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

Docket: Docket No. LA19-016
Order: Order Number LA20-06

IN THE MATTER of an appeal by Matthew Richard, of a decision of the City of Charlottetown approving Lot Consolidation and Variance Applications dated **October 15, 2019.**

BEFORE THE COMMISSION ON Wednesday, December 30, 2020.

J. Scott MacKenzie, Q.C., Chair

Erin T. Mitchell, Commissioner

ORDER

CERTIFIED A TRUE COPY

Philip J. Rafuse,
Appeals Administrator
Island Regulatory & Appeals Commission

IN THE MATTER of an appeal by Matthew Richard, of a decision of the City of Charlottetown approving Lot Consolidation and Variance Applications, dated October 15, 2019**.**

Contents

IN THE MATTER of an appeal by Matthew Richard, of a decision of the City of Charlottetown approving Lot Consolidation and Variance Applications, dated **October 15, 2019.**

Appearances & Witnesses

1. **For the Appellant, Matthew Richard.**

   Counsel:
   D'Arcy Leitch
   Andrew Jamieson

   Witnesses:
   Lilly Wilson

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

   Counsel:
   David W. Hooley, Q.C., Cox & Palmer
   Melanie McKenna, Cox & Palmer

   Witnesses:
   Greg Morrison
   Alex Forbes

3. **For the Developer, Weymouth Properties Ltd.**

   Represented by:
   Quentin Bevan

IN THE MATTER of an appeal by Matthew Richard, of a decision of the City of Charlottetown approving Lot Consolidation and Variance Applications, dated **October 15, 2019.**

Reasons for Order

1. This appeal asks the Commission to quash an October 15, 2019 decision of the City of Charlottetown (the "City") to approve two applications filed by Weymouth Properties Ltd. (the "Developer"), one to consolidate four lots within the downtown core, and the other to reduce the minimum required lot frontage and side yard setback, all to allow for the construction of a 43-unit apartment building.
2. The Appellant, Matthew Richard ("Richard") is a tenant of a building located on one of the lots subject to consolidation and this appeal.

Procedural History

3. Richard filed his original appeal on November 5, 2019, and an Amended Notice of Appeal on February 18, 2020. The hearing of this appeal was delayed due to the onset of the Covid-19 pandemic and the restrictions that were put in place. Following receipt of additional submissions from the City and Richard, the Commission heard this appeal on July 9, 2020, being the first available date acceptable to the parties, their witnesses, and legal counsel.[1]

Background

4. The Developer wishes to build a five storey, 43-unit apartment building in the City's 500 Lot area. To do so, the Developer applied to the City to consolidate four properties located at 94-98 Dorchester Street, 100-102 Dorchester Street, and 91 & 93 King Street (the "Properties").[2] The Developer's intention is to demolish the four existing buildings[3] located on the Properties.
5. On September 18, 2019, the Developer submitted two applications to the City.
6. The first was a Subdivision and Lot Consolidation Application to consolidate the Properties (the "Consolidation Application"). The application proposed to change the number of lots

[1] Richard did not testify at the hearing but appeared by teleconference with his legal counsel. His witness, Lilly Wilson, also appeared by teleconference. The City's counsel and witnesses appeared in-person. Virtual attendance is permitted by the Commission's Rules of Procedure for Public Hearings and was agreed to by counsel for the parties.
[2] Being PID#s 336909, 336917, 336974 and 336966.
[3] The demolition is considered "as of right" under the City's Zoning and Development Bylaw and the demolition itself is not the focus of this appeal.

from four to one. The stated rationale was "to consolidate all these lots to create one apartment building".[4]

7. The second was a Variance Application, seeking to reduce the minimum lot frontage required to be eligible for bonus height from 98.4ft to approximately 80.1ft and to reduce the minimum side yard step back for the fifth floor of the proposed apartment building to the City of Charlottetown right-of-way between King Street and Dorchester Street from 18'-0" to 4ft (the "Variance Application")[5]

8. On September 19, 2019, the City sent a letter and information package to all property owners within 100 meters of the Properties, requesting written comments for or against the Applications no later than October 3, 2019.[6] The only public feedback the City received was one letter in support of the Applications.[7]

9. On September 30, 2019, Heritage Board met and was provided a planning staff report "for information only" to allow Heritage Board to be made aware of the Applications.[8]

10. Planning staff prepared a report to the City's Planning Board recommending approval of the lot consolidation and variances, subject to a number of conditions.[9]

