

**THE ISLAND REGULATORY AND  
APPEALS COMMISSION**

Prince Edward Island  
Île-du-Prince-Édouard  
CANADA

**Docket LA11005  
Order LA12-02**

**IN THE MATTER** of an appeal by  
Atlantis Health Spa Ltd. of a decision of the  
City of Charlottetown, dated November 14,  
2011.

**BEFORE THE COMMISSION**  
on Tuesday, the 19th day of June, 2012.

Allan Rankin, Vice-Chair  
Maurice Rodgerson, Chair  
Jean Tingley, Commissioner

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# Order

**IN THE MATTER** of an appeal by  
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**IN THE MATTER** of an appeal by  
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# **Appearances & Witnesses**

**1. For the Appellant Atlantis Health Spa Ltd.**

**Counsel:**

**Jonathan Coady**

**Witnesses:**

**Paul J. Madden  
William Chandler**

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

**Counsel:**

**David W. Hooley, Q.C.  
Nathan Beck, Articled Clerk**

**Witnesses:**

**Hope Gunn  
Laurel Palmer-Thompson  
Philip Wood**

**3. Members of the Public (who spoke at the hearing)**

**Jeffrey Briggs  
Donald Martin**

**4. For the Commission**

**Counsel:**

**Horace Carver, Q.C.**

**Appeals Administrator:**

**Philip J. Rafuse**

**Recording Secretary:**

**Dawn Murphy**

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# Reasons for Order

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## 1. Introduction

[1] The Appellant Atlantis Health Spa Ltd. (Atlantis) has 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*). Atlantis' Notice of Appeal was received on November 16, 2011. An amended Notice of Appeal was filed on February 17, 2012.

[2] On August 10, 2011, Atlantis submitted a proposal to the City of Charlottetown (the City) to construct a mixed-use building consisting of commercial, office and residential uses on a portion of parcel number 841536 (the subject property). The subject property consists of the area of land between Atlantis' existing condominium building and Founder's Hall. In order for Atlantis' proposal to proceed, an amendment of *Appendix G, List of Approved Properties in the Comprehensive Development Area Zone and their Permitted Uses* of the City's Zoning and Development Bylaw (the Bylaw) would be required. The City's planning staff and its Planning Board recommended approval of this amendment to the Bylaw. On November 14, 2011, the City's Council rejected Atlantis' request for this amendment to the City's Bylaw.

[3] This appeal was heard on February 22, 24, 27 and March 5, 2012. Written submissions were received from Atlantis on March 19, from the City on March 30 and a rebuttal submission from Atlantis on April 10, 2012.

## 2. Discussion

### Atlantis' Submissions

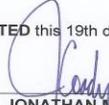
[4] Atlantis filed a highly detailed written submission. At the end of this submission is a succinct conclusion which is reproduced below:

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**CONCLUSION**

85. The decision by council in this case was unfair and inconsistent with the principles and policies set forth in the Official Plan and the Zoning Bylaw. Council was obligated to consider, and decide upon, the merits of the application submitted by Atlantis. Instead, council embarked on a separate and irrelevant inquiry – whether or not there should be a moratorium on development until the Official Plan and Zoning Bylaw are reviewed – and rejected the application on that basis. That purported exercise of discretion by council was improper, unfair to Atlantis, unsupported by the case law, inconsistent with the Official Plan, and contrary to the *Planning Act*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of March, 2012.

  
 JONATHAN M. COADY  
 STEWART MCKELVEY  
 65 Grafton Street  
 Charlottetown, PEI C1A 8B9  
 Telephone: 902.892.2485  
 Facsimile: 902.566.5283  
 Solicitor for the Appellant

**The City's Submissions**

[5] The City also filed a highly detailed written submission. The City's succinct concluding paragraphs are reproduced below:

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106. The City submits that Mr. Madden was afforded due process and the Bylaw procedures were correctly followed. Further, that cogent expert evidence was led to the effect Council's decision is consistent with good planning principles. In these circumstances and based upon the Commissions own past decisions as well as the guidance we have from the Appeal Court, this is simply not a proper case where (even if the Commission might be favourably disposed toward Mr. Madden's proposed development) the Commission ought to substitute its decision for that of Council.

**ORDER SOUGHT:**

107. It is the request of the City that Appeal #LA11005 – Paul J. Madden v. City of Charlottetown be dismissed for the above reasons.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 30<sup>th</sup> day of March, 2012.

  
 DAVID W. HOOLEY, Q.C.  
 Cox & Palmer  
 20 Great George Street  
 Charlottetown, PE  
 C1A 7L1

Solicitor for the Respondent,  
 City of Charlottetown

## Members of the Public

[6] The Commission heard from two members of the public. Mr. Martin thanked the Commission for the opportunity to attend the hearing. Mr. Briggs' comments addressed the specific subject matter of the appeal. He told the Commission that he lives in an adjacent condominium development. He noted that there was no guarantee for Atlantis to receive approval for a second building when Atlantis purchased the subject property. He suggested that perhaps a better concept plan could be obtained rather than a parking lot or Atlantis' present proposal. He submitted that the City's waterfront needs high standards, that proposed development be scrutinized with respect to its surroundings and that the City's Council listened to area residents.

## 3. Findings

[7] After a careful review of the evidence, the submissions of the parties, and the applicable law, it is the decision of the Commission to allow the appeal. The reasons for the Commission's decision follow.

[8] Appeals under the **Planning Act** take the form of a hearing *de novo* before the Commission. In an often cited decision which provides considerable guidance to the Commission, *In the matter of Section 14(1) of the Island Regulatory and Appeals Commission Act* (Stated Case), [1997] 2 P.E.I.R. 40 (PEISCAD), Mitchell, J.A. states for the Court at page 7:

*it becomes apparent that the Legislature contemplated and intended that appeals under the **Planning Act** would take the form of a hearing de novo after which IRAC, if it so decided, could substitute its decision for the one appealed. The findings of the person or body appealed from are irrelevant. IRAC must hear and decide the matter anew as if it were the original decision-maker.*

[9] In previous appeals, the Commission has found that it does have the power to substitute its decision for that of the municipal or ministerial decision maker. Such discretion should be exercised carefully. The Commission ought not to interfere with a decision merely because it disagrees with the end result. However, if the decision maker did not follow the proper procedures or apply sound planning principles in considering an application made under a bylaw made pursuant to the powers conferred by the **Planning Act**, then the Commission must proceed to review the evidence before it to determine whether or not the application should succeed.

[10] However, a consideration as to whether or not a decision maker followed "the proper procedures" ought not to be viewed narrowly to include only ascertaining that the required notices were issued and other preliminary steps taken. Rather, "proper procedure" applies to the entire decision making process, from receipt of an application to the rendering of a decision. The decision maker must always follow the applicable law.

