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

Docket: LA19-009
Order: LA20-05

IN THE MATTER of an appeal by Brown's Volkswagen et. al. of a decision of the City of Charlottetown dated June 21, 2019 to permit an Asphalt, Aggregate, and Concrete Plant and to insert a definition for that use under Appendix "A" Definitions

BEFORE THE COMMISSION ON Tuesday, December 15, 2020.

J. Scott MacKenzie, Q.C., Chair

M. Douglas Clow, Vice-Chair

Jean Tingley, Commissioner

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Philip J. Rafuse,
Appeals Administrator
Island Regulatory & Appeals Commission

ORDER

Contents

Appearances & Witnesses

1. **For the Appellants, Brown's Volkswagen et. al.**

Counsel:
Nicole M. McKenna, Carr, Stevenson & MacKay

Witnesses:

Jamie Brown

Tim Kember

Warren Phillips

Cathy Feener

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

Counsel:

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

Melanie McKenna, Cox & Palmer

Witnesses:

Alex Forbes

Robert Zilke

Laurel Palmer Thompson

REASONS FOR ORDER

1. This is an appeal of a June 21, 2019 decision by the City of Charlottetown (the "City") to enact an amendment to its Zoning and Development Bylaw (the "Bylaw") to permit a use for an Asphalt, Aggregate, and Concrete Plant and to insert a definition for that use under Appendix "A" (the "Amendment").[1] In practical terms, the Amendment would result in a permitted use for asphalt, aggregate, and concrete plants in the M-2 (Heavy Industrial) zone of the City.

PROCEDURAL HISTORY

2. This appeal was filed on July 9, 2019 by a number of businesses and residents of the Sherwood Road area.[2] The Appellants requested reconsideration by the City which, pursuant to the Bylaw, required the appeal to be held in abeyance by the Commission. The City declined to reconsider its decision. The City later filed the record with the Commission on August 5, 2019.

3. Following receipt of the record, the Appellants raised concerns with the extent of disclosure by the City. Following discussions between the Commission and the parties regarding disclosure, the Commission determined that a preliminary hearing was necessary to determine what additional documentation, if any, the City was required to provide the Appellants. That preliminary hearing was held on October 18, 2019 and the Commission issued an order on November 28, 2019, ordering additional disclosure by the City. Later, on December 12, 2019, the City filed a supplementary record with the Commission.

4. A number of hearing dates were offered to the parties by the Commission.[3] Following considerable back and forth with legal counsel regarding availability, and after the onset of the global COVID pandemic, the Commission held a public hearing – with COVID-19 restrictions in place – over the course of two and one half days on June 24-26, 2020.[4]

BACKGROUND

5. The Sherwood Road area of the City is located within the M-2 zone and has a recent history of efforts to develop an asphalt plant within its boundaries. Some – but not all – of this history is relevant to this appeal. However, it is important to note that this history, including significant public opposition to a previous

[1] Record, Tab 22.
[2] Brown's Volkswagen, Centennial Auto Group, Phillips Suzuki, and Cathy Feener (collectively, the "Appellants").
[3] Offers included the week of September 23, 2019, October 8-11, 2019, October 15-18, 2019, December 4-6, 2019 (unable to schedule due to preliminary hearing and subsequent procedural order), the week of March 2, 2020 (legal counsel for the City was unavailable in March and April); May 26-28, 2020 (rescheduled due to COVID-19 pandemic); and June 24-26, 2020.
[4] The parties also filed written submissions with the Commission. The Appellants filed a factum and book of evidence. The City filed a reply to the notice of appeal and additional written submissions in advance of the hearing.

application for an asphalt plant on the Sherwood Road, was well known to the City before the impugned Amendment was enacted.[5]

6. In February 2019, a developer advised a City planner, Laurel Palmer Thompson ("Thompson"), that he wanted to submit an application to develop an asphalt plant at 330 Sherwood Road.[6] Thompson told the City's manager of planning, Alex Forbes ("Forbes"), who advised her not to issue a permit. The developer did not file an application.

