

October 7, 2021

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

Attention: Philip J. Rafuse

Dear Mr. Rafuse:

**Re: Andrea Battison v City of Charlottetown – LA21013
Notice of Appeal – July 2, 2021**

This letter is in response to your correspondence requesting the City of Charlottetown's (the "City") Record and Reply to the Notice of Appeal filed by Andrea Battison (the "Appellant") with the Island Regulatory and Appeals Commission (the "Commission") on July 2, 2021. The City's Record was provided on or about October 1, 2021. Please accept this correspondence as the City's Reply to the Notice of Appeal.

The Appellant has appealed a decision of Council dated June 14, 2021, approving an application by the Developer, APM Commercial (the "Developer") for a site-specific exemption to permit a six-story apartment building to be constructed at 199 Grafton Street (PID 342791) (the "Property") (the "Application"). The particulars of Council's approval are as follows:

- Amend Appendix "C" of the Zoning & Development Bylaw (the "Bylaw") to exempt the Property from:
 - Section 30.2, "Regulations for Permitted Uses" in the Downtown Mixed Use Neighbourhood (DMUN) Zone; and
 - Section 30.3, "Bonus Height Development Standards" in the Downtown Mixed Use Neighbourhood (DMUN) Zone.

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in order to allow a six-story, 84-unit apartment building with parking located within and under the building, subject to a number of conditions, which are found in Council's initial resolution [Tab 25] (the "Development").

The Appellant has submitted a lengthy document outlining her grounds of appeal. She summarizes her main concerns on page 21 and the City's response to each of these grounds is as follows.

- 1. The City failed/neglected to request or conduct studies or analyses to ensure that the bonus height and the massing of the project would successfully mitigate shadow, visual, and heritage impacts.**

The Appellant suggests that the City should have obtained additional studies to assess the impact of the Development on neighbouring properties. The City submits that such a decision is within the discretion of the assigned Development Officer ("DO") and that valid reasons existed as to why additional studies were not required.

Section 3.12.5 of the City's Zoning & Development Bylaw (the "Bylaw") outlines the requirements for an application for Bonus Height:

3.12.5 An application for bonus height shall be submitted with sufficient information as may be required by the Development Officer for the purpose of adequately assessing the proposal, including:

- e.** Such additional information as deemed necessary by the Development Officer, including studies or analyses to ensure that the proposed Bonus Height and/or its massing meet the desired performance standards with respect to mitigating visual, shadow, wind, and traffic impacts.

As is stated, the requirement for any additional studies is *discretionary* and is a decision assumed by the DO as they are the person who is most familiar with the application and the requirements under the Bylaw. The City intends to present the reasoning behind these decisions through the direct testimony of the DO at the hearing. Nevertheless, for purposes of this reply, the City offers the fact that the DO considered the entirety of the circumstances surrounding the Development, which included the fact that the Polyclinic, which neighbours

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the Development, is a five-storey building, there is a four-storey apartment building located across the street and the Zion Presbyterian Church is a large building in height across the street. Furthermore, the Development is located in the Downtown Mixed Use Neighbourhood (DMUN) Zone. The DMUN Zone contemplates a bonus height of up to 60.7 ft. meaning, in the City's view, that some shadow effect is implicit. To date, the City has not heard from their direct neighbours about any issues related to a possible shadow effect.

The Appellant further suggests that a visual impact study, traffic impact study and heritage impact should have been required by the City. The City reiterates the discretionary nature of subsection 3.12.5(e) and states that a determination as to whether additional studies and/or analyses are required is determined on a case-by-case basis.

- 2. The City failed to obtain the new renderings of Clarke Street from the developer as requested at the public consultation meeting April 27, 2021, before continuing with their assessment of the project proposal.**

The City submits that it was the Appellant who requested a copy of the renderings of Clarke Street from the Developer [Tab 19, page 229]. It was not City Council or City staff that requested the renderings of Clarke Street. In response, the Developer said he *could* provide them but did not promise to do so, as alleged by the Appellant.

In order to process applications by Developers or home owners, the City is bound to follow the requirements set out in the Bylaw. In this case, the City was in possession of the information that was required by the Bylaw, which allowed the City to process the Application in a timely and fully informed manner.