[11] The Commission examined a two-part test which serves as a guideline in determining appeals under the **Planning Act**:

- Whether the municipal authority, in this case the City, followed the proper process and procedure as required in its Bylaw, in the **Planning Act** and in the law in general, including the principles of natural justice and fairness, in making a decision on what is essentially a rezoning and a bylaw amendment application; and
- Whether the City's decision with respect to the proposed rezoning and bylaw amendment has merit based on sound planning principles within the field of land use and urban planning and as enumerated in the Official Plan.

[12] Section 28 of the City's Bylaw sets out a detailed process with respect to amendments and approvals within the CDA zone. The subject property is in a CDA zone. Given the importance of this section, and the unique process pertaining to the CDA zone, section 28 is reproduced in its entirety.

## **SECTION 28 COMPREHENSIVE DEVELOPMENT AREA (CDA)**

### **28.1 PERMITTED USES**

*Uses permitted in a CDA Zone Shall be those approved by Council and May include any Uses or Mix of Uses allowing in any zone of this Bylaw and Innovative mixed-Use Developments and Council Shall give due consideration to other sections of this bylaw, but Council May approve any Use or Development in a CDA Zone which it deems to be in the public interest notwithstanding all other sections of this bylaw but only after following the procedures sections of this Section 28.*

### **28.2 DEVELOPMENT CONCEPT PLAN**

*Development within a Comprehensive Development Area Shall be subject to the approval by Council of a Development Concept Plan and any attached schedule and the applicable Development Agreement entered into pursuant to section 28.6.2. Appendix "G" comprises a list of approved properties in the Comprehensive Development Area zone and their permitted uses.*

### **28.3 DEVELOPMENT APPLICATIONS IN THE CDA ZONE**

*.1 No Development consisting of new Buildings or the demolition or relocation of Buildings Shall take place in a Comprehensive Development Area until a Development Concept Plan has been proposed and adopted by Council.*

*.2 The Council, before approving a Development Concept Plan, Shall consider the following:*

- (a) the Maintenance of Design Standards of the proposed Buildings and their acceptability with respect to land Uses and the character and scale of Existing and proposed Development in the vicinity;*
- (b) the preservation of Existing site features of unique quality and the preservation of the natural beauty of the area;*

- (c) *the type of Ownership;*
- (d) *the proposed population density of the area, the floor space ratio, the adequacy of Open Space areas, Building form, Parking, pedestrian walkways, Streets, water supply, sanitary and storm sewers; and*
- (e) *any other factors recommended by Planning Board.*

*.3 Applicants for Development approval in the CDA Zone May put forward Development Concept Plans, and such Development Concept Plans, if approved by Council, Shall serve as the elements of a Development Concept Plan for the portion of the zone in which they are situated.*

*.4 Development Concept Plans for sites in the CDA Zone Shall be prepared having regard to the site Development principles as set out in Section 4.60 of this By-law.*

#### **28.4 REQUIREMENTS**

*A comprehensive Development Concept Plan Shall comprise no less than 1.2 hectares (3 acres) in one (1) contiguous area unless it constitutes an expansion of an Existing Development Concept Plan. A Lot that is less than 1.2 hectares and existed prior to the effective date of this By-law May submit a Development Concept Plan.*

#### **28.5 APPROVAL PROCEDURE**

*.1 In considering a Development Concept Plan put forward by an applicant, Council Shall deliberate the quality of architectural Design of all proposed Buildings, their compatibility with the architectural character of adjacent Development, and the extent to which the Development Concept Plan reflects the site Development principles as set out in Section 4 of this By-law.*

*.2 Subsequent to approval of the Development Concept Plan, the working site plan and Buildings Shall be approved on the recommendation of Planning Board for each Phase within the Comprehensive Development Area provided it is, in the opinion of Council, consistent with the overall Development Concept Plan and any schedule attached thereto.*

*.3 Before Council approves or amends a Development Concept Plan in a Comprehensive Development Area, a public hearing Shall be called in the same manner, mutatis mutandis, as if an amendment to this By-law were being considered.*

*.4 Changes to a Development Concept Plan that do not change the approved intent of the Use or Lot such as minor additions to a Building, Lot Subdivision or consolidation will not be considered an amendment to the Development Concept Plan and May be approved by the Development Officer.*

## 28.6 AGREEMENTS

*.1 Upon approval of the Development Concept Plan by Council, the Development Concept Plan May be accepted by Council resolution as all or part of a Secondary Plan.*

*.2 The Council Shall require the applicant to enter into a Development agreement incorporating the terms of the Development Concept Plan setting out the responsibilities on the part of the applicant and Council, and Council May require such security as May be acceptable to Council for items as shown on the site, Building or landscape plan(s).*

[13] The subject property is located within the City's waterfront area. Section 3.5 of the City's Official Plan, entitled "Waterfront Development" outlines a vision, goals, objectives and policies for the City's waterfront. This section notes in part:

*As recently as twenty years ago, Charlottetown's waterfront was a working harbour characterized by piers, warehouses, hard edges, and railways. Today, through the determined efforts of the Charlottetown Area Development Corporation (CADC) and others, the waterfront is still a working harbour... but one which has capitalized on its historical legacy as the basis for introducing a wide variety of people-oriented uses including a boardwalk, marinas, shops, and high end open space amenities. Those responsible for shaping the waterfront have made a conscious effort to use its established urban fabric as historical reference points in redevelopment efforts so as to maintain Charlottetown's ties to its illustrious past. This has proven to be a very wise course. The waterfront is now a place of commemoration, contemplation, and celebration. Its success in the recent past can be measured by the variety of people who are drawn to it, learn through it, and enjoy the experiences offered by it.*

*Both the Boylan Commission and the Stevenson-Kellogg Report pointed out that the waterfront is a key ingredient in the healthy development of the City. Its historical legacy, viewscape characteristics, and diverse elements are central to Charlottetown's image and identity. The area now supports a variety of residential, commercial, industrial, and recreational activities... which collectively contribute to festivity and animation along the waterfront during warm weather months. Indeed, these mixed-use elements represent the kind of future growth and development which best suits that part of the waterfront which extends from the Hillsborough River Bridge to Haviland Street. However, more attention should be paid to encouraging new residential and commercial development in this area, as well as year-round usage of the waterfront's facilities. Furthermore, the City needs to continue its efforts to make the waterfront more accessible; protect viewscape characteristics both to and from the water; and enhance the landscaping, tree planting, and street furniture program for the area.*

[14] In the minutes of the September 7, 2011 meeting of Planning Board it was stated:

*4. 4 Prince Street (PID# 841536)*

*This property is located in the area between Founders Hall and the condominiums at 4 Prince Street. The property is presently used as a parking lot. There have been previous applications before the Board for this property. The applicant proposes a three storey building with office/commercial on the first floor and second floors and residential and an option for offices on the third floor. This property is located in the CDA Zone and the application would also require an amendment to the Waterfront Concept Plan. Bill Chandler, architect, attended the meeting at 6:05 p.m. to present the application. The proposed building will be long and narrow because of easements on the property. Access will be one way in under the building on the east side and egress will be from the parking area at the rear of the building. The first floor of the building will contain an office and washroom for the marina as well as small retail shops. The second floor will be office space and the third floor will have four residential units and possibly some office space. Mr. Chandler reviewed the concept drawings and noted that the building exterior will have the same elements as the condominium building but with some peaked roof areas to break up the building to look like individual buildings instead of one long generic building. This is not a fixed design but will be fixed by the time of the public meeting. Mr. Chandler left the meeting at 6:15 p.m. The Board agreed to recommend approval to Council to proceed to the public consultation phase to consider this application to amend a portion of the concept plan for the waterfront.*

*Moved and seconded that the request to proceed to the public consultation phase to consider an amendment to Appendix "G" of the City of Charlottetown Zoning and Development Bylaw – List of Approved Properties in the Comprehensive Development Area Zone and Their Permitted Uses as well as an amendment to the Waterfront Concept Plan to allow commercial, office and residential units for the vacant lot adjacent to 4 Prince Street (PID# 841536) be recommended to Council for approval.*

CARRIED

[15] At its regular meeting of Council on September 12, 2011, Council approved a request to proceed to the public consultation phase with respect to the application by Atlantis to develop the subject property.

