February 6, 2023

VIA HAND DELIVERY & EMAIL (*PJRafuse@irac.pe.ca*)

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

Dear Mr. Rafuse:

Re: M. Lynn Murray v City of Charlottetown – Appeal LA22021

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 M. Lynn Murray, K.C. (the "Appellant") with the Island Regulatory and Appeals Commission (the "Commission") on December 7, 2022 (the "Appeal"). The City's Record was provided on January 30, 2023. Please accept this correspondence as the City's Reply to the Notice of Appeal.

The Appellant has appealed a decision of the City dated November 17, 2022, approving a request by the Applicant Developer, Parker Developments (the "Applicant"), for issuance of a Development Permit as it relates to the development of a twelve-unit apartment building at 1 Palmers Lane (the "Permit") [**Tab 14**]. The Appellant has further appealed the City's decision to approve the lot subdivision/consolidation of Lots 22-1 and 22-2 on Palmer's Lane [**Tab 9 and Tab 15, Page 75**].

The Appellant has appealed the Permit and Consolidation on the following grounds:

David W. Hooley, Q.C. |Senior Counsel
Direct 902 629 3903 ***Main*** 902 628 1033 ***Fax*** 902 566 2639 ***Email*** dhooley@coxandpalmer.com
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Practicing as Professional Corporation

1. The City of Charlottetown failed to follow its proper process as set out in its bylaws, the *Planning Act,* and the law in general, including the duty of procedural fairness; and,

2. The City of Charlottetown failed to render a decision which accords with sound planning principles in the field of land use planning, including ensuring proper site boundaries and setbacks were followed.

The City's response to said grounds of appeal are as follows:

Ground 1: Proper Process and Procedure

The Applicant submitted the Building & Development Permit Application, along with a Moving and Demolition Permit Application and Subdivision and Lot Consolidation Application all on December 3, 2021. The Applications were "officially received" by the Department on January 17, 2022, when payment of the applicable permitting fees was made. The applications subject to this Appeal were approved on November 17, 2022.

As stated in the Notice of Appeal [**Tab 15**], this ground does not indicate what errors/omissions in the procedure/process prescribed by the City's *Zoning & Development Bylaw* (the "Bylaw") were made by the City in processing the Appellant's applications. The City recognizes that the Appellant likely needs to review the Record (filed and served on January 30, 2023) before it can provide full and complete particulars of any alleged shortcomings in the City's process.

The City therefore requests that the Appellant provide full and complete particulars of each and every error and/or omission which the Appellant intends to rely upon at the hearing within a reasonable time after receiving the Record. As a matter of due process of the appeal, the City is entitled to know the case to be met before the hearing and is able to proffer an informed response to this first ground of appeal. The City suggests thirty-days from the date of receipt of the Record should be sufficient time for the Appellant to provide these particulars, but defers to the Commission's direction.

It is the City's position that proper process and procedure was followed; however, in the alternative, the City submits that if any procedural error(s) or omission(s) occurred, any shortcomings were merely technical, were not material, and did not result in procedural unfairness. Any technical error that may have been made did not affect the ultimate outcome and a different result would not have followed had the proper procedure been followed.

Queens County Condo Corp. v City, LA18-02 at paras 1, 20, 32, and 61.

The City reiterates that due process of this appeal mandates that the Appellant provide detailed particulars as to the specific shortcomings in its procedure as is alleged by this ground of appeal. For example, what sections of the Bylaw were violated and why or how so.

Ground 2: Sound Planning Principles

It is the City's position that both decisions were made in compliance with sound planning principles; and, similarly to the City's response to the first ground of appeal, the City requests particulars regarding this ground of appeal. Past decisions of the Commission have stipulated that allegations of departures from sound planning principles generally require the appellant to lead expert evidence from a professional land use planner.

Queens County Condo Corp., Supra, at para 41.
Andrea Battison v City of Charlottetown, LA20-02 at paras 50-52.

Now that the Appellant has the Record, the City understands that the Appellant is in the process of commissioning a technical review. The City looks forward to receipt of an experts report in due course.

Relief Sought by the Appellant

In the Notice of Appeal, the Appellant seeks the following relief:

> *The Commission quash the approval of the Development Permit 009-BLD-22 and Lot Subdivision 002-LS-22.*

It is the City's position that (1) the City followed the proper process and procedure in making a decision on the application before it and (2) the City's decision with respect to the application had merit based on sound planning principles [*Donna Stringer v Minister of Communities, Land and Environment,* Order LA17-06 at paragraphs 52, 58, 64].

Yours very truly,

Maggie Hughes

For: David W. Hooley, K.C. & Maggie Hughes

DWH/mh

CC. Alex Forbes, Manager of Planning & Heritage Department
Parker Perry, Parker Developments, Developer
Iain McCarvill, Counsel for the Appellant

THE ISLAND REGULATORY AND APPEALS COMMISSION
Prince Edward Island
Île-du-Prince-Édouard
CANADA

Docket: **LA17-012**
Order: **LA18-02**

IN THE MATTER of an appeal by Queens County Condominium Corporation No. 40, of a decision by the City of Charlottetown, dated November 27, 2017.

BEFORE THE COMMISSION ON Wednesday, July 11, 2018.

J. Scott MacKenzie, Q.C., Chair
Jean Tingley, Commissioner
John Broderick, Commissioner

ORDER

CERTIFIED A TRUE COPY

Philip Rafuse,
Appeals Administrator,
Island Regulatory & Appeals Commission

IN THE MATTER of an appeal by Queens County Condominium Corporation No. 40, of a decision by the City of Charlottetown, dated November 27, 2017.

Contents

IN THE MATTER of an appeal by Queens County Condominium Corporation No. 40, of a decision by the City of Charlottetown, dated November 27, 2017.

Appearances & Witnesses

1. **For the Appellant, Queens County Condominium Corporation No. 40.**

   Counsel:
   Matthew J.W. Bradley, Carr, Stevenson & MacKay

   Witnesses:
   Daniel Hurnick
   Mary MacInnis
   Betty Fraser
   Ernie MacAulay

2. **For the Respondent, City of Charlottetown**

   Counsel:
   David W. Hooley, Q.C., Cox & Palmer
   Charity L. Hogan

   Witnesses:
   Jesse Morton
   Alex Forbes

3. **For the Developer, APM Construction Services**

   Representative:
   Tim Banks

   Witnesses:
   Tim Banks
   Ian Harper
   Cain Arsenault

Reasons for Order

Decision

1. The Island Regulatory and Appeals Commission (the "Commission") is satisfied that while there were some technical deficiencies, the decision of the City of Charlottetown (the "City") to approve a site-specific bylaw amendment for civic addresses 55 and 59 Richmond Street in Charlottetown (the "Property") was made in accordance with the provisions of the Zoning and Subdivision Bylaw, the Official Plan, and was based on sound planning principles. The appeal by the Queens County Condominium Corporation No. 40 ("Condo Corp") is, therefore, denied and the decision of the City is hereby confirmed.

Preliminary Matter

2. By agreement of the parties, the hearing began on May 16, 2018 and ended on May 18, 2018. At the outset, the developer, APM Construction Services ("APM"), raised a preliminary matter related to a possible conflict of interest arising out of the Chair's past representation of the developer of the Rochford Condominium building (the "Rochford Condominium"). Condo Corp represents current condominium owners in the Rochford Condominium, which is located at 41 Richmond Street in Charlottetown and adjacent to the Property.

3. The Chair was appointed to the Commission on April 28, 2014. He ceased practising law at that time. While in practice, the Chair acted as legal counsel for the corporation that was the developer of the Rochford Condominium and acted as legal counsel on the incorporation of Condo Corp. The Chair also acted as legal counsel for the developer and Condo Corp on the sale of condominium units. The Chair did not act as legal counsel on behalf of any condominium owners on the purchase of their units. Since his appointment, the Chair has not acted for, or provided advice to, Condo Corp or any of its condominium owners.

4. The Commission determined that there was no conflict of interest – real or perceived- on the part of the Chair and all parties confirmed at the hearing that they did not have any objections on the ground of conflict of interest and consented to the participation of the Chair.

Overview

5. APM wants to develop a four-storey, 23-unit apartment dwelling on the Property (the "Development"). Condo Corp opposes the Development. The issue in this appeal is the site-specific amendment made by Council to the Zoning and Development Bylaw (the "Bylaw") on November 27, 2017 (the "Amendment"). The Amendment reads as follows:

> *For a site specific bylaw amendment to the Downtown Neighbourhood (DN) Zone (including a minor variance to reduce the minimum frontage from 82 feet to 74.5 feet, a major variance to reduce the minimum grade level height from 13 feet to 9.5 feet) to permit a four storey, 23-unit apartment dwelling*

on the consolidated property at 55 Richmond Street (PID# 339911) and 59 Richmond Street (PID#339929).[1]

6. On December 15, 2017, Condo Corp filed a notice of appeal under section 28 of the *Planning Act*[2] alleging a number of errors.[3] There is no dispute amongst the parties that the Commission has jurisdiction to hear the appeal.

7. The decision by the City on November 27, 2017 was the culmination of a process initiated by APM on December 19, 2016 when it filed the first of two applications seeking a site-specific amendment for the Property. Although there are some differences between the two applications, APM, at all times, sought to develop a four-storey, 23-unit apartment building on the Property. With the consent of all parties, the City's record before the Commission included materials related to both applications.

First Application filed December 19, 2016

8. APM's initial application proceeded through various stages of the City's planning process before it was withdrawn by APM in July 2017. It was the subject of four reports by City staff to planning board,[4] was discussed at planning board on four occasions,[5] and came before Council six times,[6] including at a public meeting on February 28, 2017.[7]

9. Condo Corp raised its initial concerns with the Development on March 5, 2017. In correspondence to the City, Daniel Hurnick ("Hurnick") cited issues with parking availability, space for waste/recycling bins, and the proximity between the Rochford Condominium and the Development.[8]

10. On March 13, 2017, planning board recommended that Council approve APM's amendment request.[9] Council deferred, citing concerns over APM's request to provide cash in lieu of on-site parking.[10] APM made some modifications to its proposal prior to Council's meeting on April 10, 2017, including that APM would enter into a parking lease for thirteen parking spaces with the Charlottetown Area Development Corporation ("CADC") for a ten-year term.[11] Council again deferred consideration of the application

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[1] Exhibit R1, Tab 31. See also Notice of Appeal, Exhibit A1.
[2] RSPEI 1988, c P-8.
[3] Exhibit A1.
[4] Exhibit R3, Tabs 6 (February 1, 2017), 21 (March 2, 2017) and 28 (March 31, 2017); Exhibit R4, Tab 40 (April 26, 2017).
[5] Exhibit R3, Tabs 5 (Heritage Committee regarding demolition, January 31, 2017), 22 (March 6, 2017) and 30 (April 3, 2017); Exhibit R4 Tabs 41 (May 1, 2017) and 54 (July 4, 2017).
[6] Exhibit R3, Tabs 9 (February 14, 2017), 19 (February 28, 2017), 24 (March 13, 2017) and 35 (April 10, 2017); Exhibit R4, Tabs 43 (for information purposes, May 8, 2017) and 55 (July 10, 2017).
[7] Exhibit R3, Tab 19.
[8] Exhibit R3, Tab 20(e). Hurnick raised additional concerns regarding proximity, privacy, and security in correspondence dated April 5, 2017. Exhibit R3, Tab 28.
[9] Exhibit R3, Tab 23. The planning board motion in support of this recommendation is dated March 6, 2017 and found at Exhibit R3, Tab 22.
[10] Exhibit R3, Tabs 23, 24, and 25.
[11] Exhibit R3, Tabs 32, 34, and 35.

pending receipt of an agreement for the thirteen parking spaces and to receive a report on rectifying the balcony placement next to the Rochford Condominium.[12]

11. On May 2, 2017, the City contacted APM and advised that the frontage used by APM on its application was in error and that the actual street frontage of the Property was less than originally stated. The City advised that a variance may be required to reduce the required street frontage of the Property and, further, that the application may be required to undergo a new public notification and meeting process.[13] On July 10, 2017, Council approved APM's request to withdraw and re-submit its application.[14]

12. **Second Application filed July 17, 2017**

13. On July 17, 2017, APM filed its second application with the City.[15] The application included a request for a minor variance to reflect the actual (reduced) street frontage of the Property. On July 28, 2018, City staff recommended to planning board that it recommend to Council that the application proceed to a public meeting.[16]

14. On August 14, 2017, Council refused APM's request to proceed to a public consultation.[17] APM filed a notice of appeal with the Commission.[18] The Commission reviewed the appeal documents and the record of the City. The record disclosed that the City had erred and failed to follow the proper procedure required under the Bylaw. Commission staff were instructed to meet with APM and the City's solicitor. Subsequent to that meeting, on October 10, 2017 the City rescinded its decision of August 14, 2017 and decided to proceed with the public consultation.[19] As a result, APM did not proceed with its appeal.

