February 11, 2020

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

Attn: Philip J. Rafuse
Appeals Administrator

Dear Mr. Rafuse:

Re: Jessie Frost-Wicks et al v. City of Charlottetown
Appeal Reference LA19015

Though not specifically requested, it is our understanding that we have the opportunity to provide additional documents and legal cases for the purposes of the above appeal. As such, we, the Appellants, are submitting this addendum to our Notice of Appeal which lends support to the grounds set out.

To follow suit from Counsel for the City, Mr. Hooley, we will address each ground of appeal as originally set out.

1. It remains the position of the Appellants that Council was misinformed as to the importance of a feasible and compliant proposal for the intended structure which accompanied the application to rezone 38 Palmers Lane. To suggest that the proposed structure is irrelevant to the decision to approve or reject an application to rezone a property is both wrong and potentially misleading, particularly when the information is delivered on the cusp of a vote on that very issue. Once a property is rezoned, it is then open to the developer to seek permits for virtually any allowable structure on the site, notwithstanding that the decision to rezone may have been based upon the construction of a much smaller structure. The reason for the requirement to submit detailed plans of the proposed structure is that it is integral to the decision whether or not to rezone.

   Given that there was no further discussion or questioning before the vote took place, we cannot assume that no one was swayed by that information any more than we can assume that they had all done their homework and were basing their decision on all the information before them. Councilor Duffy was certainly insistent on having the question answered but ceased his questioning upon being advised that his question had no bearing on the issue.

Counsel for the City has suggested that the Councillors voted their respective consciences accordingly. With all due respect, the Appellants would prefer that the votes be cast based on an objective assessment of all the relevant facts, and we cannot say with certainty that that is what took place in this instance.

2. It is our position that the decision of Council has no merit based on sound planning principles. Counsel for the City has suggested that City Council considered the "housing crisis" as the overriding principle, and, further, that the housing crisis, in and of itself, is a sound planning principle. The Appellants contend that a housing shortage is but one factor to be considered before applying sound planning principles. Housing shortages are contemplated in the Official Plan, which addresses growth strategies and development plans. More importantly, the City Planner who conducted the initial assessment of this particular application and reported on it to both the Planning Board and to City Council, considered the housing shortage in her assessment. She also considered a number of other factors and carried out a balanced and professional assessment, ultimately noting that the main issue in the proposal is the shifting of a higher density residential zone further into an existing, low density mature neighbourhood. She focused on appropriate planning practices, emphasizing the need for stability within existing low density neighbourhoods, and outlining the need for transitional structures to go from medium density to low density. Planning Board supported her recommendation that the application be rejected.

   At the subsequent public consultation, and the written submissions that followed, the housing crisis was also addressed. The Appellants and others acknowledged that the city is currently experiencing a severe housing shortage, but that does not translate into a need for development at all costs. It is not a license to ignore the Official Plan, the advice of the trained professionals whom the City has hired to advise on these very issues, or the concerns of the citizens who live in the area and have lived in the area for decades.

   Development must be at a scale and density that will not cause adverse impacts for adjoining neighbours. This is one of the planning principles applied by the City Planner, which suggests that a less dense development, smaller in mass and scale, would be more appropriate and would provide a better transition between higher density development and low density development along the street. Equally applicable to the situation at hand, this same principle was enunciated in the Commission's Order LA 17-06, wherein it was stated that an apartment building of this size, scale and density immediately adjacent to low rise single detached dwellings is not consistent with good planning principles.

   City Council was presented with sound planning principles. And despite that, despite the recommendations of their staff and the Planning Board, they chose to approve this application. The Supreme Court of Canada considered a situation

such as this in *Congregation des temoins de Jehovah de St-Jerone-Lafontaine* v. *Lafontaine (Village)*, 2004 SCC 48 (Canlii). There it was written:

> Municipal decisions on rezoning fall within the sphere in which municipalities have expertise beyond the capacity of the judiciary, thus warranting deference from reviewing courts. However, this factor may not carry much weight where, as here..., there is no record to indicate that the Municipality has actually engaged its expertise in evaluating the applications.

In this instance, the municipality did engage its expertise, but chose to ignore it in its evaluation. In Order LA17-06, this Commission noted at paragraph 47 that:

> ...the case law from the Commission has regularly emphasized to municipalities the need for objective decision-making and not exercises in subjectivity. Reliance has been placed on the assessments, opinions, and reports of trained professionals as opposed to the hue and cry of neighbours or politicians.

The Appellants ask that, in addition to the hue and cry of neighbours, the Commission rely on the assessment and recommendations of the trained professionals involved in this application.

