

March 2, 2020

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

Attention: Philip Rafuse

Dear Mr. Rafuse:

Re: **Matthew Richard v City of Charlottetown**
Response to Amended Notice of Appeal – February 18, 2020

This letter is by way of reply to the Appellant, Matthew Richard's (the "Appellant") Amended Notice of Appeal filed with the Island Regulatory and Appeals Commission ("IRAC") on February 18, 2020, in response to the City of Charlottetown's (the "City") Response to his Notice of Appeal dated December 23, 2019.

For ease of reference, the City will reply to each additional argument as set out by the Appellant in his Amended Notice of Appeal.

1. The Appellant submits that the City did not comply with its obligations pursuant to section 23.1 of the *Planning Act*, R.S.P.E.I. 1988, c P-8.

The Appellant alleges that the City failed to comply with its obligations pursuant to section 23.1 of the *Planning Act*, R.S.P.E.I. 1988, c P-8 (the "Act"). Section 23.1 and section 28(1.1) state the following (the underlined portions are most relevant to this response):

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*20009937/00312/709409/v2

23.1 Notice of decision of Minister or council

(1) Where

- (a) the Minister makes a decision of a type described in subsection 28(1); or
- (b) the council of a municipality makes a decision of a type described in subsection 28(1.1)

the Minister or council, as the case may be, shall, within seven days of the date the decision is made, cause a written notice of the decision to be posted

- (c) on an Internet website accessible to the public; and
- (d) at a location accessible to the public during business hours.

[...]

- (ii) if the decision is made by the council of a municipality, in that municipality.

28. [...](1.1)

- (a) that is made in respect of an application by the person, or any other person, under a bylaw for
 - (i) a building, development or occupancy permit,
 - (ii) a preliminary approval of a subdivision
 - (iii) a final approval of a subdivision
- (b) to adopt an amendment to a bylaw, including
 - (i) an amendment to a zoning map established in a bylaw, or
 - (ii) an amendment to the text of a bylaw

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The Applicant, Nine Yards Studio (the "Applicant"), submitted two (2) simultaneous applications to the City:

- File #2019-055: **Subdivision and Lot Consolidation Application** - an application to consolidate 94-98 and 100-102 Dorchester Street and 91 and 93 King Street (the "Consolidation Application") {City Record Tab 2}
- File #19-508: **Variance Application** - an application to reduce the minimum lot frontage required to be eligible for bonus height from 98.4ft to approximately 80.1ft and to reduce the minimum side yard step back for the fifth floor of the proposed building to the City of Charlottetown right-of-way between King Street and Dorchester Street from 18'-0" to 4ft (the "Variance Application") {City Record Tab 3}

The Consolidation Application and the Variance Application were both approved by Council on October 15, 2019. With respect to subsection 1(c), a notice of approval of the Variance Application was posted on the City's website in accordance with the requirements set out in subsection 23.1(2) for the week ending October 18, 2019. {City Record Tabs 10 & 14 (post-filing addition)}

A notice of approval of the Consolidation Application was not posted on the City's website because Council's decision was tentative only being subject to a condition subsequent being first fulfilled - eg. provision of a final pinned survey plan being required *before* an approval could occur. A final, pinned survey plan had to be remitted to the City's Development Officer before any preliminary/final approval could occur. Thus, the City submits that none of the types of decisions outlined in section 28(1.1) are applicable to the Consolidation Application and a web posting was therefore not required.

For further clarification, while the definition of "subdivision" found at subsection 1(k)(ii) of the Act does include a lot consolidation, approval of an application to consolidate by Council does not constitute a *preliminary approval* or *final approval* of a subdivision. With respect to preliminary approval, the City would refer to section 45.3.2 of the City's *Zoning and Development Bylaws* (the "Bylaws") where it outlines the requirements for preliminary

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subdivision or lot consolidation approval. While a Development Officer has the authority to waive the requirement for preliminary subdivision or lot consolidation approval when four (4) lots or less are involved pursuant to subsection 45.3.2(a) of the *Bylaws*, there is no indication that this was provision had been waived by the Development Officer.

