



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

**Docket: LA16004 and LA15014**  
**Order: LA16-05**

**IN THE MATTER** of an appeal by Marshall MacPherson Ltd., of decisions of the Town of Stratford, dated December 9, 2015 and March 9, 2016.

**BEFORE THE COMMISSION ON** Friday, October 28, 2016.

J. Scott MacKenzie, Q.C., Chair  
John Broderick, Commissioner  
Jean Tingley, Commissioner

# ORDER

Compared and Certified a True Copy

A handwritten signature in blue ink, appearing to read "Philip J. Rafuse", is written over a white rectangular background.

Philip J. Rafuse

Appeals Administrator

Corporate Services and Appeals Division

**IN THE MATTER** of an appeal by Marshall MacPherson Ltd., of decisions of the Town of Stratford, dated December 9, 2015 and March 9, 2016.

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**Order**

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## **Appearances & Witnesses**

1. **For the Appellant, Marshall MacPherson Ltd..**

**Counsel:**

William F. Dow, Q.C.

**Witnesses:**

Marshall S. MacPherson  
R. Chad MacCallum, P.Eng  
Donald F. Hickox

2. **For the Respondent, Town of Stratford**

**Counsel:**

Charity L. Hogan

**Witnesses:**

Patrick Carroll, MCIP, Director of Planning

**IN THE MATTER** of an appeal by Marshall MacPherson Ltd., of decisions of the Town of Stratford, dated December 9, 2015 and March 9, 2016.

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## Reasons for Order

### 1. Introduction

- 1) The Appellant Marshall MacPherson Ltd. ("MacPherson") has filed two appeals 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). Appeal docket LA15014 is an appeal of a December 9, 2015 decision of the Respondent Town of Stratford (the "Town") to deny approval of a development concept submitted by MacPherson. Appeal docket LA16004 is an appeal of a March 9, 2016 decision of the Town to deny an application for development. In both appeals, the development concept and the application for development pertain to a proposal to develop 36 residential apartment style condominium units on lot 15-2, PID 882084, Shakespeare Drive (the "Subject Property"). The Subject Property is currently zoned Town Centre Mixed Use ("TCMU").
- 2) On September 14, 2015, MacPherson filed a preliminary plan via email (Exhibit R3, Tab 34) with the Town's planning staff. This preliminary plan involved an initial development proposal for a total of 84 residential apartment style condominium units on lots 15-1 and 15-2 of the Subject Property. Over the course of the months of October and November 2015, various emails (set out in Tabs in Exhibit R3) were exchanged between MacPherson and the Town's planning staff relating to this initial proposal.
- 3) At the November 9, 2015 meeting (Exhibit R3, Tab 19) of the Town's Planning, Development and Heritage Committee (the "Planning Committee") the Planning Committee approved a recommendation that approval be granted, subject to conditions, to a concept plan to develop 84 residential apartment style condominium units on lots 15-1 and 15-2 (containing approximately 3.89 acres in total) of the Subject Property.
- 4) On November 12, 2015 (Exhibit R3, Tab 18) the concept plan was varied into a proposal for three (3) twelve (12) unit buildings on lot 15-2 only, with the other buildings and lot to be dealt with in the future. Initial conceptual plans for this revised proposal were received by the Town on November 15, 2015 (Exhibit R3, Tab 17).
- 5) At the November 30, 2015 meeting of the Town's Committee of the Whole, MacPherson's revised proposal was presented by Patrick Carroll (Mr. Carroll), the Town's Director of Planning (Exhibit R11). The meeting adjourned for the evening and was scheduled to reconvene on December 8, 2015.
- 6) At the December 7, 2015 meeting of the Town's Planning Committee, MacPherson's revised proposal was reviewed and a majority of the Planning Committee approved

a recommendation that Council grant approval to MacPherson's revised proposal to develop 36 residential apartment style condominium units on lot 15-2 (approximately 1.67 acres) subject to conditions.

- 7) At the December 8, 2015 meeting of the Town's Committee of the Whole, MacPherson's revised proposal was further discussed and it was noted that the revised proposal had received a recommendation from the Town's Planning Committee.
- 8) At the December 9, 2015 Regular Monthly Meeting of Council, a resolution was put before the Council for approval of the proposal on the conditions as recommended by the Town's Planning Committee for approval to be granted for concept plan received from Marshall MacPherson to develop 36 residential apartment style condominium units on the Subject Property subject to the following conditions:
  1. Conformance with the proposed concept plan as well as all relevant Bylaw provisions.
  2. Final subdivision approval must be obtained for lot 15-2 prior to any building permits being issued.
  3. A detailed servicing plan must be submitted for approval to the Stratford Utility Corporation.
  4. A detailed stormwater management plan must be prepared by a qualified engineer and approved by both the Town of Stratford and DOTIE.
  5. All other relevant provisions of the Town of Stratford Zoning and Subdivision Control (Development) Bylaw are met.
- 9) The Town's Council then discussed the subject matter of the above resolution at considerable length. The following is an excerpt from the verbatim minutes of the December 9, 2015 meeting of the Town's Council (Exhibit R5).

Councillor Ogden - I will be supporting this resolution and probably the main reason is that this developer is a good developer and has a good track record in the Town. I have gone door to door on other developments – notably at the Kinlock Road and Stratford Road. I have gone door to door in those developments and the people who live in these developments are quite happy and proud of their town. The second reason is that this type of housing was highlighted as a need in the housing study we had commissioned. The third and main reason is because if there were other developments similar but there are not development singular, right beside it or close to it. For those reasons I will be supporting the Resolution and the main reason it meets the requirements of the Planning Act and our requirements, in my view.

Deputy Mayor Cooper - I also know the developer quite well, coming from the same communities. He is a pretty good fellow, just a few years my senior. He does good work within the Town, there is no question. I would have to say publicly, that some would question, how some of the developments finished out within the Town. But I think that he is the type of person that would take the bylaws within the Town and he knows it very well. Can take a planning design from scratch and work with land owners. There is not a doubt in my mind that he can do a great job. We do have a landowner who is quite familiar with the project in attendance this evening. I feel this is the wrong location for this project. There is much land within the Town and some would view the area around the Town Centre is becoming congested. We do have to meet the needs, as not everyone can live in a two story 3000 square foot home that would probably be assessed at a half a million dollars here in Stratford. We do want to go and work with landowners and developers as best we can on our affordable housing initiatives. However, we are having a tough time with it in Stratford - partly to do with the provincial and federal governments with their initiatives and their funding toward that, because without them, it is pretty tough. Like someone has to pay the bill. So if the Town is not going to take it on, and the developer is not going to take it on, the only person left to pay the bill is the new unit or new homeowner. In this particular case I really does hope that we can come to some sort of an agreement; but as it is presented, I just think it is in the wrong area. It is not what I believe needs to be in the Town Hall area next to a commercial zone. I would love to see the landowner make a presentation to Council for rezoning and I would certainly be in support of that. I certainly want to see development in the area. I certainly would like to see all the land around the Town Hall with the necessary green space, but we can have too much of it as well – and we may not all agree on that. I don't think we can just continue in the same fashion. One thing I know does know from the developer would be that is that this is a proposal and maybe if it's approved, or not approved, maybe they have to go back to the drawing board a little bit.

I know that it meets the guidelines, I know it meets the Official Plan, I know that it meets the Bylaw regulations, but personally I think it is a good project, in the wrong area, and I hope, it will go back to the drawing board. Those are my comments your Worship.

Mayor Dunphy - Thank you very much, any other questions or comments before we move on.

I will ask for the Question. O.K. I will ask for the question All in favor:

Councillor Griffin - Aye

Councillor Ogden - Aye

Councillor Clow - Nay

Deputy Mayor Cooper - Nay

Councillor MacDonald - Nay

What have we got here, two here for sure, and four against, sorry. What do you vote Councillor MacLean?

