



January 22, 2026

**VIA EMAIL ([mwalshdoucette@irac.pe.ca](mailto:mwalshdoucette@irac.pe.ca))**

The Island Regulatory & Appeals Commission  
Attention: Michelle Walsh-Doucette, Commission Clerk  
National Bank Tower, Suite 501  
134 Kent Street  
Charlottetown, PEI  
C1A 7L1

Dear Ms. Walsh-Doucette,

**Re: Appeal #LA25024 – Nicholas Haddad v. City of Charlottetown**

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We write in response to your correspondence dated January 8, 2026, requesting the Appellant, Nicholas Haddad, (the “Appellant”) file written submissions in order to respond to the City of Charlottetown’s (the “City”) Record, reply to the submission of the Respondent, and to particularize and clarify the grounds of appeal set out in the Notice of Appeal. Please accept this correspondence as the Appellant’s initial written submissions in response to the City’s Record.

### **Introduction**

The Appellant has appealed a resolution of the City of Charlottetown Municipal Council (“Council”)<sup>1</sup> dated November 12, 2025, whereby Council denied the Appellant’s application for a major variance to allow for the establishment of a 20 foot by 20 foot (400 square feet) addition to an existing accessory structure (garage) located within the rear yard of the subject property in the (R-1L) Zone as the total combined size of all existing accessory buildings and structures on the property already exceeds the maximum total combined size of 850 square feet as per Section 4.1.2.b of the Zoning & Development Bylaw based on existing lot size for the property (the “Variance Application”).

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<sup>1</sup> By way of delegated authority pursuant to section 20(2) of the *Planning Act*, RSPEI 1988, c P-8.

### **Response to City Record**

The Record filed by the City contains 24 Tabs and consecutively numbered pages. The Appellant has endeavored to summarize and provide preliminary comments regarding certain documents contained in the City's Record.

#### **Tab 1 – Building & Development Permit Application with Receipt**

By way of background, the Appellant submitted a Building & Development Permit Application and required fee on March 27, 2025 (the "Building Permit Application"). The Appellant submitted the Building Permit Application for a 20 foot by 20 foot (400 square feet) addition to an existing accessory structure (garage) located within the rear yard of his property located at 566 Malpeque Road and identified as PID 145805.

At the time the Appellant submitted the Building Permit Application, he was not aware that the proposed garage addition would require a major variance pursuant to section 4.1.2.b of the Zoning & Development Bylaw in order to proceed. The Building Permit Application was denied on April 23, 2025, and staff with the City informed the Appellant that he would be required to make an application for a major variance if he wished to proceed with the proposed garage addition.

The Appellant submitted the Variance Application on September 25, 2025.

#### **Tab 6 – Planning & Heritage: Planning Board Minutes**

The Planning & Heritage Planning Board Minutes dated October 9, 2025, and included at Tab 6 of the Record do not refer to the Appellant's Variance Application.

#### **Tab 10 – City of Charlottetown Committee Report by Sonia Kamal**

Tab 10 of the City's Record contains the Committee Report of the Planning & Heritage Department dated November 4, 2025, regarding the Appellant's Variance Application.

According to the Committee Report, Planning & Heritage Department staff encouraged Planning Board to recommend to Council to approve the Appellant's Variance Application. The Committee Report makes clear that the intent of the Variance Application was to establish a 20 foot by 20 foot addition to an *existing* accessory garage structure. While there is reference to a "garden suite" in the Committee Report, the Appellant's Variance Application does not include a request for a garden suite.

Planning & Heritage Department staff concluded that there are minimal risks and implications as a result of the proposed development and that the lot coverage of all combined structures would be less than 50% leaving adequate green space on the parcel. Planning & Heritage Department staff concluded that the overall height of the structure will not impede privacy or increase shadowing on the adjacent properties and that there is minimum impact on the surrounding land use due to the proposed addition.

The Committee Report notes one letter of support and one letter of opposition were received regarding the Variance Application. With respect to the letter of opposition received, the Appellant notes that the letter of opposition contains unsubstantiated and untrue claims that he is carrying on an illegal towing business on the property and burning garbage on the property. The Appellant disputes the unsubstantiated claims raised by a neighboring property owner and states that he is not running a business on the property or burning garbage on the property. The Appellant states that the allegations contained in the letter of opposition are not relevant to determination of the Variance Application.

Tab 13 – Planning & Heritage: Planning Board Minutes – Verbatim Excerpt

Tab 13 of the City's Record contains verbatim minutes from the Planning & Heritage Board Meeting on November 4, 2025.

We note that the Appellant was present for the Planning & Heritage Board Meeting and addressed the unsubstantiated allegations raised by a neighbour. The Appellant notes that at Page 61 of the City's Record, Deputy Mayor Jankov rightly identified that the allegations of garbage burning are not relevant to the consideration and determination of the Appellant's Variance Application.

Following the presentation of the Variance Application at the Planning & Heritage Board Meeting on November 4, 2025, the Planning Board unanimously moved to recommend that council approve the Appellant's Variance Application.

Tab 14 – Regular Monthly Meeting of Council – Verbatim

Tab 14 of the City's Record contains verbatim minutes from the City's Regular Monthly Council Meeting held on November 12, 2025.

At Tab 14 Pages 64 and 65 of the City's Record, Councillor MacKinnon's comments demonstrate a fundamental misunderstanding of the Variance Application, a potential bias against the Appellant, and evidence that Council's decision to deny the Variance Application did not have merit based on sound planning principles.

At Tab 14 Page 64 of the City's Record, Councillor MacKinnon stated as follows:

Thank you, Your Worship. I don't support this resolution. I had some phone calls from residents nearby of this property. Some of the points that were addressed was, in the resolution itself 4.1.2 subsection (b) you can't have two accessory buildings maximum of 850 square feet. He has that now already so we are asking to go 406 more square feet making it larger ***which would be against our own bylaw***. This property in the past was in non-compliance of our bylaws. He was running a commercial tow truck company out of his backyard, disrupting neighbours. He does own a property elsewhere but there is still, they are claiming there are still two to three two trucks there and with accessory building that he is building, it's not as a suite as per the package states. I did speak to the applicant today and it's going to be used for storage, tractors and stuff ***so there will be work being done there probably on the tow trucks itself. It is a residential property and yes, you can bring a tow truck home but two or three I think is a little bit above***. They are concerned with the larger garage will result in more trucks, maintenance, higher noise and again the package states it is for a garden suite and residents nearby would be ok If it was for that but it's not. ***It is probably to accommodate the towing company so as per our Zoning & Development Bylaw, I either ask that the applicant come back for a rezoning application or site-specific exemption sought out and not for this particular resolution. Thank you.*** (emphasis added)

With respect to Councillor MacKinnon's comments that making the garage larger would be against the City's bylaw, the Appellant filed the Variance Application pursuant to section 3.9 of the City's Zoning and Development Bylaw. Councillor MacKinnon's comments demonstrate a fundamental misunderstanding of the purpose of the Variance Application and the purpose and application of section 3.9 of the City's Zoning and Development Bylaw.

Councillor MacKinnon's apparent misunderstanding of the Variance Application and the purpose and application of section 3.9 of the City's Zoning and Development Bylaw is further demonstrated by his request that the Appellant file a rezoning application or site-specific exemption. At Tab 14 Page 65 of the City's Record, Councillor MacKinnon stated as follows:

The applicant is asking for another 20 x 20 400 extra square feet so it put him over 1200 square feet above and beyond what the Zoning and Development Bylaw currently allows so that's why I think we should have the applicant withdraw this one and come back and ask for either a site specific exemption or rezoning altogether because it appears he is looking to be conducting commercial business in a residential area so that's what the neighbours believe . . .

The Appellant filed the Variance Application pursuant to the requirements of the City's Zoning & Development Bylaw. The property is zoned R1-L. The Appellant is not seeking to rezone the property. There is no business being conducted at the property and the Appellant is not seeking to run a business from the property. The Appellant's Variance Application relates solely to a proposed addition to an existing accessory structure (garage) on the property.

Councillor MacKinnon's comments at the Regular Monthly Council Meeting on November 12, 2025, also demonstrate potential bias against the Appellant. As shown at Tab 14 Page 64 of the City's Record, Councillor MacKinnon made unsubstantiated allegations that the Appellant is running a commercial tow truck company from the property. Councillor MacKinnon then engaged in speculation that the Variance Application is to accommodate the towing company. At Tab 14 Page 65 of the City's Record, Councillor MacKinnon stated:

. . . it appears he is looking to be conducting commercial business in a residential area so that's what the neighbours believe. That's what they have seen in the past. Historically, he was running a non-compliance. He does have another property off-site but when they see two and three tow truck with one person; he can't drive two or three tow trucks at the same time.

Councillor MacKinnon's statements are patently false. There is no business being conducted at the property. While no business is being run out of the property, this is not a relevant consideration

for the determination of a Variance Application pursuant to the City's Zoning & Development Bylaw.

As noted in the Committee Report at Tab 10 of the City's Record, Planning & Heritage staff concluded that there are minimal risks and implications as a result of the proposed development and recommended for Planning Board to recommend the approval of the Variance Application to Council. Councillor MacKinnon's comments demonstrate that Council's decision to deny the Variance Application was not based on sound planning principles and was instead based on non-planning related factors which are untrue, unsubstantiated, and irrelevant to the determination of the Variance Application.

#### Tab 16 – Information from Applicant/Owner

At Tab 16 Page 72 of the City's Record there is an email from Councillor Trevor MacKinnon to the Appellant. In the email, Councillor MacKinnon states:

I hope that you reconsider your options for your property and ask for a variance or rezoning.

The email at Tab 16 Page 72 of the City's Record further demonstrates Councillor MacKinnon's apparent misunderstanding of the Variance Application and the purpose and application of section 3.9 of the City's Zoning and Development Bylaw, and the fact that Council's decision was not based on sound planning principles and was instead based on non-planning related factors (such as irrelevant concerns from neighbours).

#### Tab 22 – Various Emails of David Gundrum

The email from David Gundrum to the Appellant dated September 19, 2025 and contained at Tab 22 Page 107 of the City's Record further demonstrates Councillor MacKinnon's apparent misunderstanding of the Variance Application, the purpose and application of section 3.9 of the City's Zoning and Development Bylaw, and the fact that Council's decision was not based on sound planning principles and was instead based on non-planning related factors (such as irrelevant concerns from neighbours).

The email from David Gundrum to the Appellant contained at Tab 22 Page 107 confirms that the Variance Application was required for the Appellant to proceed with the proposed addition to an existing garage on the property. The proper procedure to be following for the proposed addition is the Variance Application, not a rezoning or site specific exemption as stated by Councillor MacKinnon during the Regular Monthly Council Meeting held on November 12, 2025.

### **Grounds of Appeal**

In his Notice of Appeal filed with the Commission on December 2, 2025, the Appellant identified the following grounds of appeal:

1. The City failed to follow the recommendations of the City's Planning Department and the City's Planning Board to approve the major variance. The City's Planning Board voted 8 to 0 in favour of approving the major variance;
2. The City failed to consider and apply sound planning principles;
3. The City failed to provide adequate reasons for its decision, contrary to the principles of natural justice and procedural fairness;
4. The City made its decision arbitrarily and not based on factual evidence; and
5. Such further and other grounds as may be determined upon receipt of the complete record by the City.

Upon receipt of the City's Record, the Appellant has not identified any further grounds of appeal than those set out in the Notice of Appeal filed with the Commission on December 2, 2025.

In *Hanmac Inc. v City of Charlottetown, LA15-06*, the Commission made reference to the two-part test to be considered in determining an appeal. This two-part test is summarized as follows:

- (1) Whether the municipality 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; and

- (2) Whether the municipality's decision has merit based on sound planning principles within the field of land use and urban planning and as enumerated in its Official Plan.<sup>2</sup>

The Appellant does not take issue with the process and procedure of the City's planner or the City's Planning Board followed in relation to the Variance Application. However, the Appellant submits that Council did not meet its duty of procedural fairness by failing to decide the Variance Application on its merits and did not follow sound planning principles in denying the Variance Application, as demonstrated by the verbatim minutes of the Regular Monthly Council Meeting held on November 12, 2025 and contained at Tab 14 of the City's Record.

In *Pine Cone Developments Inc. v City of Charlottetown*, LA17-08, the Commission has emphasized the need for municipalities to focus on objective decision-making and noted: "Reliance has been placed on the assessments, opinions, and reports of trained professionals as opposed to the hue and cry of neighbours or politicians".<sup>3</sup>

In *Jessie Frost-Wicks et. al. v. City of Charlottetown*, LA20-04, the Commission stressed the requirement of focusing on sound planning and, in particular, has commented on the requirement to consider sound planning principles when a municipality is deviating from the recommendation of its Planning Board. The Commission stated as follows:

*In rejecting a recommendation, Council must demonstrate sound planning reasons for doing so and its decision-making process should clearly demonstrate what factors were considered that support the final decision. That final decision must be rooted in planning principles...*<sup>4</sup>

The Appellant submits that the City's Record demonstrates that the complaints and concerns raised from a neighbour, including unsubstantiated allegations that the Appellant runs an illegal business from the property were relied on by Council to deny the Variance Application. It is the Appellant's position that these complaints and concerns are not relevant to the determination of the Variance Application. Additionally, there was no objective evidence provided to support any

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<sup>2</sup> *Hanmac Inc. v City of Charlottetown*, LA15-06, at para 32.

<sup>3</sup> *Pine Cone Developments Inc. v City of Charlottetown*, LA17-08, at para 47.

<sup>4</sup> *Jessie Frost-Wicks et. al. v City of Charlottetown*, LA20-04, at para 35.



of the concerns raised by the neighbour. Despite this, Councillor MacKinnon repeated and relied upon irrelevant, unsubstantiated, and untrue allegations as a reason to deny the Variance Application and to ignore the recommendations of Planning & Heritage staff.

The Appellant submits that the verbatim minutes of the Regular Monthly Council Meeting held on November 12, 2025, and contained at Tab 14 of the City's Record demonstrates that those councillors that voted to deny the Variance Application did not consider and apply sound planning principles and made its decision arbitrarily and not based on factual evidence by instead focusing on irrelevant, unsubstantiated, and untrue allegations and the cry of residents opposed to the Variance Application.

It is the Appellant's position that Council failed to carefully and properly evaluate the relevant legal considerations for the Variance Application and also failed provide substantive reasoning for the denial. It is the Appellant's position that Council's decision to deny the Rezoning Application did not have merit based on sound planning principles.

For the foregoing reasons, the Appellant submits that Council did not satisfy its obligation of procedural fairness and failed to satisfy its obligation with respect to planning decisions.

The Appellant retains the right to provide a further response to the City should further documentation or response to the Notice of Appeal be forthcoming.

Yours very truly,

CARR, STEVENSON & MacKAY



Maggie J. Grimmer

Encl. *Hanmac Inc. v City of Charlottetown, LA15-06*  
*Pine Cone Developments Inc. v City of Charlottetown, LA17-08*  
*Jessie Frost-Wicks et. al. v. City of Charlottetown, LA20-04*



Docket LA14005  
Order LA15-06

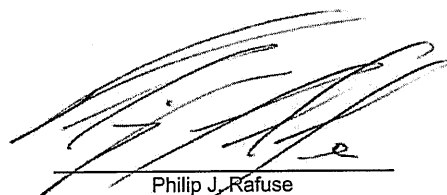
**IN THE MATTER** of an appeal by Hanmac Inc.  
of a decision of the City of Charlottetown, dated July  
14, 2014.

**BEFORE THE COMMISSION**  
on Friday, the 18th day of December, 2015.

J. Scott MacKenzie, Q.C., Chair  
Douglas Clow, Vice-Chair  
John Broderick, Commissioner

# Order

Compared and Certified a True Copy



Philip J. Rafuse  
Appeals Administrator  
Corporate Services and Appeals Division

**IN THE MATTER** of an appeal by Hanmac Inc.  
of a decision of the City of Charlottetown, dated July  
14, 2014.

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**IN THE MATTER** of an appeal by Hanmac Inc.  
of a decision of the City of Charlottetown, dated July  
14, 2014.

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# Appearances & Witnesses

**1. For the Appellant Hanmac Inc.**

**Counsel:**

**William F. Dow, Q.C.  
Jason Morais**

**Witnesses:**

**Cecil MacLaughlin  
Jeff Ready**

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

**Counsel:**

**David W. Hooley, Q.C.**

**Witnesses:**

**Laurel Palmer-Thompson, Planning and Development Officer  
Alex Forbes, Manager of Planning and Heritage**

**IN THE MATTER** of an appeal by Hanmac Inc.  
of a decision of the City of Charlottetown, dated July  
14, 2014.

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# Reasons for Order

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## 1. Introduction

[1] The Appellant Hanmac Inc. ("Hanmac") 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**"). This appeal concerns a July 14, 2014 decision of the Respondent City of Charlottetown (the "City") to reject a joint rezoning application filed on March 12, 2014 by Hanmac as developer and the Belvedere Golf Club ("Belvedere") as property owner to rezone the property located at 1 Greensview Drive, property number 279091, in the City of Charlottetown, being a parcel of land approximately 500' x 170' located in the northwest corner of lands comprising the Belvedere Golf Course (the "Subject Property") from Open Space Zone (OS) to Medium Density Residential Zone (R-3).

[2] The application was processed by the City's Planning and Heritage Department in a good and business like manner and on April 7, 2014, the City's Planning and Heritage Committee – Planning Board ("Planning Board") recommended to the City's Council ("Council") that the application to rezone the Subject Property proceed to the public consultation phase. Planning Board noted that the rezoning amendment would also require an amendment to the City's Official Plan Future Land Use Map from Recreational to Medium Density Residential. Planning Board also noted that the proposed development involves an 18-unit residential development consisting of three (3) buildings containing six (6) units each.

