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

Docket LA11002
Order LA11-08

IN THE MATTER of an appeal by Don MacKinnon of a decision of the City of Charlottetown, dated February 14, 2011.

BEFORE THE COMMISSION
on Thursday, the 4th day of August, 2011.

Allan Rankin, Vice-Chair
Michael Campbell, Commissioner
Jean Tingley, Commissioner

Order

Compared and Certified a True Copy

(Sgd.) Philip J. Rafuse

Appeals Administrator
Land, Corporate and Appellate Services Division

IN THE MATTER of an appeal by Don MacKinnon of a decision of the City of Charlottetown, dated February 14, 2011.

Contents

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Appearances & Witnesses

1. For the Appellant Don MacKinnon

Counsel:

Ian W.H. Bailey

Witnesses:

Don MacKinnon
Philip Wood

2. For the Respondent City of Charlottetown

Counsel:

David W. Hooley, Q.C.

Witnesses:

Don Poole
Laurel Palmer Thompson

3. Member of the Public

Gordon McCarville

IN THE MATTER of an appeal by Don MacKinnon of a decision of the City of Charlottetown, dated February 14, 2011.

Reasons for Order

1. Introduction

[1] The Appellant Don MacKinnon (Mr. MacKinnon) 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***). Mr. MacKinnon's Notice of Appeal was received on March 1, 2011.

[2] This appeal concerns a February 14, 2011 decision of the Respondent City of Charlottetown (the City) to reject an application by Mr. MacKinnon to rezone parcel number 948208, located at 81 Royalty Road (the subject property), from Low Density Residential Single (R-2S) zone to Low Density Residential (R-2) zone.

[3] The City filed its Record with the Commission on April 6, 2011.

[4] The hearing was originally scheduled to commence on May 16, 2011 and due public notice of that date was provided. At the joint request of legal counsel for the parties, the Commission on May 16, 2011 adjourned the matter to June 22, 2011. This appeal was heard on May 16, June 22, 23, 24 and 29, 2011.

2. Discussion

Mr. MacKinnon's Submissions

[5] Counsel for Mr. MacKinnon presented written submissions in Exhibit A2 and oral submissions at the conclusion of the hearing. Highlights of the submissions are summarized below.

- The minutes of the February 14, 2011 City Council meeting demonstrate that the City Council based its decision on a petition filed well past the deadline for written submissions. That petition raised several matters, some of which were not relevant to the rezoning application that was before Council. For example, one of the matters raised in the petition was a request for playground equipment; some of the people who signed the petition may have signed only to support that request. If the councillors had copies of the petition to review for a longer period of time, it is more likely that they would have realized that the petition was flawed. In effect, the late filed petition ambushed Council's meeting and their decision was hijacked in the process.

- Mr. MacKinnon's proposed rezoning (R-2) is consistent with good planning principles and had the support of the City's planning staff and the recommendation of the City's Planning Board. The expert evidence of Philip Wood was also in support of the proposed rezoning.

- The proposed rezoning is "workable and viable" by permitting up to 40 housing units [20 two-family residential buildings]. However, with existing zoning the project is not viable.

- Mr. MacKinnon contends that the current zoning (R-2S) ceased to be viable once he was informed that portions of the subject property are provincially designated wetlands. The current zoning would only permit up to 25 housing units [15 single family residential buildings plus 5 two-family residential buildings].

- The Commission's majority decision in Order LA10-06 *Warren Doiron* v. *City of Charlottetown* (*Doiron*) was discussed by Mr. Wood from the perspective of a planning professional. Mr. MacKinnon submits that *Doiron* may be distinguished from the present appeal on the following basis:

    (i) There was no procedural unfairness in *Doiron*.
    (ii) There were factors in the City's Official Plan to lend support to the City's decision in *Doiron*.
    (iii) In *Doiron*, unlike the present appeal, changes to the City's Official Plan, specifically the Future Land Use Map, would have been required.

- The City's legal counsel agreed with the view that Mr. MacKinnon was blindsided by the late filed petition, had no reasonable opportunity to respond to the petition and that the petition is multifaceted, raising five separate areas of concern, only one of which is specifically related to the rezoning application.

- The present appeal is a hearing *de novo* and therefore the grounds for appeal should not be given as strict an application as would be appropriate in an appeal before the Court.