Councillor MacLean - I have to vote Aye. I will have to vote for it, it meets the Bylaw and we have the water, the stormwater is my main concern. I don't believe that it follows the intent. But I am...

Mayor Dunphy - voting for

Councillor MacLean - but with Patrick's information I am voting for it.

Mayor Dunphy - so, three to three, I get to vote now.

Councillor Griffin - right

Mayor Dunphy - so, I like some Councillors, I do have some concerns about the project, obviously, um there has been a lot of discussion around the table prior to this, at the committee level. There is stormwater management issue potentially about elevation and buffering with the Town property and other properties. Um, um so the future of the second lot you know, what that's going to be, so um because of the concerns that have been raised um I'm going to vote against it as well, so motion defeated.

- 10) The December 9, 2015 resolution was defeated by a 4-3 vote of the Town's Council. Later that same evening, the Town's Director of Planning emailed Mr. MacPherson to advise him that the Town had turned down his application, not providing any reasons for the decision but advising that a formal letter would be forwarded the next day.
- 11) On December 10, 2015 MacPherson responded to the above noted email and requested minutes of the Town's Council meeting. An emailed reply was sent that same day from the Town's Director of Planning advising that the minutes would be sent "asap". Also on December 10, 2015 a letter was sent from the Town's Director of Planning to MacPherson advising of the Town's decision and also advising of the right to appeal to the Commission. No reasons for the decision were stated in this letter.
- 12) On December 29, 2015, the Commission received a Notice of Appeal from legal counsel for MacPherson pertaining to the Town's December 9, 2015 decision.
- 13) On December 30, 2015, the Commission requested a copy of the file record from the Town.

- 14) On February 1, 2016, the Commission received an email from the Town's then legal counsel advising that legal counsel for both parties "...are endeavouring to work with our respective clients to resolve this matter. As such, we would kindly ask the Commission to hold this appeal in abeyance". The same day, Counsel for MacPherson confirmed that the parties were discussing a resolution and requested an abeyance.
- 15) The Commission granted the abeyance after receiving assurance from both Counsel that their clients were aware of the joint request for an abeyance.
- 16) On February 1, 2016 MacPherson filed an application for development with the Town. This application (Exhibit R4, Tab 21) was for a permit for three (3) twelve (12) unit apartment/condominium buildings on the Subject Property.
- 17) On February 9, 2016, MacPherson filed a preliminary stormwater plan with the Town (Exhibit R4, Tab 19).
- 18) During the month of February 2016 MacPherson filed various documents filed with the Town's staff pertaining to stormwater management, landscaping/buffering changes to the concept plan and driveway access. This included comments from engineering staff at the Department of Transportation, Infrastructure and Energy ("DOTIE") with respect to the preliminary stormwater management plan and to driveway access on Shakespeare Drive.
- 19) On February 24, 2016, MacPherson's application for development was discussed at the Town's Committee of the Whole meeting.
- 20) On February 29, 2016, the Town's Planning Committee reviewed MacPherson's application for development. The Planning Committee, by a 4-1 vote, approved a recommendation that the Town's Council approve MacPherson's application for development.
- 21) At the March 9, 2016 Regular Monthly Meeting of Council (Exhibit R2-Tab 5), a resolution was put before the Council for approval of the application on the conditions as recommended by the Town's Planning Committee for approval to be granted for concept plan received from MacPherson to develop 36 residential apartment style condominium units on the Subject Property subject to the following conditions:
  1. Conformance with the proposed concept plan as well as all relevant Bylaw provisions.
  2. Final subdivision approval must be obtained for lot 15-2 prior to any building permits being issued.
  3. A detailed servicing plan must be submitted for approval to the Stratford Utility Corporation.



4. A detailed stormwater management plan must be prepared by a qualified engineer and approved by both the Town of Stratford and the Department of Transportation, Infrastructure and Energy, (DOTI it should be (TIE).
  5. All other relevant provisions of the Town of Stratford Zoning and Subdivision Control (Development) Bylaw are met.
- 22) The Town's Council then discussed the above resolution at considerable length. The following is an excerpt from the verbatim minutes of the March 9, 2016 meeting of the Town's Council (Exhibit R2-Tab 4):

Mayor Dunphy – just back to Councillor MacLean's question about subdivision – this is not a subdivision approval though this is a development permit correct.

Patrick Carroll – this is a development permit yes, sorry if I said subdivision. Final approval for the development as well. There is always a preliminary and a final and that is what the point is. It is to address these conditions and make sure they are getting done. Obviously, from what you see at a conceptual stage, things come up as you get towards the construction drawing and that's why there is a preliminary approval and then a final approval for both building and subdivision.

Mayor Dunphy – are we going to review anything before we vote,

Patrick Carroll – all the materials have been circulated in your package and there is really nothing new from what you have been presented before, so if there are any questions on it, I don't mind bringing anyone of them up or taking those questions. I don't have a presentation prepared because it would be very redundant of what you've seen before.

Mayor Dunphy – so this is the same as it was in in December?

Patrick Carroll – it is not the same as in December. It has the noted changes that have come up, but it is the same overall application aside from the additional documents that we added and the real change that you see from the concept in December is really those landscaping elements that we were just discussing, and that would be the only change to the conceptual part. The other part that you requested had to do with driveway access and also with the stormwater management plan and those have been contained within and we are satisfied based on the technical advice we received from the Province that they are sufficient.

Councillor MacLean – I still have concerns with the stormwater plan, but that is provincial. But one thing it will bring us that much closer to eventually having to put up a holding pond and that will be costly, but the way the

bylaw is, I will be supporting it because this is something we have to deal with moving forward. We can't go back and change what is in place. I believe they have done everything to satisfy what they had to do with the present plan and the only thing we can do is make changes moving forward.

Councillor MacDonald – I still have a concern of at least 36 and possibly 72 vehicles exiting that parking lot just on the turn there, so I just haven't seen the document.

Patrick Carroll – I am sorry; it should have been circulated in your package. If it wasn't, there must have been an error. It is a very simple one line email from the Province that indicates there is no concern related to access on this – none. Further to that they actually reiterated, because they provided comments at the time of subdivision that this was all planned for, and they had planned for that level of density – actually a little higher. So they certainly didn't see a concern and the curve they didn't see a concern from an engineering perspective.

Councillor MacDonald – thank you Patrick.

Mayor Dunphy – I may not get to vote here, but I still have concerns regarding the stormwater management plan – specifically the elevation of the property and where that water is going to flow. So I certainly have some concerns about that. We have existing residents in Stratford who were neighbours to an apartment complex on Dale Drive and they have been negatively impacted, and I want to make sure 100% that is not going to happen here. That's a major concern that I have. I had in December and I have it now.

Deputy Mayor Cooper – to echo your comments on that, we have been dealing with those stormwater concerns in a couple of areas in the Town, but certainly one not far from the Town Hall here now that has taken considerable time. It has been in front of us for two years now with a proposed development next door that really needs to be ensured by the Province that their concerns are going to be mitigated once and for all from stormwater management. When a large project like this does go forward, and especially a project like this which is at the higher elevation these folks will most certainly be satisfied from a stormwater management plan, but as has been communicated and with the new roof lines, the new amount of pavement within that, I really think we're going to be in to work across on the other side of Shakespeare sooner than later, and we do have future development within the Town next to our current detention/retention area. As that increases it will probably increase give less developable land going forward. My comments are the same. I know the gentleman personally who is proposing the project; he has done some tremendous work within the

Town. I think a couple of his projects in terms of the layout I don't necessarily agree with, but I wasn't on Council at the time to bring the concerns forward, or maybe get justification on why things happened the way that they did. There is not a doubt in my mind that the buildings would be constructed professionally, and likely aesthetically pleasing and visually it looks pretty good in the renderings.