11. Planning staff's report was thorough.[10] The report set out the history of the Applications and development context.[11] It explained the notification process, noting that letters were sent out to property owners within 100 metres of the subject property notifying them of Planning Board's meeting with respect to the variances.[12] Importantly, planning staff also undertook a thorough review of the Applications in light of the City's Official Plan and Bylaw.[13]

12. Planning staff noted that the "application"[14] related to a number of Official Plan objectives, and in particular, "those aimed at sustaining neighbourhoods" and "creating a vibrant 500

[4] Record, Tab 2.
[5] Record, Tab 3. Together, the Commission will refer to the Consolidation Application and the Variance Application as the "Applications".
[6] Record, Tab 4. In accordance with section 3.9.3 of the City's Zoning and Development Bylaw (the "Bylaw").
[7] Record, Tab 7.
[8] Record, Tab 5. The Report was discussed at Heritage Board at length. See Record, Tab 6.
[9] Record, Tab 7.
[10] Totalling eight pages.
[11] Record, Tab 7 (p.2 of 8).
[12] Record, Tab 7 (p.3 of 8).
[13] Record, Tab 7 (pp.3-8).
[14] Although planning staff uses the singular "application", it is clear from the report that they are referring to both the Variance Application and Consolidation Application. See Record, Tab 7 (p.7).

Lot area".[15] Staff noted the applications' positive attributes[16] and shortcomings.[17] In recommending approval subject to conditions, planning staff stated, in part:

> ***This application involves numerous requests which shall be considered concurrently, as all items must be approved to proceed with the proposed development****. Staff is confident that the majority of the requirements in the Zoning & Development By-law have been satisfied and the proposed development will enhance the existing neighbourhood.* ***Further, the applicant should be subject to the signing of a Development Agreement to ensure that the plans that have been reviewed and presented to the public and Council will be constructed. The Development Agreement will also include provisions pertaining to the bonus height public benefit and design review.*** [Emphasis added]

13. The City's Planning Board met to discuss the Applications on October 7, 2019. City Planner Greg Morrison ("Morrison") presented the Applications to Planning Board. He explained that before them was an application for two variances and a lot consolidation.[18] Morrison informed Planning Board that the existing buildings contained 21 units, and that the Developer proposed to construct 43 units in a 5-storey building.

14. Planning Board Member Rosemary Herbert asked what would happen to the residents of the existing buildings and if there was any support for them.[19] The City's Manager of Planning, Alex Forbes ("Forbes"), addressed these questions, stating that Planning Board's decision must be grounded in the City's Official Plan and Bylaw. Their exchange reads, in part:

> ***Rosemary Herbert:*** *And I guess, just in follow up to that. Is there any assistance from anybody to help people find a living spot if (sic) when they are displaced and who (unclear words)?*
>
> ***Alex Forbes:*** *And again, even if I am on the Affordable Housing Board****, this board has to be careful. When you look at this application, this is outside of the boundaries. You can make any decision you so desire but you cannot make a decision based upon that.*** *It is just not… The (sic) person owns the property. They want to make a business decision. It is up to you folks whether you concur with that. But the rationale there, we realize that it does have an impact but is not really something that this board has the authority to say, we don't want to support it because of the reason. We can find other reasons but I would suggest don't hang on that issue.*

---

[15] Planning staff highlighted a number of sections of the Official Plan, including sections 3.1.2, 3.2.1, 3.2.2, 4.2.2, and 4.2.6. Record, Tab 7 (pp.6-7).
[16] "Promotes compact urban form and infill development, as well as the efficient use of infrastructure; Consistent with the built form in the neighbourhood; Design review is required to ensure that new development is compatible with, and enhances its surroundings". Record, Tab 7 (p.8).
[17] "Requires a variance to the lot frontage requirement for bonus height; Requires a variance to reduce the minimum side yard stepback for the fifth floor on one side; Does not preserve the buildings in existing neighbourhoods". Record, Tab 7 (p.8).
[18] Record, Tab 8 (p.1).
[19] Record, Tab 8 (p.2).

