



**Date Issued:** May 2, 2023  
**Docket:** LA22-013  
**Type:** Planning Appeal

**INDEXED AS:** New Homes Plus Inc. v. City of Charlottetown, 2023 PEIRAC 3 (CanLII)

**Order No:** LA23-03

**BETWEEN:**

New Homes Plus Inc.

**Appellant**

**AND:**

City of Charlottetown

**Respondent**

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## ORDER

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Panel Members:

J. Scott MacKenzie, K.C. Chair

Erin T. Mitchell, Commissioner

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Jessica Gillis  
General Counsel  
Prince Edward Island Regulatory  
and Appeals Commission

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## **Appearances**

**For the Appellant, New Homes Plus Inc.**

**Counsel:**

Iain McCarvill, Key Murray Law

**For the Respondent, City of Charlottetown**

**Counsel:**

David W. Hooley, K.C. and Maggie Hughes,  
Cox & Palmer

## 1. INTRODUCTION

1. This is an appeal of the decision of the City of Charlottetown (the “City”), dated July 11, 2022, to reject a rezoning request by New Homes Plus Inc. (the “Appellant”) to amend Appendix G – Zoning Map of the Zoning & Development Bylaw from Single-Detached Residential, Small (R-1S) to Single-Detached Residential, Narrow (R-1N) to permit the subdivision of 46 lots for single-detached dwellings on the remaining portion of land in Sandalwood subdivision, an extension of Mutch Crescent (PID#773051) (the “Property”).
2. The Appellant sought to rezone the parcel in order to subdivide the property into 46 narrow frontage lots to construct single-detached dwellings. The decision to reject the rezoning request, in effect, restricts the Appellant to subdividing the parcel into 29 lots, as is currently permitted in the Single-Detached Residential, Small (R-1S) zone.

## 2. BACKGROUND

3. On April 27, 2022, the Appellant submitted a Rezoning & Amendments Application, seeking to rezone the Property from R1-S to R1-N (the “Application”).<sup>1</sup> The proposed use of the Property was to remain as single-family residential.
4. On June 6, 2022, the Planning and Heritage Board (“Planning Board”) considered the Application and voted to recommend to Council that the request proceed to public consultation.<sup>2</sup> Council passed a resolution on June 13, 2022, to approve that the request proceed to public consultation.<sup>3</sup>
5. On June 14, 2022, the City sent notice of a public meeting, scheduled for June 28, 2022, to approximately 60 surrounding property owners located within 100 meters of the Property.<sup>4</sup> General notice of the public meeting also appeared in The Guardian newspaper on June 18, 2022.<sup>5</sup>
6. On June 28, 2022, the City held a public meeting to seek public input on the Application.<sup>6</sup> The meeting was well-attended by members of Council, with only Councillor Greg Rivard being absent. Some members of the Planning Board were also present. The public meeting included a presentation of the Application by City planner, Laurel Palmer Thompson, and the Appellant, Warren Doiron for New Homes Plus. Several members of the public attended the meeting and asked questions and made comments regarding the Application. The City also received approximately 14 written submissions from the public, the majority of which objected to the Application.<sup>7</sup>

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<sup>1</sup> Record filed by the City of Charlottetown, Tab 2. [Record]

<sup>2</sup> Record, Tab 5

<sup>3</sup> Record, Tab 8.

<sup>4</sup> Record, Tabs 9 and 10.

<sup>5</sup> Record, Tab 11.

<sup>6</sup> Record, Tabs 13 to 17.

<sup>7</sup> Record, Tab 18.

7. On July 4, 2022, the Planning Board met to consider the Application. Ultimately, the Planning Board voted 5-3 to recommend to Council that the Application be rejected.<sup>8</sup> This meeting will be discussed in more detail in the Analysis section of this Order.
8. At the regular meeting of Council on July 11, 2022, Council voted 7-1 to reject the Application.<sup>9</sup> This meeting will, similarly, be discussed in more detail in the analysis that follows.
9. The Appellant filed a Notice of Appeal on July 27, 2022, appealing the City's rejection of the Application.
10. The Appeal was heard by the Commission on December 15, 2022.