[3] On April 14, 2014, Council approved the request to proceed to the public consultation phase to consider the proposed amendments to the Official Plan's Future Land Use Map and the City of Charlottetown Zoning and Development Bylaw (Bylaw) Appendix "H" Zoning Map.

[4] Following due public notice and specific notice with information packages sent to residents within a 100-metre radius of the Subject Property, the City held a public meeting on April 30, 2014. Minutes of this public meeting are provided at Tab 17 of the Record filed by the City as Exhibit R1. The public meeting lasted approximately one hour and was attended by only six neighbouring residents of the Subject Property and one member of the public who did not live in the immediate area. The meeting proceeded with a description of the project by John Mantha, provincial land surveyor, as spokesman for Hanmac. The comments from the public were the usual comments that would be expected from neighbours of a proposed new development. There were questions asking for clarification as to how the development would proceed, whether the units were to be rented or sold, concerns that the project was originally proposed to be developed in stages, concerns that there would be dust during the building stage, questions around the value of the units to be built, whether or not the construction would interfere with water main and other infrastructure on the property and water run-off and drainage. All questions that the members of the public put to the meeting were answered by Mr. Mantha on behalf of Hanmac, Councillor Rob Lantz or by Laurel Palmer-Thompson, City planner. Two members of the public raised concerns with respect to traffic. However, their concerns related more to the fact that Kensington Road had become a thoroughfare and was being used by tractor trailers. Councillor Rob Lantz directed the city staff "to contact Police to review and to inquire if there are any existing traffic studies or reports for the area, and asked that the developers look into a possible road access from the site on to Walker Drive". The member of the public who does not live in the area of the subject property objected on the grounds that in his opinion this was spot zoning and that spot zoning was something that should not be done by the City. Spokespersons for the Belvedere Golf Club also spoke at the meeting and addressed questions with respect to the golf club's practices and concerns raised at the meeting about the amount of water being used by the golf course. According to the Minutes no member of the public or anyone else in attendance at that public meeting brought up or even mentioned any concern with respect to whether or not it was appropriate to rezone a portion of an outdoor urban recreational space to a zone that would permit medium density residential use. As will be discussed later, the verbatim transcript of the public meeting showed that one person in attendance did mention that the area was a green zone and was under the impression that it could not be developed.

[5] The City's Planning and Development Officer processed the application to rezone the Subject Property and prepared a report to the City's Planning Board delivered to its meeting on May 5, 2014. This report noted in part:

*This form of development is prevalent in many other larger urban centres and tends to attract, executive professionals and middle aged to retirement aged persons who are looking to downsize from larger single detached dwellings. Housing alternatives may be beneficial for the area as it provides more choice for people who want to locate to the area or for people who are looking to downsize as they age but want to remain within their neighbourhood. The Official Plan states, "If Charlottetown is going to continue to grow as a healthy community, affordable housing for all segments of society must generally be available throughout the City."*

*The City is currently reviewing its existing Official Plan and through this review policies for alternate forms of housing are being explored. Denser development with narrower frontages is more sustainable as it makes for more efficient use of municipal services and uses less land resources. Kensington Road is also a bus route and it is good planning practice to locate this form of development in areas where residents can take advantage of public transit.*

*Staff feels that this request is consistent with good planning principles and are recommending for approval of this application.*

[6] On May 5, 2014, Planning Board met to review the application to rezone the Subject Property. Planning Board approved a recommendation to Council that Council approve the proposed amendments to the Future Land Use Map and to the Zoning Map. The minutes of Planning Board's deliberations with respect to the Subject Property are reproduced below. As the Minutes note, the City staff consulted with the City Police who reviewed the application and indicated there were limited concerns with respect to traffic and site distances were good for the location of this development. In addressing some of the concerns of the public, Planning Board concluded that rather than proceeding in stages the development should proceed as one phase and that these types of developments on city golf courses were not uncommon in other jurisdictions. It is at this stage that the issue of "public space" was raised, but was obviously not a significant concern as Planning Board unanimously recommended to Council that the application be approved.

**PLANNING AND HERITAGE COMMITTEE – PLANNING BOARD  
MAY 5, 2014  
4:30 P.M.**

**Present:**

Councillor Rob Lantz, Chair  
Councillor Melissa Hilton  
David Archer, RM  
Ritchie Simpson, RM  
Greg Rivard, RM  
Lynn MacLaren, RM  
Pat Langhorne, RM  
Laurel Palmer Thompson, PDO  
Greg Morrison, PDO

**Regrets:**

Mel Cheverie, CBI

Councillor Jason Coady  
Lou Barry, RM  
Lea Macdonald, RM  
Roger Doiron, RM  
Joan MacKinnon, RM  
Pat Thompson, RM  
Donna Waddell, DCS  
Alex Forbes, PHM  
Brad Wonnacott, AA

Linda Thorne, AA

EXCERPT  
FROM  
MINUTES

**1. 1 Greensview Drive (PID# 279091)**

This item is a request to rezone a portion of the Belvedere Golf Course from Open Space to R-3 to permit the development of 3 townhouses comprised of six dwellings each for a total of 18 units. An Official Plan Map amendment from Open Space to Medium Density Residential is also required. Please see attached staff summary. On April 7, Planning Board requested that this application be sent to a public meeting. The meeting was held on Tuesday, April 30, 2014 (Minutes are attached).

Staff reviewed the proposal and covered key areas of concerns brought up at the Public Meeting. Staff pointed out that they do not regard this application as a "Spot Zoning". City Police have reviewed the application and have limited concerns regarding traffic as site distances are good at this location. To minimise construction impacts on the neighbourhood Staff indicated that this development should proceed in one phase and instead of three and that a development agreement could be required outlining the terms and conditions of the development process. Staff also indicated that they researched what is happening in other municipalities relating to this type of development. Research confirmed that it is not uncommon in other jurisdictions and that such development helps to offset costs for city golf courses. The Board had questions regarding the existing lane. Furthermore, they were concerned that the public views this as "Public Space" even though it is privately owned.

The developers (Cecil MacLauchlan and Thane Hansen) were on hand to speak about the proposal and answer questions. Councillor Lantz explained the process and how it would proceed on to Council. The applicants answered questions from the Board and explained that this development would be served on a public road instead of a private lane. The development would consist of 18 condominium units with approximately 1400 sq. ft.

**Moved and seconded that the request to consider an amendment to Appendix "A" – Future Land Use Map of the Official Plan from Recreational to Medium Density Residential and an amendment to Appendix "H" – Zoning Map of the City of Charlottetown Zoning and Development Bylaw from Open Space (OS) Zone to Medium Density Residential (R-3) Zone in order to rezone a portion of the property at 1 Greensview Drive (PID# 279091) be recommended to Council for approval.**

**CARRIED**

[7] The recommendation of Planning Board was sent to Council and was dealt with at its meeting on June 9, 2014. Council approved a one-month deferment of consideration of the motion with respect to the Subject Property. The minutes note that the delay was requested by the applicant to address ongoing concerns from local residents.

[8] Hanmac dealt further with the residents of the area but no further objections beyond those that had already been raised were brought forward. The matter was then forwarded to Council for decision.

[9] At a regular meeting of Council on July 14, 2014, Council rejected Hanmac's rezoning application with respect to the Subject Property. The verbatim transcript of Council's deliberations is reproduced below.





Verbatim Excerpt re:  
1 Greensview Drive

Regular Meeting of Council  
Monday, July 14, 2014 at 4:30 PM  
Council Chambers, City Hall

Mayor Clifford Lee presiding

**Present:** Deputy Mayor Stu MacFadyen  
Councillor Cecil Villard  
Councillor David MacDonald  
Councillor Edward Rice  
Councillor Mitchell Tweel

Councillor Jason Coady  
Councillor Melissa Hilton  
Councillor Rob Lantz  
Councillor Danny Redmond

**Also:** Roy Main, CAO  
Alex Forbes, FM  
Randy MacDonald, FC  
Craig Walker, LM  
Wayne Long, EDO  
Laurel P. Thompson, PDO  
Allan MacKenzie, FO  
Greg Morrison, PDO  
Tracey McLean, RMC

Donna Waddell, DCS  
Paul Smith, FC  
Mandy Feuerstack, HRM  
Ron Atkinson, EDO  
Donna Hurry, TO  
Ramona Doyle, SC  
Belinda Rogers, FC  
Karen Campbell, CS

**Absent:** Councillor Terry Bernard  
Scott Ryan, FM

Paul Johnston, PWM  
Sue Fraser, FRM

Regular Meeting of Council  
Verbatim Excerpt re: 1 Greensview Dr.

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July 14, 2014

**Councillor Danny Redmond:** Council, this application has been around for a few months now. First of all, I want to thank the developer for taking their time to come out and present the application to Council and also to meet with the residents in the immediate area; some of them are here this evening and want to thank them for showing up. As of last month, as I understand, they pulled the application off the table because they want to see if there are any more concerns. I haven't heard of any of the residents that have been spoken to since then. I still have concerns about this application. As we all know, we have an Official Plan review underway and I think with an application such as this and we are looking at rezoning it to an R-3; I think it is going to change the landscape of the area, traffic and whatever. I am concerned about the lack of information regarding the traffic study. I am not quite sure what the Police Department did in terms of that. They did give comments that they had no concerns. I am not sure what the information is however to me when I look at R-3 to me its spots only and I don't think that is something the residents in the area like to see. So having said that, Your Worship and Members of Council, I am going to vote against the application because I see it as not the perfect fit for that area.

**Mayor Clifford Lee:** Councillor Tweel.

**Councillor Mitchell Tweel:** Councillor Lantz. Councillor Redmond represents the area that talked about some of the issues that have been identified by the residents. The question that I have is whether it is increased traffic, the change of zoning and other issues that were highlighted by the area residents. Was there more time and effort given to addressing those issues and was that information relayed back to the residents to see whether they approve or disapprove?

**Councillor Rob Lantz:** Your Worship, this item has been around for a couple of months and as you know, Councillor Tweel, we had a public meeting about this item and a number of issues were discussed. I am the Chair of Planning Board and these applications come to Planning Board for our ten resident members, our three Councillors that sit on the Board to adjudicate. At that Planning Board meeting, ultimately, the recommendation was to approve the development. I can tell you there was some discussion about the concerns that were raised by residents at the public meeting. It was felt the primary concern was around the traffic issues which Councillor Redmond referred to and the Board was anxious to hear from our traffic authority, the Police, and how they felt about that and frankly the response we got from them and I can't tell you what they did in terms of research or what they do as the traffic authority to determine these things but their response was that the development would have no significant impact on the traffic in the area.

With that and with the other information that the Board discussed came the recommendation to approve. We deferred this resolution for a couple of months now at the request of the developer. They have done some further research on some of the other issues which were raised with regard to potential water run-off. I think Council received a draft drainage plan by a certified civil engineer that the applicant had drawn up that shows the way the water flows on the property. The developers organized an open house that was not very well attended but I don't know how the invitations for that went out but to their credit they made an effort to communicate with the public. I am here as the Chair of the Board representing the resolution and recommendation that came from the Board.

**Regular Meeting of Council**  
**Verbatim Excerpt re: 1 Greensview Dr.**

3

July 14, 2014

**Mayor Clifford Lee:** Councillor Tweel.

**Councillor Mitchell Tweel:** I did attend that neighbourhood meeting and one issue that did come up was property values and the impact of the development on the adjoining property owners and their property values. I am not sure if you are in a position to talk about property values or not but in your personal assessment, would this increase or decrease the neighbours property values?

**Councillor Rob Lantz:** Your Worship, I can't answer that question. I am absolutely not in a position to answer that at all.

**Mayor Clifford Lee:** Seeing no further questions, all those in favour of the motion. Those opposed. Motion is Lost with a 5-3 vote with Councillors Coady, Lantz and Hilton in favour.

So the motion is lost. Could we have a new resolution to reject the application?

Roy Main, CAO reads the following resolution:

**Moved by Councillor Mitchell Tweel**

**Seconded by Councillor Danny Redmond**

**RESOLVED:**

That the request to consider an amendment to Appendix "A" – Future Land Use Map of the Official Plan from Recreational to Medium Density Residential and an amendment to Appendix "H" – Zoning Map of the City of Charlottetown Zoning and Development Bylaw from Open Space (OS) Zone to Medium Density Residential (R-3) Zone in order to rezone a portion of the property at 1 Greensview Drive (PID# 279091) be rejected.

**Mayor Clifford Lee:** Questions called. All those in favour. Those opposed. Motion is Carried 5-3 with Councillors Coady, Lantz and Hilton opposed.

[10] The above July 14, 2014 verbatim minutes were summarized into the following minutes of Council reproduced below.

**DRAFT**

**Regular Meeting of Council  
Monday, July 14, 2014 at 4:30 PM  
Council Chambers, City Hall**

**Mayor Clifford Lee presiding**

**Present:** Deputy Mayor Stu MacFadyen  
Councillor Cecil Villard  
Councillor David MacDonald  
Councillor Edward Rice  
Councillor Mitchell Tweel

Councillor Jason Coady  
Councillor Melissa Hilton  
Councillor Rob Lantz  
Councillor Danny Redmond

**Also:** Roy Main, CAO  
Alex Forbes, PM  
Randy MacDonald, FC  
Craig Walker, UM  
Wayne Long, EDO  
Laurel P. Thompson, PDO  
Allan MacKenzie, FO  
Greg Morrison, PDO  
Tracey McLean, RMC

Donna Waddell, DCS  
Paul Smith, PC  
Mandy Feuerstack, HRM  
Ron Atkinson, EconDO  
Donna Hurry, TO  
Ramona Doyle, SC  
Belinda Rogers, FC  
Karen Campbell, CS

**Regrets:** Councillor Terry Bernard  
Scott Ryan, FM

Paul Johnston, PWM  
Sue Fraser, PRM

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

Councillor Lantz indicated his Committee's report was included in the weekend package.

Councillor Villard declared a conflict of interest and left the Chambers for the following motion.

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

**RESOLVED:**

That the request to consider an amendment to Appendix "A" – Future Land Use Map of the Official Plan from Recreational to Medium Density Residential and an amendment to Appendix "H" – Zoning Map of the City of Charlottetown Zoning and Development Bylaw from Open Space (OS) Zone to Medium Density Residential (R-3) Zone in order to rezone a portion of the property at 1 Greensview Drive (PID# 279091) be approved.

Concerns were raised with respect to traffic in the area, type of zoning (R-3) proposed and

drainage.

**DEFEATED 5-3**

**Councillors Lantz, Coady & Hilton recorded “yea” votes**

**Moved by Councillor Mitchell Tweel**

**Seconded by Councillor Danny Redmond**

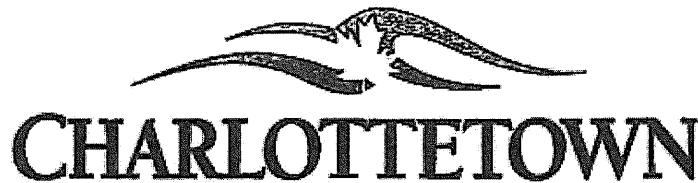
**RESOLVED:**

That the request to consider an amendment to Appendix “A” – Future Land Use Map of the Official Plan from Recreational to Medium Density Residential and an amendment to Appendix “H” – Zoning Map of the City of Charlottetown Zoning and Development Bylaw from Open Space (OS) Zone to Medium Density Residential (R-3) Zone in order to rezone a portion of the property at 1 Greensview Drive (PID# 279091) be rejected.

**CARRIED 5-3**

**Councillors Lantz, Coady & Hilton recorded “nay” votes**

[11] The City’s Planning and Development Officer then notified Hanmac of Council’s decision to reject the rezoning application in a July 15, 2014 letter, which is reproduced below.



**PLANNING, DEVELOPMENT & HERITAGE DEPARTMENT**

July 15, 2014

Mr. Thane Hanson  
Hanmac Inc.  
106 Kensington Road  
Charlottetown, PE C1A 5J5

Dear Mr. Hanson:

Charlottetown City Council passed the following resolution at the regular monthly meeting held on July 14, 2014:

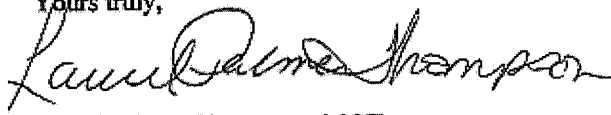
“That the request to consider an amendment to Appendix “A” – Future Land Use Map of the Official Plan from Recreational to Medium Density Residential and an amendment to Appendix “H” – Zoning Map of the City of Charlottetown Zoning and Development Bylaw from Open Space (OS) Zone to Medium Density Residential (R-3) Zone in order to rezone a portion of the property at 1 Greensview Drive (PID# 279091) be rejected.”

Council felt that it was not appropriate to re-zone a portion of an outdoor urban recreational space to a zone that would permit a medium density residential use.

In accordance with Section 4.28 of the City of Charlottetown Zoning & Development Bylaw you may, within 21 days from Council's decision, request a reconsideration of Council's decision or appeal the decision to the Island Regulatory and Appeals Commission. The process for which is attached for your reference.

If you require any further information, please contact the Planning Department at 629-4158.

Yours truly,



Laurel Palmer Thompson, MCIP  
Planning & Development Officer

/s/   
Enclosure

233 Queen Street, PO Box 98, Charlottetown, PE, Canada C1A 7K2  
t (902) 629-4158, f (902) 629-4156, e [planning@charlottetown.ca](mailto:planning@charlottetown.ca), w [www.charlottetown.ca](http://www.charlottetown.ca)

[12] Hanmac's legal counsel filed a Notice of Appeal with the Commission on August 4, 2014. The Commission gave due public notice of the appeal and the matter was heard before the Commission on October 22, 2014 and November 18, 2014.