> ***Rosemary Herbert:*** *However, just to counter that. We do support applications that are providing more apartments. I think you can argue both sides of it, right? It is an issue. It's housing so both sides can be argued.*
>
> *…*
>
> ***Alex Forbes:*** *The problem is, the municipality is not really in the housing… That is not really their mandate even though we are trying to constantly change policies. When there are policies in place, this situation unfortunately, goes on every day and we are hearing it through short term rentals. But again,* ***there are policy/ways to deal with that but we really don't have any policies dealing with displacement. Again, when you make a decision and you say why you made the decision, somebody will ask me, what authority did you have to make that decision. Is there anything in your Official Plan dealing with displacement or your documents? And there is nothing.***[20]

15. Following debate, Planning Board agreed with planning staff's recommendation to approve the lot consolidation and two variances, subject to conditions. The motion to recommend the applications to City Council ("Council") for approval passed unanimously (7-0).[21]

16. On October 15, 2019, Council unanimously approved,[22] without debate, the applications to consolidate the Properties and granted the requested variances (the "Resolution"). The Resolution stated that the approval was subject to a pinned final survey plan, a new perimeter deed being registered, design review approval, "Public Benefit being provided for the fifth storey", and a signed Development Agreement.[23]

17. The City posted notice of its Variance Application decision on the City's permit approval page of its website, for the week ending October 18, 2019.[24] There was no corresponding posting for the Consolidation Application.

18. The City tweeted[25] from the @ChtownPE Twitter account on October 15, 2019, the following:

> *#ChtownCouncil approved request for lot consolidation of 4 properties (91 King St, 93 King St, 94-98 Dorchester St & 100-102 Dorchester St) in order to construct a 5-storey, 43-unit apartment building. Approved subject to conditions.*

19. On October 16, 2019, Morrison advised the Developer of the Resolution and asked it to contact him "to discuss the following steps and required documents when you are ready to proceed with the project".[26]

20. On October 25, 2019, Richard emailed a member of City staff, Todd Saunders, with regard to the Properties. He identified the Properties, and asked if Saunders could "verify if there

---

[20] Record, Tab 8 (pp.2-3) [emphasis added].
[21] Record, Tab 8.
[22] By a vote of 10-0. Record, Tab 9.
[23] Record, Tab 10.
[24] Record, Tabs 10 and 14
[25] See email from A. Packwood to G. Morrison dated July 8, 2020.
[26] Record, Tab 11.

was a Heritage Board Review prior to the approval by Council (sic) approve the request for demolition of these buildings."

The Issues

21. The Amended Notice of Appeal raised two grounds:[27]

    a. The Planning Board's recommendation should not have been approved by Council because Planning Board procedures denied residents their entitlement to natural justice; namely, notice and to make representations; and

    b. The approved resolution is contrary to the City of Charlottetown's official plan to: (i) address social housing needs and equitable distribution; (ii) preserve the built form of Charlottetown's existing neighbourhoods; and (iii) to protect and strengthen the character and stability of neighbourhoods.

22. This appeal essentially turns on three questions.

    a. Did the City comply with the public notice requirements set out in the *Planning Act* and Bylaw?

    b. Did the City fail to meet its procedural fairness obligations in not providing Richard notice of the decision and/or the opportunity to make representations at a public meeting of council?

    c. Did the City's decision comply with its Official Plan?

Disposition

23. The appeal is denied. For the reasons that follow, the Commission finds, based on the record before it, that the City met its public notice obligations with respect to the Applications. Although the City did not meet its obligations to post public notice of its decision to approve the Consolidation Application, its technical non-compliance did not prejudice Richard. In addition, the Commission finds that the City's decision to approve the Applications has support in, and is not contrary to, the City's Official Plan.

Did the City comply with public notice requirements?

Compliance with the *Planning Act* and Bylaw

24. Richard contends that the City did not comply with its obligations to provide notice of the impugned decision, as required under section 23.1 of the *Planning Act*.[28] His position is set out in the Amended Notice of Appeal, as follows:

---

[27] The original Notice of Appeal raised a third ground, namely that the City failed to comply with s.45.3 of the Bylaw pertaining to lot consolidation. Richard abandoned this ground in the Amended Notice of Appeal. As this ground was abandoned, the Commission did not have the benefit of argument regarding, and thus has not addressed, whether the City's process regarding the Lot Consolidation Application met the Bylaw's lot consolidation procedural requirements.

[28] R.S.P.E.I. 1988, Cap. P-8.

> *[T]he Appellant submits that the City did not comply with its obligations as to notice under section 23.1 of (sic) Planning Act…*
>
> *In the record disclosed by the City to the Appellant, there is no evidence to show that the City complied with its obligation to "cause a written notice" of the impugned decision to be posted at a location accessible to the public during business hours…*[29]

25. Richard also argues that the notice was insufficient to notify affected parties of "the true nature and decision and its impact" and that the "description of the nature of the application" must be interpreted so that affected parties may make an informed decision about whether to appeal the decision "given its impact on their interests".

