

February 22, 2021

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

Attention: Philip J. Rafuse

Dear Mr. Rafuse:

Re: Don Read v. City of Charlottetown – Appeal #LA21001
Notice of Appeal – January 4, 2021

This letter is in response to your correspondence dated January 5, 2021 requesting the City of Charlottetown's (the "City") Record and Reply to the Notice of Appeal filed by Don Read (the "Appellant") with the Island Regulatory and Appeals Commission (the "Commission") on January 4, 2021. The City's Record was provided in electronic and paper form on or about February 16, 2021. Please accept this correspondence as the City's Reply to the Notice of Appeal.

In the Notice of Appeal, the Appellant is appealing the decision of Council on December 14, 2020, approving the application to amend the City's Zoning & Development Bylaw (PH-ZD.2-034) ("Bylaw") and the Official Plan ("OP") as it pertains to PIDs 390534, 390559 & 390542 located on Mount Edward Road (the "Application"). The particulars of Council's approval are as follows:

- Amend Appendix "B" of the Bylaw to develop land as a mixed use residential neighbourhood consisting of townhouses, apartment dwellings and a commercial health care facility along Mount Edward Road;
- Amend Appendix "A" of the OP from Low Density Residential to Comprehensive Plan Area; and

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- Amend Appendix “G” of the Bylaw (Zoning Map) to rezone a portion of PIDs 390559 and 390542 from R-2S (Low Density Residential) to CDA (Comprehensive Development Area)

For further clarity, Council approved the following for each PID:

- PID 390534: Approval of a Development Concept Plan in accordance with section 41.2 of the Bylaw to facilitate a mixed use development;
- PID 390559: Rezone a portion of this PID from Low Density Residential (R-2S) to Comprehensive Development Area (CDA) and form part of the Development Concept Plan to facilitate a mixed use development; and
- PID 390542: Rezone a portion of this PID from Low Density Residential (R-2S) to Comprehensive Development Area (CDA) and form part of the Development Concept Plan to facilitate a mixed use development.

The following is the City’s response to each ground of appeal raised by the Appellant.

- 1. Failure to consult on the City’s Traffic Master Plan which is related to, and relies on a land transfer from the development**

The City submits that the relevant findings from the Transportation / Traffic Master Plan (“TMP”) were considered prior to Council’s decision to approve the Application.

The TMP was commissioned by the City as the City had identified the need for the TMP since the area surrounding the Charlottetown Mall and along Mount Edward Road had experienced significant growth in the past 10 years and due to the large area of undeveloped lands to the north, that growth was likely going to increase. The TMP was commissioned to ‘unlock’ access to these undeveloped lands, meaning to determine the most appropriate locations to provide collector road access to this area, determine locations for internal roads and determine the feasibility of extending existing roads. In short, to facilitate the future efficient access to and connectivity of separate parcels of lands held in private ownership.

On October 29, 2020, a Special Meeting of Council was held [Tabs 28 & 29]. Council moved into a closed session pursuant to section 119(1), subsections (a), (d) and (e) of the *Municipal*

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Government Act, RSPEI 1988, c M-12.1 ("MGA") [Pg. 450]. In that meeting, Council heard from Mark MacDonald, the consultant from CBCL who was in the process of preparing the TMP. The purpose of hearing from Mr. MacDonald was to give Council an opportunity to hear the *draft* results of the TMP as it related to the development in question and so as to ensure the developer's traffic plans were not inconsistent / incompatible with the draft TMP. The TMP was discussed in closed session because it was still in draft form at the time and the findings of the TMP had potential future implications for surrounding private property owners with whom the draft TMP had not yet been discussed. The City had to balance a variety of interests including the developer's right to have his particular application processed in a timely manner, other property owners in the area, and City taxpayers. The City will lead evidence at the hearing to elaborate further on the reasons why at the time of the public meeting on the developer's application the draft TMP was being dealt with under section 119(1)(a)(d)(e). The City will present the final draft of the TMP in due course at a public meeting and at a date to be scheduled in the not too distant future.