## 2. Testimony & Discussion

### Hanmac's Position

[13] Hanmac presented two witnesses, Cecil MacLaughlin and Jeff Ready.

[14] Cecil MacLaughlin, an officer and part owner of Hanmac gave evidence that the Subject Property borders Kensington Road and the 4<sup>th</sup> hole of the golf course. Mr. MacLaughlin testified that the Subject Property was approximately two acres of land being 500' by 170'. He testified that the Subject Property was a left over part of the golf course, was essentially scrub land upon which trees and debris were placed and had approximately 10 years of uncontrolled growth on it. He explained that Hanmac would like to build three six unit buildings. Mr. MacLaughlin testified that to his recollection the loss of open or green space was never mentioned by members of the public at any public meeting. As a developer he indicated that the rejection of Council for reasons

that he does not understand and the only reason given to him is as set out in the letter addressed to Hanmac on July 15, 2014. He expressed frustration that Planning Board staff were in favour of the development, Planning Board unanimously approved the development and then the Council rejected the development and he still does not know why.

[15] Jeff Ready, the President of Belvedere Golf Club gave evidence that Hanmac had approached Belvedere seeking to purchase the Subject Property for development and Belvedere thought that Hanmac's proposal for development was a great idea. Mr. Ready noted that the Subject Property is land attached to Belvedere's golf maintenance shed. The Subject Property has a berm on it to block the view of the back of an adjacent commercial building owned by a third party. The Subject Property has trees, brush and "scrub" on it and it is excess land not used by the golf course. He noted that there is already a private roadway to the maintenance shed and the Subject Property separates this roadway from the 4<sup>th</sup> hole. Mr. Ready testified that the golf course development was being pursued by the developer as this had been done in other golf courses where, to support the operations of the golf course, portions of the land were sold to raise funds. He indicated that this had been done at the Glen Arbour Course in Nova Scotia and the Fox Creek Course in Moncton.

[16] Counsel for Hanmac presented oral submissions that may be summarized as follows:

- The City's Council cannot arbitrarily reject a proposal and then later justify their decision based on sound planning. Council is required to consider and apply sound planning principles when making their decision.
- If Council makes a decision contrary to the advice of the City's Planning Board, Council must give sufficient reasons for its decision and these reasons must be based on sound planning principles.
- The City's Planning and Development Officer and the City's Manager of Planning and Heritage are both experts in land use planning. These City planning professionals both agree that Hanmac's application is consistent with sound planning.
- Council did not base its decision on a loss of open or green space. Nowhere in the verbatim minutes of Council's July 14, 2014 meeting is there any mention of open or green space.
- The Subject Property is not used as open space or green space by the public. The Subject Property is excess land belonging to a golf course and contains construction debris and scrub vegetation on it.

- The verbatim minutes of Council's July 14, 2014 meeting refer to traffic, spot zoning and drainage.
- In response to an inquiry by the City's Planning and Development Officer, the City's traffic authority advised that it had no traffic concerns with respect to Hanmac's proposed development.
- The City's Planning and Development Officer stated in her May 5, 2014 report to Planning Board that the re-zoning proposed by Hanmac is not spot zoning.
- Hanmac retained the services of an engineer to consider drainage issues. A summary of the engineer's report and an attached storm water concept plan were emailed to the then Chair of Planning Board on July 8, 2014.
- The July 14, 2014 verbatim minutes reveal that one Councillor had concerns over property values. Hanmac submits that such a concern is not relevant to sound planning.
- The Commission gives deference to municipal councils when rational reasonable reasons are apparent from the minutes of a council's deliberations.

[17] Hanmac submitted that the City's Council failed to apply sound planning principles when it made its July 14, 2014 decision to deny Hanmac's rezoning application. As sound planning principles were not followed, no deference should be given to the City's Council, the Commission should reject Council's decision and the Commission should approve Hanmac's application on its merits.

### **The City's Position**

[18] The City presented two witnesses, Laurel Palmer-Thompson and Alex Forbes.

[19] Laurel Palmer-Thompson is a Planning and Development Officer for the City. Ms. Palmer-Thompson is a land use Planner by profession and she testified before the Commission that she has been employed with the City for ten years. She noted that Hanmac's development proposal is consistent with the City's Official Plan and promotes density, provides a good mix of housing forms and choices and gives nearby residents the option to downsize yet remain in their neighbourhood. She noted that Hanmac's proposal would front onto an industrial / commercial area and back onto an open space. She stated that the golf course provides a vast open area within the City. The proposed development would make efficient use of infrastructure resulting in less cost to provide municipal services. The City's Future Land Use Map designates the intended future use of properties within the City. For Hanmac's application to proceed

to development; the Future Land Use Map would need to be amended along with the City's zoning map. She reviewed Hanmac's proposal along with the City's Official Plan and the surrounding land uses. She noted that the moderate densities proposed by Hanmac provided no adverse effect on adjacent properties. She submitted that Hanmac's proposal for development of the Subject Property did not constitute spot zoning and is consistent with sound planning principles. She noted that if the rezoning is approved the City's staff would review the drainage plan in detail at the building permit stage.

[20] Ms. Palmer-Thompson briefly reviewed portions of the City's Official Plan during her testimony. She noted section 3.2 which speaks to sustaining existing neighbourhoods and section 3.2.1 which refers to the footprint, height and massing of buildings pertaining to the distinct character of the City's neighbourhoods. She referred to section 3.2.2 which permits moderately higher residential densities. She referred to section 5.1 of the Official Plan that speaks to recreational needs and section 5.2.1 which refers to open spaces.

[21] Ms. Palmer-Thompson testified that in her review of the proposed application and how it fit with the future plan for the City she noted that it is good planning to promote moderate density use in areas as they provide a good buffer between open areas and other housing, and offer a good range of housing to the public. She testified that the City Police had no real concerns with respect to traffic or access with the new development and that any concerns with respect to dust and construction time could be dealt with in a development agreement.

[22] She indicated that it was her understanding from what was expressed at public meetings that there was a concern with respect to the loss of open spaces. However, on cross examination Ms. Palmer-Thompson confirmed that there was no reference in the record as to any concerns having been made with respect to a loss of open space. She was questioned with respect to the reference in her report to Council that dealt with these concerns and indicated that she stated she remembered hearing some citizens at a meeting voice this concern. Ms. Palmer-Thompson's handwritten notes of the meeting do contain one reference to a single comment on the loss of open space. She recorded one member of the public as having commented - it's a green zone and that he was under the impression it wouldn't be developed.

[23] She confirmed that the portion of the golf course in question was, in fact, a maintenance access area that contained brush or was treed. She did not dispute that there was a ready supply of open land but she did note that there are two different views on the use of golf course properties for other development. She testified that the proposal as presented did not interfere with any recreational needs of the City. She agreed that the proposed development of Hanmac would use less than 1% of the golf course area.



[24] During redirect examination City legal counsel suggested that the verbatim transcript of the public meeting might provide for clarification on the public's objection to the rezoning of the open green space. On November 3, 2014 legal counsel for the City provided a copy of the verbatim transcript of the public meeting held on April 30, 2014. The verbatim transcript confirms the handwritten notes of Ms. Palmer-Thompson that during the entire public meeting there was only one single reference to the loss of green space or open space. The verbatim minutes of that meeting indicate that one gentleman stated:

*"I knew this was coming for other reasons and I know there is going to be another up on Greenfield and that's a green zone there. I have the documents back four or five years ago. I was under the impression that it couldn't be developed and anything, you never say never, so I know with Council and it can be rezoned and it doesn't take much."*

And further on in the meeting the same gentleman stated:

*"Anyway, I'm not against the development."*

The verbatim transcript of that meeting confirms that some of the members of the public were, in fact, not against the development and that many of the concerns voiced dealt with water and drainage on the golf course and the fact that Kensington Road had become a traffic thoroughfare for large trucks. Some members of the public did voice concerns with respect to how long the construction would take, dust, etc. and the fact that this would increase the number of people living in the area.

[25] Ms. Palmer-Thompson acknowledged that she did not provide a report to Council or Planning Board that the existing zoning is sound planning. She testified that there are no conflicting land uses in the area, noting that at the Subject Property the OS open space zone does border a light industrial M-1 zone. When asked by legal counsel for the City whether she considered that the existing zoning was consistent with good planning she stated in her oral testimony:

*"When you look at the existing plan and how it is laid out and the zoning for the area, it isn't bad planning that is currently in place."*

[26] Alex Forbes is the City's Manager of Planning and Heritage and is a member of both the Canadian Institute of Planners and the American Planning Association. He notes that his current work involves overseeing the work of planning staff at the City. He testified that he had reviewed Ms. Palmer-Thompson's written reports addressing Hanmac's application and he concurs with her recommendation approving the application. He noted that Hanmac's application for the Subject Property had strong support before Planning Board. He noted that the Subject Property is presently designated as OS open space and he stated that the current Official Plan is consistent with sound planning and it was developed in full consultation with the public. He noted that ultimately a decision of Council with respect to a rezoning land is a political

decision. Mr. Forbes' final position was that both the proposed development of Hanmac and the current Official Plan were both consistent with sound planning principles.

[27] Counsel for the City presented oral submissions to the Commission. A complete outline of these written submissions was filed with the Commission as Exhibit R11. Highlights of the City's submissions include the following.

- The Subject Property is currently zoned as open space (OS). This zoning has been in place for a very long time. In this case, an amendment to the Official Plan's Future Land Use Map is required in addition to an amendment to the Bylaw's Zoning Map.
- Appeals before the Commission have a twofold role. The Commission reviews the record in a way similar to a judicial review. The Commission also hears the matter afresh as a hearing de novo.
- The City submits that the Commission's reasoning in *Doiron* [Order LA10-06, *Warren Doiron v. City of Charlottetown* July 14, 2010] is applicable in the present appeal. *Doiron* also involved a rezoning application and would have required an amendment to the Official Plan's Future Land Use Map. In *Doiron*, the "consistent approach" was followed, recognizing that the Future Land Use Map is an important long-term planning tool that was developed in consultation with professional planners. *Doiron* recognized that the public is likely to rely on the Future Land Use Map when making a decision to purchase a residence in the neighbourhood.
- The City submits that Council as a group of elected officials have a vital role to protect the public interest. As a result, Council may have a different view of what constitutes spot zoning than that held by the City's Planning and Development Officer. Council's concern about spot zoning was a legitimate planning concern. While acknowledging that City planning staff were of the view that the proposed development was not an example of spot zoning, the City submits that the councillors could have a reasonable alternate view of what constituted spot zoning and filed a Wikipedia page to support his premise.
- The City submits that the traffic authority's opinion was brief and without a basis offered for the opinion. It was not detailed like a traffic study provided by an engineer. Council was concerned about traffic and felt that the response from the City's traffic authority was not enough.
- The City submits that Council does not need to articulate reasons in the same way as an administrative tribunal. Council was of the view that the proposed development was not the perfect fit for that area of the City.

- In *Seanic Canada Inc. v. St. John's (City)*, 2014 NLTD(G) 7 (*Seanic*), the test was enunciated as to whether a municipal council was “alive to the question at issue”. The City submits that Council was in fact alive to the issues before it.
- There is no issue of procedural fairness in the present appeal. Reasons were given during the “continuum of process”. It is not feasible to require each Councillor to verbalize their reasons for decision. Council met the standard for giving reasons as set out in *Seanic*. Even if a higher standard is required, it is submitted that Council has met such standard.

[28] For all the reasons expressed orally and as set out in depth in Exhibit R11, the City requests that the Commission deny the appeal.

### 3. Findings

[29] 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.

[30] 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), Mitchell, J.A. states for the Court at page 7:

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

[31] In previous appeals, the Commission has found that it does have the power to substitute its decision for that of the municipal or ministerial decision maker. However, in planning matters the Commission does not lightly interfere with such decisions.

[32] 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 City, followed the proper process and procedure as required in its Bylaw, in the **Planning Act** and in the law in general, including the principles of natural justice and fairness, in making a decision on a rezoning application, requiring amendments to the Bylaw's Zoning Map and also in this case requiring a companion amendment to the Official Plan's Future Land Use Map; and

- Whether the City's decision with respect to the proposed Zoning Map and Future Land Use Map amendments have merit based on sound planning principles within the field of land use and urban planning and as enumerated in the Official Plan.

[33] In reviewing the entire application from beginning to final decision of Council the Commission notes that the City's Planning and Development office handled this application in a good, business like and exemplary manner. The application for rezoning was filed with the Planning and Development office and was processed by that office in a timely manner. Public notices were given and public meetings were held, minutes produced and recommendations made based on facts made available to Planning and Development staff. Reports were written and recommendations made to Planning Board. Planning Board accepted the recommendations and issued its own recommendation to Council for approval of the application and the rezoning. It is clear from the record that the matter was given and received due consideration from individuals and committees that took the time to inform themselves to the issues involved in the matter before them. It is clear from the minutes of Council that the councillors who chose to speak had not bothered to inform themselves on the matter of the application before them. Those councillors spoke of concerns for which there were answers in the record, expressed concerns about matters which could have been and should have been canvassed by them long before they entered the Council chamber for a vote on such an important matter. At the Council meeting the chairman of the Planning Board addressed these issues and answered them in a full and complete manner. Three of the councillors voting against the motion did not even see fit to make comment at the meeting.

[34] In the minutes for Council's July 14, 2014 meeting dealing with Hanmac's rezoning application, the sole reason and explanation for the denial and rejection of the application was noted as follows:

*Concerns were raised with respect to traffic in the area, type of zoning (R-3) proposed and drainage.*

[35] The Commission is concerned with the inaccuracies as set out in these minutes of the meeting. The verbatim Minutes of Council show that there were no concerns raised with respect to drainage. The only reference to drainage was a confirmation from the chairman of Planning Board that the developers had provided a draft drainage plan by a certified civil engineer. Drainage matters may have come up earlier in the application process but they certainly were not a concern at the regular meeting of Council on July 14, 2014 and it was improper for that concern to have been stated as such, in the minutes of Council.

[36] Following the decision of Council to reject the application, the Planning and Development officer then forwarded a letter, dated July 15, 2014 to Hanmac setting out the following reason for Council's rejection, it reads:

*Council felt that it was not appropriate to re-zone a portion of an outdoor urban recreational space to a zone that would permit a medium density residential use.*

[37] The Commission is very concerned with the letter noted above that was forwarded to the developer. This is the only communication sent to the developer to explain to the developer the reason why its application was rejected by Council. The reason and rationale set out in this letter is not the reason that is recorded in the Council's Minute of July 14, 2014 and cannot be gleaned from the verbatim transcript of the Council meeting. It is not acceptable that the written explanation given to the developers as to why their project was rejected states a reason that was not even an issue at the Council meeting.

[38] In his summation, Counsel for the City referred the Commission to the decision of the Newfoundland and Labrador Supreme Court (Trial Division) in *Seanic, supra*, and submitted to the Commission that the Commission should not interfere with the decision of a Council where it is clear that the councillors were "alive to the issue" before them. It is apparent to the Commission that the councillors were most definitely not "alive to the issue" that was before them. It is also apparent to the Commission that although this application had been before the City for months, councillors expressed questions and concerns that could easily have been answered by discussing the matter with Planning Department staff and by a review of the application material that had been provided to them by Planning Board staff. But, instead, as the record confirms, they chose to enter the Council chamber and vote on a matter for which they were not fully informed.

[39] The Commission finds that the reason set out in the July 15, 2014 letter from the Planning and Development Officer to Hanmac does not reflect either the written minutes or the verbatim transcript of the meeting of Council on July 14, 2014 pertaining to Hanmac's application.

[40] In *Seanic, supra*, the Court referred to a decision of the Supreme Court of Canada in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, [2004] 2 S.C.R. 650, 2004 SCC 48. In that decision, McLachlin C.J. noted the following at paragraphs 12 and 13:

12 The five Baker factors suggest that the Municipality's duty of procedural fairness to the Congregation required the Municipality to carefully evaluate the applications for a zoning variance and to give reasons for refusing them. This conclusion is consistent with the Court's recent decision in Prud'homme v. Prud'homme, [2002] 4 S.C.R. 663, 2002 SCC 85, at para. 23, holding that municipal councilors must always explain and be prepared to defend their decisions. It is also consistent with Baker, where it was held, at para. 43 dealing with a ministerial decision, that if an organ of the state has a duty to give reasons and refuses to articulate reasons for exercising its discretionary authority in a particular fashion, the public body may be deemed to have acted arbitrarily and violated its duty of procedural fairness.

*13 Giving reasons for refusing to rezone in a case such as this serves the values of fair and transparent decision making, reduces the chance of arbitrary or capricious decisions, and cultivates the confidence of citizens in public officials. Sustained by both law and policy, I conclude that the Municipality was bound to give reasons for refusing the Congregation's second and third applications for rezoning. This duty applied to the first application, and was complied with. If anything, the duty was stronger on the Congregation's second and third applications, where legitimate expectations of fair process had been established by the Municipality itself. Emphasis added by the Commission*

[41] The direction from the Supreme Court of Canada is clear: a municipality must carefully evaluate an application, give reasons when refusing the application and municipal councillors "must always explain and be prepared to defend their decisions".

[42] A careful evaluation of Hanmac's application was given by the Planning and Development Officer and by Planning Board and these evaluations supported Hanmac's rezoning application. While Council is free to make a decision contrary to the recommendation of its staff and its Planning Board, as noted in *Congrégation*, a municipality must undertake a careful evaluation of the application before it in order to meet the duty of procedural fairness. The verbatim minutes of July 14, 2014 persuade the Commission that there is insufficient evidence to support a finding that Council carefully evaluated the application before it. The Commission finds that the City did not meet the duty of procedural fairness as it failed to decide Hanmac's application on its merits.