- Mr. MacKinnon submits that the Commission should not refer the matter back to the City for a decision as it would be reasonable to expect that he might not get fair consideration and it would require yet another divisive public meeting. Mr. Bailey termed this as "… putting the matter back into the crucible of neighbours who differ".

[6] Mr. MacKinnon requests that the Commission allow the appeal, quash the City's February 14, 2011 decision pertaining to the subject property and order that the subject property be rezoned to (R-2) as recommended by the City's Planning Board.

The City's Submissions

[7] Counsel for the City presented oral submissions at the conclusion of the hearing. Highlights of these submissions are summarized below.

- The subject property was originally zoned R-1S, permitting only single family dwellings. In 2009, the City approved an application from Mr. MacKinnon to rezone the subject property to R-2S. The R-2S zone allows up to 25% of the lots to have two-family dwellings.

- In late 2010, Mr. MacKinnon applied for a further rezoning to R-2. The R-2 zone allows up to 100% of the lots to have two-family dwellings.

- Both the existing R-2S and the requested R-2 zone are provided for in, and fully conform to, the Official Plan and its Future Land Use Map.

- The City acknowledges that there was a flaw in the procedural process. Specifically, the petition filed by residents was received late and Mr. MacKinnon was given no reasonable chance to respond. Other documents, specifically some emails, were also received after the deadline for submissions had expired. Indeed, it is not unusual for the City to accept submissions after the expiry of a deadline. That said, City planning staff advised Mr. MacKinnon on the afternoon of February 14, 2011 of the existence of the petition and urged him to defer his rezoning request.

- The City discovered its procedural error very soon after making the decision and the City offered the reconsideration process to Mr. MacKinnon. Mr. MacKinnon at first requested the reconsideration and agreed to hold his appeal to the Commission in abeyance. Mr. MacKinnon then decided to abandon the reconsideration process in favour of the appeal. Given that the City's decision was made on the basis of its Mayor breaking a tie vote and that there was new evidence available after the decision had been made, it is reasonable that the reconsideration would have been successful.

- The City submits that, with the exception of the request for playground equipment, the petition's areas of concern were either legitimate concerns to be addressed at the zoning stage or were more generally relevant and ought to be addressed at the earliest opportunity.

- The City is of the view that the water runoff concerns raised by Mr. McCarville are relevant and should be addressed at the earliest possible opportunity.

- The City submits that, while the discovery of provincially designated wetlands on the subject property may amount to an economic hardship for Mr. MacKinnon, there is no empirical evidence before the Commission with respect to the economic viability of Mr. MacKinnon's development. Furthermore, the City notes that Mr. MacKinnon's Notice of Appeal did not raise economic viability as a ground for appeal.

- The City submits that both the existing R-2S and the requested R-2 zones represent sound planning.

[8] Based on the principles of deference set out by the Commission in *Doiron* subsequently upheld by the Court of Appeal, combined with the City's early discovery of its procedural error and its offer to reconsider its decision, the City requests that the Commission remit the matter back to the City for a redetermination of Mr. MacKinnon's rezoning application.

Member of the Public

[9] Gordon McCarville (Mr. McCarville) requested an opportunity to make a presentation on behalf of the residents of Thorndale Drive. Mr. McCarville noted that he filed the petition in question with the City on the morning of February 14, 2011. Mr. McCarville noted the presence of wetlands on the subject property. He expressed concern that if the subject property is zoned R-2, there will be a greater potential for water runoff problems due to the increased density. He is also concerned that a rezoning of the subject property to R-2 would encourage other undeveloped parcels in the neighbourhood to be zoned Medium Density Residential R3.

3. Findings

[10] 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.

[11] In order to determine whether Mr. MacKinnon's appeal should succeed, it is first helpful to consider the nature of the City's February 14, 2011 decision with respect to the subject property.

[12] In Order LA11-05 *Wanda Wood and Heather McBeath* v. *Community of Victoria* (*Wood*), the Commission considered two general categories of planning decision making that a municipality, with an Official Plan and implementing bylaw, may make.

[13] The first category is that of an administrative decision. These administrative decisions relate to applications made by a land owner for matters such as a building permit or a change in zoning. Such administrative decisions may be appealed to the Commission under section 28 of the ***Planning Act***. Indeed, such a right of appeal is also commonplace outside of Prince Edward Island, either to a quasi-judicial tribunal or to the courts.