### **3. ISSUES**

11. The appeal raises two main questions for the Commission. First, the Commission must determine whether the City followed its procedure and discharged its duty of procedural fairness. Second, the Commission must consider whether the decision made by the City was one based on sound planning principles.

### **4. DISPOSITION**

12. For the reasons that follow, the appeal is allowed. The decision made by Council is quashed. The Commission orders that the Property be rezoned Single-Detached Residential, Narrow (R1-N).

### **5. POSITIONS OF THE PARTIES**

13. The Appellant raised three procedural issues with the City's decision:
  - i. That the City failed to provide written notice of its decision to the Appellant as required by the Bylaw;
  - ii. That written comments from the public were received and accepted by the City after the deadline set out in the public notice; and
  - iii. That the City failed to provide any or adequate reasons for its decision to reject the Application.
14. The Appellant also believes that the City's decision is not based on sound planning principles.
15. The City takes the position that all proper processes and procedures were followed and that no error was committed in rejecting the Application. The City argued that both the failure to provide written notice of the decision to the Appellant and the acceptance of public comments after the deadline are technical errors and that neither were prejudicial to the Appellant or affected the outcome of the Application.

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<sup>8</sup> Record, Tab 20.

<sup>9</sup> Record, Tab 21.

16. Further, the City says that on a review of the record as a whole, the reasons for Council's decision are clear and that the evidence demonstrates the decision has merit based on sound planning principles.

## 6. OVERVIEW OF EVIDENCE

### Appellant's Evidence

17. The Appellant provided two witnesses: Warren Doiron, the owner of New Homes Plus Inc., and Rob LeBlanc, Director of Planning at Fathom Studio.
18. In his testimony, Mr. Doiron provided some background information about the Sandalwood Subdivision and how it was developed over time. He described how it started with smaller single-family homes and eventually grew to include larger single-family homes. The subdivision has about 150 houses today. He testified that the majority of the houses in Sandalwood are a similar size to the ones he is proposing with the Application, the only difference being that they would be built on narrower lots.
19. Rob LeBlanc is a professional planner and was accepted by the Commission as an expert in land use planning. Mr. LeBlanc was retained by the Appellant to provide a professional expert opinion on the outcome of the requested zoning amendment Application.<sup>10</sup> His report concludes that the rezoning request is fair, warranted and in keeping with the intent of the Official Plan and the procedures set out in the Bylaw. For example, Mr. LeBlanc opined that the Application is consistent with the objectives and policies to contain urban sprawl at section 3.1 of the Official Plan, and to allow moderately higher densities in new development that is harmonious with its surroundings at sections 3.2.1 and 3.2.2 of the Official Plan. He also opined that the requested zoning amendment is consistent with good planning practice because it would promote housing variety and affordability. It would also reduce municipal maintenance costs while adding tax benefits and promoting the use of transit and active transportation.
20. Mr. LeBlanc's testimony was generally consistent with his report. He testified that this proposal makes more efficient use of the land while remaining as low-density residential, which is consistent with the Official Plan, its Future Land Use Map and the surrounding neighborhood. He testified that this proposal unequivocally has merit based on the Official Plan.
21. Mr. LeBlanc opined that present zoning is not a guarantee of future zoning, and that this is set out directly in the Official Plan at section 1.5.3. He testified that nothing in the Official Plan speaks to the percentage of completion of a neighborhood being a relevant consideration for a rezoning request.
22. Mr. LeBlanc's assessment and opinion were in accordance with the assessment and recommendation of the City's own professional planning staff.
23. The Commission is satisfied Mr. LeBlanc's evidence was relevant, reliable, and credible.