- 3. The City failed to obtain documentation and plans for a four-storey building option that was included in the site specific exemption amendment for the proposal at 199 Grafton Street.**

The resolution passed by the City [Tab 25] was to allow for construction of a six-storey apartment building, not a four-storey apartment building. The City does not require 'documentation and plans' for an application that is not before them.

The Appellant is referring to the following portion of the site specific exemption request from the Developer, which can be found at [Tab 20, page 238]:

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- *Height variance to six storeys if bonus height can be justified – 60.7 ft. is permitted. Proposing 70.4 ft. therefore requires a 9.7 ft. variance*
- *Height variance to four storeys if bonus height cannot be justified – 39.4 ft. is permitted. Proposing 747.6 ft. to top of the 4th storey therefore requires an 8.2 ft. variance.*

Following the City's approval of the Application, in order to proceed with the request for bonus height, the Developer must submit a Bonus Height Application, which will be reviewed by the City's Planning Committee and if approved, the City's Affordable Housing Incentive Program. If the Bonus Height Application is approved, the Developer will proceed with the six-storey option. If the Bonus Height Application is denied, the Developer would then be permitted to proceed with a four-storey building as it was part of Council's approval.

The Appellant has alleged that the Councilors improperly assumed that the six-storey building and the four-storey building would be the same. Yes, that is the assumption and is always the assumption that as the process continues, the design and impact of the development will remain the same. If that is not the case, and the design and/or impact changes from what was shown at the public meeting and approved by Council, the Developer will need to seek new approval by the City. This was and is contemplated by the City's approval – see section (a) and (d) of Council's resolution at [Tab 25] – and the terms of the Development Agreement, which is not yet finalized.

- 4. The City made errors in the variances that were requested and/or provided the wrong plans for evaluation, and/or omitted variances required for the project to proceed as proposed.**

The Appellant seems to suggest that the City processed six separate variance and there were errors present in each. The City disagrees with that characterization of the evidence. The Developer sought a site specific exemption [Tab 5] and the Planning Department Reports [Tabs 6 and 20] contemplated this. A site specific exemption is a more rigorous process in that the entire development is collectively processed as a whole. The list of variance provisions noted in the Report, which were eventually approved by Council, are highlighted primarily to indicate how the proposed development differs from what exactly is contemplated in the Bylaw for an 'as of right' development – they are not highlighted as individual variances as the Application was not seeking individual variances.

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When the City processes an application for a site specific exemption, they are guided by the requirements set out in the Bylaw, in particular, section 3.11.1 of the Bylaw, where the City may authorize a site specific exemption if it is not contrary to the City's Official Plan, if the proposed use is sufficiently similar or compatible with permitted uses and if the proposed use does not undermine the overall integrity of the Zone, is in the public interest and is consistent with good planning principles. In considering these factors, the City refers to the application itself and all of the plans, including site plans and elevations, and relies on those documents to support the City's decision. The plans submitted, which are found at **Tab 20, page 248**, were relied on and there is no evidence to suggest they were incorrect.

5. The City failed to follow the correct order for obtaining an external design review if it accepts the review submitted March 19, 2021. External design reviews are to occur only after any oversight in the City's standard review process, at worst, it could be interpreted as bias towards this proposal and/or proponent by the City administration.
 - a. The external design review also contained errors and/or oversights with respect to aspects of the 500 lot Standards and Guidelines.

The Design Review process is as outlined at section 3.14 of the Bylaw. It is applicable herein as the Property is located within the 500 Lot Area and the Development will provide affordable housing. Respectfully, nowhere in section 3.14 of the Bylaw does it state when in the processing of an application that Design Review must be completed. The only indication of any timeline in section 3.14 is that if design review applies, a building and/or development permit cannot be issued until the design review process is complete. The Design Review Report was prepared by Fellows & Company Limited on March 19, 2021 [**Tab 2, page 44**], reviewed by the Department on March 22, 2021 [**Tab 2, page 3**] and reviewed by the Design Review Board on March 22, 2021 [**Tab 3**].