26. Richard states that though the City *did* post a notice on its website with the description "Major Variance – Lot Frontage and side-yard step back", it did not refer to the Consolidation Application. As such, he submits that the notice was insufficient to adequately inform members of the public as to the true nature of the decision and its impact.[30]

27. The relevant portions of section 23.1 of the *Planning Act* as it relates to the posting and content of notice reads as follows:

> *23.1* ***Notice of decision of Minister or council***
>
> *(1) Where*
>
> *…*
>
> *(b) the council of a municipality makes a decision of a type described in subsection 28(1.1)*
>
> *the Minister or council, as the case may be, shall, within seven days of the date the decision is made, cause a written notice of the decision to be posted*
>
> *(c) on an Internet website accessible to the public; and*
> *(d) at a location accessible to the public during business hours*
>
> …
>
> ***Contents of notice***
>
> *(2) A notice of a decision that is required to be posted under subsection (1) shall contain*
> *(a) a description of the land that is the subject of the decision;*
> *(b) a description of the nature of the application in respect of which the decision is made;*
> *(c) the date of the decision;*
> *(d) the date on which the right to appeal the decision under section*

[29] Amended Notice of Appeal, dated February 18, 2020.
[30] Amended Notice of Appeal.

> *28 expires; and*
> *(e) the phone number of a person or an office at which the public may obtain more information about the decision.*[31]

28. The City argues that the Variance Application decision was posted on the City's website following its approval, and that the fact that the information was available at the Planning and Heritage Department, a location that is accessible to the public during business hours, renders the City in compliance with subsection 23.1(1)(d).

29. It states, however, that notice of approval of the Consolidation Application was not posted on the City's website at that time "because Council's decision was tentative only being subject to a condition subsequent being first fulfilled – e.g. provision of a final pinned survey plan being required *before* an approval could occur".[32] The City argues that none of the types of decisions prescribed in section 28(1.1) are applicable to the Consolidation Application, as the decision constituted neither a preliminary – nor final – approval and notice, therefore, was not required. If that position was accepted by the Commission (and it is not), then the question would be, what did the City do in passing the resolution?

30. Alternatively, the City argues that if the Commission finds that section 28(1.1) does apply to the Consolidation Application, the failure to post notice of its approval constitutes a mere technicality, and one that did not prejudice or compromise Richard's position. The Commission accepts this argument, on the facts of this case.

Analysis

31. The City's argument that the decision regarding the Consolidation Application constitutes neither preliminary approval nor final approval pursuant to section 28(1.1)(a)(ii) and (iii) of the *Planning Act*[33] and therefore public notice is not required cannot be accepted by the Commission. It must be one or the other.

32. The approval of the Consolidation Application was subject to conditions. Greg Morrison, a professional planner with the City, testified at the hearing that the Applications were not at the final approval stage, as they were approved subject to conditions. However, the position that this approval subject to "conditions" does not require public notice is not tenable, based on the text of the Resolution itself, the City's actions following its decision, and past practice of the City available in the public record.

33. The Resolution grants approval of both the Variance Application and the Consolidation Application, albeit subject to a series of conditions being met. The Resolution, as drafted, makes no differentiation as to the nature of the approvals given to the Variance Application

---

[31] *Planning Act*, s. 23.1.
[32] City's Response to Amended Notice of Appeal, dated March 2, 2020. [Emphasis in original].
[33] Section 28(1.1) provides that a decision of council under a bylaw for a preliminary approval of a subdivision or a final approval of a subdivision may be appealed to the Commission. See *Planning Act*, s. 28(1.1)(a),(ii) & (iii).

and the Consolidation Application. Even the Developer was advised by the City that both Applications were approved, subject to conditions.[34]

34. A plain language reading of the Resolution would lead a member of the public to conclude that the City had made a formal determination relating to the Consolidation Application. Likewise, it would lead the Developer to believe that the Consolidation Application was approved and it simply had to satisfy the conditions in order to continue the development process. Why else would the Developer undertake to fulfill these conditions – which necessarily require it to incur additional time and expense – if not a final approval? It is not unreasonable, therefore, for a member of the public to expect that notice of both of these decisions would be posted, and that they could be appealed.[35]

35. The City's argument on this point is inconsistent with the public notice it issued for two other lot consolidation approvals granted by Council on October 15, 2020, the same day the Council approved the Consolidation Application. Two other lot consolidation applications were approved at that meeting, subject to various conditions. One such application had similar conditions to those at issue in this appeal, including a pinned final survey plan, perimeter deed, and design review. The City posted notice of these decisions on the City website, as required by section 23.1 of the *Planning Act*.[36]

36. The City must post notice of its decisions in accordance with section 23.1 of the *Planning Act*. The Commission encourages the City to ensure that its decisions and resolutions are drafted in such a way as to comply with both the *Planning Act* and the Bylaws, and to provide clear and accurate information to the public. A member of the public should not be asked to perform a convoluted exercise in statutory interpretation in order to determine the status of a decision of Council and whether it can be appealed to this tribunal.

