ISLAND REGULATORY AND APPEALS COMMISSION

In the matter of Brown's Volkswagen, Phillips Suzuki, Centennial Auto Group and Cathy Feener v. City of Charlottetown

(Appeal LA19009)

APPELLANTS' FACTUM and AUTHORITIES

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INTRODUCTION

1. On June 21, 2019, the City of Charlottetown municipal council ("Council") gave final reading to a proposed amendment to the City of Charlottetown *Zoning & Development Bylaw*. The bylaw amendment as passed changes the permitted uses in the Heavy Industrial (M-2) zone to permit asphalt, aggregate and concrete plants (the "Proposed Bylaw Amendment").

2. On July 9, 2019, the appellants, Brown's Volkswagen, Phillips Suzuki, Centennial Auto Group, and Cathy Feener (collectively, the "Appellants"), filed a Notice of Appeal with the Island Regulatory and Appeals Commission ("IRAC" or the "Commission") appealing the decision of Council to enact the Proposed Bylaw Amendment (the "Appeal").

[Exhibit A-1]

3. The Appellants each own residential or commercial property at or near the Sherwood Road in Charlottetown.

4. The Appeal is made pursuant to subsection 28(1.1)(b) of the *Planning Act*, RSPEI 1988, c. P-8, which grants a right of appeal to any person who is dissatisfied with Council's decision to amend a bylaw. Subsection 28(1.1)(b) of the *Planning Act* provides as follows:

> ***Appeals from decisions of council***
> *(1.1) Subject to subsections (1.2) to (1.4), any person who is dissatisfied by a decision of the council of a municipality*
> *(b) to adopt an amendment to a bylaw, including*
> *(i) an amendment to a zoning map established in a bylaw, or*
> *(ii) an amendment to the text of a bylaw,*
> *may appeal the decision to the Commission by filing with the Commission a notice of appeal.*
>
> ***Planning Act*, section 28(1.1) [Tab 2]**

5. The Appeal was filed within twenty-one (21) days of the decision being appealed, as required by subsection 28(1.3) of the *Planning Act*.

Planning Act, section 28(1.3) [Tab 2]

6. For the reasons that follow, the Appellants respectfully request that the Commission allow the Appeal, quash the decision of Council, and declare the Proposed Bylaw Amendment to be null and void.

TIMELINE OF EVENTS

7. The construction of asphalt, aggregate and concrete plants within the City of Charlottetown has been a contentious issue since 2018 – more than a year before Council passed the Proposed Bylaw Amendment that is subject to this Appeal.

8. In March 2018, the City received an application to rezone a parcel of land on the Sherwood Road to allow for the construction of an asphalt plant (the "2018 Rezoning Application"). Although the 2018 Rezoning Application is not the subject of this Appeal, the notice procedures followed by the City and the public response to the 2018 Rezoning Application are relevant to the issues on appeal.

9. In an effort to assist the Commission, following is a timeline of relevant events from March 2018 to present.

10. **March 23, 2018**: Chapman Bros. Construction Ltd. ("Chapman Bros.") applies to rezone a parcel of land located at 249 Sherwood Road, in Charlottetown, for the purpose of constructing an asphalt plant.

[City's Supplementary Record, Volume 2, Tab 36]

11. **April 3, 2018**: The City's planning staff prepares a report and recommendations to the Planning Board. City staff recommend that the 2018 Rezoning Application be treated as if it were an amendment to the *Zoning & Development Bylaw*, which "*therefore requires notification of property owners within 100 meters of the subject property, posting of the proposed bylaw amendment and a public meeting*".

[City's Supplementary Record, Volume 2, Tab 38, Page 1]

12. **April 3, 2018**: Planning Board meets and recommends that the 2018 Rezoning Application be recommended to Council to proceed to the public consultation phase.

[City's Supplementary Record, Volume 2, Tab 39]

13. **April 9, 2018**: Council meets and approves the 2018 Rezoning Application to proceed to the public consultation phase.

[City's Supplementary Record, Volume 2, Tab 43]

14. **April 12, 2018**: City planning staff send written notice to affected property owners within 100 meters of the boundaries of the subject property.

[City's Supplementary Record, Volume 2, Tab 45, Page 1]

15. **April 19, 2018**: A notice of public meeting is posted on the property at 249 Sherwood Road.

[City's Supplementary Record, Volume 2, Tab 51, Page 1]

16. **April 21 & 28, 2018**: A notice of public meeting is published in The Guardian newspaper.

[City's Supplementary Record, Volume 2, Tab 51, Page 2-3]

17. The notices that are mailed and published by the City do not state that the 2018 Rezoning Application is for the purpose of constructing an asphalt plant on the subject property.

18. **April 26, 2018**: City planning staff is contacted by Mayor Lee. The Mayor has "*been getting a ton of calls*" about the 2018 Rezoning Application, as the notice from the City fails to disclose that the Application is to allow an asphalt plant. City planning staff recommend that the process be "*re-started*". As a result, new written notice is sent to affected property owners, a new notice is published in local newspapers, and the public meeting is rescheduled.

[City's Supplementary Record, Volume 1, Tab 24, Page 30]

19. **April 27, 2018**: City planning staff send a new notice to affected property owners. The written notice expressly states that "*the purpose of the public meeting is to hear a rezoning request to locate an asphalt plant on the subject property*".

[City's Supplementary Record, Volume 2, Tab 50]

20. **April 30, 2018**: A revised notice of public meeting is posted on the property at 249 Sherwood Road. The notice expressly states that "*this is a rezoning request to locate an asphalt plant on the subject property*".

[City's Supplementary Record, Volume 2, Tab 52, Page 1]

21. **May 2 & 5, 2018**: A revised notice of public meeting is published in The Guardian newspaper. The notice expressly states that "*the purpose of the public meeting is to hear comments regarding the rezoning request to locate an asphalt plant on the subject property*".

[City's Supplementary Record, Volume 2, Tab 52, Page 4 to 6]

22. **May 10, 2018**: A public meeting is held with respect to the 2018 Rezoning Application. The only item on the agenda for the public meeting is the application to allow an asphalt plant on the Sherwood Road.

[City's Supplementary Record, Volume 2, Tab 57]

23. The rezoning application is met with significant public opposition. Approximately 150 to 175 individuals attend the public meeting, and many speak out against the proposed asphalt plant. Residents and a member of Council raise concerns about the impact of an asphalt plant on surrounding properties, property values, increased truck traffic, quality of life, noise and air pollution, and numerous other concerns.

[City's Supplementary Record, Volume 2, Tab 57]

24. **April to May, 2018**: Residents and business owners in the Sherwood Road area write to the City to oppose the 2018 Rezoning Application. Of note, letters are received from:

a) The PEI Humane Society
b) Ellen's Creek Watershed Group Inc.
c) Doiron's Landscape & Garden Centre
d) Brown's Volkswagen
e) Phillips Suzuki
f) Centennial Auto Group
g) Many private citizens

[City's Supplementary Record, Volume 1, Tab 25]
[City's Supplementary Record, Volume 2, Tab 47]
[City's Supplementary Record, Volume 2, Tab 59]

25. **May 31, 2018**: Three weeks after the public meeting is held, Chapman Bros. writes to the City planning staff advising that it wishes to withdraw the 2018 Rezoning Application.

[City's Supplementary Record, Volume 2, Tab 61]

26. **June 11, 2018**: Council approves the withdrawal of the 2018 Rezoning Application by Chapman Bros. In accordance with the *Zoning & Development Bylaw*, Chapman Bros. is prohibited from applying for the same or similar application at that location for a period of one year, that is, until June 11, 2019.

[City's Supplementary Record, Volume 2, Tab 64]

27. **February 2019**: A member of the City's planning staff, Laurel Thompson, speaks "*at some length*" with Chapman Bros. Chapman Bros. advises the City staff that they intend to construct an asphalt plant in the Heavy Industrial (M-2) Zone (the "M-2 Zone") located off the Mt. Edward Road.

[City's Record, Tab 23, Page 9]

28. **March 4, 2019**: A Planning Board meeting is held. The City's planner, Robert Zilke, puts forth a proposal to amend the City's *Zoning & Development Bylaw*.

The proposed amendment is to allow asphalt, aggregate and concrete plants in the M-2 Zone.

[City's Record, Tab 3]

29. According to the City's planner, the Proposed Bylaw Amendment is in response to "*an application*" or "*at least some interest*" from a potential developer who is seeking to build an asphalt plant in the City. Alex Forbes, Manager of Planning and Heritage, advises the Planning Board that the developer has engaged in "*debates*" with City planning staff about whether an asphalt plant fits within existing uses.

[City's Record, Tab 3, Page 1 and 6]

30. At the meeting, Councillor Greg Rivard, Chair of the Planning Board, explains that the developer feels it is "*too expensive*" to truck aggregate from the Charlottetown Port to a location outside City limits. This is part of the reason that the developer is "*trying to push so hard to put an asphalt plant in Charlottetown*".

[City's Record, Tab 3, Page 3]

31. Certain members of the Planning Board, including Deputy Mayor Jason Coady, are reluctant to have the proposed amendments proceed to public consultation. Deputy Mayor Coady explains that the City held a public meeting in 2018 and that the consensus was that residents do not want asphalt plants in the City.

[City's Record, Tab 3, Page 3 and 6]

32. Despite these concerns, the Planning Board motion passes 5-2, and the proposed amendments to the *Zoning & Development Bylaw* are recommended to Council to proceed to public consultation.

[City's Record, Tab 3, Page 6]

33. **March 11, 2019**: A Regular Meeting of Council is held. At the meeting, Council votes 7-2 that the Proposed Bylaw Amendment be approved to proceed to public consultation.

[City's Record, Tab 5]

34. **March 14, 2019**: Chapman Bros. enters into an Agreement of Purchase and Sale to purchase property located at 330 Sherwood Road. The property is located in the M-2 Zone, and is approximately 700 meters from the property that was subject to the 2018 Rezoning Application (being 249 Sherwood Road).

[City's Supplementary Record, Volume 2, Tab 68]

[Appellants' Book of Evidence, Tab 3]

35. **March 16, 2019**: The City publishes a lengthy notice of public meeting in The Guardian newspaper and on the City website. The notice deals with five (5) separate matters that are on the agenda for the public meeting. The notice does not state that the Proposed Bylaw Amendment is to permit asphalt, aggregate and concrete plants in the M-2 Zone.

36. Instead, the notice of public meeting makes only passing reference to "Asphalt, Aggregate & Concrete Plant" in the context of "General Housekeeping amendments". The relevant portion of the public notice is as follows:

> **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.

[Appellants' Book of Evidence, Tab 1]

37. This is the only notice published by the City in relation to the public meeting.

38. The City does not provide notice to affected property owners, and it does not post a public notice on the property located at 330 Sherwood Road, or on any other property in the M-2 Zone.

39. **March 21, 2019**: Chapman Bros. applies to Executive Council for approval to purchase property located at 330 Sherwood Road.

[Appellants' Book of Evidence, Tab 40]

40. **March 27, 2019**: The public meeting is held. The discussion is dominated by the other applications on the agenda, including a proposed licensed mobile canteen (namely, Nimrods) and a proposed apartment and townhouse development.

[City's Record, Tab 11]

41. At the public meeting, no residents or business owners speak for or against the Proposed Bylaw Amendment.

[City's Record, Tab 11]

42. Following the public meeting, the City does not receive any written submissions from people in support of or opposition to the Proposed Bylaw Amendment.

43. **April 1, 2019**: A Planning Board Meeting is held. The City's planning staff recommend that the Proposed Bylaw Amendment be approved.

[City's Record, Tab 13]

44. The Planning Board does not approve the Proposed Bylaw Amendment. Instead, the Proposed Bylaw Amendment is deferred to allow the City's planning staff to meet with the Provincial Department of Environment. The Planning Board wants to determine whether the provincial requirements will allow for asphalt plants in the M-2 Zone.

[City's Record, Tab 13]

45. **April 17, 2019**: Chapman Bros. receives Executive Council approval to purchase property in the M-2 Zone on the Sherwood Road.

[Appellants' Book of Evidence, Tab 41]

46. **April 18, 2019**: Greg Wilson, Manager of Environmental Land Management with the Provincial Department of Communities, Land and Environment, provides comments on the Proposed Bylaw Amendment. He explains that the environmental assessment performed by the Department is "*just a simple initial*

screening to scope out the major issues". He confirms that "*no provincially driven public consultation would be anticipated*".

[City's Record, Tab 23, Page 33]

47. Greg Wilson also advises the City planning staff that the Air Quality Regulations and the 1985 Guidelines for Asphalt Plants establish setback standards. The Regulations and Guidelines state that an asphalt plant cannot be constructed within 500 meters of any territory zoned for residential, commercial or parks and recreational use.

[City's Record, Tab 23, Page 33]

48. There are only two areas in the City that are zoned M-2. The M-2 Zones are located in the West Royalty Business Park and on the Sherwood Road.

49. The Proposed Bylaw Amendment will allow asphalt, aggregate and concrete plants in every M-2 Zone in the City, as of right.

50. **April 23, 2019**: The City's planning staff meet with Mr. Greg Wilson. They determine that asphalt plants will not be permitted in M-2 Zones located in the West Royalty Business Park as the provincial setback requirements are not met.

[City's Record, Tab 14 and 15]

51. Instead, asphalt plants can only be constructed in M-2 Zones located on the Sherwood Road.

52. **April 23, 2019**: Alex Forbes emails Peter Kelly, Chief Administrative Officer with the City. The subject of the email is "*Asphalt Plant*". The email states that there are "*problems with locating the asphalt plant in the proposed location*". Alex Forbes asks Peter Kelly when he would like to meet on this.

[City's Record, Tab 23, Page 42]

53. **May 6, 2019**: A Planning Board meeting is held. The City planning staff advise the Planning Board about the provincial setbacks for asphalt plants and that it is

"highly unlikely" that asphalt plants will be permitted in the West Royalty Business Park.

[City's Record, Tab 15, Page 3]

54. Although City planning staff are aware that asphalt plants will only be permitted in M-2 Zones on the Sherwood Road, they do not recommend any change to the Proposed Bylaw Amendment. As the scope of the Proposed Bylaw Amendment has not changed, the City planning staff advise that no further public meeting is required.

[City's Record, Tab 14, Page 2]

55. The Planning Board moves to recommend the Proposed Bylaw Amendment to Council for approval.

[City's Record, Tab 15, Page 4]

56. **May 13, 2019**: A Regular Meeting of Council is held. Council vote on the Proposed Bylaw Amendment.

[City's Record, Tab 16]

57. Prior to the vote, Deputy Mayor Coady and Councillor Bob Doiron speak in opposition of the Proposed Bylaw Amendment. Both Councillors note that only one year earlier, residents came out in strong numbers to oppose an asphalt plant on the Sherwood Road.

[City's Record, Tab 16]

58. Council votes to allow the Proposed Bylaw Amendment to proceed to first reading. The vote is split 6-4.

[City's Record, Tab 17]

59. **June 10, 2019**: A Regular Meeting of Council is held. The Proposed Bylaw Amendment is to be read a first time.

[City's Record, Tab 18]

60. Prior to first reading, a number of Councillors ask questions and raise concerns about the notice procedure followed by the City.

[City's Record, Tab 18]

61. Councillor Kevin Ramsay asks Councillor Rivard, Chair of the Planning Board, to whom notices were sent and whether every business and resident received notice. Councillor Rivard confirms that notice was not given to affected property owners.

[City's Record, Tab 18, Page 3]

62. Councillor Mitch Tweel states that the message was "*loud and clear*" in 2018 that residents and businesses "*did not support and were adamantly opposed*" to an asphalt plant. Councillor Tweel suggests that had notice been given, residents would have come out in large numbers to oppose the Proposed Bylaw Amendment.

[City's Record, Tab 18, Page 4]

63. The Proposed Bylaw Amendment does not pass first reading. Instead, a motion carries 7-3 to defer the first reading. The purpose of the deferral is to allow Council more time to carefully review the matter and possibly go to a public meeting.

[City's Record, Tab 18, Page 6]

64. **June 14, 2019**: Four days after Council votes to defer first reading, Alex Forbes sends an email to Council. He copies the City's CAO, Peter Kelly, on the email. Mr. Forbes advises that he sought legal advice from the City's lawyer. According to the email, Mr. Forbes and the City's legal counsel agree that it would be "*inappropriate*" to hold a public meeting regarding the Proposed Bylaw Amendment as a public meeting had already been held. Mr. Forbes recommends that the first reading of the Proposed Bylaw Amendment be added to the agenda for the next Council meeting.

[City's Record, Tab 23, Page 91]

65. Later on Friday, June 14th, a Special Meeting of Council is scheduled for noon on Monday, June 17th. The only item on the agenda for the Special Council Meeting is the first reading of the Proposed Bylaw Amendment.

[City's Record, Tab 20]

66. **June 17, 2019**: At the Special Meeting of Council, a number of Councillors strongly oppose the Proposed Bylaw Amendment.

[City's Record, Tab 20]

67. Councillor Tweel states that proper notice has not been given to residents. Although there was a public meeting, the notice did not specify that the meeting was to discuss the possibility of an asphalt plant on the Sherwood Road. Councillor Tweel explains that the effect of the Proposed Bylaw Amendment is to allow an asphalt plant on the Sherwood Road. Residents and businesses therefore should have been notified, and afforded the opportunity to make submissions to Council.

[City's Record, Tab 20, Page 2]

68. Deputy Mayor Coady finds it "*quite disturbing*" that the residents and business owners are no longer going to have the opportunity to be heard at a public meeting. He explains that "*This isn't a little bylaw amendment or tweaking of the bylaws or official plan. This is to permit a asphalt plant within the City of Charlottetown*".

[City's Record, Tab 20, Page 3]

69. Deputy Mayor Coady asks what is "*driving the agenda*". He specifically asks whether any City staff or elected official has talked to Chapman Bros. about purchasing property from them if the Proposed Bylaw Amendment is passed.

[City's Record, Tab 20, Page 4 and 5]

70. In response, Mr. Forbes states that he has talked to "*Mr. Chapman*" but that it is "*always in general*".

[City's Record, Tab 20, Page 4]

71. Peter Kelly, CAO, responds that he is "*not aware of any staff person talking to Chapman Bros.*" Mr. Kelly does not disclose whether he has had any communication with Chapman Bros.

[City's Record, Tab 20, Page 4]

72. The Proposed Bylaw Amendment ultimately passes first reading at the Special Meeting. The vote is split 6-4.

[City's Record, Tab 20, Page 6]

73. **June 21, 2019**: Four days later, on Friday, June 21st, another Special Meeting of Council is held.

[City's Record, Tab 21]

74. Councillor Doiron asks if there is a conflict of interest with respect to the Proposed Bylaw Amendment and, in particular, whether there is an agreement to purchase or sell land. He has heard "*some shady things*" and asks if any Councillor or elected official has been "*in negotiations*". No conflicts are declared by any Councillor, the CAO or by the City planning staff who are present.

[City's Record, Tab 21, Page 1 and 2]

75. Councillor Tweel asks for the opportunity to have further discussion and debate regarding the Proposed Bylaw Amendment. He is advised by Mayor Philip Brown that *Robert's Rules of Order* do not allow for debate or discussion at the second reading.

[City's Record, Tab 21, Page 2 and 3]

76. Deputy Mayor Coady expresses his disappointment that members of the public and the business community are not afforded a public meeting. He notes that although the process began as a bylaw amendment, it was eventually "*whittled down*" to an amendment to specifically allow an asphalt plant on the Sherwood Road.

[City's Record, Tab 21, Page 4]

77. Prior to the vote, Mayor Brown agrees with Deputy Mayor Coady. Mayor Brown states that:

> *All I can say is that what I heard is that changing this bylaw is not going to be good for that area and the City and that is all I can say.*

[City's Record, Tab 21, Page 4]

78. The second reading of the Proposed Bylaw Amendment proceeds to a vote – without any debate or discussion.

79. The Proposed Bylaw Amendment passes second and final reading by a split vote of 5-4.

[City's Record, Tab 21, Page 5]

80. A number of residents do not become aware of the Proposed Bylaw Amendment until it passes final reading on June 21, 2019 – almost three months after the public meeting was held.

81. Dozens of residents write to City Councillors, expressing concern about the process that was followed and the lack of notice regarding the public meeting and the Proposed Bylaw Amendment.

[Appellants' Book of Evidence, Tabs 4 to 31]

82. **June 26, 2019 & July 4, 2019**: Residents hold protests against the Proposed Bylaw Amendment. The residents state that they did not have notice of the Proposed Bylaw Amendment or the public meeting.

[Appellants' Book of Evidence, Tabs 46 & 47]

83. **July 9, 2019**: The Appellants file a Notice of Appeal with this Commission.