[43] In considering whether Hanmac's application is consistent with sound planning principles, the Commission is mindful that the City's Planning and Development Officer is an experienced professional planner who prepared her report for Planning Board and testified before the Commission. Indeed, the Planning and Development Officer has testified before the Commission on several matters over the years and the Commission remains impressed with her knowledge, professionalism and candour. The City's Planning Board also recommended in favour of granting Hanmac's application for rezoning.

[44] However, the Commission must also be satisfied that an application for rezoning has the support of the Official Plan. The Commission notes the following provisions of the Official Plan that are germane to an assessment of both Hanmac's application and the existing status of the Subject Property from the perspective of sound planning principles.

### 3. DIRECTING PHYSICAL GROWTH

*The City of Charlottetown will strive to create for its residents a truly unique environment in which to live, work, and play. It will protect the distinct character of the municipality while at the same time encouraging compact urban form and creative approaches to residential, commercial, and industrial development. The City will continue to build on its past by stimulating the revitalization of heritage resources; maintaining the special qualities of Charlottetown's neighbourhoods; and safeguarding the municipality's open space characteristics and view corridors.*

### 3.1 Guiding Settlement

#### *Starting Point*

*As a recently amalgamated municipality, Charlottetown has a unique window of opportunity to create a growth profile that will help shape the City's urban fabric well into the 21st century. In large measure, the way in which the municipality now chooses to guide its settlement patterns will provide the template that molds urban development—and the quality of life issues which arise from it—for many years to come.*

...

*An effective municipal growth management program is founded on the principles of fiscal efficiency, environmental conservation, and urban containment. In Charlottetown, this means that the City will maximize the use of existing underground services before new water and wastewater lines are extended into areas that are essentially undeveloped. Finally, it means that moderately higher density development may be permitted in existing commercial areas and arterial corridors where it does not interfere with existing built-up residential neighbourhoods...*

*Collectively, these measures will promote compact and contiguous development patterns, the deployment of efficient municipal services, and the preservation of significant resource areas for present and future generations. This approach will enable the City to anticipate growth, identify areas and services which can accommodate it, while also minimizing fiscal expenditures and environmental impacts. To this extent, it will ensure that urban growth in Charlottetown takes place in a rational,*

*efficient, and orderly fashion, as well as being consistent with the provincial government's general land-use policy.*

...

#### *Defining Our Direction*

*Our goal is to develop settlement patterns which are efficient in their use of land resources and cost of servicing, encourage equitable and harmonious community relationships, and help to sustain Charlottetown's distinctive character and identity.*

1. *Our objective is to contain urban sprawl by introducing a staging strategy for new development, and to ensure that there is concurrency between proposals for new development and the provision of underground municipal services.*

*• Our policy shall be to direct urban growth to land that is a logical extension of an existing urban area, or neighbourhood, and will be serviced by municipal water and wastewater systems;*

*• Our policy shall be to monitor the long-term public costs of additional infrastructure, public services, and public service facilities prior to approving development proposals.*

*• Our policy shall be to place each key re-urbanization area identified in subsection 3.6 in a Comprehensive Development Area zoning designation until such time as a detailed concept plan has been prepared and adopted.*

*• Our policy shall be to have the responsible municipal departments ensure that adequate infrastructure and servicing facilities are in place prior to, or are developed concurrently with, new development.*

2. *Our objective is to promote compact urban form and infill development, as well as the efficient use of infrastructure and public service facilities.*

*• Our policy shall be to allow moderately higher densities in neighbourhoods, and to allow in-law suites in residential land-use designations, and to make provision for multiple-family dwellings in the downtown core, and multiple-family dwellings in suburban centres and around these centres provided it is development at a density that will not adversely affect existing low density housing.*

*• Our policy shall be to encourage in-fill development through public land assembly initiatives, flexible zoning provisions and the reduction or waiver of development fees for small or irregularly shaped lots and, when warranted, the use of tax incentives within fully serviced areas of the City.*

*• Our policy shall be to use existing underground services to its fullest practical capacity before public funds are used to extend new water and wastewater lines into areas that are essentially undeveloped.* [Emphasis added by the Commission]



### 3.2 Sustaining Charlottetown's Neighbourhoods

#### Starting Point

*In most municipalities, the neighbourhood is the basic building block of residential development and community identity. Every neighbourhood has its own distinguishing characteristics which help to identify it as an individual entity, as well as to set it apart from adjoining areas. In Charlottetown, the former communities which now comprise the new municipality, retain their distinctive characteristics and sense of identity. Indeed, even within the former communities there are several districts -- such as Brighton, Spring Park, Marysfield, and Lewis Point -- which are seen as distinct neighbourhoods.*

*In order to preserve the unique characteristics of Charlottetown's neighbourhoods the CHARLOTTETOWN PLAN introduces policies which promote both stability and community identity. The aim is to sustain vibrant neighbourhoods which have a distinct sense of community, are places of close social contact, and are generally enjoyable. This is the clear preference of Charlottetown's residents.*

*However, it is also important to recognize that change which results from economic and social transformation is already having an impact at the neighbourhood level. Smaller households, a decrease in family-oriented households, an aging population base, and an increase in home-based businesses are several of the factors for some needed flexibility in housing densities, design options, permitted uses, and lot sizes within Charlottetown's neighbourhoods. With some future adjustments in development standards, the City's residential communities will be better able to sustain a diversity of household types and lifestyles, and continue to be vibrant places to live.*

*Similarly, if Charlottetown's neighbourhoods are to remain healthy and sustainable, the policies of this plan should enable people to continue to reside in their residential communities as they move through various ages and stages of their lives. The provision of community-based services, appropriate public realm amenities, and reasonable access to shopping and facilities are measures which will support this aim.*

*As a new municipality, it is also important for Charlottetown to find ways to embrace its various neighbourhoods and bind them into the larger community. To some extent, the passage of time -- along with the equitable distribution of municipal services and amenities -- will help to solve this issue. However, the City also needs to provide physical linkages which will connect each neighbourhood to others, as well as to the downtown core and the suburban centres. The green space connector system shown on the Future Land-Use Map lays the foundation for these physical connections. Upon its completion, it will not only help to link neighbourhoods together, but also provide residents with the opportunity to walk or cycle to a variety of destinations within the City.*

### *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 located 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.*

- 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.*

...

### *5.1 Addressing Recreational Needs*

#### *Starting Point*

*The demand for recreation and leisure activities in Charlottetown -- and throughout Canada -- is changing. Increasingly, people are demanding a greater variety of facilities and programs. In the years to come, the challenge for the City will be to provide traditional recreation and leisure activities while at the same time responding to changing demands. The trends and issues that will increasingly begin to influence the delivery of these services are:*

- an aging population base;*
- changes in the type of activities demanded by this population; and*

- *the ability of the City to respond to these changing demands.*

...

## 5.2 The City's Public Places

### *Starting Point*

*The way in which we inhabit the land is often articulated through our public places. These special spaces... be they natural, groomed, or fabricated features in the community, are elements that make our daily lives richer and more vivid ... and by the physical facts of their location provide a deeper resonance with the place that is Charlottetown.*

*In addition to sustaining special relationships between people and their surroundings, the City's public places directly affect both residents and visitors' perceptions of Charlottetown's quality of life. Indeed, there is a very positive public image of the City because of its many public places, its harbour setting, and its collection of heritage buildings. The civic squares, for example, are firmly rooted in the City's earliest plans, and are an integral part of Charlottetown's image and identity. Indeed, all of Charlottetown's public places allow us to gain knowledge about the seasons, the structures, the incidents and lives—human and otherwise—that exist in our home territory. As such, it is important to preserve and build on these fundamental elements which contribute so much to the City's image and sense of place.*

### *Defining Our Direction*

*Our goal is to provide a diversity of public places throughout Charlottetown to ensure that residents and visitors can relax, celebrate, and enjoy the City's many distinct urban and natural environments.*

1. *Our objective is to encourage the upkeep, and to nourish the creation, of open spaces and public places of a grander scale which befit Charlottetown's role as the provincial capital.*

- *Our policy shall be to manage the large open spaces of Charlottetown as part of the growth management strategy, and to ensure that they are protected as long as is reasonably possible from urban development.*

- *Our policy shall be to protect, maintain, and enhance the public places of Charlottetown.*

[45] Sections 5.1 and 5.2.1 have been referenced in the oral testimony of the City's Planning and Development Officer as some of the provisions within the Official Plan which lend support to a retention of the current open space zoning for the Subject Property. Section 5.1 pertains to the City's recreational needs while section 5.2.1 pertains to the City's public places.

[46] The Subject Property is privately owned and thus it should not be confused with a publicly owned open or "green" space such as municipal parkland. The Subject Property, although zoned open space, is not one of the City's public places.

[47] The testimony before the Commission is that development of the Subject Property in no way restricts the existing recreational services provided by Belvedere. Indeed, such development may assist Belvedere in remaining viable and thus continuing to provide an important recreational need.

[48] Section 29 of the City's By-law sets out the provisions with respect to the Open Space Zone (OS). Section 29.1 list the permitted uses within that zone:

**29.1 PERMITTED USES**

- .1 active and passive recreation;*
- .2 band shell;*
- .3 Campground;*
- .4 curling Club;*
- .5 Golf Course and driving range;*
- .6 Officers Club;*
- .7 Open Space;*
- .8 Park;*
- .9 pavilion;*
- .10 Public Park;*
- .11 public recreation centre; and*
- .12 trails and fields.*

[49] The Commission notes that a rejection of Hanmac's rezoning application maintains the open space zoning of the Subject Property and as such, the permitted uses applicable to a private landowner would be rather limited. The Commission finds that the Subject Property is privately owned, underutilized, and, according to the evidence presented to the Commission, it is of little benefit to the operations of its present owner.

[50] The Commission finds that Hanmac's application for rezoning promotes compact urban form, while offering a medium-density development that is more compatible with the existing residential neighbourhood than a high-density residential development. The subject parcel is well within existing water and service lines and is adjacent to Kensington Road, a major street within the City. Hanmac's application also assists in providing some visual buffer between the commercial and residential portions of the immediate neighbourhood. As a limited scale development using under-utilized golf course land, it does not negatively impact upon the adjacent developed green space occupied by the golf course. As a medium density development located adjacent to a golf course and a commercial area, it does not negatively impact upon the existing neighbourhood. It provides housing variety within the neighbourhood which will allow residents in transition, or those undergoing "economic and social transformation" to remain within their neighbourhood, a factor of considerable importance referred to in

the Official Plan. Hanmac's development is rational, efficient, orderly and addresses the needs for housing diversity.

[51] Counsel for the City submits that the application for rezoning would result in what is referred to as spot zoning. This assertion is contrary to the determination of the City's own Planning Department and the opinion of the City's own planners as noted in the Planning Department's report to Planning Board for its consideration of this application. This Commission finds that based on the evidence before it this application for rezoning is not spot zoning.

[52] In Charlottetown (City) the Island Reg. & Appeals Com. 2013 PEICA 10, Chief Justice Jenkins of the Court of Appeal stated:

*40... However, where, as here, Council fails to decide an application for development on its merits in accordance with the applicable municipal law, which is enabled by the Planning Act, and decides the application based on irrelevant considerations, then there is no basis for deference. That is because there is no decision upon which to defer. In the Commission's words, deference to a decision maker is earned when the decision maker follows the process set out by the bylaw and is fair to all parties. Where, as here, the process was not so followed, the Commission was unable to show deference to Council's decision.*

[53] In the present appeal, the Commission finds that the Council failed to decide the application for the development on its merits in accordance with the applicable municipal law and finds that Hanmac's proposal for development of the Subject Property demonstrates clearly superior planning compared with the current use of the property.

[54] The appeal is allowed, and the City's July 14, 2014 decision to deny Hanmac's rezoning application is hereby reversed. The Commission orders the City to approve an amendment to Appendix "A"- Future Land Use Map of the Official Plan from Recreational to Medium Density Residential and an amendment to Appendix "H" - Zoning Map of the City of Charlottetown Zoning and Development By-law from Open Space (OS) Zone to Medium Density Residential (R-3) Zone in order to rezone a portion of the property at 1 Greensview Drive (PID# 279091).

## **4. Disposition**

[55] An Order allowing the appeal and requiring the rezoning of the Subject Property and related amendment to the Future Land Use Map follows.

**IN THE MATTER** of an appeal by Hanmac Inc.  
of a decision of the City of Charlottetown, dated July  
14, 2014.

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# Order

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**WHEREAS** the Appellant Hanmac Inc. has appealed a decision of the City of Charlottetown dated July 14, 2014;

**AND WHEREAS** the Commission heard the appeal at public hearings conducted in Charlottetown on October 22, 2014 and November 18, 2014 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 allowed.
2. The July 14, 2014 decision of the City of Charlottetown pertaining to this matter is hereby reversed.
3. The City of Charlottetown is hereby ordered to approve an amendment to Appendix "A"- Future Land Use Map of the

**Official Plan from Recreational to Medium Density Residential and an amendment to Appendix "H" - Zoning Map of the City of Charlottetown Zoning and Development Bylaw from Open Space (OS) Zone to Medium Density Residential (R-3) Zone in order to rezone a portion of the property at 1 Greensview Drive (PID# 279091).**

**DATED** at Charlottetown, Prince Edward Island, this 18th day of December, 2015.

**BY THE COMMISSION:**

(sgd.) *J. Scott MacKenzie*

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

(sgd.) *Douglas Clow*

\_\_\_\_\_  
Douglas Clow, Vice-Chair

(sgd.) *John Broderick*

\_\_\_\_\_  
John Broderick, 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.*

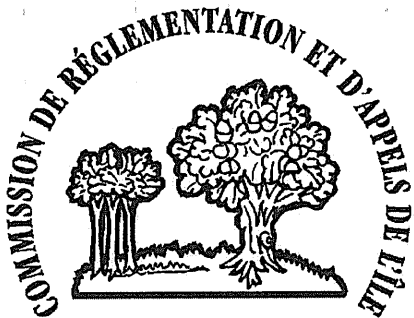
*(2) The appeal shall be made by filing a notice of appeal in the Court of Appeal within twenty days after the decision or order appealed from and the rules of court respecting appeals apply with the necessary changes.*

## **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)





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

**Docket LA16007 and  
LA16012  
Order LA17-08**

**IN THE MATTER** of an appeal by  
Pine Cone Developments Inc. of an  
appeal of June 28, 2016 decision of  
the City of Charlottetown to deny an  
application for a building permit and a  
September 12, 2016 decision of the  
City of Charlottetown to deny a  
request for reconsideration of the said  
earlier decision.

**BEFORE THE COMMISSION**  
on Wednesday, the 15th day of November,  
2017.

J. Scott MacKenzie, Q.C., Chair  
M. Douglas Clow, Vice-Chair  
John Broderick, Commissioner

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# Order

Compared and Certified a True Copy

A stylized, handwritten signature in black ink, appearing to read "Philip J. Rafuse".

Philip J. Rafuse  
Appeals Administrator  
Corporate Services and Appeals Division

**IN THE MATTER** of an appeal by Pine Cone Developments Inc. of an appeal of June 28, 2016 decision of the City of Charlottetown to deny an application for a building permit and a September 12, 2016 decision of the City of Charlottetown to deny a request for reconsideration of the said earlier decision.

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<i>Order</i>	

**IN THE MATTER** of an appeal by Pine Cone Developments Inc. of an appeal of June 28, 2016 decision of the City of Charlottetown to deny an application for a building permit and a September 12, 2016 decision of the City of Charlottetown to deny a request for reconsideration of the said earlier decision.

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# **Appearances & Witnesses**

**1. For the Appellant Pine Cone Developments Inc.**

**Counsel:**

**John W. Hennessey, Q.C., Barrister & Solicitor, McInnes Cooper**

**Witness:**

**Trevor Bevan**

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

**Counsel:**

**David W. Hooley, Q.C., Barrister & Solicitor, Cox & Palmer**

**Witnesses:**

**Laurel Palmer-Thompson  
Alex Forbes**

**IN THE MATTER** of an appeal by Pine Cone Developments Inc. of an appeal of June 28, 2016 decision of the City of Charlottetown to deny an application for a building permit and a September 12, 2016 decision of the City of Charlottetown to deny a request for reconsideration of the said earlier decision.

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# Reasons for Order

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## 1. Introduction

(1) Pine Cone Developments Inc. ("Pine Cone") has filed two appeals with the Island Regulatory and Appeals Commission ("Commission") under section 28(1.1) of the *Planning Act*, R.S.P.E.I. 1988, Cap. P-8 ("*Planning Act*"). Appeal docket LA16007 is an appeal from a June 28, 2016 decision by the City of Charlottetown ("City") to deny approval of a building permit application. Appeal docket LA16012 is an appeal from a September 12, 2016 decision of the City to deny a request to reconsider its June 28, 2016 decision. To summarize, this case revolves around an application by Pine Cone for a building permit for provincial parcel number 393314 located at 11-13 Pine Drive in Charlottetown, Prince Edward Island ("Property").

(2) On May 18, 2016, Pine Cone applied for a building permit to construct a 27 unit apartment building on the Property. On June 28, 2016, Pine Cone received a letter from Alex Forbes, who is the City's manager of planning and heritage. Mr. Forbes advised Pine Cone that the City could not issue a building permit for the proposed building. He provided a number of reasons for that decision.

