

January 18, 2020

Island Regulatory & Appeals Commission  
5<sup>th</sup> Floor Suite 501  
134 Kent Street  
Charlottetown, PE C1A 7L1

Attention: Philip Rafuse

Dear Mr. Rafuse:

Re: **Jessie Frost-Wicks et al v. City of Charlottetown**  
**Notice of Appeal – November 6, 2019**

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This letter is by way of reply to your email of December 17, 2019 requesting the City of Charlottetown's (the "City") record and reply to the Notice of Appeal filed by Jessie Frost-Wicks et al. (the "Appellants") against the City with Island Regulatory Appeals Commission ("IRAC") on October 15, 2019, appealing the decision of City Council to approve and adopt Bylaw PH-ZD.2-019, amending the *Zoning and Development Bylaw* (the "Bylaw") and rezoning 38 Palmers Lane, Charlottetown, PE (the "Property") from Low Density Residential (R-2) to Medium Density Residential (R-3). The Appeal was held in abeyance pending the City's decision on the Appellant's Request for Reconsideration, which was denied on or about December 10, 2019.

For ease of reference, the City has briefly summarized and enumerated each ground of appeal as set out by the Appellants with a response to each ground.

- 1. Council was misinformed as to the importance of a feasible and compliant proposal for the intended structure which accompanied the application to rezone the subject**

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**property and therefore, Council did not consider the structure in its decision to allow the rezoning, which is an integral part of a rezoning application.**

The City submits that Council considered the appropriate and relevant factors based on the information available to them in rendering their decision to approve the rezoning application. The application that was before the Planning and Heritage Department, the Planning Board and eventually before Council was an application to rezone the property located at 38 Palmers Lane, Charlottetown, PE (the "Property") to permit construction of a 3-storey, 18 unit apartment building. The proposed structure was included as part of the application and was included as part of the Planning and Heritage Department's report, which is reviewed and considered by Council. Further, the Councilors have heard and rendered decisions on countless applications, including applications for a rezoning followed by construction in the rezoned area. Council is alive to the fact that the intent of a rezoning is typically to permit a new development. That was no different in this case.

Councilors are elected officials that vote in Council meetings based on all the information before them and on their own personal knowledge and beliefs. The Appellants allege that comments made by Councilor Rivard may have swayed the votes of other Councilors; and therefore, Councilors were somehow "misinformed" as to the details of the application. The City's position is that the Councilors were each provided with all of the relevant background information on the application and voted their conscience accordingly. The Appellants have not presented any evidence to suggest that any of the Councilors were inappropriately 'swayed' to vote a certain way; therefore, the City submits that Council was not misinformed and rendered their decision in a reasonable and informed manner.

- 2. The decision of Council has no merit based on sound planning principles. In particular, Council did not properly consider the shift from a low density residential zone into a high density residential zone and did not consider the lack of transition between the current structures in the neighbourhood to the proposed high density structure.**

In approving the application by Weymouth Properties to rezone the Property from Low Density Residential (R-2) to Medium Density Residential (R-3), Council applied sound planning

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principles. The Appellants contend that Council's failure to apply sound planning principles in rendering their decisions stems from the alleged failure to consider potential land use conflicts and alleged need for a transition or buffer between the low density residential neighbourhood that currently exists and the higher density rezoning and proposed structure. While this may be one consideration, the City submits that Council placed significant emphasis on the City's "housing crisis" in rendering their decision, - which is in accordance with good planning principles. Specifically, the dire shortage of housing and historically low vacancy rate in Charlottetown was considered in the report of the Planning and Heritage Department as a potential reason to approve this rezoning application.

In *Queens County Condominium Corporation No. 40 v City of Charlottetown*, LA17-012 Docket LA18-02, the Commission considered a similar argument that the decision of the City was not in accordance with sound planning principles. At paragraph 45, the Commission stated:

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 [was] based on sound planning principles.

Council's consideration of the housing shortage was plainly one of the main reasons for approving the rezoning application. That is cogent evidence to support the finding that the decision accords with sound planning principles. There is no requirement that Council must consider each and every factor considered by the Planning and Heritage Department or the Planning Board, rather there is a general obligation on Council to consider and render decisions in accordance with good planning principles, its Official Plan ("OP") and its Zoning & Development Bylaw ("Bylaw"). Making this decision is inherently a delicate balancing act. The alleged failure to specifically / expressly consider potential land use conflicts, transition or buffer structures to protect the existing low density residential structures and concerns from the residents about the potential negative effects it may have on their neighbourhood does not mean that Council's decision was not alive to those considerations nor that their decision is not in accordance with good planning principles. Rather, it suggests that

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Council/Councilors considered *other* good planning principles (i.e. enabling an adequate supply of housing) as more relevant and important to this particular decision.