[Exhibit A-1]

84. **July 9, 2019**: On that same day, City staff write to the Provincial Manager of Municipal Affairs to advise that the Proposed Bylaw Amendment has been adopted by the City. The Proposed Bylaw Amendment requires the approval of the Minister of Agriculture and Land, in accordance with section 17 of the *Planning Act*.

[City's Second Supplementary Record, Tab 84]

85. The City states in its correspondence to the Province that it "*has followed all municipal bylaw procedures and the procedures contained in the Planning Act in approving this amendment.*" The City does not disclose to the Province that a Notice of Appeal has been filed which alleges procedural errors.

[City's Second Supplementary Record, Tab 84]

86. **July 10, 2019**: The Appellants and other residents of Charlottetown organize and host their own public meeting to voice their concerns regarding the Proposed Bylaw Amendment.

87. Mayor Brown and Deputy Mayor Coady attend the public meeting.

88. At the meeting, attendees are given a three page handout. The handout lists concerns relating to asphalt, aggregate and concrete plants, as well as the contact information for a number of elected officials.

[Appellants' Book of Evidence, Tab 32]

89. The handout also includes a copy of the public notice that the City published in relation to the March 27, 2019 public meeting.

[Appellants' Book of Evidence, Tab 32]

90. At the meeting, Mayor Brown makes reference to the public notice that is being circulated. He acknowledges that the notice "*didn't clearly indicate*" and "*probably did not clearly explain where it* [the asphalt plant] *was going*".

[Appellants' Book of Evidence, Tab 33]

91. **July 10, 2019**: The Appellants make a formal Request for Reconsideration of the Proposed Bylaw Amendment, in accordance with section 3.15 of the *Zoning & Development Bylaw*. The Request for Reconsideration is presented to Mayor Brown at the July 10th meeting with residents.

[Appellants' Book of Evidence, Tab 34]

92. **July 18, 2019**: Council meets and, on the advice of their legal counsel, refuses to consider the Request for Reconsideration. The meeting is not open to the public and the Appellants are not permitted to attend.

[Appellants' Book of Evidence, Tab 35 & 36]

93. **July 22, 2019**: Chapman Bros. submits an application to the City to construct an asphalt plant at 330 Sherwood Road.

[City's Supplementary Record, Volume 2, Tab 72]

94. **July 30, 2019**: Chapman Bros. is told by City planning staff that the permit application cannot be approved until the Province signs off on the Proposed Bylaw Amendment.

[City's Supplementary Record, Volume 1, Tab 26, Page 3]

95. **August 15, 2019**: Chapman Bros. purchases 15.05 acres of land located at 330 Sherwood Road. The property is located in the M-2 Zone and is adjacent to land owned by the City of Charlottetown.

[Appellants' Book of Evidence, Tab 42]
[City's Supplementary Record, Volume 2, Tab 70]

96. **September 3, 2019**: A Planning Board meeting is held. Asphalt, aggregate and concrete plants are back on the agenda.

[Appellants' Book of Evidence, Tab 37]

97. This time, the Planning Board Agenda and Notice of Meeting clearly indicate that the City's planning staff are proposing to "***prohibit*** *Asphalt, Aggregate and Concrete Plants* ***in the West Royalty Business Park***" [emphasis added].

[Appellants' Book of Evidence, Tab 37]

98. Prior to the meeting, the City planning staff provide written recommendations to the Planning Board. The staff note that due to the close proximity of residential uses in the adjacent area and preliminary conversations with the Province, the staff feel that an asphalt, aggregate and concrete plant is an incompatible land use in the West Royalty Business Park.

[Appellants' Book of Evidence, Tab 38]

99. Although not disclosed in the recommendations from the City's planning staff, the "*preliminary conversations*" with the Province occurred in April 2019 – two months before the Proposed Bylaw Amendment went to first reading.

100. At the Planning Board meeting, the City planning staff recommend that the Proposed Bylaw Amendment be further amended to prohibit asphalt, aggregate and concrete plants in the West Royalty Business Park. The proposed "amendment to the Amendment" reads as follows:

36.2.3 That an Asphalt, Aggregate and Concrete Plant is prohibited from being established in the West Royalty Business Park.

[Appellants' Book of Evidence, Tab 38]

101. This amendment makes it clear that the true nature and intent of the Proposed Bylaw Amendment is to permit asphalt, aggregate and concrete plants only on the Sherwood Road.

102. The Planning Board votes to defer the "amendment to the Amendment" pending the outcome of this Appeal.

[Appellants' Book of Evidence, Tab 39]

103. **March 2020**: An additional application is submitted to the City by a developer seeking to construct an asphalt plant on the Sherwood Road.

104. At this time, the Appellants are aware of two applications to the City to construct asphalt plants on the Sherwood Road. The Proposed Bylaw Amendment, if upheld, will allow these developments to proceed as of right, without any opportunity for public consultation.

GROUNDS OF APPEAL

A. THE CITY FAILED TO PROVIDE PROPER AND ADEQUATE NOTICE OF THE PUBLIC MEETING.

105. Proper notice is a condition precedent to Council's authority to act. The failure to give proper and adequate notice will therefore invalidate a decision of Council.

***Peterson v Resort Municipality of Whistler*, [1982] BCWLD 1760 (BCSC) at para 15**

***Peardon et al v Montague*, Order LA94-06 [Tabs 3 & 4]**

106. The Appellants submit that the City failed to provide proper and adequate notice of the public meeting held to consider the Proposed Bylaw Amendment. As a result, Council did not have the authority to enact the Proposed Bylaw Amendment. The Proposed Bylaw Amendment is therefore null and void due to a lack of proper notice.

107. Public participation is paramount to the planning process in this Province. This is made clear in the *Municipal Government Act*, RSPEI 1988, c M-12.1, the *Planning Act*, and in the City's Official Plan and *Zoning & Development Bylaw*.

108. The *Planning Act* has five objects, one of which is to provide the opportunity for public participation in the planning process. Section 2(e) of the *Planning Act* provides:

> ***2. Objects***
>
> *The objects of this Act are* [...] *(e) to provide the opportunity for public participation in the planning process.*
>
> ***Planning Act*, section 2(e) [Tab 5]**

109. When planning is at the municipal level, the onus rests with the municipal council to encourage and enable public participation in matters affecting the municipality. This is made explicit in the *Municipal Government Act*, which provides as follows:

> *3.* ***Purposes of municipal council***
>
> *The purposes of a council include, among other things,*
>
> *(a) providing good government in its municipality;*
>
> [...]
>
> *(e) encouraging and enabling public participation in matters affecting the municipality.*
>
> ***Municipal Government Act*, section 3 [Tab 6]**

110. The City's Official Plan also discusses and recognizes the importance of involving residents, businesses and community groups in the City's actions and decision making. In particular, the Official Plan provides as follows:

> 6.1 ***Seeking Community Support***
>
> [...]
>
> *This document defines bold initiatives for a vital new community ... and the "ways and means" to achieve these goals. For the CHARLOTTETOWN PLAN to work effectively, the residents of this City and their Council must join together to implement identified actions, monitor the effectiveness of the various implementation by-laws, and participate in the development of proposed concept plans*

> *for the City. Likewise, residents, businesses, and community groups must also support, and contribute to, the vision outlined by this plan. All interested parties are invited to help Charlottetown grow and prosper.*
>
> ***City of Charlottetown Official Plan*, section 6.1 [Tab 7]**

111. The requirement for public participation in the planning process is also codified in the City's own *Zoning & Development Bylaw*. The *Bylaw* requires Council to conduct a public meeting and to receive the views and opinions of the public before amending the *Bylaw*.

***Zoning & Development Bylaw*, section 3.10.3 [Tab 8]**

112. Public participation can only occur if the public is first given notice of the ability to participate.

113. Accordingly, the City's *Zoning & Development Bylaw* requires the City to publish notice of a public meeting in at least two issues of a newspaper circulating in the City. The first notice must be published at least seven (7) calendar days prior to the public meeting.

***Zoning & Development Bylaw*, section 3.10.4(c) [Tab 8]**

114. The *Planning Act* requires that the public notice include "*in general terms the nature of the proposed bylaw*" [emphasis added]. Section 18(1) of the *Planning Act* provides:

> ***18. Notice of meeting***
>
> *(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.*
>
> [emphasis added]
>
> ***Planning Act*, section 18(1) [Tab 9]**

115. At common law, Canadian Courts have recognized that the purpose of public notice is to ensure that citizens who may reasonably be affected by a bylaw amendment are made aware of the amendment. The notice must provide sufficient information to ensure that citizens can come to an informed conclusion as to whether to attend the public meeting or request further information from the City.

***Peterson v Resort Municipality of Whistler, supra*, at para 46 [Tab 3]**

116. So as to make an informed decision, the notice of public meeting must clearly identify:

a) Those citizens who may reasonably be affected by the bylaw amendment; and

b) The nature of the bylaw amendment.

***Peterson v Resort Municipality of Whistler, supra*, at para 46 [Tab 3]**

117. In determining whether the public notice is adequate, it is the average citizen who must be considered. Public notice will only be adequate if it "*brings to an ordinary, reasonable reader, who is likely to be affected by the proposed changes mentioned in the publication, an awareness that he may be affected thereby*".

***Great Canadian Casinos Co. v Surrey (City)*, 1999 BCCA 619 at paras 10-11**

***Country View Ltd. v City of Dartmouth (No. 2)*, [1974] N.S.J. No. 271 at para 16 [Tabs 10 &11]**

118. In March 2019, a public meeting was held to receive public input with respect to the Proposed Bylaw Amendment. Prior to the public meeting, the City published a notice in The Guardian newspaper and on the City's website. The notice, which reads as follows, makes only passing reference to "Asphalt, Aggregate & Concrete Plant" in a long list of "General Housekeeping amendments":

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.

[Appellants' Book of Evidence, Tab 1]

119. The Appellants submit that the notice of public meeting was wholly inadequate and failed to comply with the notice requirements set forth in the *Planning Act*.

120. The *Planning Act* requires that the public notice state the nature of the proposed bylaw. "Nature" is defined to mean "*a fundamental quality that distinguishes one thing from another; the essence of something*".

***Blacks Law Dictionary*, 8th ed, *sub verbo* "nature" [Tab 12]**

121. The true nature of the Proposed Bylaw Amendment is to change the permitted uses in the M-2 Zone to allow asphalt, aggregate and concrete plants – a use which was vehemently opposed by residents at a public meeting only months earlier. Yet this change in use is not disclosed in the public notice published by the City. Instead, the notice characterizes the contentious change in use as a mere "housekeeping amendment".

122. The notice does not state that the Proposed Bylaw Amendment is intended to permit asphalt, aggregate and concrete plants within the City. The notice does not state where the asphalt, aggregate and concrete plants would be located. The notice does not make any reference to the Sherwood Road, the West Royalty Business Park or even the M-2 Zone.

123. At common law, the notice must also clearly identify those citizens who may reasonably be affected by the Proposed Bylaw Amendment. Although land owners and residents in the area of the Sherwood Road and the West Royalty Business Park will be disproportionately impacted by the change in permitted use, these areas are not identified in the public notice in any way.

124. Instead, the public notice published by the City buries the phrase "Asphalt, Aggregate & Concrete Plant" in a long list of "General Housekeeping amendments".

125. The average citizen reading the public notice simply would not be informed of the nature of the Proposed Bylaw Amendment or that they may reasonably be affected by it.

126. Simply put, the public notice provides no notice at all.

127. The British Columbia Supreme Court recently decided a markedly similar case. In *Kelowna (City) v Khurana*, 2018 BCSC 392, the City of Kelowna sought to amend its bylaw to change the permitted uses within a particular zone. The City advertised the proposed changes to the bylaw as being "housekeeping amendments".

***Kelowna (City) v Khurana*, 2018 BCSC 392 [Tab 13]**

128. The Court determined that the average person being advised that a bylaw was to undergo "housekeeping amendments" would likely conclude that sections of the bylaw may be re-numbered, moved or re-phrased so as to bring clarity or better organization to the bylaw. The average person would not conclude that "housekeeping amendments" would include a change in the permitted uses.

***Kelowna (City) v Khurana, supra*, at para 19 [Tab 13]**

129. The Court in *Kelowna (City) v Khurana, supra*, concluded that the notice published by the City did not adequately state the purpose of the bylaw. The intent of the amendment was to change the bylaw in substantial ways – not simply for housekeeping purposes. The Court ultimately determined that the average citizen reading the notice would not have come to an informed decision as to whether the bylaw amendment affected him or her. The Court therefore determined that the bylaw amendment was invalid due to a lack of proper notice.

***Kelowna (City) v Khurana, supra*, at paras 17-23 [Tab 13]**

130. The same is true on the facts of this Appeal. The average citizen, including the Appellants, reading the public notice would not have known the true nature of the Proposed Bylaw Amendment or that the Amendment may affect them. The average citizen, upon reading the notice, would not reasonably conclude that the intent of the Proposed Bylaw Amendment was to allow asphalt, aggregate and concrete plants on the Sherwood Road, or even in the M-2 Zone.

131. It is not only the Appellants who take issue with the lack of notice from the City. City Councillors and the Mayor have also publicly stated that the notice of public meeting was inadequate.

132. At the June 10, 2019 Council Meeting, the first reading of the Proposed Bylaw Amendment was deferred, in part, due to a lack of public notice of the Proposed Bylaw Amendment. The records from the Council Meeting clearly state that Council voted to defer the first reading to possibly go to a public meeting.

[City's Record, Tab 18]

133. At the June 17, 2019 Special Council Meeting, Councillors again expressed concern – prior to the first reading – that proper notice had not been given to residents. Councillor Tweel raised particular concern with the public notice published by the City, stating that the notice did not state that the public meeting was to discuss the possibility of an asphalt plant on the Sherwood Road and that *"people with any vested interest on the Sherwood Road were not informed"*.

[City's Record, Tab 20]

134. On July 10, 2019, the Appellants and other residents organized and held their own public meeting to voice their concerns regarding the Proposed Bylaw Amendment. Mayor Philip Brown attended the meeting.

[Appellants' Book of Evidence, Tab 32]

135. At the July 10th meeting, Mayor Brown acknowledged that the public notice published by the City "*didn't clearly indicate*" and "*probably did not clearly explain where it* [the asphalt plant] *was going*".

[Appellants' Book of Evidence, Tab 33]
[See audio recording at 37:03 and 45:25]

136. The fact that citizens did not have proper notice is evident from the fact that not one person spoke for or against the Proposed Bylaw Amendment at the March 2019 public meeting. This is in stark contrast to the meeting that was held only months earlier, in May 2018, for which proper notice was given. More than 150 people attended that meeting, and many more residents and business owners – including the Appellants – wrote to the City to voice their opposition to an asphalt plant on the Sherwood Road.

137. The Appellants' failure to attend the public meeting in March 2019 was not because they no longer opposed an asphalt plant on the Sherwood Road. It was because the City failed to provide proper and adequate notice of the public meeting.

138. The failure of the City to provide proper notice deprived the Appellants – and all residents of Charlottetown – of the right to participate in the planning process and the right to be heard before Council approved this highly contested change in permitted use.

139. As the Proposed Bylaw Amendment was passed without proper notice, it was also passed without proper authority. As a result, the Proposed Bylaw Amendment must be declared null and void due to a lack of proper notice.

B. THE CITY FAILED TO COMPLY WITH THE NOTICE PROCEDURE SET FORTH IN THE CITY'S *ZONING & DEVELOPMENT BYLAW*.

140. In addition to the failure to provide proper and adequate notice of the public meeting, the City also failed to abide by the notice procedure for a bylaw amendment set forth in the City's own *Zoning & Development Bylaw*.

141. The law is clear that the giving of proper notice is "*at the very root of the authority of council*" to adopt a bylaw. As a result, where a notice procedure is prescribed, it is incumbent on Council "*to follow the procedure strictly and without deviation*".

***Peterson v Resort Municipality of Whistler, supra*, paras 15, 17 [Tab 3]**

142. The City's *Zoning & Development Bylaw* establishes a clear process that must be followed to ensure that affected property owners and members of the public receive notice of a bylaw amendment.

143. This process is set forth in section 3.10.4 of the *Zoning & Development Bylaw*, which provides as follows:

> *3.10.4 Before a Rezoning is heard at a public meeting, the Development Officer shall:*
>
> *a. Provide written notice by ordinary mail advise all Affected Property Owners within 100 m (328.1 ft) of the boundaries of the subject Lot through notification in writing at least seven (7) calendar days prior to the public meeting, of the date of the public meeting; and*
>
> *b. Ensure that the notice identifies the subject Lot and describes the Rezoning application and the date by which written objections must be received.*
>
> *c. Publish a notice in not less than two issues of a newspaper circulating in the City with the first notice at least seven (7) calendar days prior to the public hearing date.*
>
> *d. Post a copy of the notice in at least one (1) conspicuous place on the subject Lot at least seven (7) calendar days prior to the date fixed for the public meeting.*

***Zoning & Development Bylaw*, section 3.10.4 [Tab 8]**

144. The notice requirements set forth in section 3.10.4 make specific reference to rezoning. However, the *Zoning & Development Bylaw* explicitly states that the notice requirements – with the exception of written notice to Affected Property Owners – also apply to a bylaw amendment. Section 3.10.7 of the *Zoning & Development Bylaw* states as follows:

> *3.10.7 Where there is a proposed amendment to the text of this by-law that does not entail Rezoning,* ***all procedures*** *in this subsection* ***shall*** *be followed except that the procedure for notification of Affected Property Owners shall not apply.*
>
> [emphasis added]
>
> ***Zoning & Development Bylaw*, section 3.10.7 [Tab 8]**

145. As a result, the City is required to comply with each of the notice requirements set forth in sections 3.10.4(b), (c) and (d) of the *Zoning & Development Bylaw* prior to amending the *Bylaw*.

146. The City agrees with this interpretation and acknowledges that the City was required to comply with sections 3.10.4(b), (c) and (d) of the *Zoning & Development Bylaw*. In the City's submissions to this Commission dated August 1, 2019, the City states:

> *This means that the City is required to abide by Section 3.10.4(b), (c) and (d) but not section 3.10.4(a) as it is the provision requiring notice to Affected Property Owners.*
>
> **[Exhibit R-2]**

147. Section 3.10.4(b) of the City's *Zoning & Development Bylaw* specifically requires that the City shall "*ensure that the notice identifies the subject Lot*". Despite this

explicit requirement, the notice published by the City makes no reference to the Sherwood Road, the West Royalty Business Park, or even the M-2 Zone.

148. According to the City's submissions, it did not include a map with the public notice because "*a text amendment has application to multiple properties*".

[Exhibit R-2]

149. But the *Zoning & Development Bylaw* does not require the City to publish a map. It requires the City to "*ensure that the notice identifies the subject Lot*" [emphasis added].

***Zoning & Development Bylaw*, section 3.10.4 [Tab 8]**

150. The City could have easily identified the subject area by making reference to the M-2 Zone, where asphalt, aggregate and concrete plants would be permitted. The City also could have referenced the Sherwood Road and the West Royalty Business Park, as the City planning staff knew that these were the only two M-2 Zones in the City.

151. Yet the notice from the City failed to identify the proposed location of the asphalt, aggregate and concrete plants in any way. In failing to identify the subject area, the City failed to comply with the express requirements of the *Zoning & Development Bylaw.*

152. The City, by its own admission, also failed to comply with the notice requirements in section 3.10.4(d) of the *Zoning & Development Bylaw.* The provision clearly states that a copy of the public notice must be posted in a conspicuous place on the subject lot at least seven (7) days prior to the public meeting.

[Exhibit R-2]

153. Although the City has suggested that this requirement does not apply to a text amendment, this submission is directly contrary to the express language of the *Zoning & Development Bylaw.* Section 3.10.7 of the *Bylaw* makes it clear that

"*where there is a proposed amendment to the text of this by-law…all procedures in this subsection shall be followed*" [emphasis added].

154. The *Zoning & Development Bylaw* defines "shall" as being imperative.

***Zoning & Development Bylaw*, Appendix A [Tab 14]**

155. As a result, it was not open to the City to simply choose not to comply with the notice provisions set forth in sections 3.10.4(b) and (d). The City was required to follow each of the procedures set forth in sections 3.10.4(b), (c) and (d) prior to exercising its authority to amend the *Zoning & Development Bylaw*.

156. The City's failure to comply with the notice procedure set out in the *Zoning & Development Bylaw* is, in itself, grounds to quash the Proposed Bylaw Amendment. However, when the City's conduct is considered as a whole, it is evident that the Proposed Bylaw Amendment must be declared null and void due to a lack of proper notice.

157. As the City chose not to comply with the notice provisions set forth in sections 3.10.4(b) and (d) of the *Zoning & Development Bylaw*, this was the only notice given by the City prior to the public meeting:

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.

