



Docket: LA17-012
Order: LA18-02

IN THE MATTER of an appeal by Queens
County Condominium Corporation No. 40, of
a decision by the City of Charlottetown, dated
November 27, 2017.

BEFORE THE COMMISSION ON Wednesday, July 11, 2018.

J. Scott MacKenzie, Q.C., Chair
Jean Tingley, Commissioner
John Broderick, Commissioner

ORDER

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Philip Rafuse,
Appeals Administrator,
Island Regulatory & Appeals Commission

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IN THE MATTER of an appeal by Queens County Condominium Corporation No. 40, of a decision by the City of Charlottetown, dated November 27, 2017.

Appearances & Witnesses

1. For the Appellant, Queens County Condominium Corporation No. 40.

Counsel:

Matthew J.W. Bradley, Carr, Stevenson & MacKay

Witnesses:

Daniel Hurnick

Mary MacInnis

Betty Fraser

Ernie MacAulay

2. For the Respondent, City of Charlottetown

Counsel:

David W. Hooley, Q.C., Cox & Palmer

Charity L. Hogan

Witnesses:

Jesse Morton

Alex Forbes

3. For the Developer, APM Construction Services

Representative:

Tim Banks

Witnesses:

Tim Banks

Ian Harper

Cain Arsenault

Reasons for Order

Decision

1. The Island Regulatory and Appeals Commission (the "Commission") is satisfied that while there were some technical deficiencies, the decision of the City of Charlottetown (the "City") to approve a site-specific bylaw amendment for civic addresses 55 and 59 Richmond Street in Charlottetown (the "Property") was made in accordance with the provisions of the Zoning and Subdivision Bylaw, the Official Plan, and was based on sound planning principles. The appeal by the Queens County Condominium Corporation No. 40 ("Condo Corp") is, therefore, denied and the decision of the City is hereby confirmed.

Preliminary Matter

2. By agreement of the parties, the hearing began on May 16, 2018 and ended on May 18, 2018. At the outset, the developer, APM Construction Services ("APM"), raised a preliminary matter related to a possible conflict of interest arising out of the Chair's past representation of the developer of the Rochford Condominium building (the "Rochford Condominium"). Condo Corp represents current condominium owners in the Rochford Condominium, which is located at 41 Richmond Street in Charlottetown and adjacent to the Property.
3. The Chair was appointed to the Commission on April 28, 2014. He ceased practising law at that time. While in practice, the Chair acted as legal counsel for the corporation that was the developer of the Rochford Condominium and acted as legal counsel on the incorporation of Condo Corp. The Chair also acted as legal counsel for the developer and Condo Corp on the sale of condominium units. The Chair did not act as legal counsel on behalf of any condominium owners on the purchase of their units. Since his appointment, the Chair has not acted for, or provided advice to, Condo Corp or any of its condominium owners.
4. The Commission determined that there was no conflict of interest – real or perceived- on the part of the Chair and all parties confirmed at the hearing that they did not have any objections on the ground of conflict of interest and consented to the participation of the Chair.

Overview

5. APM wants to develop a four-storey, 23-unit apartment dwelling on the Property (the "Development"). Condo Corp opposes the Development. The issue in this appeal is the site-specific amendment made by Council to the Zoning and Development Bylaw (the "Bylaw") on November 27, 2017 (the "Amendment"). The Amendment reads as follows:

For a site specific bylaw amendment to the Downtown Neighbourhood (DN) Zone (including a minor variance to reduce the minimum frontage from 82 feet to 74.5 feet, a major variance to reduce the minimum grade level height from 13 feet to 9.5 feet) to permit a four storey, 23-unit apartment dwelling

on the consolidated property at 55 Richmond Street (PID# 339911) and 59 Richmond Street (PID#339929).¹

6. On December 15, 2017, Condo Corp filed a notice of appeal under section 28 of the *Planning Act*² alleging a number of errors.³ There is no dispute amongst the parties that the Commission has jurisdiction to hear the appeal.
7. The decision by the City on November 27, 2017 was the culmination of a process initiated by APM on December 19, 2016 when it filed the first of two applications seeking a site-specific amendment for the Property. Although there are some differences between the two applications, APM, at all times, sought to develop a four-storey, 23-unit apartment building on the Property. With the consent of all parties, the City's record before the Commission included materials related to both applications.