15. On October 19, 2017, the City issued notice of a public meeting scheduled for November 2, 2017.[20]

16. In response to the notice, a number of members of the public, including some of the witnesses for Condo Corp, filed written correspondence with the City both for and against the Development.[21] This correspondence was filed with the Commission as part of the City's record.[22]

17. A public meeting was held on November 2, 2017. Tim Banks ("Banks") gave a presentation on behalf of APM outlining the Development. Banks answered questions from Council and members of the public.[23] Hurnick gave a presentation on behalf of Condo Corp in response to Banks.[24] Both presentations were filed with the Commission as part of the

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[12] Exhibit R3, Tabs 35 and 36.
[13] Exhibit R4, Tab 41.
[14] Exhibit R4, Tabs 55 and 56.
[15] Exhibit R4, Tab 60.
[16] Exhibit R4, Tab 61. Planning board agreed with the staff recommendation. See Exhibit R4, Tabs 62 and 64.
[17] Exhibit R4, Tabs 65, 66 and 68.
[18] Commission Docket LA17-005.
[19] Exhibit R1, Tab 3.
[20] Exhibit R1, Tab 5. See also Exhibit R9.
[21] City staff advised Council that as of November 2, 2017, 38 letters were received: 32 in favour and 6 against. Exhibit R1, Tab 20.
[22] Exhibit R1, Tab 5.
[23] Exhibit R1, Tab 24; Exhibit D1.
[24] Exhibit A2.

City's record. Both Hurnick and Banks also expanded upon their presentations during their testimony at the hearing.

18. On November 14, 2017, the Amendment passed first and second reading.[25] On November 27, 2017, the Amendment passed third reading.[26]

Issues

19. Condo Corp raised a number of arguments in its appeal. The Commission has distilled these arguments in light of the evidence at the hearing. Condo Corp makes three primary submissions:

    a. Did the City fail to follow the proper procedure as set out in its Bylaw and err by issuing notice of a public meeting before APM obtained conditional design review approval?

    b. Did the City err by failing to follow the advice of its planning staff?

    c. Is the decision of the City to permit the Development consistent with good or sound planning principles?

Analysis

A. Design Review Standards Procedure

20. Condo Corp argued that the City erred in failing to obtain conditional design review approval before issuing notice of the November 2, 2017 public meeting. Condo Corp contends that this approval is required under section 9.10.1 of the Bylaw. The Commission agrees, but finds that this technical error was not material and did not result in any unfairness. The deficiency was also not of sufficient weight to affect the ultimate outcome of the appeal.

21. Section 9 of the Bylaw sets out design review standards that apply to the 500 Lot Area of the City (the "Area"), including the Downtown Neighbourhood Zone where the Property is located. Witnesses for the City explained to the Commission that the design review process was created to recognize the unique history and structure of the Area and to ensure that future development is compatible with its special character. In essence, the design review process provides an additional level of oversight, including a review by the heritage board for the City and an external architect.

22. The design reviewer considers a proposed building's exterior appearance with reference to the design standards in the Bylaw and the 500 Lot Standards and Guidelines (the "Guidelines").[27] According to the City, the reviewer provides comments and indicates if the proposal meets the design standards and the Guidelines. The reviewer does not re-design the building.

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[25] Exhibit R1, Tab 24.

[26] Exhibit R1, Tab 31.

[27] See also, Bylaw, ss.9.8-9.9.

23. It was not contested that the Development, being a new construction project with more than four units, was subject to the design review process.[28] It was also not strenuously contested that the Development was a "substantive application."[29] Substantive applications are subject to "all applicable provisions" of the Bylaw, including the design review standards."[30]

24. The application by APM sought to increase the maximum storey height in the Bylaw (from three storeys to four storeys),[31] which triggered a public consultation process (a public meeting).[32] The Commission heard testimony that, where section 4.79 of the Bylaw is engaged, the City follows the process set out in section 4.29 of the Bylaw.[33] The process was described by the City as being "rigorous."

25. Section 9.10.1.b of the Bylaw states that substantive applications "must first receive conditional approval from the external design reviewer prior to public notification being sent on any other matters."

26. The City argues that section 9.10 of the Bylaw was not engaged by APM's application because it only applies to applications where there is no requirement for a public meeting; that is, the section creates a public consultation process where there otherwise would be none. The Commission disagrees with the City's position. Section 9.10 of the Bylaw distinguishes between public *notification* and public *consultation*. Section 9.10.1 applies to applications that require public *notification* under the Bylaw. It clearly provides that conditional design review must be completed before that *notification* is issued. Section 9.10.2 goes on to add an additional and more onerous public *consultation* process in two specific instances, neither of which is applicable in this case.

27. The text chosen by the City in section 9.10.1 of the Bylaw requires conditional design review to be completed before notification is issued of the public meeting contemplated under section 4.29 of the Bylaw. Conditional approval by a design reviewer was not obtained before the City issued its notice of the public meeting in October 2017. As the record shows, the design review process was not initiated by the City until March 2018.[34] This was an error.

28. However, as counsel for the City noted in his closing submissions, nothing turns on this error.

29. It is well-established that the Commission hears appeals by way of a hearing *de novo*. Given that the City erred in failing to obtain conditional approval from a design reviewer before issuing notice of the public meeting, the Commission can and has reviewed APM's submission to the design reviewer and the subsequent reports.[35] Upon review, the

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[28] Bylaw, s.9.3.12.
[29] Bylaw, s.9.3.12.
[30] Bylaw, s.9.8.1.
[31] Bylaw, s.4.79.2.
[32] Bylaw, s.4.29.
[33] As per the Bylaw, s.4.79.1.b.
[34] Exhibit D2.
[35] Exhibits D2-D4.

Commission finds that approval was ultimately granted.[36] In the circumstances of this case, the City's error was, therefore, a technical one.

30. The plans submitted for design review were filed with the Commission by APM.[37] The development submitted for design review appears to the Commission to be substantially similar to that put forward at the public meeting.[38] For example, neither development has patios on the ground floor, or balconies on the second floor, adjacent to the Rochford Condominium.[39]

31. The Commission also notes that the recommendations from the design reviewer do not speak to Condo Corp's main concerns regarding proximity, parking, or density. The design reviewer recommended changes to the building entrance, including materials and detailing.[40] These changes were made by APM and accepted by the design reviewer.[41]

32. In conclusion, the Commission is not persuaded that a different result would have followed had design review been completed before the City provided notice of the public meeting. The plans submitted by APM and approved by the design reviewer are substantially similar to the plans presented by APM at the public meeting. The Commission does not accept Condo Corp's argument that the public did not know at the public meeting what APM was proposing to build. The public meeting was attended by members of Condo Corp. Hurnick, for example, made a rebuttal presentation. Further, the modifications suggested by the design reviewer (and, ultimately, accepted by APM) did not relate to the complaints raised by Condo Corp at the public meeting or the hearing of the appeal. The weight of the evidence before the Commission did not demonstrate that this error was material to the application or resulted in any prejudice to Condo Corp or the public.

B. Failure to Follow Advice from Planning Staff

33. Condo Corp argues that the City did not follow the advice of its planning staff who recommended approval of the Amendment "subject to receipt of final pinned survey plans, design review approval, and the signing of a development agreement." Condo Corp relies on the text of the Council resolution on November 14, 2017[42] and argues that the text of the Bylaw should have been amended to include these conditions. Condo Corp contends that this error means that a future developer – not necessarily APM – is now able to, as-of-right, develop a four-storey, 23-unit apartment dwelling on the Property.

34. The City submitted that these requirements were conditions subsequent upon approval of the Amendment and not conditions forming part of the Amendment itself. In other words, the conditions would have to be fulfilled by APM or any other developers at further stages in the development process, culminating with a building permit issued upon conditions included in a development agreement. The City noted that the resolution filed in the record was an attachment to the draft development agreement.[43] The Commission heard

[36] Exhibit D4. See also, the Heritage Board Resolution dated April 19, 2018. Exhibit D5.
[37] Exhibit D3.
[38] Exhibit R2.
[39] Exhibit R1, Tabs 1; Exhibit R2 (supplementary record); Exhibit D1; Exhibit D3.
[40] Exhibit D2.
[41] Exhibit D4.
[42] Exhibit R1, Tab 25.
[43] Exhibit R1, Tab 35.

testimony that the conditions are intended to be enforced through the development agreement, and the Commission was directed to sections 4.62.7 and 4.62.9 of the Bylaw, which provide that Council may require a developer to execute a development agreement.

35. The Commission does not accept Condo Corp's argument that the conditions were intended to form part of the amended Bylaw. The interpretation put forward by counsel for Condo Corp ignores the remaining text of the resolution, which authorizes the Mayor and CEO "to execute standard contracts/agreements to implement [the] resolution."[44] Meaning must also be given to this language. When the resolution is read in its entirety and considered in light of the development process as a whole, the Commission finds that Council intended for the conditions to be dealt with and incorporated into a development agreement between the City and APM.

36. Counsel for Condo Corp is correct that the Amendment permits a future developer (and not just APM) to develop a four-storey, 23-unit apartment dwelling on the Property. However, any new developer would still be required to provide survey plans, obtain design review approval, and sign a development agreement if the Development were to change in any material respect. Finally, as will be discussed below, as-of-right developments are still subject to the Bylaw, the Official Plan, and sound planning principles.

C. Sound Planning Principles

37. Condo Corp argues that the Development does not meet sound planning principles. Condo Corp suggests that these principles require that the "best" development for the Property be approved. Condo Corp submits that the City did not consider moving the building away from the property line next to the Rochford Condominium (and closer to the parking lot on the other side of the Property) and, as a result, sound planning principles have not been applied. Condo Corp argues that this option was never explored before Council passed the Amendment.

38. Witnesses for Condo Corp raised a number of concerns before the Commission. The Commission finds that there were three primary areas of concern:

    a. parking, including the loss of existing parking spaces and the impact of additional vehicles in the neighbourhood;

    b. the proximity of the Development to the Rochford Condominium and its impact on the privacy, security, and enjoyment of personal space by condominium residents; and

    c. increased density in the neighbourhood and its resulting impact on the surrounding area.

[44] Exhibit R1, Tab 35.

I. General Principles

39. It is well-settled that the Commission, when exercising its appellate authority under the *Planning Act*, is entitled to assess a decision of Council on the basis of sound planning principles.

40. Witnesses for the City and APM repeatedly emphasized that the Property could be developed "as of right" to the property line bordering the Richmond Condominium. The text of the Bylaw certainly recognizes this possibility. However, it bears repeating that a right to development is not absolute. As discussed in *Pine Cone Developments Inc. v. City of Charlottetown*,[45] a development must adhere not only to the technical requirements of the Bylaw, but also to the Official Plan and sound planning principles.[46]

41. The Commission is generally reluctant to interfere with a decision of a municipality on the basis that it is not consistent with sound planning principles, where that decision is supported by objective and reliable evidence from planning professionals confirming that the decision is based on the *Planning Act*, the applicable official plan and bylaw, and sound planning principles. It is incumbent upon an appellant to bring forward objective and reliable evidence to the contrary. In other words, where sound planning principles are at issue, it is prudent to call evidence from a planning professional or a person with experience in making planning-related decisions. More than the subjective concerns expressed by neighbouring property owners is required.

42. Each of the neighbouring property owners appearing before the Commission sincerely and succinctly set out their real concerns with respect to how the Development, in their opinion, would negatively effect the enjoyment of their own condominiums and would change the neighbourhood. However, when it comes to developments, assertions or speculations from neighbours are not sufficient to overcome objective and reliable evidence. While consultation with – and input from – the public is an important element of the planning process, it cannot be construed as a veto on the development of properties owned by others.