7. Forbes reviewed the Bylaw and decided that Council should provide direction to staff with respect to asphalt plants within the City.[7] Forbes directed a different City planner, Robert Zilke ("Zilke"), to prepare the Amendment, which was to be included with a series of other Bylaw amendments already underway.[8]

8. On March 4, 2019, the Amendment was introduced at a meeting of Planning Board. The report from planning staff was prepared by Zilke and reviewed by Forbes. The report stated that the planning department had received "either inquiries or applications" for two different land uses that were not specifically defined in the Bylaw, including an asphalt plant. With respect to the asphalt plant, the report stated in part:

> ***Asphalt, Aggregate, Concrete plant is proposed as both a definition and permitted use in the Heavy Industrial (M-2) Zone.*** *Historically, the City has approved such a use through the Discretionary use approval process that has been removed from the existing By-law. Due to substantial land use impacts this use can have on adjacent properties (i.e. noise, odour, dust),* ***staff is bringing this type of land use forward to Council for direction to determine if it should be included as a permitted use in the Heavy Industrial (M-2) Zone*** *… .* [9]

9. The Amendment was discussed at Planning Board, and Councillor Rivard sought clarification of the Amendment and the impacted location. A portion of his exchange with Zilke clarified that the Amendment was focused on the M-2 zone:

> ***Greg Rivard: Where does this location could be, so without knowing all the M-2 zones in Charlottetown? There is not many? The one that we are referring to here is off Sherwood Road****, but as you are well aware of the application last year was on the lower side of Sherwood Road. It was near the residential, light industrial and (unclear words). It was encouraged that the developers try to find something in the heavy industrial. It is over the M-2, it is across the road. It is next to, it is in behind, adjacent to (unclear*

[5] As confirmed by City Planning Staff during oral testimony before the Commission.
[6] Oral testimony of Thompson. See also email correspondence from D. Hooley to Forbes dated February 27, 2019 – Record, Tab 23.
[7] Oral testimony of Forbes.
[8] Oral testimony of Zilke.
[9] Record, Tab 2 [emphasis added].

> *words) the big parcel of property there. It is in deep in that. It is in the proper zone. But again, but when we removed asphalt plants from our Zoning and Development Bylaw together, they couldn't come with anything.* ***That's why we are doing this to be able to allow them to come forward. But by changing this, what we are saying, this is allowing a permitted use…***
>
> ***Robert Zilke: In any M-2 zone****…*
>
> ***Greg Rivard: In the M-2 zone, right? So as of right, it takes the decision making out of Council's hand. Does that make sense?*** *Before, it used to be a discretionary use as Robert said in the airport zone.*[10]

10. Planning Board recommended to Council that the Amendment proceed to public consultation.[11]

11. On March 11, 2019, Council approved a motion for the Amendment to proceed to public consultation.[12]

12. Notice of the public meeting was published in the Guardian newspaper on March 16, 2019 and March 23, 2019.[13] The notice addressed multiple planning matters at the City, including a number of site-specific rezoning or exemption requests for particular properties within the City, which included diagrams of these subject properties.

13. The portion of the notice at the heart of this appeal was set out in the fourth paragraph of the six-paragraph notice and reads as follows:[14]

> ***Amendments to the Zoning & Development Bylaw (Bylaw 2018-11)***
>
> *Proposed amendments to the Zoning & Development Bylaw pertaining to Housing Transitional Facility, Site regulations for Lodging Houses, Group Homes, Site Landscaping Requirements, Undersized Lot Regulations, Asphalt, Aggregate & Concrete Plant and General Housekeeping amendments.*

14. The public meeting was held on March 27, 2019.[15] One individual questioned why asphalt plants were previously removed from the Bylaw.[16] No written submissions were delivered after the public meeting.

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[10] Record, Tab 3 [emphasis added].
[11] Record, Tab 3.
[12] Record, Tab 5.
[13] Record, Tabs 4, 7, and 12 (p.11).
[14] Record, Tab 4 [Emphasis in original].
[15] Record, Tab 11.
[16] The report from planning staff dated April 1, 2019 states that a resident asked a question at the public meeting regarding why asphalt plants were removed from the Bylaw. On cross-examination, Zilke agreed with questioning that the individual who spoke appeared to be a resident of Stratford and not the City.