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<sup>10</sup> Expert Opinion Report of Rob LeBlanc, filed with the Commission on November 24, 2022. [LeBlanc Report]

### City's Evidence

24. Prior to the hearing, the City filed its record with the Commission. The record totaled one-hundred and sixty-nine (169) pages and included all Planning Board and Council meeting packages and agendas, as well as verbatim minutes of those meetings where this Application was discussed, including all public comments. The record also contained the Application itself, Planning Staff reports about the Application, written submissions from the public, and all correspondence between the parties in relation to the Application.
25. At the hearing, the City called two witnesses, being Alex Forbes and Laurel Palmer Thompson.
26. Alex Forbes is the Manager of Planning and Heritage for the City of Charlottetown. He was accepted by the Commission as an expert in land use planning. He testified regarding the general purpose of an official plan and its policies and how it is intended to guide future development. Mr. Forbes spoke to the report prepared by Planning Staff regarding this Application, and the table included in the report that sets out the Application's positives, neutral attributes and shortcomings. He testified that Staff try to outline in the planning report the issues that are significant in an application and that the decision-makers need to be aware of so that Council is well-informed.
27. On cross-examination, Mr. Forbes agreed that this development would not result in a significant increase in density; however, in his opinion, Council retains the discretion to decide that the status quo has equal merit to an application before it.
28. Laurel Palmer Thompson is employed as a planner with the City. She was accepted by the Commission as an expert in land use planning. Ms. Palmer Thompson was involved in the application process from the beginning and was the author of the Planning Staff report that recommended approval for the zoning request.<sup>11</sup>
29. The Planning Report prepared by Ms. Thompson and approved by Mr. Forbes is comprehensive and, as this Commission has come to expect from the professional planners at the City, a thorough review of the Application. She provided a complete analysis of the Property and surrounding lands including a brief history of the land development in the area over the past 20 years. She reviewed the present zoning, the current economic climate and the need for housing options. Her Report contains a review of a number of the objectives set out in the Official Plan (sections 3.1, 3.2 and 3.3) and the statement, "*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.*"<sup>12</sup>
30. The Planning Report speaks to the present housing crisis and the difficulty to acquire land in established neighbourhoods at reasonable prices and that this proposal would allow for 17 more narrow frontage lots for single-family homes. Ms. Palmer-Thompson addressed the concerns raised by the public. She set out the pros and cons of the rezoning application and provides the opinion that the rezoning R-1N (Narrow Single Detached Residential Zone ) will allow for 17 new single-family homes and that this is

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<sup>11</sup> Report of Planning Staff, Record, Tab 17.

<sup>12</sup> Report of Planning Staff, Record, Tab 17, pg. 82.

compatible with the existing R-1S Zone. The Report encourages Planning Board to recommend approval of the Application.

31. On cross-examination, Ms. Palmer Thompson agreed that the R-1N zone makes more efficient use of infrastructure and is compatible with the neighborhood as R1 zoning and that the Application has merit based on sound planning principles. However, she clarified that the existing zoning is also compatible and has merit based in sound planning. She commented that it is not a question of “best”, as both are compatible and both are supportable.
32. Both Mr. Forbes and Ms. Palmer Thompson testified that as professional planners, their role is to advise Council, while Council is responsible to make the final decision.

## 7. ANALYSIS

### Authority and Guideline

33. The Commission has the authority to substitute its decision for one made by a municipal council; however, the Commission does not lightly interfere with these types of decisions<sup>13</sup>. The Commission ought not to interfere with a decision merely because it disagrees with the end result<sup>14</sup>.
34. The parties agree that the guideline developed by the Commission for exercising its appellate authority under the *Planning Act* is applicable in this case. The guideline involves two main considerations:
  - Whether the municipal council followed the proper procedure as required by its bylaw, the Planning Act and the law in general, including the duty of procedural fairness; and
  - Whether the decision made by the municipal council has merit based on sound planning principles in the field of land use planning and as enumerated in the Official Plan and Bylaw.<sup>15</sup>
35. The Commission will generally be reluctant to interfere with a decision on the basis that it is not consistent with sound planning principles where that decision is supported by objective and reliable evidence. This evidence must come from planning professionals confirming that the decision is based on the *Planning Act*, the applicable official plan and bylaw, and sound planning principles.<sup>16</sup> The Commission will typically be deferential toward planning decisions by Council that are properly made.

### Procedural Issues

36. With respect to the procedural issues raised by the Appellant, the Commission accepts the position of the City that the failure to provide written notice of its decision to the Appellant, and the acceptance of public comments after the deadline, are technical

<sup>13</sup> Order LA22-07, *Landfest Company Ltd. v. Town of Stratford* at para 32. [*Landfest*]

<sup>14</sup> Order LA10-06, *Warren Doiron v. City of Charlottetown*, at para 15. [*Doiron 2010*]

<sup>15</sup> See, for example, *Landfest* at para 32; and LA17-02, *APM Construction Services Inc. v. Community of Brackley* at para 21.