[16] On October 19, 2011 the City held a public meeting which dealt with, Atlantis' application for the subject property. According to the newspaper notice published on October 8 and 15, 2011 (Exhibit R-1, Tab 10), Atlantis' application was one of four items to be considered at that public meeting. Five area residents spoke at the meeting raising concerns about Atlantis' proposed application to develop the subject property.

[17] Following the public meeting, the City received several written submissions opposing Atlantis' proposed development of the subject property.

[18] In his November 7, 2011 report directed to the City's Planning Board, Don Poole, then the City's Manager of Planning, added to his September 7, 2011 report to Planning Board and wrote:

*The Public meeting was held on October 19, 2011 with three items on the agenda. This one received some comments from the public but most were complaints about extraneous issues involving the Roseport Condominiums and their issues (i.e. potential noise during construction, traffic, visibility or views to harbour from their building). Others mentioned there should be more green space and we should be doing another more revised waterfront plan. The Eastern Gateway study was sited [sic] but it did not deal with this area and also the 500 Lot Study which we did ask them to provide some waterfront general principles but it again did not address specifics of this area. We do have a waterfront plan now and in this area it shows parking or black top not landscaping as suggested. The Developer indicated he bought the land from CADC and he is now look [sic] to bring some commercial/offices space to the waterfront hopefully year round tenants.*

*The owner would once again like to apply to place a building on this lot with office/commercial on the first and second floor and option of office or residential on the third floor. This is in the CDA zone and would require an amendment to the concept plan given the concept plan does not show a building in this location.*

*The building would be stepped back between Founders Hall and the Condominium building and not block viewscapes. The building would be as mentioned a three story building allowing for commercial store fronts and offices on the ground floor and giving the building a commercial feel and would add to year around occupation and activity just like the Spa next door. The Architect should be available to present the building plan and elevation (not available for mailout) at the meeting and explain the details of the building given it is a concept building elevation at this stage.*

*Given the original Waterfront Plan did not propose a building at this location it is an amendment to the plan and would require a public meeting to consider this change. In reality the proposed Yacht club relocation shown on the plan may never happen either. The developer has indicated he has leased the water lot for his marina for [the] next ten years from the Harbour Authority, and plans to use a portion of the proposed new building for yacht services much like Quartermaster Marine does. He does not plan to use underground parking but instead surface parking for this project and the building will have to meet our sea level rise for height above grade.*

*This development, given it is between the other two building[s], appears to be good infill development and provides year round occupation and activity and is stepped back far enough from Founders Hall windows to allow a future different use for that building and use of the windows on this side. It is also stepped back fro[m] views from Prince Street of the harbour.*

[19] In the minutes from its November 7, 2011 meeting, the City's Planning Board stated in part:

*Paul Madden and Bill Chandler attended the meeting at 5:40 pm to answer questions from the Board. Mr. Madden provided a letter to the Board which addressed any concerns expressed at the public meeting. As part of his office/commercial/residential project he would, given he has leased the waterfront from the Harbour Authority for the next 10 years, would like to provide services (i.e. washrooms) for those people using his boat docks. A future connection to Hillsborough Street through his parking area as a one way access was discussed but is beyond the scope of this application as it is currently under different ownership.*

*The Board asked about the distances between the proposed building and the existing condos and Founders Hall. Mr. Chandler responded that the parking lots were designed to reflect the width of City streets or approx. 65 feet. The Board liked the design and the fact there will likely be more year-round activity on the water front and felt it is better than a big parking lot as in the existing waterfront plan.*

*The applicants left the meeting at 5:50 pm.*

*The Board agreed to recommend approval of this request to Council.*

[20] The November 7, 2011 minutes of Planning Board then went on to state that the request to recommend approval of the amendment of the Bylaw's Appendix "G" to Council was moved, seconded and carried.

[21] The verbatim minutes of the November 14, 2011 regular meeting of Council were filed by the City's legal counsel as part of the City's Record and are contained at Tab 23 of Exhibit R1. The verbatim minutes shed light on Council's discussions with respect to Atlantis' application. While these verbatim minutes are lengthy, the Commission is of the view that the discussions cannot be accurately or fairly reflected by merely citing excerpts. Accordingly, the entire text of the verbatim minutes pertaining to the subject property follows.



Verbatim Excerpt of November  
14, 2011 Regular Council –  
(minutes not approved by  
Council)

**Regular Meeting of Council  
Monday, November 14, 2011 at 7:00 PM**

**Mayor Clifford Lee presiding**

**Present:** Deputy Mayor Stu MacFadyen      Councillor Terry Bernard  
Councillor David MacDonald      Councillor Edward Rice  
Councillor Rob Lantz      Councillor Danny Redmond  
Councillor Jason Coady      Councillor Melissa Hilton  
Councillor Cecil Villard      Councillor Mitchell Tweel

**Also:** Donna Waddell – DCS      Joseph Coady – DPS  
Phil Handrahan – DFDS      Scott Ryan – FM  
Paul Johnston – PWM      Don Poole – PM  
Sue Hendricken – PRM      Dan Hughes – HRM  
Craig Walker – UM      Randy MacDonald – FC  
Paul Smith – PC      Beth Johnston – CO  
Wendy Reid – CP      Tracey McLean – RMC

**Regrets:** Roy Main – CAO      Ron Atkinson – EconDO  
Wayne Long – EvenDO      Sharon MacKinnon – CC

**Minutes of the previous meetings were by motion adopted:**

Regular Meeting – October 11, 2011

Public Meeting – October 19, 2011

**4. Planning & Heritage – Councillor Rob Lantz**

**Councillor Rob Lantz:** One of our applications tonight that we are dealing with is an issue for development on the waterfront. I know that it has been here before and it is similar to an application that I supported in the past. I am committing to support the application again here this evening for the same reasons I supported it in the past. There has been a lot of discussion around town, at public meetings and various meetings. Also, there have been discussions with the Downtown Residents Association and residents in general that they would like to see a new and revised Waterfront Master Plan developed. We do have this application that we are dealing with tonight and we have a responsibility to process the application before we make any further decisions about our Waterfront Master Plan. Once we have made a decision on this application, the Planning Committee has an opportunity to step back and take a closer look at how we proceed with any future development on the waterfront. Until such time we can develop a revised concept plan that reflects the vision and priorities of everyone in this city, we need to take a step back and take a look at measures we can use to limit development. I am not entirely sure what that is but I am going to take that to our Planning Committee. There may or may not be a moratorium of some type but

