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January 5, 2024

VIA EMAIL

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

Attention: Mr. Philip Rafuse (pjrafuse@irac.pe.ca)

RE : LA23-009, Andea Battison v City of Charlottetown (the 'appeal')

Dear Mr. Rafuse,

Below, please find my (the Appellant) submission in response to the two questions posed by the Island Regulatory and Appeals Commission ('IRAC' or, 'the Commission') and the replies by counsel for the PEI Housing Corporation (the 'Developer'), and the City of Charlottetown (the 'City').

Question #1:

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

{1} Per the City of Charlottetown's Zoning and Development Bylaw, Appendix A, Definitions:

"Development shall have the same meaning as defined in the *Planning Act*, as may be amended and in the case of any dispute, the final determination shall be made by the provincial government department having responsibility for enforcement of such regulations."

500 Lot Area means the Heritage Resource area identified within the City of Charlottetown that is generally located south of Euston Street, and is more specifically described in Appendix E*.

*(*Note, Appendix E is the Watercourse and Wetland Environmental Buffer. The correct reference is Appendix H, 500 Lot Area Map)*

{2} The PEI Planning Act (the Planning Act) definition of development includes demolition (Section 1.d.ii).

'development' means

1.d. (ii) locating, placing, erecting, constructing, altering, repairing, removing, relocating, replacing, adding to or **demolishing structures or buildings** in, under, on or over the land,

{3} The Planning Act definition of 'development permit' references a development (Section 1.e.1).

"development permit" means a permit issued for a **development** under the regulations or pursuant to a bylaw but does not include a building permit issued under the Building Codes Act;

{4} The Commission can hear an appeal regarding a development permit under the Planning Act (Section 28.4.1.a). Therefore, as demolition is a recognised component of development, for which development permits are issued, an appeal regarding the demolition component of the development permit may also be heard by the Commission.

{5} The Appellant refutes the position in the November 7 and 29, 2023 letters from counsel for the PEI Housing Corporation which suggest that demolition permits are not appealable under clause 28 (1.1a.1) of the Planning Act because under Section 1.(e.1) of the Planning Act, the definition of a 'development permit' does not include a building permit issued under the Building Codes Act. While demolition permits and building permits are issued under the Building Codes Act, a demolition permit is not a building permit. As such the argument does not apply.

{6} The existence of building permits and demolition permits as permits under the Building Codes Act does not mean that they are viewed equally under the Planning Act. In fact, the Planning Act makes specific reference only to the exclusion of building permits in Section 1.(e.1).

{7} As there is no specific exclusion of demolition permits from the Planning Act, the Commission could use its discretion to consider the appeal on its merits for reasons outlined below. Question one (#1) posed by the Commission might be rephrased and contemplated as *"Does the definition of development, and so by association the issuance of a development permit, require consideration of the demolition component of the development?"*

{8} That the proposed three-storey apartment building to replace the single family home currently on parcel at 231 Richmond Street (PID# 340703) is a development cannot be in question. The PEI Housing Corporation submitted plans requiring major variances in February 2022. Section 1.d of the Planning Act also includes the following in the definition of a development:

(iv) **changing the use or intensity of use of a parcel of land** or the use, intensity of use or size of a structure or building; [emphasis added]

{9} Per Section 3.3.2 of the City's Zoning and Development Bylaw "No Development shall be undertaken without a Development Permit" Under the Zoning and Development Bylaw, the definition for Development is as per the Planning Act. The latter includes demolition (see paragraph {1}). Therefore, the demolition portion of the development cannot proceed without a valid Development Permit.

{10} A Development Permit was clearly required. Neither the PEI Housing Corporation nor the City have provided an approved development permit, or even an application for one, in their submissions. Section 28 (1.1.a) of the Planning Act '... in respect of an application...'. Errors of omission are still errors and reflect non-compliance with a Bylaw. Failure to submit an application for, and the City to issue, the required Development Permit before undertaking the demolition component of the development can be considered by the Commission.

{11} In effect, Council made a decision to not issue a Development Permit where one was required. Decisions of Council can be appealed under Section 28 (1.1) of the Planning Act.

