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November 29, 2023

VIA EMAIL – pjrafuse@irac.pe.ca

Philip J. Rafuse
Appeals Administrator
The Island Regulatory and Appeals Commission
National Bank Tower, Suite 501
134 Kent Street, Charlottetown PE C1A 7L1

Re: Appeal #LA23-009 – Andrea Battison v City of Charlottetown

BACKGROUND

These submissions are provided on behalf of the Developer, Prince Edward Island Housing Corporation (the “Housing Corporation”), regarding the above noted appeal (the “Appeal”) filed by Andrea Battison on April 17, 2023 against the City of Charlottetown (the “City” or “Council”).

The Appeal is in relation to the approval of a demolition permit (file 001-DEM-23) issued by the City’s Building Inspector and Development Officer for a building located at 231 Richmond Street, PID 340703, Charlottetown, PEI (the “Demolition Permit”).

On November 7, 2023, the Housing Corporation provided the Commission with written submissions raising an issue of jurisdiction. On November 10, 2023, the Commission wrote to the parties to advise that the hearing of the Appeal was postponed, and directing the parties to provide further written submissions addressing the following questions:

- 1. Do demolition permits meet the definition of “development permit” under the Planning Act such that they can be appealed to the Commission per subsection 28(1.1) of that Act?*
- 2. Is the appeal moot due to the expiry of the Demolition Permit?*

SUBMISSIONS

Question 1: Do demolition permits meet the definition of “development permit” under the Planning Act such that they can be appealed to the Commission per subsection 28(1.1) of that Act?

The Housing Corporation submits that, for the reasons set out in its written submissions dated November 7, 2023, demolition permits do not meet the definition of “*development permit*” under subsection 28(1.1) of the *Planning Act*. As such, the issuance of, or refusal to issue, demolition permits by the City cannot be appealed to the Commission under subsection 28(1.1) of the *Planning Act*.

Question 2: *Is the appeal moot due to the expiry of the Demolition Permit?*

Doctrine of Mootness

The Supreme Court of Canada has summarized the doctrine of mootness as follows:

*...The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. **Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice.** The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.¹ [emphasis added]*

There are three possible ways the Appeal may be disposed of by the Commission:

- (a) The Commission could confirm that the Demolition Permit does not meet the definition of “*development permit*” and cannot be appealed to the Commission under subsection 28(1.1) of the *Planning Act*; or
- (b) The Commission could find that the Demolition Permit is a “*development permit*” (which the Housing Corporation disputes) and is therefore appealable to the Commission under subsection 28(1.1) of the *Planning Act*. In that case, the Commission could
 - (i) confirm the City’s decision to issue the Demolition Permit, or
 - (ii) substitute the City’s decision to issue the Demolition Permit with the Commission’s own decision.²

To confirm the City’s decision would mean confirming that the Demolition Permit was valid for 60 days and is now expired. If the Commission were to substitute the City’s decision with

¹ *Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (SCC), at page 353

² *Charlottetown (City) v. Island Reg. & Appeals Com.*, 2013 PECA 10, at para. 38

its own, the Demolition Permit's period of validity could be lengthened from 60 to 90 days³, yet in that case the result would remain that same – the Demolition Permit would still have expired several months ago.

As there is no possible way for the Commission to find the Demolition Permit valid at this point, no “*present live controversy exists which affects the rights of the parties*” and the Appeal is therefore moot.

COMMISSION SHOULD DETERMINE JURISDICTION DESPITE MOOTNESS

The Housing Corporation submits that, despite the mootness of the Appeal, the Commission should exercise its discretion to decide the jurisdictional question for the reasons that follow.

A demolition permit issued under the City's *Zoning and Development Bylaw* (the “*Bylaw*”) may be valid for no more than 90 days.⁴ An appeal made under subsection 28(1.1) of the *Planning Act* may be made within 21 days of the decision at issue.⁵ The *Bylaw* also permits an aggrieved person to request that Council reconsider a decision to issue a permit within 21 days.⁶ Where a person files an appeal with the Commission under subsection 28(1.1) of the *Planning Act* and also requests that Council reconsider the decision at issue under the *Bylaw*, the Commission may hold the appeal in abeyance until the City completes its reconsideration. The *Bylaw* places no time limitation on Council's reconsideration of the issuance of a permit.

In this case, by the time the Commission issued Order LA23-08 on September 28, 2023 setting out the procedural timeline for the Appeal, the Demolition Permit had already been expired for four months.