43. The City called two professional planners at the hearing, Jesse Morton ("Morton") and Alex Forbes ("Forbes"). Morton was the City planner responsible for both applications filed by APM. He holds his Masters degree in planning and is a licensed professional planner. Morton's work was overseen by Forbes, who is the Manager of Planning for the City. Forbes has 26 years of planning experience and the Commission accepts that he is an expert in the field of planning and land use.

44. Condo Corp called four witnesses at the hearing. All were residents of the Rochford Condominium and without any professional planning experience. The concerns raised by those witnesses, although sincere, did not have the ingredients necessary to overcome the testimony of Morton and Forbes. Objective and reliable evidence was lacking from Condo Corp. The Commission accepts the evidence of the professional planners, Forbes and Morton, that the Development is based on sound planning principles.

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[45] LA17-08.
[46] LA17-08. See also LA12-01.

45. The Commission heard and understood the concerns expressed by the residents of the Rochford Condominium. However, as a quasi-judicial tribunal the Commission is obligated to exercise its authority in accordance with the law and the evidence. In this appeal, the weight of the evidence supports the finding that the Development based on sound planning principles.

II. The "Best" Development

46. Witnesses for Condo Corp were consistent in stating that they are not opposed to development generally. Rather, it was just "this development" that was objectionable. Condo Corp argued that the City's decision failed to meet sound planning principles because the Development was not the "best development" for the Property.

47. Sound planning principles did not require the City or APM to consider every possible development option for the Property. The record reveals that the APM engaged in meaningful dialogue with the City and made adjustments to its proposal to respond to concerns shared by the City and others.[47] What one may view as the "best" development for her neighbour's property cannot be the standard against which planning-related decisions are made by a municipality. Such an approach would have the effect of frustrating development, maintaining the status quo, and diminishing the rights associated with land ownership.

48. The soundness of a planning decision is measured by the Commission against the principles recognized within the field of land use planning, the Official Plan of a municipality, the applicable bylaws, and any relevant federal and provincial laws. When assessed against that objective standard, the Commission is satisfied that the City's decision to pass the Amendment was guided by sound planning principles.

III. Parking Concerns

49. APM proposes to enter into a long-term parking lease with CADC for parking spaces in the Pownal Parkade as opposed to providing on-site parking or cash in lieu of parking. This is permissible under the Bylaw. Condo Corp argues that the Development is inappropriate because there is already insufficient parking in the neighbourhood. Condo Corp argued that the Development requires parking for 23 units and guests and would displace an unapproved parking lot on the Property that serves approximately 16 vehicles. Condo Corp also argued that the City erred in approving the Amendment because APM has not filed a parking lease with the City as required by section 4.44.6 of the Bylaw.

50. The Commission is not persuaded that the proposed off-site parking is contrary to sound planning principles. Parking is a concern in many municipalities and is specifically addressed by the City in the Bylaw and Official Plan. The existence of an unapproved parking lot on the Property is not a relevant consideration. Unapproved parking is liable to enforcement under the Bylaw, and the City has discretion over whether to pursue a remedy or not. The existence of an unapproved use today is therefore not guaranteed tomorrow. It cannot be relied upon to defeat a proposal for parking that actually satisfies

[47] See, for example, Exhibit R1, Tab 17.

the terms of the Bylaw. The Bylaw specifically provides for off-site parking in the Area[48] and Morton gave evidence that requests for off-site parking are not uncommon.

51. The absence of a parking lease, at this stage in the overall development, is not unusual. The Bylaw provides that a development officer, with approval from Council, may accept off-site parking in the Area if the parking is within 240 metres (787.4 feet) of the subject property and the developer has filed a lease that is at least ten years in length with the City. The record included correspondence from CADC to APM dated June 16, 2017, which stated that CADC is prepared to enter into a parking agreement for 13 spaces at the Pownal Parkade in the event that APM "is able to obtain a development permit."[49] The evidence before the Commission also confirmed that the distance from the Property to the Pownal Parkade is approximately 370 feet (by sidewalk).[50] The Commission accepts the City's position that it intends the lease requirement to form part of the development agreement with APM. Support for this position is found in the resolution passed by Council on November 14, 2017,[51] which approved APM's request to "enter into a 10 year off-lot parking agreement with CADC for 12 parking spaces + 1 accessible parking space at the Pownal Parkade (100 Pownal Street)."

52. This technical argument by Condo Corp also overlooks the substance of this appeal. The decision under review by the Commission related to a site-specific bylaw amendment. The argument may have been more persuasive had the application related to a development permit. At that latter stage in the development process, the failure of APM to file a lease with the City could prove fatal (for failure to conform to the Bylaw).[52] However, the development process operates on a continuum and involves a series of municipal decisions. To require a long-term contract to be signed and filed with the City before the site-specific bylaw amendment was even approved would be inconsistent with commercial reality and result in an illogical interpretation of the Bylaw. Absent the amendment, the proposal would have to change and, with it, the parking requirement.

IV. Proximity to the Rochford Condominium

53. Witnesses for the Condo Corp testified that they had concerns about the proximity of the Development to the Rochford Condominium. They stated that there were possible safety concerns, including the possibility of accessing balconies on the Rochford Condominium from the third and fourth floor balconies on the Development. Some witnesses also testified that the balconies were so close together that the Development would reduce their privacy and the enjoyment of their condominium units. It is unfortunate that the first APM plan showed that the proposed patios and balconies on the south side of the Property would be built within inches of the existing patios and balconies of the east side of the Rochford Condo. The City, for its part, was alive to these concerns from the beginning of the initial application process in December 2016. Planning staff specifically considered the placement of the balconies.[53] For example, the location of the balconies was

[48] Exhibit R4, Tab 61.
[49] Exhibit R4, Tab 45.
[50] Exhibit R4, Tab 61.
[51] Exhibit R1, Tab 25.
[52] Bylaw, s.4.54.6.
[53] Exhibit R4, Tab 61.

addressed in the report prepared by Morton on November 3, 2017 for planning board.[54] APM also made efforts to address some the concerns. APM removed patios and balconies from the bottom two floors of the Development.[55]

54. Ernie MacAulay is a resident of the Rochford Condominium. His street-level unit is adjacent to the Property. He testified that his patio extends 22 inches to the property line. The presentation prepared by APM suggests that the Development is five feet from the property line, with the balconies extending into that five-foot space. In his report to planning board on November 3, 2017, Morton stated that the third and fourth floor balconies would be set back one foot from the property line. He also noted that the Rochford Condominium incorporates a "step-back" after the second storey and estimated the distance between the adjacent third storey balconies to be approximately seven feet and the fourth storey balconies approximately 10.5 feet.[56] It is not possible to determine the precise distance between the balconies of the Rochford Condominium and the Development based upon the record; however, the Commission accepts the best evidence available at the hearing and that was the estimate provided by Morton. He stated that there would be approximately seven feet between the third storey balconies and approximately 10.5 feet between the fourth storey balconies.[57] At the hearing Banks stated that APM would consider removing the balconies from the third floor of the Development. Banks stated that he would have his architects review the distances between the third floor balconies and the Rochford Condominium balconies and they could meet with the Condo Corp's advisors, Coles Associates, to work out a solution. This could include removing the third floor balconies or possibly putting screens on the balconies, if advisable. A final determination on the balconies will be dealt with by the City during the further stages of the development process.

55. The Commission is not persuaded that the balconies proposed for the Development offend sound planning principles. While they may be closer to the Rochford Condominium than its residents may have anticipated or enjoyed in the past, this does not mean that the balconies run counter to sound planning. Any asserted rights of privacy or quiet enjoyment are also beyond the statutory jurisdiction of the Commission. On the record and testimony before it, the Commission is being asked to speculate about the existence and likelihood of certain health and safety concerns. The Commission, however, was not provided with any evidence that the Development does not meet requirements of the National Building Code, the Fire Prevention Bylaw, or any other applicable law. Condo Corp also chose not call any independent evidence on the subjects of health or safety. There was no testimony from any police, fire, or security organization. The Commission cannot, without more, find that the Development does not meet sound planning principles because of its proximity to the Rochford Condominium. As noted above, the Bylaw itself expressly contemplated the possibility of a diminished setback for the Development because the Rochford Condominium had previously been granted a zero setback by the City.

56. There was a great deal of discussion, especially by APM, that the Rochford Condominium had previously been granted a zero setback from its eastern boundary by the City. Both Forbes and Morton gave evidence that, under the Bylaw, this would allow the owner of

[54] Exhibit R1, Tab 21.
[55] Exhibit R1, Tab 17.
[56] Exhibit R1, Tab 21.
[57] Exhibit R1, Tab 21.

the Property to also have a zero setback next to the Rochford Condominium. In short, under the Bylaw a zero setback granted to one property owner conveys the same zero setback rights to the adjoining property owner. However, in any development, the Bylaw is merely the starting point. As stated by both Morton and Forbes, when approving a development, a holistic approach must be taken. This requires the development to meet the specific requirements of the Bylaw, be consistent with the Official Plan, and be consistent with sound planning principles. The zero setback situation, as noted above, is not one which grants an as-of-right development using a zero setback. The development must meet all of the other requirements of the Bylaw, be consistent with the Official Plan, and be consistent with sound planning principles.

V. Increased Density

57. Condo Corp argued that the Development does not fit the Property. It noted that a variance was required to reduce the street frontage, and that planning staff failed to address the frontage issue in its final report to planning board. Condo Corp noted that the density of the Property was increased from three units to 23 units. Although a minor variance was required to reduce the street frontage from 82 feet to 74.5 feet, the impact was significant because it allowed the density to increase by 20 units. Condo Corp contends that the Development is too large for the Property and therefore does not meet sound planning principles.

58. Both Morton and Forbes spoke about the City's goal of increasing density in the context of sound planning principles. In his report to planning board on November 3, 2017, Morton commented on the massing and density of the Development. He relied on the Official Plan and its stated objectives.[58] The Commission finds that the City was alive to the increased density that would accompany the Development and considered this reality in light of the Official Plan. Absent any objective evidence to the contrary, the Commission cannot accept that increasing the density of the Property is contrary to sound planning principles.

59. This conclusion is strongly supported by the testimony of Morton and Forbes. For his part, Morton highlighted the importance of "massing" for buildings located in the downtown. He also emphasized that a design must be compatible with the surrounding area. Morton added that construction of the Rochford Condominium actually "transformed" the massing in the neighbourhood. Morton further explained that the Development will help with the transition from the Rochford Condominium to other buildings on Richmond Street and complement the existing streetscape. These assessments were echoed by Forbes, who advised the Commission that the Rochford Condominium had "set the tone" for the neighbourhood and increased the density in the surrounding area.

VI. Conclusion on Sound Planning Principles

60. The Commission does not accept Condo Corp's submission that the Development does not meet sound planning principles. The record and evidence before the Commission reveals a thorough development process was undertaken by the City with input from not only the public, but also professionals in the fields of land use planning and architectural design. The Development was also considered and reconsidered on a number of occasions by both planning board and Council. The Commission finds that the

[58] R1, Tab 21 referencing the Official Plan at section 3.2, objectives 1 and 2.

Development meets the requirements of the Bylaw, Official Plan, and is consistent with sound planning principles.

Conclusion

61. The appeal is denied and the decision of the City is hereby confirmed. While Condo Corp identified some technical deficiencies, the Commission, after reviewing the record as a whole, including the testimony from all of the witnesses at the hearing, is satisfied that the outcome – namely the Amendment – was a sound planning decision. The Commission encourages all involved – the City, APM and Condo Corp – to continue their dialogue as the Development moves forward. To date, these constructive exchanges have improved the Development to the benefit of the City as a whole.

IN THE MATTER of an appeal by Queens County Condominium Corporation No. 40, of a decision by the City of Charlottetown, dated November 27, 2017.

Order

WHEREAS the Appellant Queens County Condominium Corporation No. 40 appealed a November 27, 2017 decision of the City of Charlottetown to approve a site-specific bylaw amendment for 55 and 59 Richmond Street, Charlottetown;

AND WHEREAS the Commission heard the appeal at public hearings conducted in Charlottetown on May 16, 17, and 18, 2018, after due public notice and suitable scheduling for the parties;

AND WHEREAS the Commission has issued its findings in this matter in accordance with the Reasons for Order issued with this Order;

NOW THEREFORE, pursuant to the *Island Regulatory and Appeals Commission Act* and the *Planning Act;*

IT IS ORDERED THAT:

1. The appeal is denied and the decision of the City is hereby confirmed.

DATED at Charlottetown, Prince Edward Island, Wednesday, July 11, 2018.