<sup>16</sup> Order LA18-02, *Queen County Condominium Corporation No. 40 v. City of Charlottetown*, at para 41. [*QCC 40*]



- errors and did not prejudice the Appellant or substantively impact the City's assessment of the Application.<sup>17</sup>
37. First, while the Commission agrees that section 3.10.6 of the Bylaw does require the City to provide written notice of its decision to an applicant, the Appellant nevertheless received actual notice of the decision and did file an appeal with the Commission within the prescribed limitation period in the *Planning Act*. On cross-examination, Mr. Doiron testified that he spoke with Laurel Palmer Thompson some time after the meeting and learned the Application had been rejected. Ms. Palmer Thompson also testified that she spoke with Mr. Doiron after the meeting and communicated the City's decision that the Application was rejected. Despite this finding on these particular facts, the Commission encourages the City to follow section 3.10.6 of the Bylaw and provide written notice to applicants in a timely manner, even where verbal notice may have been given, in order to ensure procedural fairness and to safeguard applicants' appeal rights.
38. Second, while the Record demonstrates that the City did accept at least one letter from a resident after the deadline set out in the public notice, the comments in the letter were substantively similar to other issues and objections already raised by other residents. As such, the acceptance of this letter after the deadline did not unfairly prejudice the Appellant. Further, the deadline set by the City in the public notice is not prescribed by the Bylaw. The Commission accepts the submission of the City, supported through testimony of Laurel Palmer Thompson, that this deadline is an administrative one set by the City.
39. Finally, the third procedural defect advanced by the Appellant related to the adequacy of the reasons provided by Council. The Appellant argued that Council's reasons were deficient because a majority of Councillors who voted against the Application provided no reasons at all, and because the Councillors who did speak at both the Planning Board and Council meetings failed to demonstrate clear reasons for their decision.
40. The City has urged the Commission to review the record as a whole and consider that in rejecting the Application, Council was following the recommendation of Planning Board from its July 4, 2022, meeting. The City invoked prior comments of the Commission to say that when 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.<sup>18</sup>
41. However, in this case Planning Board made a recommendation to Council which was contrary to the recommendation of City Planning Staff. Where that happens, there is an added obligation on Council to demonstrate sound planning reasons for not following the advice of its professional planning staff.<sup>19</sup> Council's decision-making process should clearly demonstrate what factors were considered that support the final decision.<sup>20</sup> Council did not do so.

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<sup>17</sup> See, for example, *QCC 40*, at para 19.

<sup>18</sup> Order LA12-02, *Atlantis Health Spa v. City of Charlottetown*, at para 23. [*Atlantis Health Spa*]

<sup>19</sup> *Landfest*, at para 48; see also Order LA20-04, *Jessie-Frost Wicks et al. v. City of Charlottetown*, at para 35.

<sup>20</sup> *Landfest*, at para 48.

42. As the Commission has previously stated, “Reasons are sufficient when they explain why a municipal council arrived at its decision.”<sup>21</sup> When reviewing for adequacy or sufficiency, the Commission must consider the reasons given as a whole in the context of the application before council and with an appreciation for the type of decision made”.<sup>22</sup>
43. Upon review of the minutes as a whole, the Commission does not agree with the conclusions reached by Council. However, the Commission is satisfied that the minutes do set out the reasons why Council voted against the Application. Whether those reasons are grounded in sound planning principles is a separate and different question. In this case, the minutes of Council are sufficient in the procedural sense. The Appellant knows why the Application was denied. This ground of appeal, based on procedural error, is therefore not accepted by the Commission.