[Appellants' Book of Evidence, Tab 1]

158. The notice fails to disclose the true nature of the Proposed Bylaw Amendment. The notice fails to inform the average citizen that he or she may be affected by the Proposed Bylaw Amendment. And the notice is, at law, wholly inadequate.

159. Although a finding by this Commission that either the notice of public meeting was inadequate, or that the City failed to follow its own Bylaw, is enough to declare the Proposed Bylaw Amendment null and void, the Appellants submit that when the City's conduct is considered as a whole, it is clear that the Proposed Bylaw Amendment simply must be declared null and void due to a lack of proper notice.

C. THE CITY FAILED TO COMPLY WITH THE COMMON LAW REQUIREMENTS OF PROCEDURAL FAIRNESS.

160. In addition to the City's failure to comply with the notice procedure set out in the City's own *Zoning & Development Bylaw*, the City also failed to comply with the common law requirements of procedural fairness.

161. The concept of procedural fairness is not fixed. Instead, the requirements for procedural fairness will vary with the context and the interests at stake.

Sara Blake, *Administrative Law in Canada*, 6th ed (Toronto: LexisNexis Canada, 2017), 2.24 [Tab 15]

162. In *Baker v Canada (Minister of Citizenship & Immigration)*, 1999 SCC 699, the Supreme Court of Canada identified five factors to consider in determining the content of procedural fairness in a given circumstance. The factors are:

(1) the nature of the decision and the process followed in making it;
(2) the nature of the statutory scheme;
(3) the importance of the decision to the individual(s) affected;
(4) the legitimate expectations of the parties; and
(5) the procedure chosen by the decision-maker.

***Baker v Canada (Minister of Citizenship & Immigration)*, 1999 SCC 699 at paras 23 to 27 [Tab 16]**

163. In the context of procedural fairness, the nature of the decision varies along a spectrum. This spectrum has, at one end, purely legislative functions, which have

been found to attract minimal procedural fairness and, at the other end, judicial or quasi-judicial functions, which have been found to attract a higher standard of procedural fairness.

***Airport Self Storage & R.V. Centre Ltd. v Leduc (City)*, 2008 ABQB 12 at para 24 [Tab 17]**

164. Although the amendment of a bylaw may appear, at first glance, to be a legislative function, this is not always the case.

165. Instead, the Supreme Court of Canada has held that the realities and substance of the situation must be considered in determining whether a bylaw amendment is judicial, quasi-judicial or legislative.

***Wiswell v Greater Winnipeg (Metropolitan)*, [1965] SCR 512, 51 DLR (2d) 754 at para 29 [Tab 18]**

166. At issue in *Wiswell*, *supra*, was whether the municipal council acted fairly and impartially, and in accordance with the principles of natural justice. The case involved an ongoing dispute between a developer, who wanted to construct an apartment building in an otherwise residential area, and neighboring property owners.

167. The neighboring property owners had formed a homeowners association and opposed each application made by the developer. When the council received an additional request from the developer to rezone the subject property, the planning committee determined that a public meeting would be held.

168. The municipality did not provide notice of the public meeting to the homeowners association, as it was not required to do so under the bylaws. At the public meeting, the homeowners association did not appear in opposition to the application. As a result, the council approved the bylaw on the recommendation of the planning committee.

169. The municipality in *Wiswell, supra*, argued that the amending bylaw was purely legislative. As a result, it had the right to proceed without notice to interested parties. The Supreme Court of Canada rejected this argument. Instead, the Court found that the process was quasi-judicial, and that the municipality was required to act fairly and impartially:

> *Metro was essentially dealing with a dispute between Dr. Ginsburg, who wanted the zoning requirements to be altered for his benefit, and those other residents of the district who wanted the zoning restrictions to continue as they were. That Metro resolved the dispute by the device of an amending by-law did indeed give to its proceedings an appearance of a legislative character. But in truth the process in which it was engaged was quasi-judicial in nature; and I feel I must so treat it.*
>
> [emphasis added]

***Wiswell, supra,* at para 29 [Tab 18]**

170. More recently, in *Airport Self Storage & R.V. Centre Ltd. v Leduc (City)*, 2008 ABQB 12, the Alberta Court of Queens Bench likewise found that a text amendment fell toward the judicial end of the spectrum, requiring a higher degree of procedural fairness.

***Airport Self Storage, supra* [Tab 17]**

171. In *Airport Self Storage, supra*, the municipality issued a permit to a developer to construct a commercial storage facility on its property. An adjacent landowner appealed the issuance of the permit, arguing that it was not a permitted or discretionary use under the land use bylaw.

***Airport Self Storage, supra* [Tab 17]**

172. While the appeal was ongoing, the developer asked that Council amend the land use bylaw to add a "commercial storage facility" as a permitted use in that particular zone. The planning department recommended that the proposed text

amendment proceed to a public meeting. The planning department published notice of the meeting in a local newspaper, as required by the bylaw. However, no notice was provided to the adjacent landowner who had opposed the first permit, as personal notice was not a requirement under the land use bylaw.

173. At the public meeting, no one opposed the proposed bylaw amended. The text amendment then proceeded through second and third readings, and was adopted by Council.

174. The municipality in *Airport Self Storage, supra*, sought to portray the bylaw amendment as a "*typical text amendment*" – similar to the position of the City in the present Appeal. This position was rejected by the Court. The Court held that in light of the dispute between neighboring property owners, this was not simply a "*neutral text amendment*". Instead, the text amendment fell toward the judicial end of the spectrum, and a higher duty of procedural fairness was necessary.

***Airport Self Storage, supra*, at para 25, 28 and 29 [Tab 17]**

175. The City in this Appeal, similar to the municipalities in *Wiswell, supra*, and *Airport Self Storage, supra*, also argues that the Proposed Bylaw Amendment was purely legislative in nature, and should be afforded less procedural fairness.

[Exhibit R-2]

176. In support of its position, the City relies on the decision in *Souris (Town) v Jarvis*, 2009 PESC 35. In *Souris (Town) v Jarvis, supra*, the municipality was enacting a zoning bylaw with general application to the municipality. The Court determined that the municipality was acting legislatively in passing its zoning bylaw to give effect to its official plan.

***Souris (Town) v Jarvis*, 2009 PESC 35 at para 16 [Tab 19]**

177. The decision *Souris (Town) v Jarvis, supra*, is based on an entirely different factual scenario and has no application to the present Appeal.

178. The Proposed Bylaw Amendment was not a bylaw with general application to the City. Instead, the Amendment disproportionately impacts landowners in the area of the Sherwood Road and the West Royalty Business Park, as these are the only M-2 Zones in the City.

179. As instructed by the Supreme Court of Canada, in determining the true nature of the Proposed Bylaw Amendment, the realities and substance of the situation must be considered.

180. In reality, the construction of an asphalt plant on the Sherwood Road has been a highly contentious issue since May 2018 – over a year before the Proposed Bylaw Amendment passed final reading.

181. In May 2018, 150 to 175 residents attended a public meeting to oppose the proposed asphalt plant. Many residents and business owners also wrote to the City to oppose the construction of an asphalt plant on the Sherwood Road. The 2018 Rezoning Application was eventually withdrawn by the developer.

182. In February 2019, the same developer was engaged in lengthy discussions with the City's planning staff. Shortly thereafter, in March 2019, the City planning staff put forward a proposal to amend the *Zoning & Development Bylaw* to effectively allow asphalt, aggregate and concrete plants on the Sherwood Road.

183. The City was aware of the public opposition to the 2018 Rezoning Application to construct an asphalt plant on the Sherwood Road. The City was also aware that the effect of the Proposed Bylaw Amendment was to amend the *Zoning & Development Bylaw* to allow an asphalt plant on the Sherwood Road.

184. The Proposed Bylaw Amendment cannot, therefore, be characterized as a neutral text amendment. Instead, it was a decision on a highly contested issue, framed as a bylaw amendment.

185. In light of the known opposition to the 2018 Rezoning Application, the decision of Council to amend the *Zoning & Development Bylaw* to allow asphalt, aggregate and concrete plants on the Sherwood Road had the effect of resolving a dispute between the developer and neighboring property owners. In accordance with the decisions in *Wiswell*, *supra*, and *Airport Self Storage*, *supra*, the enactment of the Proposed Bylaw Amendment constitutes a judicial or quasi-judicial decision. It was therefore incumbent on the City to act fairly and impartially.

***Wiswell, supra,* at para 38 [Tab 18]**

186. The decision to allow asphalt, aggregate and concrete plants in the M-2 Zone is of the utmost importance to the Appellants.

187. The Proposed Bylaw Amendment, if upheld, will allow for an unlimited number of asphalt, aggregate and concrete plants on the Sherwood Road and the West Royalty Business Park. The only limiting factor will be the availability of land and compliance with Provincial setback requirements.

188. Although the Proposed Bylaw Amendment is not yet in effect, the City has already received two applications to construct asphalt, aggregate and concrete plants in the M-2 Zone. It is reasonable to assume that more applications are yet to come.

189. The construction of asphalt, aggregate and concrete plants in the M-2 Zone will have significant and lasting impacts on the Appellants, residents and businesses in the vicinity of M-2 Zones, and the City as a whole.

190. The plants will necessarily lead to increased truck traffic, noise and air pollution, decreased property values, and health and safety concerns. The decision to enact the Proposed Bylaw Amendment has the potential to drastically and negatively impact the health and safety of neighboring property owners, the value of properties, and the general use and enjoyment of nearby properties. The neighboring properties include a number of car dealerships, commercial businesses, a cemetery, a humane society, and a dog park.

191. As was aptly stated by Mayor Philip Brown at the June 21, 2019 Special Meeting of Council:

> *All I can say is that what I heard is that changing this bylaw is not going to be good for that area and the City and that is all I can say.*

[City's Record, Tab 21, Page 4]

192. The Appellants and other residents have expressed these concerns regarding an asphalt plant on the Sherwood Road since 2018. As part of the 2018 Rezoning Application, the City received letters of opposition from many of the neighboring property owners, including:

a. The PEI Humane Society
b. Ellen's Creek Watershed Group Inc.
c. Doiron's Landscape & Garden Centre
d. Brown's Volkswagen
e. Phillips Suzuki
f. Centennial Auto Group
g. Many private citizens

[City's Supplementary Record, Volume 1, Tab 25]
[City's Supplementary Record, Volume 2, Tab 47]
[City's Supplementary Record, Volume 2, Tab 59]

193. As in *Airport Self Storage*, *supra*, "*these facts indicate that a fairly high duty of procedural fairness should be required in the circumstances*".

***Airport Self Storage*, *supra*, at para 34 [Tab 17]**

194. The Appellants also had a legitimate and reasonable expectation that the City would follow the same or similar process as it had for the 2018 Rezoning Application.

195. The Appellants reasonably expected that, in the event there was another proposal to construct an asphalt plant on the Sherwood Road – whether by way of rezoning, site specific exemption or bylaw amendment – that the City would provide notice as it had only months earlier.

196. As part of the 2018 Rezoning Application, the City posted a notice on the subject property, published notices in The Guardian newspaper, and also provided personal notice to affected property owners. The notices published by the City in 2018 clearly stated that a public meeting was being held to discuss the construction of an asphalt plant on the Sherwood Road.

197. Although personal notice to affected property owners is not a requirement under the City's *Zoning & Development Bylaw*, in light of the City's past practice and the known opposition to an asphalt plant on the Sherwood Road, it was reasonable for the Appellants to expect personal notice.

***Airport Self Storage, supra*, at para 37 [Tab 17]**

198. Notice to affected property owners is even more crucial as the Proposed Bylaw Amendment will allow for the construction of an asphalt plant on the Sherwood Road as of right. The Appellants – and other residents of Charlottetown – will not have any other opportunity for public consultation or input. As explained in *Airport Self Storage, supra*:

> *In all of these circumstances it is reasonable that the Applicant would expect to be consulted about and specifically informed in respect to a proposal to change the land use regulations on the Lands located immediately across the street from its parcel. This is especially so if the enabling bylaw would virtually guarantee that the that the proposed development would proceed to construction without any further input from the Applicant.*
>
> [emphasis added]
>
> ***Airport Self Storage, supra*, at para 37 [Tab 17]**

199. The entire process followed by the City in approving the Proposed Bylaw Amendment is critical to the issue of procedural fairness. As explained by this Commission, deference to a decision maker is not automatic. Instead, deference is earned when the decision maker follows the process set out by law and is fair to all parties.

***Atlantis Health Spa v City of Charlottetown*, Order LA12-02 at para 33 [Tab 20]**

200. When considered as a whole, it is abundantly clear that the process followed by the City was not transparent and was not fair to all parties. The decision of Council to enact the Proposed Bylaw Amendment is therefore entitled to little, if any, deference.

201. The City had absolute control over the bylaw amendment process. The onus rested with the City to ensure that proper and adequate notice was provided to residents. But at each step of the process, the City chose to proceed in a way that limited the notice to residents:

a) The City chose to proceed by way of bylaw amendment rather than a rezoning or site specific exemption. Of the three options, a bylaw amendment is the only process that does not specifically require notice to affected property owners.

b) The City chose not to post a notice of public meeting on any property in the M-2 Zone.

c) The City chose to publish a notice of public meeting that mischaracterized the contentious change in permitted use as a mere "housekeeping amendment".

d) The City chose to publish a notice of public meeting that did not disclose that the Proposed Bylaw Amendment would allow asphalt plants on the Sherwood Road.

e) The City chose not to give notice of the public meeting to affected property owners in the area of the Sherwood Road or the West Royalty Business Park.

f) The City chose not to amend the Proposed Bylaw Amendment when it learned (after the March 2019 public meeting) that asphalt plants would only be permitted in M-2 Zones on the Sherwood Road. Had an amendment been made, another public meeting would have been required prior to first reading. Instead, the City chose to make this change only after the Proposed Bylaw Amendment had already passed second reading.

g) The City chose to proceed with the first reading of the Proposed Bylaw Amendment, despite the objections of Councillors that residents did not have proper notice of the public meeting.

h) The City chose to conduct both the first and second reading of the Proposed Bylaw Amendment in a span of only four (4) days. Both readings were held via Special Meetings of Council scheduled with little public notice. The Special Meetings were scheduled for noon on week days, making it difficult for members of the public to attend.

202. The City made these choices knowing that a developer intended to construct an asphalt plant on the Sherwood Road – and knowing that neighboring landowners were vehemently opposed to the development.

203. The Proposed Bylaw Amendment was therefore not a neutral text amendment. Instead, it was a means by which to resolve a dispute regarding permitted uses on the Sherwood Road.

204. The law is clear that the decision fell toward the judicial or quasi-judicial end of the spectrum, and required a higher degree of procedural fairness. Yet the City, at each step of the bylaw amendment process, chose a procedure that provided

minimal – if any – notice to affected property owners in the areas of the Sherwood Road and the West Royalty Business Park.

205. The entire bylaw amendment process followed by the City was aptly described by one Councillor as being "*sneaky*". At the June 17, 2019 Special Meeting of Council, prior to the first reading of the Proposed Bylaw Amendment, Councillor Doiron summarized the bylaw amendment process as follows:

> *I understand but if we go back to what Councillor Tweel discussed, if people in Ward 6 or whatever ward, they knew that this was going to allow an asphalt plant. It's just a simple little zoning amendment in the paper. No big deal. If it would have said we were going to change to allow an asphalt plant and the possibility of West Royalty and then the Sherwood Road. Think people would have come out instead of a little amendment? I believe truly that they would. I think by us, doing what we are doing, it's very sneaky to allow this type of thing. I know the city would come out in full force not to allow.*
>
> [emphasis added]
>
> **[City's Record, Tab 20, Page 5]**

206. At that same meeting, Deputy Mayor Coady was "*disturbed*" that residents and business owners did not have the opportunity to be heard at a public meeting. Deputy Mayor Coady questioned what was truly "*driving the agenda*".

[City's Record, Tab 20, Page 3]

207. It is abundantly clear that the entire bylaw amendment process lacked transparency and lacked fairness for all affected parties. Despite known opposition to an asphalt plant on the Sherwood Road, the City embarked on a process that had the effect of depriving the Appellants – and all interested individuals – of the right to participate in the planning process and to make their opinions heard before a decision was made.

208. The Appellants submit that, for all of these reasons, the City failed to comply with the common law requirements of procedural fairness. As a result, the Proposed Bylaw Amendment should properly be declared null and void.

D. THE PROPOSED BYLAW AMENDMENT IS INCONSISTENT WITH THE CITY'S OFFICIAL PLAN.

209. An amendment to the *Zoning & Development Bylaw* must be consistent with the City's Official Plan. The law is clear that in the event there is an inconsistency between the *Bylaw* and the Official Plan, the Official Plan shall prevail.

210. The paramountcy of the Official Plan is made clear in the *Planning Act*. Section 15(2) of the *Planning Act* states that in the event of a conflict or inconsistency between the Official Plan and a bylaw, the Official Plan prevails:

> ***Bylaws, conformity with plan***
>
> *(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.*

***Planning Act*, section 15(2) [Tab 21]**

211. This Commission has also recognized the significance and paramountcy of a municipality's Official Plan. This Commission has stated that the City's Official Plan is "*not merely a recommendation*". Instead, it is a legally binding document that binds the Council, residents and property owners:

> *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.*
>
> *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.*

***Pine Cone Developments Inc. v City of Charlottetown*, Order LA17-08 at para 41 and 42 [Tab 22]**

212. The Appellants submit that the Proposed Bylaw Amendment, which allows asphalt, aggregate and concrete plants within the City, is inconsistent with the City's Official Plan. In light of this inconsistency, the Official Plan must prevail.

213. The City's Official Plan clearly states that the City of Charlottetown "*could and should be more sustainable than it presently is*". In support of this goal, the Official Plan identifies a number of objectives and policies that will support sustainability.

214. In particular, the Official Plan clearly states that any large-scale development proposals shall be evaluated on their long-term and cumulative impact on the environment.

215. Further, an objective of the Official Plan is to ensure that the City's air quality is not endangered by actions taken by the public or private sectors. The Official Plan states that the City shall work to identify sources of air pollution and to undertake measures to collectively reduce or eliminate air pollution.

216. The relevant portions of the Official Plan are found in section 3.8, and state as follows:

> *Charlottetown could and should be more sustainable than it presently is.*
>
> [...]
>
> *"Quality of life" is becoming a more significant factor in determining people's satisfaction with where they live. It is therefore important for Charlottetown to take a leadership position in laying the groundwork now to protect and enhance the quality of life for its residents, and to create a welcoming environment which attracts new residents and businesses.*
>
> [...]
>
> *2. Our **objective** is to create a balance between urban development and the natural environment.*
>
> - *Our **policy** shall be to require that large-scale development proposals be evaluated on their long-term and cumulative impact on the environment.*
>
> [...]
>
> *5. Our **objective** is to ensure that Charlottetown's air quality is not endangered by actions taken by the public or private sectors.*
>
> - *Our **policy** shall be to collaborate with the province to develop appropriate air quality standards within Charlottetown.*
> - *Our **policy** shall be to work with the province to identify sources of air pollution and to undertake*

> *measures to collectively reduce or eliminate this contamination.*
>
> ***City of Charlottetown Official Plan*, section 3.8 [Tab 23]**

217. The Proposed Bylaw Amendment, which allows for asphalt, aggregate and concrete plants in the City, is directly contrary to the objectives of the Official Plan to encourage sustainability, consider the long-term and cumulative impact on the environment, and to reduce or eliminate air pollution.

218. The City's Official Plan also includes a defined direction for appropriate industrial development. This includes goals, objectives and policies for the appropriate industrial use of the West Royalty Business Park and the Sherwood Road area.

219. The City's Official Plan recognizes the proximity of the Sherwood Road to the Provincial arterial highway system. As a result, the Official Plan states that the Sherwood Road "*could see future suitability for use by transportation-related companies*". The Official Plan does not contemplate the use of the Sherwood Road area for asphalt, aggregate and concrete plans.

220. In fact, the Official Plan expressly states that the City must ensure that industrial zones do not detract from the City's character and appeal. As a result, the City's policy is to minimize land-use conflicts that may exist or arise between existing industrial zones and their non-industrial neighbors.

221. The relevant portions of the City's Official Plan state as follows:

> ***Defining Our Direction***
>
> *Our **goal** is to create new land-use categories which reflect the types of industrial development that are appropriate for Charlottetown, to designate tracts of land for them, and to work with public and private sector partners to stimulate this type of growth.*
>
> [...]