The City therefore contends that approval of the Consolidation Application does not constitute preliminary approval or final approval pursuant to section 28(1.1)(a)(ii) and (iii). At tab 11 of the City's Record, Greg Morrison, Planner II with the City, wrote to the Developer, Quentin Bevan of Weymouth Properties Ltd. (the "Developer"), on October 16, 2019, advising the Developer of Council's decision to "approve" the Variance Application and the Consolidation Application. Nowhere in that letter does it state that the applications have received preliminary approval or final approval, rather it requests that the Developer contact the City to proceed to next steps including provision of a pinned survey plan. Therefore, the City was not required to post Council's "approval" of the Consolidation Application in accordance with section 23.1 of the Act on their website.

In the alternative, if the Commission finds that section 28(1.1) does apply to the Consolidation Application, the City submits that the failure to post approval of the Consolidation Application on the City's website in this particular context and in this instance was merely a technicality; and, further that it did not prejudice or compromise the Appellant's position. The Variance Application and the Consolidation Application were submitted together, they were both before Council together and they were approved together. As a result, the Appellant was able to appeal in a timely manner and has suffered no prejudice. It should also be noted that if a final pinned survey plan is eventually forthcoming and the lot consolidation attains final or preliminary approval, then the notice would be published at that time and theoretically that decision could be the subject of an appeal. That said, the City suggests the appeal of both decisions occurs together to avoid a multiplicity of proceedings.

In *Schurman v Minister of Community Services and Attorney General*, Order LA99-06, the Respondent raised a preliminary issue being that the Appellant failed to serve the Notice of Appeal in accordance with section 28(6) of the Act and requested that the Appeal be dismissed. While the facts differ from the matter at hand, the Commission's comments in

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Schurman are helpful in this matter. The Commission first stated that nowhere in the Act does it state that failure to comply with the Act would bring an end to the appeal. The Commission then went on to state that the facts of the case, in combination with section 9 of the *Interpretation Act*, R.S.P.E.I. 1988, Cap. I-8 which states: "Every enactment shall be construed as being remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainments of its objects", disclose that no prejudice was suffered by the Respondent for the apparent non-compliance with section 28(6). This was mainly due to the fact that all parties were aware of the appeal, had received copies of the Notice of Appeal and were able to reply to the appeal.

In this case, the City submits that nowhere in the Act does it state that non-compliance with section 23.1 would invalidate a decision of Council. The Appellant appealed the resolution of Council approving the Consolidation Application and the Variance Application within the appeal period and the Notice of Appeal included three (3) grounds of appeal which addressed both the Consolidation Application and the Variance Application. The facts of this case in combination with section 9 of the *Interpretation Act*, *supra*, clearly suggest that the Appellant suffered no prejudice as a result of the failure to comply with section 23.1(1)(c) of the Act for the Consolidation Application.

With respect to compliance with subsection 23.1(1)(d), it has been and continues to be the City's practice that compliance with section 23.1(1)(d) is having the information in subsection 23.1(2) available to the public upon request. As soon as a decision is rendered by Council, the City of Charlottetown's Planning & Heritage Department located at 233 Queen Street, Charlottetown has the information about the decision available to the public which was the case for the Variance Application and while the City maintains that section 23.1 of the Act does not yet apply to the Consolidation Application, this information was also available at the Department. The Planning & Heritage Department is a location accessible to the public during business hours; thus, the City is compliance with subsection 23.1(1)(d).


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2. The Appellant submits that the City's decision does not comply with the objectives of the City's Official Plan.

In response to the Appellant's Amended Notice of Appeal regarding Ground 2, the City reiterates and relies upon the representations outlined in their reply to the Appellant's Notice of Appeal in a letter to IRAC dated December 27, 2019.

In addition, the City further states that members of the Planning Board considered the appropriate and relevant factors based on the information available to them in rendering their decision to approve the Variance Application and the Consolidation Application. The Appellant alleges that the Planning Board members were 'tainted' by the comments of Alex Forbes, Manager of Planning with the City. The City submits that there is no cogent evidence to suggest this; rather, Planning Board has the Department's report before them and considers what is in the report and may consider other relevant factors they feel are necessary. The Board then makes an objective assessment of the application(s) before them and render their votes accordingly.

Yours very truly,


David W. Hooley, Q.C.

DWH/mm

c. Alex Forbes
Matthew Richard