Richard suffered no prejudice

37. Although this Commission has found that the City had failed in its obligation to properly post notice of its decision to approve the Consolidation Application, we find that Richard was not prejudiced as a result and was afforded the opportunity to appeal the impugned decisions.

---

[34] Record, Tab 11.

[35] Although the City argued that the Lot Consolidation Application decision was not one which required public notice under the *Planning Act*, it did not go so far as to argue that it was not an appealable decision under s.28(1.1) of the *Planning Act*.

[36] Record, Tab 14. City File Nos. 2019-52 and 2019-56. These Resolutions were not filed with the Commission during the appeal, but are publicly available on the City's permit approval website. So, too, are the planning board and Council meeting packages related to these files. A screenshot of the signed resolutions and minutes page, which included a link to the October 15, 2019 meeting resolutions, was filed by the City with the Commission at the hearing.

38. In *Booth and Peake v. IRAC*,[37] a decision which pre-dates the passage of section 23.1, of the *Planning Act*, Justice Webber (as she then was) discussed the need for notice to ensure that a right of appeal is a real, rather than merely illusory, right:

> *[20] All these cases express a concern about ensuring that a right of appeal is a real rather than an illusory right.*
>
> *[21] I find that* ***Re Hache and Minister of Municipal Affairs*** *(1969), 2 D.L.R. (3d) 186 (NBSCAD) applies in this province and the appeal period will begin to run when an appellant has received notice of the decision. This may be specific notice or general notice through posting or publication or by some other means. The bylaws of a community could establish the type of public notice that will be given upon the issuance of a building permit, e.g. publication in a newspaper or newsletter, posting in the community office. If the public can become aware of the decision by way of this public process then the process will likely satisfy the requirements of notice.*
>
> *...*
>
> *[23] Such notice of a decision is essential to give meaning to the appeal process. If this were not the case, the right to appeal would be illusory, rendering the statutory right of appeal meaningless. It would not be reasonable to interpret the statute in a way that renders a given right meaningless. The law does not specify the manner in which notice to the public must be given but does state that there must be some public notice of a decision - or specific notice to persons affected by the development - before an appeal period can be said to run.*

39. Considering, then, whether Mr. Richard afforded a real – and not illusory – opportunity to appeal the impugned decisions, we look at the larger context. As discussed, the Resolution itself was available at the City offices. The City tweeted[38] that the Consolidation Application was approved, subject to conditions. Mr. Richard emailed[39] Todd Saunders, Heritage Officer for the City, on October 25, 2019, to inquire as to whether the City had investigated the heritage of the Consolidated Properties prior to "the approval by Council approve [sic] the request for the demolition of these buildings?". He was clearly aware of the Applications and the Resolution, clearly aware of the fact that, if approved, the Consolidated Properties would be demolished, and so subsequently took steps to file an appeal.

40. As noted by this Commission in *Queens County Condominium No. 40* v. *City of Charlottetown*, "[w]hile consultation with - and input from - the public is an important element

---

[37] 2004 PEISCAD 18.

[38] Posting on a Twitter account is not included in the list of methods by which public notice of municipal planning decisions is to be provided to the public and is not sufficient, on its own, to satisfy the requirements in section 23.1 of the *Planning Act*. The Commission also notes that the referenced tweet does not contain all of the information prescribed in section 23.1(2) of the *Planning Act*.

[39] Email dated October 25, 2019 from M. Richard to T. Saunders, submitted by the counsel for the City at the hearing of the appeal.

of the planning process, it cannot be construed as a veto on the development of properties owned by others."[40]

41. In consideration of these facts,[41] the Commission cannot agree that Mr. Richard was deprived of the ability to make an informed decision about whether to appeal the Resolution. He was not prejudiced by the City's process, and so we find no justification to disturb the City's decision making process on this ground.

Procedural fairness and the rights of others

42. The Commission wishes to briefly address an argument Richard raises on behalf of others, wherein he contends that Council should not have approved the applications "because the Planning Board procedures denied residents their entitlements to natural justice; namely, notice and to make representations."