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Planning Excerpt**

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there has been and continues to be a significant amount of new development on the waterfront. In one case, for example, the new convention centre. There was very little, if any at all, public consultation that took place and how that will affect the entire vision of the waterfront. I think the only consultation was around the environmental aspects of that particular development. We will deal with this application tonight and then I would like to begin the process with our Planning Committee of looking at the entire Waterfront Plan. Until such time that we have that plan, we may have to speak with our partners at CADC who are the owners of some of the major undeveloped land down on the waterfront about perhaps not entertaining any applications for those properties. So no doubt, the waterfront will be a strong point of interest next year when we begin our review of our Official Plan and until then, we need to consider carefully any new major proposals for development down there. With that said, we will proceed with our resolutions.

**Mayor Clifford Lee:** Any questions of Councillor Lantz before we move to the resolutions? Seeing none, Mrs. Waddell.

**Moved by Councillor Rob Lantz  
Seconded by Councillor Jason Coady**

**RESOLVED:**

That the request to amend Appendix "G" of the City of Charlottetown Zoning and Development Bylaw – List of Approved Properties in the Comprehensive Development Area Zone and Their Permitted Uses as well as an amendment to the Waterfront Concept Plan to allow commercial, office and residential units for the vacant lot adjacent to 4 Prince Street (PID# 841536) be approved.

**Mayor Clifford Lee:** Councillor Rice.

**Councillor Edward Rice:** I listened to Councillor Lantz's comments at the beginning of this regarding the Waterfront Plan to be changed. I understand we have a Waterfront Plan in existence. I am not sure whether this plan even matches the one that is 10 years old. I am not completely sure of that. If it fits for one building and now we are having two. A yacht club was suppose to be put there and it's not being put there and it's not going to be put there. The square footage of it is small compared to what this new edition is. However, I'm going to start at the first.

I'm not sure why we have this here because I read it in the Guardian already and I don't know why we are voting for sure because this was approved by town planning board; it was announced in the paper to us and the developer told us that we could do nothing else but approve it and that as far as he was concerned, it was a *fait accompli*. I don't know what role we serve here as the final judges by making that decision. I don't know how that information got out but I hope when you review town planning that there is some confidentiality and at least Council is informed before the public papers are informed. There was a press release given by the developer and it said what the vote was and it was approved. I didn't know that but I found it out when residents called from Ward 1. First of all, the waterfront is not a problem of Ward 1. Your Worship, you are perfectly aware of this, from your last election campaign. You said that you heard it throughout the whole city. The waterfront is not being developed the way it should be. A lot of people are unhappy with the way it's going. They don't know the answer of what's right but they do know what's wrong. You said

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Planning Excerpt**

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that to me on a couple of occasions. Ward 1 is not responsible for the waterfront; every member of Council is responsible for the waterfront and they should take their responsibility seriously.

I reviewed a couple of documents but I want to know a couple of questions first. Has this property been allowed to be subdivided and if it has, what is the status on it? If we approve it, what the status will be and can the developer sell that package to another developer and get the same square footage but perhaps not the same deal for us as a city. Do we have any other chance to interact with that proposal if it's sold, if he doesn't develop it and sells it? Another concern is that this project happens to hit on a piece of land that is almost like the Gaza Strip.; it's between Hillsborough and Prince. We have a plan developed up to Prince; we seem to have a plan with the Gateway Study under George Drew and the 500 Lots from Hillsborough on. This is no man's land which allowed it to be considered. So I want Council to be really careful before they make that decision. In fact, there was a very good article by a resident in Ward 1 and it covers quite nicely of what should be considered in this proposal. There has been an urban strategies development and planning partnership with the 500 Lots so we have reviewed with two people; a \$300,000 study done on the waterfront. We have our 500 Lot study which has made recommendations though they are not enacted. They are asking for a cohesive, comprehensive and solid development plan both consultants reinforced the need for a plan and to save this valuable resource for the enjoyment of citizens and visitors. Two previous times this proposal has been refused and a major change to the plan - a second building at 4 Prince Street representing 27,000 sq. ft. of commercial and residential use to spite the fact that the current building, Hillsborough Waterfront Condo, occupies 36,000 sq. ft. This exceeds the original plan by roughly 3,000 sq.ft. This change radically affects the previous concept plan and I'm not talking about the new future ones, I'm talking about the one in existence that CADC developed however they saw fit to sell the land and I don't know where their status stands now. I understand they were offered it back and refused it. Since the City has significantly funded the last two studies and in an effort to provide sound development for the City, I ask Council to reconsider the proposal and this proposition tonight because remember that you are all responsible for the waterfront; I'm not, you all are. So make your decision, take it serious and grant it on that. Essentially, the entire waterfront needs a solid plan to fit the goals of the City and its residents and provide constant message to developers and not have piecemeal development.

**Mayor Clifford Lee:** Councillor Lantz.

**Councillor Rob Lantz:** Councillor Rice, there were a significant number of comments and questions there so I will try to quickly address them...

**Councillor Edward Rice:** I want a couple answered if you don't mind Your Worship. If it's not developed, can the developer sell the permit and was it subdivided first? It was one piece and now it's two. It was subdivided with whose permission?

**Councillor Rob Lantz:** With the permission of the Planning Department. I don't think it came to Planning Board.

**Councillor Edward Rice:** Even though it's in a Comprehensive Area?

**Councillor Rob Lantz:** That's right. It doesn't matter whether the land is subdivided or not. The concept deals with what actually goes on the property.

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**Councillor Edward Rice:** But the land has already been subdivided?

**Councillor Rob Lantz:** That's my understanding...

**Councillor Edward Rice:** So we are part way home as far as the proposal being sold. Land has been allotted, separated and a new proposal has called for it.

**Councillor Rob Lantz:** Ok. Let me try to deal with a few of these and I will get to that one because that wasn't your first question. Does it fit the plan? No, it doesn't and that's why we are here tonight. We have to pass a resolution to amend the Waterfront Concept Plan and that's the entire idea. It's a Comprehensive Development Area and the purpose of CDA Zones is to give the City the flexibility to respond to changing conditions. The Waterfront Concept Plan is old; it was developed at a time when no one thought there would be as much interest as there is in those properties. I keep telling everybody when we go to review our Official Plan which will include concept areas like the waterfront plan I think we will discover that the residents of this city have many different visions and priorities then they did when we developed our Official Plan in 1999. The resolution is to amend that concept plan and I think that answers the first question.