[14] The second category is that of a legislative decision. In *Wood*, the Commission stated that:

> *[19] By contrast, a legislative decision is a decision to create, or amend, a law. While a tribunal or court may be called upon to interpret legislation, the validity of the legislation is usually beyond the reach of such tribunal or court. There are always exceptions, usually limited to issues of constitutionality and the Charter of Rights and Freedoms.*
>
> *[20] As a result, administrative decisions of a wide range of decision makers, including elected municipalities, may be appealed to tribunals or the courts while the legislative decisions of elected bodies are normally free from such a challenge.*

[15] The Commission went on to summarize in *Wood*:

> *[25] While clause 28(1.1)(b) of the **Planning Act** allows an appeal of a decision to amend a bylaw, the Commission interprets this clause as pertaining to bylaw amendments made as an administrative, rather than a legislative, function of a municipality. Thus an amendment to a bylaw, for example an amendment to a zoning map, along with any necessary consequential amendments to an official plan, for example an amendment to the future land use map, both of which were required to allow a specific development project to go ahead, are viewed as administrative decisions which may be appealed to the Commission. By contrast, a comprehensive review of the official plan and the accompanying review of the implementing bylaw, not pertaining solely to any one specific application, constitute a legislative enactment made by the municipality.*

[16] In *Wiswell* v. *Metropolitan Corporation of Greater Winnipeg*, [1965] S.C.R. 512, Justice Hall of the Supreme Court of Canada wrote commencing at page 519:

> *The respondent [City of Winnipeg] took the position that in enacting By-law No. 177 it was engaged in a legislative function and not in a quasi-judicial act and that it had the right to proceed without notice to interested parties despite its own procedure resolution before mentioned.*
>
> *I agree with Freedman J. A. [of the Manitoba Court of Appeal] when, on this aspect of the matter, he says:*
>
> > *But to say that the enactment of By-law No. 177 was simply a legislative act is to ignore the realities and the substance of the case. For this was not a by-law of wide or general application, passed by the Metropolitan Council because of a conviction that an entire area had undergone a change in character and hence was in need of re-classification for zoning purposes. Rather this was a specific decision made upon a specific application concerned with a specific parcel of land. Metro had before it the application of Dr. Ginsburg, since deceased, for permission to erect a high-rise apartment building on the site in question. Under then existing zoning regulations such a building would not be lawful. To grant the application would require a variation in the zoning restrictions. Many residents of that area, as Metro well knew, were opposed to such a*

> *variation, claiming that it would adversely affect their own rights as property holders in the district. In proceeding to enact By-law No. 177 Metro was essentially dealing with a dispute between Dr. Ginsburg, who wanted the zoning requirements to be altered for his benefit, and those other residents of the district who wanted the zoning restrictions to continue as they were. That Metro resolved the dispute by the device of an amending by-law did indeed give to its proceedings an appearance of a legislative character. But in truth the process in which it was engaged was quasi-judicial in nature; and I feel I must so treat it.*
>
> [Explanatory words added by the Commission]

[17] In the present case, Mr. MacKinnon had applied to the City to change the zoning designation of the subject property. This application required the City to embark on an administrative process set out in section 4.27 [Amendments to the Zoning and Development By-law] of its Zoning and Development By-law (the By-law). City staff followed the process contained in section 4.27. The public was heard from at a public meeting held on February 9, 2011. On February 10, 2011, the City's Planning Board recommended to Council that the rezoning of the subject property from R-2S to R-2 be approved.

[18] Mr. MacKinnon's application for rezoning of the subject property was scheduled to be heard by City Council on the evening of February 14, 2011. Council had exercised its role as a law making body previously, for it was Council who adopted the City's Official Plan and it was Council who passed the City's By-law, including a process for amending the zoning contained within that By-law. In doing so, Council was engaged in a legislative function.

[19] At its February 14, 2011 meeting, Council's role in this application represented the culmination of an administrative process. Council's role, to conclude this administrative process, was akin to an administrative tribunal. Council was to receive the views and opinions of the public and Mr. MacKinnon at a public meeting [By-law section 4.27.4] and request and consider the recommendations of the Planning Board and the Development Officer [By-law section 4.27.5]. In effect, Council's role was quasi-judicial: it was to consider input from the applicant and the public, to consider the advice of its professional staff and its Planning Board, apply 'the law', that is to say the Official Plan and the By-law, and make a decision.