The November 9, 2020 [Tab 32] resolution of Council approved the Application subject to five (5) conditions. One of these conditions was: "that the City's Traffic Master Plan confirms that the development does not conflict with the proposed site plan". This condition was sufficient protection for purposes of processing the developer's application in a timely manner. By the time of the November 9, 2020 Meeting of Council, the TMP was still incomplete. However, the Development Officer assigned to the application consulted with Scott Adams, Manager of Public Works, to confirm whether the City could move forward with the Application. Mr. Adams confirmed, after speaking with Mr. MacDonald from CBCL on the preliminary findings of the TMP as were relevant to the proposed development, that the only potential issue previously identified, a north-south connector through the development, was confirmed by CBCL to not be an issue for the City and the development could proceed without negative implications for the TMP to service the larger area of which the development formed one part: See Tab 39, pg. 674 of the Record, where Mr. Adams recommended from a public works perspective in relation to the TMP that the Application could move forward, conditional that the final TMP not contradict the preliminary findings of the draft TMP, - being that a north-south connector through the proposed development concept plan area was unnecessary. The City submits that it clearly and adequately considered the draft TMP prior to approval of the application on November 9, 2020.

Further, the Applicant Developer, APM Commercial ("Developer"), at the City's request, commissioned its own traffic study. The Traffic Impact Study ("TIS") [Tab 3] was posted on the Developer's website and formed part of the package and discussion at the August 26, 2020

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Public Meeting [Tab 18]. The findings of the draft TMP and the TIS were then considered by the Development Officer, in consultation with the Chief of Police and Manager of Public Works. Consideration of these findings then formed part of the recommendation from the Planning & Heritage Department (the "Department") to the Planning & Heritage Board (the "Board") and then to Council. This is shown in the September 8, 2020 Report from the Department [Tab 19, pgs. 308-309]. The City will lead oral evidence of details at the hearing.

The City submits that the statement made by Councillor Duffy on December 14, 2020, does not contradict the November 9, 2020 resolution condition and does not serve as evidence that the TMP was not properly considered in reaching Council's decision. In his comments, Councillor Duffy was referring to the relationship between the TMP and future developments, acknowledging that the purpose of the TMP was to ensure the interconnectivity of public roads to any private roads and private developments. He further noted that the decision was not contingent on the TMP but that the TMP had a bearing on the outcome, which is why it was considered. This statement is accurate.

The Commission has found in numerous previous decisions that it will not lightly substitute its own opinion for Council's opinion on zoning matters, - unless Council manifestly failed to adhere to good planning principles; the OP; the Bylaw; or, failed to adhere to the common law principles of natural justice: See for example: *Hanmac Inc. v City of Charlottetown*, LA15-06 at paras. 31-32. As such, the City submits that the Commission ought to show deference to Council's decision, as Council had sound planning reasons for the making the impugned decision and took into account all relevant considerations in approving the Application.

2. Failure of the traffic impact assessment to adequately assess traffic growth rates

The City does not agree that that the TIS failed to adequately address traffic growth rates. To the contrary, the TIS used a growth rate of 1%, which is typical for urban municipalities in the Maritimes. While the City experienced a growth rate higher than that in 2018/2019 and 2019/2020, the use of the growth rate in the TIS is for the likely *future* of Charlottetown on average. The TIS was prepared by professional traffic engineers. While they have much experience in preparing traffic impact studies, they are unable, like anyone, to predict the exact growth in population of any city in 5, 10 or 15 years. As such, the TIS engineers based their study on a number that, in their experience and with the information/evidence before them, was going to provide the most likely results. Absent the Appellant adducing expert evidence to the contrary supporting a growth rate such as 1.5% or 2.5% as suggested by the Appellant, the Commission is left with the uncontradicted expert evidence in the TIS.

3. Failure to assess cumulative traffic impacts

The Appellant alleges that the TIS failed to consider cumulative traffic impacts and only considers the impacts of the proposed development itself.

The City respectfully disagrees. The TIS [Tab 2] evaluates traffic in existing conditions, traffic in future conditions without development and future conditions with development. Findings for these evaluations can be found at sections 2, 3 and 4 of the TIS, respectively [Pgs. 10-24]. Section 5 further provides recommendations based on the projected 2025 conditions. Neither the City, nor the developer, nor the Appellant is in a position where they can predict with absolute certainty what the future of this area of the City will look like in 5, 10 or 15 years. There are too many variables. As a result, the City makes decisions based on the Application and the supporting evidence before them. The City must balance the interests of the intended developer together with the general public bearing in mind the provisions of the OP, the Bylaw, and good planning principles. In this case, the Developer was required by the City to provide a traffic study and he complied. The TIS was reviewed by the Department, in consultation with the Chief of Police and Manager of Public Works, who collectively determined that the results of the TIS confirmed that there would be no operational issues with the proposed development.