> *Our **objective** is to ensure that industrial zones do not detract from Charlottetown's character and appeal.*
>
> [...]
>
> - *Our **policy** shall be to minimize the land-use conflicts which might exist or arise between existing industrial zones and their non-industrial neighbours.*
>
> [...]
>
> *The Sherwood Industrial area has been designated as a combination of Heavy Industry, Light and Business Park zones due to its mix of industrial uses and transportation links to the Provincial arterial highway system. In addition, this area is relatively removed from residential uses. As this location is in proximity to the perimeter highway it could see future suitability for use by transportation-related companies.*
>
> ***City of Charlottetown Official Plan*, section 4.8 [Tab 24]**

222. The Proposed Bylaw Amendment, which allows asphalt, aggregate and concrete plants on the Sherwood Road, is inconsistent with the City's defined direction for appropriate industrial development as stated in the Official Plan. In particular, the use is not one that is contemplated or permitted in the Official Plan, it will detract from the City's character and appeal, and it will increase (rather than minimize) land-use conflicts with non-industrial neighbors.

223. For all of these reasons, the Appellants submit that the Proposed Bylaw Amendment is inconsistent with the City's Official Plan. In light of these inconsistencies, the Official Plan must prevail, and the Proposed Bylaw Amendment should properly be declared null and void.

RELIEF SOUGHT

224. For all of the foregoing reasons, the Appellants respectfully request that this Appeal be allowed, that the decision of Council be quashed, and that the Proposed Bylaw Amendment be declared null and void.

ALL OF WHICH is respectfully submitted this 17th day of June, 2020.

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Power of entry

(2) For the purposes of subsection (1), a person authorized by the Minister or the council may enter upon any lands upon which the building or structure is being constructed or the activity performed. *1988, c.4, s.27.*

PART V — APPEALS

28. Appeals from decisions of Minister

(1) Subject to subsections (1.2) to (4), any person who is dissatisfied by a decision of the Minister that is made in respect of an application by the person, or any other person, pursuant to the regulations for(a) a development permit;

(b) a preliminary approval of a subdivision or a resort development;

(c) a final approval of a subdivision;

(d) the approval of a change of use; or

(e) any other authorization or approval that the Minister may grant or issue under the regulations,

may appeal the decision to the Commission by filing with the Commission a notice of appeal.

Appeals from decisions of council

(1.1) Subject to subsections (1.2) to (1.4), any person who is dissatisfied by a decision of the council of a municipality

(a) that is made in respect of an application by the person, or any other person, under a bylaw for

(i) a building, development or occupancy permit,

(ii) a preliminary approval of a subdivision,

(iii) a final approval of a subdivision; or

(b) to adopt an amendment to a bylaw, including

(i) an amendment to a zoning map established in a bylaw, or

(ii) an amendment to the text of a bylaw,

may appeal the decision to the Commission by filing with the Commission a notice of appeal.

"bylaw"

(1.2) In subsection (1.1) and subsection (1.4) "**bylaw**" means a bylaw made under this Act.

Notice of appeal and time for filing

(1.3) A notice of appeal must be filed with the Commission within 21 days after the date of the decision being appealed.

Council decision that requires Minister's approval

(1.4) For greater certainty, where a person is dissatisfied by the decision of a council of a municipality to adopt an amendment to a bylaw, the 21-day period for filing a notice of appeal under this section commences on the date that the council gave final reading to the amendment to the bylaw.

Elimination of appeal when development approved under *Environmental Protection Act*

(2) Where the Lieutenant Governor in Council has by order declared that

(a) a development for which approval is required under the *Environmental Protection Act* has met all the requirements of that Act and written approval has been given; and

(b) the right of appeal to the Commission in respect of that development should be curtailed,

subsection (1) has no application and there is no right of appeal to the Commission in respect of a decision on that development.

Reasons to be tabled

(3) Where a declaration has been made under subsection (2), the Lieutenant Governor in Council shall submit to the next session of the Legislative Assembly a statement of the reasons for making the declaration.

Exceptions

(4) No appeal lies from a decision of the council or the Minister respecting

(a) the final approval of a subdivision where the grounds for the appeal are matters that could have been heard and determined at the stage of preliminary approval of the subdivision; or

(b) the final approval of a subdivision or development permit within a resort development, where the grounds for the appeal are matters that could have been heard and determined at the stage of preliminary approval of that subdivision or development. *2001, c.47,s.1.*

Notice

(5) A notice of appeal to the Commission under subsection (1) shall be in writing and shall state the grounds for the appeal and the relief sought.

Service upon council or Minister

(6) The appellant shall, within seven days of filing an appeal with the Commission, serve a copy of the notice of appeal on the council or the Minister, as the case may be.

Procedure

(7) Subject to adherence to the rules of natural justice, the Commission shall determine its own procedure.

Order

(8) The Commission shall hear and decide appeals and shall issue an order giving effect to its disposition.

Reasons

(9) The Commission shall give reasons for its decision.

Implementation

(10) The council or the Minister, as the case may be, shall implement an order made by the Commission.

Action by Commission

(11) Where the council or the Minister, as the case may be, fails to implement an order made under subsection (8), the Commission, on its own initiative or the initiative of an interested

1982 CarswellBC 231
British Columbia Supreme Court

Peterson v. Whistler (Resort Municipality)

1982 CarswellBC 231, [1982] B.C.W.L.D. 1760, [1982] B.C.J. No. 1751, 16 A.C.W.S. (2d) 345, 39 B.C.L.R. 221

PETERSON v. RESORT MUNICIPALITY OF WHISTLER

Rae J.

Heard: July 22 and 23, 1982
Judgment: August 27, 1982
Docket: Vancouver No. A822026

Counsel: *S. G. Thompson*, for petitioner.
D. Lidstone, for respondent.

Subject: Public; Municipal

Application to set aside by-law for illegality.

***Rae J.*:**

1 The petitioner is an elector and resident of the resort municipality of Whistler, the respondent ("Whistler"), and is therefore qualified under s. 313 of the Municipal Act, R.S.B.C. 1979, c. 290 ("the Act") to apply (as he does pursuant to the authority of that section) to set aside for illegality By-law 254 of Whistler. By-law 254 purports to amend "Resort Municipality of Whistler Zoning Bylaw No. 9, 1975" as amended.

2 By-law 254 was finally adopted by the council of Whistler 31st May 1982.

3 The petitioner attacks the by-law on a considerable number of grounds as set out in the petition. As the grounds were dealt with in argument at the hearing they were four in number, some of which had a considerable number of subheadings. These four, broadly stated, were:

4 1. That the notice of public hearing as required by s. 720 of the Act as a condition precedent to the adoption of the by-law did not comply with the requirements of the section.

5 2. That the by-law is void for uncertainty in a number of respects.

6 3. That the by-law in a number of respects is contrary to or at variance with the Official Community Plan, all contrary to s. 712 of the Act.

7 4. That the by-law is wrongly discriminatory and not in the public interest.

8 Before proceeding to ground 1, I must first deal with a preliminary objection raised by counsel for Whistler.

9 Sections 313 to 316 of the Act, as enacted in R.S.B.C. 1979, c. 290, read:

Setting bylaw aside

313. The Supreme Court, on application of an elector of a municipality or of a person interested in a bylaw of its council, may set aside the bylaw in whole or in part for illegality and award costs for or against the municipality according to the

result of the application. This section does not apply to a security issuing bylaw providing for the issue of debenture or other evidence of indebtedness to a regional district or to the Municipal Finance Authority of British Columbia.

Notice of application

314. (1) Notice of the application to set aside a bylaw setting forth the grounds of the application shall be served on the clerk not less than 10 days before the hearing and not more than one month after the adoption of the bylaw [am. 1980, c. 50, s. 62].

(2) Where the bylaw is a security issuing bylaw adopted under section 335, the notice shall be served on the clerk not less than 5 days before the hearing and not more than 10 days after the adoption of the bylaw.

(3) An application to set aside a bylaw requiring the assent of the electors which the council purported to adopt without assent may be heard at any time after 10 days notice of the application has been served on the clerk, and that notice may be served more than one month after the adoption of the bylaw.

Declaratory orders

315. An application for a declaratory order relating to a bylaw shall not be entertained on the ground of irregularity in the method of enactment or in the form of a bylaw more than one month after the adoption of the bylaw.

Limitation period for hearing

316. Except for a bylaw referred to in section 314(3), an order under section 314 or a declaratory order relating to a bylaw shall not be made unless the application is heard within 2 months after the adoption of the bylaw.

10 The petition herein was launched by filing on 28th June 1982, i.e., within one month of the adoption of the by-law. The petition came to be heard on 22nd July 1982 and concluded the following day, i.e., it was heard within two months after the adoption of the by-law.

11 The preliminary objection is that s. 315 (quoted above) applies and that, as it is said, ground 1 constitutes merely a ground of "irregularity in the method of enactment" under s. 315, that the application is for a declaratory order, as referred to in the section, and that it should not be "entertained" after the one month referred to in the section. It is said that to "entertain" means to "hear" and that the court is forbidden to hear the matter after the expiration of the one month referred to.

12 The preliminary objection is properly to be rejected on a number of grounds.

13 The non-compliance with the notice provisions of s. 720 of the Act, which it is alleged occurred in the case at bar, is not an "irregularity" within s. 315. For the immediate purposes here the definition of "irregularity" as it appears in Jowitt's Dictionary of English Law, vol. 1, 2nd ed. (1977), is apt:

When a proceeding (judicial or extrajudicial) is done in the wrong manner, or without the proper formalities, it is said to be irregular or an irregularity — as opposed to a proceeding which is illegal or *ultra vires*. An irregularity may be waived by the consent or acquiescence of the opposite party or (in the case of judicial proceedings) will generally be allowed by the court to be set right on payment of the costs occasioned by it (R.S.C., Ord. 2, r. 1), while a proceeding which is illegal or *ultra vires* is, as a rule, wholly null and void.

14 Section 720 [am. 1981, c. 21, s. 63] (formerly s. 703 [of R.S.B.C. 1960, c. 255]) of the Act reads, in part:

Hearing required for zoning bylaw

720. (1) The council shall not adopt a zoning bylaw until it has held a public hearing on it, notice of which stating the time and place of the hearing has been published in not less than 2 consecutive issues of a newspaper published or circulating in the municipality, with the last of the publications appearing not less than 3 days or more than 10 days before the date of the hearing.

(2) The notice of hearing shall

(*a*) identify the land deemed to be affected;

(*b*) state in general terms the intent of the proposed bylaw;

(*c*) state where and the days and hours during which a copy of the proposed bylaw may be inspected; and

(*d*) be in a size, form and style of printing prescribed by regulation.

(3) The council shall, by bylaw, provide that notice of the hearing on a proposed amendment to the zoning bylaw having the effect of rezoning an area of the municipality from one zone to another zone must be mailed or otherwise delivered to the owners and occupiers of all real property within the area subject to the rezoning and within a distance specified in the bylaw from the area subject to the rezoning ...

Section 721 (formerly s. 704) reads, in part:

721. (1) A zoning bylaw shall not be adopted, amended or repealed except after a hearing under section 720 ...

15 The giving of a proper notice under s. 720 is at the very root of the authority of the council to adopt the by-law. It is a condition precedent to the council's authority so to act: see *Bay Village Shopping Centre Ltd. v. Victoria*, [1973] 1 W.W.R. 634, 31 D.L.R. (3d) 570 (B.C.C.A.); see also *Little v. Cowichan Valley Regional Dist.* (1978), 8 B.C.L.R. 369, 94 D.L.R. (3d) 417 (C.A.). In the *Bay Village* case there was failure to publish a notice. I quote, in part, from the reasons for judgment of Robertson J.A. (with whom Nemetz J.A., as he then was, was in general agreement) at p. 576:

It is, however, argued for the respondents that the failure to publish notice of the hearing on June 10th was a mere irregularity and reliance is placed on the decision of this Court in *McMartin v. Vancouver* (1968), 65 W.W.R. 385, 70 D.L.R. (2d) 38 (B.C.C.A.).

16 His Lordship then proceeds to give reasons why the McMartin case was not applicable, and then at pp. 577-78 says:

Adhering to my first impression of the effect of ss. 704 and 703, I think that the appellant was entitled to have the by-law quashed in whole for illegality, pursuant to s. 238 of the Act. It will be seen that I have, with respect, disagreed with the view of the learned Judge below, being of the opinion that there was failure to fulfil a statutory prerequisite, that it is immaterial whether or not anyone was prejudiced by the error, and that the Court has no discretion to refuse to quash. I would allow the appeal and quash By-law 248 for illegality.

17 I quote also from the reasons of Nemetz J.A. (as he then was) at p. 578:

It is my opinion that the opposite provisions of the *Municipal Act*, R.S.B.C. 1960, c. 255 (ss. 703 [am. 1961, c. 43, s. 42; 1968, c. 33, s. 167] and 704 [am. 1972, c. 36, ss. 29, 30), also constitute a code of procedure which must be followed strictly where it is intended to amend a zoning by-law. In the circumstances of this case the by-law was adopted illegally because the prescribed procedure was not followed. In my view the Legislature's intention in enacting this legislation is clear and unambiguous. That intention is, as I perceive it, to protect the public by requiring a council not to adopt zoning by-laws until a public hearing thereon has been held. [sic] "notice of which stating the time and place of the hearing has been published ...". In order to comply with these requirements it is incumbent upon a council to follow the procedure strictly and without deviation. In my view, the failure to give proper notice as provided in s. 703 of the Act made the meeting of June 10, 1971, an illegal one and vitiated any decisions taken in respect of By-law 248 on that day.

18 I proceed to a second basis for considering that s. 315 is inapplicable here. Section 316 says, in part:

316. ... an order under section 314 or a declaratory order relating to a bylaw shall not be made unless the application is heard within 2 months after the adoption of the bylaw.

19 A number of matters are to be noted with respect to the wording of s. 316. I take it that the reference to s. 314 therein is to an order which the court obtains its power to make under s. 313, s. 314 being largely procedural.

20 Next, one notes that the reference in the section is to "heard" as opposed to the use of the word "entertained" in s. 315. Sections 315 and 316 were previously enacted in 1962 (B.C.), c. 41, s. 13 as follows:

> 240A. (1) Subject to section 241, no application for a declaratory order relating to a by-law shall be entertained on the grounds of irregularity pertaining to the method of enactment of or the form of the by-law after the expiration of one month after the date of the adoption of the by-law.
>
> (2) No declaratory order relating to a by-law shall be made unless the application is heard within two months after the date of the adoption of the by-law.

21 The reference again is to "entertained" in s. 240A(1)(s. 315) and to "heard" in s. 240A(2)(s. 316). If the legislature meant by the word "entertained" in s. 315 that the application should be heard within one month it would have been a simple matter to say so. When it meant "heard" in s. 316 it used that word. It appears to follow from this that whatever else the word "entertained" may mean in s. 315, it means something other than "heard".

22 This conclusion is supported by a reference to s. 314(1) if one assumes that the "application" referred to in s. 315 is an "application" under s. 314. It will be noted that s. 314(1) permits the notice to be served up to one month after the adoption of the by-law, which service in turn is not less than 10 days before the hearing. If "entertained" in s. 315 means "heard" you would have the anomaly of a notice of hearing, complying with s. 314 as to times, being out of time under s. 315 because the hearing date was set too late. That cannot in reason be so.

23 Finally, one notes that s. 316, unlike the previous s. 240A(2), refers to "an order under s. 314 *or* a declaratory order" (the italics are mine). Section 240A(2) referred only to a declaratory order. Thus a distinction is made in s. 316 between an order made under the summary procedure set out in s. 314, and a declaratory order, which is what s. 315 refers to. It may be that the use of the disjunctive is intended to distinguish between an order to set aside (formerly quash) under the summary procedure s. 313, and a declaratory order, made possibly in other proceedings. But I need not decide the point. The preliminary objection is rejected for the earlier reasons given.

24 I turn next to the first ground on which it is sought to set aside the by-law. As already noted, s. 720(2)(*b*) requires the notice thereunder to "state in general terms the intent of the proposed bylaw". I take that to mean the intent to be determined from the by-law and evidence relevant thereto, not the purpose of council in enacting it.

25 The petitioner submits that the notices published and delivered did not adequately or properly comply with that s. 720(2)(*b*). Consideration of this requires, first, a reference to the by-law.

26 By-law 254 came about because the council of Whistler wished to make it possible for a proposed developer, with whom the council was in touch, to develop a parcel of land with equestrian facilities. As a consequence, the original By-law 254 was drafted and submitted in due course to a public meeting on 14th December 1981, after notice purporting to be in accordance with s. 720.

27 The by-law as then drawn and submitted to the public meeting was then submitted to the Ministry of Municipal Affairs as required. Approval by that ministry was refused on a number of grounds, including deficiencies in the notice under s. 720.

28 The by-law as then proposed was then amended in some respects and was submitted to a later public meeting in April 1982. This is the by-law in question here. The notice of that meeting is the one in question here.

29 One of the amendments made as indicated was at the request of the proposed developer and was to eliminate a reference in the by-law as previously drafted to "accessory hostel use".

30 It is apparent that the council knew, at least as early as the public hearing on 14th December 1981, that there was considerable concern as to a proposed structure of 16,000 square feet, which was variously referred to at that meeting as a pension, a commercial complex, a hostel, a hotel and a lodge. It appears from the minutes that the pension, as it is now called in the by-law, was the major concern of the public present. It appears also that the council was alert to the need to insist that the pension be permitted only as ancillary to the equestrian facilities and not otherwise. The pension seems to have been regarded by council and the proposed developer as necessary, however, to make the overall proposed development commercially feasible. The proposed developer intended to operate the pension of 40 sleeping units under a manager.

31 I now turn to a consideration of the terms and the intent of By-law 254. It is unfortunately so drafted as to make that task rather difficult.

32 The by-law creates a new class of zone called "Recreational Development Two (RD2)". The Zoning By-law proper, i.e. No. 9, already had provision for a class of zone called RD1. By-law 254 says with respect to the new RD2 that it "... delineates land that is best suited for the development of recreation uses and facilities ancillary to the principle [sic] recreation use" (the italics are mine). By-law 9 says the same with respect to the RD1 zone. The essential difference between these two classes of zone is that the RD1 in By-law 9 restricts the "lands, buildings and structures ... to the principal recreation uses":

> (b) schools for cross-country skiing;
>
> (c) schools for white-water boating;
>
> (d) boat ramps and boat rentals;
>
> (e) hostels; and
>
> (f) campsites, picnic sites, parks and playgrounds;
>
> and permitted ancillary uses to the foregoing principal recreation uses include:
>
> (g) the sale, repair and fabrication of equipment required for a principal use; and
>
> (h) accessory residential uses for the sole purpose of occupation seasonally or permanently by employees of any business directly related to a principal recreation use — buildings intended for accessory residential use by employees shall not be constructed until after the principal recreation use to which they are accessory is established and occupation of such buildings shall continue only for the period during which the principal use is in effect.

33 This was not the type of use which the council had in mind for RD2. By-law 254 says in respect of the newly created RD2 zone that:

> ... the use of land, buildings and structures is restricted to:
>
> (a) equestrian use;
>
> (b) parks and playgrounds;
>
> (c) accessory residential use;
>
> (d) accessory pension.

34 Equestrian use is defined in By-law 254, para. 2(a) as:

> "Equestrian use" means the keeping of horses and includes arenas, stables, corrals, and grooming and exercising facilities.

35 It is noted that these parts of By-law 254 and of By-law 9 sometimes use the word "ancillary" and sometimes the word "accessory" By-law 9, of which By-law 254 purports to be an amendment, in para. 1.3.0 defines "accessory use" as:

> "accessory use" means a use ancillary or subordinate to a principal use of the land, building or structure; ...

"Ancillary", in turn, is defined in the Shorter Oxford English Dictionary as:

> Ancillary ... 1. Subservient, subordinate (*to*) ...

By-law 9 defines "accessory residential use" as:

> "accessory residential use" means a use accessory to another use where the building or buildings so used include not more than one dwelling unit for the accommodation of the owner, operator, manager or caretaker; ...

"Pension" is defined in By-law 9:

> "pension" means a building containing common areas including a dining room intended for the use of occupants and sleeping units without cooking facilities; ...

36 By-law 254 provides that the maximum gross floor area for accessory pension use shall be 16,000 square feet, of which a minimum of 70 per cent shall be contained in a maximum of 40 sleeping units (a potentially large accommodation).

37 There are essentially two areas of land involved in the re-zoning, as shown on a plan attached to and forming part of By-law 254, and as shown on a similar plan published and delivered respectively as part of the notice under s. 720. The two areas are immediately adjacent to a single family residential area.

38 Prior to By-law 254 the two areas were zoned as "Rural Resource One (RR1)" whose permitted uses are set out at length in By-law 9, at p. 33, para. 4.9.1. They include among a number of other permitted uses a single residential dwelling on an individual lot.