First Application filed December 19, 2016

8. APM's initial application proceeded through various stages of the City's planning process before it was withdrawn by APM in July 2017. It was the subject of four reports by City staff to planning board,⁴ was discussed at planning board on four occasions,⁵ and came before Council six times,⁶ including at a public meeting on February 28, 2017.⁷
9. Condo Corp raised its initial concerns with the Development on March 5, 2017. In correspondence to the City, Daniel Hurnick ("Hurnick") cited issues with parking availability, space for waste/recycling bins, and the proximity between the Rochford Condominium and the Development.⁸
10. On March 13, 2017, planning board recommended that Council approve APM's amendment request.⁹ Council deferred, citing concerns over APM's request to provide cash in lieu of on-site parking.¹⁰ APM made some modifications to its proposal prior to Council's meeting on April 10, 2017, including that APM would enter into a parking lease for thirteen parking spaces with the Charlottetown Area Development Corporation ("CADC") for a ten-year term.¹¹ Council again deferred consideration of the application

¹ Exhibit R1, Tab 31. See also Notice of Appeal, Exhibit A1.

² RSPEI 1988, c P-8.

³ Exhibit A1.

⁴ Exhibit R3, Tabs 6 (February 1, 2017), 21 (March 2, 2017) and 28 (March 31, 2017); Exhibit R4, Tab 40 (April 26, 2017).

⁵ Exhibit R3, Tabs 5 (Heritage Committee regarding demolition, January 31, 2017), 22 (March 6, 2017) and 30 (April 3, 2017); Exhibit R4 Tabs 41 (May 1, 2017) and 54 (July 4, 2017).

⁶ Exhibit R3, Tabs 9 (February 14, 2017), 19 (February 28, 2017), 24 (March 13, 2017) and 35 (April 10, 2017); Exhibit R4, Tabs 43 (for information purposes, May 8, 2017) and 55 (July 10, 2017).

⁷ Exhibit R3, Tab 19.

⁸ Exhibit R3, Tab 20(e). Hurnick raised additional concerns regarding proximity, privacy, and security in correspondence dated April 5, 2017. Exhibit R3, Tab 28.

⁹ Exhibit R3, Tab 23. The planning board motion in support of this recommendation is dated March 6, 2017 and found at Exhibit R3, Tab 22.

¹⁰ Exhibit R3, Tabs 23, 24, and 25.

¹¹ Exhibit R3, Tabs 32, 34, and 35.

pending receipt of an agreement for the thirteen parking spaces and to receive a report on rectifying the balcony placement next to the Rochford Condominium.¹²

11. On May 2, 2017, the City contacted APM and advised that the frontage used by APM on its application was in error and that the actual street frontage of the Property was less than originally stated. The City advised that a variance may be required to reduce the required street frontage of the Property and, further, that the application may be required to undergo a new public notification and meeting process.¹³ On July 10, 2017, Council approved APM's request to withdraw and re-submit its application.¹⁴

12. Second Application filed July 17, 2017

13. On July 17, 2017, APM filed its second application with the City.¹⁵ The application included a request for a minor variance to reflect the actual (reduced) street frontage of the Property. On July 28, 2018, City staff recommended to planning board that it recommend to Council that the application proceed to a public meeting.¹⁶
14. On August 14, 2017, Council refused APM's request to proceed to a public consultation.¹⁷ APM filed a notice of appeal with the Commission.¹⁸ The Commission reviewed the appeal documents and the record of the City. The record disclosed that the City had erred and failed to follow the proper procedure required under the Bylaw. Commission staff were instructed to meet with APM and the City's solicitor. Subsequent to that meeting, on October 10, 2017 the City rescinded its decision of August 14, 2017 and decided to proceed with the public consultation.¹⁹ As a result, APM did not proceed with its appeal.
15. On October 19, 2017, the City issued notice of a public meeting scheduled for November 2, 2017.²⁰
16. In response to the notice, a number of members of the public, including some of the witnesses for Condo Corp, filed written correspondence with the City both for and against the Development.²¹ This correspondence was filed with the Commission as part of the City's record.²²
17. A public meeting was held on November 2, 2017. Tim Banks ("Banks") gave a presentation on behalf of APM outlining the Development. Banks answered questions from Council and members of the public.²³ Hurnick gave a presentation on behalf of Condo Corp in response to Banks.²⁴ Both presentations were filed with the Commission as part of the

¹² Exhibit R3, Tabs 35 and 36.