3. The decision of council does not comply with the principles and objectives of the City's Official Plan. In particular, the decision of Council is contrary to section 3.1.2, 3.2 and 3.2.2 of the City's Official Plan, as the proposed structure would be the largest, tallest and most imposing structure in the neighbourhood and would be entirely out of character.

The September 26, 2019 resolution of the City approving and adopting Bylaw PH-ZD.2-019 to amend the *Bylaw* to rezone the Property from Low Density Residential (R-2) to Medium Density Residential (R-3) is not contrary to the City's OP. Rather, the City submits that the rezoning has support in the OP. In particular, the City finds support for its decision in the following provisions of the OP.

Section 3.1 entitled '*Directing Physical Growth*' states the following:

With population growth in the order of 1% per annum projected through the year 2006 [...] and a significant reserve of underdeveloped residential lots, the City is well-positioned to introduce a comprehensive Growth Management Strategy. An effective municipal growth management program is founded on the principles of fiscal efficiency, environmental conservation and urban containment. In Charlottetown, this means that the City will maximize the use of existing underground services before new water and wastewater lines are extended into areas that are essentially undeveloped. Finally, it means that moderately higher density development may be permitted in existing commercial areas and arterial corridors where it does not interfere with existing built-up residential neighbourhoods, and will be encourage through comprehensive site planning for key re-urbanization areas [...] and new subdivisions.

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The City submits that approving the amendment to the *Bylaw* achieves the objectives outlined in 3.1 of the OP. By allowing this development, the City will maximize the use of existing underground services and it allows for a moderately higher density development in a low density neighbourhood that does not interfere unreasonably with the existing mixed use / density neighbourhood. The neighbourhood is comprised of a variety of zoning, including, but not limited to:

- The eastern end of Palmers Lane along St. Peters Road consists of Mixed-Use Commercial (MUC) Zoning.
- The north side of Palmers Lane transitions from MUC Zoning to Low Density Residential (R-2) Zoning.
- The MUC Zoning and R-2 Zoning is separated by MacKay Drive.
- The south side of Palmers Lane transitions from MUC Zoning to Apartment Residential (R-4) Zoning.
- There are two 12-unit apartment buildings adjacent to the subject property.

The Appellants submit that the proposed structure would be the largest, tallest and most imposing structure in the neighbourhood while being entirely out of character with the rest of the homes. The City submits that the various types of zoning in the areas surrounding the Property demonstrates the variety of structures and layouts in the neighbourhood. The City submits that the proposed structure is not entirely out of character for the neighbourhood as a whole.

Without limitation, the City contends there is further support for its decision in the following provisions of the OP:

3.1.1 Our objective is to contain urban sprawl by introducing a staging strategy for new development, and to ensure that there is concurrency between proposals for new development and the provision of underground municipal services.

- Our policy shall be to direct urban growth to land that is a logical extension of an existing urban area, or neighbourhood, and will be serviced by municipal water and wastewater systems.

3.1.2 Our objective is to promote compact urban form and infill development, as well as the efficient use of infrastructure and public service facilities

- Our policy shall be to use existing underground services to its fullest practical capacity before public funds are used to extend new water and wastewater lines into areas that are essentially undeveloped.

3.3.1 Our objective is to encourage development in fully services areas of the City, to promote settlement and neighbourhood policies as mechanisms for directing the location of new housing, and to encourage new residential development near centres of employment.

- Our policy shall be to base residential densities on the availability of municipal services, education facilities, recreation and open space amenities, transportation routes and such other factors as the City may need to consider.

3.3.2 Our objective is to enhance the range of housing available to residents who have special social, economic or physical needs.

- Our policy shall be to work with our partners to address social housing needs, and to encourage its equitable distribution throughout the City.

The City's contends that the *Bylaw* amendment to rezone and the proposed structure have ample support from the policies outlined in the OP. Amending the zone from Low Density Residential to Medium Density Residential and thus allowing the development of a 3-storey 18-unit apartment building accords with the objective of the OP to encourage development in developed areas of the City that have the supports and services in an area that contains

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municipal services, education facilities, recreation, open space amenities and transportation routes – which allow individuals to live and work.