39 By-law 254 re-zones the larger of the two areas to RD2, which permits the uses described above. The smaller of the two areas is re-zoned to "Single Family Comprehensive (RS1)" which By-law 9 says:

> ... delineates land best suited for development of *two or more residential buildings* on a single lot of land. (The italics are mine.)

40 By-law 254 then designates apparently both areas of land (depending on one's reading of the by-law) as development permit areas which means (under By-law 9) that one must obtain a development permit before proceeding to development *other than the development of three or less self-contained dwelling units.*

41 "Dwelling unit" is defined in By-law 9:

> "dwelling unit" means more than one room operated as a house keeping unit, used or intended to be used as a domicile by one or more persons and usually containing cooking, eating, living, sleeping facilities ...

42 "Dwelling, single residential" is also defined in By-law 9:

> "dwelling, single residential" means a building consisting of one dwelling unit (other than a mobile home) which is occupied or intended to be occupied seasonally or permanently by one family or six or fewer unrelated persons ...

43 In addition to the foregoing, By-law 254 provides for such usual matters reasonably to be expected in such zonings, i.e., lot coverage, height of buildings, parking, building siting, fencing and screening.

44 I now revert to the matter of "in general terms the intent of the proposed by-law". The following are extracted from the definition of "general" in the Shorter Oxford English Dictionary:

> General ... A. *adj.* 1. Pertaining to all, or most, of the parts of a whole; completely or approximately universal within implied limits; opp. to *partial* or *particular* ... 8. Comprising, dealing with, or directed to the main elements, features, etc. 1563; ...

45 These extracts appear to me reasonably to express the meaning to be attributed to the term "general" as used in the statute.

46 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. The situation as here stated is somewhat similar to that in *Mosaic Enterprises Ltd. v. Kelowna* (1979), 15 B.C.L.R. 327 at 339 (C.A.), although there the notice in question was required under a different section of the Act and in a somewhat different context.

47 What then might reasonably be said in general terms to be the intent of the proposed by-law here (at some risk of repetition)?

48 The intent included the following:

49 1. To re-zone two areas of land (as identified).

50 2. To restrict the use of the larger one to:

51 (a) the keeping thereon of horses and the construction thereon of some one or more of arenas, stables, corrals and grooming and exercising facilities;

52 (b) the construction thereon of parks and playgrounds and of residence(s) (ancillary to the equestrian use) with a maximum of three (3) bedrooms and 1,200 sq. ft. each;

53 (c) the construction thereon of what is termed "pension(s)" (ancillary to the equestrian use) of not more than 40 sleeping units or of 16,000 sq. ft. each.

54 3. On the smaller of the two areas (zoned RS1) the intent in so zoning was to permit two or more residential buildings on a single lot of land and to restrict the use to:

55 (a) single residential dwellings;

56 (b) boarding use restricted to no more than four boarders per dwelling unit;

57 (c) home occupation use;

58 (d) parks and playlots;

59 (e) buildings and structures accessory to the uses permitted in clauses(a) and (d);

60 (f) accessory off-street parking use;

61 (g) public utility use excluding public storage or works yards.

62 4. To require a development permit for any development other than three (3) or less self-contained dwelling units.

63 5. To limit and regulate the number of buildings per parcel, lot coverage, height and siting of structures, fencing and screening.

64 6. To require parking facilities to be provided according to building classes.

65 The notice published and delivered in the case at bar purporting to comply with s. 720 of the Act, including the plan as part thereof, is as follows:

66 Then is the foregoing notice in reasonable compliance with the requirement of stating in general terms the intent of the by-law? I think not, particularly if one has some regard to the persons intended to be informed by it. Granted that one must not be unduly critical and should approach the notice in an attempt, within reason, to give validity to it. But it nevertheless appears to me that considering this notice as a whole it is fair to say that much of it is a collection of verbiage calculated, in general, rather to obscure and confuse than to reveal and

[Graphic not reproduced].

inform. The reason for language is to communicate and to the extent that it fails to do so it fails in its essential purpose.

67 A fair reading of this notice does convey the information that there is to be a re-zoning of an area to RD2 in consequence of which "equestrian use" is defined. It is reasonable to deduce from this that the RD2 zone intends to permit development for equestrian purposes. But there is no mention whatever of what development is intended to be permitted under that term. Even if one could reasonably infer that there might be structures related to the keeping, riding, exercising and use of horses, much would be left to conjecture as to what, if anything, the intent of the by-law was in that respect.

68 No mention whatever is made of the intended pension of the potential dimensions and accommodation previously indicated. On the other hand it was deemed proper to say that the RS1 zone would permit, for example, "up to three (3) residential dwellings". Such imparting of partial information tends to indicate that apart from this there is little information of consequence to convey. Apart from these instances, there is no mention of what the by-law intends to permit by way of improvements or structures in either zone, even in the most general terms.

69 There is a mention of "the requirement for development permit", without any indication of what requirement is intended and in respect of what development.

70 In my judgment the form of notice in question is not a reasonable compliance with the requirement of stating in general terms the intent of the by-law. The by-law is set aside accordingly. The petitioner is entitled to costs.

Application allowed.

Sunday, June 07, 2020

SITE MENU
Home

REGULATION
Auto Insurance
Electricity
Lands Protection
Municipal
Petroleum
Waste Management
Water & Sewer

APPEALS
Environmental
Planning
Rental
Tax

RENTAL
Residential
Rental Property

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

Docket: LA94005
Order: LA94-06

IN THE MATTER of the *Planning Act*, R.S.P.E.I. 1988 Cap. P-8;

and

IN THE MATTER of an appeal to The Island Regulatory and Appeals Commission (the Commission), under Section 28 of the *Planning Act*, by David S. Peardon on behalf of certain residents and landowners (the Appellants) of Montague, against a decision of the Montague Town Council to rezone from Residential (R1) to Commercial (C1), 212 Kennedy Street (Provincial Property Number 197954) located in Montague, P.E.I.

DATED the 13th day of June, 1994.

John L. Blakney, Vice-Chairman
Myrtle Jenkins-Smith, Commissioner
James Nicholson, Commissioner

Order

Appearances

1. For the Appellants

David S. Peardon

Appellant

2. For the Town of Montague

Kerr Scott

Councillor

3. For the Property Owner

Sean Michael Halley

Legal Counsel for Frank Lannigan and Kelly Lannigan

Reasons for Decision

I. BACKGROUND

In accordance with the ***Planning Act*** and the ***Town of Montague Zoning and Subdivision Bylaws***, specifically Part 15, Sections 9 and 10, the Town Council of Montague may change a zoning designation of any parcel of land.

The matter before the Commission involves an appeal by David S. Peardon on behalf of residents and landowners, against a decision of the Montague Town Council to rezone property (Provincial Property Number 197954) from Residential (R1) to Commercial General (C1).

Frank Lannigan made application (no date indicated) to the Montague Town Council to rezone his property (Provincial Property Number 197954) located at 212 Kennedy Street from Residential (R1) to Commercial General (C1). (Exhibit 12.)

Town Council held a public meeting on the matter on Tuesday, February 15, 1994. (Exhibit 7.)

At a special meeting of the Montague Town Council on Friday, February 25, 1994, Council gave second and final reading and passed a motion in favour of rezoning the property. (Exhibit 5.)

On March 9, 1994, David S. Peardon appealed the decision of the Town Council to The Island Regulatory and Appeals Commission. (Exhibit 3.)

The Commission heard the appeal on Wednesday, April 20, 1994, in Montague.

II. EVIDENCE AND ARGUMENTS

A. Appellants

Arguments for the Appellants, as presented during the hearing, fall into two broad categories and can be summarized as follows:

1. <u>The Impacts of Rezoning</u>

A rezoning of the property for commercial use and developing a business which consists of a combined lounge and restaurant could constitute a nuisance to the residents of the area.

The residents of the area fear that rezoning the property for commercial use will lead to fighting, public drunkenness, excessive noise, and property damage. The residents believe that their security and safety will be affected which will lead to the degradation of their quality of life.

The Appellants contend that property values will also decrease if the property is rezoned and businesses continue to develop. The development, if permitted, will allow one person to profit at the expense of others. 62

2. Planning Policy

The property in question is surrounded by residential homes and the proposed commercial development is totally incompatible. This rezoning goes against the natural zoning of the neighbourhood.

B. Town of Montague

Arguments for the Town of Montague can be summarized as follows:

No further commercial development can occur in the Tudor Hall building without additional parking. Council investigated all avenues to acquire more parking, however, the only available alternative is to rezone the subject property to commercial and develop this as a parking lot.

At the public meeting, the public voiced their opinion both for and against the rezoning proposal. Council weighed these arguments and decided that the need for parking was important. Based on the best interest of the Community, the Council made a decision to rezone the property commercial to allow the parking lot to be developed.

C. Property Owner

Arguments for the property owner can be summarized as follows:

In making its decision to rezone the property, Council considered the "larger" picture of what was good for the Community. Council made this decision after giving full consideration to the objections raised by area residents.

Council has determined that in order for the owner of the Tudor Hall to proceed with the development of this operation as a restaurant and lounge, additional parking is required. The existing building is an eyesore and if additional parking is required in the community, this may be the best use for the property. The parking lot will be well maintained and adequately landscaped.

D. Others

The Commission heard comments from other interested persons both for and against the rezoning.

III. DECISION

Having considered the evidence presented during the hearing, the Commission decided to deny the appeal.

During the hearing, Council argued that the proposed use of the Tudor Hall is not relevant to the issue of rezoning 212 Kennedy Street from Residential to Commercial. The Council argued that the matter before the Commission is the question of rezoning 212 Kennedy Street from Residential R1 to Commercial C1 and that the proposed use of the property for a parking lot is only incidental to activities related to the Tudor Hall.

As in other rezoning cases, the Commission holds the opinion that no individual owner has a statutory right to a rezoning.[1]

Generally on appeals the Commission believes it is required to exercise independent judgement on the merits of each application. However, the Commission is reluctant to interfere with the decision of elected representatives in the exercise of their discretion on rezoning applications. In these cases the Commission considers the following: 1. Whether Council complied with the statutory provisions of the Town's bylaws; 2. Whether Council's decision to rezone is discriminatory; 3. Whether Council acted in bad faith; 4.

Whether Council acted in the interest of the public; and 5. The planning principles or 63 standards upon which Council made its decision. This is not to say that in any other applications of similar nature the Commission would fetter itself by these principles and not consider other matters which may arise in a given case. However, in this case, the Commission's decision rests on its findings relevant to these principles.

1. Whether Council complied with the statutory provisions of the Town's bylaws

The Commission finds that some statutes prescribe preliminary steps to reach rezoning decisions. Such requirements are designed to protect the owners of land affected by the rezoning. Where a statute directs the Council to give notice and hold a public meeting, failure to give sufficient notice will invalidate the decision.

Accordingly, the Commission finds that pursuant to Part 15, Sections 9 and 10 of the **Town of Montague Zoning Bylaw**, the Montague Town Council has the authority to amend the zoning designations but in so doing, must first give public notice of its intention.

> *Section 9.*
>
> *Before changing the zone designation of any parcel of land, the Town Council of Montague shall insert an advertisement giving notice of its intention to do so at least once a week for two successive weeks in a newspaper published or circulating in the area affected; the first of such notices to be published at least two clear weeks before the date fixed for consideration of objections.*
>
> *Section 10.*
>
> *The notice shall state the place where and the hours during which the regulations and the proposed amendment may be inspected by any interested persons and a time and place set for the consideration by the Council for objections.*

In reviewing the public notice regarding this rezoning application, the Commission finds that a notice appeared in The Guardian newspaper. Council states the first of such notice was published on February 1 and a second was published on February 8, 1994. Although the notice does meet the general intent of the requirements for content, the Commission has concluded that this notice was not published *"at least two clear weeks"* as required.

The Commission refers to Section 23. (4) of the ***Interpretation Act*** of Prince Edward Island:

> *In the calculation of time expressed as clear days, **weeks**, months, or years, or as "at least" or "not less than" a number of days, weeks, months, or years, the **first and last** day, **week**, month or year **shall be excluded**. (emphasis added)*

Pursuant to the provisions of this section, the Commission believes Council has failed to meet the strict requirements for notice.

However, the Commission does note that Council held a public meeting on February 15, 1994 to consider objections. The minutes of this meeting indicate that no individuals objected to the timing of the notice nor did any individuals state they were denied the right to comment on the proposed application. Further to this matter, the Commission heard no arguments during the public hearing that any individual objected to the timing of the notice. Therefore, the Commission concludes that a flaw in the notice did not place anyone at a serious enough disadvantage to warrant quashing Council's decision to rezone.

2. Whether Council's decision to rezone is discriminatory

There are two primary factors to be considered on the issue of discrimination[2]: 1) Whether or not permission is given to one individual or group to rezone property while denying another request of similar nature and circumstance. 2) Establishing that Council had improper motives—deliberately making a decision injurious to one individual or group without regard to the public interest.

In this case, the Commission understands that Council received a request from Frank Lannigan to rezone the subject property (Exhibit 11). In the course of the hearing no evidence was presented to the Commission to convince it that Council members deliberately made the decision to injure one individual or group of individuals and without giving consideration to the public interest.

There is no evidence before the Commission that Council acted in a discriminatory manner in granting the rezoning request.

3. Whether Council acted in bad faith

Bad faith infers that "*the Council has acted unreasonably or arbitrarily and without the degree of fairness and impartiality required by a municipal government.*"[3]

Based on the evidence, it is clear to the Commission that Council decided to rezone the lot to improve the greater community good by solving ongoing vehicle parking problems in the area. That is, to properly plan for and deal with a growing parking problem. Although the rezoning encroaches an area zoned residential, the Council sufficiently demonstrated to the Commission that in this case the rezoning will serve a public good and that Council has not acted unreasonably or arbitrarily or in an unfair or partial manner.

4. Whether Council acted in the interest of the public

The Commission heard evidence from Kerr Scott, Development Officer for the Town of Montague, stating that Council held a public meeting and considered the objections raised at that meeting.

Council's decision to rezone 212 Kennedy Street was viewed as a means to alleviate the parking problem in the area and in so doing, provide for safer vehicular access. Mr. Scott argued that in this case, the Council considered the objections raised at the public meeting, however the greater public interest outweighed the interest of the concerned residents.

In the case of the Appellants, arguments were presented stating that the rezoning of the property would lead to nuisance or undue harm. Also, the parking lot would be unsightly.

The Commission is of the opinion that Council gave careful consideration to the objections of local area residents, and made its decision with a view to the common good and benefit of the general public.

5. The planning principles or standards upon which Council made its decision

The provisions pursuant to the ***Planning Act*** and the ***Municipalities Act***, confer upon the Town of Montague extensive powers to regulate the use of land, buildings and structures. Among these powers is the authority to zone land as contained in Part 3: Zone and Zoning Maps in the Zoning By-law of the Town of Montague.

In this case, Council has made a deliberate decision to expand the commercial boundaries into an area zoned residential. The question is whether this decision is based on sound planning principles and standards.

In this case the facts are: (1) The general area across the street from the subject lot is experiencing intensive commercial and institutional activity. (2) The properties in the block containing the subject lot and fronting on Kennedy Street are zoned Residential Single Family (R1). The block is comprised of a vacant lot at the corner of Kennedy Street and MacLaren Avenue, a single-family home adjacent to the subject property and a single-family home which is currently rented on the opposite side of the subject

property. (3) The subject lot contains a vacant residential building. (4) The remaining[65] two lots near Riverside Drive are single-family residents. (5) Across the street from the subject property is land zoned Special Use (O2) consisting of a building operated by the St. John Ambulance Society and used on occasion as a bingo hall. (6) On the opposite corner of Kennedy Street and School Street is the Tudor Hall zoned for commercial use.

In this case, the Commission views the decision of Council and the planning strategy adopted by Council to be significantly different from the previous rezoning appeal involving Hilda Hilchey and Faye Fraser (Order LA93-10).

In that case, the Commission disagreed with the strategy adopted by Council to rezone property on Fraser Street from Residential Single- Family to Commercial. It was the opinion of the Commission that the approach used to amend the zoning of the area constituted *checker boarding*--that would leave a residential lot in the middle surrounded on three sides by lots zoned for commercial use.

As stated in a decision of the Land Use Commission involving Food City Limited *"the encroachment of commercial development into residential areas creates major land use conflicts and usually an unwanted transition in land use."* The Commission believes this statement to be valid, however the situation on Kennedy Street is one of a traditional residential area in transition, affected by past decisions to allow commercial uses across the street.

The Appellants argued that the rezoning would interfere with the residential quality of life in the neighbourhood. However, it is the Commission's opinion that historical decisions to allow commercial and institutional activity adjacent to the residential area has helped to expedite its transition from residential use as the preferred use. In these situations residential lots gradually lose their appeal as residential lots and become valued for potential uses more compatible with commercial and institutional activities. The task for the land use planning process in the Town is to determine to what extent the commercial area should expand.

During the hearing, staff of the Commission asked if any consideration was given to not rezoning the lot for commercial purposes because the existing size of the lot was far below the commercial lot size requirements under the bylaw. It is the Commission's view that if the entire block containing the subject lot was rezoned commercial, the subject lot would be included in the rezoning. Consequently, the size of the lot has little to do with whether or not the lot should be rezoned from residential to commercial. In the opinion of the Commission the matter of lot size will become relevant when an application for a building permit, in this case a permit for a parking lot, is considered by Council.

IV. CONCLUSION

A reality in urban development is that commercial areas do grow and often at the cost of residential neighbourhoods. The question which often confronts planners and municipal officials is when should commercial expansion be permitted to encroach residential areas. In this case, Council has made a conscious decision after considering public input that the appropriate time is now—a decision although not agreeable to a number of local residents, is clearly a policy decision to be made by the elected officials and should not be interfered with unless the decision violates these well-established principles. In this case, the Commission finds that Council complied with these principles.

The Commission heard evidence by Kerr Scott and Mayor Richard Collins that the Town has recently initiated a process to develop an official plan for the Town. As the plan develops, the Commission anticipates that Council will address the future of Kennedy Street and its role as a residential or commercial area. Area residents must be aware of the changing role of the lots fronting on Kennedy Street and that pressures associated with commercial development will continue. The reality is that with the increased development of commercial land, residents will continue to find their residential neighbourhood unstable until a comprehensive land use policy is adopted by the Town.

In the result, the Commission disallows the appeal.

IN THE MATTER of the ***Planning Act***, R.S.P.E.I. 1988 Cap. P-8;

and

IN THE MATTER of an appeal to The Island Regulatory and Appeals Commission (the Commission), under Section 28 of the ***Planning Act***, by David S. Peardon on behalf of certain residents and landowners (the Appellants) of Montague, against a decision of the Montague Town Council to rezone from Residential (R1) to Commercial (C1), 212 Kennedy Street (Provincial Property Number 197954) located in Montague, P.E.I.

Order

WHEREAS David S. Peardon on behalf of certain residents and landowners (the Appellants) appealed to The Island Regulatory and Appeals Commission (the Commission), in written notice dated March 9, 1994, against a decision of the Montague Town Council;

AND WHEREAS the Commission heard the appeal at a public hearing conducted in Montague, P.E.I., on Wednesday, April 20, 1994, after due public notice;

AND WHEREAS the Commission has made a decision in accordance with the stated reasons;

NOW THEREFORE, pursuant to the ***Planning Act***;

IT IS ORDERED THAT the appeal is hereby denied.

DATED at Charlottetown, Prince Edward Island this 13th day of June, 1994.

BY THE COMMISSION:

John L. Blakney, Vice-Chair

Myrtle Jenkins-Smith, Commissioner

James Nicholson, Commissioner

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1 Island Regulatory and Appeals Commission Order LA93-10, September 15, 1993.