{12} The City's position is that "The Commission does not have the authority to hear matters outside the scope of section 28(1.1)..." in its response of December 13, 2023. The Appellant disagrees with the statement "According to section 28 (1.1) of the Planning Act, appeals to the Commission must be from decisions of the council of a municipality.....the issuance of a demolition permit is not a decision of Council." It appears that the City is implying that because a City staff member issued the permit, Council is not responsible. This position has been rejected by the Commission under the nature of delegated authority and the Interpretation Act (*LA05-012, Guptill, Moore and Morneau vs City of Summerside, paragraphs 27 and 28*). The numbering for Section 9 in the current Interpretation Act (May 13, 2021) is Section 11.2.

[27] With respect to the Respondent's argument that the subsection 28(1) appeal process under the Planning Act should be read literally and only a decision of council should be able to be appealed, the Commission rejects such an argument. The decisions of officials delegated by municipal councils and, for that matter, the Minister of Community and Cultural Affairs have been appealed to the Commission on many past occasions following the principle of delegated authority. If the Commission accepts the Respondent's argument on this point, a municipal council or the Minister could avoid the statutory appeal process merely by delegating decisions to staff officials. Fortunately, the nature of delegated authority and section 9 of the Interpretation Act serve to maintain the appeal rights of the public by tempering an overly literal reading of an enactment. In this sense, the legal rights of the public to appeal are protected against the imposition of "black letter law".

[28] Accordingly, the Commission finds that it does have the jurisdiction to hear the Appeal LA05012.

Remedial construction

11.(2) Acts and regulations shall be construed as being remedial and shall be given the fair, large and liberal interpretation that best ensures the attainment of their objects.
2021,c.10,s.11

{13} The ‘Objects’ in the Planning Act are listed in Section 2, Purposes with 2.a, 2.b, 2.c, 2.d, and 2.f being most, but not exclusively, relevant to the current appeal.

2. Purposes

The purposes of this Act are

- (a) to provide for **efficient** planning at the provincial and municipal level;
- (b) to promote sustainable and **planned** development; [emphasis added]
- (c) to protect the natural and **built environment** of the province; [emphasis added]
- (d) to encourage co-operation and co-ordination among stakeholders;
- (e) to address potential conflicts regarding land use;
- (f) to provide the opportunity for public participation in the planning process; and
- (g) to ensure compatibility between land uses. 1988, c.4, s.2; 2021,c.42,s.1.

The ‘500 Lots Area’ in Charlottetown is of great historical importance, a recipient of the Prince of Wales Prize for heritage preservation, nationally recognised as the ‘Birthplace of Confederation’ and as such is a **built environment** (2.c) unique to the province of Prince Edward Island. Demolition of buildings unequivocally impacts the built environment. The City of Charlottetown has also acknowledged this in multiple ways. The Official Plan Section **4.2 A Vibrant Downtown – The 500 Lot Area** is dedicated uniquely to the 500 Lots Area. Planning consultants were hired to advise the City on how develop the 500 Lots while maintaining its character resulting in ‘The **500 Lots Development Standards and Design Guidelines**’ which was implemented by Council in 2013 (Appellant’s Supplementary Record, Tab 5). Section 7 of the Zoning and Development Bylaw, ‘**DESIGN STANDARDS FOR THE 500 LOT AREA**’ provides guidelines and restrictions for development in the 500 Lots Area and in Appendix A, Definitions states that the “**500 Lot Area** means the Heritage Resource area...”. A separate **Heritage Preservation Bylaw** was created in 2018 to protect Designated Heritage Resources and Heritage Preservation Areas.

{14} Having an approved Development Permit in place before beginning any component e.g., demolition, of a development would be consistent with a ‘**planned** development’ (2.b) which has followed all the required bylaws, regulations etc. of a municipality.

{15} As the appeal is relevant to the objects of the Planning Act, the Commission can find that it has jurisdiction to hear the appeal under section 11.(2) of the Interpretation Act.

{16} Furthermore, the position that the demolition permit can only be appealed under the mechanism provided in the Building Codes Act deserves consideration by the Commission. Demolition is not defined in the Building Code Bylaw; however, the bylaw indicates that the definition in the PEI Building Codes Act would apply. Per the latter (section 1.c) ‘demolition’ “refers to anything done for the purposes of the removal of a building or any material part of a building.” Section 4.81 of the Building Code Bylaw states the Bylaw is related only to the work involved in the demolition or after. The Building Code Act refers to ‘standards for construction and demolition work’ (section 26.3.b) and ‘responsibilities, and obligations... with respect to construction or demolition work’ (26.3.d); No reference to the context, validity, legality, or conformance to the relevant bylaws that provide the restrictions and conditions for demolition permits is made in either the Building Code Bylaw or the Building Codes Act.