The Appellant alleges that “many roads/junctions are already at capacity”. The City submits that this is merely an anecdotal opinion and the Appellant has yet to produce any cogent expert evidence to support this contention. It is incumbent on the Appellant to produce such expert evidence to support any such finding by the Commission. The Commission has indicated as much in previous decisions. The TIS, at pages 18-19 [Tab 3, pgs. 25-26], identified the intersections relevant to this development, identified potential issue related to these intersections and outlined the proposed improvements and mitigation techniques that should be used. This development forms part of a natural extension of the existing largely developed commercial and residential area that abuts the subject properties. Much of the necessary interconnecting road infrastructure is already in place so as to not cause concern for the convenience, health and/or safety of the occupants and residents, as per section 6.3 of the Bylaw. According to the TIS the ‘local streets’ in this area are designed to withstand increased traffic and have a proven ability to do so as are the local collector streets.

Furthermore, as part of Council's approval, the Developer has to deed to the City, at no cost, the ‘future road as shown on the comprehensive development plan’ prior to the issuance of any Building & Development Permits [Tab 32, pg. 474]. The ‘future road’ will be a continuance

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of Spencer Drive along the north boundary of the development connecting to Mount Edward Road [Tab 19, pg. 517]. This condition is intended to further improve traffic flow in this area and provide alternate traffic routes for residential and commercial traffic in this area.

4. Failure to carry out satisfactory and appropriate public consultation in accordance with the council code of conduct

It is the City's position that the public consultation process was completed in accordance with the Council Code of Conduct Bylaw and the Bylaw. Specifically, there was proper compliance with section 8.8 which, reads as follows:

8.8. Members of Council have a duty to be as open as possible about their decisions and actions. This means communicating appropriate information openly to the public about decision-making processes and issues being considered, encouraging appropriate public participation, communicating clearly and providing appropriate means for recourse and feedback

The public was made aware of the decision making processes as well as the issues being considered. While some residents, including the Appellant, may disagree with Council's decision, the Commission has held that public opinion alone is insufficient to overcome decisions based on objective and reliable lay and expert evidence that is made in accordance with sound planning principles and the principles of natural justice: See for example: *Queens County Condominium Corporation No. 40 v City of Charlottetown*, LA18-02).

The City further states that appropriate public participation was encouraged and communication was clear. In accordance with section 3.10.4 of the Zoning and Development Bylaw, Notice of the Public Meeting was posted on the subject property and mailed to property owners within 100 meters of the subject properties on Thursday, August 13, 2020; and was published in the Saturday, August 15, 2020 and Saturday, August 22, 2020 editions of The Guardian. The Public Meeting was subsequently held on August 26, 2020 [Tabs 10-13].

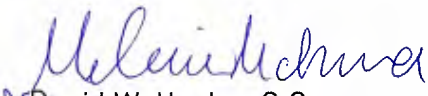
We respectfully disagree with the Appellant's statement that the City's failure to provide the local residents with the draft TMP resulted in Council failing to encourage appropriate participation in accordance with section 8.8 of the Code of Conduct Bylaw. The TMP was not disclosed to the public at the time for the reasons as stated above in response to Issue one. At the time, the draft TMP had to be dealt with under section 119(1) of the MGA. A final draft will be presented to the public in due course. Council's approval was conditional upon the TIS

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and final TMP being consistent. At the Public Meeting, the Developer gave a presentation on the details of the development and the TIS. The TIS was made available to the public through the City and the Developer. Further, Ian Harper, the Developer's Vice President of Engineering, discussed the plans and considerations for road access.

Finally, Council provided the appropriate means for public recourse and feedback. Evidence of same includes the Public Meeting as well as the receipt of numerous letters expressing both support (43) and concern (6) over the development [Tab 14].

Yours very truly,



David W. Hooley, Q.C.

DWH/mm

cc. Don Read, Appellant
Timothy R. Banks, President of APM Commercial
Alex Forbes, Manager of Planning