2 Rogers, Canadian Law of Planning and Zoning, 1993, p.210.3. 3 Ibid., p.210.4.

(j) "**resident**" in relation to a municipality, means a person who has attained the age of eighteen years and is ordinarily resident within the boundaries of the municipality;

(k) "**subdivision**" means

(i) the division of a parcel of land to create two or more new parcels of land,

(ii) the consolidation of two or more contiguous parcels of land to create a new parcel of land, or

(iii) the attachment of a part of a parcel of land to another parcel of land contiguous to that part to create a new parcel of land,

by means of a plan of subdivision, a plan of survey, an agreement, a deed or any other instrument, including a caveat, that transfers or creates an estate or interest in the new parcels of land created by the division, or in the new parcel of land created by the consolidation or the attachment, as the case may be;

(l) "**subdivision agreement**" means an agreement between a council and a developer whereby the developer undertakes to provide basic services in order to develop a plan of subdivision. *1988, c.4, s.1; 1991, c.18, s.22; 1993, c.29, s.4; 1994, c.46, s.1 {eff.} March 31, 1995; 1995, c.29, s.1 {eff.} Oct. 14/95; 1997,c.20,s.3; 2000,c.5,s.3; 2009,c.73,s.2; 2010,c.31,s.3; 2012,c.17,s.2; 2014,c.40,s.1; 2015,c.28,s.3; 2016,c.44,s.277; 2017,c.10,s.1(2); 2019,c.1,s.3.*

OBJECTS

2. Objects

The objects of this Act are

(a) to provide for efficient planning at the provincial and municipal level;

(b) to encourage the orderly and efficient development of public services;

(c) to protect the unique environment of the province;

(d) to provide effective means for resolving conflicts respecting land use;

(e) to provide the opportunity for public participation in the planning process. *1988, c.4, s.2.*

PART I — LAND USE COMMISSION

Sections 3 to 5 repealed by *1991, c.18, s.22 {eff.} Nov. 4/91.*

PART II — PROVINCIAL PLANNING

6. Role of Minister

The Minister shall

(a) advise the Lieutenant Governor in Council on provincial land use and development policy;

(b) perform the functions conferred on him by this Act and the regulations;

(c) generally, administer and enforce this Act and the regulations,

and may

Application of Act

(2) This Act applies to all councils and municipalities. *2016,c.44,s.2.*

3. Purposes of municipal council

The purposes of a council include, among other things,

(a) providing good government in its municipality;

(b) providing services, facilities or other things that the council considers necessary or desirable for all or part of its municipality;

(c) providing for stewardship of the municipality's public assets;

(d) developing and maintaining its municipality as a safe and viable community; and

(e) encouraging and enabling public participation in matters affecting the municipality. *2016,c.44,s.3.*

4. Powers

(1) A municipality is a corporation and has, for the exercise of its powers under this and any other Act, all the rights and liabilities of a corporation as set out in the *Interpretation Act* R.S.P.E.I. 1988, Cap. I-8.

Natural person powers

(2) In addition to the rights and liabilities referred to in subsection (1), a municipality has, for the exercise of its powers under this Act, the capacity and, subject to this Act, the rights, powers and privileges of a natural person.

Prohibition

(3) Despite subsections (1) and (2), a municipality shall not establish another corporation to do anything that the municipality does not itself have the legal power, right or duty to do.

Idem

(4) A municipality shall not be a shareholder or member of another corporation for the sole purpose of doing anything that the municipality does not itself have the legal power, right or duty to do. *2016,c.44,s.3.*

5. Effect of inconsistency

Where there is an inconsistency between a bylaw of a municipality and this Act or another enactment, the bylaw of the municipality is of no force or effect to the extent of the inconsistency. *2016,c.44,s.5.*

6. References to population

A reference in this Act to the population of a municipality or other area means the population of the municipality or area as shown by the most recent census acceptable to the Minister. *2016,c.44,s.6.*

7. Expiry of time when municipal offices are closed

Except in relation to things done or required to be done under Part 3, where the time for any proceeding or for doing anything in the office of a municipality falls or expires on a day when

6. MAKING CHARLOTTETOWN PLAN HAPPEN

6.1 Seeking Community Support

The ***CHARLOTTETOWN PLAN*** provides strategic directions for Charlottetown in the 21st century and beyond. This document represents the culmination of an extensive public consultation process by residents and other stakeholders. Their opinions and suggestions have provided sound direction, and helped to refine the policies and implementation measures which are contained within the plan. Their guidance has also helped to establish a clear vision of the City's future, as well as the steps that are necessary to achieve it.

This document defines bold initiatives for a vital new community ... and the "ways and means" to achieve these goals. For the ***CHARLOTTETOWN PLAN*** to work effectively, the residents of this City and their Council must join together to implement identified actions, monitor the effectiveness of the various implementation by-laws, and participate in the development of proposed concept plans for the City. Likewise, residents, businesses, and community groups must also support, and contribute to, the vision outlined by this plan. All interested parties are invited to help Charlottetown grow and prosper.

6.2 The Office of the Mayor

If there is a particular project or an element of this plan to which you feel you might contribute to in some way, you are invited to call the Mayor's office at 566-5548.

The ***CHARLOTTETOWN PLAN*** does not stand alone in the region, although because of the City's size, it is expected to function as the major element in the capital region. Since its amalgamation under the provisions of the Charlottetown Area Municipalities Act, the new City of Charlottetown has been an integral part of an ongoing liaison with the flanking *new* towns of Stratford and Cornwall. The mayors of the three municipalities have established quarterly "summit" talks which are designed to enhance the functions of each municipality as equal partners in the region and give proper balance to the normal competitions that happen among adjacent municipalities.

It is intended that the implementation of this plan will coincide with the ongoing cooperative actions of the mayors, and that this collaborative process will be a significant factor lending to the successful outcome of the ***CHARLOTTETOWN PLAN***.

6.3 The Role of the Planning Board

The Planning Board plays an important role in maintaining and enhancing growth and development in Charlottetown. In accordance with the Prince Edward Island Planning Act, the Planning Board is also obliged to review the Official Plan and implementation by-laws "at intervals of not more than five years". Moreover, the Board will assume the principal responsibility for overseeing development of the concept plans described earlier in this document. With the adoption of the ***CHARLOTTETOWN PLAN***, the Board will continue its day-to-day planning responsibilities, but will also need to focus on implementation of the plan's policies, and assessing the effectiveness of the associated implementation by-laws.

6.4 Linkages with the Capital Budget

The ***CHARLOTTETOWN PLAN*** is the foundation for the City's future growth, now and well into the next millennium. It contains a broad range of initiatives that will require capital funding for many years to come. Some costs will be modest while others will reflect the magnitude associated with profound improvement to the public realm. Even so, some initiatives can be carried out as part of the City's annual operating costs. Others will require dedicated funding from the Capital Budget.

The actions outlined in this plan will help position Charlottetown to take advantage of the opportunities afforded by economic and social transformation. To this extent, it also provides an excellent occasion to change the way that Council establishes its Capital Budget. Prior to this point in time, forecasts have been established on a more informal basis with little opportunity to project expenditures over an extended period of time. It has been demonstrated in other communities that the establishment of a five-year Capital Budget creates a forward-thinking framework for Council and staff to consider their strategic actions. It will also provide the backdrop for manageable implementation of the various public works initiatives that have been identified within the plan.

c. Ensure that the notice identifies the subject Lot and describes the Major Variance application and the date by which written objections must be received.

3.9.4 After fourteen (14) calendar days from the date of the notice, the Major Variance will be referred to Planning Board which shall consider the request and any comments received in response to the notice, and shall make a recommendation to Council. Council may, without prejudice, approve or reject the Major Variance.

3.9.5 When an application for a Major Variance has been lawfully denied, the same or a similar Major Variance application shall not be reheard by Council within one (1) year of its rendering a decision unless:

a. New material facts or evidence not available at the time of the initial order or decision have come to light; or

b. A material change of circumstances has occurred since the initial order or decision.

3.9.6 If, after one (1) year of a Major Variance approval, no Development and/or Building Permit has been issued or the Development and/or Building Permit has not been acted upon (construction has not commenced), the Major Variance and the related Permit shall automatically be deemed null and void.

3.10 AMENDMENTS TO THE BY-LAW AND REZONINGS

3.10.1 Council may initiate an amendment to the *Zoning and Development By-law* to change the text of the by-law or to Rezone a property without the authorization of the Owner(s) of land(s) involved in the Rezoning, provided that the proposed amendment obtains the support of Council and complies with the general intent and purpose of the *Official Plan*. If the proposed amendment is contrary to the policies in the *Official Plan*, an amendment to the *Official Plan* must be filed in-conjunction with the by-law amendment.

3.10.2 A person who seeks to Rezone a parcel of land, or to otherwise have this by-law amended, shall submit an application that includes such information as may be required by the Development Officer for the purpose of adequately assessing the desirability of the proposal, and if the application is for a Rezoning it shall include:

a. Sufficient funds to cover the cost associated with processing the application;

b. A legal description and a plot plan, or a survey plan, accurately showing the location of the property or properties to be Rezoned;

c. The names and addresses of the Owner of the property and, if the applicant is not the Owner, a statement as to the applicant's interest in the property;

d. Drawings to illustrate any proposed Building(s) for the Lot in a detailed concept plan with a floor plan and elevations for the Building(s) and a detailed site plan showing the location of the Building(s) on the Lot and any required Landscaped Areas; and

e. Such other information as deemed necessary by the Development Officer to evaluate the proposal.

3.10.3 Before amending the regulations of this by-law or rezoning any parcel of land, Council shall conduct a public meeting to receive the views and opinions of the public and the applicant. Council may, for reasons that are in the best interests of the City, reject a proposed amendment to this by-law without public notice and without referral to a public meeting, but if an application goes to a public meeting, then Council shall determine the disposition of the application and the applicant may not be allowed to withdraw the application after the public meeting.

3.10.4 Before a Rezoning is heard at a public meeting, the Development Officer shall:

a. Provide written notice by ordinary mail advise all Affected Property Owners within 100 m (328.1 ft) of the boundaries of the subject Lot through notification in writing at least seven (7) calendar days prior to the public meeting, of the date of the public meeting; and

b. Ensure that the notice identifies the subject Lot and describes the Rezoning application and the date by which written objections must be received.

c. Publish a notice in not less than two issues of a newspaper circulating in the City with the first notice at least seven (7) calendar days prior to the public hearing date.

d. Post a copy of the notice in at least one (1) conspicuous place on the subject Lot at least seven (7) calendar days prior to the date fixed for the public meeting.

3.10.5 When an application for a text amendment to this by-law or a Rezoning has been lawfully denied, the same or a similar application shall not be reheard by Council within one (1) year of its rendering a decision unless:

a. New material facts or evidence not available at the time of the initial order or decision have come to light; or

b. A material change of circumstances has occurred since the initial order or decision.

3.10.6 A notice in writing shall be sent to the applicant within seven (7) calendar days of the Council decision stating if the application is successful, and if not successful, stating the appeal process available to the applicant.

3.10.7 Where there is a proposed amendment to the text of this by-law that does not entail Rezoning, all procedures in this subsection shall be followed except that the procedure for notification of Affected Property Owners shall not apply.

3.11 SITE SPECIFIC EXEMPTION

3.11.1 Council may approve a Site Specific Exemption to the permitted uses and regulations in any Zone, where the following criteria are satisfied:

a. The proposed Site Specific Exemption is not contrary to the *Official Plan*. If an application is contrary to the policies in the *Official Plan*, an application to amend the *Official Plan* must be filed in-conjunction with the application;

b. If a proposed use of land or a Building that is otherwise not permitted in a Zone is sufficiently similar to or compatible with the permitted uses in a different Zone, Council may consider Permitting such an application through a by-law amendment process;

c. Council may consider Rezoning a property and restricting some or all of the permitted uses within the Zone with the exception of the proposed use under consideration; and

d. The proposal does not undermine the overall integrity of any given Zone, is in the public interest and is consistent overall with good planning principles.

3.11.2 Notwithstanding any other provision of this by-law, Council may approve a Site Specific Exemption to the permitted uses or regulations within any Zone, after:

a. Receiving a recommendation from the Development Officer and Planning Board; and,

b. Following the process as prescribed for an amendment to this by-law.

3.12 BONUS HEIGHT APPLICATIONS

3.12.1 An increase to the minimum standards pertaining to Building Height shall be permitted at the discretion of the Development Officer/Planning Committee in certain Zones as specified in the regulations of the Zones where applicable, in exchange for securing specific public benefits of one or more of the following:

a. Adaptive reuse, Maintenance, preservation, or enhancement of a Designated Heritage Resource as defined in the *Heritage Preservation By-law*.

b. The provision of Affordable Housing Dwelling Units, by way of subsidization between the applicant and the Province and/or Federal Government(s) for a specified period of time and confirmed in a written agreement registered to the property;

c. The provision of three or four bedroom Dwelling Units;

d. The provision of a Landscaped Area, such as urban park, plaza, boardwalk or other facility where a deficiency exists or as indicated by the City;

e. The provision of public art in a location to be agreed upon by the City;

f. Investment in active transportation or public transit;

g. The provision of a LEED-gold standard certified Building or other equivalent qualification; or

h. The provision of subsidized commercial space for arts or other cultural uses.

3.12.2 The value of the public benefit shall be a rate set from time to time by a resolution of Council based upon the Gross Floor Area of any Storey above the pre-bonus Height, and the specified rate shall be adjusted at most every two years, in accordance with the Consumer Price Index.

3.12.3 When it is not feasible to provide the public benefit on the Lot in question, the public benefit may be provided offsite, at a location agreed upon by the City.

3.12.4 All applications for a Bonus Height are subject to the Design Review process.

3.12.5 An application for a Bonus Height shall be submitted with sufficient information as may be required by the Development Officer for the purpose of adequately assessing the proposal, including:

a. A legal description and a plot plan, or a survey plan, accurately showing the location of the property and Building(s) or Structure(s) on the property in question;

MUNICIPAL PLANNING BYLAWS

16. Municipal planning bylaws

A council may make bylaws implementing an official plan for the municipality. *1988, c.4, s.16.*

17. Approval of Minister

The bylaws shall be subject to the approval of the Minister and shall be effective on the date of approval by the Minister. *1988, c.4, s.17.*

18. Notice of meeting

(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.

Bylaw amendment requiring official plan amendment

(2) Where a bylaw amendment requires an amendment to the official plan pursuant to subsection 15(2), the council may consider the official plan amendment concurrently with the bylaw and shall

(a) indicate in general terms, in the notice published under clause (1)(b), the nature of the proposed plan amendment; and

(b) give the planning board an opportunity to comment on the plan amendment prior to adoption of the amendment. *1988, c.4, s.18.*

19. Procedure

A bylaw shall be made in accordance with the following procedure:

(a) it is read and formally approved by a majority of councillors on two occasions at meetings of the council held on different days;

(b) after it is read a second time, it is formally adopted by resolution of the council;

(c) it is signed by the mayor or chairman, the administrator and the Minister and formally declared to be passed, and sealed with the corporate seal of the municipality;

(d) the minutes of the meeting record the name of the bylaw and the fact that it is passed; and

(e) a copy of the bylaw bearing the signature of the mayor or chairman, the administrator and the Minister is entered into the register of bylaws retained by the administrator. *1988, c.4, s.19.*

20. Bylaws

(1) The powers of a council to make bylaws includes the power to make bylaws applicable within the municipality with respect to all of the matters set out in clauses 8(1)(a) to (q) except clauses (i), (l) and (p) as if

(a) references to the Crown were references to the municipality;

1999 BCCA 619
British Columbia Court of Appeal

Great Canadian Casinos Co. v. Surrey (City)

1999 CarswellBC 2420, 1999 BCCA 619, [1999] B.C.J. No. 2495, [2000] 3 W.W.R. 681, [2000] B.C.W.L.D. 102, 11 B.C.T.C. 159, 130 B.C.A.C. 189, 211 W.A.C. 189, 5 D.M.P.L. 253, 71 B.C.L.R. (3d) 199, 7 M.P.L.R. (3d) 33, 95 A.C.W.S. (3d) 370

Great Canadian Casino Company Ltd., Petitioner (Appellant) and City of Surrey and British Columbia Lottery Corporation, Respondents (Respondents)

Lambert, Rowles, Braidwood JJ.A.

Judgment: October 19, 1999
Docket: Vancouver CA024617, CA024621

Proceedings: reversing in part (1998), 45 M.P.L.R. (2d) 240, 53 B.C.L.R. (3d) 379, [1999] 3 W.W.R. 13 (B.C. S.C.); additional reasons at (1998), 45 M.P.L.R. (2d) 261, 19 C.P.C. (4th) 52 (B.C. S.C.)

Counsel: *G.B. Butler*, appearing for the Appellant, Great Canadian Casino Company Ltd.
C. MacFarlane and *A. Capuccinello*, appearing for the Respondent, city of Surrey.
D.W. Buchanan, Q.C. and *V. Hlus*, appearing for the Respondent, British Columbia Lottery Corporation.
B.W. Dixon, appearing for the Intervenor, the Attorney General of British Columbia.

Subject: Public; Constitutional; Municipal

APPEAL by petitioner casino and CROSS-APPEAL by respondent municipality and lottery corporation from judgment reported at (1998), 45 M.P.L.R. (2d) 240, 53 B.C.L.R. (3d) 379, [1999] 3 W.W.R. 13 (B.C. S.C.), additional reasons at (1998), 45 M.P.L.R. (2d) 261, 19 C.P.C. (4th) 52 (B.C. S.C.), declaring that zoning by-law prohibiting use of slot machines as "video lottery gaming" being valid and that s. 4(d) of *Lottery Corporation Act* and regulation passed by lottery corporation authorizing persons to assist corporation in operation and management of gaming not ultra vires.

The judgment of the court was delivered by *Lambert J.A.* (orally):

1 The legal issues which this Court is required to address in this appeal are issues about the application of the *Municipal Act* to a zoning bylaw. In the cross-appeal the issues relate to the interpretation of the *Criminal Code* and the *Lottery Corporation Act* of B.C. The Court is not required to consider either the desirability or the legality of gaming in general or computer lottery machines in particular.

2 The appeal and the cross-appeal are brought from a decision of the Supreme Court of British Columbia reported as *Great Canadian Casino Co. v. Surrey (City)* (1998), 45 M.P.L.R. (2d) 240 (B.C. S.C.). The issues are more limited now in this appeal and cross-appeal than the issues that confronted the chambers judge. Since the chambers judgment is reported, I propose to go directly to the issues which were actually argued in the appeal and cross-appeal.

3 I turn first to the appeal itself. There is a difference between a slot machine and a video lottery terminal. The video lottery terminal has a video monitor built into the machine. It is operated by touching the video monitor and it can be asked to play a number of different games, one of which is usually a game like the traditional game of the pull-arm slot machine where three spinning wheels come to a stop and a win or a loss depends on the representations on the three wheels and on their alignment. That video lottery terminal machine is to be contrasted with the slot machine operated by pulling an arm or pressing a button to create the three spinning wheels. That slot machine has no video monitor.

4 In British Columbia both types of machines when they are lawfully operated are controlled by a computer at the offices of the British Columbia Lottery Corporation, hooked up to a computer chip in each individual machine. The computer chip controls the odds and the ratio of winners and losers. So all machines which can lawfully play the game characterized by the three spinning wheels could be accurately described as computer controlled or as electronically controlled, but one type has a video screen through which the game is played and the other type does not, but instead has a handle to be pulled or a button to be pressed.

5 The City of Surrey decided to amend its zoning bylaw in relation to lottery machines. It had to comply with the sections of the *Municipal Act* dealing with public hearings on bylaws. I refer first to s. 890(1) of the *Municipal Act*:

> **Division 4 - Public Hearings on Bylaws**
>
> ***Public hearings***
>
> 890 (1) Subject to subsection (4), a local government must not adopt a community plan bylaw, rural land use bylaw or zoning bylaw without holding a public hearing on the bylaw for the purpose of allowing the public to make representations to the local government respecting matters contained in the proposed bylaw.
>
> [My Emphasis]

The next relevant provision is 892:

> **Notice of public hearing**
>
> 892 (1) If a public hearing is to be held under section 890(1), the local Government must give notice of the hearing
>
> (a) in accordance with this section, and
>
> . . . . .
>
> (2) The notice must state the following:
>
> (a) the time and date of the hearing;
>
> (b) the place of the hearing;
>
> (c) in general terms, the purpose of the bylaw;
>
> (d) the land or lands that are the subject of the bylaw;
>
> (e) the place where and the times and dates when copies of the bylaw may be inspected.
>
> [My Emphasis]

6 I propose to set out the form of the bylaw proposed by the City of Surrey in its relevant part:

> 1. This By-Law may be cited for all purposes as the "City of Surrey Zoning Amendment (Video Lottery Gaming) By-Law 1995, No. _____".
>
> 2. The Zoning By-Law is hereby amended by adding:
>
> (a) In Part 1 after the definition of "USE - PRINCIPAL" the following definition:

"VIDEO LOTTERY GAMING" means any activity or game of chance for money or other valuable consideration carried out or played on or through a computer, electronic or other video device or machine, but excluding the following:

(i) the purchase and sale of lottery tickets pursuant to a government approved lottery scheme administered by the Public Gaming Branch and the British Columbia Lottery Corporation";

(ii) pari-mutual systems and machines that are duly licensed under regulations pursuant to Section 204 of the **Criminal Code** and under the **Horse Racing Act**, S.B.C. 1993, c. 51;

(iii) "pull-tab" machines that are owned and administered by the British Columbia Lottery Corporation;

(b) In Part 4, Section C, "USES PROHIBITED IN ALL ZONES", the following is inserted in Subsection 1 as new paragraph (i):

(i) Video Lottery Gaming

[My Emphasis]

7 The following is the form of the notice of public hearing given by the City of Surrey:

City of Surrey
Notice of Public Hearing

The Council of the City of Surrey will hold a Public Hearing pursuant to the provisions of the Municipal Act, in the Council Chamber at City Hall, 14245 - 56 Avenue, Surrey, BC, on Monday, July 24, 1995, commencing at 7:00 p.m.