¹³ Exhibit R4, Tab 41.

¹⁴ Exhibit R4, Tabs 55 and 56.

¹⁵ Exhibit R4, Tab 60.

¹⁶ Exhibit R4, Tab 61. Planning board agreed with the staff recommendation. See Exhibit R4, Tabs 62 and 64.

¹⁷ Exhibit R4, Tabs 65, 66 and 68.

¹⁸ Commission Docket LA17-005.

¹⁹ Exhibit R1, Tab 3.

²⁰ Exhibit R1, Tab 5. See also Exhibit R9.

²¹ City staff advised Council that as of November 2, 2017, 38 letters were received: 32 in favour and 6 against. Exhibit R1, Tab 20.

²² Exhibit R1, Tab 5.

²³ Exhibit R1, Tab 24; Exhibit D1.

²⁴ Exhibit A2.

City's record. Both Hurnick and Banks also expanded upon their presentations during their testimony at the hearing.

18. On November 14, 2017, the Amendment passed first and second reading.²⁵ On November 27, 2017, the Amendment passed third reading.²⁶

Issues

19. Condo Corp raised a number of arguments in its appeal. The Commission has distilled these arguments in light of the evidence at the hearing. Condo Corp makes three primary submissions:
- a. Did the City fail to follow the proper procedure as set out in its Bylaw and err by issuing notice of a public meeting before APM obtained conditional design review approval?
 - b. Did the City err by failing to follow the advice of its planning staff?
 - c. Is the decision of the City to permit the Development consistent with good or sound planning principles?

Analysis

A. Design Review Standards Procedure

20. Condo Corp argued that the City erred in failing to obtain conditional design review approval before issuing notice of the November 2, 2017 public meeting. Condo Corp contends that this approval is required under section 9.10.1 of the Bylaw. The Commission agrees, but finds that this technical error was not material and did not result in any unfairness. The deficiency was also not of sufficient weight to affect the ultimate outcome of the appeal.
21. Section 9 of the Bylaw sets out design review standards that apply to the 500 Lot Area of the City (the "Area"), including the Downtown Neighbourhood Zone where the Property is located. Witnesses for the City explained to the Commission that the design review process was created to recognize the unique history and structure of the Area and to ensure that future development is compatible with its special character. In essence, the design review process provides an additional level of oversight, including a review by the heritage board for the City and an external architect.
22. The design reviewer considers a proposed building's exterior appearance with reference to the design standards in the Bylaw and the 500 Lot Standards and Guidelines (the "Guidelines").²⁷ According to the City, the reviewer provides comments and indicates if the proposal meets the design standards and the Guidelines. The reviewer does not re-design the building.

²⁵ Exhibit R1, Tab 24.

²⁶ Exhibit R1, Tab 31.

²⁷ See also, Bylaw, ss.9.8-9.9.

23. It was not contested that the Development, being a new construction project with more than four units, was subject to the design review process.²⁸ It was also not strenuously contested that the Development was a “substantive application.”²⁹ Substantive applications are subject to “all applicable provisions” of the Bylaw, including the design review standards.”³⁰
24. The application by APM sought to increase the maximum storey height in the Bylaw (from three storeys to four storeys),³¹ which triggered a public consultation process (a public meeting).³² The Commission heard testimony that, where section 4.79 of the Bylaw is engaged, the City follows the process set out in section 4.29 of the Bylaw.³³ The process was described by the City as being “rigorous.”
25. Section 9.10.1.b of the Bylaw states that substantive applications “must first receive conditional approval from the external design reviewer prior to public notification being sent on any other matters.”
26. The City argues that section 9.10 of the Bylaw was not engaged by APM’s application because it only applies to applications where there is no requirement for a public meeting; that is, the section creates a public consultation process where there otherwise would be none. The Commission disagrees with the City’s position. Section 9.10 of the Bylaw distinguishes between public *notification* and public *consultation*. Section 9.10.1 applies to applications that require public *notification* under the Bylaw. It clearly provides that conditional design review must be completed before that *notification* is issued. Section 9.10.2 goes on to add an additional and more onerous public *consultation* process in two specific instances, neither of which is applicable in this case.
27. The text chosen by the City in section 9.10.1 of the Bylaw requires conditional design review to be completed before notification is issued of the public meeting contemplated under section 4.29 of the Bylaw. Conditional approval by a design reviewer was not obtained before the City issued its notice of the public meeting in October 2017. As the record shows, the design review process was not initiated by the City until March 2018.³⁴ This was an error.
28. However, as counsel for the City noted in his closing submissions, nothing turns on this error.
29. It is well-established that the Commission hears appeals by way of a hearing *de novo*. Given that the City erred in failing to obtain conditional approval from a design reviewer before issuing notice of the public meeting, the Commission can and has reviewed APM’s submission to the design reviewer and the subsequent reports.³⁵ Upon review, the