BY THE COMMISSION:

(sgd) J. Scott MacKenzie

J. Scott MacKenzie, Q.C., Chair

(sgd) Jean Tingley

Jean Tingley, Commissioner

(sgd) John Broderick

John Broderick, Commissioner

NOTICE

Section 12 of the ***Island Regulatory and Appeals Commission Act*** reads as follows:

> *12. The Commission may, in its absolute discretion, review, rescind or vary any order or decision made by it, or rehear any application before deciding it.*

Parties to this proceeding seeking a review of the Commission's decision or order in this matter may do so by filing with the Commission, at the earliest date, a written Request for Review, which clearly states the reasons for the review and the nature of the relief sought.

Sections 13(1) and 13(2) of the ***Act*** provide as follows:

> *13(1) An appeal lies from a decision or order of the Commission to the Court of Appeal upon a question of law or jurisdiction.*
>
> *(2) The appeal shall be made by filing a notice of appeal in the Court of Appeal within twenty days after the decision or order appealed from and the rules of court respecting appeals apply with the necessary changes.*

NOTE: In accordance with IRAC's *Records Retention and Disposition Schedule*, the material contained in the official file regarding this matter will be retained by the Commission for a period of 2 years.

COMMISSION DE RÉGLEMENTATION ET D'APPELS DE L'ÎLE

THE ISLAND REGULATORY AND APPEALS COMMISSION
Prince Edward Island
Île-du-Prince-Édouard
CANADA

CERTIFIED A TRUE COPY

Phil Ralfuse,
Appeals Administrator
Island Regulatory & Appeals Commission

Docket: **Docket LA20003**
Order: **LA20-02**

IN THE MATTER of an appeal by Andrea Battison, of a decision of the City of Charlottetown, dated May 13, 2020, to adopt a Bylaw for a site specific exemption in order to allow a nine storey dormitory/residence to be constructed on the property of the University of Prince Edward Island.

BEFORE THE COMMISSION ON Tuesday, September 22, 2020.

J. Scott MacKenzie, Q.C., Chair

M. Douglas Clow, Vice-Chair

Erin T. Mitchell, Commissioner

ORDER

Contents

Appearances & Witnesses

1. **For the Appellant, Andrea Battison**

   Witnesses:

   Douglas Mills
   Joan Cumming

2. **For the Respondent, City of Charlottetown**

   Counsel:

   David W. Hooley, Q.C.
   Melanie McKenna

   Witnesses:

   Greg Morrison
   Alex Forbes

3. **For the Developer, University of Prince Edward Island**

   Counsel:

   Jonathan Coady, Q.C.

   Will Cann

IN THE MATTER of an appeal by Andrea Battison, of a decision of the City of Charlottetown, dated May 13, 2020, to adopt a Bylaw for a site specific exemption in order to allow a nine storey dormitory/residence to be constructed on the property of the University of Prince Edward Island.

Reasons for Order

Overview

1. The Appellant, Andrea Battison ("Battison"), appeals a May 13, 2020 decision of the City of Charlottetown (the "City") to adopt Bylaw PH-ZD.2-027, a Bylaw for a site specific exemption in the Institutional (I) Zone of the Zoning & Development Bylaw (the "Bylaw") for 550 University Avenue (PID #373126) (the "Property") in order to allow the proposed nine storey (35.4m) dormitory/residence to be constructed on the Property (the "Development"). This decision permits construction of a building on the Property by the developer, the University of Prince Edward Island (the "University"), which otherwise exceeds the maximum building height permitted in the City's Institutional (I) Zone.

2. Battison's primary argument on appeal is that the public meeting procedure, adopted by the City in response to the global COVID-19 pandemic and utilized for a public meeting regarding the Development, does not meet the requirements of the City's Bylaw or the *Municipal Government Act* (the "MGA").[1] She further argues that a typographical error in the second of two newspaper notices of the public meeting invalidates the meeting and, therefore, the City's decision.

3. Battison also made submissions which the Commission understood to suggest that she believes the City's decision was inconsistent with sound planning principles.

Decision

4. The Commission denies the appeal and confirms the City's decision.

5. The Commission finds that the public meeting procedure adopted by the City in response to the onset of the COVID-19 pandemic, including the notice requirements for the public meeting held with respect to the Development, met the requirements of the City's Bylaw, as well as all other statutory requirements.

6. As will be discussed, Battison identified a single error with a registration date contained in the second of two newspaper notices regarding the public meeting. In this instance, a mere technical error, which did not strike at the heart of the public notice and which could

[1] Municipal Government Act R.S.P.E.I. 1988, Cap. M-12.1 . See in particular Part 5, Division 1.

easily have been clarified by contacting the City, is insufficient to invalidate what was otherwise proper notice.[2]

7. With respect to sound planning principles, Ms. Battison did not provide any objective evidence to establish that the City failed to adhere to sound planning principles.

Background

8. On February 14, 2020 the University applied for a bylaw exemption for the "Southwest corner of UPEI property, 550 University Avenue". The application stated:

> *Construction of a new residence building that will provide housing for the athletes for the 2023 Canada Games. It will also provide much needed housing for University students.*

Efforts to Schedule Public Meeting

9. The application was reviewed by the City's planning staff, the City's Planning Board and the City's Council. On March 9, 2020, Council approved that the request proceed to a public meeting.[3]

10. A public meeting was initially scheduled for March 24, 2020. Public notice was issued in accordance with the Bylaw.[4]

11. Due to the onset of the COVID-19 pandemic in mid-March, 2020, the public meeting was rescheduled to March 30, 2020. Public notice was also issued for this meeting. As a result of the directions of the Chief Public Health Officer for PEI that meeting was cancelled.[5]

12. The City then set a new public meeting date for April 28, 2020.[6]

Notice of the April 28, 2020 Public Meeting

13. On April 18, 2020 and April 25, 2020, the City published identical notices of the public meeting in the Guardian newspaper.[7] the public notice specified that the City would be using a modified public meeting procedure, set out options for public participation, and encouraged City residents to contact City staff for further information.

14. With respect to the available methods of participation, the notices stated:

> *Residents wishing to participate may use any of these methods*
> - *Webex; or*
> - *Connect by phone and/or watch the live stream at wwww.charlottetown.ca/video; or*
> - *Attend in person (social distancing policies will apply)*

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[2] For further discussion of technical deficiencies being insufficient to invalidate otherwise sound municipal decisions, see decision of the Commission in *Queens County Condominium Corporation No. 40* (Order LA18-02).

[3] Record, Vol.1, Tab 6.

[4] Record, Vol. 1, Tab 8.

[5] Ibid.

[6] Ibid.

[7] The City also issued notification letters to property owners located within 100 metres of the Property and posted an announcement on the City's website. See Record, Vol.1, Tab 8.

Residents who just wish to watch or listen without participation may do so by watching the live stream at www.charlottetown.ca/video.

15. For those wishing to participate, the notices encouraged residents to contact the City Planning Department on or before April 23, 2020 to provide their contact information. City staff would then contact the interested parties no later than noon on April 27, 2020 with participation details:

> ***Residents who are interested to participate in the public meeting are encouraged to contact the Planning & Heritage Department by email at planning@charlottetown.ca or call 902-629-4158 on or before 4:30 p.m. on Thursday, April 23, 2020 to provide their contact details (Name, phone number and/or email address).*** *Business hours are between 8:00 AM – 4:30 PM, Monday – Friday. Staff will contact interested participants no later than 12:00 p.m. on Monday, April 27, 2020 with the details on how to participate in the meeting.* [emphasis added]

16. The notices also invited written submissions, with a deadline of April 30, 2020 at 12:00 p.m.

Public Meeting Procedure

17. The modified public meeting procedure provided four opportunities to participate in and/or observe the public meeting. Individuals could participate via WebEx video conference, by telephone (with or without watching a livestream), attend in person and participate using a computer on-site, or view a livestream audio and video feed.

18. The modified public meeting was held on April 28, 2020 at 6:00 p.m.

19. University staff and a consultant presented at the public meeting. The public was invited to submit questions and/or comments; however, none were submitted during the meeting. Councillors asked a number of questions regarding the Development.[8] The public presentation and question and answer component of the meeting lasted approximately 35 minutes.[9]

20. Participants were also advised at the public meeting that written submissions could be emailed to City staff before noon on April 30, 2020.[10]

Planning Board Recommendation and Council Approval

21. City planning department staff recommended approval of the site-specific exemption.[11]

22. Planning Board considered the application on May 4, 2020, agreed with the planning staff recommendation, and recommended approval to Council.[12]

23. Council agreed with Planning Board's recommendation. The application went before Council for first reading on May 11, 2020. Second reading (and thus approval) of the Bylaw exemption occurred on May 13, 2020.[13]

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[8] Record, Tab 11.
[9] Ibid.
[10] Verbatim Minutes of Public Meeting. Record, Tab 11.
[11] Record, Tab 12.
[12] Record, Tab 13.
[13] Record, Tabs 14, 15, and 17.

Appeal Procedural History

24. Battison filed a Notice of Appeal with the Commission on June 2, 2020, within the statutory appeal deadline as set out in the *Planning Act*.[14]

25. A telephone pre-hearing conference was held with Commission staff and the parties on June 16, 2020.

26. The Record was received on June 22, 2020.[15]

27. Mediation was held July 13, 2020 but was unsuccessful.

28. The appeal was heard on July 30, 2020, subject to the Commission's COVID-19 in-person hearing directives.[16]

Discussion

29. Battison argues that public engagement in the municipal decision-making process is an essential requirement of the *MGA*, that the second public notice of the April 28, 2020 public meeting did not meet they Bylaw notice requirements, and that the public meeting was not acceptable as it did not meet the standards of a 'traditional' (i.e. in-person) public meeting.

30. Battison did not give oral testimony at the Commission hearing. Rather, she called two witnesses: her spouse, Douglas Mills ("Mills"), and her friend, Joan Cumming ("Cumming").

Alleged Public Notice Deficiency

31. Battison's argument with respect to public notice is extremely narrow. In her view, the typographical error in the second newspaper notice published April 25, 2018, which encourages residents to contact the City on or before April 23, 2020,[17] to register for the public meeting, invalidates the notice and thus the public meeting and City decision. This argument is not persuasive.

32. The City, for its part, concedes its error, but states that no resident was turned away from the meeting. The University argues that the error was technical, not material, and did not affect the outcome of the process.

33. With respect to the public notice, the Commission heard not from Battison, but rather Mills and Cumming with respect to what impact, if any, the typographical error had on their attendance at the public meeting.

34. Mills testified that he did not see the Guardian notice on April 18, 2020, but he did read the Guardian notice on April 25, 2020. He testified that by then it was too late to contact the City as, in his mind, the notice gave a deadline of April 23, 2020. He did not attempt to contact City staff. He also speculated that the meeting would be cancelled as people were expected to stay indoors and not allowed to go to functions due to the COVID-19 public health emergency.

35. Cumming testified that she has electronic access to the Guardian newspaper but does not get a printed copy. She stated that her internet was slow due to increased web traffic due

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[14] RSPEI 1988, c P-8, s.28(1.3).
[15] Via email. paper copies provided to the Commission on June 24, 2020.
[16] Available on the Commission website at www.irac.pe.ca. The hearing was broadcast publicly on the Commission's website.
[17] i.e. two days prior to the notice's publication date.

to COVID-19, and depended on CBC Compass for the news. She would receive notice of public meetings from discussions with Battison, a long-time friend. She did not participate in the public meeting as she was busy operating her student/tourism rental business.

36. Greg Morrison ("Morrison") is a planner in the City's planning department. He was responsible for processing the University's application. Morrison testified that the purpose of the April 23, 2020 date in the public notice was to have members of the public contact the City so it could provide individuals with training to use Webex and become accustomed to the modified meeting process. The City continued to operate during the COVID-19 pandemic, and individuals could have called the City for further information regarding the public meeting, even after April 23, 2020. Alex Forbes ("Forbes") is the Manager of Planning for the City. He testified that the registration component of the public notice was to permit the City to prepare for the public meeting and comply with social distancing requirements.