15. On April 1, 2019, Planning Board met to consider the recommendation by planning staff to approve the Amendment.[17] The staff report prepared for this meeting stated in part:

> *New Permitted Uses and Regulations Amendments*
>
> *Recently**, the department has received either inquiries or applications for two different land uses that are not specifically defined in the Zoning & Development (sic)**; Asphalt Plant and Transitional Housing Facility. The analysis for each is as follows:*
>
> ***Asphalt, Aggregate, Concrete Plant is proposed as both a definition and permitted use in the Heavy Industrial (M-2) Zone.** Historically, the City has approved such a use through the Discretionary use approval process that has been removed from the existing By-law. Due to substantial land use impacts this use can have on adjacent properties (i.e. noise, odour, dust), **staff is bringing this type of land use forward to Council for direction to determine if it should be included as a permitted use in the Heavy Industrial (M-2) Zone.** If so, then staff is also bringing forward Environmental Impact Assessment requirements for land uses that could potentially present a nuisance or could have a negative environmental impact … .*[18]

16. Planning Board deferred its decision to allow staff to meet with the provincial Department of Environment to discuss issues regarding environmental impact assessments.[19]

17. On May 6, 2019, Planning Board met again to consider the Amendment.[20] Planning staff raised provincial buffering requirements for asphalt plants at this meeting and advised Planning Board for the first time that it was likely that an asphalt plant would not be approved in the West Royalty Industrial Park (an M-2 zone).[21] City planning staff did not, however, recommend any changes to the Amendment. Planning Board recommended the Amendment for approval by Council.[22]

18. On May 13, 2019, Council met and recommended that the Amendment proceed to first reading.[23] The Amendment was read for the first time on June 10, 2019.[24]

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[17] Record, Tab 13.
[18] Record, Tab 12.
[19] Record, Tab 13.
[20] Record, Tab 14.
[21] Record, Tab 15. In other words, with the Amendment, the only remaining location for an asphalt plant would be the area of Sherwood Road.
[22] Record, Tab 15.
[23] Record, Tab 16.
[24] Record, Tab 18.

19. Council next considered the Amendment on June 10, 2019. At that meeting, Forbes had the following exchange with Mayor Brown with respect to the Amendment:

> ***Alex Forbes, PM:*** *Your Worship, regardless of the way we deal with it what needs to happen in the zoning bylaws is that* ***we need to provide clarity one way or the other because it is a permitted use or it should be a permitted use or not a permitted use but it should be clearly indicated in the bylaw one way or another. Some people are stating that they do have existing rights in the bylaw which is challenging but I disagree with them that there is any rights to have an asphalt plant*** *so from the staff point of view, it's just ideal – yes or no. Because it will set the future so there will be no lack of clarity in regard to what the City of Charlottetown wants to do with an asphalt plant.*
>
> ***Mayor Brown: Nothing in our zoning allows for an asphalt plant or concrete plant?***
>
> ***Alex Forbes, PM: Correct.***[25]

20. Following considerable debate, a motion was passed to defer first reading. Council wished to have more time to review the matter and possibly go to a public meeting.[26]

21. On June 14, 2019, Forbes sent an email to Council stating that he had received legal advice from the City's legal counsel and that they agreed that it would be "inappropriate" to hold a second public meeting regarding the Amendment because a public meeting had already taken place.[27] On the very same day, a special meeting of Council was scheduled for June 17, 2019 to consider the Amendment.

22. On June 17, 2019, the Amendment passed first reading by majority (6-4).[28]

23. On June 21, 2019, a second special meeting of Council was held. The Amendment passed second reading by majority (5-4).[29]

Arguments of the Appellants

24. The position of the Appellants is relatively straightforward. The public notice, and specifically the notice published in The Guardian newspaper on March 16, 2019,[30] does not meet the City's obligations under the *Planning Act*, the Bylaw, or the

[25] Record, Tab 18.
[26] Record, Tabs 18 & 19.
[27] Record, Tab 23.
[28] Record, Tab 20.
[29] Record, Tab 21.
[30] And again on March 23, 2019. Record, Tab 4.

common law. Given that proper notice is a condition precedent to Council's authority to act, this failure to give proper notice invalidates Council's decision to approve the Amendment.[31]

25. The Appellants argue that the City added a controversial and highly contested new use to the Bylaw that directly impacted the Sherwood Road area. It was also a permitted – as opposed to a discretionary – use. In effect, the Appellants submit that, by the Amendment, the City has allowed for asphalt, aggregate, and concrete plants to operate within the City and, in particular, in the area of Sherwood Road. In doing so, the Appellants argue that this significant change to the Bylaw was made without proper notice to affected persons.

26. The Appellants reject the City's contention that it was making a simple, neutral text amendment to the Bylaw. Rather, the Appellants argue that the City was well aware of prior opposition to an application for an asphalt plant on the Sherwood Road and created a way to permit an asphalt plant in the M-2 zone "as of right" and without meaningful notice to, or participation by, residents in the area.

