

September 9, 2022

**VIA EMAIL**

The Island Regulatory & Appeals Commission  
Attention: Philip Rafuse  
National Bank Tower, Suite 501  
134 Kent Street  
Charlottetown, PEI  
C1A 7L1

Dear Mr. Rafuse:

**Re: New Homes Plus Inc. v City of Charlottetown – Appeal LA 22-013**

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This letter is in response to your correspondence dated August 1, 2022, requesting the City of Charlottetown’s (the “City”) Record and Reply to the Notice of Appeal filed by New Homes Plus Inc. (the “Appellant”) with the Island Regulatory and Appeals Commission (the “Commission”) on May 16, 2022 (the “Appeal”). The City’s Record was provided on September 2, 2022. Please accept this correspondence as the City’s Reply to the Notice of Appeal.

The Appellant has appealed a decision of City Council dated July 11, 2022, whereby Council denied the Appellant’s request to rezone part of the property identified as PID 773051 (the “Property”) from R-1S (Single Detached Residential) Zone to R-1N (Narrow Single Detached Residential) Zone. The request to rezone the Property is in an effort to develop the Property into 46 R-1N narrow frontage lots to construct single detached dwellings, which is 17 more lots than what is currently permitted in the R-1S zone (29 lots) (the “Application”). This Property is located in the Sandlewood Subdivision.

The City has reviewed the Appeal filed by the Appellant and at this time would request fulsome particulars now that the City’s Record has been provided. The City is reserving the right to respond to those particulars within a reasonable time of being provided those particulars. At this time, the City responds, in brief, to the Appellant’s five grounds of appeal as follows.

**David W. Hooley, Q.C.** | Senior Counsel

Direct 902 629 3903 Main 902 628 1033 Fax 902 566 2639 Email [dhooley@coxandpalmer.com](mailto:dhooley@coxandpalmer.com)

Dominion Building 97 Queen Street Suite 600 Charlottetown PEI C1A 4A9

Practicing as Professional Corporation

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I. The Rezoning was Recommended by the City's Planning & Heritage Department

The City does not dispute that the Application was recommended for approval by the City's Planning & Heritage Department (the "Department"). The City does dispute, however, that this is a valid reason for the Commission to overturn the City's ultimate decision to deny the Application.

The City submits that Council's decision to deny the Application was an appropriate exercise of Council's discretion and ultimate decision-making authority based on all of the background information provided to them. Councillors are elected officials that render votes one way or the other in Council meetings based on that background information, which includes, but is not limited to, the Department report, the Planning Board recommendation, the applicable provisions of the City's bylaws and Official Plan and the voices of the neighbouring residents who are likely to be affected by Council's decision. In the process of considering the Application, Councillors would have read and considered the Department report but at law, they are not obliged to blindly follow the recommendation included therein. This point has previously been raised before the Commission and addressed by the Commission in *Doiron v City of Charlottetown*, LA10-06, which dealt with a portion of the Property currently under appeal:

[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 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 this case, while the Department recommended approval, Planning Board recommended denying the Application and Council agreed with that recommendation. In the Council meeting on July 11, 2022 [Tab 21], where Council made their decision to deny the Application, a number of Councillors spoke as to their reasons for voting against the Application. To briefly

summarize, those reasons primarily related to the feedback received from local residents and acknowledging that the Property already allowed 29 lots to be developed on the Property. In *Doiron v City of Charlottetown*, which is similar to the facts herein, the Commission quoted from a Councillor the following:

[27] The verbatim minutes provide the Commission with insight as to the basis for Council's decision. The following remark appears to sum up Council's rationale:

*Councillor Rob Lantz: I will be very brief because I was going to say something similar to what Councillor MacDonald already said. If you read the notes from Planning staff in the report from Planning Board, it is very sound planning principles that they are advocating here, I think. I agree with Councillor MacDonald that these people bought their property understanding of the circumstances at the time and so did the developer for that matter. I did speak to Planning Board about if these are important principles to use about density, step zoning on the highways and so on and so forth that we start looking at land outside the City that is currently undeveloped or very little development on it and start planning for the future so that we are not having to deal with these rezonings after a certain parcel of land is half developed and there are residents who have certain expectations for their property.*

The reasons provided by Councillor Rivard, Councillor Jankov and Councillor McCabe in particular, emulate similar reasons to those articulated by Council in 2010, in addition to the other concerns such as safety. Local residents purchased their properties with the expectation that the Property would be developed but the addition of seventeen lots is now what they understood. Councillors have an obligation to listen to those objections from residents and bring those forward to Council.

## **II. The Proposed Rezoning Accords with Sound Planning Principles and the City's Official Plan**

The Department's Report, which we assume is the basis for this ground of appeal, is found at **Tab 17** of the City's Record. As always, the Report describes the Application, discusses the

Official Plan and any requirements from the City's Zoning & Development Bylaw (the "ZD Bylaw"), public feedback, conducts an analysis and finishes with a conclusion based on the positives, neutrals and shortcomings of the Application (page. 6). The Department did recommend approval to Planning Board, primarily based on the current demand for housing and low vacancy rate – one of the positives of the Application identified by the Department. Planning Board identified and agreed moreso with the shortcomings of the Application, and as a result, recommended to Council for denial. Council had both the Department Report and Planning Board recommendation before it and sided with the Planning Board.

The reasons support a denial were all part of the Department's analysis and discussion on the Application. This, in the City's view, establishes that Council's decision, based on a recommendation of Planning Board, was made in accordance with sound planning principles. Similarly, the Official Plan is a constant evolving document that was drafted in a way to reflect different circumstances and adapt to the needs of a growing City. While we don't dispute that the Application found support in the City's Official Plan, the City does additionally submit that there is also support found in the Official Plan for denying the Application – see page 4 [Tab 17] of the Department's Report.

The Department, the Board and Council each have differing roles in the planning process prescribed by applicable legislation and bylaws. City Councillors, as elected representatives of their constituents also have an obligation to consider the perspectives and input from their constituents. In fact, case law has recognized the obligation that elected municipal councillors have and that they should be accorded a certain latitude/deference due to the unique nature of their job (see: *Nanaimo (City) v Rascal Trucking Ltd.*, 2000 SCC 13).

### **III. Council Failed to Base their Decision on Sound Planning Principles**

The City relies on their response to the second ground of appeal as outlined herein.

### **IV. Council Failed to Provide Sound Reasons for their Decision**

In accordance with the direction from the Commission in *Doiron v City of Charlottetown*, Order LA10-06, City Councillors, in particular Councillor Rivard, Councillor McCabe and Councillor Jankov, spoke in detail regarding their reasons for denying the Application. The reasons primarily related to the current development opportunity available for the Property (without a rezoning) and the concerns from the local residents. In the City's view, those reasons, in

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addition to the other reasons articulated by the Councillors, are sound reasons for denying the Application.

**V. Council Acted Arbitrarily and Violated its Common Law Duty of Procedural Fairness**

The City denies that Council acted arbitrarily in denying the Application. Their decision was based on sound planning principles and their duty to residents as elected officials/representatives. The City further denies that the common law duty of procedural fairness was violated and would request further particulars of this allegation in order to properly respond.

Yours very truly,



David W. Hooley, Q.C. & Melanie McKenna

DWH/mm

cc. Alex Forbes, Manager of Planning & Heritage  
Iain McCarvill and Derek Key, Q.C., Counsel for the Appellant