On the issue of what recommendation Planning Board made, you said town planning made a decision. We don't make decisions at Planning Board; we only make recommendations that come to Council which is where it is now for the decision to be made. The applicants are always apprised of what the decision of Planning Board is; they need to know that to proceed or to make a decision to withdraw an application. They need to be informed and they are perfectly entitled to make it publicly known what Planning Board has recommended to Council. I don't think that is unusual in any way. The 500 Lot study did briefly deal with the waterfront area and the reason that it wasn't dealt with comprehensively because it wasn't a planning exercise. It was an exercise in design standards and development guidelines. They did mention issues of scale of development on the waterfront for maintaining sight views but it's not the definitive last word on waterfront development and concepts. The last time this similar proposal was here before the Board, there was some suggestion of why doesn't this property become a park or something. That might be a perfectly reasonable suggestion but it is up to a private property owner to decide what course he wants to take with the property they own; property owners have rights.

It's up to Council to make a decision on what we will allow under our bylaw. So what control do we have about proposals that come toward us? None to be quite frank but what control do we have if the developer sells the land to someone else. You said it was offered to CADC and it may have been offered but at a price. It's not free; it's very valuable land and obviously CADC declined to purchase it. At this time, we have an application before us and we are bound to make a decision and we will do that here tonight. No decision has been made and Planning Board has only made a recommendation to approve.

**Mayor Clifford Lee:** Councillor Rice for the final time.

**Councillor Edward Rice:** Councillor Lantz, I am perfectly aware when I stated that the Planning Board used to at one point...one didn't read about the recommendations in the Guardian; they read about them from Council. I did not know that this information was made instantly public. It wasn't

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before in my time and I think maybe when you do get around to that long waited review of town planning that this is one of the issues that will be looked at and how it is passed on because it definitely read like it was a *fait accompli* and that's where the residents got upset and rightfully so. Secondly, you said that the land can be sold to anybody once this is approved.

**Councillor Rob Lantz:** It's private property...

**Councillor Edward Rice:** It's private property so it can be. This plan would go through and it is possible for anything as long as it fits the Comprehensive Development Plan that's submitted here tonight.

**Councillor Rob Lantz:** If it is amended.

**Councillor Edward Rice:** I believe as far as we don't have any plan, we do. We have a 12-year old plan and it's like a police law, we have to honour it. It may not be updated but we have to honour it and we have to honour the plan that was submitted to us. I'm still operating on the CADC plan of the year 2009 or 2010; it's not worth a year to fight over it but I am operating on that and it doesn't say two buildings; it says one building. It is our decision at the end. It is private land but it's in a Comprehensive Area so we have the right to make that decision. It's not what the developer wants or what the developer doesn't want. Nobody suggested parkland. I do definitely see development there but is this the right proposal or time for it to happen. That's all I'm asking Council to do is to use their wisdom to judge what is on your waterfront not mine; it's on everybody's waterfront.

**Councillor Rob Lantz:** That's a perfectly reasonable statement that everyone should use their judgment and make a reasonable decision here. Back to the issue of Planning Board; we have ten resident members of Planning Board. We make decisions as a group. We live in the information age. They do not sign non-disclosure agreements. Those recommendations are probably all over town before I make it home to my front doorstep. I understand there is confusion when things get reported and everyone doesn't always understand the process that Planning Board does not make decisions and yet that is perfectly reasonable that somebody may have inferred the wrong thing from whatever was in the media. I will attempt to answer any further questions.

**Mayor Clifford Lee:** Councillor Tweel.

**Councillor Mitchell Tweel:** I certainly have no problem with the recommendations of Planning Board being release to the media. I think it keeps the residents informed of the process as we move through it as long as it states that it is a recommendation to Council. So you are right that it's in the information age and as long as the information is correct, I don't have any problems with that. It's stated here that the waterfront is not just Ward 1; it's the entire City of Charlottetown. Anytime we deal with a resolution concerning Planning or any issue, we always deal with it from a global perspective. Whether it's the waterfront, East Royalty, the Airport or the BioCommons and that's pretty well the norm and it's understood. It's normal procedure that all ten members of Council vote on all resolutions that affect all of the 35,000 people that live, work and pay taxes in this city.

What we are facing here tonight is a polarization. A polarization between developers and residents. Polarization is either that you are for development and you will hear comments sometimes from the

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business community that we got to be open for business. We are open for business and do we go with this development or not go with this development. Whose plan was this? Was it submitted by CADC or was it the City of Charlottetown that submitted this plan? It's not the developers fault; he buys a piece of property with the understanding that he can go through the process to develop. When you look at the Charlottetown Area Development Corporation, it's to develop. That is their mandate and their mandate is to develop. Some cities don't have development agencies that control their waterfront; the city controls the waterfront. I talked to a lot of people that are saying why doesn't the City own the waterfront so you can determine from the outset what takes place.

Whether there is going to be development, is it going to be a green space, is it going to be open to all to enjoy, is it for all citizens or for the select few or whatever the case may be. It is not the developers fault. He is just going through the process. Then we have the residents that are saying enough. Once again, it polarizes Council. We want to make a good decision, we want to make an informed decision and we want to respect the concerns and wishes of the residents. These are tough decisions and they are not easy. When we refused the previous development, Councillor Lantz, could you please explain what the difference is this time around as apposed to what we are dealing with here tonight?

**Councillor Rob Lantz:** Well, I believe if I can recall correctly, the last proposal was for residential only. It was another 10 or 12 units/condominiums. This proposal involves some lower level small retail/commercial space. Perhaps some space for providing services and amenities to the marina which the developer is operating with a water lease from the Harbour Authority. It also involves the second and third floors, apartments and office space. It's somewhat different from the last proposal in its uses. The design is also different and has significantly changed from what we dealt with last time.

**Councillor Mitchell Tweel:** Thank you for your answer. You talked about in your first set of comments that we should revisit the waterfront and come up with a plan that would include all residents and potential developers. When can that process begin in terms of coming up with a revised Waterfront Plan where all parties can be happy with. When can we start that process? We have the 500 Lots, the Gateway vision which could take place over the next 25/30 years. When can we start that process in terms of a Waterfront Plan for today's standards? A contemporary plan as apposed to a plan that's 10 to 15 years old. When can we start that process?

**Councillor Rob Lantz:** Well, the Planning Department will certainly be involved but I believe this falls under the mandate of Advanced Planning, Priorities and Special Events Committee which will begin next year if all works out well; a comprehensive review of our Official Plan and our Zoning and Development Bylaws. I assume that this review of the waterfront would be a high priority in that process. We talked about this process unfolding one area at a time; one neighbourhood at a time. Perhaps much of those details are still to be worked out. Certainly, it's not going to happen tomorrow. I believe it's a priority of the City and sounds to be if you listen to some of the comments we get from residents about the value of our waterfront. I think we will get to it as soon as we possibly can but perhaps you might address that to the Committee with the mandate to move forward that process.

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**Councillor Mitchell Tweel:** Thank you. With respect to the residents and the developer, have there been any attempts in terms of a compromise where both sides could live with whether it's a commercial or residential development or is it firmly entrenched.