27. The Appellants dispute the City's position that the notice was sufficient, arguing that four words in a lengthy newspaper notice, dealing with multiple matters, does not constitute proper notice in this case.

28. The Appellants urge the Commission to focus on the text of the notice and specifically the fact that nowhere in the notice does it identify any affected area (or the relevant zone). The Appellants also observe that the notice does not mention that the effect of the amendment is to add asphalt plants to the permitted uses that can be constructed in the M-2 zone. The Appellants point to the following words in the notice:

> *Proposed amendments to the Zoning & Development Bylaw pertaining to Housing Transitional Facility, Site regulations for Lodging Houses, Group Homes, Site Landscaping Requirements, Undersized Lot Regulations, Asphalt, Aggregate & Concrete Plant and General Housekeeping amendments.*

29. The Appellants rely, in part, on the oral evidence of Zilke, the City planner who drafted the notice. The Appellants argue that Zilke described the nature of the bylaw amendment as being to add a permitted use in the M-2 zone for an Asphalt, Aggregate, and Concrete Plant. According to the Appellants, the public notice in the newspaper should have at least stated the nature of the Amendment as had been succinctly described by Zilke.

30. The Appellants argue that the City's position in support of the notice is practically illogical and would allow the City to issue public notices consisting of a single word. The Appellant characterizes the test for proper notice as being an objective one:

[31] Appellants' Factum, paras. 105-106.

would the average person reading the advertisement know the nature of the bylaw amendment and that they would be impacted by the amendment?

31. The Appellants also rely on a decision of the British Columbia Supreme Court in *Kelowna (City) v. Kharuna*.[32] They argue that the City purposely grouped the Amendment with "housekeeping" amendments which, in effect, masked the true nature of the Amendment from members of the public.

32. The Appellants caution the Commission against relying upon the expertise of Zilke or Forbes with respect to the sufficiency of the notice, arguing that their expertise is in land use planning. In this instance, they are not impartial, independent, or unbiased. Rather, they are defending their own actions in drafting and issuing the notice. The question of whether the notice satisfies the *Planning Act* is, according to the Appellants, one that falls to the Commission to answer on appeal.

33. The Appellants also contend that the City failed to follow the notice procedure set out in section 3.10.4 of the Bylaw in that the notice did not identify the subject lot. In addition, the Appellants argue that the City did not post a copy of the notice in a conspicuous place on the subject lot.[33]

34. Finally, the Appellants argue that the City failed to comply with its common law duty of procedural fairness[34] and that the Amendment is inconsistent with the City's official plan.[35]

Arguments of the City

35. The City argues that it met the requirements of section 18(1) of the *Planning Act* in publishing the notice.[36] The City argues that the nature and content of notice for a "text amendment" differs from site specific amendments, and its sufficiency "ought to be determined solely by satisfying the express requirements of the [*Planning*] *Act* (and bylaw)".[37] The City argues the fact that the Appellants did not see the notice is not the appropriate test.

36. The City also argues that sometimes more information is not as good as concise information. It argues that it made "huge" amendments to the Bylaw in a big package. The notice was intended to alert the reader that, if they had an interest in the Bylaw, to visit the City's website for more information. The City contends that it would be impossible to give a detailed reference to everything and that the *Planning Act* only requires the nature of the amendment to be described in general – not specific – terms.

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[32] 2018 BCSC 392 [*Kelowna*].
[33] Bylaw, ss.10.4(b) and (d). See Appellants' Factum, paras. 142-159.
[34] Appellants' Factum, paras.160-208.
[35] Appellants' Factum, paras. 209-223.
[36] City Written Submission filed August 1, 2019.
[37] *Ibid*.

37. As noted above, the City contends that the notice meets the requirements of the *Planning Act* and the Bylaw. In support of that contention, the City takes a broader view of the wording in the notice than the Appellants. The City focuses on thirteen words – not four:

> ***Proposed amendments to the Zoning & Development Bylaw pertaining to*** *Housing Transitional Facility, Site regulations for Lodging Houses, Group Homes, Site Landscaping Requirements, Undersized Lot Regulations,* ***Asphalt, Aggregate & Concrete Plant*** *and General Housekeeping amendments.*

38. The City urges the Commission to adopt this broader view and, in doing so, it will see that the notice tells residents that the City is making amendments to the Bylaw "pertaining to Asphalt, Aggregate, and Concrete Plants."[38]