[20] However, a petition was filed with the City on the morning of February 14, 2011. Counsel for Mr. MacKinnon and Counsel for the City both agree that Mr. MacKinnon was blindsided by this petition:

Thorndale Ave. PETITION of Feb. 14, 2011

To: Mayor Lee & Members of Charlottetown City Council

From: 56 Residents of Thorndale Avenue

Re: *The Rezoning of* ***81 Royalty Road*** *from R-2S to R-2, the* ***proposed walkway*** *near the top of Thorndale Ave and the need for* ***some playground equipment****.*

There were a number of issues raised *at the* ***Public Meeting of Feb. 9th*** *such as:*

(a) ***Concerns*** *about the* ***density of the development*** *which* ***R-2*** *zoning will allow;*
(b) ***Concerns*** *about* ***ownership & maintenance of the "wetlands"*** *on the property;*
(c) ***Concerns*** *about* ***water runoff & drainage issues*** *affecting Thorndale residents;*
(d) ***Concerns*** *about* ***the walkway*** *from Thorndale to the MacKinnon subdivision.* ***NOTE:*** *We are concerned the walkway will become a dirt bike path in the summer and a snowmobile trail in the winter since there are currently* ***no developed parklands nor any public trails*** *on the 81 Royalty Rd property and* ***it could be several years before the City*** *will have the funds to* ***develop*** *parklands or trails on the property. We therefore strongly* ***oppose*** *the establishment of a walkway between Thorndale Avenue and the new Don MacKinnon subdivision.*

We, the undersigned hereby call upon Charlottetown City Council to:
1) Deny the rezoning request *for 81 Royalty Rd from R-2S to R-2;*
2) Deny the proposed walkway *from Thorndale Ave to Mr MacKinnon's property;*
3) Provide some playground equipment *for the City's Thorndale Park playground located at the top of Thorndale Avenue where back in the 1980s there were actually four pieces of playground equipment and there has only been* ***a swing set*** *and* ***a sand box*** *for the last 16 years, since the new water lines went through to the Industrial Park.*

[21] The Commission wishes to point out that the names and addresses of the petition signers have not been reproduced by the Commission for privacy reasons and only one of the petition signers made the voluntary decision to appear as a member of the public at the Commission's public hearing.

[22] The Commission is of the view that the City was also blindsided by the petition. This petition presents a mix of issues. The issue concerning the purported need for playground equipment, while it may be important in its own right, is completely irrelevant to Mr. MacKinnon's zoning application and could be viewed as an opportunity to elicit more signatures. Of the remaining issues, some may be relevant at the rezoning stage while the remainder of the issues may be relevant at the subdivision approval stage.

[23] Strictly speaking, the City could have refused to accept or consider the petition as it was filed approximately five days after the deadline set out in the letter to property owners: "*Written Comments will also be accepted and should be submitted no later than 12 noon, February 9, 2011".* However, the City's Council chose to accept and consider the petition. With the benefit of hindsight, perhaps a strict application of the deadline would have been prudent. However, the Commission is of the view that Council was technically entitled to waive the deadline expressed in the City staff's letter and allow this late filed petition into consideration, as section 4.27 of the By-law does not set out a formula for deadlines with respect to submissions or petitions. Further, it is understandable that a City Council would wish to be flexible in order to hear from its residents.

[24] Again, with the benefit of hindsight, there was much wisdom in the City staff's letter requiring written comments, presumably to include petitions as well, to be filed no later than noon on February 9, 2011. Had the petition been filed by that date, Planning Board would have had the opportunity to reflect on the petition before giving its recommendation for approval the following day. Council would perhaps have had the benefit of Planning Board's input with respect to the petition and Council would certainly have had some advance opportunity to consider the petition and thus been better positioned, with the extra time, to more thoroughly assess the relevance of the petition.