37. Section 3.10.4 of the Bylaw sets out the notification requirements that the City must follow for a public meeting. The Record and testimony before the Commission establishes that the City met those requirements. Notice was published twice in a local newspaper. It contained all of the content prescribed by the Bylaw. For instance, the notice identified the subject lot, described the application, and provided a deadline for written comments.[18]

38. There is no evidence before the Commission that anyone was denied the opportunity to participate in the public meeting as a result of the erroneous registration date in the second newspaper notice. The newspaper notice encouraged, but did not mandate, registration. Neither of the witnesses called by Battison made any efforts to contact the City. The registration procedure was not a statutory requirement. The notice complied with all the procedural obligations of the *Planning Act*, *MGA*, and City bylaws.

39. The Commission is satisfied that the registration date error in the April 25, 2020 newspaper notice was a technical defect. This has been conceded by the City. However, the error was not material. Morrison testified that no one was turned away from the public meeting. There is no evidence to suggest otherwise. The error was immaterial and does not invalidate the public meeting notice or process.

Public Meeting Process

40. Battison made further arguments taking issue with the form of meeting undertaken by the City. She argued that the public meeting was limited only to those with "technical resources" and that there needs to be a public meeting where all interested public can attend. In support of her argument, Battison again relied on the testimony of Mills and Cumming.

41. Mills testified that the 'traditional' in-person meeting is the only form of meeting he is familiar with, he does not use email, uses a "flip-phone", and finds technology difficult. He also testified that he did not want to use the telephone, did not want to be put on hold, and he preferred an in-person meeting. Mills did not participate in the public meeting.

42. For her part, Cumming testified that she has attended many public meetings in the past, but was not as active in her attendance as she used to be. She testified that she has

[18] This notice also met the requirements of subsection 18(10) of the *Planning Act*, RSPEI 1988, c P-8, which required that the notice be published in a local newspaper at least seven clear days in advance of the meeting and indicate "in general terms the nature of the proposed bylaw and the date, time and place of the council meeting".

problems using technology. She was suspicious of "apps", concerned for computer security and thus would not download "apps" such as Webex. She testified that she did not want to leave her home during this time and only went outside if it were "life and death". Cumming did not participate in the public meeting.

43. The Commission cannot accept Battison's argument with respect to the public meeting process developed and executed by the City. The testimony of Mills and Cumming was unhelpful and did not assist Battison in this regard. The Commission is satisfied that the City met its Bylaw obligations,[19] as well as the electronic meeting requirements of the MGA[20] and the City's procedural bylaw regarding electronic meetings.

44. Counsel for the University accurately summarized the relationship between the *Planning Act*, the *MGA*, and the relevant city Bylaws, being the Bylaw and its procedural bylaw. Section 122 of the *MGA* addresses electronic meetings of council. In effect, it requires councillors to speak and hear. It requires members of the public to see and hear. The City's procedural bylaw mimics these requirements.[21] The Record is clear that the requirements for the City to conduct the public meeting electronically were met.[22]

45. The Record and testimony of City staff makes this abundantly clear. The public meeting had an in-person component.[23] The City's Parkdale room was equipped with large television screens for individuals to view while maintaining social distancing. In addition, areas on the first floor and foyer were prepared to accommodate in-person attendance if required. A computer was set up for in-person participation. Individuals could also participate using the Webex platform or by telephone. They could also watch the City's live stream, and send in written comments after the meeting.[24] Not only could individuals "see and hear", they could actively participate. Questions were permitted and could be asked in not less than three ways: via Webex, telephone, or a physical computer at the meeting location.[25]

46. The Commission finds the City's modified public meeting process met, and exceeded, the relevant statutory obligations. In fact, the various forms of participation offered by the City went above and beyond the minimum requirements of the *MGA* and applicable bylaws.[26] It also complied with the existing Public Health Order in effect at the time, which limited – but *permitted* – public gatherings of up to five people.

47. The COVID-19 pandemic has upended life for all Islanders. What was business-as-usual before is no longer. Yesterday's public meeting is not today's, or tomorrow's. What remains constant is the need for public bodies, such as the City, to provide services to its residents. In this instance, the Commission is satisfied that the City not only met its statutory obligations in hosting the April 28, 2020 public meeting, but did so commendably.

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[19] Bylaw, s.3.10.4.
[20] MGA, s.122.
[21] Procedural Bylaw, s.13.3.
[22] University Written Submission, July 7, 2020.
[23] The in-person component was also clearly set out as being available in the public notice.
[24] Testimony of A. Forbes. See also Record at Tab 12. Four letters of opposition and four letters of support were submitted, including correspondence from Battison.
[25] Record, Tab 11. That no questions were asked by the public does not take away from the fact that the opportunity was provided.
[26] And satisfied the City's *Planning Act* obligations to give residents and other interested persons the opportunity to make representations. See *Planning Act*, s.18(10)(a).

48. The Commission recognizes that Battison may not feel that the requirements of the *MGA* or the City's Bylaws are sufficient to address her concerns. However the appropriate forum for Battison to raise these concerns is not the Commission. Rather, the appropriate remedy is for Battison to lobby for changes to the *MGA* or the City's bylaws. Policy submissions belong not in the Commission hearing room, but rather on the floor of the legislature or the City Council Chamber.[27]

Sound Planning Principles

49. Although not specifically referenced in her grounds of appeal,[28] A number of comments by Battison and contained within the Record suggest to the Commission that she believes that the City's decision is inconsistent with sound planning principles. For instance, Battison questioned why the Development was not subjected to design review. The Development is not a property that is subject to the design review process under the Bylaw.[29] She also raised concerns about the height of the Development, and that it may create a precedent for other buildings in the immediate area.[30]

50. The Commission has repeatedly emphasized the need for appellants, seeking to have the Commission overturn a well-reasoned municipal decision on the basis of sound planning principles, to bring forward objective and reliable evidence to support their position:

> *The Commission is generally reluctant to interfere with a decision of a municipality on the basis that it is not consistent with sound planning principles, where that decision is supported by objective and reliable evidence from planning professionals confirming that the decision is based on the Planning Act, the applicable official plan and bylaw, and sound planning principles.* ***It is incumbent upon an appellant to bring forward objective and reliable evidence to the contrary. In other words, where sound planning principles are at issue, it is prudent to call evidence from a planning professional or a person with experience in making planning-related decisions. More than the subjective concerns expressed by neighbouring property owners is required.***[31] [emphasis added]

51. Appellants cannot expect that they will be successful in challenging decisions of municipal or provincial planning authorities, where the decision-maker has availed itself of planning expertise and provided sound reasons for its decision, absent evidence to the contrary. Subjective complaints, without more, are insufficient to overturn proper, reasoned municipal planning decisions.

52. The Commission finds that there is adequate support in the Record for the Development. Planning Board accepted City planning staff's recommendation to approve the University's application. Council accepted Planning Board's recommendation to do the same.[32] There is no expert evidence before the Commission to challenge Morrison's evidence. The

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[27] *Teksavvy Solutions Inc. v. Bell Media Inc.*, 2020 FCA 108 (CanLII) at para.11.
[28] As set out in the Notice of Appeal.
[29] Bylaw, s.3.14.
[30] Record, Vol.III, Tab 121.
[31] *Queens County Condominium Corporation No. 40 v. City of Charlottetown* (Order LA18-02) at para.41.
[32] Record, Vol.1, Tabs 3, 12 & 13.

Commission is satisfied that the City's decision is consistent with sound planning principles.

Conclusion

53. The appeal is denied. The City's decision of May 13, 2020 is confirmed.

IN THE MATTER of an appeal by Andrea Battison, of a decision of the City of Charlottetown, dated May 13, 2020, to adopt a Bylaw for a site specific exemption in order to allow a nine storey dormitory/residence to be constructed on the property of the University of Prince Edward Island.

Order

WHEREAS the Appellant Andrea Battison appealed a decision of the City of Charlottetown, granting a site specific exemption in the Institutional (I) Zone of the Zoning & Development Bylaw pertaining to 550 University Avenue (PID #373126) ("the subject property"), dated May 13, 2020;

AND WHEREAS the Commission heard the appeal on July 30, 2020;

IT IS ORDERED THAT

1. The appeal is denied.
2. The City's May 13, 2020 decision pertaining to the Property is confirmed.

DATED at Charlottetown, Prince Edward Island this 22nd day of September, 2020.

BY THE COMMISSION:

(sgd) J. Scott MacKenzie

J. Scott MacKenzie, Q.C., Chair

(sgd) M. Douglas Clow

M. Douglas Clow, Vice-Chair

(sgd) Erin T. Mitchell

Erin T. Mitchell, Commissioner

NOTICE

Section 12 of the ***Island Regulatory and Appeals Commission Act*** reads as follows:

> *12. The Commission may, in its absolute discretion, review, rescind or vary any order or decision made by it, or rehear any application before deciding it.*

Parties to this proceeding seeking a review of the Commission's decision or order in this matter may do so by filing with the Commission, at the earliest date, a written Request for Review, which clearly states the reasons for the review and the nature of the relief sought.

Sections 13(1) and 13(2) of the ***Act*** provide as follows:

> *13(1) An appeal lies from a decision or order of the Commission to the Court of Appeal upon a question of law or jurisdiction.*
>
> *(2) The appeal shall be made by filing a notice of appeal in the Court of Appeal within twenty days after the decision or order appealed from and the rules of court respecting appeals apply with the necessary changes.*

THE ISLAND REGULATORY AND APPEALS COMMISSION
Prince Edward Island
Île-du-Prince-Édouard
CANADA

Docket LA15010
Order LA17-06

IN THE MATTER of an appeal by Donna Stringer of a decision of the Minister of Communities, Land and Environment, dated August 12, 2015.

BEFORE THE COMMISSION
on Thursday, the 10th day of August, 2017.

J. Scott MacKenzie, Q.C., Chair
Douglas Clow, Vice-Chair
John Broderick, Commissioner

Order

Compared and Certified a True Copy

Philip J. Rafuse
Appeals Administrator
Corporate Services and Appeals Division

IN THE MATTER of an appeal by Donna Stringer of a decision of the Minister of Communities, Land and Environment, dated August 12, 2015.

Contents

IN THE MATTER of an appeal by Donna Stringer of a decision of the Minister of Communities, Land and Environment, dated August 12, 2015.

Appearances & Witnesses

1. **For the Appellant Donna Stringer**

   Counsel:

   John D. Stringer, Q.C.

   Witnesses:

   Donna Stringer

   Leland Wood

2. **For the Respondent Minister of Communities, Land and Environment**

   Counsel:

   Robert MacNevin

   Witness:

   Jay Carr

3. **For the Developers Betty Ann Bryanton and Gareth Llewelleyn**

   Counsel:

   Steven Forbes

   Witness:

   Betty Ann Bryanton

IN THE MATTER of an appeal by Donna Stringer of a decision of the Minister of Communities, Land and Environment, dated August 12, 2015.

Reasons for Order

1. Introduction

(1) On August 19, 2015, the Appellant Donna Stringer (the "Appellant") filed an appeal with the Island Regulatory and Appeals Commission (the "Commission") under section 28 of the ***Planning Act***, R.S.P.E.I. 1988, Cap. P-8, (the ***"Planning Act"***).

(2) The Appellant appealed an August 12, 2015 decision of the Respondent Minister of Communities, Land and Environment (the "Minister") granting Development Permit No. M-2015-0087 ("Permit 87") and Development Permit No. M-2015-0088 ("Permit 88") to the Developers Betty Ann Bryanton and Gareth Llewelleyn (the "Developers") to change the permitted use of an existing non-commercial storage building to a summer cottage (Permit 87) and to relocate three non-commercial storage buildings (Permit 88) on Provincial Parcel Number 931741, located on the south side of 158 Paradise Drive, in the Community of Little Pond (the "subject property").

(3) The Commission forwarded letters to the Minister and the Respondents advising of the Appeal and requesting that the Minister provide a copy of the development application file. On September 4, 2015 a copy of the application file was received and forwarded via email to the Appellant and the Developers.

(4) On September 15, 2015, Commission received a letter submission from Robert MacNevin, legal counsel for the Minister. Mr. MacNevin acknowledged that "Evidently the non-commercial storage buildings are used, from time to time, to accommodate people who use them to sleep at night during the summer months". Mr. MacNevin further advised that as these "non-commercial storage buildings are not hooked up to water or sewer systems, they are not considered to be "dwellings". He further submitted that "There was nothing in the ***Planning Act*** Subdivision and Development Regulations that regulate either the number or use of non-commercial storage buildings". Mr. MacNevin submitted that "There was no basis for the appeal to be successful".