43. Mr. Richard is a named party to these proceedings in his own right, and does not purport to, nor did he provide evidence of, being a representative of a larger group of interested residents. In fact, Mr. Richard did not testify before the Commission or lead any evidence in his own right. Mr. Richard does not have standing before this Commission to make submissions on behalf of others.

44. In both written and oral submissions, counsel for Mr. Richard argued that the City, its Development Officers, and Planning Board, failed in the duty to notify the residents of the Consolidated Properties of the true nature of the Applications. He submitted:

> *…where, as here, the notice effected is insufficient to notify the affected parties of the true nature of the decision and its impact, notice cannot be said to have been adequate. Residents on the to-be-consolidated lots – or any other interested party – could not have understood that the request approved by Council on October 15, 2019 was to 1) consolidate 91 King, 93 King, 94-98 Dorchester Street and 100-102 Dorchester Street or that 2) the Major Variance and consolidation were requested and approved "in order to construct a five-story, 43-unit apartment building" – a description from which they could have inferred that their homes would be demolished and their lives displaced.*[42]

45. Mr. Richard did not provide any evidence that other residents were unaware of the Resolution and/or were deprived of a right to appeal.

46. As outlined above, section 23.1 of the *Planning Act* specifies how notice of certain decisions of the council of a municipality is to be provided to the public. It constitutes a general notice to the public, as opposed to specific notice. Specific notice is not required by section 23.1.

---

[40] LA18-02 at para. 42.
[41] And in consideration of section 9 of the *Interpretation Act,* RSPEI 1988, Cap. I-8.
[42] Amended Notice of Appeal.

47. Richard appears to conflate the requirement to give notice of Council's decision in section 23.1 with the specific requirements of the Bylaw[43] to provide property owners within 100 metres of the boundaries of the Properties with written notice of the application for a major variance.

48. The Commission heard testimony from Greg Morrison that letters were sent to all affected property owners within 100 metres of the Properties to advise them of the then-pending Applications.[44] These letters were sent in compliance with section 3.9.3 of the Bylaw. The Commission also notes that the Bylaw does not require such notice for the lot consolidation.

49. The notice to affected property owners was detailed.[45] It described that an application for variances affecting four properties had been filed with the City. It explained that the applicant intended to demolish the existing structures, consolidate the properties, and construct a 43-unit apartment building. The variances were explained. It requested written comment and afforded recipients the opportunity to contact City Planning Staff with questions or concerns. No property owners did. Rather, one letter was filed in support.[46]

50. Richard does not suggest that the City failed to comply with the notice requirements of the *Planning Act* or Bylaw. Rather, he argues that inadequate notice of Council's decision deprived tenants of the affected Properties the right to be heard.

51. There is nothing in the *Planning Act* nor the Bylaw to require the provision of notice to the tenants of the affected Properties. The question of whether there should be is fundamentally a policy issue. The proper place to bring an argument seeking policy change is not before this tribunal, but with Council or the provincial ministry responsible for the *Planning Act*.

52. Neither the planners employed by the City nor Planning Board have the ability, nor the obligation, to step outside of the legislative and regulatory framework that is set by the Legislative Assembly (in the *Planning Act*) and by Council (in the Bylaw). This Commission, in fulfilling its role as an appellate tribunal of municipal planning decisions must also work within this regulatory framework. The Commission is not the appropriate body from which to seek such relief.

53. The Commission finds that that City did not err in not communicating directly with the tenants of the Properties regarding the Planning Board meeting. It had no legal obligation to do so.

Did the City comply with the Official Plan?

Expert Testimony

54. To support his position that the City approved the Applications without due consideration of the City's Official plan, Mr. Richard sought to have Ms. Lilly Wilson of Vancouver, British

[43] Bylaw, s.3.9.3.
[44] Record, Tab 4.
[45] Record, Tab 3.
[46] Record, Tab 7.

Columbia qualified as an expert witness in urban and community planning. The City opposed this qualification.

55. The Commission heard that Ms. Wilson earned her Master of Community and Regional Planning degree from the University of British Columbia in 2018. In 2014, she earned a Bachelor of Arts degree, with a specialization in urban planning and a minor in human environment from Concordia University in Montréal. She has been employed since 2018 as development manager for the Community Land Trust Group of Societies in British Columbia, and prior to that was employed as a development assistant with the BC Housing Authority. Ms. Wilson was, at the time of the hearing, still a candidate member of the Planning Institute of British Columbia and the Canadian Institute of Planners.