[25] However, although Council was entitled to accept the petition on February 14, 2011, they needed to do so with care. One of the fundamental principles of fairness and natural justice, ***audi alteram partem*** (hear the other side) was triggered. Council should have refrained from making a decision premised on the petition until it heard from Mr. MacKinnon and if Mr. MacKinnon had then requested additional time to respond, granted any such reasonable request. By not inviting a response from Mr. MacKinnon, Council tilted the scales of justice against Mr. MacKinnon when it accepted the petition. While Counsel for the City emphasized that City staff had urged Mr. MacKinnon to defer the matter, the Commission is of the view that there was no obligation on Mr. MacKinnon to do so. There was an obligation on Council to be fair to Mr. MacKinnon.

[26] The acceptance of the petition by Council is one matter. The weight to be given to such evidence is another matter. The following excerpts from the minutes of the February 14, 2011 meeting suggest that there was a diversity of opinion on the matter:

> Councillor Lantz: This is an application for which we had a public meeting recently. As all of Council is aware, there have been a number of concerns brought forward from area residents. Primarily, I think what we are seeing is a lot of concern about the concept plan that was shown and a path that was drawn in through a City right-of-way to Thorndale Avenue. It was added to the concept plan on the advice or recommendation of City staff and it was intended to be an amenity to provide access to area residents to the parkland that will be developed there in the future. I understand that has caused a lot of concern …
>
> …
>
> Councillor Villard: First of all, I want to bring everybody's attention to a petition that was tabled this morning at City Hall with respect to this particular development. I appreciate that there has been a lot of discussion on the walkway issue itself. The primary concern raised in the petition deals with the actual rezoning and the level of density within this project. I know the developer very well and he does good quality work. … The development in its current format is not acceptable to the citizens on Thorndale Avenue and they have made that very clear. … when citizens of the City speak, we need to listen. … I think that eventually we will have a quality development out in that area but I don't think this is the development that we are looking for. I will be voting against this and I would ask members of Council to consider doing the same.
>
> …

> Councillor Rice: Why are we turning this down if you have a meeting and several of the key players within the City are going to meet with the Thorndale residents and come to a conclusion? Why are we doing anything with the resolution until that meeting takes place?
>
> Mayor Lee: The meeting that is planned really doesn't have anything to do with this proposed development. This development wasn't even on the radar screen back last fall. The meeting that was planned is to talk about the existing piece of parkland that is there, addition of the street, snow removal, storm water, drainage and that type of thing.

[27] Ultimately, the matter came down to a tied vote and the City's Mayor voted to break the tie, as he is entitled to do.

[28] Before casting his vote, the Mayor spoke to the issue:

> Mayor Lee: It's a tie vote. Before I make the deciding vote, I will speak to the issue. We have an application for development where we have 56 residents in the City of Charlottetown who have expressed their opposition to the development. I think before Council can go in opposition to what that number of residents of our city are saying, we need very good reason to proceed with the development. I really don't see any overriding reason why this property should be rezoned with such opposition from the residents so I vote against the motion that is on the floor.

[29] The Commission is of the view that the late acceptance of the petition without an opportunity for Mr. MacKinnon to respond not only negatively affected Mr. MacKinnon but also placed Mayor and Council in a very difficult position where five councillors plus the Mayor felt obligated to respond promptly to what likely appeared to them, at the time, to be solid public opposition. Councillor Lantz put matters in clear perspective and Councillor Rice urged deferral and three other councillors agreed with them. The Mayor appears to have placed great reliance on the petition, a petition which referred to concerns about the proposed walkway and water runoff/drainage issues. Yet the Mayor earlier had stated that the meeting to be held the following week was to deal with, among other items, "…addition of the street, snow removal, storm water, drainage and that type of thing" and the meeting "…really doesn't have anything to do with this proposed development".

[30] Shortly after Council's decision, Mr. MacKinnon explored a request for reconsideration [pursuant to section 4.28 of the By-law] with the City. Mr. MacKinnon also filed his appeal with the Commission, but requested that his appeal be held in abeyance, pending the reconsideration request. Shortly thereafter, Mr. MacKinnon was informed that his reconsideration request had passed the "threshold test". However, upon learning that his reconsideration process would involve several steps, one of which was another public meeting, Mr. MacKinnon withdrew his reconsideration request and asked the Commission to proceed with his appeal.

[31] Mr. Hooley, legal counsel for the City, acknowledged both in oral submissions to the Commission and in a March 7, 2011 email to City staff, that the City had made a procedural error. In his closing submissions, Mr. Hooley urged the Commission to remit the matter back to the City for reasons cited earlier.