### Sound Planning Principles

44. Moving on to the second consideration under the Commission’s accepted guideline, it is well-settled that the Commission must be satisfied that the final decision made by Council was animated by sound planning principles.
45. In the Commission’s review, the minutes from the July 4, 2022, Planning Board meeting do not reflect planning-based reasons for departing from Planning Staff’s professional recommendation. Planning Board had the Planning Report before it and Ms. Palmer Thompson gave a summary of the report at the meeting. The Minutes show that the members were not alive to the issue before them and were sidetracked on the benefit of having sidewalks. Ms. Palmer Thompson advised that sidewalks were not a factor in the application before them. While there was some discussion dealing with the requested change to allow 17 more lots, only two members actually spoke to their rationale, and neither grounded their rationale in the Official Plan or sound planning-related concerns. It is of particular concern to the Commission that it was the Chair and Councillors in attendance at Planning Board who did not appear to understand their role and obligations in assessing the rezoning application. It was the lay members of Planning Board who followed the advice of the City’s Planning Professionals and voted to recommend approval.<sup>23</sup>
46. The Minutes of Council of July 11, 2022 show that the Councillors were unduly focused on the concerns of a small number of members of the public who live in the subdivision bordering the Property. Councillor Mike Duffy tried, to no avail, to get the Councillors to focus on the question before them. He spoke of his concern of receiving a rejection from Planning Board in light of a recommendation to approve by the professional planning staff for the City, who he described as very good, well educated and well trained who “know their work inside and out”. He questioned others reliance on letters from only 14 objectors, after public notification, when the area “is a fairly big subdivision”. He noted that some of their objections, such as speeding in the area is a police issue, not a planning issue and that the City Engineer determined that 17 new single-family homes would not compromise traffic volumes on the street. In dealing

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<sup>21</sup> Order LA17-08, *Pine Cone Developments Inc. v. City of Charlottetown* (November 15, 2017) at para. 56. See generally *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48 at para. 12.

<sup>22</sup> Order LA22-07, *Landfest Company Ltd. v. Town of Stratford* at para. 46.

<sup>23</sup> Verbatim Minutes re Mutch Crescent Extension, July 4, 2022, Planning and Heritage Board, Record, Tab 20.

- with comments of others suggesting that predictability and zoning should not change, Councillor Duffy also noted that some change should be expected. “There is always revamping and that’s why we have variances – minor and major.”<sup>24</sup>
47. The other Councillors who spoke at the meeting focused on the objection letters from the public complaining about the increase in the number of permissible lots. They did not discuss the Planning Staff Report or its findings. It must be noted that the minutes reflect that four of the seven councillors who voted to reject the Application did not speak to the motion whatsoever.
48. As recently stated by the Commission in Order LA20-04, the thread in prior Commission decisions 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. 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 recommendations from their professional staff to approve the application. Those recommendations are not binding and may be overcome; however, in saying that, the Commission's guidance is very clear: when rejecting a recommendation from Planning Staff, there is an added obligation on Council to clearly and methodically set out its own thought process and analysis.<sup>25</sup> Council should clearly demonstrate what factors were considered that support the final decision, and demonstrate sound planning reasons for doing so.<sup>26</sup>
49. To reiterate, the Appellant sought to rezone approximately 7.02 acres of land that will extend Mutch Crescent in the existing Sandalwood subdivision.<sup>27</sup> This will be the final phase of development in the subdivision, which began in the early 2000s. The land is currently zoned R1-S, as is the balance of the existing subdivision. The current zoning permits the Appellant to subdivide the property into 29 lots for single detached dwellings. The Appellant wants to rezone the property to R1-N in order to subdivide the property into 46 narrower frontage lots to construct single-detached dwellings.
50. The Appellant proffered expert opinion evidence from Mr. LeBlanc to support the position that the proposed rezoning is consistent with the policies and objectives of the Official Plan, that the R1-N zoning would be harmonious with the surrounding land uses, and that the main reason for Councillors’ rejection of the Application because the subdivision is nearly 75% developed is not a relevant planning consideration. In other words, the proposed rezoning has merit based on sound planning principles.
51. The City, for its part, contends that Council’s decision to reject the Application is grounded in sound planning. The City submitted that Council, in following the recommendation of Planning Board, did not fail to base its decision on sound planning, but rather based its decision on planning principles that are different than those underlying the recommendation of Planning Staff. The City submitted that Council’s decision is largely grounded in the concepts of reliability and predictability as articulated at section 3.2.1 of the Official Plan, as well as those Official Plan policies that encourage the preservation of neighbourhoods and public safety. The City also

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<sup>24</sup> Verbatim Minutes re Mutch Crescent, July 11, 2022, Council Meeting, Record, Tab 21.