²⁸ Bylaw, s.9.3.12.

²⁹ Bylaw, s.9.3.12.

³⁰ Bylaw, s.9.8.1.

³¹ Bylaw, s.4.79.2.

³² Bylaw, s.4.29.

³³ As per the Bylaw, s.4.79.1.b.

³⁴ Exhibit D2.

³⁵ Exhibits D2-D4.

Commission finds that approval was ultimately granted.³⁶ In the circumstances of this case, the City's error was, therefore, a technical one.

30. The plans submitted for design review were filed with the Commission by APM.³⁷ The development submitted for design review appears to the Commission to be substantially similar to that put forward at the public meeting.³⁸ For example, neither development has patios on the ground floor, or balconies on the second floor, adjacent to the Rochford Condominium.³⁹
31. The Commission also notes that the recommendations from the design reviewer do not speak to Condo Corp's main concerns regarding proximity, parking, or density. The design reviewer recommended changes to the building entrance, including materials and detailing.⁴⁰ These changes were made by APM and accepted by the design reviewer.⁴¹
32. In conclusion, the Commission is not persuaded that a different result would have followed had design review been completed before the City provided notice of the public meeting. The plans submitted by APM and approved by the design reviewer are substantially similar to the plans presented by APM at the public meeting. The Commission does not accept Condo Corp's argument that the public did not know at the public meeting what APM was proposing to build. The public meeting was attended by members of Condo Corp. Hurnick, for example, made a rebuttal presentation. Further, the modifications suggested by the design reviewer (and, ultimately, accepted by APM) did not relate to the complaints raised by Condo Corp at the public meeting or the hearing of the appeal. The weight of the evidence before the Commission did not demonstrate that this error was material to the application or resulted in any prejudice to Condo Corp or the public.

B. Failure to Follow Advice from Planning Staff

33. Condo Corp argues that the City did not follow the advice of its planning staff who recommended approval of the Amendment "subject to receipt of final pinned survey plans, design review approval, and the signing of a development agreement." Condo Corp relies on the text of the Council resolution on November 14, 2017⁴² and argues that the text of the Bylaw should have been amended to include these conditions. Condo Corp contends that this error means that a future developer – not necessarily APM – is now able to, as-of-right, develop a four-storey, 23-unit apartment dwelling on the Property.
34. The City submitted that these requirements were conditions subsequent upon approval of the Amendment and not conditions forming part of the Amendment itself. In other words, the conditions would have to be fulfilled by APM or any other developers at further stages in the development process, culminating with a building permit issued upon conditions included in a development agreement. The City noted that the resolution filed in the record was an attachment to the draft development agreement.⁴³ The Commission heard

³⁶ Exhibit D4. See also, the Heritage Board Resolution dated April 19, 2018. Exhibit D5.

³⁷ Exhibit D3.

³⁸ Exhibit R2.

³⁹ Exhibit R1, Tabs 1; Exhibit R2 (supplementary record); Exhibit D1; Exhibit D3.

⁴⁰ Exhibit D2.

⁴¹ Exhibit D4.

⁴² Exhibit R1, Tab 25.

⁴³ Exhibit R1, Tab 35.

testimony that the conditions are intended to be enforced through the development agreement, and the Commission was directed to sections 4.62.7 and 4.62.9 of the Bylaw, which provide that Council may require a developer to execute a development agreement.