39. Counsel for the City asks the Commission to consider what was happening with respect to the Amendment. He notes that a developer was arguing with the City that he could erect an asphalt plant in the M-2 zone as-of-right. Counsel notes that the Bylaw formerly permitted asphalt plants as a discretionary use in the Airport zone before the Bylaw was amended and this discretionary use was removed during a recent review. Counsel argues that the amendment was a neutral text amendment and merely a "clarification" of what Council intended to be a permitted use in the M-2 zone. In his submissions, counsel posed the following question to the Commission: where else would you put it? Of course, that question presupposed that the very first questions – do you put it back into the Bylaw and, if so, as a discretionary or permitted use? – were already answered in the affirmative.

40. The City also argues that there is a lot of pressure from developers and residents for planning decisions. The City packaged this amendment with a number of others in the interest of serving the public and getting things done. As counsel for the City explained, people expect things to happen and do not want to be held up forever in the "quagmire of the bureaucracy." Counsel for the City asks, if the City had added "M-2 zone" to the notice, would it have changed anything? In his submission, there was enough, in a general way, to alert residents that there were amendments pertaining to "asphalt, aggregate, and concrete plants."[39]

41. Finally, the City argues that it met the procedural notice requirements of the Bylaw. In addition, the City relies on *Souris (Town) v. Jarvis*[40] for the proposition that the

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[38] City Written Submission filed August 1, 2019, p. 6. The notice in question did not reference "Plants", but rather "Plant" [emphasis added]. Nothing really turns on this pluralization by counsel for the City; however, it does lend support for the view that the notice was not reasonably clear as to its purpose (or nature). It cannot reasonably be argued that a reader of the notice would be informed that the Amendment was adding a definition, introducing a permitted use, and directing both items to a particular zone or area of the City.

[39] *Ibid.*

[40] 2009 PESC 35.

passing of a zoning bylaw is a legislative function and, as such, so long as the City meets its statutory requirements, there are no additional common law requirements of procedural fairness.[41]

DECISION

42. The Commission is not tasked in this appeal with determining whether or not asphalt, aggregate, and concrete plants should be in the City or whether or not they should be permitted uses in the M-2 zone. The merits of an asphalt plant within the boundaries of the City, the consequences to surrounding residents and the City generally, and the proper scope of provincial guidelines for the environmental impact of asphalt plants are but a few examples of the matters to be weighed and debated within the Council chamber by the elected members of Council. They are not, however, relevant to this appeal. The focus of this appeal is the Amendment.

43. The issue that the Commission must decide is very narrow. In this particular case, did the City give proper notice of the public meeting to residents as required by law? The Commission finds that the City did not. The reasons for that finding follow.

44. Both parties agreed that the notice in this case had to comply with section 18(1) of the *Planning Act*. Section 18(1) reads as follows:

> *18(1)* ***Before making any bylaw the council shall***
>
> *(a) give an opportunity to residents and other interested persons to make representations; and*
>
> (b) *at least seven clear days prior to the meeting,* ***publish a notice in a newspaper circulating in the area indicating in general terms the nature of the proposed bylaw*** *and the date, time and place of the council meeting at which it will be considered.*

45. This appeal therefore turns on the interpretation of the statutory requirement for the notice to "indicat[e] in general terms the nature of the proposed bylaw." The provision, as interpreted, must then be applied to the record before the Commission in this particular case.

46. This interpretative exercise requires the Commission to examine the text, context, and purpose of the notice requirement set out by the Legislature in s. 18(1) of the *Planning Act*. The text makes it clear that the provision is intended to give residents and other interested persons an opportunity to make representations before a bylaw is made. In order to ensure that the opportunity is meaningful or tangible, council is required to publish a notice indicating, in general terms, "the nature of the proposed bylaw" together with the details of the meeting when it will be considered. The nature of the bylaw must, therefore, be set out by council in

[41] City Written Submission filed August 1, 2019, p. 4.

general terms so as to result in residents having an opportunity to participate (if they choose to do so). The context of this notice requirement is revealed upon examination of the legislation as a whole. Section 2(e) of the *Planning Act* states that one of the specific objects of the statute is "to provide the opportunity for public participation in the planning process." This statutory insistence upon public input is also found at other critical stages of the planning process, including the development of official plans,[42] interim planning policies,[43] bylaws,[44] and development charges.[45] Finally, the very purpose of notice is to give persons sufficient information about a particular subject so that they can make an informed decision whether to participate and, if they do decide to participate, to do so in a meaningful way. Notice is, therefore, intended to facilitate public participation in the planning process.