Deputy Mayor Cooper – as our last two or three surveys commented our residents would not be in full support of a project like this taking place in its current location. There are lots of areas in the Town that could use this type of development and I would personally, although it is only a personal comment, see that being more of a commercial zone even though it is TCMU. That is the type of development that would be more cohesive within the area, and our residents have spoken to say that is what they want to see from the Town Hall southeast. That is what they would like to see happen with that land. Now we only have so much control over what takes place when projects come forward, and if we are going to be spending time and money to go out and get information and comments from our residents then I think that information needs to be passed along.

I didn't support the development in the first place and I certainly have concerns about the stormwater management from the beginning and I still have concerns about the stormwater management. Can they make it work – certainly if they do things right, but there are a couple very close to here that are messed up already and it is going to be hard to get those back. So unless the Province who approves these storm water management plans does a better job of what the expectations are from engineers and developers, we could create another situation down the road. I hope we don't, but it is certainly possible.

Councillor Ogden – I would just like to point out that this stormwater management plan, as you have pointed out, is approved by the Province and stamped by a professional engineer and it complies with the zoning as it exists now for that piece of property. I would suggest if we are going to approve development within the Town, we should look at making sure we follow the law as it is, and if we look at changing the law we should do that before reacting to a proposal from a very good developer who has a good track record within the Town. Who employs – with this project would bring close to 200 new people to the Town, the tax base, millions of dollars in investments in jobs – with the loss of the Home Hardware and recently the loss of farm equipment operation. This is much needed in the Town for employment and for development and it will be a positive thing for the Town and I think it complies with all the bylaws – zoning and planning requirements, as well as being recommended by the planning board – which includes residents of our Town and when we made a conscious decision to have them represent the citizens. I know the survey may have something – I am not familiar with exactly what you are referring to, but

there may be some discussion about the kind of developments within the Town. We do have a core area plan that indicates that we need density for the long term sustainability of our sewer and water infrastructure. We can't all have single family dwellings, so I would suggest that if we are going to look at changing our zoning for this parcel, we should have done it before this development came forward, or negotiated with the developer to try to have it on another location, but I think that we are going to follow the law, we have to approve this application and I will be supporting it.

Mayor Dunphy – Just for clarification, at this point in time, do we have the detailed stormwater management plan completed by the Province and approved by the Town?

Patrick Carroll – yes we do for this site, it is the one included in your package.

Mayor Dunphy – that's for the parcel itself.

Patrick Carroll – yeah it is, that's the parcel. Oh, you do mean the larger area itself, the watershed?

Mayor Dunphy – where the water flows.

Patrick Carroll – Orooba, is working on that (provincial official) and that relates to the subdivision application, and it will be required that all things be addressed if anything comes up, and most of that relates to the climate change issue. They are not expecting to question the engineering numbers they worked with except for those that may relate to climate changes, precipitation changes and the like. Essentially, that will have to happen before final subdivision approval happens. It will have to be addressed. Now, I couldn't tell the Province to do it right away. She did say they are working on it and it will get to us as soon as it is prepared.

Mayor Dunphy – so we are going on subdivision here today?

Patrick Carroll – no.

Mayor Dunphy – you said before that subdivision approval.

Patrick Carroll – yes because there is a concurrent as noted at previous meetings. There is a concurrent subdivision approval held by the current land owner and it is not going to be approved because there is no sense of the subdivision, if the development itself cannot go ahead. So essentially, we would be creating lots that there wouldn't be a proposed development for in the core area. So that is why they are being held.

Mayor Dunphy – so just to confirm the stormwater management plan that Orooba is working on is not complete yet, is that correct?

Patrick Carroll – that is for the entire watershed and it is only to adjust the numbers based on that entire agreement of the whole watershed. We do not expect any issues that would relate to this particular site. If so it is compelled on the Province to bring that up. They didn't indicate that, as you have seen from their comments.

Mayor Dunphy – so in the case of the Dale Drive development would they have approved that?

Patrick Carroll – I was not working here at the time, but I do understand that there were actual construction related provincial investments that did not occur along the Trans Canada Highway (TCH) that led to this problem. I don't understand that it had anything to do with the Dale Drive Development itself. That's what I have been told from a technical perspective. You may know otherwise, but I'm not sure why no one brought me up to speed on that. What I was indicated that it was a provincial investment that lead to the Dale Drive stormwater management issues, as well as lack of requirement for stormwater management planning in the history of things which is consistent with most areas and essentially it caused a problem and the problem needs to be addressed by an investment by the Province to address that level of a ditch. To be very practical I bike by it all the time, if you go and look at the Coast Guard property water does not pass that site.

Deputy Mayor Cooper – to follow up on that. That is what we are talking about when it comes to stormwater management. I do agree with you Councillor Ogden when you talk about management plans being drawn up by qualified individuals, stamped and approved. I'm referring to is subdivision approval that was granted preliminary approval two years ago and is still currently being held up because of the stormwater management plan. I don't want to put words in your mouth your Worship but that's the concern I have when we start talking about a stormwater management plan, and the Dale Drive subdivision is a constant issue. The Province hasn't fixed it and they stamped the drawings. I fail to see the relevance that we can just assume that the Province is going to do a good job, with a qualified engineer either on staff, or sub-contracted out to a reputable company, probably on the Island. That we can just assume that it is going to be right. Because a development down there is totally being held up, not because of economic sustainability, it's being held up because of stormwater management plan and the tremendous increase in dollars that it is going to take on the investments of the developer, which they have agreed to. I think the holdup is the Province because they haven't done anything with that yet. They certainly may do that in the future but that's

what it is all about. There is a very good development similar to what we are talking about here, it is a good development by a great contractor that we feel will have issues, and I personally feel that they will have issues with the development very soon; if not prior to completion, very soon after, if some work is not done. That is perceived by me, that's not actual I don't have actual documents to say that is what is going to take place. But they can't clean up there mess within 700 meters of the proposed development, so I don't see it being that much different.

Patrick Carroll – to clarify the difference between an investment in stormwater management and stormwater management planning. No one has ever indicated to me that there was an error of stormwater management planning along Dale Dr. there were [issues] before Stratford was Stratford there were issues where developments went on and there was no stormwater management plan and there certainly a lack of investment from the Province on that particular part of stormwater flow in the Town. I do understand that it was a lack of investment not an error of planning. I think that is an important point to understand. As I understand it, the investment in stormwater management plan has been held up from discussions on the Mason Road/Dale Drive intersection. It is an investment according to the Province they are waiting to get through that process before they make any investment in the stormwater. As I understand it, it wasn't an investment in stormwater management planning. It is actually an investment that just hasn't happened for a number of reasons.

Deputy Mayor Cooper – That is quite possible on some facets when it might pertain to planning here within the Town, but made no mistake that there was what I consider a good development of those new apartments and whether they turned into apartments or condos that are down there now. There are two new buildings adjacent to the Dale Drive area and they had minimal water concerns before those two structures were put in place. And now they float, basically float, I've seen it and some have rivers behind their homes, some has small streams in their basements and that was after development. So, we have met with the Province, we've heard their take on that they would be more than happy to participate down there and get things done. The probably is, there was a development that took place, that Council of the day considered a good development, the residents that live in those apartments think that it's a great development and it took place. I will tell you that the neighbours don't think it was. They have been drastically impacted by development in that area. I agree, they will say well we are waiting for a desired plan of action at the Mason Road/Dale Drive area. Well, we would have signed that off long ago here. As indicated to us, we are a partner in that. You correct me if I'm wrong Your Worship, but we are only a partner in our opinion, because we don't have anything to do with the planning and the infrastructure or the investment of anything that

happens in terms of the realignment of the Trans Canada Highway in that area.