56. The City objected to Ms. Wilson being qualified as an expert, and pointed out that though she had significant academic training in areas relating to housing justice and human rights, she was not a municipal planner and had no experience in preparing official plans or zoning and development bylaws. The City also noted that she was not yet a member in a professional association, and had no significant work experience in the area of municipal planning.

57. Counsel for Mr. Richard cited several cases[47] in support of Ms. Wilson's eligibility for qualification as an expert, arguing that she possessed "precisely the kind of training and experience required" to assist the Commission in this case. The fact that she was not yet a full member in any professional association, he argued, was not disqualifying as her experience and education nevertheless gave her greater knowledge than the triers of fact.

58. The most compelling submission regarding the extent of Ms. Wilson's expertise came from Ms. Wilson herself. In the supplementary material filed by Ms. Wilson and dated July 3, 2020, she stated:

> *My expertise is characterized here as a planner and housing development professional familiar with developing and redeveloping non-market housing within a number of different municipalities and associated municipal and provincial regulatory contexts. My work and educational experiences have been based in Quebec, Ontario, and British Columbia. I am not an expert in specificities regarding municipal or provincial processes or regulations within the City of Charlottetown or Prince Edward Island.* [Emphasis added]

59. The Commission acknowledges that Ms. Wilson may have some experience in the planning and "housing development" fields outside of Prince Edward Island, but it is not sufficient to meet the threshold of a planning "expert" in this jurisdiction. Ms. Wilson is not a member of a professional association. Nor is she a municipal planner. She has no experience in preparing official plans. By her own admission, Ms. Wilson is "not an expert in specificities regarding municipal or provincial planning processes or regulations" in the City or this province. Simply put, her evidence and any 'expertise' which she may have outside of the

[47] *R. v. Mohan*, [1994] 2 SCR 71; *R. v. N.O.* [2009] AJ No. 213 (Alta CA); [2013] N. *New Brunswick (Minister of Social Development) v. N.S.* B.J. No. 23 (NB CA); *R. v. Russell*, [1994] O.J. No. 2934 (Ont. C.A.)

planning context was not necessary, and would not assist, the Commission to decide the specific issues under appeal, being the City's compliance with its notice obligations under the Bylaw and Planning Act, and compliance with its own Official Plan in deciding to approve variances and lot consolidation applications under its Bylaw.

60. The Commission determined that Ms. Wilson may have some experience in the planning field outside of this jurisdiction, but it is not sufficient to meet the threshold of "expert". The Commission declined to accept Ms. Wilson as an expert.

61. Nevertheless, for the sake of expediency, the Commission permitted Ms. Wilson to testify at the oral hearing. The Commission, however, has given no weight to her opinion regarding planning law in Prince Edward Island, including any assessment of the requirements of the *Planning Act*, City Official Plan or Bylaw, or sound planning principles.

62. Absent compelling expert evidence from a qualified planner, and without having led any direct evidence, Richard is left only with legal submissions regarding the interpretation of the City's Official Plan and Bylaw.

Analysis

63. Richard argues that the City approved the Applications contrary to the provisions of its Official Plan, and that

> *…these provisions must be read in context, namely, within the context of the official city plan's objectives to (i) address social housing needs and equitable distribution; (ii) preserve the built form of Charlottetown's existing neighbourhoods, and (iii) protect and strengthen the character and stability of neighbourhoods.*[48]

64. Richard placed specific emphasis on the first objective, which is actually a policy within the Official Plan[49] and reads as follows:

> *3.3.2. Our objective is to enhance the range of housing available to residents who have special social, economic or physical needs.*
> *• Our policy shall be to work with our partners to address social housing needs, and to encourage its equitable distribution throughout the City.*
> *• Our policy shall be to allow accessory suites in detached houses, subject to all other applicable land-use and development regulations.*
> *• Our policy shall be to actively work with our partners to address the housing needs of seniors, to expand the range of affordable housing available to them, and to provide it in neighbourhoods preferred by them.*

[48] Amended Notice of Appeal.
[49] City of Charlottetown, Official Plan, Section 3.3.2.

65. Richard, through his counsel and written submissions, placed emphasis on two points to establish that the City did not comply with the Official Plan.

66. The first argument was that the recent shortage of social housing in the City of Charlottetown should have been considered by Planning Board and Council prior to the Applications being approved. The failure to do so, he submitted, is reason to overturn the decision of Council, as "Council did not consider or decide whether the variance and consolidation application furthered [objective 3.3.2], given that the impugned resolution was passed without debate".[50]

67. The Commission is not persuaded by this submission, which must be analyzed in light of the nature of the decision under appeal and the complete record before the Commission.