Building Code Bylaw

Section 4.8 Demolished Building

4.8.1. When the whole or any part of a building is demolished, this Bylaw applies to the work involved in the demolition and to the work required to any parts remaining after demolition to the extent that deficiencies occurring or remaining after demolition require correction.

{17} *The correctness of the process by which the decision was made that demolition permit could be issued without a development permit in place* could be heard by the Commission. As demolition is considered a component of development under the Planning Act, and as demolition permits are required for developments, and as the Commission can hear appeals in respect of development permits, the mechanism to appeal a demolition permit could also extend to Section 28(1.1). The Charlottetown Building Code Bylaw does not specify a route of appeal therefore, the Commission could use its discretion to hear the appeal.

{18} The City contends (December 13, 2023) that demolition permits are ‘as of right’. The Commission has previously clarified the concept of ‘discretion vs as-of-right’ such that rights are subject to statutes, regulations, and bylaws in *LA11-01, Biovectra vs City of Charlottetown, paragraph 61*, as follows:

[61] The caselaw is clear. At common law, a property owner may do with his land what he wishes, subject to the rights of surrounding property owners, for example, the law of nuisance. However, these rights may be restricted by statute, regulation or bylaw. Such restrictions must be expressed clearly and with solid legislative authority. To the extent that discretion is permitted by the statute, regulation or bylaw the wording must be clear and the criteria objective. Arbitrary discretion is to be avoided.

{19} In the case of demolition permits, the City's Zoning and Development Bylaw (Sections 3.5.1 and 3.5.2) and Heritage Preservation Bylaw (Sections 4.2.1.a, 4.2.1.b and 3.5) clearly establish objective restrictions, conditions, and criteria under which demolition permits may be approved or denied. Demolition permits are not as-of-right. The City acknowledged this fact when they checked to see if 231 Richmond (PID#340703) was on the list of Designated Heritage Resources ('Appendix A') – a restriction under the Zoning and Development Bylaw, Section 3.5.2.

{20} At the core of this appeal is the status of the 500 Lots Area as a Heritage Preservation Area which has the same restrictions as Designated Heritage Resource, requiring de-designation of a property or portion of a Heritage Preservation Area under the Heritage Preservation Bylaw. The de-designation process itself also has restrictions governing how and for what reasons properties can be de-designated before a demolition permit can be issued (Section 3.5).

{21} As clear, objective criteria, restrictions and conditions for demolition permits are found in the City's Zoning and Development and Heritage Preservation Bylaws, and both being bylaws enacted "in the execution of a power conferred by or under the authority of an Act (Section 1(d), Interpretation Act), and under section 1(c) of the Interpretation Act, 'enactment' includes a regulation, then Section 11.2, 'remedial construction' of the Interpretation Act also applies. The Commission can find that it has jurisdiction to hear the current appeal (*LA05-012, Guphill, Moore and Morneau vs City of Summerside*).

{22} In summary, the Appellant submits that demolition permits meet the definition of 'development permit' for the additional reasons listed above the Commission can hear the appeal under section 28(1.1) of the Planning Act and/or use its discretion and/or section 11.2 of the Interpretation Act for reasons including, but not limited to:

- i) Per the City's Zoning and Development Bylaw, 'development' is defined as in the Planning Act and, a Development Permit must be issued before a development may be undertaken. The definition of 'development' in the Planning Act includes demolition and changing the intensity of use of a parcel of land. The proposal for 231 Richmond Street is undoubtedly a development, therefore requires a Development Permit.
- ii) As demolition is a recognised component of development, for which development permits are issued, an appeal regarding the demolition component of the development permit may also be heard by the Commission.
- iii) Failure of the Developer to submit an application for, and the City to issue, a Development permit is appealable under section 28(1.1) of the Planning Act 'in respect of an application'. Acts of omission are errors and reflect non-compliance with a bylaw.
- iv) Under the principle of delegated authority and section 11.2 of the Interpretation Act, decisions of staff can also be appealed to the Commission. In this case, Council made a decision not to issue a Development Permit where one was required. Decisions of Council can be appealed under 28(1.1).