47. After analyzing the text, context and purpose of section 18(1) of the *Planning Act*, the Commission finds that the appropriate measurement for proper notice was set out by the Appellants in their written submissions[46] and grounded in the decision in *Peterson v. Whistler (Resort Municipality)*,[47] which states:

> *Next, one must consider the requirements in the statute as to notice and their purpose.* ***The notice is not required to set out the provisions of the by-law, but its intent in general terms. A major part of its purpose is to inform those citizens of the municipality who might reasonably be deemed to be affected*** *by the proposed re-zoning, including owners and occupiers nearby, of what the intent of the by-law is* ***so that such persons, average citizens, may come to an informed conclusion as to whether to attend or take part in representations at the public meeting. They are to be informed within reason as to the extent, if any, to which the by-law might affect them, so that they might reach a conclusion as to whether to seek further details*** *by perusing the by-law and the like. It is essential for the citizen in question to be informed of the intent of the by-law.*

48. When determining whether the notice in this particular case was adequate, the Commission must consider whether the average citizen would have, upon reading

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[42] *Planning Act*, ss. 11(1)&(2).
[43] *Planning Act*, s.10(3).
[44] *Planning Act*, s.18(1).
[45] *Planning Act*, s. 20.1(3).
[46] Appellants' Factum, paras. 115-116.
[47] 1982 CanLII 710 (BC SC) at para. 42 [*Peterson*] [emphasis added]. Appellants' Factum, Tab 3. In *Peterson*, the relevant statutory provision required the notice to "state in general terms the intent of the proposed bylaw." See *Peterson* at para. 44. See also *Kelowna* at para.15, citing *Great Canadian Casinos Co. v. Surrey (City)*, 1999 BCCA 619 at para. 10 [*Great Canadian Casinos*], which noted that the statutory language had been revised since *Peterson* to change "intent" to "purpose" (consistent with s.18(1) of the *Planning Act*). In *Great Canadian Casinos*, the British Columbia Court of Appeal determined that this statutory amendment of "intent" to "purpose" did not affect the statement in *Peterson*.

the notice, been reasonably notified of the purpose (or nature) of the Amendment.[48]

49. The *Kelowna* decision relied upon by the Appellants is not determinative of this appeal, but it is instructive and helpful. In *Kelowna*, proposed bylaw amendments initiated by the municipality imposed additional restrictions on the defendant's property. The municipality advertised the proposed bylaw amendments as "housekeeping" amendments.

50. The British Columbia Supreme Court reviewed the advertisement to determine if it provided adequate public notice. In doing so, it stated that the "whole of the notice must be read in conjunction with the proposed bylaw."[49] In finding that "housekeeping" was the descriptive term for the purpose of the bylaw, the court found that the notice did not permit the average person to conclude that they should attend the public hearing because the amendments may affect them. The court held that "the essence of the notice requirement is that the content must be such that **a meaningful and informed decision can be made by those affected** by the proposed changes."[50] The court went on to state:

> *The City argues that the number of people who attended the first public hearing is an indication that the notice was sufficient. However, reliance on the number of people who attended the meeting brings a subjective element to the analysis.* ***The assessment of the adequacy of the notice is an objective analysis. An objective analysis leads to only one conclusion: the notice did not adequately state the purpose of the bylaw. The intent was to change the bylaw in substantial ways – not just for housekeeping purposes.***[51]

51. In light of this judicial guidance, what then is the nature (or purpose) of the Amendment? It is as described by the City itself. In their reports to Planning Board, planning staff explained that the purpose of the Amendment was to add a new permitted use for asphalt, aggregate, and concrete plants in the M-2 zone.[52] On cross-examination, Zilke, the drafter of the Amendment and the notice, was questioned at length as to his understanding of the purpose of the Amendment. He agreed that the nature of the Amendment was to permit asphalt plants in a particular zone, that the amendments included a permitted use, an environmental impact assessment and a definition of "asphalt, aggregate, concrete plant," and that this information was not included in the notice:

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[48] *Great Canadian Casinos* at paras. 10-11. See also *Kelowna* at para. 16.
[49] *Kelowna* at para. 17.
[50] *Kelowna* at para. 22 [emphasis added].
[51] Kelowna at para. 21 [emphasis added].
[52] It is not, as set out in the text of the Amendment itself, simply "to amend the City of Charlottetown's Zoning and Development Bylaw provisions to permit an Asphalt, Aggregate and Concrete Plant and insert a definition for said use under Appendix A. Definitions." See Record, Tab 22.