[32] There is much merit in Mr. Hooley's submission that the Commission exercise its discretion and remit the matter back to the City in situations where the City acknowledges procedural error. The problem with this request is the timing. When requested early in the appeal process, such an approach could potentially save all parties time and money and allow the City to correct its error and revisit the decision, perhaps with direction from the Commission. Such a suggestion could have been raised in April 2011 when the City first filed its Record with the Commission.

[33] However, Mr. Hooley only made the above noted submission on June 29, 2011, the final hearing day. While Mr. Hooley had raised as a preliminary matter on June 22, 2011, a somewhat similar request that the Commission adjourn the matter to allow for reconsideration, Mr. Bailey, legal counsel for Mr. MacKinnon, opposed this request and Mr. Hooley withdrew his preliminary request.

[34] At the May 16, 2011 commencement of the hearing, the Commission had encouraged the parties to consider resolving the matter during the intervening five weeks leading up to the June 22, 2011 hearing date. The first few days following May 16 would have been an opportune time for the City to formally request a brief hearing, founded on a concession of procedural error, on the issue of remittal back to the City. Such timing could have saved days of legal fees, the cost of retaining an expert witness and could have possibly resulted in a resolution of the matter by late June.

[35] However, since the idea of remitting the matter back to the City was only proposed by Mr. Hooley in late June after the completion of days of testimony, the Commission finds that there would have been no real benefit to either party, only additional delay and uncertainty for Mr. MacKinnon. Accordingly, the Commission will not remit this matter back to the City for a determination.

[36] Counsel for the City submits that both the City's February 14, 2011 decision to deny Mr. MacKinnon's zoning request (with the subject property remaining R-2S) and the requested zoning (R-2) are consistent with sound planning principles. Mr. Hooley referred the Commission to the majority decision of the Commission in Doiron, which was upheld by the Court of Appeal in *Doiron* v. *Island Regulatory and Appeals Commission* 2011 PECA 9 (*Doiron Appeal*). Mr. Hooley submits that, given the Commission's decision in *Doiron*, the Commission should in the present appeal show deference to the City's decision as both the City's decision to retain the existing R-2S zoning and the R-2 zoning sought by Mr. MacKinnon are consistent with sound planning principles.

[37] Mr. Bailey, counsel for Mr. MacKinnon, emphasized the evidence of Mr. Wood that the present appeal can be distinguished from *Doiron* in that in *Doiron* there was no procedural unfairness, there were factors in the City's Official Plan to support the City's decision in *Doiron,* and changes to the City's Future Land Use Map, part of the Official Plan, would have been required in *Doiron* but not in the present appeal.

[38] Mr. Bailey also noted the evidence of Mr. MacKinnon that the status quo R-2S zoning was no longer viable, given the presence of the designated wetlands.

[39] Frankly, the Commission finds it problematic to ascribe deference to any decision made following a denial of natural justice. Deference to the original decision maker is inappropriate where the denial of natural justice may reasonably be said to have had an impact on the weight given to evidence and where that decision maker appears to have relied on such evidence. In the present appeal, Mr. MacKinnon had no reasonable opportunity to respond to the late filed petition. This was not a minor or a mere technical breach of procedure. The petition contained five separate concerns, only one relating directly to the rezoning matter before the City's Council. It would not be reliable to assume that all 56 signatories were opposed to the rezoning itself. Had Mr. MacKinnon been afforded the opportunity to respond to the petition, the City might very well have voted in favour of the application for re-zoning.

[40] In *Doiron*, the Commission stated at paragraph 17: "… *there is no indication that the City made a procedural error*". There was no denial of natural justice in *Doiron*. On this point alone, *Doiron* can be readily distinguished from the present appeal.