3. Not only do the Appellants contend that the decision of City Council is without merit on the basis of sound planning principles, but we further assert that the decision flies in the face of the Official Plan for the City, a document by which the City Council is bound. Paragraph 50 of the Commission's decision in Order LA17-06 notes as follows:

> Section 3.2.1 of the Official Plan is particularly relevant to this appeal. It contains criteria that are measurable, specific, and objective:
>
> > Our **goal** is to maintain the distinct character of Charlottetown's neighbourhoods, to enhance the special qualities of each, and to help them adjust to the challenges of economic and social transformation.
> >
> > 1. Our **objective** is to preserve the built form and density of Charlottetown's existing neighbourhoods, and to ensure that new development is harmonious with its surroundings.
> >
> >   - Our **policy** shall be to ensure that the footprint, height, massing and setbacks of new residential, commercial, and institutional development in existing neighbourhoods is physically related to its surroundings.

- Our **policy** shall be to establish an appropriate relationship between the height and density of all new development in mixed-use residential areas of existing neighbourhoods.

Section 3.2.1 of the Official Plan forms part of a public document that is accessible to, and relied upon by residents, developers, and land owners. It is also consistent with sound planning principles. But, most importantly, section 3.2.1 of the Official Plan is binding upon the City and Pine Cone.

The Appellants have already outlined the physical attributes of this neighbourhood as well as the general character of it, as well as the impact this proposed structure will have on it. There is nothing about this structure that is in keeping with the goal, objective or policy of the Official Plan.

Admittedly, at the east end of Palmers Lane there are commercial properties, which then transition to two multi-unit residential properties. These are the two 12-unit apartment buildings currently owned by the developer seeking to rezone 38 Palmers Lane which have been there since approximately the 1970s or early 1980s. There was, until roughly ten years ago, a bungalow at 38 Palmers Lane that had been there since at least the 1950s. It, too, was owned by the developer seeking to rezone 38 Palmers Lane. That bungalow was there when the majority of the homeowners now on Palmers Lane purchased their homes and lent the expectation that it would stay as a low density residential property.

Ours is a very character driven neighbourhood. There is a national historic site, Ardgowan, at the western end of the street, along with an elementary school, a ball diamond and the rest is primarily 1 and 1 ½ storey homes, together with six semi-detached bungalows. Notwithstanding that this proposed apartment building is closer to the commercial corrider on St. Peter's Road, it does not change the fact that it is a further encroachment on what has historically been a low density residential neighbourhood. It will irreparably change the character of our neighbourhood.

In her recommendations to City Council, the City Planner noted that the application conflicts with the primary objective of Section 3.2 of the Charlottetown Office Plan, as noted above. It does not preserve the built form and density of an existing and mature neighbourhood and is not harmonious with its surroundings.

4. The Appellants maintain their position that the decision of City Council to approve this application for rezoning did not demonstrate a *bona fide* exercise of discretion, which is an obligation placed upon them by virtue of their position as a governing body for this municipality. There is a great deal of case law which discusses the nature of discretion, and we suggest that City Council has not fulfilled their obligations in this regard.

The *Lafontaine* decision from the Supreme Court of Canada as noted above stands for the principle that discretion is not without limits.

> When making an administrative decision affecting individual rights, privileges or interests, a municipality is bound by a duty of procedural fairness which includes a consideration of all relevant factors. The Municipality is then bound to articulate reasons for refusing or granting the application. Where the municipal council acts in an arbitrary fashion in the discharge of its public functions, good and sufficient reason exists to warrant intervention from the reviewing court in order to remedy the proven misconduct. No discretion casts a net wide enough to shield an arbitrary or capricious municipal decision from judicial review. In public regulation of this sort, there is no such thing as absolute and untrammeled discretion, that is that action can be taken on any ground or for any reason that can be suggest to the mind of the administrator.

This sentiment was echoed the same year by the Ontario Supreme Court in *Ontario Mission of the Deaf* v. *Barrie (Corp. of the City)*, 2004 CanLII 13583. That court stated:

> In exercising discretion, a Minister of the Crown or a municipality must base any decision upon a weighing of considerations pertinent to the object of the administration. There is no such thing as absolute discretion. The exercise must be based on relevant considerations, must not be arbitrary and must be made in good faith.

While the appellants are not suggesting that there is bad faith involved in the matter at hand, it is suggested that the decision was made without an appropriate consideration of all relevant factors, and that it was arbitrary. Once again, in Order LA 17-06, this Commission, at paragraph 56, observed as follows:

> In addition to making decisions animated by sound planning principles, a municipal council is also obligated to provide reasons for its planning-related decisions. Reasons provide a justification to the public and the developer. They are also a critical part of any review by the Commission. In *Hanmac Inc.* v. *City of Charlottetown,* Order LA15-06, the commission considered the decision of the Supreme Court of Canada in *Congregation des temoins de Jehovah de St-Jerome-Lafontaine* v. *Lafontaine (Village)* 2004 SCC 48, and stated at paragraph 41:
>
> > [41] The direction from the Supreme Court of Canada is clear: <u>a municipality must carefully evaluate an application, give reasons when refusing the application and municipal counsillors "must always explain and be prepared to defend their decisions".</u>