(3) On July 18, 2016, Pine Cone filed a notice of appeal with the Commission. It appealed the City's decision of June 28, 2016. On this same date, Pine Cone wrote to the City and requested reconsideration of its decision. Pine Cone also asked the Commission to hold the appeal in abeyance pending the outcome of the request for reconsideration. The Commission agreed to this request.

(4) As part the reconsideration process, the Planning Board received a written report dated September 6, 2016 from Laurel Palmer-Thompson, who is a planning and development officer employed by the City. The report examined the earlier rationale for refusing the building permit and provided input on the request for reconsideration from a professional planning perspective. The Planning Board met on September 6, 2016. Ms. Palmer-Thompson reviewed her written report. The Planning Board recommended to Council that the request for reconsideration be rejected.

(5) On September 12, 2016 the reconsideration request came before Council. The verbatim minutes from that meeting set out the grounds relied upon by Council for rejecting Pine Cone's request for reconsideration:



Verbatim Excerpt re: 11-13  
Pine Drive from the Regular  
Meeting of Council of  
September 12, 2016

**Regular Meeting of Council  
Monday, September 12, 2016 at 4:30 PM  
Council Chambers, City Hall**

**Mayor Clifford Lee presiding**

<b><u>Present:</u></b>	<b>Deputy Mayor Mike Duffy</b>	<b>Councillor Mitchell Tweel</b>
	<b>Councillor Edward Rice</b>	<b>Councillor Melissa Hilton</b>
	<b>Councillor Terry Bernard</b>	<b>Councillor Jason Coady</b>
	<b>Councillor Greg Rivard</b>	<b>Councillor Kevin Ramsay</b>
	<b>Councillor Terry MacLeod</b>	<b>Councillor Bob Doiron</b>

<b><u>Also:</u></b>	<b>Peter Kelly, CAO</b>	<b>Randy MacDonald, FC</b>
	<b>Paul Johnston, PWM</b>	<b>Brad MacConnell, DPC</b>
	<b>Alex Forbes, PM</b>	<b>Mandy Feuerstack, HRM</b>
	<b>Frank Quinn, PRM</b>	<b>Richard MacEwen, AUM</b>
	<b>Wayne Long, EDO</b>	<b>Ron Atkinson, EconDO</b>
	<b>Donny Hurry, TO</b>	<b>Allan MacKenzie, SFO</b>
	<b>Laurel P. Thompson, PDO</b>	<b>Greg Morrison, PDO</b>
	<b>Scott Adams, PrgC</b>	<b>Jen Gavin, CO</b>
	<b>Steven Forbes, CS</b>	<b>Tracey McLean, RMC</b>

**Regrets: Ramona Doyle, SO**

**4. Planning & Heritage – Councillor Greg Rivard**

**Moved by Councillor Greg Rivard  
Seconded by Councillor Jason Coady**

**RESOLVED:**

That the request for Reconsideration, under Section 4.30 of the City of Charlottetown Zoning & Development Bylaw, of a refusal by the Development Officer to approve a Building Permit for a 27 unit apartment building at 11-13 Pine Drive (PID# 393314) be rejected.

**Mayor Lee: Councillor Rivard**

**Councillor Rivard:** Thank you, Your Worship. With regard to the Reconsideration, under Section 4.30 of the City of Charlottetown Zoning & Development Bylaw, I offer the following: the subject property is owned by Bevans and the development rights pertaining to this property have been contested by the residents in this neighbourhood for quite some time. In 1998, it was

Regular Meeting of Council  
Verbatim Excerpt (11-13 Pine Dr.)

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September 12, 2016

rezoned by the City of Charlottetown from Low Density Residential (R-1) to Medium Density Residential (R-3) as part of the amalgamated community comprehensive zoning and development bylaw. In 2005, this property was designated from Low Density Residential in the Official Plan to Medium Density Residential. This property contained a 5-unit apartment building dating back to 1991. In 2012, a proposal was received to build a 24-unit apartment building at this location. There was a public meeting in the neighbourhood and residents were opposed to the proposal. The developer decided to withdraw the application before Council's decision was rendered. In 2013, the applicant came forward with a proposal to build a 19-unit townhouse development at this location. This proposal involved the subject property and the rezoning of an adjacent parcel to Medium Density to make the townhouse proposal work. The proposal was not well received by the neighbourhood and the applicant, again, withdrew their application before a decision of Council was rendered. In June of 2016 the most recent application for a 27-unit apartment building at this location was rejected by Staff because they felt that a building of this size and scale was contrary to a number of policies in the Official Plan and the Zoning and Development Bylaw.

Specifically, the Official Plan states in **Section 1.3 Strategic Directions** that the Charlottetown Plan articulates policies which *preserve existing residential low density neighbourhoods*.

**Section 3.1.2 on Defining our Direction** – *Our objective is to promote compact urban form and infill development, as well as the efficient use of infrastructure and public service facilities. Specifically, it states that Our policy shall be to allow moderately higher densities in neighbourhoods, and to allow in-law suites in residential land-use designations, and to make provision for multiple-family dwellings in the downtown core, and multiple-family dwellings in suburban centres and around these centres provided.*

**Section 3.2 under Sustaining Charlottetown's Neighbourhoods** – *our goal is to maintain a 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.*

**Section 3.2.1** is states that *our objective is to preserve the built form and density of Charlottetown's existing neighbourhoods, and to ensure that new development is harmonious with its surroundings. Our policy shall be to ensure that the footprint, height, massing, and setbacks of new residential, commercial, and institutional development in existing neighbourhoods is physically related to its surroundings. Our policy shall be to establish an appropriate relationship between the height and density of all new development in mixed-use residential areas of existing neighbourhoods*

**Section 3.2.2** states that *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*

**Section 3.2 under the Environment for Change** it states that *preserving the distinctive character and identity of Charlottetown's neighbourhoods requires strategies that promote*

Regular Meeting of Council  
Verbatim Excerpt (11-13 Pine Dr.)

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September 12, 2016

*internal stability as well as a sense of community identity. The CHARLOTTETOWN PLAN incorporates policies which will help preserve the harmony and integrity of each existing neighbourhood within the City. Secondly, although the zoning map provides for R-3 residential development on this site, a single 27-unit apartment building of this size proposed conflicts with several specific provisions of the Zoning and Development Bylaw namely Sections 4.534(c), 4.536(f) and 4.61.3(a). Staff concluded that the single 27-unit apartment building as proposed conflicts with good planning principles.*

Finally, pursuant to Section 15.2 of the Planning Act the Official Plan policies overrides any inconsistencies in the Zoning Bylaw. The bylaw or regulations, under clause 1(d), shall conform to the Official Plan in the event of any conflict or inconsistencies, the Official Plan prevails.

The developer has asked for Reconsideration of this application before they proceed to the Island Regulatory and Appeals Commission (IRAC). In light of the fact that the applicant may pursue the Development Officer's decision further, I would like to state publicly that I will not be commenting any further on this application until after the various legal processes available to the applicant have been totally exhausted.

**Mayor Lee:** Councillor Doiron

**Councillor Doiron:** Thank you, Your Worship. For those of you not familiar with this property it's in my Ward. This area is a very quiet neighbourhood of single-family homes. I know the Bevans are great people but I have to agree with Councillor Rivard and his Committee that this is a single residential area and this would be out of the norm for this area and that is why I would like to publicly comment that I will be supporting Councillor Rivard and his Committee. Thank you very much.

**Mayor Lee:** Deputy Mayor Duffy

**Deputy Mayor Duffy:** Thank you, Your Worship. Councillor Rivard, in the past we had a few problems interpreting resolutions. I see in this one that there are two negatives in it; the word refusal and rejected. Are we all sure or clear of what these people are allowed to have, what they want to have and what they are going to be able to have tomorrow morning?

**Councillor Rivard:** Alex, do you want to answer that?

**Alex Forbes, Planning Manager:** They are asking for Reconsideration which means that if Council wishes to and grant a Reconsideration, if you want to approve it that means to have a public meeting in the neighbourhood. By saying that I already refused the permit, you folks would be voting on this evening is if you reject it; you are rejecting sending this to a public hearing. They have other options available to them which I presume they will employ but the reality is that based on the last two public meetings held in that neighbourhood, from my point of view, I think I pretty well know what the neighbourhood thinks but that's up to you folks. The resolution tonight is if you want a public hearing or not. By rejecting the Reconsideration you are saying you do not want to go to a public hearing.

Regular Meeting of Council  
Verbatim Excerpt (11-13 Pine Dr.)

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September 12, 2016

**Deputy Mayor Duffy:** Your Worship, I just want to make it clear to approve a rejection is 'no'?

**Alex Forbes, Planning Manager:** Correct.

**Deputy Mayor Duffy:** Thank you.

**Mayor Lee:** Councillor Tweel

**Councillor Tweel:** Councillor Rivard, just want to ask with respect to the last two public meetings and this opportunity to go to a public meeting; is there any new information that the applicant has brought forward that would be vastly different than the two previous requests. Is there anything that is new, significant or outstanding?

**Councillor Rivard:** Thank you Councillor Tweel. The only thing significant is the amount of units that they are proposing. They went from a townhouse application and I think the first one was a 17-unit and then it went to a little denser townhouse with a different shape. Now they are looking to put up a 27-unit apartment building so it is growing in mass. The units are getting that much greater and yet the public opposed it when it was at 17 units.

**Mayor Lee:** I just want to note for the record that the motion is Moved by Councillor Rivard and Seconded by Councillor Coady.

**Councillor Rivard:** Your Worship, just to touch on Councillor Duffy's question. This is to reject and so he'd be in favour of rejecting.

**Deputy Mayor Duffy:** Yes.

**Mayor Lee:** All those in favour of the resolution. Those opposed.

**MOTION IS CARRIED 10-0**

**End of Excerpt**

(6) On October 3, 2016, Pine Cone filed a second notice of appeal with the Commission. It appealed the decision by Council on September 12, 2016. Pine Cone requested that both appeals be set for hearing together. The Commission agreed to this request.

(7) On November 4, 2016, the Commission received the record from the City. On November 8, 2016, the Commission informed the parties that it was available to hear the appeals on December 8 and 9, 2016. Unfortunately, legal counsel for the parties were unavailable. Accordingly, the Commission scheduled the matter to be heard on January 11 and 12, 2017 with the agreement of counsel.



(8) The hearing of both appeals began on January 11, 2017 and was expected to conclude the following day. However, Pine Cone requested an adjournment early in the morning of January 12, 2017 as its legal counsel was unable to attend. The Commission adjourned the appeal and the hearing of the matter concluded on the next available date, being February 7, 2017.

## 2. Testimony & Discussion

### Pine Cone's Position

(9) Pine Cone presented one witness, Trevor Bevan. Mr. Bevan has been involved in property management with Pine Cone since 2011, with particular emphasis on property development projects. Mr. Bevan testified that Pine Drive is a cross street that runs between Brackley Point Road and Mount Edward Road. The Property has a street frontage of 121 feet. Mr. Bevan presented as a capable witness and his evidence was helpful to the Commission.

(10) Mr. Bevan testified that Pine Cone acquired the Property in 2011 and was aware that the Property is zoned R3. Pine Cone acquired the Property with the intent of developing a new multi-unit apartment building. Initially, Pine Cone intended to build a 24 unit apartment building. However, Pine Cone later withdrew that application after the public meeting was held. Pine Cone then acquired provincial parcel number 393322, which is zoned R1 and located immediately to the west of the Property. Pine Cone submitted a new proposal for the development of both properties. There was considerable public opposition and, again, Pine Cone withdrew the application. The latest application by Pine Cone was for a 27 unit apartment building with underground parking. That application is the subject of this appeal.

(11) Mr. Bevan introduced Exhibit A6 at the hearing. Exhibit A6 contains photographs of various multi-unit residential buildings within the City of Charlottetown that are located adjacent to single family homes. This exhibit was reviewed closely by the Commission.

(12) Pine Cone did not present supporting evidence from a professional planner.

(13) Legal counsel for Pine Cone did, however, make detailed submissions to the Commission at the hearing. Counsel referred the Commission to the book of authorities filed on behalf of Pine Cone (Exhibit A3), which includes excerpts from the City's Zoning & Development Bylaw ("Bylaw"), various provisions from the **Planning Act**, and case law being relied upon by Pine Cone. While all submissions made by Pine Cone were heard and considered by the Commission, some of the highlights included:

- While Pine Cone appealed the original decision and the reconsideration decision by the City, its focus is on the original decision.
- Pine Cone's application for a 27 unit apartment building was "as of right" and the City's refusal to issue a permit is contrary to the Bylaw.
- The City's decision is arbitrary and based on subjective opinions rather than objective criteria.

- Any contrast between Pine Cone's proposed development and the existing neighbourhood is a consequence of the Bylaw and the Official Plan. The existence of two different zones on adjacent properties, R1 and R3, creates the disharmony. However, this dual zoning was done intentionally.
- The content of the Official Plan must be carried into, and expressed in, the Bylaw. A development proposal must therefore be assessed according to the requirements of the Bylaw and not the Official Plan.
- Pine Cone's proposed development of the Property is consistent with the Bylaw.
- Mr. Forbes from the City did not refer the application to the Planning Board under section 4.54.4(c) of the Bylaw. The fact that the application proceeded to Planning Board as part of the reconsideration process does not "cure" this missed procedural step because 4.54.4(c) is a mandatory requirement.
- The criteria set out in Bylaw sections 4.54.4(c), 4.54.6(f), and 4.62.3(a) are subjective when they ought to be objective.
- Bylaw section 4.54.6(f) speaks of architectural disharmony, but the scale and size of a building are not architectural features.
- Exhibit A6 illustrates how the subjective criteria in the Bylaw may be applied on an arbitrary basis.
- There is a distinction to be made between objective facts and objective criteria. Lot coverage and height are some examples of objective facts, but the case law says the criteria have to be objective.
- While no statement of compatibility was filed, it is the practice of the City that missing information will be requested if an application is believed to be incomplete. The City did not go back to Pine Cone and request a statement of compatibility for the current application, but they had done so in the past (Exhibit R1, Vol.1, Tab 21).
- Different planners will have different opinions when applying the subjective criteria set out in the Bylaw and, therefore, their opinions are also subjective and provide no protection against arbitrary decisions.

(14) Pine Cone requests that the Commission allow the appeal and order the City to issue the building permit.

### City's Position

(15) The City presented two witnesses, Laurel Palmer-Thompson and Alex Forbes. Ms. Palmer-Thompson is a professional land use planner and is employed by the City as a planning and development officer. Mr. Forbes is also a professional land use planner and serves as the City's manager of planning and heritage. The testimony of Ms. Palmer-Thompson and Mr. Forbes was presented at the hearing as a panel. It was helpful to the Commission.

(16) Ms. Palmer-Thompson has worked with the City's planning department for approximately 13 years. She testified about the two prior applications by Pine Cone for development of the Property. Neither application is the subject of this appeal. This evidence was therefore presented as background information only.

(17) Ms. Palmer-Thompson testified that the first application for a 24 unit apartment building was filed in 2012. The application proceeded to a public meeting where concerns were raised about traffic, property values, overpowering adjacent dwellings, and surface water drainage. Letters from concerned residents were also filed with the City. Ms. Palmer-Thompson testified that there was a great deal of public opposition. The application was withdrawn by Pine Cone before the matter could go back to Planning Board for consideration.

(18) Ms. Palmer-Thompson testified that the second application was filed in 2013, and it proposed a 19 unit townhouse development for the Property and the adjacent provincial parcel number 393322. This proposal also involved a request to re-zone the Property and provincial parcel number 393322 to the Comprehensive Development Area zone. A public meeting was held. The Planning Board recommended approval of this proposal, contingent on Pine Cone entering into a development agreement with the City. A draft development agreement was then prepared. Pine Cone had questions about the development agreement and requested that the proposal not proceed to Council for consideration.

(19) Mr. Forbes has worked with the City for approximately three and a half years. He testified that he took responsibility for Pine Cone's current application, which is the subject of this appeal. Mr. Forbes testified that he met with the principals of Pine Cone, reviewed the application, and discussed the matter with planning staff at the City. He was concerned that the application was in conflict with some of the policies expressed in the Official Plan. Mr. Forbes' letter to Mr. Bevan on June 28, 2016 (Exhibit R1, Vol.3, Tab 105) sets out those concerns.

(20) Mr. Forbes referred to section 1.3 of the Official Plan, noting that the Official Plan articulates policies which preserve existing residential low density neighbourhoods and ensures that new residential development is physically related to its surroundings. He also acknowledged section 3.1 of the Official Plan, which encourages efficient compact urban form while sustaining existing character and identity. Mr. Forbes also testified that, pursuant to section 3.2.2 of the Official Plan, moderately higher densities are encouraged so long as such initiatives do not adversely affect existing low density housing. To summarize, Mr. Forbes testified that the Official Plan requires new development to be physically related to its surroundings in order to be harmonious and to maintain the distinct character of the City's neighbourhoods.

(21) Mr. Forbes also testified that Pine Cone's proposal conflicts with sections 4.54.4(c), 4.54.6(f), and 4.62.3(a) of the Bylaw. He testified that a development officer at the City may refuse an application if the conditions in the Bylaw are not met. He also noted that the application did not contain a written statement with graphic descriptions that addressed the compatibility and integration of the proposed development with existing adjacent land uses, as required by section 4.62.2(c) of the Bylaw. Mr. Forbes stated that he refused the application on the ground of compatibility. He testified that he was not trying to prevent the exercise of Pine Cone's right to development.

