“Where a regulation or case decision is found by the court not to be in accordance with law under Section 2.2-4027, the court shall suspend or set it aside and remand the matter to the agency for further proceedings, if any, as the court may permit or direct in accordance with law.”).

14. Therefore, regardless of whether the Appellants are successful in their Appeal and Complaint, this matter must be remanded back to the Department of Historic Resources for further adjudication. There is no “live” dispute, and this matter should be remanded to the agency.

IV. The Appellants’ Claim for Declaratory Judgment is barred by the Doctrine of Sovereign Immunity

15. “As a general rule, the Commonwealth is both immune from actions at law for damages and from suits in equity to restrain governmental action or to compel such action.” Alliance to Save the Mattaponi v. Commonwealth, 270 Va. 423, 455 (2005).

16. The Appellants declaratory judgment action is barred by the doctrine of sovereign immunity. See Afzall v. Commonwealth, 273 Va. 226, 231 (2007) (“Sovereign immunity may also bar a declaratory judgment proceeding against the Commonwealth.”).

17. For the reasons stated above, and for the reasons to be stated in a Memorandum in Support and during oral argument, the Commonwealth Appellees respectfully request that this Court dismiss the Appellants’ Appeal and Complaint.

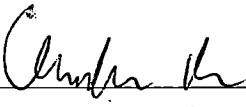
WHEREFORE, for the reasons set forth above, the Commonwealth Appellees respectfully request that this Court grant this Motion to Dismiss, Demurrer, and Plea in Bar, and remand the case to the Virginia Department of Historic Resources so that the parties may undergo the process provided for in the Virginia Administrative Process Act.

Respectfully submitted,

**JULIE V. LANGAN, in her official capacity as
Director of the Commonwealth of Virginia,
Department of Historic Resources,**

and

**COMMONWEALTH OF VIRGINIA,
DEPARTMENT OF HISTORIC RESOURCES**

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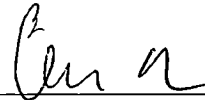
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion to Dismiss, Demurrer and Plea in Bar. was mailed by first class U.S. mail, postage prepaid, this 25 day of November 2019, to:

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Hon. Mona A. Foley
Williamsburg/James City County Circuit Court
5201 Monticello Avenue
Suite Six
Williamsburg, VA 23188-8218

Re: Carol D. Tyrer and Circa ~ Cultural Resources Management, LLC v. Julie V. Langan
and Commonwealth of Virginia Department of Historic Resources
Case No.: CL19001867-00

Dear Ms. Foley:

Enclosed for filing, please find the Respondents-Appellees-Defendants' Motion to Dismiss,
Demurrer, and Plea in Bar to the Petitioners-Appellants-Plaintiffs' Petition for Appeal and Complaint.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

[Handwritten signature of Christopher E. Bergin, Jr.]

Christopher E. Bergin, Jr.
Assistant Attorney General

Enclosures

cc: Dale G. Mullen, Esq.
Michael H. Brady, Esq.
Julie V. Langan (By Email Only)

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COUNTY OF JAMES CITY