- v) The proposed development and its demolition component are directly related to objectives of the Planning Act, therefore the Commission can use its discretion and hear the appeal under section 11.2 of the Interpretation Act.
- vi) Demolition is not 'as-of-right' as it is subject to the City's Zoning and Development Bylaw and Heritage Preservation Bylaw which clearly establish objective restrictions, conditions, and criteria under which permits can be issued.
- vii) Neither the Building Code Bylaw nor the Building Codes Act address the process by which city staff, and by the principle of delegated authority Council, determined that issuance of the demolition permit was within the restrictions and conditions as outlined in the Zoning and Development Bylaw and the Heritage Preservation Bylaw. Decisions of Council can be appealed under 28(1.1).

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

{23} Providing a definition of mootness from the Supreme Court (below) in its letter of November 29, 2023, Counsel for the PEI Housing Authority suggested the Commission find the appeal moot based on the expiry of the demolition permit as this indicated a lack of a ‘live controversy’. In contrast, the Appellant suggests that the Commission can find that a ‘live controversy’ does exist in the form of determination of the status of the 500 Lots Area as a Heritage Preservation Area and therefore the appeal is not moot. Counsel for the City similarly identified the status of the 500 Lots Area as the crux of appeal LA23-009 (November 3, 2023; paragraph 7).

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

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

{24} The Appellant submits that the decision of the Commission in appeal LA23-009 will have the effect of resolving some controversy which affects, or may affect, the rights of the parties in the future. The City has continued to issue demolition permits in the 500 Lots Area since December 6, 2023, e.g., 119 Pownal Street; 91 King Street (two buildings), 100-102 Dorchester Street, 68 Queen Street. A Reconsideration Request regarding permits for 119 Pownal Street was submitted December 14, 2023. As of January 3, 2024, the City had not responded. The house at 119 Pownal was demolished Jan 2, 2024. Future Demolition and Development permits for proposals in the 500 Lots Area can reasonably be expected. It is in the interest of the Commission, to hear and rule on appeal LA23-009 regarding the status of the 500 Lots Area as a Heritage Preservation Area. This will provide clarity to the General Public, the City, and Developers and set precedent as to what legislation, regulations and bylaws will apply to the 500 Lots Area. The appeal is not moot.

- {25} As stated by the Respondent's counsel (letter to the Commission, November 3, 2023, paragraph 7), the crux of the Appellant's argument in this appeal is whether or not the 500 Lots Area is a Heritage Preservation Area within the City of Charlottetown and therefore subject to legislation governing Heritage Preservation Areas as defined in the City of Charlottetown Heritage Preservation Bylaw. The Appellant's position that the 500 Lots Area is a Heritage Preservation Area is presented in the amended appeal. The appeal is not moot. Appeal LA23-009 is *also a question of correct process*. The Commission's decision on this question of process is required.
- {26} The appeal is not moot since a decision by the Commission is required on the nature of demolition being 'as-of-right' as suggested by the City (December 13, 2023). The Appellant contends that the position taken by the Commission in *LA11-01, Biovectra v. City of Charlottetown, paragraph 61*, applies to the current appeal. See paragraph {18}, this document.
- {27} Furthermore, under the principle of delegated authority, when city staff issued the demolition permit Council effectively made a decision not to recognise and apply the legislation governing Heritage Protection Areas to the property as noted in {21}, such that de-designation was required before a demolition permit could be issued. Decisions of Council are appealable under the Planning Act, Section 28(1.1). The correctness of this decision is a live controversy and so the appeal is not moot.
- {28} Hearing the appeal at this stage would also be efficient and be consistent with object (a) of the Planning Act. It is not unreasonable to expect that a new appeal would be filed once the required Development Permit is issued with the focus that the property is within a Heritage Preservation Area and so subject to relevant legislation. Hearing the appeal at the earlier stage would allow for the remedy of finding that the 500 Lots is a Heritage Preservation Area and subject to the governing legislation regarding demolition such that de-designation is required before demolition can occur as outlined in the Heritage Preservation Bylaw. Determining the status of the 500 Lots Area as a Heritage Preservation Area will influence the fate of any property in the 500 Lots Area that does not appear in 'Appendix A'.