35. The Commission does not accept Condo Corp's argument that the conditions were intended to form part of the amended Bylaw. The interpretation put forward by counsel for Condo Corp ignores the remaining text of the resolution, which authorizes the Mayor and CEO "to execute standard contracts/agreements to implement [the] resolution."⁴⁴ Meaning must also be given to this language. When the resolution is read in its entirety and considered in light of the development process as a whole, the Commission finds that Council intended for the conditions to be dealt with and incorporated into a development agreement between the City and APM.
36. Counsel for Condo Corp is correct that the Amendment permits a future developer (and not just APM) to develop a four-storey, 23-unit apartment dwelling on the Property. However, any new developer would still be required to provide survey plans, obtain design review approval, and sign a development agreement if the Development were to change in any material respect. Finally, as will be discussed below, as-of-right developments are still subject to the Bylaw, the Official Plan, and sound planning principles.

C. Sound Planning Principles

37. Condo Corp argues that the Development does not meet sound planning principles. Condo Corp suggests that these principles require that the "best" development for the Property be approved. Condo Corp submits that the City did not consider moving the building away from the property line next to the Rochford Condominium (and closer to the parking lot on the other side of the Property) and, as a result, sound planning principles have not been applied. Condo Corp argues that this option was never explored before Council passed the Amendment.
38. Witnesses for Condo Corp raised a number of concerns before the Commission. The Commission finds that there were three primary areas of concern:
- a. parking, including the loss of existing parking spaces and the impact of additional vehicles in the neighbourhood;
 - b. the proximity of the Development to the Rochford Condominium and its impact on the privacy, security, and enjoyment of personal space by condominium residents; and
 - c. increased density in the neighbourhood and its resulting impact on the surrounding area.

⁴⁴ Exhibit R1, Tab 35.

I. General Principles

39. It is well-settled that the Commission, when exercising its appellate authority under the *Planning Act*, is entitled to assess a decision of Council on the basis of sound planning principles.
40. Witnesses for the City and APM repeatedly emphasized that the Property could be developed "as of right" to the property line bordering the Richmond Condominium. The text of the Bylaw certainly recognizes this possibility. However, it bears repeating that a right to development is not absolute. As discussed in *Pine Cone Developments Inc. v. City of Charlottetown*,⁴⁵ a development must adhere not only to the technical requirements of the Bylaw, but also to the Official Plan and sound planning principles.⁴⁶
41. The Commission is generally reluctant to interfere with a decision of a municipality on the basis that it is not consistent with sound planning principles, where that decision is supported by objective and reliable evidence from planning professionals confirming that the decision is based on the *Planning Act*, the applicable official plan and bylaw, and sound planning principles. It is incumbent upon an appellant to bring forward objective and reliable evidence to the contrary. In other words, where sound planning principles are at issue, it is prudent to call evidence from a planning professional or a person with experience in making planning-related decisions. More than the subjective concerns expressed by neighbouring property owners is required.
42. Each of the neighbouring property owners appearing before the Commission sincerely and succinctly set out their real concerns with respect to how the Development, in their opinion, would negatively effect the enjoyment of their own condominiums and would change the neighbourhood. However, when it comes to developments, assertions or speculations from neighbours are not sufficient to overcome objective and reliable evidence. While consultation with – and input from – the public is an important element of the planning process, it cannot be construed as a veto on the development of properties owned by others.
43. The City called two professional planners at the hearing, Jesse Morton ("Morton") and Alex Forbes ("Forbes"). Morton was the City planner responsible for both applications filed by APM. He holds his Masters degree in planning and is a licensed professional planner. Morton's work was overseen by Forbes, who is the Manager of Planning for the City. Forbes has 26 years of planning experience and the Commission accepts that he is an expert in the field of planning and land use.
44. Condo Corp called four witnesses at the hearing. All were residents of the Rochford Condominium and without any professional planning experience. The concerns raised by those witnesses, although sincere, did not have the ingredients necessary to overcome the testimony of Morton and Forbes. Objective and reliable evidence was lacking from Condo Corp. The Commission accepts the evidence of the professional planners, Forbes and Morton, that the Development is based on sound planning principles.

⁴⁵ LA17-08.

⁴⁶ LA17-08. See also LA12-01.

45. The Commission heard and understood the concerns expressed by the residents of the Rochford Condominium. However, as a quasi-judicial tribunal the Commission is obligated to exercise its authority in accordance with the law and the evidence. In this appeal, the weight of the evidence supports the finding that the Development based on sound planning principles.