(5) On September 18, 2015, the Commission's Appeals Administrator emailed the parties to facilitate the filing of written submissions and noting that the Commission was prepared to hear the appeal as early as November 2015.

(6) Submissions from Appellant's Counsel were received by the Commission on October 13, 2015. Submissions were received from the Developers on November 2, 2015.

(7) On December 9, 2015 counsel for the Minister provided a further submission by letter, departing from the original position taken in his September 15, 2015 letter, now stating that "It is the Department's position that non-commercial storage buildings, which is what Permit No. N-2015-0088 allows, are not intended to be used as sleeping quarters, or "bunkies"." [emphasis added] He further submitted that there was a gap in the Subdivision and Development Regulations that has been recognized by the Department and he advised that the Department "Will be creating Regulations to specifically address this issue in the near future, and he noted that the regulatory changes will be made in the new year, and as such I suggest that this appeal be put on hold until the new Regulations come into force. At that time the Department officials will be in a position to determine if Ms. Bryanton's units are in compliance with the new Regulations." In response to this submission the Appellant's Counsel responded noting that statutes and Regulations are not to be construed as having retrospective operation unless they are expressly or by necessary implication required in the language of the regulation. He noted that "It is the view of the Appellant that any retroactive or retrospective future legislation would be prejudicial to the rights of the Appellant, thereby giving rise to a presumption against retroactivity." He requested that the appeal proceed to a public hearing to have the matter adjudicated.

(8) On January 15, 2016 the Commission advised the parties that the appeal would proceed to a hearing and invited the parties to indicate their available dates. After consulting with the parties, the Commission scheduled the appeal to be heard on June 9 and 10, 2016.

(9) On March 15, 2016, Steven Forbes advised the Commission that he would be representing the Developers. On March 18, 2016 the Commission received a letter from Mr. Forbes requesting a change in the hearing date to July 2016. Mr. Forbes also requested the opportunity to file written submissions. On March 22, 2016, John D. Stringer, Q.C., Counsel for the Appellant, advised the Commission that he did not object to a July or August hearing. On March 22, 2016 the Commission's Appeals Administrator contacted counsel for the three parties to encourage the parties to reflect on the possibility of alternative dispute resolution ("ADR") and offer the Commission's assistance in providing ADR services. Subsequently all parties and the Commission agreed to hearing dates of July 21 and 22, 2016. Dates for filing written submissions and rebuttal submissions were also agreed to.

(10) Following the receipt of the various written submissions, Counsel for the Appellant canvassed counsel for the other parties inquiring whether there was interest in pursuing ADR. By June 3, 2016 all counsel had expressed a willingness to participate in ADR.

(11) With the agreement of all parties and their legal counsel, ADR was held on the morning of July 21, 2016 with the Commission's Appeals Administrator as mediator. The parties were unable to reach a mediated solution and requested that the appeal be heard by the Commission.

(12) The Commission heard the appeal commencing on the afternoon of July 21, 2016. Legal counsel for all three parties filed an Agreed Book of Documents which was entered as Exhibit E-1. The hearing concluded on the morning of July 22, 2016.

2. Discussion

Appellant's Testimony and Submissions

(13) The Appellant Donna Stringer ("Mrs. Stringer") testified that she purchased her property in the autumn of 2007. Mrs. Stringer's property is located adjacent to the subject property. At the time Mrs. Stringer purchased her property, the Developers had a shed on their property and also placed a tent and a dining tent on the property for two to three weeks each year. In poor weather, the Developers slept in the shed.

(14) Mrs. Stringer testified that her cottage contains seven rooms including four bedrooms. The Appellant provided an aerial photo of the cottages on Paradise Drive (Tab 27 of Exhibit E-1). The aerial photo has been annotated to insert descriptions of the ownership of the cottages and the placement of the "bunkies". The photo shows a total of five cottages, three of which are the size of the Appellant's, one which is somewhat smaller and the Developer's converted shed cottage which is substantially smaller than the others.

(15) Mrs. Stringer testified that on July 20, 2015 a port-a-pottie or free standing portable outdoor toilet enclosure was delivered to the subject property. The next day a number of workers arrived with one shed and started putting in stakes where the shed was to be placed. The second shed arrived the next day. The sheds were put in place and windows were installed in the sheds to allow for a view of the water. Mrs. Stringer testified that the Developers informed her that they were just sheds. However, Mrs. Stringer could view the workers trying to put queen size air mattresses into the sheds. She stated that when she questioned the Developers on what permits they had obtained to be allowed to put the sheds on the property, the Developers responded that they did not need permits. The Appellant checked with Leland Wood of the Department of Communities, Land and Environment and he advised that no permits had been issued. Mrs. Stringer advised that a few days later after the initial installation the shed that was closest to the water was moved and the workmen began setting in pegs for the placement of a third shed. Pegs for a third shed were later removed.

(16) Mrs. Stringer testified that when she spoke to Leland Wood at a later time he advised her that the permits were in fact granted, directed her to the Planning website and told her that in order to get information on the permits issued to the Developers, she would have to launch an appeal to the Commission under the ***Planning Act***. When she received the file as part of the appeal process, she was surprised to learn that the original shed that had been on the property was now approved through Permit 87 as a cottage. Mrs. Stringer indicated that she has a concern over the number of accessory buildings being placed on this property and was concerned that more sheds were going to be placed on the property. She also noted that to her knowledge no septic system was ever installed on the Developers' property.

(17) Under cross-examination, Mrs. Stringer acknowledged that the sheds did not impede her view of the water and that, to date, her safety and security were not compromised by the presence of the sheds. However, Mrs. Stringer did note that in her view the Developers and the Developers' guests did compromise safety and security as there were no sanitary facilities on the property and she questioned the cooking and other sanitary facilities where there was no proper disposal. Under cross-examination when she was questioned about her concerns about more sheds, she testified that originally there was pegging put in the ground for four sheds, but in the end only two sheds were actually put on the property.

(18) Leland Wood ("Mr. Wood"), is a safety standards officer employed by the Minister. Mr. Wood was called to testify by Appellant's Counsel. Mr. Wood testified that he has worked for the Minister first as a property development officer and then as a safety standards officer, for the past 13 years. He is licensed as a septic inspector. Mr. Wood is not a land use planner. He testified a summer student working at his office had taken a building permit application for two "bunkies" from Betty Ann Bryanton ("Ms. Bryanton") who is one of the Developers. Mr. Wood testified that he spoke with Ms. Bryanton who confirmed that she was seeking a permit for "bunkies". Mr. Wood testified that the original application for the "bunkies" was refused for the reason that there was no dwelling or cottage on the property at the time of the application.

(19) Mr. Wood testified that he informed Ms. Bryanton that unless the first storage shed on the property was subject to a change of use to a dwelling, there could not be any other accessory buildings placed on her property. Mr. Wood informed Ms. Bryanton that there could only be one dwelling per lot. Mr. Wood testified that he informed her that a septic permit would be required in order to change the original shed to a cottage. He noted that it was a paper application and he did not visit the subject property. He testified that without the original shed being approved through a change of use to a cottage the two additional sheds could not be approved as the "bunkies" were considered to be accessory buildings. He noted that the term "bunkies" was used in the Developer's application.

(20) When asked if 20 "bunkies" would be permitted on the subject property, Mr. Wood replied that approving that many would be questionable as that would be a large number for one building lot. He acknowledged that the Regulations do not specify how many would be permissible and noted that the number allowed is "discretionary". He stated that "lots of people have four storage sheds". Mr. Wood testified that "bunkies' are not permitted to be used as accommodations because there is no septic system connected to the "bunkies". When asked whether you could live in a "bunkie" he replied "No". Mr. Wood testified that the original application was for "bunkies" and he told the applicant that they could not have "bunkies" and he suggested that the application be changed to a request for two non-commercial storage buildings instead.

(21) Mr. Wood testified that a building may be approved as a cottage if there is a septic permit, that there is no time limit on septic approval, no system is first required and no occupancy permit is required. He stated that with regard to a septic system, staff do not know if its installed as the building is not inspected and the Department does not follow-up to determine whether a septic system has been installed. He stated that the Regulations do not specify a minimum size for a cottage.

(22) Under cross-examination from Counsel for the Minister, Mr. Wood clarified that site inspections are not performed for every development permit as resources are not sufficient to do so.

(23) Under cross-examination from Counsel for the Developers, Mr. Wood clarified that Jay Carr directed him to approve the "bunkies" as non-commercial storage buildings with the condition attached to Permit 88 that they were not to be connected to water or sewer.

(24) Counsel for the Appellant submitted that the appeal is against the Minister's decision to issue Permit 87 and Permit 88. He submitted that there is little disagreement with respect to the facts. He submitted that where the parties do differ is on the interpretation of the ***Planning Act*** and the ***Planning Act*** Subdivision and Development Regulations (the "Regulations"). He submitted that the Regulations do not support the issuance of either permit. Highlights of his oral submissions include the following:

- The June 26, 2006 permit application for the original storage shed had the annotation "future cottage many years from now". Exhibit E-1, Tab 19, page 4 contains a reference to "bona fide cottage" which suggests that the Developers do not consider the original shed to be a true cottage. The change of use application which resulted in the issuance of Permit 87 identified the original shed which was changed to a cottage as being 12 by 14 feet for a square footage of 168 square feet.
- The original shed, now deemed to be a cottage, does not have a sewage disposal system. All that was required was approval of a septic permit form. That paper approval was issued about one year ago yet no system has been installed and the Developer has no present intention of installing a septic system. However, such a system is the underpinning for the change of use application.
- Exhibit E-1, Tab 18, provides photographs of four structures: the original shed or "cottage", a small plastic storage shed, a shed used as a "bunkie" and another shed used as a "bunkie".
- No site inspection occurred for either the change of use Permit 87 or the approval of the "bunkies" Permit 88.
- Past decisions of the Commission have emphasized a need for clear wording, objective criteria and the avoidance of arbitrary discretion.
- The definition of "dwelling" under the Regulations is relevant while the definition of dwelling unit is not.
- Granting the permit after locating the structures on the property is a contravention of Sec. 31 of the Act.
- The government did not proceed properly, there is no current septic system on the property, there was no site inspection done to determine whether the structures met the cottage requirements, that both the Developers and government personnel seemed to take the position that, with septic systems, all that is required is a permit, not the installation of the system itself.
- The sewage disposal system to be installed must be the system that was approved and for which a permit was issued as this is the basis for granting a change of use to a cottage under Permit 87.

- Sec. 42(1) of the ***Planning Act*** states that there cannot be more than one building used as a dwelling on a lot and that these terms are defined in the Act. This provision limits the ability to construct multiple buildings and dwellings and have one lot sprinkled with numerous "bunkies".
- "Bunkies" meet the definition of dwelling as set out in the Act.

(25) Counsel for the Appellant requested that the Commission revoke both Permit 87 and Permit 88 and require the two "bunkies" to be removed.

Testimony and Submissions on behalf of the Minister

(26) Jay Carr ("Mr. Carr") is the Safety Standards Chief for the Minister. Mr. Carr is not a land use planner. Mr. Carr testified that he deals with the more "out of the ordinary" files. He testified that the Department will not issue permits for "bunkies", they can't, as they are not provided for in the Regulations. The Regulations do provide for permits for non-commercial storage buildings, that are not dwelling units. The Regulations do not state what non-commercial storage buildings may be used for and nothing in the Regulations prevent sleeping in a non-commercial storage building. Mr. Carr noted that the Minister's staff now has one or two inquiries per year about "bunkies" and the matter is now on the Minister's "radar" and it is expected that in the future the Regulations will be amended to address "bunkies".

(27) Mr. Carr noted that the present matter involves three sheds on the subject property, which is a relatively large lot, and in his opinion at the time it would not have been referred to Planning for consideration for detrimental impact. He advised that as of two months prior to the date of giving his testimony the Department now has the safety standards officers under the Planning Division and that the Department was recently instructed after a decision of this Commission in another matter to have their personnel consult more with land use planners in the Department. He stated that previously it was the environmental aspects that were the focus of the Department in approving such permit applications, but now land use planners are also brought in and the planning aspect to an application needs to be considered. He stated that having three sheds on one lot was, in hindsight, not properly based on sound planning principles and if the application were received today land use planners in the Department would be consulted.