[41] In *Doiron* the majority of the Commission stated:

> *[30] The Official Plan, text and Future Land Use Map alike, was developed in consultation with members of the public and, presumably, with the advice of a planning professional. The policies and objectives set out in the text of the Official Plan apply, unless targeted to a specific area such as the downtown core, to the City generally. The Official Plan's Future Land Use Map, in a clear and very visual manner, sets out the City's intention as to the type of desired development particular to various areas and neighbourhoods contained within the City. In all likelihood, residents who wonder what the future holds for their neighbourhood will consult the Future Land Use Map rather than read through the various policies and objectives within the text of the Official Plan. The Future Land Use Map indicates that the subject property would be developed for single family residences.*
>
> *[31] In effect, the position of City Council appears to be supported on the basis of consistently adhering to the "plan" earmarked for the neighbourhood; the very same plan which may have guided the residents to purchase homes there. The Commission finds that there is some merit in this "consistent" approach.*
>
> *[32] The majority of the Commission panel finds that the City's decision to deny the proposed rezoning of the subject parcel was in fact reasonable. While the proposed rezoning of the subject property would result in better land use planning than the present zoning; the present zoning is nonetheless reasonable, has support in the Official Plan, and thus the majority of the Commission panel will defer to the decision of City Council. Accordingly, the appeal is denied.*

[42] The Commission finds that, in the present appeal, the proposed (R-2) zoning of the subject property would continue to adhere to the "plan" earmarked for the neighbourhood as both the existing (R-2S) zoning and the proposed (R-2) zoning are consistent with the Low Density Residential designation for the subject property on the Future Land Use Map.

[43] In the February 4, 2011 report prepared for Planning Board by the City's planning staff, it is noted:

> *… Council did approve the land to be rezoned to R-2S in 2009, but given the loss of land to the wetland areas the developer will only get a fraction of the lots that he had planned. In addition he will incur costs to redesign the subdivision and service the land. Therefore he would like to rezone it to R-2 to make the subdivision feasible.*

[44] Mr. Hooley submits that there is no expert evidence as to the economic viability of any future subdivision of the subject property, whether zoned (R-2S) or (R-2). The Commission agrees with that assessment.

[45] However, the Commission is not restricted to expert evidence. Mr. MacKinnon testified that a subdivision of the subject property based on the current (R-2S) zoning would not be financially viable. Mr. Wood testified as to increased development costs, noting that with higher municipal standards costs to developers increase sharply. Mr. Wood stated that, in addition to the cost of purchasing land and the carrying costs of owning that land, a developer should expect to pay about $30,000 per lot just for servicing costs. He also noted that, within the last five to seven years, there is a huge demand for lots for semi-detached homes.

[46] Given the significant reduction of lots as a result of the presence of the designated wetland areas, the Commission finds that the development of the subject property premised on the existing (R-2S) zoning would be of doubtful viability.

[47] Mr. Hooley also submits that Mr. MacKinnon's Notice of Appeal did not list economic viability or even economic hardship among the grounds for appeal. Mr. Hooley seems to imply that the Commission cannot consider such arguments because they were not raised in the grounds for appeal.

[48] However the Commission, guided by the Prince Edward Island Supreme Court – Appeal Division [now the Court of Appeal], does not view grounds for appeal in such a restrictive sense: *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 paragraph 10:

> *The fact that an appellant must state the grounds of appeal and relief sought in writing in order to invoke the appeal procedure does not restrict the jurisdiction of IRAC in hearing or deciding the case. In situations where an appeal is by way of trial de novo grounds of appeal do not serve the same function as they do for instance in appeals to this court. [See: Salhany, Canadian Criminal Procedure, Canada Law Book Ltd. 1968 at pp. 203-4.] Their purpose in hearing de novo appeals is simply to alert the appeal tribunal and parties to the nature of the appellant's complaint with the decision, and the form of redress being sought.*

[49] A review of the City's Official Plan reveals that there are objectives and policies which could be characterized both in support of the proposed rezoning to (R-2) and in support of retaining the existing (R2S) zoning for the subject property.

[50] Here are some of the objectives and policies under section 3.2 Sustaining Charlottetown's Neighbourhoods:

Defining Our Direction

*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.*

*2. Our **objective** is to allow moderately higher densities and alternative forms of development in any new residential subdivisions which may be established, provided that this development is well planned overall, and harmonious with existing residential neighbourhoods.*

- *Our **policy** shall be to permit moderately higher densities in new neighbourhoods and to permit in-laws suites in residential land use designations and to make provision for higher density residential projects in the Downtown Growth Area which is located in the Downtown Core Area and to permit multiple unit developments in suburban areas provided that it is development at a density which will not unduly adversely affect existing low density housing.* ***Amended May 25, 2005***