"Surrey Zoning By-law, 1993, No. 12000, Text Amendment By-law, 1995, No. 12632"

APPLICANT:	City of Surrey 14246 - 56 Avenue Surrey, BC V3X 3A2
PROPOSAL:	To amend the Zoning By-law to prohibit Video lottery Terminals in the City of Surrey.
FURTHER INFORMATION:	Additional information may be obtained from the **Planning & Development Department at 591-4441.**

Copies of the by-law(s), supporting staff reports and any relevant background documentation may be inspected at the City Hall, Monday through Friday (except statutory holidays) between 8:30 a.m. and 4:30 p.m. from Tuesday, July 11, 1995 to Monday, July 24, 1995.

All persons who believe their interest in property affected by the proposed by-law(s) shall be afforded an opportunity to be heard at the Public Hearing on matters contained in the by-law(s).

Donna B. Kenny

City Clerk

8 The Great Canadian Casino Company Ltd., when it considered it lawful to do so and under agreement with the British Columbia Lottery Corporation, a Crown corporation under the *Lottery Corporation Act*, placed lottery slot machines in its Surrey casino. It has never placed machines containing a video monitor in its casino.

9 The essence of the question in this appeal is whether the lottery machines used by the Great Canadian Casino Company Ltd. at its casino in Surrey are within the prohibition in the bylaw. Two issues dealing with aspects of that question were argued. The first issue relates to the interpretation of the phrase: "... carried out or played on or through a computer, electronic or other video device or machine, ..." in the definition of "Video Lottery Gaming" in the bylaw. The second issue relates to whether the notice requirements of s. 892(2) of the *Municipal Act* were met, and particularly, whether the notice that was given complied with the requirement that the notice must state: "(c) in general terms, the purpose of the bylaw;". As I have said, the stated purpose was to prohibit video lottery terminals in the City of Surrey.

10 The most helpful case on the meaning of s. 892(2)(c) of the *Municipal Act* is the decision of Mr. Justice Rae in the Supreme Court of British Columbia in *Peterson v. Whistler (Resort Municipality)* (1982), 39 B.C.L.R. 221 (B.C. S.C.). At the time the equivalent provision of the *Municipal Act* read that the notice should: "state in general terms the intent of the proposed by-law". I do not think the change in wording from "intent" to "purpose" affects what was said by Mr. Justice Rae in this passage at p. 231:

> 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 bylaw 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 bylaw and the like. It is essential for the citizen in question to be informed of the intent of the by-law. ...

It is important to understand, as Mr. Justice Rae said, that it is average citizens who must be kept in mind when deciding whether the notice adequately stated the purpose of the bylaw.

11 There was evidence in this case of usage in the lottery business and of some use in that business of the phrase "video lottery terminal" to describe machines with no video component. But in my opinion, the average citizen would not think that a prohibition of video lottery terminals would operate to prohibit electronic computer machines with no video component. It is possible to speculate that anyone interested in electronic computer machines with no video component would have been alerted to the possibility that the bylaw might extend to cover machines of that type. It is possible to speculate also that there may have been average citizens in Surrey who are interested in electronic computer machines with no video component, but who are not interested in electronic computer machines with a video component. An affidavit of an officer of the Great Canadian Casino Company Ltd. said that such was the position of his company. But in the end the question is whether average citizens would have been reasonably notified of the purpose of the bylaw by the notice. In my opinion, if this bylaw was going to prohibit something more than computer electronic machines with a video component and seek to prohibit machines with no video component, the notice did not adequately set out the purpose of the bylaw.

12 As decided in *Peterson v. Whistler*, *supra*, and in *Loring v. Victoria (City)* (1989), 48 M.P.L.R. 113 (B.C. S.C.), a decision of Mr. Justice Bouck, the effect of not complying with the requirement that the purpose be stated in general terms must be that the bylaw is subject to being declared invalid in whole or in part.

13 In this case, the notice was adequate to support a bylaw whose purpose was to prohibit electronic machines with a video monitor component. On the facts of this case, where the Great Canadian Casino Company Ltd. is only involved with machines with no video component, it is sufficient to say that the bylaw is not valid and effective to prohibit computer electronic lottery machines with no video monitor component. It is not necessary to decide in this case whether the bylaw was valid with respect to machines with a video component and I would not do so. I would allow the appeal on this issue.

14 I turn now to the cross-appeal. I will state the issue in the terms in which it was stated by the trial judge:

Is s. 4 (d) of the ***Lottery Corporation Act*** *ultra vires* the British Columbia Legislature by reason of illegally delegating the conduct and management of slot machines to a private entity?

That question is a purely legal question of constitutional law when it is stated in that way. However, it has been argued on two fronts in this appeal.

15 The first is an argument directed to the question of whether s. 4(d) of the *Lottery Corporation Act* is *ultra vires* the British Columbia Legislature. The second question that was argued is whether the functioning of the Great Canadian Casino Company Ltd. in relation to computer electronic non-video slot machines was an unlawful functioning under the *Criminal Code* and the *Lottery Corporation Act*. The trial judge really dealt with both of those questions. He answered both of them in the negative.

16 I propose to turn first to the purely legal question raised by the legislation. The applicable provisions of the *Criminal Code* are s. 207(1)(a) and s. 207(1)(g):

Permitted lotteries

207. (1) Notwithstanding any of the provisions of this Part relating to gaming and betting, it is lawful

(a) for the government of a province, either alone or in conjunction with the government of another province, to conduct and manage a lottery scheme in that province, or in that and the other province, in accordance with any law enacted by the legislature of that province;

. . . . .

(g) for any person, for the purpose of a lottery scheme that is lawful in a province under any of paragraphs (a) to (f), to do anything in the province, in accordance with the applicable law or licence, that is required for the conduct, management or operation of the lottery scheme or for the person to participate in the scheme; and

[My Emphasis]

17 The provision of the *Lottery Corporation Act* of British Columbia that is relevant to this argument is s. 4:

Objects of corporation

4 The objects of the corporation are the following:

(a) to develop, undertake, organize, conduct and manage lottery schemes on behalf of the government;

(b) if authorized by the minister, to enter into agreements to develop, undertake, organize, conduct and manage lottery schemes on behalf of or in conjunction with the government of Canada or the government of another province, or an agent of either of them;

(c) if authorized by the minister, to enter into the business of supplying any person with computer software, tickets or any other technology, equipment or supplies related to the conduct of lotteries in or out of British Columbia, or any other business related to the conduct of lotteries;

(d) if authorized by the minister, to enter into agreements with a person regarding any lottery conducted or managed on behalf of the government;

(e) to do other things the minister may require from time to time.

[My Emphasis]

18 There is no issue about the constitutionality of the *Criminal Code* provisions and in their straightforward interpretation, British Columbia Lottery Corporation is a provincial Crown agent which may lawfully *conduct* and *manage* a *lottery scheme* under s. 207(1)(a). Again in a straightforward interpretation of the *Criminal Code* provision, the Great Canadian Casino Company Ltd. may do anything to further a lottery scheme that is conducted and managed by British Columbia Lottery Corporation including anything required for the *conduct, management or operation of the scheme* all under s. 207(1) (g).

19 Next we turn to s. 4(d) of the *Lottery Corporation Act*. It is a section setting out the objects of the British Columbia Lottery Corporation. The Corporation is authorized to enter agreements regarding lotteries *conducted or managed* on behalf of the government. In my opinion, there is nothing *ultra vires* about that provision. We were referred to the decision of the Supreme Court of Canada in *R. v. Furtney* (1991), 66 C.C.C. (3d) 498 (S.C.C.). Mr. Justice Stevenson gave the unanimous judgment for the Supreme Court of Canada. At p. 507 he said this:

> In my view, the regulation of gaming activities has a clear provincial aspect under s. 92 of the ***Constitution Act, 1867***, subject to Parliamentary paramountcy in the case of a clash between federal and provincial legislation.

At p. 509 Mr. Justice Stevenson said this:

> Thus, Parliament may delegate legislative authority to bodies other than provincial legislatures, it may incorporate provincial legislation by reference and it may limit the reach of its legislation by a condition, namely, the existence of provincial legislation.

20 As counsel for the Attorney General of British Columbia said in argument, this issue is not an argument about the provincial legislation being *ultra vires* but about paramountcy between valid federal and provincial legislation. In my opinion, there is nothing in conflict between the federal legislation and the provincial legislation, and, consequently, I would reject the submissions relating to the *Criminal Code* to the effect that s. 4(d) of the *Lottery Corporation Act* is *ultra vires* as a matter of constitutional law.

21 That brings me to the factual aspect of the question to the extent that it is properly before the Court. That question is whether the British Columbia Lottery Corporation under its arrangement with the Great Canadian Casino Company Ltd. is a person *conducting and managing the lottery scheme* within the meaning of s. 207(1)(a) of the *Criminal Code*, and whether the British Columbia Lottery Corporation is simply doing things required for the *conduct, management or operation of the lottery scheme*, but without becoming the person who is itself conducting and managing the lottery scheme.

22 We were referred to the decision of the Manitoba Court of Appeal in *Keystone Bingo Centre Inc. v. Manitoba Lotteries Foundation* (1990), 3 M.P.L.R. (2d) 178 (Man. C.A.), in which it was decided that the Bingo Centre was conducting and managing the scheme itself. But this case is factually entirely different from that case and it is particularly relevant that the scheme was being supported in the Manitoba case under s. 207(1) (b) in relation to charity gaming and not as in this case under s. 207(1) (a).

23 We were referred on this factual issue to the regulations made by the British Columbia Lottery Corporation and to the terms of the agreement between the British Columbia Lottery Corporation and the Great Canadian Casino Company Ltd. We were referred also to para. 61 of the reasons of the chambers judge which set out the functions carried out by the British Columbia Lottery Corporation and to para. 62 of the chambers judge's reasons which set out the operational responsibilities of the Great Canadian Casino Company Ltd. The chambers judge then reached this conclusion in para. 68 of his reasons:

> In the case at bar, the Surrey Casino is not "its own master" with respect to the operation of slot machines, nor is the Casino the "operating mind" of those machines. The installation, technical support, monitoring, and setting of games and payouts are all controlled by the Lottery Corporation. Casino employees assist in the operation of the machines, but the Lottery Corporation manages and controls the slot machine scheme.

24 The chambers judge then concluded on the basis of the facts that he had found and set out in that paragraph that the operation of the lottery scheme was not unlawful. For the purposes of the point which I am dealing with in relation to s. 4(d), both factually and legally, in my opinion there is no error of law on the part of the chambers judge and no finding of fact with which this Court could interfere. For those reasons, I would dismiss the cross-appeal.

Rowles J.A.:

25 I agree.

Braidwood J.A.:

26 I agree.

Lambert J.A.:

27 The appeal is allowed and the cross-appeal is dismissed.

Appeal allowed; cross-appeal dismissed.

1974 CarswellNS 192
Nova Scotia Supreme Court, Appeal Division

Country View Ltd. v. Dartmouth (City)

1974 CarswellNS 192, [1974] N.S.J. No. 271, 10 N.S.R. (2d) 361, 2 A.P.R. 361

Country View Ltd. v. City of Dartmouth (No. 2)

Coffin and Cooper, JJ.A.

Judgment: August 1, 1974

Counsel: *G. W. MacDonald*, for the appellant.
J. S. Drury, Q.C., for the respondent.

Subject: Contracts; Public; Municipal

***Cooper, J.A.*:**

1 The opinion of the court in this proceeding was duly rendered and filed under date of January 3, 1974. [see 8 N.B.R. (2d) 1]. The result as expressed therein was that the appellant succeeded in its submission that s. 34C of By-Law 74, the zoning By-Law of the City of Dartmouth, was invalid. The court, however, held that the zoning By-Law had been amended since the original application for building permits by By-Law C-217 and that as a result the appellant was not entitled to the relief which it sought, namely, an order declaring that it was entitled to have the building permits issued.

2 The appellant thereafter made application to the court to have further evidence received under rule 62.22 of the *Civil Procedure Rules*. The relevant provisions of rule 62.22 are as follows:

> 62.22 (1) The Appeal Division may,
>
> . . . . .
>
> (c) subject to paragraph (2), receive further evidence, either by oral examination, affidavit, deposition or otherwise;
>
> . . . . .
>
> (2) Any new evidence may be given without leave on interlocutory applications, and on appeals when the evidence relates to any matter that occurred after the date of the order appealed from. Any other evidence may only be admitted by leave of the Appeal Division, or a judge thereof, on special grounds being shown.

3 The new evidence sought to be introduced consisted of affidavits of Neil C. Cohoon, City Clerk of the respondent. Ralph H. Stoddard, City Clerk of the City of Halifax; and James Drolet, Planning Technician with the Department of Municipal Affairs for the Province of Nova Scotia. These affidavits were introduced for the purpose of establishing that By-Law C-217 had not been validly passed, the conditions precedent for its enactment not having been observed. I may point out here that the factum of the respondent before us on the main hearing contained the following:

> The position of the Respondent is that By-law C-217, being duly passed by the Council of the City of Dartmouth under the authority of Section 38 of the *Planning Act* and all the procedural requirements being complied with is a valid By-law which operates to prohibit the issue of any building permit which may be inconsistent with its provisions for a period of one hundred and twenty days from the date of publication (*Planning Act*, Section 41).

4 The appellant did not take issue at the hearing with the statement I have quoted except to contend that s. 41 of the *Planning Act*, c. 16, N.S. Stats., 1969, had no application and that the By-Law therefore did not operate to prohibit the issue of any building permit for the one hundred and twenty day period.

5 The court, however, granted leave to the appellant to tender the additional evidence, despite the failure of the appellant to argue on the hearing that By-Law C-217 had not been validly passed. The requirements for enactment of the By-Law are set out below. It is sufficient to say at this point that it was not until after the decision of the trial judge from which the appeal was taken that the Council of the respondent resolved to give third reading to the By-Law - see, clause (2) of rule 62.22. We thought this sufficient ground, apart from the desirability of permitting a full hearing on all matters in issue, to permit the introduction of the additional evidence put forward by the appellant. We also, however, ordered that the respondent should be permitted to introduce affidavit evidence with respect to By-Law C-217, and on the date set for the further hearing counsel for the respondent produced affidavits of Glen J. L'Esperance, Planner with the City of Dartmouth, and Harry G. Bensted, Clerk of the Municipality of the County of Halifax.

6 I turn now to the requirements to be observed in enacting amending by-laws of the City of Dartmouth. The authority for amending the general zoning By-Law 74 is derived from the transitional provisions of the *Planning Act*, supra, and in particular s. 31(4), which reads as follows:

> (4) A zoning by-law or official town plan to which this Section applies may be amended, revised or repealed and the provisions of Part VII and Part III respectively shall apply *mutatis mutandis*; and without restricting the generality of the foregoing a zoning by-law may be amended or revised by extending its application to other parts of the municipality.

7 Section 31 brings into play s. 38 as amended, which I quote in part:

> (1) The council may by by-law amend, revise or repeal a zoning by-law passed under this Act and subsections (1) to (6) inclusive of Section 36 shall apply *mutatis mutandis*; and a by-law passed under this subsection does not require approval of the Minister...
>
> (2) The notice required to be published in the newspaper under subsection (1) of Section 36 shall contain a statement of the reasons for or an explanation of the amendment, revision or repeal; and a copy of the notice shall be filed with the Director within five days after its publication.
>
> (3) Upon the passing of a by-law amending, revising or repealing the zoning by-law the council shall give notice of its passing by an advertisement in a newspaper circulating in the area affected; and a copy of the by-law together with proof of compliance with the requirements of this Section and all written objections to the by-law and a copy of the reports if any of the planning advisory committee if any or the district planning commission if any shall be filed with the Director within ten days of the passing of the by-law.
>
> (4) An interested person, the Director or the council of any other municipality may within thirty days of the publishing of the notice under subsection (3) appeal to the board and the board may:
>
> (a) confirm the decision of the council; or
>
> (b) confirm the decision of the council with respect to all or part of the land in issue subject to such conditions as the board may prescribe; or
>
> (c) reverse the decision of the council amending the zoning by-law.

8 Section 38 also requires consideration of s. 36(1) to (5), which read:

> (1) The council shall give notice of its intention to pass a zoning by-law by advertisement inserted at least once a week for two successive weeks in a newspaper circulating in the area affected.

(2) On or before the date of the publication under subsection (1), a copy of the notice shall be given to the clerk of each municipality within three miles of the municipality intending to pass the by-law.

(3) The notice shall state a place where and a time during which the zoning by-law may be inspected by any interested person and the time and place set for the consideration by the council of written objections to the by-law.

(4) The council shall make suitable provisions for inspection of the zoning by-law by interested persons and, before passing the by-law, shall hear and determine all written objections thereto.

(5) The council may by resolution delegate to an official of the municipality the authority to fix the time and date on which the matter will be considered, to prepare the advertisement and to give on its behalf the notice referred to in subsection (1); such resolution shall remain in full force and effect until rescinded by a subsequent resolution of the council.

9 In addition to the requirements which I have set out the *Dartmouth City Charter*, N.S. Stats., 1970, c. 89, contains provisions relevant to the issues before us among which are:

126(2) Every by-law shall have three distinct and separate readings before it is finally passed and not more than two readings shall be had at one meeting of the council, unless the members present unanimously agree to give the by-law third reading.

128(1) A by-law shall be deemed to have been published when,

(a) it has been passed by the council in the manner provided in this Act;

(b) it has been approved by the Minister, when such approval is required; and

(c) a notice has been published in a newspaper circulating in the city, stating the object of the by-law, the date of its final passage, the place where it may be read or a copy obtained and, where necessary, that it has received the approval of the Minister.

(2) Except where otherwise provided by law, every by-law of the council shall come into effect and have the force of law, if not otherwise provided for herein, at the expiration of fifteen days after the publication thereof.

10 The appellant contended that the statutory provisions set out in s. 36 and s. 38 were conditions precedent to the enactment of By-Law C-217, that the respondent had not complied with them, and that therefore the By-Law was invalid.

11 The first of the conditions precedent which it was argued was not complied with is contained in s. 36(1) of the *Planning Act*. It requires that a notice of intention to amend the Zoning By-Law be advertised in the manner prescribed. It was submitted that such notice must be given before the Council took any step to amend. A by-law must have three distinct and separate readings. In this case the Council had given first and second reading to the amending By-Law before publishing the notice to amend.

12 By-Law C-217 was in fact read the first and second time at a regularly called meeting of the Council on August 22, 1972. At a further meeting of the council held on September 5, 1972 By-Law C-217 was again before Council and a date for a public hearing in connection with its enactment was set. The notice of intention was published in the Halifax Mail-Star newspaper on September 15, 1972.

13 There is no express provision that requires the giving of the notice of intention by advertisement before first or second reading. Indeed, I find it difficult to envisage a notice of intention to amend before such intention had been given expression by the Council. As I have said, the By-Law received first and second reading on August 22, 1972 and in my opinion constituted the expression of intention necessary before the notice could be properly advertised.