Patrick Carroll – as I understand it, we actually had a report done to access what the safety issues were that the Province had indicated. So, essentially as I understand the holdup is that we actually did research that contradicted what the Provinces research indicated and we are currently working through it.

Deputy Mayor Cooper – Oh, we certainly did on the placement of a new signalized intersection or round about. No question, we were involved with that.

Patrick Carroll – My understanding that was the holdup. I don't see that as a planning issue, as much as it is an investment issue that relates to another site and I still can't see what the connection to that is to Marshall.

Deputy Mayor Cooper – When you say planning, do you mean our planning department?

Patrick Carroll – No the planning that is going on along the roads. Essentially, as we know we are relying on the engineers once again in the Province, because we don't have that technical capacity. We do have a role in the planning that and we are part of the reason that it's not completed, because we are looking at other issues that the Province has to consider.

Deputy Mayor Cooper – I think that the Dale Drive issue was planned and not executed and we are bearing the brunt of that and our residents of the Dale Drive area are being impacted greatly. We talk about property values and what buildings are going to look like next to us and who is going to be coming in, what type of building it is going to be, what is the color of the roof. But, I will tell you when a development happens and all of a sudden you go from having issues, water issues related to your property based on a storm water management plan that was put together and wasn't executed. If I was a resident there I would be going a little bit farther that they probably are now. The only thing that is holding them back is the fact that there is a subdivision approval granted for the adjacent property, which may mitigate their water issues. But the holdup is the stormwater management plan.

Patrick Carroll – As I understand it, the stormwater management plan isn't holding it up from a conceptual phase any longer, although it did, since I've been here in April, essentially the developer was required to consult with the community because he wanted to make some changes. That is what held it up this year. He is required to construct the entire stormwater

management pond very similar to the one that's going to be required on the file that we are actually considering tonight. It essentially the same type of structure and the stormwater management planning that was done ahead of time on the Kel-Mac lands that we are considering tonight was never done on Dale Drive. It is being done now at the expense of the developer, being Southside Greens. They are installing that as part of the development to address an issue that in the case of this file, has been addressed ahead of time through the work done with Kel-Mac and CBCL. So, from a planning perspective we look at what is going on with this file to be a great improvement on what was done on the Dale Drive side and we certainly didn't see a reason to fault this particular file for things of the past.

Deputy Mayor Cooper – Bottom line with Dale Drive, it was planned and it wasn't executed and the stormwater management plan of this here approval will not affect the development that's going to happen on the property, it will affect the neighbours.

Patrick Carroll – And in this case it could affect the wildlife population, we well, this is a very substantial feature and it is something that when it hits 60% developed the Town is on the hook, so is the Province and they are the main funder and the developer as well. And they cannot proceed with development pass the 60% mark unless they build that structure to its design guidelines. So, I have no reason to believe, that there is a reason question what's going in this situation. Because, as I understand it the things that need to be there, will be there and I can see why everyone is getting concerned in this phase because the development, and we understand it, is above the 45% mark. I don't know the exact figure but we are closing in on that 60%. You are certainly correct that stormwater management issues could become a problem, if they don't move forward and implement that plan. I just have no reason to believe that it will not happen.

Deputy Mayor Cooper – that's a fair statement. We have lots of evidence within the Town where planning was done well both from our planning department, the Province and other avenues with qualified engineers, with stamped documents that were never executed.

Patrick Carroll – you are entirely correct. Actually the problem is not the plan but the implementation.

Mayor Dunphy – the issue, that I personally have this particular development is based on history, we have had history in the Town, and not very far from this proposed development – Dale Drive, and that was done very recently. We had a stormwater management plan in the Town at the time and it had a very negative impact on a lot of people in the area. If anyone has gone door to door in this area they know. When we went



through the Southside Greens/Smallwood property development and that was the number one issue. The number one issue was stormwater.

Patrick Carroll – but it's the same watershed. The Dale Drive watershed is what Southside Greens is.

Mayor Dunphy – yes, but Southside Greens is not going to fix the Dale Drive issue. It is two separate...

Patrick Carroll – we understand the investment in the TCH ditch along in front of the Coast Guard...

Mayor Dunphy – the question is. The Dale Drive two apartment buildings were built there and caused a lot of negative impact on neighbouring properties.

Patrick Carroll – It's important to know what technical input you are using there, because I certainly don't have any of that information.

Mayor Dunphy – you go door to door tomorrow and you will find out. We have lots of anecdotal data, word of mouth, whatever you want to call it. There is water in people's basements after development there, so drawn your own conclusion there.

Patrick Carroll – I can't make conclusions there.

Mayor Dunphy – I certainly have, so we have concerns and we have raised it. We have raised particular concerns about this project. This is not the first that you have heard it tonight. We have had these issues before. So, obviously there are not addressed sufficiently, in my opinion, and I guess my opinion does count sometimes. We will see if it does tonight or not. Whether I get to vote or not – if I get to vote then I don't support it. I didn't support it in December and I don't support it now. That is for a stormwater management issue. It may well be fine, and it may be approved tonight, I don't know but at some point in time someone has to make a decision and we have to better information, I feel myself personally, from the Province, to insure that this project and any future development in the area does not negatively impact any neighbours be it the Town Hall or whoever it is in the area. That's my concern.

Councillor MacLean – we have had a lot of discussion on the past development and bringing it forward to this and as Councillor Ogden said, we should follow the bylaw. There are reasons people can appeal these decisions and it because if a contractor or developer follows the bylaw the way it is written a Council cannot vote against it. If you do, there are a lot of case studies saying that Council will get turned down and the reason is

not always because you don't like a certain development. Prejudice can also come into a Councillor's decision if you are not following the law. There is a regulation and you have to follow it. I do have concerns about the stormwater. But we don't have the ability or an engineer here to deny it. It goes to the Province. I said the last time I have a concern with it, I still have concern that the Town's going to have to pay for the pond, but I don't see anything here where Marshall came in with a plan that wasn't hitting everything in our Bylaws. As a Council we have to make these decisions beforehand, not should, I believe we have to. I believe it is a risk not to vote in favour.

Mayor Dunphy – are you ready for the Question?

All in favor [two said Aye]

Contravened? [two said Nay]

Tie vote I vote, I oppose, as well.

Motion Denied

- 23) The verbatim minutes thus record that the Town's Council defeated the March 9, 2016 resolution by a 3-2 vote, with the Mayor voting to break the tie.
- 24) On March 11, 2016, the Town's Director of Planning sent a letter to MacPherson advising of the Town's decision and the right to appeal (Exhibit R 2-Tab 3). This letter stated the following reasons for the decision:
- There were a number of reasons for the decision, including concerns regarding: Traffic volumes resulting from the development and nearby curve; The elevation of the development; The flow of stormwater from the development, including the effect upon neighbours; The management of stormwater within the watershed area; Consistency with the priorities identified in the commitments from residents surveyed within the Town; and related subdivision not yet approved. We do note that this is only a brief summary of the lengthy discussion by Council about your development.*
- 25) On March 17, 2016, the Commission received a Notice of Appeal from legal counsel for MacPherson pertaining to the Town's March 9, 2016 decision.
- 26) On March 22, 2016, the Commission advised counsel for both parties that hearing dates of April 26 and 27, 2016 were available.
- 27) The Commission heard both appeals at a public hearing on April 26 and 27, 2016.
- 28) Counsel for MacPherson and counsel for the Town filed their written submissions on May 4, 2016.