(22) Ms. Palmer-Thompson testified that she did her own review of Pine Cone's application after the request for reconsideration was filed. Her report of September 6, 2016 (Exhibit R1, Vol.3, Tab 109) referred to section 4.30 of the Bylaw, which sets out the process for reconsideration. She noted that her report was based on a review of the application by Pine Cone as well as the grounds set out by Pine Cone in its request for reconsideration. She noted that Pine Cone based its request on section 4.30.3(c) of the Bylaw, which states:

*(c) there is a clear doubt as to the correctness of the order or decision in the first instance.*

(23) Ms. Palmer-Thompson characterized Pine Cone's proposal as an infill project. She testified that the role of planning staff was to ensure that the project fit into the existing neighbourhood. She testified that Pine Drive is an older, established, and stable residential neighbourhood. She testified that R1 zoning is adjacent to the Property, but also noted that there is some R2S zoning nearby, which allows for a mix of single family and semi-detached homes. She further noted that there is some R3 zoning some distance away on St. Peter's Road. Ms. Palmer-Thompson identified bulk, mass, and scale as factors that made it difficult for Pine Cone's proposal to fit into the existing streetscape. She also noted that Pine Cone did not file a written statement as required by section 4.60.2(c) of the Bylaw. Ms. Palmer-Thompson provided her September 6, 2016 report to Planning Board, who agreed with her recommendation to deny the request for reconsideration. The recommendation from Planning Board then went to Council for consideration. Council also agreed to deny the request.

(24) In her testimony, Ms. Palmer-Thompson reviewed the neighbourhoods represented in the photographs contained in Exhibit A6. These properties were distinguished from the Pine Drive neighbourhood.

(25) Under cross-examination, Mr. Forbes testified that Pine Cone, after filing the current application, was seeking to move the matter along and receive a decision. Pine Cone wanted a swift decision – a yes or no answer – and they did not want to go back to the public for input. Mr. Forbes determined, however, that he could not issue a building permit for the current project.

(26) Mr. Forbes also testified that the phrase "architectural disharmony" is broader than the phrase "architectural details." He also testified that some architectural designs can help to mask the bulk, scale, and size of a building. These design features relate to harmony and compatibility.

(27) Under cross-examination, Ms. Palmer-Thompson testified that planning staff at the City try to work with a developer (or their architect) in a collaborative way to try to make a project fit into an existing neighbourhood. She testified that her opinions on planning matters represent a professional opinion based on planning practices. Ms. Palmer-Thompson was candid and stated that she does not see any issues with respect to traffic. She noted that there was a traffic assessment done for one of Pine Cone's earlier applications and no concerns were raised. Ms. Palmer-Thompson also testified that concerns about property values require "good hard facts to back it up," such as appraisals. She noted that there were no such reports in this case and that this was not a legitimate concern. Ms. Palmer-Thompson testified that she was unable to speak about any surface water drainage issues because Pine Cone had not yet submitted a surface water drainage plan. Ms. Palmer-Thompson expressed her view that the calculation of lot coverage, the bulk, scale and massing of the project, and the height of the proposed building would overpower the existing streetscape on Pine Drive. Ms. Palmer-Thompson did state that she visited the Pine Drive area before completing her report to Planning Board.

(28) Counsel for the City filed a written submission with the Commission and presented oral argument at the hearing. While both were considered fully by the Commission, some of the highlights from oral argument included:

- Pine Cone's application was thoroughly reviewed by the City because it was initially reviewed and declined by Mr. Forbes and then went to reconsideration where it was reviewed by Ms. Palmer-Thompson, Planning Board, and Council.
- The City is not saying "no" to a multi-unit residential development on the Property; rather, the City is saying this particular proposal is not appropriate in light of the neighbourhood, the Official Plan, and the Bylaw.
- The purpose of the Bylaw is to implement the Official Plan. After the Bylaw is enacted, the role of the Official Plan is to inform the interpretation of the Bylaw.
- The Pine Drive neighbourhood is an established, stable, and low density neighbourhood featuring large lots. It is not a neighbourhood in transition.
- Bulk, scale, and mass are architectural considerations that are relevant when a professional planner is assessing architectural disharmony. In this case, two analyses were performed. Each was done by a professional planner. The assessments were neither arbitrary nor subjective. They were performed by professionals. Lot coverage, size, mass, bulk, building height, and shape of the lot are all objective criteria that must be considered.

- Pine Cone did not want to go to a public meeting. Rather, it wanted a swift "yes" or "no" decision from the City. As part of the reconsideration process, the decision did go before Planning Board and Council. Both confirmed the decision reached by professional planning staff employed by the City. From a pragmatic perspective, this "cured" any procedural irregularity because Planning Board did, in fact, ultimately review the matter. While Pine Cone may argue that it was initially deprived of due process, it encouraged that process by wishing to avoid a public meeting and seeking a swift decision from the City.
- In the most recent application, Pine Cone did not provide the City with a written statement regarding integration with adjacent land uses, contrary to the requirement set out in section 4.62(c) of the Bylaw.
- The reconsideration process is narrow in scope because there is a right of appeal to the Commission. The applicable ground requested by Pine Cone for the reconsideration was section 4.30.3(c). Ms. Palmer-Thompson's report addressed the reconsideration process and Council put its mind to the key issues when making this decision.

(29) The City requests that the Commission deny the appeals.

### 3. Findings

(30) After a careful review of the evidence, the submissions of the parties and the applicable law, it is the decision of the Commission to deny the appeals.

(31) No objection as to jurisdiction was raised by the parties, and the Commission finds that it has the necessary jurisdiction to hear both appeals under section 28(1.1) of the **Planning Act**.

(32) It is well-known and accepted that appeals under the **Planning Act** take the form of a hearing *de novo* before the Commission. The Commission may, and generally does, hear new evidence in addition to the record before the original municipal decision-maker. The Commission does have the power to substitute its decision for that of a municipality. However, the Commission does not lightly interfere with municipal decisions. That is especially true when a municipality has acted fairly, provided substantive reasons for its decision, and those reasons are animated by sound planning principles, the **Planning Act**, and the applicable bylaw or official plan.

(33) The Commission generally uses two questions as a guideline when exercising its appellate authority under the **Planning Act**. In the context of an appeal from a municipality, those questions are:

- Whether the City followed the proper process and procedure required by the Official Plan and Bylaw, the **Planning Act**, and the law in general, including the principles of natural justice and fairness, when making a decision on the application; and

- Whether the City's decision on the application has merit based on sound planning principles within the field of land use planning and as enumerated in the **Planning Act**, the Official Plan, and the Bylaw.

(34) There is agreement that the Property is zoned Medium Density Residential (R-3), and a 27-unit apartment building meets the technical conditions for that zone as set out in section 17 of the Bylaw.

(35) Pine Cone takes the position that, by meeting the technical requirements in the R-3 zone, it is entitled to a building permit for a 27-unit apartment building as of right. Pine Cone also takes the position that provisions of the Official Plan cannot be used to deny an as of right development. Pine Cone also takes the view that the provisions of the Bylaw being relied upon by the City are subjective and arbitrary and, therefore, cannot be used to deny an as of right development.

(36) The City does not share these views. It takes the position that the Property, although zoned R-3, is an example of spot-zoning, is an infill property within an existing neighbourhood, and that various provisions in the Official Plan extend additional protection to that surrounding neighbourhood. The City also takes the position that the application conflicts with several specific provisions of the Bylaw, namely sections 4.54.4(c), 4.54.6(f) and 4.62.3(a). In short, there is limited residual discretion vested in the City to deny approval even when a development is, on its face, as of right.

(37) Counsel for Pine Cone referred the Commission to three cases from Ontario and New Brunswick: *Steven Polon Ltd. v. Metropolitan Toronto Licensing Commission*, 1961 CarswellOnt 147 (H.C.), *Re R.K.A. Associates Ltd.*, 1973 CarswellNB 155 (S.C. (Q.B.)), and *Woodglen & Co. v. North York (City)*, (1983), 43 O.R. (2d) 289 (Co. Ct.), *aff'd* in (1984) 47 O.R. (2d) 614 (Div. Ct.). Counsel for Pine Cone also referred the Commission to paragraph 3.10 of *Canadian Law of Planning and Zoning*, Second Edition, which reads as follows:

*Later judicial pronouncements, however, have made it clear that an official plan, even after adoption and approval, is not effective to prevent development at variance with the plan in the absence of a zoning by-law giving effect to the use proposals. An Ontario plan has been held no more than a statement of intention of what at the moment the municipality plans to do in the future and is not an effective instrument restricting land use, and until it is implemented by by-law, it is only a recommendation.*

(38) In Prince Edward Island, the **Planning Act** does state that an official plan requires implementation in the form of bylaws. However, the legislation also goes further than mere implementation. Sections 15(1)(d), 15(2), and 16 of the **Planning Act** provide as follows:

15(1) *Following the approval of an official plan by the Minister*

...  
(d) *the council shall, as soon as is practicable, cause bylaws to be made to implement the official plan.*

15(2) *The bylaws or regulations made under clause (1)(d) shall conform with the official plan and in the event of any conflict or inconsistency, the official plan prevails.*

...

16 A council may make bylaws implementing an official plan for the municipality.

[emphasis added]

(39) These local statutory provisions must also be read in conjunction with s. 9(1.1)(b) of the **Planning Act**, which states:

9(1.1) Where

...  
(b) minimum requirements applicable to official plans pursuant to clause 7(1)(b) have; ...

been adopted, established or made, the land use policy of a council or the official bylaws of a municipality shall, subject to subsection 7(2), be consistent with them.

[emphasis added]

(40) By virtue of Order EC640/97, Executive Council adopted the *Minimum Requirements for Municipal Official Plans*. Among other things, these requirements state that:

3.0 *Official Plan*

...

3.3 The social, economic, physical and environmental objectives contained in the Official Plan should be measurable and as specific as possible. They should lend themselves to practical evaluation and interpretation. Very general statements should be avoided.

...

12.0 *Official Plans are Binding*

12.1 Official plans are binding on the Council, the Minister, residents and property owners within the municipality.

[emphasis added]

(41) It is well-established that the Legislature does not speak in vain and all provisions in an enactment are intended to have meaning. When read together, subsections ss. 9(1.1)(b), 15(1)(d), 15(2), 16 of the **Planning Act** and Executive Council Order EC640/97 combine to give legal effect to the Official Plan of the City. This local statutory matrix means that the Official Plan is binding upon the City, its residents, and land owners within the municipality. It also means that the Official Plan has legal effect even after the implementation of the Bylaw. Finally, it means that, from a hierarchical perspective, the Official Plan is paramount and the Bylaw must be consistent with the Official Plan. In the event of an inconsistency or conflict, the content of the Official Plan prevails. In summary, in Prince Edward Island, an official plan is not merely a recommendation. Rather, it contains binding legal content for municipalities and therefore must be considered together with the strict technical requirements



found in a zoning and development bylaw.

(42) The Commission finds that, in Prince Edward Island, official plans are binding on a municipal council, residents, and property owners. They form part of the body of municipal law in our province and, unlike some other jurisdictions, they are not exhausted upon the implementation of bylaws. Official plans in Prince Edward Island are not merely statements of intention. They continue to have legal effect, they inform the meaning and content of bylaws and, to the extent of any conflict or inconsistency, they will prevail. This conclusion is not only supported by the wording of the **Planning Act** and Executive Council Order EC640/97, but also the case law from the Commission.

(43) For example, in *O'Brien v. City of Charlottetown*, Order LA05-08, the Commission observed that, even in the context of an "as of right" development, the official plan is a consideration and its objectives must be satisfied by a municipal decision:

*[22] The Commission does not accept that the development is an "as of right" decision until the Official Plan has been considered. Had a decision been made that the development did in fact meet the objectives of the Official Plan, then the argument that it is an "as of right" decision carries more weight.*

...

*[24] The Commission therefore allows the appeal, in part, and while finding that the technical requirements were met, orders that the lot consolidation and subdivision decision be held in abeyance until such time as the Respondent has made a formal determination on whether or not it is in keeping with the Official Plan.*

[emphasis added]

(44) In *Lavoie v. Town of Cornwall*, Order LA12-01, the Commission considered the role of sound planning principles and an official plan in the context of an "as of right" development. The municipality and the Commission considered not just the bylaws, but also the official plan:

*[28] A development proposal, properly submitted and meeting the requirements of the appropriate bylaws, is considered an "as of right" development. It simply means the Developer has a right to develop if they have met the necessary legal requirements.*

...

*[32] The Commission, in considering an appeal from a decision of a community, first reviews the decision in terms of whether the appropriate process set out in the Bylaws, **Planning Act** and established laws were followed.*

...

*[40] A second level of test utilized by the Commission is the adherence to sound planning principles. Usually, if the proper process has been followed and the decision is in keeping with sound planning principles, the Commission is reluctant to overturn the decision of the municipal body which is elected by residents to make such decisions.*

[41] In this appeal the Commission takes comfort in the Official Plan and the Bylaws. It is clear that such type of development was contemplated at the time the Official Plan and the zoning was approved. The zoning and bylaws have been in effect for over eight years and this is not the only PURD zone in the community.

...

[51] The proposal meets all the requirements of the Bylaws. It can find root in the Official Plan.

[emphasis added]

(45) The Commission finds that this earlier case law supports its interpretation of ss. 9(1.1)(b), 15(1)(d), 15(2), and 16 of the **Planning Act** and Executive Council Order EC640/97. An official plan in Prince Edward Island, upon approval, has legal effect and is a relevant consideration for a municipality throughout the planning and development process. In other words, an official plan is not merely a recommendation or guideline in our province.

(46) In this case, while Pine Cone's proposed development for the Property met the technical requirements in section 17 of the Bylaw, the City was not satisfied it met other qualitative requirements in the Bylaw aimed at ensuring compatibility with the existing neighbourhood. In response, Pine Cone raised the case of *MacArthur v. Charlottetown (City)*, 2005 PESCTD 37 [*MacArthur*], as authority for the proposition that development criteria must be objective in nature. Paragraph 22 of the *MacArthur* decision reads, in part, as follows:

[22] Exactly the same conclusion may be reached when one examines s. 4.73 of the present bylaw. Although it contains a medley of events, circumstances, or things which "in the opinion of Council" constitute reasons for refusing any development, it is, in effect, a menu without detail. It leaves to the exclusive discretion of the members of City Council of the day the ultimate authority to deny any development which, in its opinion, falls into any of the myriad of things contained in s. 4.73. For example, the development might be inferior to the general standard of appearance prevailing or intended to prevail in the area. What does that mean? Where are the objective criteria for that statement? Likewise, the development might significantly, or permanently, injure neighbouring properties by reason of architectural disharmony. What does that mean? And what are the criteria by which it is judged? When the bylaw refers to such things as traffic generation, or noise, or vibration, then presumably there are some objective criteria for that. ... In my view, this section "Effectively transforms an authority to regulate by legislation into a mere administrative and discretionary power to cancel by resolution a right which ... could only ... be regulated."

...

[emphasis added]

(47) Since the *MacArthur* decision, the case law from the Commission has regularly emphasized to municipalities the need for objective decision-making and not exercises in subjectivity. Reliance has been placed on the assessments, opinions, and reports of trained professionals as opposed to the hue and cry of neighbours or politicians. For example, in *Biovectra Inc. v. City of Charlottetown*, Order LA11-01, the Commission stated at paragraph 61:

*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.*

[emphasis added]

(48) It is also worth noting that an as-of-right development was at issue in *Biovectra Inc. v. City of Charlottetown*. The Commission found at paragraph 66 that the development officer still held a measure of discretion to assess the application, provided that limited discretion was exercised in a manner consistent with the principles set out in *MacArthur*. The Commission also observed at paragraph 64 that "a distinction can be made between the mere whim of arbitrary discretion and the principled discretion of a well trained professional." [emphasis added]

(49) This point was also recently reiterated in *Marshall MacPherson Ltd. v. Town of Stratford*, Order LA16-05, where the Council failed to heed the advice of its professional planner that the development met all of the technical requirements of the Bylaws and was an appropriate development based on sound planning principles. The Commission stated at paragraphs 78 and 83 that objective evidence is necessary if an "as of right" development is going to be denied for reasons other than the technical requirements for a zone:

*(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.*

...

*(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.*

[emphasis added]

(50) Section 3.2.1 of the Official Plan is particularly relevant to this appeal. It contains criteria that are measurable, specific, and objective:

Our **goal** is to maintain the distinct character of Charlottetown's neighbourhoods, to enhance the special qualities of each, and to help them adjust to the challenges of economic and social transformation.

1. Our **objective** is to preserve the built form and density of Charlottetown's existing neighbourhoods, and to ensure that new development is harmonious with its surroundings.
  - Our **policy** shall be to ensure that the footprint, height, massing and setbacks of new residential, commercial, and institutional development in existing neighbourhoods is physically related to its surroundings.
  - Our **policy** shall be to establish an appropriate relationship between the height and density of all new development in mixed-use residential areas of existing neighbourhoods.

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

(52) Given that the Property is zoned R3, Pine Cone has a right to build a multi-unit residential building. However, in addition to meeting the technical requirements for the zone as set out in section 17 of the Bylaw, the development must also adhere to the Official Plan, the Bylaw as a whole, and sound planning principles. Lot coverage, scale, height, massing, and unique lot features must all be considered to ensure compatibility and architectural harmony with the surrounding neighbourhood, which is zoned R1 and consists of longstanding single family homes. These considerations must also be based on objective evidence and, in most cases, professional advice. In summary, there is a right to develop the Property; however, that right is not absolute.

(53) In this case, the Commission finds that the decision made by the City was based on objective evidence from planning professionals. The application submitted by Pine Cone was carefully evaluated by Mr. Forbes, and Mr. Forbes explained his rationale for refusing to grant a development permit. Those reasons were directly related to the Bylaw and the Official Plan. Ms. Palmer-Thompson performed a second evaluation of the application. It too was careful and provided a similar rationale for refusing this particular proposal. Ms. Palmer-Thompson's report was later considered and endorsed by Planning Board and, ultimately, by Council.