68. The City was considering a request from a developer to, among other things to consolidate four lots. The purpose of the consolidation was to demolish four structures totalling 21 units,[51] in order to construct a five-story, forty-three unit apartment building.

69. The *Planning Act* and the Bylaws do not include provisions that address, or provide remedies for, developments which result in the displacement of residents.

70. Neither the Official Plan nor Bylaw compels any developer to include "social housing" in their development projects. At the oral hearing, Forbes acknowledged that there exists a housing issue in the City of Charlottetown, but testified that it is the Provincial or Federal Governments that have programs to support affordable housing; the City does not. He indicated that the Developer might be able to access such programming in future as the project progresses, but that at this early stage it was not confirmed. He also stated that the City was not able to compel the Developer to include affordable housing in the project.

71. Richard did not provide evidence to the Commission on how the demolition of twenty one units, and the creation of forty three units, would impact the vacancy rates in Charlottetown – and how that could be construed as being contrary to the Official Plan. No evidence was led as to the nature of the units to be demolished and whether they constituted "affordable housing".

72. In summary, there is no evidence before the Commission that establishes the approval of the proposed development is contrary to Objective 3.3.2 of the Official Plan.

73. The second argument raised by Richard alleged that Forbes went outside his authority to counsel Planning Board to not consider the residents who would be displaced as a result of the proposed development. To be clear, Forbes was acting at all material times in his capacity as an advisor to Planning Board in making a planning decision. Forbes was not the decision-maker.

74. The Commission does not accept that this argument has merit.

---

[50] Amended Notice of Appeal.
[51] Record, Tab 7.

75. The relevant portion of the record relating to Forbes' interactions with Planning Board is reproduced, above. At the oral hearing, Forbes stated that he was counselling Planning Board to stay within its mandate and follow the Bylaws, neither of which require consideration of the potential displacement of residents.

76. The Commission finds that Forbes acted appropriately in providing advice to Planning Board.

Appellant's submissions on social policy and affordable housing in the planning context

77. In addition to addressing the appropriateness of the notice given and the procedure followed by the City, Ms. Wilson and Counsel on behalf of Richard spent a great deal of time discussing the rights, and the alleged infringement thereof, of tenants in the planning process when dealing with demolition of existing rental buildings to make way for new development.

78. In her testimony Ms. Wilson suggested that in Vancouver B.C., where she works, the city by-laws provide that specific written notice of planning applications must be delivered to tenants as well as surrounding property owners. She also testified that the Vancouver city by-laws require that city planning authorities consider the effect of the displacement of tenants when assessing a development application that involves the demolition/change of an existing apartment building.

79. The *Planning Act*, By-Law and Official Plan of the City do not contain any provisions requiring such notice to tenants or consideration of displacement. Further, this Commission was not provided with any support for the argued position that these considerations fall within what are acceptable sound planning principles or the broad obligations of planning professionals in assessing applications.

80. The Commission makes no comment on whether such rights for tenants should be included in provincial legislation or the official plans and by-laws of municipalities. That public policy debate is one that should be should be held with provincial and municipal authorities.

81. As succinctly put by Mr. Justice David Stratas of the Federal Court of Appeal; policy submissions seeking change to the law should be made to politicians, not to an adjudicative body. [52]

82. The Commission agrees with Justice Stratas. These types of public policy submissions should not be made before an administrative appellate body. This Commission, and the planning appeal process, is not the appropriate forum and should not be used to advance that public policy debate.

---

[52] *Teksavvy Solutions Inc*. v. *Bell Media Inc.*, 2020 FCA 108. "*We reminded them that we are running a court of law, not a court of policy, and, still less, a legislature, and so those who want to make freestanding policy submissions should wander down the street to lobby a politician."*

Conclusion

83. For the reasons set out above, the Commission dismisses the appeal.

IN THE MATTER of an appeal by Matthew Richard, of a decision of the City of Charlottetown approving Lot Consolidation and Variance Applications dated **October 15, 2019.**

Order

WHEREAS the Appellant, Matthew Richard appealed a decision of the City of Charlottetown approving Lot Consolidation and Variance Applications dated October 15, 2019**;**

AND WHEREAS the Commission heard the appeal at a hearing conducted on July 9, 2020;

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.**

DATED at Charlottetown, Prince Edward Island, on Wednesday, December 30, 2020.

BY THE COMMISSION:

(sgd.) *J. Scott MacKenzie*

J. Scott MacKenzie, Q.C., 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.*

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.