## 2. Testimony & Discussion

### Appellant's Position

- 29) MacPherson presented three witnesses: Marshall MacPherson, Chad MacCallum and Donald Hickox.
- 30) The record shows that MacPherson had a plan of survey for the Subject Property prepared on August 7, 2015 and that in mid-September, 2015 MacPherson commenced discussions with the Planning staff at the Town regarding the proposed development. The record also shows that there was a great deal of contact between MacPherson and the Town Planning staff during the months of October and November, 2015.
- 31) Marshall MacPherson, the owner and President of Marshall MacPherson Ltd., gave evidence that his company has built over 200 apartment / condominium type units and some 150 single family homes. He testified that he has an agreement of purchase and sale with Kel-Mac to purchase the Subject Property, conditional on receiving a development permit for the project under appeal.
- 32) Mr. MacPherson testified that he re-arranged his initial design in consultation with the Town's planning staff. On December 10, 2015, he received a letter advising him that the Town had denied his request to develop 36 units on the Subject Property. Mr. MacPherson noted that this letter, signed by the Town's Director of Planning, did not provide reasons. Mr. MacPherson testified that he appealed the Town's decision. His lawyer then entered into discussions with the Town's legal representative with a view to resolving the matter. He stated that he hired Chad MacCallum, P. Eng. to prepare a stormwater management plan to address the Town's concerns. He also stated that he worked with Kevin Reynolds, the Town's Development Officer, on a landscaping and buffering plan.
- 33) Mr. MacPherson further testified that no problems were identified by the Town's planning staff. His application for development went before the Town's Council on March 9, 2016 where it was defeated 3-2 with the Town's Mayor breaking the tie. He received a letter from the Town dated March 11, 2016 which gave a list of reasons for the denial. He stated that he does not know why his application was denied, given that the Province had no concerns about ingress and egress and given that a stamped stormwater management plan was filed.
- 34) Chad MacCallum, a civil engineer with the firm SCL Engineering (2005) Inc., presented his curriculum vitae (Exhibit A4) to the Commission. He gave evidence that he has substantial experience in municipal engineering, including the design of subdivisions, preparation of site plans and preparation of stormwater management plans. Following some initial questions on his education and professional experience, the Commission accepted Mr. MacCallum as an expert witness on stormwater management planning.

- 35) Mr. MacCallum testified that he was engaged by MacPherson to prepare a stormwater management plan. He discussed the matter with an engineer with DOTIE. He noted that a stormwater management plan is designed to specific requirements. The preliminary stormwater management plan he prepared (Exhibit R4, Tab 10) is based on collecting stormwater and taking it to the stormwater ditch along the right of way. He noted that stormwater may also be retained in a pond. He could also design a stormwater management system which would retain water and gradually discharge the water. He noted that the comments provided by the DOTIE engineer would be incorporated into the final stormwater management plan.
- 36) Donald Hickox, a sales representative for Kel-Mac Inc., gave evidence that there is an agreement of purchase and sale between Kel-Mac and MacPherson. He testified that on September 30, 2015 he met with the Town's Deputy Mayor and Councillor Clow. Mr. Hickox testified that the Deputy-Mayor informed him that the Town was interested in the Subject Property but was not prepared to pay market value. Mr. Hickox stated that he was blindsided and taken aback and had never had a town official speak to him in this manner. Mr. Hickox stated that he advised the Deputy Mayor that others had an interest in the property. He then advised that there were further discussions about other land owned by Kel-Mac that the Town might be interested in acquiring. Sometime later he had a meeting with Councillor Griffin and Mr. Carroll and the matter of the Town purchasing the Subject Property was mentioned by Councillor Griffin.
- 37) Counsel for MacPherson filed detailed written submissions which were received following the conclusion of the public hearing. Counsel also made oral submissions at the hearing; the highlights of which may be summarized as follows:
- The Responded failed to follow the Town of Stratford Zoning & Subdivision Control (Development) Bylaw #29 (the "Bylaw") as the development proposed by MacPherson for the Subject Property is an as-of-right use within the current TCMU zone.
  - As part of the February 1, 2016 application for development, MacPherson addressed three concerns raised by the Town; namely, stormwater management, traffic / access on to Shakespeare Drive and landscaping / buffering. MacPherson filed a preliminary stormwater management plan prepared by an experienced civil engineer, the Province of Prince Edward Island had no concerns with respect to traffic or access and the landscaping and buffering was revised in consultation with the Town's planning staff.
  - Section 4.18 of the Bylaw does give the Town the discretion to refuse to issue a permit if the specified criteria are met, but only if these specified criteria are met. Counsel submitted that these criteria must only be applied in the presence of objective supporting evidence. Under cross-examination, the Town's Director of Planning was unable to identify any empirical evidence to support the application of the criteria set out in section 4.18.

- MacPherson's application to develop the Subject Property conforms with the Town's Official Plan, Bylaw, and policies. The Town's Planning Committee recommended that MacPherson's application be approved.
  - There is evidence to suggest that the Town was interested in the Subject Property for its own use.
- 38) Counsel for MacPherson submitted that the Town's Council did not follow its own process and procedure as the application for development filed by MacPherson was a permitted use in the TCMU zone and there was no objective evidence to support the application of section 4.18 of the Bylaw. MacPherson's application for development must be approved as-of-right and therefore the appeal should be allowed and the Town's decision reversed.

### **The Town's Position**

- 39) The Town presented one witness; Patrick Carroll, the Town's Director of Planning.
- 40) Patrick Carroll has been the Town's Director of Planning since April 2015. He has a Master's degree in Planning. Prior to April 2015, Mr. Carroll was employed by the Province of Prince Edward Island as a land use planner for six years. Prior to that time and while he was completing his education, he had worked for the Province for one year. He gave evidence that MacPherson's proposal was first raised in August 2015. At first there was not enough detail to the proposal. The original proposal consisted of three (3) structures on lot 15-2 and four (4) structures on lot 15-1 for a total of 84 units in seven (7) structures.
- 41) Mr. Carroll stated that the Subject Property is zoned TCMU with permitted uses including single family residential, row house, town house, apartments and apartments with commercial on the first floor. The Subject Property is in the Town's core area and is located adjacent to the Town's Town Hall.
- 42) Mr. Carroll testified that the Town had previously conducted a residents' survey and received 1100 responses. Of these 1100 responses, 20 responses had complaints concerning apartment developments.
- 43) Mr. Carroll explained that the Town's planning staff reviewed MacPherson's initial concept, considering the Official Plan, Bylaw and core area guidelines. The usual process is that planning staff makes a recommendation to the Planning Committee and the Planning Committee makes a recommendation to Council. On November 9, 2015, Planning Committee recommended approval with conditions. At that point in time, the proposal was still for 84 units. Concerns were raised with respect to appearance of the front of the building, accessibility for seniors and the possibility of a better use for the land. Planning staff raised these concerns with MacPherson and MacPherson decided to revise the project to a 36 unit proposal.
- 44) Mr. Carroll noted that MacPherson filed revised renderings of the project and the matter proceeded before Committee of the Whole on November 30, 2015 with the discussion continuing to the next meeting of Committee of the Whole on December 8, 2015. The proposal was reviewed by Planning Committee on December 7, 2015.

At Committee of the Whole, discussion ensued with respect to stormwater management, buffering and landscaping, loss of additional land for the Town Centre, public use of land and lighting.