> ***Nicole McKenna:*** *No. So this morning I asked you what the nature of the proposed bylaw amendment was and you said it was to add a permitted use in the M2 zone for asphalt, aggregate and concrete plants - and that's not stated anywhere in this advertisement is it?*
>
> ***Robert Zilke: That specific reference is not stated.***
>
> ***Nicole Mckenna:*** *OK. And we agree that that's the nature of the bylaw amendment, is that right?*
>
> ***Robert Zilke:*** *Well, I would say that the nature of the bylaw amendment was again to permit for asphalt – like asphalt, aggregate and concrete plants so there was a multiple amendments such as permitted use, EIA and then the definition.*
>
> ***Nicole McKenna:*** *OK. And those are not stated in this advertisement [inaudible]?*
>
> ***Robert Zilke: No. Those are not stated in the advertisement.***[53]

52. In the face of the record and the testimony of City planning staff, the Commission cannot agree with the suggestion of counsel for the City that the Amendment is merely a simple textual amendment to the Bylaw. According to the City's own record and submissions, asphalt plants were previously a discretionary use in the Airport zone. This discretionary use was removed from the Bylaw during a previous review. The Amendment was, according to the City, initiated by its own planning staff for the purpose of adding a new permitted use in a particular zone, namely the M-2 zone.[54] Planning staff were also aware, however, that this new permitted use could not, in fact, be approved in the West Royalty Industrial Park (another M-2 zone).[55]

53. Did the notice published by the City in this case provide residents and other interested persons, who could reasonably be impacted by the Amendment, with the opportunity to make an informed decision whether to make representations to the City regarding the Amendment? The Commission is satisfied that the notice did not do so for at least two reasons.

54. First, the record is clear that the focus of the amendment was the M-2 zone. Nowhere in the notice is this information found. For public notice to be adequate, affected persons must be able to reasonably determine if the proposed

[53] This verbatim excerpt was prepared by the Commission's Appeal Administrator upon review of the audio recording. It is not a certified transcript.
[54] See, for example, the report from planning staff dated April 1, 2019 which discusses the "Asphalt, Aggregate, Concrete Plant" amendment under the heading "New Permitted Uses and Regulations Amendments". Record, Tab 12.
[55] Record, Tab 15. In other words, with the Amendment, the only remaining location for an asphalt plant would be the area of Sherwood Road.

amendment may impact them. In this particular instance, it is unclear from the notice that a new use was being defined and inserted into the Bylaw. It is also unclear where (and, as a result, who) within the City would be impacted by this change. It is further unclear whether this new use would be permitted or discretionary.

55. The Commission does not accept that clarifying the affected zone or the nature of the proposed use, in this particular instance, would be an impossible administrative burden on the City. Theoretical amendments affecting numerous zones, as discussed during oral testimony, are not relevant to this Amendment or this notice.[56]

56. Second, the Amendment introduced a new defined term, namely "Asphalt, Aggregate, and Concrete Plant,"[57] into the Bylaw. This term was almost identical[58] to the terminology used by the City in the notice and the terminology presented to the Commission as being adequate. The Commission finds that it was not sufficient for the City to simply insert the newly defined term into the notice, without more, and then suggest that publication of the term alone constituted adequate notice of not only a new definition, but also a new permitted use within a particular zone. After reading the notice, an average citizen would not be notified of these consequences. In this case, the nature (or purpose) of the Amendment was not made reasonably clear by the City in its notice.

57. Much time was spent in oral argument in determining whether City planning staff intentionally worded the notice and grouped "Asphalt, Aggregate, & Concrete Plant" together with "General Housekeeping amendments" so as to obscure the true nature of the Amendment. Proof of intention, however, is not necessary in order for the Commission to undertake an objective analysis of whether the notice was proper in this particular case. The applicable perspective is that of the average resident.

58. It is also not lost on the Commission that legal counsel spent a considerable amount of time during the hearing arguing about the placement of commas, phraseology, and discrete terms in a newspaper notice. Although by no means conclusive, it certainly lends some practical support to the Commission's determination that the average citizen would not be capable of reasonably determining whether the Amendment affected them and making an informed choice whether to participate by making representations to the City.