It is this point which drives part of the position of the Appellants. There has been no explanation as to how or why Council came to this decision other than the "Housing Crisis", as if that is all that needs to be said. When the Council made this decision in the first instance and in the subsequent two instances, all of the evidence before them recommended a rejection of this application. Yet, with no debate or discourse of any kind on the issues surrounding this application, Council voted to approve the application. In a subsequent media report, a copy of which is attached as Document 1, one of the City Councillors indicated that it was the housing crisis which was the determining factor, as if that was all the reasoning needed to ignore the mandate of the Official Plan. The City Councillor did mention that affordable housing was important, despite there being no indication in this application that the proposed development would offer affordable housing.

The housing shortage in Charlottetown is not a broad stroke rationale for ignoring every other relevant consideration, yet that seems to have been the case in this instance as there is nothing on record of any other considerations by City Council, or what exactly it is about the housing crisis that warranted the weight it was given in this decision.

Furthermore, there is no consistency between this decision and other similar situations. The Pine Drive decision of City Council, which was the basis for the oft-quoted Order LA 17-06 above, was a situation involving a rejection by City Council of a permit application for a 27 unit apartment building. The media report which followed is attached as Document 2. Though not a rezoning application, the reasons cited by City Council for rejecting the application were primarily that the proposed structure was not harmonious with the area – the scale was too large. There was no mention of a housing shortage at that time. Yet, according to the Canada Mortgage and Housing Corporation, the vacancy rate for rental properties in Charlottetown in 2016 was 1.8 percent, which is not as low as 2018, but is still much lower than the ideal 4 percent which has been noted by Council for the City. One would have thought that the housing shortage at that time would have been at least considered as well as the harmony of the structure with the surrounding properties.

Moreover, just last month a proposal for a 14 unit structure at 68 Brackley Point Road was rejected by City Council. This proposal concerned a vacant lot which has been acknowledged by the Municipality to be large for a single-family home, and was rejected because it doesn't 'fit' the area. Again, no apparent consideration of the housing shortage was mentioned. It is important to note that this property is perhaps four blocks away from 38 Palmers Lane, so it begs the question why the housing shortage is an overriding concern in this neighbourhood, but not in that one. The media report on that decision is attached as Document 3.

The above are simply three examples of decisions which suggest a certain arbitrariness to the process. If the only reason that City Council can provide for the decision to approve the rezoning application is the housing crisis, then they should be able to provide some explanation as to why it is not the only reason in other similar applications in the area. They have not done so.

Moreover, the assertion of an inappropriate exercise of discretion is supported by the fact that City Council was operating on inaccurate data. The specifics of this information may not have been available to City Council at the time of the decision, but the indications were certainly there. The media was reporting as early as June of 2019 that construction was on a dramatic rise and building permit values for multi-unit residential buildings had increased by 450% in the previous two years. The CBC article on that point is attached as Document 4. Just last month, however, the Canada Mortgage and Housing Corporation released its 2019 rental market survey. The media report provides a synopsis of the survey results for Charlottetown and is vastly less voluminous than the actual report. A copy of this report is attached as Document 5.

In essence, while the vacancy rate for Charlottetown was 0.2% in 2018, in 2019 that rate increased to 1.3%. While still not ideal, it is a marked improvement. Notwithstanding that, City Council is/was still relying on old figures, citing a 0.2% vacancy rate for Charlottetown as recently as December, 2019, at the Planning and Heritage Committee, Planning Board meeting. A copy of the minutes of that meeting are attached as Document 6 and outline the discussion around the Reconsideration Request which the Appellants had filed regarding 38 Palmers Lane. Additionally, City Council would be or should be aware of numbers in terms of new construction. According to the CHMC survey, 170 new rental units were completed in Charlottetown in 2019. That was sufficient to bring the vacancy rate from 0.2% to 1.3%. Currently under construction for completion in 2020, there are a total of 428 units. Using very basic calculations, this could then bring the vacancy rate in Charlottetown up to approximately 3.8% in 2020.

Overall, the Appellants submit that the decision respecting 38 Palmers Lane was inconsistent with similar applications in the City and certainly gives the appearance of an arbitrary decision. It was an inappropriate exercise of discretion with no proper explanation other than a general reliance on a very broad premise, which, as it turns out, was not founded on fact.

The Appellants reiterate their position that the decision to approve the rezoning application for 38 Palmers Lane was not based on sound planning principles, was not compliant with the Official Plan, and was not made with a *bona fide* exercise of discretion.

Thank you for your consideration.

Jessie Frost-Wicks,
Appellant