- *Our **policy** shall be to allow a mix of residential, commercial, institutional, and recreational uses in new subdivisions which are established, provided that there is a comprehensive site plan which ensures that development is well-related to both its internal and external environments.*

[51] Here are some of the objectives and policies under section 3.3 Housing Needs and Variety:

Defining Our Direction

*Our **goal** is to work with public and private sector partners to create an attractive physical environment and positive investment climate in which the housing requirements of all residents can be met (including those with special needs), and to provide clear direction as to where residential development should take place.*

*1. Our **objective** is to encourage development in fully serviced areas of the City, to promote settlement and neighbourhood policies as mechanisms for directing the location of new housing, and to encourage new residential development near centres of employment.*

- *Our **policy** shall be to ensure that all new multiple dwelling unit buildings are serviced by water and wastewater systems which have the capacity to accept the development proposed.* ***Amended May 25, 2005.***

- *Our **policy** shall be to base residential densities on the availability of municipal services, education facilities, recreation and open space amenities, transportation routes, and such other factors as the City may need to consider.*

- *Our **policy** shall be to provide medium density housing styles to meet future housing needs.*

- *Our **policy** shall be to direct the location of medium rise multiple dwelling unit buildings to the Downtown Growth Area located in the Downtown Core Area. Amended May 25, 2005*

- *Our **policy** shall be to allow the conversion of upper floors of commercial buildings in the downtown core for residential use.*

*2. Our **objective** is to enhance the range of housing available to residents who have special social, economic or physical needs.* ***Amended May 25, 2005***

*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.*

Emphasis added.

[52] The Commission notes that Mr. Wood expressed his opinion that the provincially designated wetlands on the subject property would serve to provide a natural buffer between Mr. MacKinnon's proposed development and the existing neighbourhood of Thorndale Avenue. It was Mr. Wood's opinion that the proposed development would constitute a new residential development rather than the expansion of an existing development. There was no such natural buffer in *Doiron* and the development proposed in that situation could be categorized as a new phase of the same development.

[53] Based on the February 4, 2011 report of City staff, the February 10, 2011 recommendation of Planning Board, the expert testimony of Mr. Wood and the testimony of Mr. MacKinnon, the Commission finds that it would be consistent with sound planning principles to zone the subject property (R-2).

[54] Had there been no provincially designated wetlands to significantly reduce the number of potential lots, the development of the subject property with the existing (R-2S) zoning would also have been consistent with sound planning principles.

[55] However, given the reduction in the number of potential lots mandated by the provincially designated wetlands, the Commission finds that the evidence, on a balance of probabilities, does not support a finding that the development of the subject property based on the current (R-2S) zoning would be consistent with sound planning principles. From a common sense perspective, sound planning principles must invariably include economic considerations, including the return of fixed and variable development expenses, as well as a reasonable profit for the developer, in order to avoid the pitfalls of clusters of empty building lots remaining for years to come.

[56] Given the fundamental procedural error and the unfair treatment of Mr. MacKinnon that resulted from that error, and given the evidence in support of the requested rezoning, the Commission finds that it is appropriate to allow the appeal, quash the City's February 14, 2011 decision pertaining to the subject property, and order the City to rezone the subject property to Low Density Residential (R-2).

4. Disposition

[57] An Order allowing the appeal and requiring the rezoning of the subject property to Low Density Residential (R-2) follows.

IN THE MATTER of an appeal by Don MacKinnon of a decision of the City of Charlottetown, dated February 14, 2011.

Order

WHEREAS the Appellant Don MacKinnon has appealed a decision of the City of Charlottetown, dated February 14, 2011;

AND WHEREAS the Commission heard the appeal at public hearings conducted in Charlottetown on May 16, June 22, 23, 24 and 29, 2011 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 February 14, 2011 decision of the City of Charlottetown pertaining to this matter is hereby quashed, and the City of Charlottetown is hereby ordered to rezone parcel number 948208 to the Low Density Residential (R-2) zone.**

DATED at Charlottetown, Prince Edward Island, this 4th day of August, 2011.

BY THE COMMISSION:

(Sgd.) *Allan Rankin*
Allan Rankin, Vice-Chair

(Sgd.) *Michael Campbell*
Michael Campbell, Commissioner

(Sgd.) *Jean Tingley*
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)