II. The “Best” Development

46. Witnesses for Condo Corp were consistent in stating that they are not opposed to development generally. Rather, it was just “this development” that was objectionable. Condo Corp argued that the City’s decision failed to meet sound planning principles because the Development was not the “best development” for the Property.
47. Sound planning principles did not require the City or APM to consider every possible development option for the Property. The record reveals that the APM engaged in meaningful dialogue with the City and made adjustments to its proposal to respond to concerns shared by the City and others.⁴⁷ What one may view as the “best” development for her neighbour’s property cannot be the standard against which planning-related decisions are made by a municipality. Such an approach would have the effect of frustrating development, maintaining the status quo, and diminishing the rights associated with land ownership.
48. The soundness of a planning decision is measured by the Commission against the principles recognized within the field of land use planning, the Official Plan of a municipality, the applicable bylaws, and any relevant federal and provincial laws. When assessed against that objective standard, the Commission is satisfied that the City’s decision to pass the Amendment was guided by sound planning principles.

III. Parking Concerns

49. APM proposes to enter into a long-term parking lease with CADC for parking spaces in the Pownal Parkade as opposed to providing on-site parking or cash in lieu of parking. This is permissible under the Bylaw. Condo Corp argues that the Development is inappropriate because there is already insufficient parking in the neighbourhood. Condo Corp argued that the Development requires parking for 23 units and guests and would displace an unapproved parking lot on the Property that serves approximately 16 vehicles. Condo Corp also argued that the City erred in approving the Amendment because APM has not filed a parking lease with the City as required by section 4.44.6 of the Bylaw.
50. The Commission is not persuaded that the proposed off-site parking is contrary to sound planning principles. Parking is a concern in many municipalities and is specifically addressed by the City in the Bylaw and Official Plan. The existence of an unapproved parking lot on the Property is not a relevant consideration. Unapproved parking is liable to enforcement under the Bylaw, and the City has discretion over whether to pursue a remedy or not. The existence of an unapproved use today is therefore not guaranteed tomorrow. It cannot be relied upon to defeat a proposal for parking that actually satisfies

⁴⁷ See, for example, Exhibit R1, Tab 17.

the terms of the Bylaw. The Bylaw specifically provides for off-site parking in the Area⁴⁸ and Morton gave evidence that requests for off-site parking are not uncommon.

51. The absence of a parking lease, at this stage in the overall development, is not unusual. The Bylaw provides that a development officer, with approval from Council, may accept off-site parking in the Area if the parking is within 240 metres (787.4 feet) of the subject property and the developer has filed a lease that is at least ten years in length with the City. The record included correspondence from CADC to APM dated June 16, 2017, which stated that CADC is prepared to enter into a parking agreement for 13 spaces at the Pownal Parkade in the event that APM "is able to obtain a development permit."⁴⁹ The evidence before the Commission also confirmed that the distance from the Property to the Pownal Parkade is approximately 370 feet (by sidewalk).⁵⁰ The Commission accepts the City's position that it intends the lease requirement to form part of the development agreement with APM. Support for this position is found in the resolution passed by Council on November 14, 2017,⁵¹ which approved APM's request to "enter into a 10 year off-lot parking agreement with CADC for 12 parking spaces + 1 accessible parking space at the Pownal Parkade (100 Pownal Street)."
52. This technical argument by Condo Corp also overlooks the substance of this appeal. The decision under review by the Commission related to a site-specific bylaw amendment. The argument may have been more persuasive had the application related to a development permit. At that latter stage in the development process, the failure of APM to file a lease with the City could prove fatal (for failure to conform to the Bylaw).⁵² However, the development process operates on a continuum and involves a series of municipal decisions. To require a long-term contract to be signed and filed with the City before the site-specific bylaw amendment was even approved would be inconsistent with commercial reality and result in an illogical interpretation of the Bylaw. Absent the amendment, the proposal would have to change and, with it, the parking requirement.

IV. Proximity to the Rochford Condominium

53. Witnesses for the Condo Corp testified that they had concerns about the proximity of the Development to the Rochford Condominium. They stated that there were possible safety concerns, including the possibility of accessing balconies on the Rochford Condominium from the third and fourth floor balconies on the Development. Some witnesses also testified that the balconies were so close together that the Development would reduce their privacy and the enjoyment of their condominium units. It is unfortunate that the first APM plan showed that the proposed patios and balconies on the south side of the Property would be built within inches of the existing patios and balconies of the east side of the Rochford Condo. The City, for its part, was alive to these concerns from the beginning of the initial application process in December 2016. Planning staff specifically considered the placement of the balconies.⁵³ For example, the location of the balconies was

⁴⁸ Exhibit R4, Tab 61.