**Councillor Rob Lantz:** No, the answer is no. The developer is moving ahead with the application he made. There was an opportunity for public input at the public meeting and I think most of the comments were not of a nature of compromise. They were primarily, for those who spoke against it, in opposition. We do have an obligation to deal with applications as we receive them and no there were no suggestions of a compromised plan.

**Mayor Clifford Lee:** Seeing no further questions, we will move along to the vote.

**DEFEATED 7-3****(Councillors Bernard, Hilton, Redmond, Rice, Tweel & Villard registered "nay" votes)**

**Moved by Councillor Cecil Villard  
Seconded by Councillor Melissa Hilton**

**RESOLVED:**

That the request to amend Appendix "G" of the City of Charlottetown Zoning and Development Bylaw – List of Approved Properties in the Comprehensive Development Area Zone and Their Permitted Uses as well as an amendment to the Waterfront Concept Plan to allow commercial, office and residential units for the vacant lot adjacent to 4 Prince Street (PID# 841536) be rejected.

**CARRIED 7-3****(Deputy Mayor MacFadyen, Councillors Coady and Lantz registered "nay" votes)****End of Excerpt**

[22] In brief summary, Atlantis filed its application which was then reviewed and assessed by City planning staff. Following the staff review and assessment the following steps occurred:

- Atlantis' application proceeded to Planning Board, where Planning Board recommended to Council that Atlantis' application move to the public consultation phase,
- Council voted to proceed to the public consultation phase,
- a public meeting was held,
- Planning Board then met to discuss the merits of the application and voted to recommend Atlantis' request to Council, and
- Council voted to deny Atlantis' request.

[23] The Commission is of the view that Council certainly may reach a decision different than Planning Board's recommendation. Planning Board's recommendation is just that, a recommendation, something to be considered seriously but not tying the hands of Council. When Council follows Planning Board's recommendation, it may fairly be said that in so doing, Council is adopting the reasoning and analysis used by Planning Board. However, the Commission is also of the view that when Council makes a decision against Planning Board's recommendation, it is expected that Council clearly and methodically set out its own thought process and analysis leading up to its decision.

[24] In the view of the Commission, the record suggests that despite the valiant efforts of the Chair of Planning Board to direct discussion of the matter at hand, Council did not decide Atlantis' application based on its respective merits or lack thereof. Rather, the minutes reveal that Council appeared concerned that the recommendation of Planning Board had been circulated to the media, inquired whether compromise was possible and discussed the need for a new waterfront plan.

[25] The verbatim minutes record a decision making process in contrast with the direct and specific wording of section 28.5.1 of the Bylaw:

#### **28.5 APPROVAL PROCEDURE**

*.1 In considering a Development Concept Plan put forward by an applicant, Council Shall deliberate the quality of architectural Design of all proposed Buildings, their compatibility with the architectural character of adjacent Development, and the extent to which the Development Concept Plan reflects the site Development principles as set out in Section 4 of this By-law.*

[26] The *Canadian Oxford Dictionary*, 2<sup>nd</sup> edition defines "deliberate" as:

*Verb ... 1 intransitive think carefully; take counsel (the jury deliberated for an hour) 2 transitive consider, discuss carefully (deliberated the question).*

[27] *Black's Law Dictionary*, 9<sup>th</sup> edition, defines "deliberate" as:

*Deliberate ..., vb. (Of a court, jury etc.) to weigh and analyze all the evidence after closing arguments <the jury deliberated for 12 hours before reaching a verdict>.*

[28] The Commission finds that there is nothing in the City's Record or evidence to establish, on the civil standard of the balance of probabilities, that Council met the requirements of section 28.5.1 of the Bylaw. The verbatim minutes of the November 14, 2011 meeting of Council fail to establish that Council deliberated what is required under section 28.5.1 of the Bylaw. While other portions of section 28 use the term "consider", section 28.5.1, by using the term "deliberate", requires a process more rigorous than to "consider" a matter.

[29] By disregarding the recommendation and thus the reasoning of Planning Board and then failing to meet the procedural requirement set out in section 28.5.1 of the Bylaw, the Commission finds, on a balance of probabilities, that Council disregarded the caution expressed by the Chair of its Planning Board and decided the status of Atlantis' application based on a 'felt need' for a future new waterfront plan rather than making a decision to accept or reject the application based on the process and procedure contained in the existing law: the existing Official Plan, the existing waterfront plan and the existing Bylaw.

[30] As stated orally by the City's Counsel just prior to calling his first witness, the nub of the City's position was that Atlantis' proposed development was premature because the City was about to embark on a grand plan for the waterfront arising out of the 500 Lot Study. This causes the Commission great concern. Simply put, the merits of the application were sidestepped by a desire to develop a new waterfront plan. This was irrelevant to the application put forward to Council for determination and unfair to Atlantis.

[31] Counsel for the City urges the Commission to be deferential to the decision of Council, citing a recent appeal to the Prince Edward Island Court of Appeal.

[32] In *Doiron v. Island Regulatory and Appeals Commission* 2011 PECA 9, Justice Murphy, writing for the Court, noted that:

[29] The appellant argued in his third ground of appeal that the Commission erred by considering irrelevant factors or by ignoring relevant factors. The appellant argued that any consideration by the Commission of the reasonableness of Council's decision caused the Commission to fall into error.

[30] As I stated previously in these reasons, the Commission came to its own independent conclusion after considering the evidence before it. The Commission found the decision of Council to be reasonable, that is, that it was a tenable and plausible decision and conclusion to reach in all the circumstances. This, in no way, indicates the Commission was deferring its decision without conducting its own independent evaluation.

...

## **CONCLUSION**

[37] I find in reaching its decision, the majority of the Commission embarked on its own independent and analytical review and judgment of the issues before it. The Commission exercised its discretion properly, assessed the appropriate factors and did not err in interpreting the Official Plan of the City.

[33] The Commission finds that Council's decision-making process erred in law as they failed to decide the fate of Atlantis' application on its merits according to the process set out in the present law. Further, the City's decision making process was unfair to Atlantis as it proceeded to decide its application on an irrelevant matter. Deference to a decision maker is earned when the decision maker follows the process set out by the law and is fair to all parties. The City followed its decision making process in *Doiron* and thus earned deference from the Commission. In the present case, however, the City's decision making process did not follow the process required by the Bylaw and thus the Commission is unable to show deference to the City's decision in the present appeal.

[34] The Commission will therefore review the evidence before it to determine whether or not Atlantis' application will succeed, thus deciding the matter anew as if it were the original decision maker.

#### **Testimony of Paul J. Madden**

[35] Mr. Madden is the principal of Atlantis. He has municipal council experience, having served for 18 years on a municipal council in Newfoundland. He has been involved in the fields of construction and development since 1980. Approximately 8 years ago he was approached by the Charlottetown Area Development Corporation (CADC) about the concept of establishing a spa in Charlottetown. He subsequently developed the existing condominium/spa project. The infrastructure (water, sewer, electricity transformers) for a second building is in place and he contributed to the cost of such infrastructure.