(54) Both Mr. Forbes and Ms. Palmer-Thompson are experienced professional planners, and the Commission finds their evidence to be credible and balanced in this case. Their evidence also finds legitimacy in the content of the Official Plan and reflects sound planning principles. Pine Cone did not call any contrary evidence from a professional planner and, based on the record before it, the Commission accepts the evidence of Mr. Forbes and Ms. Palmer-Thompson as it relates to land use planning and sound planning principles.

(55) Before leaving this subject, the Commission also notes that no challenge has been made by Pine Cone as to the validity of the Official Plan or sections 4.54.4(c), 4.54.6(f), and 4.62.3(a) of the Bylaw. Any such declaration would, as was the case in *MacArthur*, have to be granted by the Supreme Court of Prince Edward Island. Absent any such declaration, the Commission must apply the Bylaw and the Official Plan in their current form and interpret them in a purposive and contextual way.

(56) In addition to making decisions animated by sound planning principles, a municipal council is also obligated to provide reasons for its planning-related decisions. Reasons provide a justification to the public and the developer. They are also a critical part of any review by the Commission. In *Hanmac Inc. v. City of Charlottetown*, Order LA15-06, the Commission considered the decision of the Supreme Court of Canada in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, and stated at paragraph 41:

*[41] The direction from the Supreme Court of Canada is clear: a municipality must carefully evaluate an application, give reasons when refusing the application and municipal councillors "must always explain and be prepared to defend their decisions".*

[emphasis added]

(57) In this case, Mr. Forbes' letter of June 28, 2016 (Exhibit R3, Volume 3, Tab 105) refers to specific provisions of the Official Plan and the Bylaw. For example, it identifies section 3.2.1 of the Official Plan. The testimony of Mr. Forbes before the Commission was also consistent with the content of his letter.

(58) Ms. Palmer-Thompson's report dated September 6, 2016 (Exhibit R1, Volume 3, Tab 109) also provided an extensive review of the application and the various bases for the original decision made by Mr. Forbes. That report provided, in part, as follows:

*It is staff's opinion that these policies and objectives reinforce the Planner/Development Officer's rationale for rejecting the application for a building permit for a 27 unit apartment building at this location. It is clear that the Official Plan supports infill development within existing neighbourhoods. However, it also clearly states that infill development must be at a scale and density that would not cause adverse impacts to adjoining neighbours. A means of achieving this would be to design a building or buildings that are lower rise and that fit into the existing streetscape. In other areas of the City such as the 500 Lot area, new infill development is required to go through a design review process. Whereby the proposed design of buildings are reviewed by an independent consultant and the building design, bulk and scale are considered within the environment that it is to be constructed. Although the design review process is not required in this area of the City, the Planner/Development Officer would still apply similar principles when reviewing the site, massing, placement, bulk and scale of a development within an existing neighbourhood.*

*The Official Plan supports mixed forms of housing within existing neighbourhoods to allow for housing choices. Housing choices within neighbourhoods are important as they provide variety for people at various stages of their lives. Notwithstanding, it clearly states that new development must be physically related to its surroundings and that there should be an appropriate relationship between height and density for new development in existing neighbourhoods. "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."*

*Although 11-13 Pine Drive is zoned R-3 and typically an apartment building is considered an as of right use in this zone, an apartment building of this size, bulk, scale and density immediately adjacent to low rise single detached dwellings is not consistent with good planning principles. In respect to the streetscape it would be difficult for a building with this bulk, mass and scale to fit into the surrounding streetscape.*

[emphasis added]

(59) Ms. Palmer-Thompson's testimony before the Commission was also consistent with her report to Planning Board.

(60) The reasons provided by Mr. Forbes and Ms. Palmer-Thompson must be read together with the minutes of Planning Board and Council. As the Commission explained in *Atlantis Health Spa Ltd. v. City of Charlottetown*, Order LA12-02 at paragraph 23, "[w]hen Council follows Planning Board's recommendation, it may fairly be said that in so doing, Council is adopting the reasoning and analysis used by Planning Board." That principle is also applicable in this case. When the record is read as a whole, the Commission is satisfied that the City discharged its obligation to provide substantive reasons for its decision to refuse the application filed by Pine Cone.

(61) Reconsideration is a strategic decision made by a developer and may, in appropriate circumstances, result in a different outcome. However, reconsideration also provides an opportunity for a municipality to revisit its original decision and address any alleged deficiencies. In this case, Pine Cone decided to request reconsideration and, by doing so, the application was reviewed by a professional planner, Planning Board, and Council. All of this evidence was contained in the record filed before the Commission. No objection was raised by Pine Cone. When that evidence is reviewed and considered, the Commission is satisfied that Planning Board and Council evaluated the application fairly and in accordance with its Bylaw and Official Plan.

(62) The law recognizes that, in some cases, a subsequent hearing or reconsideration exercise may remedy or cure procedural defects in the original proceeding. Pine Cone argues that its initial application was required to be placed before Planning Board. The City, on the other hand, stresses that Pine Cone itself wanted a swift "yes" or "no" decision from the City and that, as part of the reconsideration process, the matter did go before both Planning Board and Council. According to the City, the practical effect of this process was to "cure" any procedural irregularity in the treatment of the application. The Commission recognizes that there will be cases where nothing less than full compliance with all procedural requirements at all stages of the development process will satisfy the duty of fairness in certain circumstances. However, in the context of this particular case, and the evidence before the Commission as to the history of this Property and the expectations of Pine Cone regarding this particular application, the Commission is satisfied that the City considered the proposal from Pine Cone in a fair and reasonable manner. After an independent review of all the surrounding circumstances, the Commission has decided not to interfere with the decision made by the City.

(63) For these reasons, the appeals are denied and the City's decisions on June 28, 2016 and September 12, 2016, which denied the application by Pine Cone for a building permit for the Property, are hereby confirmed.

#### **4. Disposition**

(64) An Order denying the appeals and confirming the City's decisions follows.

**IN THE MATTER** of an appeal by Pine Cone Developments Inc. of an appeal of June 28, 2016 decision of the City of Charlottetown to deny an application for a building permit and a September 12, 2016 decision of the City of Charlottetown to deny a request for reconsideration of said earlier decision.

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# Order

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**WHEREAS** the Appellant Pine Cone Developments Inc. appealed a June 28, 2016 decision of the City of Charlottetown to deny an application for a building permit and also appealed a September 12, 2016 decision of the City of Charlottetown to deny a request for reconsideration of said earlier decision;

**AND WHEREAS** the Commission heard the appeal at public hearings conducted in Charlottetown on January 11, 2017 and February 7, 2017 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 denied and the City of Charlottetown's decisions are hereby confirmed.

**DATED** at Charlottetown, Prince Edward Island, this 15th day of November, 2017.

### BY THE COMMISSION:

\_\_\_\_\_  
(Sgd.) J. Scott MacKenzie  
J. Scott MacKenzie, Q.C., Chair

\_\_\_\_\_  
(Sgd.) M. Douglas Clow  
M. Douglas Clow, Vice-Chair

\_\_\_\_\_  
(Sgd.) John Broderick  
John Broderick, 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.

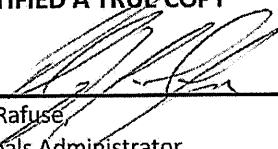
IRAC141AA(2009/11)



**Docket: LA19-015**  
**Order: LA20-04**

**IN THE MATTER** of an appeal by Jessie Frost-Wicks et. al., of a decision of the City of Charlottetown, dated September 26, 2019, to approve the rezoning of a property from R-2 (low density residential) to R-3 (medium density).

**CERTIFIED A TRUE COPY**

  
\_\_\_\_\_  
Phil Rafuse,  
Appeals Administrator  
Island Regulatory & Appeals Commission

**BEFORE THE COMMISSION ON** Wednesday, October 7, 2020.

J. Scott MacKenzie, Q.C., Chair  
M. Douglas Clow, Vice-Chair  
Erin T. Mitchell, Commissioner

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**ORDER**

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## **Appearances & Witnesses**

**1. For the Appellants, Jessie Frost-Wicks, et. al.**

**Witnesses:**

Jessie Frost-Wicks

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

**Counsel:**

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

**Witnesses:**

Laurel Palmer Thompson, City Planner  
Greg Morrison, City Planner

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

**Counsel:**

James C. Travers, Q.C., Stewart McKelvey

**IN THE MATTER** of an appeal by Jessie Frost-Wicks et. al., of a decision of the City of Charlottetown, dated September 26, 2019, to approve the rezoning of a property from R-2 (low density residential) to R-3 (medium density).

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## Reasons for Order

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### Overview

1. On September 26, 2019 the City of Charlottetown (the "City") approved an application filed July 16, 2019, by Weymouth Properties Ltd. (the "Developer") to rezone a vacant lot at 38 Palmers Lane, Charlottetown, PEI (PID #275156) (the "Property") from R-2 (Low Density Residential) to R-3 (Medium Density) to allow for the construction of a three-story, 18-unit apartment building (the "Application").<sup>1</sup>
2. A number of Charlottetown residents appealed the decision of the City to approve the rezoning, alleging that the decision was not based on sound planning principles, did not comply with the City's Official Plan and was not a *bona fide* exercise of discretion by City Council.

### Planning Department Recommends Against Public Meeting

3. On August 6, 2019, the City's planning department (the "Department") filed a ten-page report with the City's Planning Board.<sup>2</sup> The report was prepared by City planner Laurel Palmer Thompson ("Thompson"). Department staff recommended against proceeding to public consultation on the Application. In making its recommendation, the Department described, in part, the existing zoning within the current neighbourhood as follows:

*Zoning within this neighbourhood is R-2 consisting of low density single family and two-unit buildings to the west as well as on the opposite side of the street, in contrast to the two 2.5 storey (R-4) apartment buildings to the east, which then transition into the commercial properties (i.e. car dealer, real estate office) on St. Peters Road. The lot in question contained a single-detached dwelling which was demolished after 2010.*

4. In its report, Department staff highlighted various portions of the City's official plan, noted an increased demand in the City for housing, and stated that the vacancy rate within the City was "very low". However, in recommending against proceeding to a public meeting, the Department stated that the proposed rezoning would not provide a transition between the existing apartment buildings and low density uses and would result in a "shifting of a higher density residential zone further into an existing, low density mature neighbourhood", in conflict with the City's Official Plan:

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<sup>1</sup> Application dated July 16, 2019 – Record, **Tab 2**.

<sup>2</sup> Record, **Tab 2**.

*However, for this proposal the existing neighbourhood context must be considered. The majority of the neighbourhood is currently comprised of one and two unit dwellings to the west of the subject property as well as on the opposite side of the street. This is in, [sic] contrast to the two 2.5 storey apartment buildings on the east, which then transition into the commercial properties (i.e. car dealer, real estate office) on St. Peter's Road. The addition of a third, 3-storey 18-unit apartment building would result in a westward shift of the low-to-high density transition along Palmer's Lane. Rezoning the lot to R-3 would not provide any form of transition or buffer between the existing apartment buildings and low density uses. The proposed 18-unit building is larger than the existing 12 unit buildings therefore, the density would increase between the existing apartment buildings and low density uses. The decrease in zoning (R4-R3-R2) would actually result in the same hard transition that currently exists between the 12 unit building and the single detached dwellings to the west. However, it would now be one property further westward on Palmers Lane. The general practice in zoning to mitigate land use conflicts between higher density and lower density uses is to allow a transitional use such as town houses or semi-detached dwellings between low and higher density uses.<sup>3</sup>*

#### **Planning Board Recommends Public Meeting and Council Agrees**

5. Contrary to the Department's recommendation, Planning Board recommended that the Application proceed to a public meeting.<sup>4</sup> On August 12, 2019, Council agreed that the Application proceed to a public meeting.<sup>5</sup>

#### **Public Meeting and Resident Feedback**

6. The Application was presented at a public meeting on August 27, 2019.<sup>6</sup> A representative of the Developer made a presentation to Council and members of the public.<sup>7</sup> A number of residents attended and spoke against the Application.<sup>8</sup>

#### **Planning Department Recommendation**

7. On September 3, 2019, following the public meeting, the Department filed an eleven-page report with Planning Board recommending against rezoning the Property.<sup>9</sup> The Department noted that it had received seven letters opposing the Application and one in favour.<sup>10</sup> The Department reiterated many of its previous concerns<sup>11</sup> and suggested that a less dense town-house development is more fitting for the Property:

<sup>3</sup> Planning Department Report (Meeting Date August 6, 2019) – **Record, Tab 2.**

<sup>4</sup> Planning Board Meeting Minutes (Verbatim Excerpt) dated August 6, 2019 – **Record, Tab 2.**

<sup>5</sup> City of Charlottetown Resolution (Planning #3) dated August 12, 2019 – **Record, Tab 3.**

<sup>6</sup> **Record, Tabs 4 & 5.**

<sup>7</sup> Public Meeting of Council (August 27, 2019) Verbatim Minutes – **Record, Tab 5.**

<sup>8</sup> Ibid.

<sup>9</sup> This Report, like the August 6<sup>th</sup> report, was also authored by Thompson.

<sup>10</sup> Planning Department Report (Meeting Date September 3, 2019) – **Record, Tab 6.**

<sup>11</sup> Planning Department Report (Meeting Date August 6, 2019) – **Record, Tab 3.**

*Notwithstanding, the main issue remains to be the shifting of a higher density residential zone further into an existing, low density mature neighbourhood, which conflicts with the primary objective of Section 3.2 of the Charlottetown Official Plan which states that "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". Perhaps a more appropriate option for the site would be a town-house development that is less dense, is more fitting in mass & scale and provides a further transition between higher density development and low density development along the street.<sup>12</sup>*

8. The Department suggested that medium density residential development in the area "should be encouraged to be located towards the Commercial Corridor of St. Peters Road rather than into the interior of the existing neighbourhoods."<sup>13</sup>

#### **Planning Board Recommends Denying the Application**

9. On September 3, 2019, by a vote of six to three, and following a presentation by Thompson summarizing her report, Planning Board recommended to Council that the Application be rejected.<sup>14</sup>

#### **Council Decision and Discussion**

10. On September 9, 2019, Council rejected the recommendation of Planning Board and introduced a motion to approve the Application.<sup>15</sup>
11. The verbatim transcript from the meeting of Council totals four pages and includes discussion by two councillors. Councillor Tweel spoke against the Application and Councillor Rivard spoke in favour. In support of the Application, Councillor Rivard stated as follows:

*I don't want to get into an argument with Councillor Tweel but we talked about people lobbying and making an effort to lobby for votes; if I recall the floating dock there was a level of lobbying going for a floating dock that people opposed. From a planning perspective what Councillor Tweel is missing is that the Upper Prince Street application was actually forwarded from staff with the recommendation to not approve. This is very different; Planning staff felt that was a good project to take place and it was different. **The reason why I support this project, it wasn't easy and we have lots of information in our binders from Planning staff. There are pros and cons to this. There are parts of the Official Plan that this meets and doesn't meet. We are in a spot where we have a shortage of housing***

<sup>12</sup> Planning Department Report (Meeting Date September 3, 2019) – **Record, Tab 6.**

<sup>13</sup> Ibid.

<sup>14</sup> Planning Board Meeting Minutes (Verbatim Excerpt) dated September 3, 2019 – **Record, Tab 7.**

<sup>15</sup> City of Charlottetown Resolutions (Planning #1) dated September 9, 2019 – **Record, Tabs 8 & 9.**

***right now. My meter certainly flops the way of housing as it is something we desperately need in Charlottetown.***<sup>16</sup> [emphasis added]

12. On September 26, 2019, the motion to approve the Application passed second reading.<sup>17</sup>

### **Appeal to Commission and Request for Reconsideration**

13. On October 16, 2019, the Appellants filed this appeal with the Commission.
14. On October 22, 2019, the lead appellant, Jessie Frost-Wicks ("Frost-Wicks"),<sup>18</sup> filed a request for reconsideration of Council's decision. This request was denied by Council on December 9, 2019<sup>19</sup> and this matter was subsequently set down for a hearing on February 20, 2020, the first date that was acceptable to the parties.

### **Submissions from the Parties**

#### **The Appellants**

15. The Appellants raise three primary arguments against the decision by Council to approve the Application. They submit that the decision was not based on sound planning principles, was not compliant with the City's Official Plan, and was not made with a *bona fide* exercise of discretion.
16. The Appellants argue that the Application does not have merit based on sound planning principles. They argue that Council's focus on the "housing crisis" in the City is not the only factor in determining sound planning, but rather one of many relevant factors for consideration. The Appellants argue that the Official Plan addresses housing shortages and that this topic was considered by the Department in its reports to Planning Board and also raised at the public meeting. The Appellants argue that a severe housing shortage is "not a license to ignore the Official Plan, the advice of the trained professionals whom the City has hired to advise on these very issues, or the concerns of the citizens who live in the area."<sup>20</sup>
17. The Appellants also argue that the Application is contrary to the goals, objectives, and policies of the Official Plan. They state that the development will be a "further encroachment on what has historically been a low density residential neighbourhood" and will irrevocably change the neighbourhood's character. The Appellants argue that the proposal conflicts with the primary objective of section 3.2 of the City's Official Plan because it does not preserve the built form and density of the existing neighbourhood and is not harmonious with its surroundings.

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<sup>16</sup> The votes to reject the Planning Board recommendation and to approve the application each proceeded by way of a five to four split. Regular Meeting of Council (Verbatim Excerpt) dated September 9, 2019 – **Record, Tab 8**.

<sup>17</sup> Again by a five to four vote.