⁴⁹ Exhibit R4, Tab 45.

⁵⁰ Exhibit R4, Tab 61.

⁵¹ Exhibit R1, Tab 25.

⁵² Bylaw, s.4.54.6.

⁵³ Exhibit R4, Tab 61.

addressed in the report prepared by Morton on November 3, 2017 for planning board.⁵⁴ APM also made efforts to address some the concerns. APM removed patios and balconies from the bottom two floors of the Development.⁵⁵

54. Ernie MacAulay is a resident of the Rochford Condominium. His street-level unit is adjacent to the Property. He testified that his patio extends 22 inches to the property line. The presentation prepared by APM suggests that the Development is five feet from the property line, with the balconies extending into that five-foot space. In his report to planning board on November 3, 2017, Morton stated that the third and fourth floor balconies would be set back one foot from the property line. He also noted that the Rochford Condominium incorporates a "step-back" after the second storey and estimated the distance between the adjacent third storey balconies to be approximately seven feet and the fourth storey balconies approximately 10.5 feet.⁵⁶ It is not possible to determine the precise distance between the balconies of the Rochford Condominium and the Development based upon the record; however, the Commission accepts the best evidence available at the hearing and that was the estimate provided by Morton. He stated that there would be approximately seven feet between the third storey balconies and approximately 10.5 feet between the fourth storey balconies.⁵⁷ At the hearing Banks stated that APM would consider removing the balconies from the third floor of the Development. Banks stated that he would have his architects review the distances between the third floor balconies and the Rochford Condominium balconies and they could meet with the Condo Corp's advisors, Coles Associates, to work out a solution. This could include removing the third floor balconies or possibly putting screens on the balconies, if advisable. A final determination on the balconies will be dealt with by the City during the further stages of the development process.
55. The Commission is not persuaded that the balconies proposed for the Development offend sound planning principles. While they may be closer to the Rochford Condominium than its residents may have anticipated or enjoyed in the past, this does not mean that the balconies run counter to sound planning. Any asserted rights of privacy or quiet enjoyment are also beyond the statutory jurisdiction of the Commission. On the record and testimony before it, the Commission is being asked to speculate about the existence and likelihood of certain health and safety concerns. The Commission, however, was not provided with any evidence that the Development does not meet requirements of the National Building Code, the Fire Prevention Bylaw, or any other applicable law. Condo Corp also chose not call any independent evidence on the subjects of health or safety. There was no testimony from any police, fire, or security organization. The Commission cannot, without more, find that the Development does not meet sound planning principles because of its proximity to the Rochford Condominium. As noted above, the Bylaw itself expressly contemplated the possibility of a diminished setback for the Development because the Rochford Condominium had previously been granted a zero setback by the City.
56. There was a great deal of discussion, especially by APM, that the Rochford Condominium had previously been granted a zero setback from its eastern boundary by the City. Both Forbes and Morton gave evidence that, under the Bylaw, this would allow the owner of

⁵⁴ Exhibit R1, Tab 21.

⁵⁵ Exhibit R1, Tab 17.

⁵⁶ Exhibit R1, Tab 21.

⁵⁷ Exhibit R1, Tab 21.

the Property to also have a zero setback next to the Rochford Condominium. In short, under the Bylaw a zero setback granted to one property owner conveys the same zero setback rights to the adjoining property owner. However, in any development, the Bylaw is merely the starting point. As stated by both Morton and Forbes, when approving a development, a holistic approach must be taken. This requires the development to meet the specific requirements of the Bylaw, be consistent with the Official Plan, and be consistent with sound planning principles. The zero setback situation, as noted above, is not one which grants an as-of-right development using a zero setback. The development must meet all of the other requirements of the Bylaw, be consistent with the Official Plan, and be consistent with sound planning principles.