[36] Mr. Madden testified that in his view, the City's rejection of his latest proposal for development is not based on sound planning principles. He expressed concern that he never received a reason for the rejection from Council. Don Poole, then the City's Manager of Planning, informed him that the City wanted a vibrant downtown, with developments that were open for business on a year round basis. Mr. Madden noted that he offered to sell the unused land back to CADC. Prior to pursuing the present project, he spoke with Philip Wood. Mr. Wood suggested that he apply for a larger building, "apply for 8 stories and they will give you 4".

[37] Mr. Madden told the Commission that Bill Chandler designed the proposed building for the latest application. Mr. Madden noted that he had some input in the design as well. He submitted that they took design features of the existing spa/condominium building and Founders Hall. The proposed building will be kept 60 feet away from Founders Hall. It will also be stepped back so not to harm the streetscape view.

[38] Mr. Madden testified that he never was advised by the City or CADC of any restrictions or freeze on development on the waterfront.

**Testimony of William Chandler**

[39] Mr. Chandler has been an architect since 1983 and established his own firm in 1992. He testified that Atlantis' present proposal will feature small retail shops on the first level, a mix of office and retail on the second level and apartments on the third level. The project will be three stories high to be consistent with nearby buildings. The building is approximately 40 feet wide. Open space will be preserved to protect Founders Hall. The parcel was approved for subdivision by the City. The infrastructure for the project was 'roughed in'. He noted that the CDA zone is based on flexibility. The pre-approved uses under the CDA zone are as of right uses. There was a process to go through and Mr. Madden and he felt they followed the required principles for the amendment process.

[40] Mr. Chandler believes that the present project is consistent with the requirements of section 28 of the Bylaw. He noted that that one of the present problems with the waterfront is that it tends to become a 'ghost town' after Thanksgiving. Atlantis' present proposal addresses this concern by providing a year round development.

**Testimony of Hope Gunn**

[41] Ms. Gunn has been employed as a Development Officer with the City since 2008. Ms. Gunn reviewed a chronology of events (Exhibit R2-7) as well as other documents. Ms. Gunn reviewed excerpts from the December 2011 500 Lot Study with respect to development standards and design guidelines (Exhibit R3) noting the Study included a recommendation for a waterfront plan. She also referred to a December 2011 letter from the City's Mayor to CADC requesting a delay or slowdown in further waterfront development (Exhibit R2-6).

[42] On cross-examination, Ms. Gunn acknowledged that the 500 Lot Study report was issued after the City's November 14, 2011 decision with respect to the subject property. She acknowledged that Atlantis' proposed development was of a mixed use. She noted that the City has changed its concept plan for the waterfront several times and the City is on concept plan number 6 or 7 now. The present concept plan is dated June 15, 2006 (Exhibit R2-8).

[43] Ms. Gunn described the CDA zone as a zone where "anything goes as long as approved by Council".

**Testimony of Laurel Palmer-Thompson**

[44] Ms. Palmer-Thompson has been employed as a Development Officer with the City since 2004. She has past experience as a municipal councillor for another community.

[45] Ms. Palmer-Thompson explained that the CDA zone is an innovative mixed use zone. She noted that the City has designated certain important areas in the City with the CDA zone. The CDA zone provides flexibility subject to a public process. The process allows specific uses to be approved. Section 28 of the Bylaw sets out the process to consider an amendment to a concept plan.

[46] Ms. Palmer-Thompson noted that most of the time Council does follow the recommendation of Planning Board. However, on this occasion Council did not follow Planning Board's recommendation. She believes that Council was considering public opinion, the importance of the area, the limited amount of land left on the waterfront and the compatibility of proposed uses with existing uses to achieve a good fit. She noted that the 500 Lot Study covered the geographic area from south of Euston Street down to, and including, the waterfront. She noted that the Study was concerned about fragmented development and the need for a new comprehensive master plan for the waterfront. She stated that staff's recommendation with respect to Atlantis' application was a sound recommendation but felt that Council's decision was also sound.

[47] On cross examination, Ms. Palmer-Thompson stated that planners support infill development but Council had a bigger picture in mind; the need for a new waterfront plan. She stated that she would have probably made the same recommendation as Mr. Poole but she endorses the development of a new waterfront plan. She acknowledged that an application must be determined on the plan currently in place and the factors in the Bylaw as of the date of application. She noted that planners do not want to see land used as a parking lot on a long term basis; rather, they favour development or, in the alternative, green space. She also acknowledged that there is no interim planning policy or moratorium in place affecting development on the waterfront.

#### **Testimony of Philip Wood**

[48] Mr. Wood is a seasoned land use planner who has presented evidence to the Commission on numerous occasions and in varying roles. Mr. Wood introduced his testimony by noting that he reviewed the various documents submitted by the City as a witness appearing for the City, rather than a witness engaged with the City.

[49] Mr. Wood commented on the need to re-develop the City's waterfront in the 1970s. He commented that the approach taken was similar to peeling an onion, as re-development starts one begins to see more clearly with respect to the best use of a particular property. He described the CDA zone as the "wait and see zone". He noted that development in the CDA zone is inherently piecemeal and that the CDA zone represents contract zoning. He noted that there is a need to address traffic and pedestrian circulation on the waterfront. He submitted that the subject property could be critically important to achieving "flow". He noted that the City is about to commence a comprehensive review of its Official Plan and the waterfront will be the centrepiece of this review. He also noted the ongoing need for parking and that until other parking has been provided for the City should be reluctant to eliminate the subject property as a source of parking. He also noted that parking lots can be very useful for festivals etc. He stated that nobody owns a viewplane over another's property. That said, there is a reasonable expectation of a viewplane because the property is currently zoned as a parking lot. He referred to this concept as a "vested viewplane".

[50] Mr. Wood stated that he felt that Council made the right decision and that Council was not presented with options by planning staff. He stated that a planner's role is to provide information and a range of options to council. He acknowledged that from the minutes it was difficult to "get into the councillors' heads".

[51] Mr. Wood offered his opinion that Mr. Madden was the kind of developer that the City needed.

[52] Mr. Wood stated on cross-examination that while infilling was important, viewplanes, open space and parking are also important. He noted that councillors often forget the policies of their official plans. He stated that he usually advises developers to avoid CDA zones as the approval process is long and drawn out compared to zones which allow for as of right development. He noted that he interpreted the public meeting as a groundswell of opposition to Atlantis' development proposal for the subject property.

[53] Mr. Wood stated on cross-examination that he believed that Mr. Poole crossed over the line and became an advocate for Atlantis. He felt that Mr. Poole discounted the views of the public at the public meeting.

[54] On cross-examination, Mr. Wood acknowledged that Mr. Madden had "showed up" at his office door. Mr. Wood noted that Mr. Madden was frustrated and used colourful language. Mr. Wood does not recall telling him to apply for a bigger building but it may have been a tongue-in-cheek comment. Mr. Wood added that he was not retained by Mr. Madden.