<sup>25</sup> *Atlantis Health Spa*, at para 23.

<sup>26</sup> *Landfest*, at para 48; see also, *Jessie-Frost Wicks*, at paras 35-36.

<sup>27</sup> Report of Planning Staff, Record, Tab 17.

- submitted that the existing zoning of R1-S has merit, complies with Official Plan and Bylaw, and that the status quo was a reasonable alternative to the Application.
52. In this case, the recommendation from Planning Staff clearly demonstrates a thorough consideration of the applicable policies of the Official Plan as it relates to the proposed rezoning. Both Mr. Forbes and Ms. Palmer Thompson are experienced professional planners, and the Commission finds their evidence to be credible and balanced. Some highlights of Planning Staff's report include the advice that narrower lots allow for additional density which allows for more affordable housing products within this sought-after neighborhood and which would provide a benefit to the area.<sup>28</sup> The report also concludes that this proposal would make more efficient use of the land and underground services.
53. The evidence supports that Planning Staff were alive to the policies in the Official Plan requiring developments to not adversely impact existing low-density residential neighbourhoods. Nevertheless, Planning Staff recommended this Application be approved on the basis that it makes more efficient use of the land and that accommodating an additional 17 single detached dwellings is compatible zoning with the existing R1-S zone.<sup>29</sup> The conclusion in the Report finds legitimacy in the content of the Official Plan and reflects sound planning principles.
54. The expert opinion evidence from Mr. LeBlanc is consistent with the conclusions and recommendations from Planning Staff.
55. In contrast, of the three Councillors who spoke to the motion to reject the Application at the July 11, 2022, Council meeting, each gave reasons almost exclusively grounded in the expectation of nearby residents of "predictability" in relation to the existing R1-S zoning of the subject property because the subdivision is nearly 75% complete, without any reference to the objectives or policies of the Official Plan or other sound planning principles.<sup>30</sup> The minutes of the July 4, 2022, Planning Board meeting reflect a similar dearth of reasoning rooted in planning principles.<sup>31</sup>
56. The Commission is not persuaded that the "expectation" of nearby residents that the final phase of the subdivision would have 29 single-family homes instead of 46 single-family homes is a relevant planning consideration. Present zoning is not a guarantee of future zoning. Both the Official Plan and Bylaw expressly contemplate and allow for the process of rezoning, and neither speak to the percentage completion of nearby neighbourhoods as a consideration in that process. Further, neither the report of Planning Staff, the evidence of the City's professional planners, nor the expert evidence provided by Mr. LeBlanc, supports the conclusion that a subdivision being 75% complete is a relevant planning consideration for a rezoning request like this one.
57. At the hearing, the City relied on the majority reasons of the Commission in Order LA10-06, *Warren Doiron v. City of Charlottetown* as support for Council adhering to the "plan" earmarked for the neighbourhood, and argued that there is merit in that consistent approach.<sup>32</sup> However, that decision can be distinguished on the basis that

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<sup>28</sup> Report of Planning Staff, Record, Tab 17.

<sup>29</sup> Report of Planning Staff, Record, Tab 17, pg. 88.

<sup>30</sup> Verbatim Minutes re Mutch Crescent, July 11, 2022, Council Meeting, Record, Tab 21.

<sup>31</sup> Verbatim Minutes re Mutch Crescent Extension, July 4, 2022, Planning and Heritage Board, Record, Tab 20.

<sup>32</sup> *Doiron 2010*, at para 31.