V. Increased Density

57. Condo Corp argued that the Development does not fit the Property. It noted that a variance was required to reduce the street frontage, and that planning staff failed to address the frontage issue in its final report to planning board. Condo Corp noted that the density of the Property was increased from three units to 23 units. Although a minor variance was required to reduce the street frontage from 82 feet to 74.5 feet, the impact was significant because it allowed the density to increase by 20 units. Condo Corp contends that the Development is too large for the Property and therefore does not meet sound planning principles.
58. Both Morton and Forbes spoke about the City's goal of increasing density in the context of sound planning principles. In his report to planning board on November 3, 2017, Morton commented on the massing and density of the Development. He relied on the Official Plan and its stated objectives.⁵⁸ The Commission finds that the City was alive to the increased density that would accompany the Development and considered this reality in light of the Official Plan. Absent any objective evidence to the contrary, the Commission cannot accept that increasing the density of the Property is contrary to sound planning principles.
59. This conclusion is strongly supported by the testimony of Morton and Forbes. For his part, Morton highlighted the importance of "massing" for buildings located in the downtown. He also emphasized that a design must be compatible with the surrounding area. Morton added that construction of the Rochford Condominium actually "transformed" the massing in the neighbourhood. Morton further explained that the Development will help with the transition from the Rochford Condominium to other buildings on Richmond Street and complement the existing streetscape. These assessments were echoed by Forbes, who advised the Commission that the Rochford Condominium had "set the tone" for the neighbourhood and increased the density in the surrounding area.

VI. Conclusion on Sound Planning Principles

60. The Commission does not accept Condo Corp's submission that the Development does not meet sound planning principles. The record and evidence before the Commission reveals a thorough development process was undertaken by the City with input from not only the public, but also professionals in the fields of land use planning and architectural design. The Development was also considered and reconsidered on a number of occasions by both planning board and Council. The Commission finds that the

⁵⁸ R1, Tab 21 referencing the Official Plan at section 3.2, objectives 1 and 2.

Development meets the requirements of the Bylaw, Official Plan, and is consistent with sound planning principles.

Conclusion

61. The appeal is denied and the decision of the City is hereby confirmed. While Condo Corp identified some technical deficiencies, the Commission, after reviewing the record as a whole, including the testimony from all of the witnesses at the hearing, is satisfied that the outcome – namely the Amendment – was a sound planning decision. The Commission encourages all involved – the City, APM and Condo Corp – to continue their dialogue as the Development moves forward. To date, these constructive exchanges have improved the Development to the benefit of the City as a whole.

IN THE MATTER of an appeal by Queens County Condominium Corporation No. 40, of a decision by the City of Charlottetown, dated November 27, 2017.

Order

WHEREAS the Appellant Queens County Condominium Corporation No. 40 appealed a November 27, 2017 decision of the City of Charlottetown to approve a site-specific bylaw amendment for 55 and 59 Richmond Street, Charlottetown;

AND WHEREAS the Commission heard the appeal at public hearings conducted in Charlottetown on May 16, 17, and 18, 2018, after due public notice and suitable scheduling for the parties;

AND WHEREAS the Commission has issued its findings in this matter in accordance with the Reasons for Order issued with this Order;

NOW THEREFORE, pursuant to the *Island Regulatory and Appeals Commission Act* and the *Planning Act*;

IT IS ORDERED THAT:

1. The appeal is denied and the decision of the City is hereby confirmed.

DATED at Charlottetown, Prince Edward Island, Wednesday, July 11, 2018.

BY THE COMMISSION:

(sgd) J. Scott MacKenzie

J. Scott MacKenzie, Q.C., Chair

(sgd) Jean Tingley

Jean Tingley, Commissioner

(sgd) John Broderick

John Broderick, Commissioner

NOTICE

Section 12 of the *Island Regulatory and Appeals Commission Act* reads as follows:

12. The Commission may, in its absolute discretion, review, rescind or vary any order or decision made by it, or rehear any application before deciding it.

Parties to this proceeding seeking a review of the Commission's decision or order in this matter may do so by filing with the Commission, at the earliest date, a written Request for Review, which clearly states the reasons for the review and the nature of the relief sought.

Sections 13(1) and 13(2) of the *Act* provide as follows:

13(1) An appeal lies from a decision or order of the Commission to the Court of Appeal upon a question of law or jurisdiction.

(2) The appeal shall be made by filing a notice of appeal in the Court of Appeal within twenty days after the decision or order appealed from and the rules of court respecting appeals apply with the necessary changes.

NOTE: In accordance with IRAC's *Records Retention and Disposition Schedule*, the material contained in the official file regarding this matter will be retained by the Commission for a period of 2 years.