[55] Also on cross-examination, Mr. Wood noted that he spent four hours discussing the history of this matter with Phil Handrahan, the City's Director of Fiscal and Development Services. Mr. Wood stated that Mr. Handrahan was interested in having him lend a hand as they were short-handed.

[56] At the outset of the hearing, Counsel for the City informed the Commission that Mr. Don Poole, Manager of Planning and the City staff person chiefly responsible for the Atlantis application file, was on extended leave and would not be called to give evidence. At the request of Counsel for Atlantis, the Commission issued a subpoena requiring Mr. Poole to appear, however he could not be located and the subpoena was not successfully served. Following this and upon hearing the evidence of the other City officials, Counsel for Atlantis determined that Mr. Poole's testimony was unnecessary.

### **The Commission's Decision**

[57] The Commission is mindful of Don Poole's September 7 and November 7, 2011 reports to Planning Board and the consideration given to Atlantis' application by Planning Board on September 7 and November 7, 2011. Mr. Poole notes in his November 7, 2011 report:

*The building would be stepped back between Founders Hall and the Condominium building and not block viewsapes. The building would be as mentioned a three story building allowing for commercial store fronts and offices on the ground floor and giving the building a commercial feel and would add to year around occupation and activity just like the Spa next door.*

...

*This development, given it is between the other two building[s], appears to be good infill development and provides year round occupation and activity and is stepped back far enough from Founders Hall windows to allow a future different use for that building and use of the windows on this side. It is also stepped back fro[m] views from Prince Street of the harbour.*

[58] Planning Board agreed to recommend approval to Council and offered its own reasoning, first in its September 7, 2011 report:

*The proposed building will be long and narrow because of easements on the property. Access will be one way in under the building on the east side and egress will be from the parking area at the rear of the building. The first floor of the building will contain an office and washroom for the marina as well as small retail shops. The second floor will be office space and the third floor will have four residential units and possibly some office space. Mr. Chandler reviewed the concept drawings and noted that the building exterior will have the same elements as the condominium building but with some peaked roof areas to break up the building to look like individual buildings instead of one long generic building. This is not a fixed design but will be fixed by the time of the public meeting.*

Planning Board then went on to say in its November 7, 2011 report:

*The Board asked about the distances between the proposed building and the existing condos and Founders Hall. Mr. Chandler responded that the parking lots were designed to reflect the width of City streets or approx. 65 feet. The Board liked the design and the fact there will likely be more year-round activity on the water front and felt it is better than a big parking lot as in the existing waterfront plan.*

[59] Section 3.5 of the Official Plan seeks mixed use elements and encourages residential and commercial development, as well as year-round usage of the waterfront and the protection of viewscape characteristics both to and from the water.

[60] Ms. Palmer-Thompson stated that planners support infill development and she would have probably made the same recommendation as Mr. Poole. An application must be determined on the plan currently in place and the factors in the Bylaw as of the date of application. Planners do not want to see land used as a parking lot on a long term basis; rather, they favour development or, in the alternative, green space. She agreed with Council of the need for a new waterfront plan.

[61] The Commission holds Mr. Wood in the highest esteem for his planning knowledge and ability to explain difficult planning concepts in an exceptionally easy to understand fashion, albeit sometimes straying outside his field of expertise. However, on this unique occasion, the Commission finds that it has to be cautious in weighing Mr. Wood's evidence, as it appears that the City unintentionally placed him in an awkward position by calling him as a witness. The record before the Commission reveals that Mr. Wood had met with Mr. Madden and had offered supportive advice, whether tongue-in-cheek or otherwise. Mr. Wood prefaced his testimony by noting that he was appearing for the City, rather than engaged by the City. Yet, on cross-examination, Mr. Wood revealed that he had been asked by a high ranking City staff member to "lend a hand" as the City was short-handed. Mr. Wood's comments about Mr. Poole "crossing the line" and becoming an advocate for Atlantis came across as a rather presumptuous personal opinion. The Commission, having reviewed the City's Record repeatedly, can find no objective evidence to support this conclusion. Where Mr. Wood's evidence conflicts with Ms. Palmer-Thompson's evidence, the Commission accepts the evidence of Ms. Palmer-Thompson.

[62] The Commission has carefully considered the requirements of section 28 and has deliberated on the requirements set out in section 28.5.1 of the Bylaw. The Commission finds that the evidence before it, including the reports prepared by the City's planning professional, the recommendations of Planning Board and the testimony of Mr. Chandler, support a determination that the quality of architectural design of the proposed building is adequate, the proposed building is compatible with the architectural character of the adjacent development, in particular Founders Hall and the spa/condominium development, and the development concept plan reflects the site development principles set out in section 4 of the Bylaw. Both Planning Board and Mr. Poole referred to Official Plan factors and the Commission agrees that these factors are met with Atlantis' proposal. Accordingly, the Commission finds that Atlantis' proposed development for the subject property, as put forward by Planning Board, is consistent with sound planning principles.

[63] Given the procedural error described earlier, that is to say a failure to decide Atlantis' application on its merits according to the process set out in the Bylaw (a procedural error which strikes at the very heart of the City's decision), combined with an unfair determination of Atlantis' application based on irrelevant considerations, and given the evidence in support of the requested amendment, the Commission finds that it is appropriate to allow this appeal, quash Council's decision and substitute a decision based on the recommendation of the City's Planning Board.

[64] Accordingly, the Commission hereby quashes the City Council's November 14, 2011 decision (a decision expressed in two resolutions) pertaining to the subject property, and orders the City to amend Appendix "G" of the City of Charlottetown Zoning and Development Bylaw – List of Approved Properties in the Comprehensive Development Area Zone and Their Permitted Uses as well as an amendment to the Waterfront Concept Plan to allow commercial, office and residential units for the vacant lot adjacent to 4 Prince Street (PID# 841536).

## **4. Disposition**

[65] An Order allowing the appeal and ordering the City to amend its Bylaw and its Waterfront Concept Plan follows.

**IN THE MATTER** of an appeal by  
Atlantis Health Spa Ltd. of a decision of the  
City of Charlottetown, dated November 14,  
2011.

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# Order

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**WHEREAS** the Appellant Atlantis Health Spa Ltd. Has appealed a decision of the City of Charlottetown dated November 14, 2011;

**AND WHEREAS** the Commission heard the appeal at public hearings conducted in Charlottetown on February 22, 24, 27 and March 5, 2012 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 hereby allowed.
2. The November 14, 2011 decision of the City of Charlottetown pertaining to this matter is quashed, and the City of Charlottetown is hereby ordered to amend Appendix "G" of the City of Charlottetown Zoning and Development Bylaw – List of Approved Properties in the Comprehensive Development Area Zone and Their Permitted Uses as well as an amendment to the Waterfront Concept Plan to allow commercial, office and residential units for the vacant lot adjacent to 4 Prince Street (PID# 841536).

**DATED** at Charlottetown, Prince Edward Island, this 19th day of June, 2012.

**BY THE COMMISSION:**

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Allan Rankin, Vice-Chair

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Maurice Rodgerson, Chair

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Jean Tingley, 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)