{29} The Commission has previously found the benefit of hearing an appeal at earlier stages and has applied ‘a fair, large and liberal construction to section 28 ... to best ensure the attainment of the objects of the Planning Act’ (LA10-10; para 21-23). As stated in {13} Objects a, b ,c, d, and f of the Planning Act are particularly relevant to the current appeal. Section 11.2 of the current Interpretation Act is the same as section 9 referenced below.

LA10-10, Andrea Battison and Joan Cumming v. City of Charlottetown

[21] The Commission has often referred to section 9 of the **Interpretation Act** where a strict reading of legislation would appear to frustrate the appeal process. The Commission is mindful of the above cited objects of the **Planning Act**. Objects (a) and (d) are particularly germane to this jurisdictional issue. There is considerable merit in encouraging the appeal process to be exercised as early as practical in the planning process, as this allows an appellant to exercise the right to appeal a project in its early stages before a developer incurs greater development costs. In addition, if the outcome of an appeal requires modifications to a project, it is easier and less expensive to implement such modifications in the concept stage, rather than at a much later stage. Simply put, it is often good for all parties to an appeal to deal with the issues as early as practical provided that such an early determination is also just and fair. It is often said that justice delayed is justice denied. It may also be said that justice rushed is justice hushed. These two sayings may be reconciled by proceeding as swiftly as possible, provided that due process is followed and the rights and responsibilities of all parties are respected.

[22] The Commission finds that proceeding with an appeal in the early stages of a project helps to facilitate efficient municipal land use planning. It also helps to provide an effective means for resolving land use conflicts by addressing the issues before plans become highly detailed and fixed. In the present appeal, proceeding with the appeal benefits all three parties while delaying the appeal until after a final reading of the various bylaw amendments was passed would cause confusion, delay, added expense and runs the risk of bringing the administration of justice into disrepute.

[23] Given that all parties to this appeal consented to the Commission's jurisdiction with respect to this present appeal, the Commission hereby applies a fair, large and liberal construction to section 28 of the **Planning Act**, as it applies to the City's June 14, 2010 Resolution, in order to best ensure the attainment of the objects of the **Planning Act**. Accordingly, the Commission finds that it has the jurisdiction to hear the present appeal. {emphasis added}

{30} Were the Commission to not hear the appeal on the grounds that the Demolition Permit has expired and the home subsequently demolished, options for remedies would be limited. Once a building is gone it is gone. Historic buildings such as the home at 231 Richmond Street cannot be replaced.

{31} Paragraphs {16} and {17} regarding the mechanisms available for appealing a demolition permit are also relevant to Question #2 and require a decision. The appeal is not moot.

{32} In *Borowski vs Canada* (above), the Supreme Court also ruled that the Court could exercise its discretion to hear the case. Similarly, the Commission could use its discretion to hear appeal LA23-009. Reasons for the Commission to find that the appeal is not moot include, but are not limited to, the following:

- i) Numerous live controversies exist.
 - a. The crux of the appeal is whether or not the 500 Lots Area is a Heritage Preservation Area as presented by the Appellant in the amended appeal. The appeal will have an effect on resolving this controversy.
 - b. A decision on whether demolition is as-of-right in the 500 Lots Area is required.
 - c. A decision on whether the principle of delegated authority apply to demolition permits making their issuance a decision of Council is required.
- ii) Hearing the appeal at this stage would be efficient, fulfil objects of the Planning Act and provide more options for remedy.
- iii) Provide clarity to the General Public, the City, and Developers and set precedent as to what legislation, regulations and bylaws will apply to the 500 Lots Area

CONCLUDING REMARKS

The 500 Lots Area is seeing an unprecedented increase in pressure for new development. It is critical that the City have clarity regarding how this development should proceed i.e., which governing legislation applies.

Were the Commission to deny the motion to dismiss appeal LA23-009, clarity regarding the appropriate legislation governing development in the 500 Lots Area would be achieved. The Commission could find that the 500 Lots is a Heritage Preservation Area (the Appellant's position) with the resulting remedy that the Heritage Preservation Bylaw applies to PID# 340703 and all properties in the 500 Lots Area. Alternatively, the Commission could find that the 500 Lots is not a Heritage Preservation Area (which the Appellant refutes) but, when a development requires demolition, an approved Development Permit is required.

Sincerely,

Andrea Battison

Cc: Stephen Flanagan, Counsel for the Developer
Maggie Hughes and Melanie McKenna, Counsel for the City