(28) Mr. Carr testified that the Regulations do not set out minimum size standards for a cottage. He noted that to constitute a dwelling unit a kitchen and bathroom is typically required.

(29) Mr. Carr explained that licensed septic contractors design a system, buy registered documents, fill the documents out, send the documents back to the Minister's staff and are required to notify the minister's staff when the system is going to be installed. The Minister's staff does not inspect every system but do random inspection audits. He testified that if an audit is done and they find a system that has not been installed then they proceed to enforce the septic tank permit.

(30) Under cross-examination from Counsel for the Appellant, Mr. Carr testified that the application filed by the Developers was for "bunkies" but the permit issued was for non-commercial storage buildings. Mr. Carr stated that non-commercial storage buildings are accessory buildings and must be accessory to a main use. Mr. Carr also reiterated that there is no minimum size requirement for a building to be approved as a cottage. When asked what the Department would do if they determined that no septic system was installed as in accordance with the permit, Mr. Carr testified that a letter would be provided providing one month to install the system and that if nothing was done then the Department would issue an order providing one month to install the system. Further enforcement steps could be taken including pulling septic tank permit if the work was not conducted.

(31) Under cross-examination from Counsel for the Developers, Mr. Carr stated that the definitions of a "dwelling" and a "dwelling unit" are considered by the Minister's staff to be essentially the same but they are technically separate definitions.

(32) Under questioning from the Commission's Chair, Mr. Carr stated that internal policy now requires planners to be consulted in these type of circumstances. Mr. Carr acknowledged that sound planning principles apply to the ***Planning Act*** and the Regulations. Mr. Carr testified that previously sound planning principles were far down on the list of considerations with applications such as these. As of the date of the hearing he confirmed that sound planning principles are now on the top of the list of considerations that must be dealt with. With respect to the consideration of premature development, Mr. Carr stated that premature development mostly applies to subdivision matters but could also apply with respect to the building of rental cottages.

(33) Counsel for the Minister, departing again from the previous written submission of December 9, 2015 where it was clearly stated that commercial storage buildings were not intended to be used as sleeping quarters or "bunkies", submitted that the use of non-commercial storage buildings as "bunkies" was not prohibited and as such there was no basis to allow the appeal and rescind the permits. Counsel for the Minister presented further oral submissions in support of the Minister's decisions, highlights of which include the following:

- There is nothing in the ***Planning Act*** or the Regulations to prohibit the storage of people in non-commercial storage buildings.
- These bunkies might only be used a handful of times per twelve-month period.
- The bunkies were unfinished inside and provided protection from the rain.
- It would be absurd to consider these structures to be dwellings. By way of example, if someone fell asleep in a gazebo, would that fact make the gazebo a dwelling?
- It was not warranted to send the matter to the Minister's planners.
- "Bunkies" are a new phenomenon in Prince Edward Island and new Regulations are being considered to address them.
- Sound planning principles are now, as of the date of this hearing, being used in development applications by the Department.

- Having this number of storage sheds on a property is not unusual, twenty such sheds would be unusual, but here the number involved was not enough to trigger any kind of a planning review.
- "Bunkies" cannot be considered to be dwellings as defined in the Act.
- Sec. 9 of the Act is a saving provision that allows permits to be issued where development occurs and it is then determined that an application should have been applied for.

(34) Counsel for the Minister submitted that Permit 87 and Permit 88 should be upheld and the appeal denied.

Developers' Testimony and Submissions

(35) Betty Ann Bryanton ("Ms. Bryanton") is the co-owner of the subject property. She purchased the property in 2003-2004. Ms. Bryanton told the Commission that she resides in Ontario. Ms. Bryanton testified that she was born and raised on Prince Edward Island and wanted a summer cottage "spot". She visits the subject property a minimum of a week per year to a maximum of five weeks per year, with the average visit being two to three weeks.

(36) Ms. Bryanton told the Commission that at first she had a tent on the property and went to Sally's Beach to use the washroom facilities there. Ms. Bryanton stated that she needed a well and a building for the well. In 2006 storage shed #1 was placed on the property and she tented next to the building, with the building itself being used to store "our stuff" (e.g. camping gear). There is now a full kitchen in shed #1. One year prior to the application for Permit 87 and Permit 88 an eight foot by eight-foot shed was put up. Prior to receiving the septic permit a portable chemical toilet was used.

(37) Ms. Bryanton testified that Leland Wood helped her with the applications and that she met him to ensure that they complied with all of the set-back requirements and placements. After consulting him she ended up moving one of the placements of the "bunkie" further back up on the property as she was advised that it was not placed properly. Draft applications were prepared and they were then reviewed by Mr. Wood and that was when Mr. Wood told her to correct the placement for the lower "bunkie". She testified that she had told Mr. Wood that she bought sheds hoping that people would be able to stay in them. Mr. Wood, however, advised her that there are no "bunkies" permitted in PEI. She was told that only non-commercial accessory buildings could be used and that fit best for her as their plan was to use the "bunkies" as storage as well. She testified that when it came to the placement of the shed, she placed them on the left side of her property away from the Stringer's property and out of view of their cottage so that there would be privacy for anyone who stayed in the "bunkies". She testified that she never intended to have four "bunkies" on the property, only two "bunkies".

(38) Ms. Bryanton testified that the "bunkies" are small pre-built sheds that were placed on the subject property and were then upgraded with vinyl siding and windows. The "bunkies" would allow her guests to sleep in them rather than in tents when it was raining. The "bunkies" do not have running water or electricity. An air mattress is used for sleeping. The original shed has a kitchen and waste is taken care of. The change of use for the original shed is representative of what it is. In the summer of 2015 there were more people at the subject property due to the activity of placing and upgrading the sheds and an outside portable toilet was used. The "bunkies" are not presently rented out and she testified that she has no intention to rent out the "bunkies". When questioned Ms. Bryanton testified that she did not anticipate putting anymore "bunkies" on the lot.

(39) Under cross-examination by Counsel for the Appellant, Ms. Bryanton testified that she would consider using an outside portable toilet again as she had discovered that it was much more convenient than using the chemical toilet located in the original shed, now the cottage. She has not ordered an outside portable toilet so far this year. Ms. Bryanton testified that the cost of installing a septic system would exceed the benefit of such a system. She maintained that a septic system was not required; rather only a permit for such system. She stated that composting toilets were something she was looking into. Waste water from washing dishes, known as "greywater", goes through a trough and is drained underneath into gravel and goes into the ground.

(40) Ms. Bryanton testified that the change of use for the original shed was filed at Mr. Wood's behest. When not used for sleeping, the bunkies are also used for seasonal storage of items such as a picnic table, wheel barrow, shovels, rakes, chairs etc.

(41) Under re-direct examination from Counsel for the Developers, Ms. Bryanton testified that she is willing to investigate alternate waste disposal methods with the Minister's staff.

(42) In response to questions from the Commission panel, Ms. Bryanton testified that she never had any intention of installing a septic system for two weeks per year use. She then added that she would install such a system if she had to, but she would prefer to utilize a composting toilet. Ms. Bryanton confirmed that the "bunkies" were unfinished on the inside and had standard shed type doors.

(43) Counsel for the Developers presented oral submissions in favour of upholding Permit 87 and Permit 88. These oral submissions include the following points:

- With respect to Permit 87, the change of use permit for the original shed now a cottage, a change of use represents an authorization to do rather than a certification of what has been done. Ms. Bryanton has testified that she will consult with the Minister's staff to deal with alternative options to deal with waste and if necessary, she is open to installing a septic system.
- Both Permit 87 and Permit 88 exist for a period of twenty-four months from the date of issue. As that time period has not passed yet, there is no issue of non-compliance today.

- With respect to Permit 88, that permit is for three non-commercial storage buildings. Of these three buildings, two are used as "bunkies" for at most ten days per year. At all other times, they are used for storage. The mere fact that an air mattress is placed on the floor for a few days per year does not turn a shed into a dwelling.
- In this matter there are only two small buildings being considered as bunkies and this would not be of a sufficient degree to constitute a detrimental impact. Therefore, there is no need to have the application evaluated by the Minister's planning staff.
- Bunkies are not a prohibited use and there would need to be clear and express wording to prohibit using non-commercial storage buildings as bunkies. A right to restrict should be interpreted narrowly while a right to permit should be interpreted broadly. There is no clear wording to prohibit the use of these buildings as bunkies.
- With respect to the definitions of dwelling and dwelling unit: a dwelling is a home, apartment building, a duplex etc. while a dwelling unit is a base unit such as an apartment in an apartment building. Thus, the definition of dwelling and dwelling unit, which are found in the same section of the Regulations, should be applied in the same way.
- The Developers contend that both Permit 87 and Permit 88 were validly granted. However, in the event that the appeal was successful, what would be an appropriate remedy? Permit 87 is a matter of compliance only. As for Permit 88, if the two non-commercial storage buildings used as bunkies were considered to be dwellings, then the only proper remedy would be to prohibit their use for sleeping as there would be no reason not to use them for non-commercial storage.

(44) Counsel for the Developers submit that Permit 87 and Permit 88 should be upheld by the Commission and the appeal dismissed.

3. Findings

(45) After a careful review of all documents in evidence, the oral testimony of the witnesses, the written and oral submissions of counsel for the parties and the applicable law, it is the decision of the Commission to allow the appeal.

(46) Subsection 28.(1) of the ***Planning Act*** sets out the Commission's jurisdiction to hear this appeal of both Permit 87 as a change of use permit and Permit 88 as a development permit:

> *28. (1) Subject to subsections (1.2) to (4), any person who is dissatisfied by a decision of the Minister that is made in respect of an application by the person, or any other person, pursuant to the Regulations for*
>
> *(a) a development permit;*
> *(b) a preliminary approval of a subdivision or a resort development;*
> *(c) a final approval of a subdivision;*
> *(d) the approval of a change of use; or*
> *(e) any other authorization or approval that the Minister may grant or issue under the Regulations,*
>
> *may appeal the decision to the Commission by filing with the Commission a notice of appeal.*

Emphasis added.

(47) The objects of the ***Planning Act*** are set out in section 2:

2. The objects of this Act are

(a) to provide for efficient planning at the provincial and municipal level;
(b) to encourage the orderly and efficient development of public services;
(c) to protect the unique environment of the province;
(d) to provide effective means for resolving conflicts respecting land use;
(e) to provide the opportunity for public participation in the planning process. 1988,c.4,s.2.

(48) The following definitions found within section 1 of the Regulations are noteworthy:

(a) "accessory building" means a building whose use is incidental and subordinate to, and consistent with, the main or approved use of the lot upon which the building is located;

...

(c) "building" means any structure having a roof supported by columns or walls intended for the shelter, housing or enclosure of any person, animal, or chattel, and includes a mini home or mobile home;

...

(d) "change of use" means

(i) altering the class of use of a parcel of land from one class to another, recognizing as standard classes residential, commercial, industrial, resource (including agriculture, forestry and fisheries), recreational and institutional uses, or

(ii) a material increase in the intensity of the use of a building, within a specific class of use as described in subclause (i), including an increase in the number of dwelling units within a building;

...

(f.3) "detrimental impact" means any loss or harm suffered in person or property in matters related to public health, public safety, protection of the natural environment and surrounding land uses, but does not include potential effects of new subdivisions, buildings or developments with regard to

(i) real property value;
(ii) competition with existing businesses;
(iii) viewscapes; or
(iv) development approved pursuant to subsection 9(1) of the Environmental Protection Act;

...

(g.1) "dwelling" means a building or portion thereof designed, arranged or intended for residential occupancy, and

> *(i) "dwelling unit" means one or more rooms used or intended for domestic use of one or more individuals living as a single housekeeping unit with cooking and toilet facilities,*
>
> *(ii) "single unit dwelling" means a building containing one dwelling unit and does not include mobile homes, but does include mini homes,*
>
> ...
>
> *(v.2) "summer cottage" means a single unit dwelling that is intended to be occupied primarily during the summer months;*

(49) At the hearing, Counsel for the Minister took the position that the Minister was correct in issuing both Permit 87 and Permit 88. However, Counsel for the Minister had taken a different position in his December 9, 2015 letter to the Commission, as he stated that it was the Department's position that non-commercial storage buildings are not intended to be used as sleeping quarters or bunkies. He advised that Regulations to address the issue would be prepared in the near future and requested that the appeal be put "on hold" until the new Regulations come into force.