Given that the period of time between the filing of an appeal and the Commission's issuance of a decision will inevitably exceed the maximum possible lifespan of any demolition permit issued under the *Bylaw*, if the Commission refuses to determine the jurisdictional question on the basis of the Appeal being moot, the cycle the parties are now involved in could endlessly repeat itself – the Housing Corporation would apply for and receive a demolition permit, an appeal would be filed, the demolition permit would expire and the appeal would subsequently be dismissed for mootness.

Hazelbrook v. Government of P.E.I., 2005 PESCAD 5 (“Hazelbrook”)

This scenario was considered by the PEI Supreme Court, Appeal Division (the “SCAD”) in *Hazelbrook*. In *Hazelbrook*, the Community of Hazelbrook sought judicial review of the Minister of Fisheries, Aquaculture and Environment's decision to issue two permits under the *Environmental Protection Act*. One of these permits was an excavation permit that had

³ City of Charlottetown *Zoning and Development Bylaw*, section 3.5.6

⁴ *Ibid*

⁵ *Planning Act*, RSPEI 1988, c P-8, subsection 28(1.3)

⁶ City of Charlottetown, *supra* note 3, at section 3.15.1

expired by the time the matter was considered by the SCAD. At paras. 35 and 36, the SCAD held:

35 Given the term of these permits and the time it takes to have a judicial review application heard, to dismiss the applications because the permits have expired implies that the decisions to issue the permits will continually evade a substantive review even where the Minister makes a decision which is patently unreasonable. This is not in the public interest.

36 Notwithstanding the expiration of the permits, the granting of the judicial review applications has the practical effect of informing the Minister that he or she is immediately accountable for non-compliance with the Regulations. It also has the practical effect of informing the Community and the citizens of the province generally, if there is non-compliance with the relevant legislation, they have recourse to a remedy at law.⁷ [emphasis added]

Llewellyn v. Carter et al., 2008 PESCAD 12 (“Llewellyn”)

In *Llewellyn*, the appellant sought an order that the respondent disclose certain information the respondent claimed was privileged. The appellant’s motion was denied, and the appellant appealed to the SCAD. By the time the SCAD heard the appeal, the respondent had disclosed the information sought by the appellant.⁸ The respondent argued that the appeal was, therefore, moot.⁹

The SCAD exercised its discretion to hear the appeal on its merits despite the appeal being moot and, in doing so, the SCAD set out a series of factors to consider when determining whether to exercise this discretion:

*[18] Even if I were to consider the appeal to be moot, I would nevertheless exercise my discretion and hear the appeal on its merits. **There continues to be an adversarial context to the proceeding; the expenditure of judicial resources in addressing the issues in the appeal could serve the parties at a later date when future disclosure might become an issue; and recognizing that one of the proper functions of the court is to interpret legislative provisions like the Rules of Court**, the court should address the issues of disclosure which arise in this appeal.¹⁰ [emphasis added]*

⁷ *Hazelbrook v. Government of P.E.I.*, 2005 PESCAD 5, at paras. 35 and 36

⁸ *Llewellyn v. Carter et al.*, 2008 PESCAD 12, at paras. 5 to 8

⁹ *Ibid*, at para. 16

¹⁰ *Ibid*, at para. 18

Applying *Hazelbrook* and *Llewellyn* to the Appeal:

- The lifespan of a demolition permit issued under the *Bylaw* cannot exceed 90 days. As the time it takes for the Commission to hear an appeal under the *Planning Act* will inevitably exceed 90 days, if the Commission refuses to make a determination on jurisdiction due to mootness in this case, such a determination might never be made. This is not in the public interest.
- There continues to be an adversarial context to the proceeding – the Housing Corporation remains intent on demolishing the building at 231 Richmond Street and the Appellant presumably remains opposed to said demolition.
- Addressing the question of jurisdiction in this proceeding could serve the parties and the Commission at a later date when the same issue arises, either between the parties to the Appeal or in other Commission proceedings.

For these reasons, the Housing Corporation submits that, despite the mootness of the Appeal, the Commission should exercise its discretion to decide the jurisdictional question.

CONCLUSION

The Housing Corporation submits that, despite the Appeal being moot, the Commission should exercise its discretion to decide the jurisdictional question. In doing so, the Housing Corporation submits that, for the reasons set out in its written submissions dated November 7, 2023, the Commission should find that demolition permits issued under the *Bylaw* do not meet the definition of “*development permit*” under subsection 28(1.1) of the *Planning Act*. As such, the issuance of, or refusal to issue, demolition permits by the City cannot be appealed to the Commission under subsection 28(1.1) of the *Planning Act*.

Signed,



Stephen Flanagan
Counsel to the Developer,
PEI Housing Corporation