59. Under cross-examination, Forbes suggested that residents of the M-2 zone ought to have been sufficiently triggered by the notice, given the past history of asphalt plants in the Sherwood Road area. Suffice to say, prior knowledge of earlier site-

[56] Likewise, the focus of this appeal is not on other proposed bylaw amendments found within the notice. This is not an appeal regarding the appropriateness of the notice given regarding site landscaping requirements, garden suites, undersized lot regulations, or general housekeeping amendments.
[57] Record, Tabs 12 & 22.
[58] The only difference being the use of "&" between "Aggregate" and "Concrete" in the notice.

specific applications does not – and should not – minimize the City's notice obligation for an amendment that, according to the City, was initiated by its own planning staff to add a new permitted use and was not focused on any particular development or developer. The burden on the City is a statutory one, and the applicable test is objective in nature. The knowledge of residents of previous applications is not relevant to deciding whether the City met its notice obligation under the *Planning Act* in this particular instance.

60. The Commission itself, even with the benefit of the complete record, oral testimony of staff from the City and institutional expertise in the area of municipal land use planning, is not able to determine, based on the contents of the notice, the nature of the Amendment, the zone or area impacted by the Amendment, or the persons that could be affected by the Amendment. In other words, the notice published in this case does not indicate in general terms the nature of the proposed bylaw.

61. The Commission also wishes to briefly address the arguments raised by the City during the hearing that its planning staff are busy and doing the best they can. The Commission does not dispute this statement. The City processes a high volume of development applications and Bylaw amendments. The vast majority of those decisions do not find their way to the Commission for review. However, in this case, the Commission was presented with a bylaw amendment that, according to the City, was initiated by its own staff. While efficiency and expediency are relevant considerations, they do not alleviate the City from discharging its legal obligation to provide its residents with proper notice of amendments to the Bylaw.

62. The City is free to amend the Bylaw as it sees fit within the parameters of the law. It is for the City to determine whether to define asphalt, aggregate, and concrete plants and to determine, with reference to its official plan and the Bylaw, if and where this use may be permitted within the City and its zones. However, in doing so, it is incumbent upon the City to provide its residents with adequate notice of any proposed amendment so as to facilitate meaningful public participation as expressly contemplated by the *Planning Act*.

63. Having concluded that the notice is deficient on its face and does not satisfy s. 18(1) of the *Planning Act*, the Commission finds that it is not necessary to address the Appellants' secondary arguments. Both parties agreed that the notice in this case had to comply with section 18(1) of the *Planning Act*. The central issue in dispute between the parties was therefore determinative of this appeal.

CONCLUSION

64. The appeal is allowed and the City's decision to approve the Amendment is quashed.

IN THE MATTER of an appeal by Brown's Volkswagen et. al. of a decision of the City of Charlottetown dated June 21, 2019 to permit an Asphalt, Aggregate, and Concrete Plant and to insert a definition for that use under Appendix "A" Definitions

Order

WHEREAS the Appellants, Brown's Volkswagen et. al. appealed a decision of the City of Charlottetown dated June 21, 2019 to amend its Bylaw to permit an Asphalt, Aggregate, and Concrete Plant and to insert a definition for that use under Appendix "A" Definitions;

AND WHEREAS the Commission heard the appeal at a hearing conducted on June 24, June 25, and June 26, 2020;

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

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

IT IS ORDERED THAT

1. The appeal is allowed.

2. The June 21, 2019 decision of the City to amend its Bylaw to permit an Asphalt, Aggregate, and Concrete Plant and to insert a definition for that use under Appendix "A" Definitions is quashed.

DATED at Charlottetown, Prince Edward Island, Tuesday, December 15, 2020

BY THE COMMISSION:

(sgd.) *J. Scott MacKenzie*

J. Scott MacKenzie, Q.C., Chair

(sgd.) *M. Douglas Clow*

M. Douglas Clow, Vice-Chair

(sgd.) *Jean Tingley*

Jean Tingley, Commissioner

NOTICE

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

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

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

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

> *13(1) An appeal lies from a decision or order of the Commission to the Court of Appeal upon a question of law or jurisdiction.*
>
> *(2) The appeal shall be made by filing a notice of appeal in the Court of Appeal within twenty days after the decision or order appealed from and the rules of court respecting appeals apply with the necessary changes.*