- the application at issue in that case requested an amendment to the Official Plan and Future Land-Use Map (FLUM) from Low Density Residential to Medium Density Residential. In this case, the subject property will remain Low Density Residential. The Appellant is still seeking to build single-family homes, they will just be on narrower lots.
58. Section 1.4 of the Official Plan states that the FLUM is a concept plan providing a general interpretation of various future land-use activities within the City. Council's reliance on the expectations of residents as to the future use of the subject property as a reason to deny this Application may be more convincing if this foundational document were being amended. Certainty and predictability are more compelling arguments where land use will be significantly changed.
59. Finally, the City made submissions that the existing R1-S zoning of the subject property has merit in sound planning. However, the Commission has been clear on this point in the past: Council was voting for or against the Application made by the Appellant to rezone the property. The issue before Council for determination was not, as the City has argued, whether to maintain the status quo. The merits of the Application submitted by the Appellant had to be determined on its own based on sound planning principles.<sup>33</sup>
60. 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.<sup>34</sup>
61. In this case, it appears that Council was swayed by the subjective complaints of nearby residents that "enough is enough" and that building 17 additional lots in this subdivision would violate the expectations they had about future development when they purchased their homes.<sup>35</sup> The record does not demonstrate that Council's decision to reject the Application to rezone this property from R1-S to R1-N was based on sound planning rationale. Rather, the comments of one Councillor confirm their singular concern:<sup>36</sup>
- "We are not arguing traffic. Not arguing the safety piece even though they absolutely have those valid concerns. The point is predictability. It's the fact that they invested in something knowing what was going to be behind them and that is the reason why I am opposed to it."
62. In summary, the Commission is satisfied that Council made a substantive error when it based its decision on considerations other than sound planning principles.
63. Having received, considered and weighed the expert planning evidence given by Mr. Forbes, Ms. Palmer Thompson and Mr. LeBlanc, the Commission has sufficient evidence before it to decide the merits of this Application. In concert with reviewing and considering the policies of the Official Plan that apply to this rezoning request, the Commission finds that rezoning the Property to permit 17 additional single-family

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<sup>33</sup> *Landfest*, at para 54(a).

<sup>34</sup> Order LA 17-08, *Pine Cone Developments Inc. v. City of Charlottetown*, at para 47.

<sup>35</sup> Verbatim Minutes re Mutch Crescent, July 11, 2022, Council Meeting, Record, Tab 21.

<sup>36</sup> Verbatim Minutes re Mutch Crescent, July 11, 2022, Council Meeting, Record, Tab 21, at pg 126.

homes in this neighbourhood is consistent with the policies of the Official Plan and has merit based on sound planning principles.

### Remedy

64. The City made submissions that the Supreme Court of Canada in *Vavilov*<sup>37</sup> directs that where reasons are defective, the Commission is not to substitute its own reasons. The City invited the Commission to send the matter back to Council should the Commission find its reasons lacking in this case.
65. The Commission does not agree. 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 hear new evidence in addition to the record before the original municipal decision-maker. Whether by failing to follow its process, or not discharging its duty of fairness, or making a decision that is not grounded in sound planning principles, the Commission is not required to show deference to the decision made by a municipal council. The Commission does have the power to substitute its decision for that of a municipality.<sup>38</sup>
66. In the context of this case, the decision of Council is not one that deserves the Commission showing deference and remitting the matter back to City. The Planning Board and Council had the benefit of the advice of its own planning professionals. The underlying decision from the Council was made where it had an opportunity to review and consider advice from its planning professionals about the Application, Official Plan, Bylaws, and sound planning principles. The Commission has received the advice of a second expert in planning that supported the City's professional planners' recommendation to approve the rezoning. There would be no benefit to sending this matter back to Council. Therefore, this is a case where it is appropriate for the Commission to exercise its discretion and substitute its own decision for that made by Council.

## **8. CONCLUSION**

67. For the reasons above, the appeal is allowed and the decision of the Council is quashed. The Commission orders that the Property be rezoned Single-Detached Residential, Narrow (R1-N).
68. The Commission thanks the Appellant and the City for their submissions in this matter.

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<sup>37</sup>*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 96.

<sup>38</sup>*Charlottetown (City) v. Prince Edward Island (Island Regulatory and Appeals Commission)* 2013 PECA 10.

**IT IS ORDERED THAT**

The appeal is hereby allowed. The decision of Council is quashed. The Commission orders that the Property be rezoned Single-Detached Residential, Narrow (R1-N).

**DATED** at Charlottetown, Prince Edward Island, May 2, 2023.

**BY THE COMMISSION:**

*(sgd. J Scott MacKenzie)*

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J. Scott MacKenzie, K.C., 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.*

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