(50) For the record, the appeal was not held in abeyance and there is no evidence before the Commission that such regulatory additions have been made.

(51) From a review of the file and the testimony of Mr. Carr, it is clear that the Minister did not consult with a professional land use planner prior to issuing either Permit 87 or Permit 88. This causes the Commission concern, especially where there are compelling reasons to seek the expertise of a professional planner. The testimony of Mr. Carr also indicates that the Minister's internal policy now provides for staff planning professionals to be consulted on applications such as those filed by the Developers. The Commission commends the Minister for this change in policy to now use land use planners on these types of applications.

(52) In the context of municipal planning decisions, the Commission has often utilized a two-part test to guide its consideration of an appeal. The Commission is of the view that the same test should be applied to appealable Ministerial decisions made under the ***Planning Act*** and the Regulations. In the context of Ministerial decisions, that test is:

- Whether the land use planning authority, in this case the Minister, followed the proper process and procedure as required in the Regulations, in the ***Planning Act*** and in the law in general, including the principles of natural justice and fairness, in making a decision on an application for a development permit, including a change of use permit; and
- Whether the Minister's decisions with respect to the applications for development and the change of use have merit based on sound planning principles within the field of land use planning and as identified in the objects of the ***Planning Act***.

The Commission's Consideration of Permit 87

(53) Permit 87 grants permission to the Developers to change the use of a non-commercial storage building previously permitted by permit K-095-2006 to a summer cottage on parcel number 931741 located on the south side of 158 Paradise Drive in the Community of Little Pond. The permit is dated August 12, 2015 and expires twenty-four (24) months from the date of issue. The permit is subject to the structure being erected in accordance with the approved application sketch and compliance with the Environmental Protection Act's 15 metre watercourse/wetland buffer zone.

(54) Permit 87 is issued under the authority of the Regulations and purports to change an existing non-commercial storage building to a summer cottage. While a summer cottage is a defined term under the Regulations, a non-commercial storage building is not defined in the Regulations. The definition of a summer cottage references the meaning of a single unit dwelling which in turn references a dwelling unit. The definition of dwelling unit specifies a single housekeeping unit with cooking and toilet facilities. The testimony of Ms. Bryanton indicates that there is a kitchen, with wastewater from washing dishes going through a trough into a graveled area and into the ground. There is also a chemical toilet and Ms. Bryanton has considered using an outside portable toilet in the future as having used it in the summer of 2015 proved more convenient than using a chemical toilet.

(55) The evidence given at the hearing was that although a septic system is required for a dwelling unit to be considered a cottage, such a system did not have to be installed, but that all that is required is that a septic permit be obtained. This is an absurdity. While possession of such a permit may facilitate proceeding with the construction of a cottage, mere possession of a septic system permit, without installing the septic system itself, does not legitimately allow for the use of a cottage. The septic system must be installed, inspected and approved before the landowners may occupy their cottage. The presence of an approved septic system is necessary to protect the environment. The absence of the installation of an approved septic system places the environment at risk.

(56) The Commission does not endorse the actions of a property owner taking it upon themselves to install a greywater drainage system that has not been inspected and approved by the Minister's environment experts. It should be the Minister's environmental experts, not the property owner, who decides what is acceptable. The septic system, which is a condition required under Permit 87, must be used for greywater disposal as well.

(57) The Minister's staff did not perform a site inspection of the original 12 by 14 foot building prior to issuing Permit 87. In the absence of such an inspection, and given the testimony of Ms. Bryanton, the Commission finds that the 12 by 14-foot converted shed does not meet the definition of a "cottage" or a "dwelling unit" as set out in the Regulations without the installation of toilet facilities in the unit itself and without the installation of an approved septic system. The Commission, therefore, finds that the Minister did not follow an acceptable proper process of procedure as required in the Regulations in ensuring that the building that was to be subject to a change of use, complied with and met the Regulations. The Minister therefore contravened the first part of the two-part test as enumerated in paragraph 52.

(58) The second part of the two-part test enumerated in paragraph 52 requires that the Minister's decision for this change of use have merit based on sound planning principles within the field of land use planning as identified in the objects of the ***Planning Act***. The evidence of the Minister's staff is that at the time this application was dealt with sound planning principles were far down on the list of considerations. As of the date of the hearing, the staff confirmed that sound planning principles are now on the top of the list of considerations that must be dealt with. This Commission has found, in numerous past decisions, that there must be evidence that a proposed development or change of use is consistent with sound planning principles (*Biovectra v. City of Charlottetown*, Order LA12-06). In determining whether or not a development proposal should go forward, the Minister must make an examination beyond the strict conformity with the Regulations and must consider sound planning principles including, but not limited to, the quality of architectural design, compatibility with architectural character of adjacent development, site development principles for the placement of structures and a thorough assessment of whether the development is consistent with sound planning principles (*Atlantis Health Spa Ltd. V. City of Charlottetown*, Order LA12-02). The alteration of the character and appearance of the neighbourhood must also not be contrary to sound planning principles (*Compton v. Town of Stratford*, Order LA07-05).

(59) The evidence is irrefutable and the Commission finds that the Minister did not consider whether sound planning principles supported a decision to approve the change of use of the 12 by 14 foot building from "non-commercial storage building" to a summer cottage. As such, the Minister failed to demonstrate adherence to a key object of the ***Planning Act***, namely efficient planning based on sound planning principles at the provincial level, and accordingly, the Commission hereby quashes Permit No. M-2015-0087.

The Commission's Consideration of Permit 88

(60) Permit 88 grants permission to the Developer Betty Ann Bryanton to relocate three non-commercial storage buildings located on parcel number 931741 located on the south side of 158 Paradise Drive in the Community of Little Pond. The permit is dated August 12, 2015 and expires twenty-four (24) months from the date of issue. The permit is subject to the structure being erected in accordance with the approved application sketch, compliance with the Environmental Protection Act's 15 metre watercourse/wetland buffer zone, and that none of the non-commercial storage buildings are to be serviced with sewer or water.

(61) Once again, the terminology of "non-commercial storage buildings" is neither defined nor referred to in the Regulations, although the term "accessory building" is both defined and referred to in the Regulations. It is not apparent from the face of Permit 88 that the non-commercial storage buildings are approved as sleeping quarters or "bunkies". It was clear from the evidence that the Minister's staff were well aware that these sheds were bought for and intended to be used so that people could stay in them. It was the Minister's staff that advised that this was not permissible, but that the shed could fall within the Regulations and be permitted to be placed on the property as a "non-commercial storage building". By accepting an application, knowing full well that the intended use is not what is stated on the application, the Minister therefore breached the first part of the two-part test and did not follow proper process and handling of the application.

(62) The evidence before the Commission is that at no time did anyone in the Department seek the opinion of a professional land use planner with respect to the application which resulted in Permit 88.

(63) The objects of the ***Planning Act*** require: efficient planning, protection of the Province's unique environment, an effective means for resolving land use conflict and to provide the opportunity for public participation in the planning process. The Commission expects decisions made under the ***Planning Act*** and the Regulations to not only follow the legislative requirements but also be in accordance with sound planning principles. Adherence to sound planning principles is especially important where, as here, the legislation has not addressed a particular type of development. Sound planning principles could consider not only whether "bunkies" would or would not be permitted, but also, if deemed to be permissible, determine the number permitted on a parcel, size, location, appearance, consultation with adjacent property owners and other such factors.

(64) The Commission reiterates, as set out in paragraph 58 herein, that this type of development must have merit based on sound planning principles. Adherence to sound planning principles is especially important where there are applications to place a number of buildings on a single lot all of which, for the most part, would be used as "bunkies". Sound planning principles would determine whether it is appropriate to have a sprinkling of sheds over a cottage lot property and, if so, what number, size and location, appearance would be permitted on the parcel, after consultation with adjacent property owners and consideration of other factors. (*Atlantis Health Spa Ltd. v. City of Charlottetown*, Order LA12-02). The ***Planning Act*** addresses not only municipalities with Official Plans and land use bylaws but also areas of the Province which do not have Official Plans and land use bylaws. Sound planning must be a common feature of development throughout Prince Edward Island and property owners located in areas of the Province for which there is no municipal government should not be subject to inferior land use planning rights and responsibilities. Sound planning principles are a guard against arbitrary decision making especially where a regulatory checklist does not address a concern. Sound planning principles require regulatory compliance but go beyond merely insuring such compliance and require discretion to be exercised in a principled and informed manner. Sound planning principles require the decision maker to take into consideration the broader implications of their decisions. In order to ensure that sound planning principles have been followed in anomalous applications a professional land use planner must be consulted. The Minister's staff admitted that, in hindsight, the decision to grant the permits for these applications allowing the placement of three sheds on one lot was not based on sound planning principles. The Minister's staff further acknowledged that the applications, if they were now received, would not have been processed without land use planners being consulted.

(65) The Commission notes that when the Appellant contacted the Minister's department to get information on the building permits that were issued she was advised that she would have to launch an appeal with this Commission in order to get that information. The Commission recommends that the Minister change this policy when dealing with inquiries with respect to applications or permits under the ***Planning Act***. No one should be forced to launch a quasi-judicial appeal simply to obtain information with respect to a permit issued by the Minister. As the Commission has seen in the past this results in numerous appeals being filed, only to be withdrawn after there is full disclosure to the Appellant with respect to the permit. The Commission recommends that the

Minister develop an internal procedure to allow for the efficient dissemination of information on permits issued so that interested parties can then make a determination as to whether or not an appeal should be filed.

(66) The Developers' applications to designate a small storage shed a cottage and receive approval for "bunkies" were not contemplated by the Regulations and thus required consultation with a professional land use planner. As the Minister's staff did not consult with a professional planner, the Commission finds that the Minister failed to consider sound planning principles. Accordingly, the second part of the two-part test has not been met and the Commission hereby quashes Permit No. M-2015-0088.

4. Disposition

(67) An Order allowing the appeal and quashing Permit No. M-2015-0087 and Permit No. M-2015-0088 follows.

IN THE MATTER of an appeal by Donna Stringer of a decision of the Minister of Communities, Land and Environment, dated August 12, 2015.

Order

WHEREAS the Appellant Donna Stringer appealed the decision of the Minister of Communities, Land and Environment to issue two permits, both dated August 12, 2015;

AND WHEREAS the Commission heard the appeal at public hearings conducted in Charlottetown on July 21 and 22, 2016 after due public notice and suitable scheduling for the parties and their legal counsel;

AND WHEREAS the Commission has issued its findings in this matter in accordance with the Reasons for Order issued with this Order;

NOW THEREFORE, pursuant to the ***Island Regulatory and Appeals Commission Act*** and the ***Planning Act***

IT IS ORDERED THAT

1. **The appeal is allowed.**

2. **Permit No. M-2015-0087 and Permit No. M-2015-0088 issued by the Minister on August 12, 2015 are hereby quashed.**

DATED at Charlottetown, Prince Edward Island, this 10th day of August, 2017.

BY THE COMMISSION:

(sgd.) *J. Scott MacKenzie*
J. Scott MacKenzie, Q.C., Chair

(sgd.) *Douglas Clow*
Douglas Clow, Vice-Chair

(sgd.) *John Broderick*
John Broderick, Commissioner

NOTICE

Section 12 of the ***Island Regulatory and Appeals Commission Act*** reads as follows:

> *12. The Commission may, in its absolute discretion, review, rescind or vary any order or decision made by it or rehear any application before deciding it.*

Parties to this proceeding seeking a review of the Commission's decision or order in this matter may do so by filing with the Commission, at the earliest date, a written **Request for Review**, which clearly states the reasons for the review and the nature of the relief sought.

Sections 13(1) and 13(2) of the ***Act*** provide as follows:

> *13.(1) An appeal lies from a decision or order of the Commission to the Court of Appeal upon a question of law or jurisdiction.*
>
> *(2) The appeal shall be made by filing a notice of appeal in the Court of Appeal within twenty days after the decision or order appealed from and the rules of court respecting appeals apply with the necessary changes.*

NOTICE: IRAC File Retention

In accordance with the Commission's Records Retention and Disposition Schedule, the material contained in the official file regarding this matter will be retained by the Commission for a period of 2 years.

IRAC141AA(2009/11)