<sup>18</sup> A designation, signed by all of the Appellants, was filed with the Commission designating Frost-Wicks as their representative before the Commission. For ease, Ms. Frost-Wicks is referred to as Frost-Wicks or the "lead appellant".

<sup>19</sup> City of Charlottetown Resolution (Planning #3) dated December 9, 2019 – **Record, Tab 23**.

<sup>20</sup> Appellants' Written Addendum to Notice of Appeal (February 12, 2020) – **Exhibit A-1(a)**.



18. The Appellants also argue that Council ignored the expertise of the Department and suggest that the record is insufficient to indicate that the City engaged its own expertise to evaluate the Application. They further contend that the decision was arbitrary and made without consideration of all relevant factors. They argue that there has been no explanation as to how or why the decision was made, other than the reference to the "housing crisis". In doing so, the Appellants rely on a previous decision of the Commission, *Pine Cone Developments Inc. v. City of Charlottetown*,<sup>21</sup> and case law from the Supreme Court of Canada.<sup>22</sup>
19. The Appellants filed a lengthy notice of appeal and a number of addendums to the notice of appeal. Frost-Wicks testified before the Commission.

### The City

20. The City defends its decision on the basis that Council rendered its decision in a reasonable and informed manner, that the Application has merit based on sound planning principles, the Application has support in the Official Plan, and that Council appropriately exercised its discretion in approving the Application.<sup>23</sup>
21. The City argues that Council rendered its decision in a reasonable and informed manner. It argues that the councillors were provided with the relevant background information and "voted their conscience accordingly." The City argues that councillors are elected officials who vote based on the information before them and their own personal knowledge and beliefs.
22. The City states that there is cogent evidence to support the finding that the decision accords with sound planning principles, while recognizing that the housing shortage in the City was "plainly one of the main reasons" it approved the Application. The City states that there is a general obligation on Council to render decisions in accordance with good planning principles, the Official Plan and the Bylaw, but that there is no requirement that it must consider every factor considered by the Department or the Planning Board. In other words, the fact that Council did not specifically or expressly consider land use conflicts, transitions, buffer structures, or the concerns of residents does not mean that Council was not alive to those considerations. Instead, it "suggests that Council/Councillors considered other good planning principles (i.e. enabling an adequate supply of housing) as more relevant and important to this particular decision."
23. The City states that the decision of Council accords with its Official Plan and relies on various provisions of the Official Plan.<sup>24</sup> The City argues that the Application will maximize existing underground services and allow for a moderately higher density development that does not interfere unreasonably with the existing mixed use density neighbourhood.
24. The City contends that the decision of Council was an appropriate exercise of its discretion and was not arbitrary.<sup>25</sup> It was based on the reports from the Department, the recommendation from Planning Board, and the concerns of the residents.

<sup>21</sup> Order LA17-08 ("Pine Cone").

<sup>22</sup> *Congregation des temoins de Jehovah de St-Jerome-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48.

<sup>23</sup> City Written Submissions dated January 18, 2020 – **Exhibit R-2**.

<sup>24</sup> Including sections 3.1, 3.1.1, 3.1.2, 3.1.3, and 3.3.2.

<sup>25</sup> The City also relies on *Seanic Canada Inc. v. St. John's (City)*, 2014 NLTD(G) 7 at paras.51-53.

25. The City argues that it is not obliged to follow the recommendation of its staff. Relying on *Doiron v. City of Charlottetown*,<sup>26</sup> the City acknowledges that it should "always demonstrate, by discussion or in writing, their consideration of relevant evidence and the reasons attributed to their decision."
26. The City acknowledges that Council placed "significant emphasis on the 'housing crisis' in Charlottetown as part of their reason in allowing the rezoning application. The City argues that there is no single list of relevant factors that Council must consider in a rezoning decision, but rather Council must "intuitively weigh and weight all factors." Counsel for the City argued that, because all councillors attended the public meeting and listened to the concerns of residents, "it is reasonable to state that Council was alive/attuned to the issues and factors" the Appellants allege were not considered.<sup>27</sup>
27. The City urges deference by the Commission towards Council's decision and relies on a number of previous decisions of the Commission in support of this position.<sup>28</sup>
28. In support of its position, the City called two witnesses: Thompson, who was the City planner responsible for the Application and the author of the reports from the Department, and Greg Morrison ("Morrison"), who spoke about the City's process on reconsideration of the decision to approve the Application.

#### **The Developer**

29. Counsel for the Developer made brief submissions at the hearing before the Commission, reiterating the position of the City, stating that the Application meets sound planning principles, and pointing to the "housing crisis" in the City in support of its request that the appeal be denied.
30. The Developer did not call any witnesses in support of its position.

#### **Discussion and Analysis**

31. The Commission has considered the written and oral submissions of the parties, the record, and the oral evidence of Frost-Wicks, Thompson and, to a lesser extent, the oral evidence of Morrison. Weighing the admissible evidence is always a discretionary exercise that is undertaken carefully by the Commission, and it is also an exercise that is informed by the cases, provisions, and principles that apply to the particular municipal decision that is under review.
32. While the Commission has been asked to consider a number of different arguments for and against the City's decision, the Commission is satisfied that it can dispose of this appeal on primary basis that the City's decision does not meet its obligation of procedural fairness. Neither the relevant legal considerations nor their evaluation by Council are revealed upon review of the record delivered to the Commission by the City. In particular, the verbatim transcript, minutes, and resolutions from Council are insufficient to persuade the Commission that Council properly evaluated the Application. For completeness, the

<sup>26</sup> Order LA10-06 ("Doiron") at para.39.

<sup>27</sup> Ibid.

<sup>28</sup> *L & A MacEachern Holdings Ltd. v. City of Charlottetown* (LA08-04) and *Hanmac Inc. v. City of Charlottetown*, (LA15-06) ("Hanmac").

Commission will also address the issue of sound planning principles. It too is dispositive of this appeal.

### Reasons of Council to Justify Approval of the Application

33. A municipal council, such as the City, must provide reasons for its planning decisions. This principle is well-known to the City. For example, in *Pine Cone*,<sup>29</sup> the Commission explained that reasons assist the public and the developer to understand how and why a decision was made. Reasons also assist the Commission in fulfilling its appellate review responsibilities. Finally, reasons foster respect for public decision-making – whether by a municipal council or the Commission:

*In addition to making decisions animated by sound planning principles, a municipal council is also obligated to provide reasons for its planning-related decisions. Reasons provide a justification to the public and the developer. They are also a critical part of any review by the Commission.*<sup>30</sup> [emphasis added]

34. In *Hanmac*, a decision that pre-dates *Pine Cone*, the City denied a rezoning request, contrary to the recommendations of the Department and Planning Board. In discussing the Council's duty of procedural fairness in the context of denying a rezoning application, the Commission stated:

*A careful evaluation of Hanmac's application was given by the Planning and Development Officer and by Planning Board and these evaluations supported Hanmac's rezoning application. While Council is free to make a decision contrary to the recommendation of its staff and its Planning Board, as noted in Congregation, a municipality must undertake a careful evaluation of the application before it in order to meet the duty of procedural fairness. The verbatim minutes of July 14, 2014 persuade the Commission that there is insufficient evidence to support a finding that Council carefully evaluated the application before it. The Commission finds that the City did not meet the duty of procedural fairness as it failed to decide Hanmac's application on its merits.*<sup>31</sup> [emphasis added]

35. The City contends that it is not required to follow the recommendations of its planning staff or Planning Board. In support of this position, it relies upon the Commission's decision in *Doiron*. The Commission agrees that Council for the City is not bound to follow the advice of its professional staff or the recommendations delivered by its Planning Board. However, the Commission's guidance in *Doiron*, as relied upon by and set out in the City's written submissions in this case, is very clear. In rejecting a recommendation, Council must demonstrate sound planning reasons for doing so and its decision-making process should clearly demonstrate what factors were considered that support the final decision. That final decision must be rooted in planning principles:

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<sup>29</sup> *Pine Cone* at para.56.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Hanmac* at para.42.

*City Council is not bound by recommendations of their planning department. In fact, I believe that they have a public duty to not blindly follow submitted recommendations and to judge the validity of those recommendations. The Council is free to decide in the alternative but they should expect no less of their decision making process than they expect of the basis upon which a staff recommendation is made. **In rejecting a recommendation, they should demonstrate sound planning reasons for doing so, and if they wish to have the decision sustained on appeal then it should be clear in the City's decision making process that other factors were considered that support the final decision and give weight to the decision. As it is a planning matter, the final decision should be rooted in planning principles.***<sup>32</sup> [emphasis added]

36. The thread in *Hanmac*, *Pine Cone*, and *Doiron* is strong and plain to see: procedural fairness requires, and the Commission expects, that every municipal council provide sufficient reasons, based on sound planning principles, to justify its decision so that it can be sustained on appeal. The mere assertion of a single councillor that his meter "flops the way of housing" does not meet the standard set out in the case law from the Commission and cited by the City itself in this appeal. More is expected when an application has been the subject of a public meeting, when written submissions for and against the application have been received from members of the public, and when Council has received adverse recommendations from both their professional staff and Planning Board. Those recommendations are not binding and may be overcome; however, there must be sufficient information presented to the Commission to demonstrate a careful evaluation by Council and that the final decision was motivated by planning-related considerations.
37. Upon review of this record, and in particular the reasons for the impugned decision, the Commission finds that there is insufficient evidence to conclude that Council for the City properly evaluated the Application based on sound planning principles.

#### ***Public Meeting Attendance by Councillors***

38. The Commission wishes to address one particular argument advanced by the City, which was that the attendance of all councillors at the public meeting means that Council was alive to the issues raised by the Appellants.<sup>33</sup> Attendance at a public meeting by City councillors is not, on its own, evidence that the councillors have considered the relevant issues and made a final determination based on sound planning principles.
39. Attending a public meeting, and making a final decision on a development application that affects the rights and interests of a number of parties, are distinct functions. Both may relate to one application; however, they are different exercises. Attending a meeting is an opportunity for councillors to collect information and listen to parties that may ultimately be affected. A councillor is a public representative and a listener. No decision is made at this meeting. Making a final decision on a development application is something different. It is akin to a quasi-judicial function. Council must reach a conclusion that is based on the applicable law and the objective evidence that is contained in the record supporting the

<sup>32</sup> *Doiron* at para.39.

<sup>33</sup> City Written Submissions dated January 18, 2020 – Exhibit R-2.

particular application. It is not grounded in earlier or other applications. In summary, while attendance at a public meeting may very well inform a councillor's vote at the end of the day, it does not relieve a municipal council from its obligation to explain how and why it decided an application in a particular way.

### Sound Planning Principles

40. Based on the evidence before it, the Commission is not able to make a determination that the Application has merit and should be approved on sound planning principles.
41. As the Commission has frequently stated, it is reluctant to interfere with municipal decisions on the ground of sound planning where the decision is supported by objective and reliable evidence that confirms the decision is based on the applicable official plan and bylaw and sound planning principles.<sup>34</sup> In this case, missing from the record is sufficient objective and reliable evidence to persuade the Commission that Council for the City weighed all of the relevant factors and found that the Application met sound planning principles.<sup>35</sup>
42. The Commission is concerned with the argument advanced by the City – and, to a lesser extent, by the Developer – that the “housing crisis” is, in and of itself, a sound planning principle or an overriding principle in this case. When coupled with the City’s plea for deference to Council, this argument ignores, or at least minimizes, the body of planning law that has developed in this province and requires adherence to sound planning principles.
43. This is not to say that the availability of housing within the City is not an appropriate consideration for Council.<sup>36</sup> It is relevant. However, it is not an overriding principle capable of sustaining any or all development without regard to other relevant factors or sound planning considerations. The inquiry for Council is a contextual one.
44. The reports prepared by the Department speak to a number of sound planning principles and discuss a variety of relevant factors for consideration by Council. Professional staff at the City considered and analyzed a number of factors with respect to the Application. For example, the Department considered the development history of the Property,<sup>37</sup> compliance with the Official Plan,<sup>38</sup> the existing neighbourhood context,<sup>39</sup> potential for conflict between low and high density developments in the area,<sup>40</sup> and the demand for housing in the City.<sup>41</sup> Professional staff did not have one singular focus and properly so.

<sup>34</sup> See for example, *Queens County Condominium Corporation No. 40* (Order LA18-02, July 11, 2018) (“Queens County Condo”) at paras.39-45, where the Commission upheld a decision of the City to approve a site-specific bylaw amendment and determined that sound planning principles was supported by the record and evidence of the City planners.

<sup>35</sup> The Commission has frequently commented on the need for compliance with sound planning principles and provided examples of what constitutes sound planning. See, for example, *Queens County Condo*, *Biovectra v. City of Charlottetown* (Order LA12-06) and *Atlantis Health Spa Ltd. v. City of Charlottetown* (Order LA12-02).

<sup>36</sup> As discussed in the Department reports, housing availability is an objective set out in the City’s Official Plan and is, therefore, a relevant consideration for Council.

<sup>37</sup> Planning Department Report (Meeting Date September 3, 2019) at p.3– **Record, Tab 6.**

<sup>38</sup> *Ibid.* at pp.3-7.

<sup>39</sup> *Ibid.* at pp.6-7.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.* at pp.7-8.

45. Following consideration of these factors, the Department recommended denying the Application. Likewise, the verbatim transcript of the deliberations at Planning Board suggests to the Commission that its members turned their minds to the planning-related issues raised by the Department.<sup>42</sup> Planning Board agreed with advice from the Department and recommended denial of the Application.<sup>43</sup>
46. However, there was a concerning lack of discussion by Council about these planning-related factors when making its final decision on the Application. Putting aside the commentary about potential lobbying of councillors and other historical decisions by Council, the "housing crisis" appears to be the sole reason for not following the recommendation from Planning Board and approving the Application. That discussion was limited to just two councillors.
47. In contrast, the objective reliable evidence before the Commission related to sound planning principles was the expert planning opinion proffered by the City's own planning staff. Thompson testified before the Commission and authored the reports from the Department on the Application. Thompson's evidence supported the recommendation by the Department to Planning Board that the Application and proposed development was not appropriate for the neighbourhood because of the existing character of the neighbourhood and issues with respect to transitioning and buffering. Planning Board deliberated and followed the recommendation from the Department.
48. In summary, the bulk of the evidence with respect to sound planning before the Commission was derived from the City's own expert planner, Thompson. That evidence does not favour the City's position. Absent sufficient reliable and objective evidence to the contrary, the Commission is not able to make a determination that the Application has merit and should be approved based on sound planning principles.

### ***Evidence of Morrison***

49. The Commission briefly heard evidence from Morrison, who was the planner in the Department who reviewed and provided a recommendation regarding the Appellants' request for reconsideration. The Commission allowed this evidence at the hearing, but its usefulness was limited only to confirming the fact that a request for reconsideration was made and denied by Council. The Appellants did not attempt to appeal this decision. The Commission was also not asked to review this decision. As such, the evidence of Morrison has been given little weight by the Commission because it was not relevant to the Application or the decision under appeal and did not assist the Commission to decide the merits of this appeal.

### **Conclusion**

50. The appeal is allowed and the decision of the City to rezone the Property from R-2 (low density residential) to R-3 (medium density) is quashed.

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<sup>42</sup> The September 3, 2019 Planning Board minutes indicate discussion by councillors of the official plan, transition from low to high density developments, the need for housing in the area, and the character and height of the building.

<sup>43</sup> The motion to recommend to Council rejection of the Application was carried (six in favour, three opposed).

IN THE MATTER of an appeal by Jessie Frost-Wicks, of a decision of the City of Charlottetown, dated October 16, 2019, to approve the rezoning of a property from R-2 (low density residential) to R-3 (medium density).

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# Order

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**WHEREAS** the Appellants, Jessie Frost-Wicks et. al. appealed a decision of the City of Charlottetown to approve an application by Weymouth Properties Ltd. to rezone 38 Palmers Lane (PID #275156) from R-2 to R-3 to construct a three-story, 18-unit apartment building;

**AND WHEREAS** the Commission heard the appeal at a hearing conducted at Charlottetown, on February 20, 2020;

**AND WHEREAS** The Commission has issued its findings in this matter in accordance with the Reasons for Order issued with this Order.

**NOW THEREFORE** pursuant to the *Island Regulatory and Appeals Commission Act* and the *Planning Act*,

**IT IS ORDERED THAT**

1. The Appeal is allowed.
2. The September 26, 2019 decision of the City to rezone 38 Palmers Lane (PID #275156) from R-2 to R-3 to construct a three-story, 18-unit apartment building is hereby quashed.

**DATED** at Charlottetown, Prince Edward Island, Wednesday, October 7, 2020

**BY THE COMMISSION:**

(sgd) J. Scott MacKenzie

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J. Scott MacKenzie, Q.C., Chair

(sgd) M. Douglas Clow

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M. Douglas Clow, Vice-Chair

(sgd) Erin T. Mitchell

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Erin T. Mitchell, Commissioner





## NOTICE

Section 12 of the *Island Regulatory and Appeals Commission Act* reads as follows:

*12. The Commission may, in its absolute discretion, review, rescind or vary any order or decision made by it, or rehear any application before deciding it.*

Parties to this proceeding seeking a review of the Commission's decision or order in this matter may do so by filing with the Commission, at the earliest date, a written Request for Review, which clearly states the reasons for the review and the nature of the relief sought.

Sections 13(1) and 13(2) of the *Act* provide as follows:

*13(1) An appeal lies from a decision or order of the Commission to the Court of Appeal upon a question of law or jurisdiction.*

*(2) The appeal shall be made by filing a notice of appeal in the Court of Appeal within twenty days after the decision or order appealed from and the rules of court respecting appeals apply with the necessary changes.*