- 45) Mr. Carroll stated that Councillor Griffin and he met with Mr. Hickox on December 8, 2015. The purpose of the meeting was to get confirmation on whether or not the land was available for purchase by the Town. Mr. Carroll said that he noted the file that this issue was no longer a concern after the December 8, 2015 meeting because Councillor Griffin did get a clear answer from Kel-Mac Inc. that the land was spoken for.
- 46) Mr. Carroll testified that when the proposal was presented as a resolution to Council on December 9, 2015, the resolution was lost on a tie break vote by the Mayor. Mr. Carroll stated that based on his experience with other development files where Planning Committee had recommended approval, he had expected Council to approve the proposal and was surprised that Council voted against the resolution.
- 47) Mr. Carroll stated that following the filing of MacPherson's appeal of the December 9, 2015 decision, a discussion took place between the Town's Chief Administrative Officer Robert Hughes ("CAO"), the Town's lawyer Perlene Morrison and himself. Three primary concerns were identified, specifically: stormwater management, safety of driveway access and landscaping / buffering with respect to adjacent parcels. Ms. Morrison contacted MacPherson's legal counsel to see if there was interest in discussing a possible resolution. MacPherson agreed to work with the Town to resolve the matter.
- 48) Mr. Carroll stated that on February 1, 2016 MacPherson filled a formal application for development. MacPherson submitted a preliminary stormwater management plan which conformed with the Bylaw requirements and the plan was forwarded to an engineer with the Province's DOTIE for comment. The DOTIE engineer also confirmed in an email that the driveway access was safe. Planning staff discussed the matter of landscaping and buffering with MacPherson and a revised concept plan was provided.
- 49) Mr. Carroll stated that MacPherson's application was discussed at the February 24, 2016 meeting of the Town's Committee of the Whole. Discussion then ensued as to whether the watershed group should be consulted. It was decided that the watershed group, which is an advisory body dealing with watershed matters in general, would not be consulted as it would not be appropriate to bring that group in on this type of an application. MacPherson's application went to Planning Committee on February 29, 2016 where it was recommended for approval.
- 50) Mr. Carroll referred to the verbatim minutes of the March 9, 2016 meeting of Council (Exhibit R6). He noted that he was present at this meeting and most of the matters raised had been discussed at previous meetings. Council discussed remaining concerns about the stormwater management plan. Mr. Carroll noted that there was general discussion about watershed planning in general, stormwater problems in the Dale Drive area, which is in a different area of the Town, and a concern that previous developments where the Province gave its technical input and signed off did not go

well from a stormwater management approach. The Mayor and Deputy Mayor expressed the view that it was difficult to put a lot of trust in Provincial assessment of stormwater management based on past history. One councillor also raised a concern about traffic and safe access. The resident comments came up very briefly but that aspect wasn't elaborated on. The landscaping revisions did not come up as a remaining concern. The March 9, 2016 resolution concerning MacPherson's application was denied by another tie-break vote.

- 51) In dealing with the formal letter of March 11, 2016 to MacPherson advising that the Council had voted against its application (Exhibit R4-Tab3), Mr. Carroll stated that the reasons for the rejection of the proposal were just a listing of all concerns mentioned at the meeting and that they were put in this letter because they had been raised at the meeting.
- 52) On cross-examination Mr. Carroll was referred to the Planning Committee Minutes of November 9, 2015 (Exhibit R3), Mr. Carroll stated that the recommendations from Planning Committee setting out the five conditions for the approval of the application were standard conditions. In reference to the Planning Committee Minutes of January 11, 2016 (Exhibit R4-Tab 25) Mr. Carroll noted that the concerns raised by Deputy Mayor Cooper were not, in his professional opinion, viable or valid reasons to deny a permit under the bylaw.
- 53) Mr. Carroll was referred to the Minutes of the Planning, Development & Heritage Committee of November 9, 2015 (Exhibit R3-Tab 19). In particular Mr. Carroll was referred to comments by Deputy Mayor Cooper. The Minutes read:

“Deputy Mayor Cooper noted that he cannot support the development. He explained that the Town is trying to negotiate with Kel-Mac to purchase a piece of land beside the Town Hall. A meeting is scheduled with Kel-Mac, Councillor Griffon and Patrick, the concern is that approval of the subdivision and development [MacPherson application] may limit these negotiations.”
- 54) Mr. Carroll, upon questioning, stated that it was his professional opinion that this was not a valid reason to deny the application under the bylaw.
- 55) Mr. Carroll was also referred to an email forwarded to representatives of Kel-Mac and to MacPherson dealing with the Town's interest in purchasing additional land for the Town Centre and for expansion (Exhibit R3-Tab 14). Mr. Carroll noted that this email arose directly as a result of MacPherson's application for subdivision and a desire to have all parties discuss the matter. He further advised that this email, to his knowledge, was directed to be sent by Town Council.
- 56) Mr. Carroll was referred by legal counsel from MacPherson to the Committee of the Whole Minutes of December 8, 2015 (Exhibit R3-Tab 7), where Mr. Carroll explained the application for development by MacPherson, the rights of Council in dealing with the application under the bylaw and the fact that Planning Board recommended approval of the application as “it meets the bylaw”. Mr. Carroll was questioned about comments in the Minutes with respect to Mayor Dunphy and Deputy Mayor Cooper

and the purchase by the Town of the land that is the subject of MacPherson's application. Mr. Carroll confirmed that the Mayor and Deputy Mayor saw the Subject Property as a possible public acquisition for the Town. Mr. Carroll stated that the Councillors must put those things "out of sight" and "can't let these distractions become the attention". He stated that the decision on the application "must be based on its merit – must be based on fairness and that the considerations with respect to the purchase of the Subject Property by the Town could put the Town in a conflict of interest".

- 57) On further cross-examination, Mr. Carroll was asked to deal with the three specific issues that came up, namely: stormwater management, buffering and landscaping, and access and egress. Mr. Carroll stated that the plan prepared by SCL Engineering showed that there would be no problem in dealing with stormwater. With respect to buffering and landscaping, he noted that MacPherson had dealt with all of the issues to the Planning Department's satisfaction. With respect to access and egress, he stated that the Province had signed off on the subdivision, dealing with leveling and grading, access and egress, and provided approval for this type of development. The Planning Committee noted that the use, density and parking as proposed by MacPherson was within the bylaw requirements. On further questioning, Mr. Carroll stated that the reasons that were set out in the formal letter noting of the rejection by Council were not really reasons, but simply a list of all of the concerns that had been raised by the Councillors at that meeting. On questioning he agreed that the issue with respect to traffic that might result from the development was an issue that was already answered and it was not a problem that still needed to be resolved. Mr. Carroll stated on questioning that he agreed there was no evidence of any problem with the subdivision stormwater management plan. Mr. Carroll stated that there was no evidence that the development would create a hazard or would injure any adjoining or other property. On cross-examination Mr. Carroll stated that the application as filed by MacPherson met all of the requirements of the bylaw. He confirmed that in his professional opinion Council does not have the right to look at external factors. He stated that although Council may make a determination based on its opinion, Council's opinion and ability to turn down such an application is limited to the specific provisions as contained in the bylaw.
- 58) Under questioning from the Commission's Chair, Mr. Carroll indicated that a stormwater management plan for the entire subdivision, from which the Subject Property was created, had been approved and was accepted by Council a number of years ago, likely before the current Mayor was elected. There was also a subdivision road agreement which went with it that the Province holds and it essentially lays out who is going to pay for what in terms of the roads and it references this stormwater management plan specifically. Issues concerning a watershed in another area of the Town were causing concern among the elected officials and creating a sense of a lack of trust but this is a different area which, as Mr. Carroll understands it, "does not drain from here to there". In addition, "that other area did not have a watershed level stormwater plan, it was never done, this is actually a rather new thing". Later in his testimony under questioning from Town's Counsel, Mr. Carroll confirmed that the stormwater management plan for the subdivision dated back to February 2002.