The Appellant has made a number of allegations regarding the technical aspects of the Design Review Report. The Report was completed by Peter Fellows, an Architect who resides in New Brunswick, who is a professional in his field. Respectfully, the Appellant's disagreements with Mr. Fellows' methodology or analysis is not sufficient to overcome his professional, unbiased and educated opinion.

Furthermore, the Appellant suggests that accepting the 'prematurely submitted design review' could be interpreted as preferential treatment, or bias' by the City. The City takes allegations

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of bias very seriously but more than a mere allegation or statement of bias is needed in order to substantiate such a serious allegation. The Appellant has not produced any evidence beyond her assertions of possible bias and the City submits that no such evidence exists [see: *Old St. Boniface Residents Association Inc. v Winnipeg (City)*, 1990 CarswellMan 235].

- 6. The City has failed to consider the health and safety of occupants, nearby residents and/or the general public, be they pedestrians or motorists, who use Clarke Street or the Prince Street and Clarke Street corner.**

The City disagrees with the Appellants suggestion that the City failed to consider the health and safety of City residents when approving the Application. The City is representative of its residents, and the health and safety of the City's residents is of utmost importance. The Appellant states that approval of the Application is contrary to section 3.3.8(e), which states that a development must not be detrimental to the residents in the vicinity or general public. Respectfully, this section is immaterial to the Application as it was not an application for a Development and/or Building Permit. Nevertheless, the factors in section 3.3.8(e) always form part of the City's decision making process.

To further this point, the City refers the Commission to the *draft* Development Agreement, found at **Tab 46, page 1322**, where the City and Developer agree to certain requirements of the Developer related to safety of surrounding residents and the general public – sections 2.8, 2.9, 2.11, 2.17, 2.18, 2.22, 2.23 and 2.24 for example. In addition to the Planning Department's involvement, the Manager of Public Works Department is consulted to ensure that appropriate measures are taken from that perspective.

Finally, the Developer did and continues to consider the safety of surrounding residents and the general public. At the public meeting [**Tab 19, page 228**], the Developer, when questioned by the Appellant, indicated his willingness to implement, if needed, additional safety measures for pedestrians.

- 7. Design Review Board members were presented with incorrect information.**

The City reiterates their response noted in ground 5 herein.

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- 8. Planning Board members expressed concern regarding insufficient understanding of the use of affordable housing for bonus height applications which was not clarified prior to their voting on this application.**

The City disagrees that the questions surrounding the Affordable Housing Program and Bonus Height Applications were not clarified prior to making a recommendation to Council. The discussion took place at the May 3, 2021 meeting of the Planning and Heritage Board and questions arose from some of the members seeking clarification on how the Provincial and Federal affordable housing programs worked in combination with the bonus height incentive for the City [Tab 22]. The questions were answered by various members of the Planning Department, including Alex Forbes and Robert Zilke. A further discussion took place to clarify that it was not the City setting the parameters for these Provincial and Federal programs and it was only the City's role to determine whether or not the Developer would be granted two additional floors pursuant to the bonus height provisions in the Bylaw.

It is important to remember that a decision to approve or deny an application is not made by the Planning and Heritage Board. The Board evaluates the applications and makes a recommendation to Council for decision. In the City's view, the Planning and Heritage Board members undertook a thorough and informative discussion and in the end, were able to make a fully informed recommendation to Council.

- 9. The City failed to follow good planning principles when evaluating, process, and voting on this application.**

The City submits that the decision to approve the Application was a decision made in accordance with good planning principles. As the Commission knows, in order to prove that a decision was not made in accordance with good planning principles, an Appellant is required to show more than mere anecdotal evidence of their opinion and disagreement and must provide expert evidence to overturn the decisions made by Council on recommendations from expert planners based on objective and reliable evidence. Public opinion alone is insufficient to overturn these decisions and this has been upheld by the Commission on a number of occasions [see: *Queens County Condominium Corporation No. 40 v City of Charlottetown*, Order LA18-02].

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Yours very truly,


for David W. Hooley, Q.C.
DWH/mm

cc. Alex Forbes, Manager of the Planning & Heritage Department
Tim Banks, Developer
Andrea Battison, Appellant