4. Council's decision did not demonstrate a *bona fide* exercise of discretion. There was no consideration, debate or discussion of the application by Council, thus demonstrating an arbitrary decision of Council to allow the bylaw amendment contrary to the recommendation by the Planning and Heritage Department to reject the proposal and the two previous rejected applications by the same applicant. It appears that Council made the decision in response to the "housing crisis" in Charlottetown but failed to give proper consideration to other relevant factors and did not exercise their discretion in a reasonable and judicious manner.

The City submits that Council's decision to approve the rezoning application was an appropriate exercise of Council's discretion. The Appellants state that Council erred in their decision to approve the rezoning as the decision was completely arbitrary. The City submits that Council's decision was not arbitrary; rather, Council made a well informed decision based on all of the information provided to them which included, but was not limited to, the report of the Planning and Heritage Department, the decision of Planning Board and the concerns of the residents, in person and in writing. All of the ten (10) councilors attended the Public Meeting on August 27, 2019, where some residents voiced their concerns regarding the proposed rezoning.

The City submits that Council is not required to follow the recommendation of the Planning and Heritage Department or Planning Board. This point was considered in *Doiron v City of Charlottetown*, LA10-06 Docket LA10005 where IRAC, in denying Mr. Doiron's appeal, stated the following:

[39] City Council is not bound by recommendations of their planning department. In fact I believe that they have a public duty to not blindly follow submitted recommendations and to judge the validity of those recommendations. The Council is free to decide in the alternative but they should expect no less of their decision making process than they expect of the basis upon which a staff recommendation is made. In

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rejecting a recommendation they should demonstrate sound planning reasons for doing so, and if they wish to have the decisions sustained on appeal then it should be clear in the City's decision making process that other factors were considered that support the final decision and give weight to the decision. As it is a planning matter, the final decision should be rooted in planning principles.

In rendering their decisions, Council should always demonstrate, by discussion or in writing, their consideration of relevant evidence and the reasons attributed to their decision. In doing so, Council gives reviewing bodies like IRAC or the Courts reasons to support or endorse their decision<sup>1</sup>.

In this case, the City acknowledges that Councilors placed significant emphasis on the “housing crisis” in Charlottetown as part of their reason in allowing the rezoning application. They were right to do so. Oftentimes there will be trade-offs amongst competing policies. Council must inevitably weigh these in each case and reach a decision which they believe best serves the overall public interest. Much has been said and written about the City's housing crisis which profoundly affects all City residents. The City's vacancy rate is below 0.5%. ~4% is considered a rental market in equilibrium. The Appellants state that Council erred in their decision by only considering the “housing crisis” and not considering “any of the relevant factors” in reaching their decision. There is no single list of relevant factors that Council *must* consider in rendering a rezoning decision. Rather, Council must intuitively weigh and weight all factors and be attuned to the competing considerations inherent in each rezoning application.

The Commission has indicated in past decisions that it will not lightly substitute its opinion for the elected Council's – unless Council manifestly failed to adhere to good planning principles (typically as must be evidenced by expert opinion evidence), its own OP / Bylaw, or failed to adhere to common law principles of natural justice: *L & A MacEachern Holdings Ltd v City of Charlottetown*, LA08-04 Docket LA08003 and *Hanmac Inc. v City of Charlottetown*, LA15-06 Docket LA14005

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<sup>1</sup> Rogers & Butler, *Canadian Law of Planning and Zoning* (2<sup>nd</sup> Ed) at 8-42.7.



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To reiterate, the ten (10) Councilors attended the Public Meeting on August 27, 2019 and listened carefully to the concerns regarding the proposed rezoning brought forward by some residents in the area. It is reasonable to state that Council was alive / attuned to the issues and factors referred to by the Appellants as they heard these issues first hand. It is the City's position that the consideration of the "housing crisis" in Charlottetown, in combination with their responsibility to administer the OP in accordance with the *Planning Act*, RSPEI 1988, c P-8, was an appropriate exercise of their discretion in approving this rezoning application. i.e. see: *Seanic Canada Inc. v St. John's (City)*, 2014 NLTD(G) 7 at paragraphs 51-53.

Yours very truly,

  
for David W. Hooley, Q.C.

DWH/mm

c. Jesse Frost-Wicks  
City of Charlottetown Planning Department