- 59) Also in response to questioning from the Commission Chair, Mr. Carroll stated that he believed the Town's councillors understood the concept of an as-of-right application and they were aware that MacPherson's application was an as-of-right use and a permitted use. Mr. Carroll noted the comments made by Councillor MacLean and Councillor Ogden who made it clear that was how they assessed it.
- 60) Mr. Carroll stated that to the best of his knowledge there was no evidence before him or before the Town's Council that the Province was negligent or did a poor job in its work on stormwater management plans. He noted that this was considered to be a strong level of planning in that it was done well ahead of time and staff didn't find anything that indicated a reason not to see as credible either the site level storm water management plan or, even more importantly, the plan for the whole watershed. Mr. Carroll also stated that Dale Drive which is in another area of the Town and which was the subject of much discussion by the Mayor and Deputy Mayor at the Council meeting of March 9, 2016, is a different watershed from that surrounding the Subject Property.
- 61) Under cross-examination by MacPherson's Counsel, Mr. Carroll agreed that it was not a valid legal reason under the Bylaw to deny MacPherson's application because it was too close to the Town Hall.
- 62) Counsel for MacPherson referred Mr. Carroll to each of the criteria set out in section 4.18 of the Bylaw. Mr. Carroll testified that there was no objective evidence to support denial of MacPherson's application based on the criteria set out in section 4.18.
- 63) Under final questioning from the Commission Chair, Mr. Carroll agreed that the Town's Council is required to exercise its opinion within the four corners of the Bylaw. Mr. Carroll also stated that to deny an application, Council is required to exercise its discretion within the parameters set out in section 4.18 of the Bylaw.
- 64) Counsel for the Town filed detailed written submissions which were received following the conclusion of the public hearing. Counsel also made oral submissions at the hearing; the highlights of which may be summarized as follows:
- The reasons provided in the Town's March 11, 2016 decision letter are well supported by the Minutes. Council discussed the matter at length, carefully evaluated the application and expressed concern about matters which are within Council's discretion under section 4.18 of the Bylaw. Council was particularly uneasy about the stormwater management plan. Council's concerns were not adequately addressed by the information presented to Council and thus the application for development was denied.
  - Had the proposed development been for fewer than 18 units, the matter would not need to have been presented to Council. This suggests that for 18 or more units a larger impact may occur and thus the application of Council's discretion is appropriate.

- 65) Counsel for the Town submitted that the Commission should give deference to the Town's decisions, uphold the decisions and dismiss the appeals in their entirety.

### 3. Findings

- 66) 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 appeals.
- 67) It is well known and accepted that appeals under the *Planning Act* take the form of a hearing de novo before 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)). The Commission has the power to substitute its decision for that of a municipality. However, the Commission does not lightly interfere with such municipal decisions.
- 68) The Commission finds that the two-part test that it has used in the past also serves as a guideline in determining this appeal.
- Whether the municipal authority, in this case the Town, 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 an application for development; and
  - Whether the Town's decision with respect to the application for development has merit based on sound planning principles within the field of land use and urban planning and as enumerated in the Official Plan.
- 69) The Subject Property is located within the Town TCMU zone. Section 32.2 of the Bylaw sets out the permitted uses for the TCMU zone, which includes apartments (owned by a single Property Owner or as Condominiums).
- 70) The Commission finds that MacPherson's application for development is a permitted use within the zoning of the Subject Property.
- 71) The concept of an "as-of-right" development has a long history within Canadian municipal law as the following case law illustrates.
- 72) In *Mackenzie v. Toronto* (1915) 7 O.W.N. 820 at page 821, Middleton J. stated:

*"When the plans and specifications of the proposed building conform to the building by-law, the duty of the civic official is to issue the permit."*

- 73) In *Dominion Stores Ltd. v. Borough of Etobicoke et al.* 1982 Carswell Ont 665, 135 D.L.R. (3d) 301, Galligan J noted at paragraph 2:

*[2] The applicant wishes to build and operate a large supermarket on the site. The proposed use is in all respects in compliance with the zoning by-laws of the municipality. The applicant applied for a*

*building permit and it is admitted that it has complied in all respects with the requirements therefore. Accordingly it is prima facie entitled to a building permit: Ottawa v. Boyd Bldrs. Ltd., [1965] S.C.R. 408, 50 D.L.R. (2d) 704.*

- 74) Based on the record and testimony provided, the Commission finds that MacPherson's application for development must be considered on an as-of-right basis. The bylaw under which MacPherson applied is one where MacPherson was entitled to receive a development permit unless there was objective evidence to allow Council to come to a reasonable conclusion that there would be a contravention of the provisions of bylaw 4.18. That bylaw reads as follows:

#### 4.18 Authority to Deny Permits

(1) No Development Permit shall be issued if, in the opinion of Council, the proposed Development could create a hazard to the general public or any Resident of the Municipality or could injure or damage neighbouring Property or other Property in the Municipality, such injury or damage to include but not be limited to water, drainage or other water run-off damage.

(2) No Development Permit shall be issued if, in the opinion of Council, the proposed Development could create a health, fire or accident hazard or increase the likelihood of the existence of rodents, vermin, or other pests.

(3) No Development Permit shall be issued if, in the opinion of Council:

(i) the proposed Development does not conform to this Bylaw or the Building Bylaw;

(ii) the method of water supply is not suitable;

(iii) the method of sanitary waste disposal is not appropriate;

(iv) there is not a safe and efficient access to a public Highway, Road or Street;

(v) the impact of the proposed Development would be detrimental to the environment;

(vi) the proposed Development would create unsafe traffic conditions;

(vii) the proposed Development would significantly or permanently injure neighbouring properties by reason of Architectural Disharmony; or,

(viii) the proposed Development would be detrimental to the convenience, health, or safety of residents in the vicinity or the general public.

- 75) In Re East Royalty; Affleck v. East Royalty, Village Commissioners of [1983] P.E.I.J. No. 62, Justice MacDonald of the Supreme Court of Prince Edward Island (Appeals Division) noted:

*[5] The case law in this area has been stated many times and it is that any by-law, regulation or statute that is restrictive on the common law rights of a person or the liberty with which he may exercise those rights are to be strictly construed.*

- 76) In Order LA11-01, Biovectra Inc. v. City of Charlottetown, the Commission stated at paragraph 61:

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

- 77) The first three subsections of bylaw 4.18 attempt to create a discretion on the part of the Town's Council through the use of the phrase, "in the opinion of Council". However, this discretion must be strictly construed in order to be consistent with the law.
- 78) The Commission finds that objective evidence supporting bylaw 4.18 criteria must be present before those Bylaw criteria may be invoked to deny an as-of-right application. A municipal council must meet the duty of fairness in applying its bylaws. It is not open for municipal council to exercise arbitrary discretion.
- 79) The Commission finds that the Town's Planning, Development and Heritage Department handled both the 2015 concept filed by MacPherson and MacPherson's 2016 formal application for development in a thorough and professional manner. The various minutes of the Town's Planning Committee, Committee of the Whole and Council reveal that some councillors had a solid grasp of planning law and the concept of an as-of-right development, while the Mayor, Deputy Mayor and some other councillors did not. The January 11, 2016 meeting of the Planning Committee [Exhibit R4, Tab 25] where the aftermath of the Town's December 9, 2015 decision was discussed and the January 27, 2016 minutes of the Town's Committee of the Whole [Exhibit R4, Tab 23] reveal the advice of the Town's Chief Administrative Officer and Town Solicitor with respect to the first appeal. Comments at that meeting by the Deputy Mayor and some councillors show that they did not understand the development permit application process and the fact that this application was under a section of the bylaw where development must be considered on an as-of-right basis.
- 80) Negotiations then ensued between the Town and MacPherson through their respective legal counsel. Three areas of concern were identified and efforts were made by MacPherson and the Town's staff to address these concerns through (i) a preliminary water management plan filed by an experienced civil engineer and

reviewed by a Provincial government engineer, (ii) a revised concept plan to address landscaping and buffering concerns, and (iii) confirmation from the same Provincial government engineer that there was “no issue” with roadway access for the proposed development.

