



**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

Order

Compared and Certified a True Copy

A stylized signature in blue 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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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.

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.

Reasons for Order

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

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

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

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

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.

Order

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)