- 81) The Commission notes that the town planner, Mr. Carroll, testified that in his opinion there was no evidence to support the denial of the development application pursuant to the only criteria that would allow such denial as set out in section 4.18.
- 82) The Commission is in agreement with the town planner, has reviewed all of the provisions of Council’s authority to deny an application for development as set out in Sec. 4.18 and the Commission finds that there was no evidence that the development permit, if issued:
  1. Could create a hazard to the general public or any resident of the municipality or could injure or damage neighbouring properties or other property of the municipality, such injury or damage to include but not limited to water, drainage or water run-off damage. All evidence before the Town Council and before this Commission showed that there was absolutely no evidence that this type of damage could occur. To the contrary, the stormwater management plan as prepared by SCL Engineering showed an acceptable stormwater and drainage management plan and should have been accepted by Council as such. It was unreasonable and unacceptable for the Mayor and Deputy Mayor to refer to other water drainage problems in other areas of the Town that, according to the town planner, were in a totally different watershed drainage area, as the reason to justify their voting against this as-of-right development.
  2. Could create health, fire accident hazard or increase the likelihood of existence of rodents, vermin or other pests. There was no evidence placed before the Town or this Commission which would indicate that Council could deny the permit on this basis.
  3. The proposed development does not conform to the bylaw or building bylaw. All evidence before the Town and before this Commission is that the development did conform to the bylaw and the building bylaw.
  4. The method of water supply is not suitable. There was no evidence that there was any problem with the water supply.
  5. The method of sanitary waste disposal was not appropriate. There was no evidence that the method of sanitary waste disposal was not appropriate.
  6. There is not safe and efficient access to a public highway, road or street. The Province had reviewed the access and had advised that there was no problem with the access and egress to a public highway, road or street.
  7. The impact of the proposed development would be detrimental to the environment. There was no evidence before the Town or the Commission

that the development on the Subject Property would be detrimental to the environment.

8. The proposed development would create unsafe traffic conditions. There was no evidence that this development would create unsafe traffic conditions and, in fact, the province in its response to traffic concerns advised that there were no such concerns.
  9. The proposed development would significantly and permanently injure neighbouring properties by reason of architectural disharmony. There was no evidence of this before the Town or the Commission.
  10. The proposed development would be detrimental to the convenience, health or safety of residents in the vicinity or the general public. There was no such evidence before the Town or the Commission with respect to these concerns.
- 83) With respect to the Town's decision of December 9, 2015, the Commission finds that Council denied MacPherson's concept plan for a multi-unit apartment condominium development on the Subject Property which is zoned TCMU, an as-of-right proposal, based on fears and concerns without any objective evidence to provide support to such concerns. Council's decision to deny an as-of-right development was not justified and was not in accordance with the requirements of section 4.18 of the Bylaw because there was no objective evidence to support the imposition of said section. Council's decision was not rational and was unreasonable.
- 84) For the above reasons, the Commission quashes the Town's December 9, 2015 decision pertaining to MacPherson's proposal for the Subject Property.
- 85) With respect to the Town's decision of March 9, 2016, the Commission also adopts the reasoning set out in the preceding paragraphs.
- 86) The Commission is particularly concerned about Council's March 9, 2016 decision to deny the as-of-right development given the following factors:
- The Town received professional advice from its legal counsel, CAO and its Director of Planning in January 2016. This advice was consistent with negotiating a resolution rather than allowing the matter to proceed to the appeal. The Town then agreed to pursue a negotiated solution;
  - The Town then narrowed its areas of concern to three areas, namely stormwater management, buffering/landscaping and the safety of entry-way access;
  - During the month of February 2016, MacPherson provided a preliminary stormwater management plan, which was reviewed by a provincial engineer, a revised concept plan addressing landscaping and buffering, and the Town's planning staff obtained an opinion from a Provincial engineer that "... there is no issue with the two lots to have driveway accesses on Shakespeare Dr."

- The Town's Planning Committee then recommended on February 29, 2016 that Council approve MacPherson's formal application for a development permit.
- 87) In the days prior to the Town's March 9, 2016 decision, not only was there still no objective evidence to support the fears of some members of Council, there was also objective evidence which ought to have eased such concerns. Had the advice of the professionals and some members of Council, who clearly understood their obligation with respect to this application, been heeded, the parties would have been able to resolve the matter without the need for further appellate oversight. If Council had accepted this sage advice emanating from several trusted sources, the substantial cost and delay associated with a second appeal and the ensuing public hearing would have been avoided for both parties. Thus, it was not a matter of hindsight; rather the outcome of the matter was foreseeable and the consequences could have been easily avoided.
- 88) The Commission is particularly concerned with the actions of the Mayor and Deputy Mayor in this matter. Their conduct throughout this application for development filed by MacPherson was inappropriate. They proceeded along a course of tilting at windmills and did not deal with this application based on the evidence before them and based on an application of the Town's own bylaws governing such developments. It was inappropriate for a Mayor or Deputy Mayor, or a Councillor for that matter, to raise the spectre of water drainage problems experienced in another area of the Town in a way to suggest that those drainage problems would also be experienced with the application for development before them when there was no evidence whatsoever to support such a conclusion. The comments by the Mayor and Deputy Mayor were nothing short of obfuscation, inappropriate and evidence of their lack of understanding of planning law and of the obligations of a Town Council in dealing with planning and development matters. As a result, although the Town's administration and planning department dealt with the developer in a good and professional manner, the developer was treated most inappropriately by Town Council.
- 89) The Commission hereby reverses Council's March 9, 2016 decision pertaining to MacPherson's application for a development permit. The Commission orders that the concept plan submitted by MacPherson to develop 36 residential apartment style condominium units on the Subject Property is hereby approved subject to the five conditions as set out in Town Resolution Number PH004-16. Any development agreement to be imposed by the Town must set out reasonable terms and conditions including, but not limited to, any deposits, fees, costs or other expenses to be paid by the developer to the Town.

## 4. Disposition

- 90) An Order quashing the Town's December 9, 2015 decision, reversing the Town's March 9, 2016 decision and approving the concept plan submitted by MacPherson to develop 36 residential apartment style condominium units on the Subject Property subject to the five conditions as set out in Town Resolution Number PH004-16.



**IN THE MATTER** of an appeal by Marshall MacPherson Ltd., of decisions of the Town of Stratford, dated December 9, 2015 and March 9, 2016.

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# Order

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**WHEREAS** the Appellant, Marshall MacPherson Ltd. appealed two decisions of the Town of Stratford, dated December 9, 2015 and March 9, 2016;

**AND WHEREAS** the Commission has heard the appeal at public hearings conducted in Charlottetown on April 26 and 27, 2016 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 Appeals are allowed
2. The December 9, 2015 decision of the Council of the Town of Stratford pertaining to this matter is hereby quashed.
3. The March 9, 2016 decision of the Council of the Town of Stratford pertaining to this matter is hereby reversed. The concept plan submitted by MacPherson to develop 36 residential apartment style condominium units on the Subject Property subject to the five conditions as set out in Town Resolution Number PH004-16 is hereby approved.
4. The requirements contained in any development agreement to be imposed by the Town must be upon

reasonable terms and conditions including, but not limited to, any deposits, fees, costs or other expenses to be paid by the developer to the Town

.

**DATED** at Charlottetown, Prince Edward Island, this 28<sup>th</sup> day of October, 2016.

**BY THE COMMISSION:**

\_\_\_\_\_  
J. Scott MacKenzie, Q.C., Chair

\_\_\_\_\_  
John Broderick, Commissioner

\_\_\_\_\_  
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.*

**NOTE:** In accordance with IRAC's *Records Retention and Disposition Schedule*, the material contained in the official file regarding this matter will be retained by the Commission for a period of 2 years.