14 The second condition precedent which the appellant submitted had not been complied with is related to s. 38 (2) of the *Planning Act*. That subsection requires that the notice of intention "shall contain a statement of the reasons for or an explanation

of the amendment,..." The notice as published was headed with a crest, presumably of the City of Dartmouth, and with the words in bold type, "Public Notice Amendment to Zoning By-Law City of Dartmouth". Its text is as follows:

> The City Council of the City of Dartmouth gives notice of its intention to amend the City of Dartmouth zoning by-law as follows:
>
> By changing the requirements of the General Building Zone to read as follows:
>
> 34A No person shall erect, alter, repair, maintain or use any building in whole or in part, or use any land in a G-Zone for any other purpose than one or more of the following uses, namely:
>
> 1. any use permitted in an R1 or P Zone
>
> 2. any use accessory to any of the uses in (1)
>
> 34B Buildings erected, altered, repaired, maintained or used for R1 or P uses in a G Zone shall comply with the requirements of an R1 or P Zone.
>
> The proposed rezoning by-law amendment may be inspected by any interested person at the Office of the Development Officer, City Hall, Dartmouth, during regular office hours, being Monday to Friday, 9 a.m. to 5 p.m.
>
> City Council will meet on October 17, 1972 in the City Hall, Dartmouth, to consider and determine all written objections.
>
> DATED at Dartmouth, Nova Scotia, this 14th day of September, 1972.
>
> A public meeting will be held on Monday, October 2, 1972, at 7:30 p.m. in the conference room, Dartmouth City Hall to explain the proposed change in the by-law to interested citizens.
>
> D.A. Bayer,
>
> DEVELOPMENT OFFICER

15 We were referred to *Rogers' Laws of Canadian Municipal Corporations*, 2nd ed., vol. 2 at p. 795 where it is stated that if the statute makes the giving of a notice mandatory (as is the case here) "it is a condition precedent to its enactment resulting in a nullity if it is not given or the notice is deficient". We were referred also to *Campbell v. City of Regina* (1966), 58 D.L.R. (2d) 259 and to *Flemming v. Town of Sandwich* (1919), 46 D.L.R. 613. In the latter case the required notice was not given at all and therefore I find it of no assistance here. In *Campbell* an amending by-law was attacked on the ground that the notice of intention to pass it did not comply as to notice with the requirements of the *Community Planning Act*, 1957 (Sask.), c. 48, as amended. Those requirements were contained in s. 42 and s. 46(2) of the Act which were as follows:

> 42(1) The council shall give notice of its intention to pass a zoning bylaw by advertisement inserted at least once a week for two successive weeks in a newspaper published or circulating in the area affected.
>
> (2) The notice shall:
>
> (a) set forth a description of the area affected by the bylaw which description shall, where possible, be by reference to streets and house numbers; and
>
> (b) state a place where and the hours during which the zoning bylaw may be inspected by any interested person, and the time and place set for the consideration by the council of written objections to the bylaw.
>
> 46(2) The notice required by section 42 shall in the case of an amendment to or revision of the by-law include a statement of the reasons for or an explanation of the amendment for revision.

16 It was found by Johnson, J., of the Saskatchewan Queen's Bench that the description of one of the areas to be re-zoned did not give adequate notice of properties to be affected either in itself or by inspection of the zoning map at the city planner's office. He said at p. 272:

> Unless a publication brings to an ordinary, reasonable reader, who is likely to be affected by the proposed changes mentioned in the publication, an awareness that he may be affected thereby, then it cannot be considered notice to the reader. Applying that test I do not think that an ordinary reasonable person residing on Cowan Cres., Cowburn Cres., Parker Ave. or Hillsdale St., near the area in dispute, would have been made aware by para. 8(f) of the defendant's notice that heis property was likely to be affected and that he should out of caution check further. In this notice I can find nothing likely to so prompt him.

and at p. 273:

> It is also important to note that the statute, s. 42(2)(a), states that when describing the area affected, where possible, reference shall be made to streets and house numbers. An examination of the map filed shows that the area sought to be designated by para. 8(f) could have been generally described by reference to existing named streets and the evidence of Mr. Campbell, Mr. Tennant, a qualified land surveyor, and Mr. Viminitz (chief surveyor of the Regina Land Titles Office) confirms that such a description was practicable and possible.

17 I am of the opinion that the *Campbell* case is readily distinguishable from the case at bar. Here the notice stated the provisions which were to be incorporated in the amending by-law. It would bring to an ordinary reasonable reader likely to be affected by the amendment an awareness that in fact he might be affected thereby. I have no doubt also that if he, out of caution, checked further he could have done so effectively through the City Development Officer. Indeed, the notice itself appears to me to convey by its wording an explanation of the amendment. What is to be done is explained in 34A and 34B. The reference to the public meeting to be held on Monday, October 2, 1972, amplifies the whole matter for the benefit of any reader left in doubt. It appears to have been designed to give the fullest information to interested citizens, but in my view is not to be taken as derogating from the explanation patent in the very words of the notice.

18 The third condition precedent alleged not to have been observed was the requirement that, by s. 36(2) of the *Planning Act*, a copy of the notice published in the newspaper must be given to the clerk of each municipality within three miles of the municipality intending to pass the by-law. In this case copies of the notice were under s. 36(2) required to be given to the Clerk of the City of Halifax and the clerk of the Municipality of the County of Halifax. The affidavit of R. H. Stoddard, Clerk of the City of Halifax, contained the statement that he was not provided with a copy of the notice of intention "on or before September 15, 1972", and the further statement that no person in the City Clerk's office had ever been provided with such a copy. The affidavit of Glen J. L'Esperance, however, contains the following:

> 3. THAT I did cause to be given to the Development Officer, City of Halifax, Scotia Square, P.O. Box 1670, Halifax, Nova Scotia and to the Director of Planning, County of Halifax, P.O. Box 300, Armdale, Nova Scotia a copy of the said notice under letter dated September 18, 1972 a copy of which letter is attached hereto and marked Exhibit "C" to this my affidavit by sending the same by ordinary mail to the within named persons.

Mr. L'Esperance's affidavit established that copies of the notice of intention were indeed given to the Development Officer of the City of Halifax; the Director of Planning, County of Halifax; and the Director of Community Planning Division of the Department of Municipal Affairs of the Province. In addition the affidavit of Harry G. Bensted, Clerk of the Municipality of the County of Halifax, submitted by the respondent, states as follows:

> 2. THAT if and when my office receives any Notice from any Municipality of the intention of such Municipality to amend its zoning by-law, such notice is immediately forwarded to the Director of Planning for the County of Halifax who has the authority in the said Municipality to process such Notices and prepare reports and make recommendations in regard to such amendment.

3. THAT it has been our practice to notify the City of Halifax and the City of Dartmouth where so required under the *Planning Act*, of the intention of the Municipality of the County of Halifax to amend our zoning by-law by notifying the respective Development Officers of the Cities aforesaid since it is our understanding that it is these Officers who process such Notices for their respective Cities.

4. THAT I have been informed by the Director of Planning for the County of Halifax and do verily believe that his department received a notice of the intention of the City of Dartmouth to amend its "G" Zone under cover of letter dated September 18, 1972.

In my opinion what was done in this case satisfied the requirements of s. 36(2) of the *Planning Act*. There was at the least substantial compliance with s. 36(2) and having regard to all the circumstances of this case I am not prepared to hold that By-Law C-217 was not validly enacted for non-observance of s. 36(2) when copies of the notice were given to the responsible officials of the City of Halifax and of the County in accordance with the usual practice in such cases. The purpose of s. 36(2) is obviously to let municipalities likely to be affected by, or to have an interest in, an amendment to a zoning by-law have knowledge of its proposed content, and in my view that purpose was here accomplished. The provision of the *Planning Act* must surely be interpreted so as to carry out the intent of the legislation and I think that was done here.

19 Counsel for the appellant also referred to s. 38(3) of the *Planning Act* and particularly to that part of it which provides that a copy of the by-law together with proof of compliance with the requirements of s. 38 and all written objections to the by-law be filed with the Director within ten days of the passing of the by-law.

20 In the affidavit of James Drolet it appears that, in his capacity of Planning Technician of the Department of Municipal Affairs for the Province of Nova Scotia, he works with the Director of Community Planning. His affidavit continues:

2. THAT I am authorized by the Director of Community Planning to review all of the files contained in the offices of the Director of Community Planning with respect to the amendment of the General Building Zone By-Law for the City of Dartmouth and am further authorized by the Director of Community Planning to make this Affidavit.

3. THAT I have reviewed all of the files contained in the offices of the Director of Community Planning with respect to the amendment of the General Building Zone By-Law for the City of Dartmouth.

4. THAT a copy of a Notice of intention to amend zoning by-law by the City of Dartmouth published in the Halifax Mail Star on September 15, 1972 was received by the Director of Community Planning on September 19, 1972. A true copy of the Notice received by the Director of Community Planning is attached hereto as Exhibit "A" to this my Affidavit.

5. THAT on January 29, 1973 the Director of Community Planning received a letter advising that the City of Dartmouth had amended its zoning by-law and enclosing a copy of a Notice published in the Halifax Chronicle Herald dated December 9, 1972. A true copy of the letter received by the Director of Community Planning is attached hereto as Exhibit "B" and a true copy of the Notice enclosed with the letter is attached hereto as Exhibit "C".

6. THAT there are no other communications received by the Director from the City of Dartmouth with respect to the amendment of the General Building Zone By-Law.

The notice published in the Halifax Chronicle-Herald newspaper dated December 9, 1972 was, in summary, that the amending By-Law had been passed at the December 5, 1972 meeting of the Council of the City of Dartmouth, setting out its provisions, and advising that the By-Law might be read or a copy obtained at City Hall. The notice contained at the end this paragraph:

Any interested person, the Director of Community Planning, or the Council of any other Municipality may, within thirty (30) days of the publishing of this notice, appeal to the Provincial Planning Appeal Board.

21 It is apparent, however, that there was imperfect compliance with s. 38(3). The Director was not given notice of the passing of the By-Law within ten days nor were copies of written objections, of which there were two, furnished to the Director.

Is this failure to observe the provisions of s. 38(3) fatal to the validity of the By-Law? I do not think so. The requirements of s. 38(3) cannot be said to be conditions precedent necessary to be observed as a pre-requisite of the exercise of the powers of the Council to enact the By-Law. They came into play only after enactment of the By-Law. It may be that the Director in the name of the Crown when authorized by the Minister, as provided in s. 57 of the Act could bring an action or other legal proceeding in respect of the failure to comply with s. 38(3) but in my opinion such failure per se did not render the By-Law invalid.

22 Counsel for the appellant in support of his contention that the failure to observe the provisions of s. 38 (3) referred us to *Nichol v. County of Leduc*, [1973] 2 W.W.R. 85 (Alta. West Ct.). But that was a case where the governing legislation required, by the use of the word "shall", certain matters to be provided for in the zoning by-law in question and the enacting authority failed to make the required provisions. Haddad, D.C.J., held that it must be regarded as an illegality to omit to reflect the mandatory provisions of a statute in a by-law. He said at p. 91:

> The provisions of the statute not complied with in the by-law go far beyond that of mere technical defects.

Here there is no question of illegality in the terms of the By-Law itself but only failure to inform the Director sufficiently or in time under s. 38(3) after enactment of the By-Law. This is a different situation indeed from that in the *Nichol* case.

23 We were also referred to *Wiswell v. Metropolitan Corporation of Greater Winnipeg*, [1965] S.C.R. 512, where an amending zoning by-law was declared invalid. The failure to post placards giving notice of the proposed amendment as required by a procedural resolution of the Metropolitan Council for amendments to zoning by-laws along with the manifest ignoring of the fact that the appellants would oppose the by-law was held fatal to its validity. Judson, J., dissented. The majority said that in enacting the amending by-law the respondent was engaged in a quasi-judicial matter and was in law required to act fairly and judicially and in good faith and fairly listen to both sides. As in the *Nichol* case what was complained of in *Wiswell* preceded the passage of the by-law. I repeat that in the instant case the failure to observe s. 38(3) was a matter which occurred after the By-Law C-217 had been passed.

24 For the reasons I have set out I therefore reject the contention of the appellant that By-Law C-217 was not validly enacted in compliance with the provisions of the *Planning Act*. I wish to add only what was said by Ewing, J., in *Shilleto Drug Co. v. Hanna*, [1931] 3 D.L.R. 567, at p. 569 as follows:

> In *Re Caswell and R. M. of South Norfolk* (1905), 1 W.L.R. 327, at p. 329, Perdue, J., in discussing an action to quash a by-law said as follows:-
>
> > 'On an application, therefore, to quash a by-law, the consideration of the questions to be determined should be undertaken in the spirit and with the object of ascertaining whether there has been a substantial compliance with all the requirements of the statute and not of finding some slight or trivial departure on which to hinge a decision adverse to the validity of the by-law.' He further quotes the remark of Cameron, J., in *White v. E. Sandwich* (1882), 1 O.R. 530, at p. 536, to the effect that: 'The Court should not be astute in finding grounds on which the by-law might be held defective.'

25 The appellant further submitted that even if By-Law C-217 were validly enacted no effect should be given to it on this appeal. It may well be that this point is not relevant to the application for admitting new evidence under Rule 62.22(2) of the *Civil Procedure Rules*, but we nevertheless heard argument on it and consider that we should deal with it.

26 I set out briefly at the risk of repetition the facts relevant to this second submission of the appellant. On August 8, 1972 at a regularly called meeting of the City Council the appellant applied for the issue of building permits to construct four office and warehouse buildings on its lands located in a General Zone. The Building Inspector had by letter dated June 29, 1973, addressed to the Mayor and Council, said:

> Attached are four identical applications for permits to build four office and warehouse buildings on Lakeview Drive by Country View Ltd., P.O. Box 576, Dartmouth.

> The estimated value of construction of each building is $50,000. The property is located in a General Zone. All buildings in a General Zone require the approval of City Council.
>
> The building will be serviced by wells and septic tanks as approved by the Provincial Department of Health.
>
> I recommend approval of the buildings as plans and specifications comply with the City of Dartmouth Building By-laws. See attached report of the Planning and Development Department.

The "attached report" is dated June 30, 1972, is also addressed to the Mayor and Council, and is signed by Donald A. Bayer, Director, Planning and Development. It reads in part:

> A permit to build the above has been reviewed by the Planning and Building Inspection Department and attached is a report from the Building Inspector indicating that the buildings comply with the National Building Code, subject to the approval of the Department of Health for septic tank operations.
>
> From the Planning and Development point of view, this area is not serviced by City water and sewer and is outside of the existing Development Boundary. The existing Official Town Plan and the proposed Municipal Development Plan both indicate this as an area for future residential development and, as such, the proposed use by Country View Limited is in contradiction of those plans and policies. Areas designated for general industrial and commercial uses are provided for in the North Dartmouth industrial area.
>
> The lands in question are presently zoned G Zone (General Building Zone) which will permit the full range of land uses to occur. However, this zone contains the following paragraph:
>
> > Council may refuse to issue a building permit to erect, repair, alter, maintain a building in a G Zone so that it may be used as a shop, tavern, restaurant, factory, overnight cabin, motel, apartment house, or for any other industrial or commercial purpose until it has been furnished with the consent, in writing, of the majority of real property owners within 1,000 feet of the lot on which the building is situated or to be situated.
>
> The City of Dartmouth is one of the major property owners within 1,000 feet of the proposed development and I would respectfully recommend that the City strongly object to the issuance of building permits for the proposed development. The basis for this recommendation is as follows:
>
> > 1. The proposed development is contrary to the policies in the existing Official Town Plan and the proposed Municipal Development Plan. More specifically -
> >
> > > (a) the area is designated as future residential and
> > >
> > > (b) it is outside of the present Development Boundary.
> >
> > 2. Premature development of this area will set in motion pressures related to the continuing development of the area and, also, for demand of community services which can be supplied more economically in other developable areas of the City.
> >
> > 3. The proposed development is in conflict with the overall community industrial and commercial development patterns inasmuch as the City has established an ongoing industrial and commercial development strategy in the Burnside area which provides fully serviced industrial lots related to the overall land use patterns of the City, transportation links and availability of trunk water and sewer. The City should not encourage the indiscriminate placement of commercial and industrial warehousing throughout the City, particularly where it cannot be hooked in to an existing trunk sewer service.

> 4. The exit point onto Lakeview Drive from the development is located at the proposed diamond interchange area, as approved jointly by the City of Dartmouth and the Province of Nova Scotia Department of Highways. To protect the function of Lakeview Drive, and to provide safe entry and exit from abutting land uses, this proposed diamond interchange should be constructed before approval of any significant development occurs on either side of the highway.

27 The paragraph as to the right of Council to refuse a permit in the circumstances there mentioned was contained in By-Law 74 and was declared invalid as being *ultra vires* in the previous opinion of this Court. [see 8 N.S.R. (2d) 1].

28 There is also on the record an affidavit of Mr. Bayer, which in part is as follows:

> 2. THAT the Building Inspector and the matter of issuing building permits is my responsibility subject to the direction of City Council of the City of Dartmouth.
>
> 3. THAT the application by Country View Limited for building permits involves the construction of two buildings within 200 feet of a controlled access highway as defined in the *Public Highways Act*.
>
> 4. THAT I have inquired at the Department of Highways of the Province of Nova Scotia and I am informed and believe that no building permit has been issued to Country View Limited as is required to comply with Section 21, Subsection 1, Clause (c) of the Statutes of Nova Scotia 1967, Chapter 248.

The controlled access highway referred to in the affidavit appears clearly to be Lakeview Drive. Section 21(1)(c) of the *Public Highway Act*, R.S.N.S. 1967, c. 248, provides:

> (1) Where a highway or portion thereof or any land has been designated as a controlled access highway, no person shall, without a written permit from the Minister,
>
> > (c) erect, construct or place or cause to be erected, constructed or placed, any building or other structure, or part thereof, or extension or addition thereto upon or within two hundred feet of the limit of the controlled access highway.

29 Council passed a motion at the meeting of August 8, 1972 suggesting that negotiations be carried on with the appellant in an attempt to obtain forty acres of land owned by the appellant in exchange for land owned by the City and located in the Burnside industrial area. It seems clear that the land proposed to be built upon formed part of the forty acres. Council also passed a motion deferring the grant of the building permits "until such time as it has been determined that the application has complied with all City planning requirements and by-laws, including the Provincial Health Dept. requirement."

30 On August 22, 1972 the Council gave first and second reading to By-Law C-217. The originating notice of the appellant was issued on August 24, 1972. The application for a declaration was heard on September 8, 13 and 15, 1972. Third reading was given to By-Law C-217 on November 7, 1972 and a notice of reconsideration was given at that time. This motion to reconsider was defeated at the meeting of Council held on December 5, 1972.

31 As I have said we held in our previous opinion that By-Law C-217 was validly enacted, and was in full force with the result that the appellant was not *then* entitled to the declaration which it sought. The appellant submits that the fact that the appellant may not be entitled to permits *at this time* is not relevant but that it is entitled to an order declaring that *as of the date of its application for building permits* it was entitled to such permits. The position of the appellant is that the original requirement as to General Zone land use having been held to be *ultra vires* those requirements were void at the time of the application for building permits and the amending By-Law C-217 could not operate so as to defeat the appellant's right to a declaration that as of the date of its application for building permits it was entitled to them.

32 It may be noted that, unlike the situation in cases to which we were referred and others which I have read, the application here was not for an order of mandamus requiring the issue of the building permits but rather for a declaration of entitlement thereto without any consequential relief. I interject here the provisions of Rule 5.14 of the *Civil Procedure Rules*:

> No proceeding shall be open to objection on the ground that only a declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether or not any consequential relief is or could be claimed.

What is claimed is a judgment merely proclaiming the existence of a legal relationship and not containing any order which might be enforced against the respondent - see, *The Declaratory Judgment* by I. Zamir at p. 1. Presumably any further remedy would be the subject of further proceedings. Indeed it is stated in the appellant's factum:

> The Appellant may well have an action against the City for wrongful refusal to issue the building permits to which the Appellant was entitled at the relevant time but that is not before this Court.

33 I now turn to the authorities to which we were referred and others which I have examined. I preface what follows by saying that in many of the cases where mandamus was applied for the application was met with a motion to adjourn it *sine die* upon it appearing that the municipal authority had passed or was intending to pass an amending by-law which, if approved by governmental authority such as the Ontario Municipal Board, would not allow the land to be used for the purpose intended by the applicant for a building permit. The object of the adjournment, of course, was to secure approval of the amending by-law necessary for its due enactment. This was the situation, for example, in *Hammond and Hammond v. The City of Hamilton*, [1954] O.R. 209 (Ont. C.A.) and *Re Marckity v. The Town of Fort Erie and Burger*, [1951] O.W.N. 836 (Ont. H.C.). The adjournment was refused in the first case and granted in the second despite the fact that in the second case it was agreed by Council that there was no by-law "presently effective which affects the issuance of the said permit" - per Spence, J,, at p. 836. No approval by any external authority was here necessary for the bringing into force of By-Law C-217. The matter was within the powers of the Council. It is in the light of these circumstances that I consider the authorities bearing upon issue of building permits.

34 The principal case cited to us by counsel for the appellant and upon which he placed great reliance was *City of Ottawa v. Boyd Builders Limited*, [1965] S.C.R. 408. In that case the respondent company was assured by municipal officers that certain lands were zoned to permit apartment houses. The company thereupon took options and completed the purchase of the lands and immediately instructed its architects to draft plans for an apartment house, and submitted on September 9, 1963 an application for a building permit. The acting building inspector admitted that he would have granted the permit on September 19, 1963 if he had not been instructed to refuse it. The surrounding residents when they heard of the application had raised a clamour. The upshot was the "hasty" enactment of a by-law so as to prohibit the building of apartment houses on the land in question and an application on September 20, 1963 to the Municipal Board for approval of it. Boyd Builders Limited were not given notice of relevant meetings of the Ottawa Planning Area Board or of the Council. The Company applied for an order of mandamus on September 30, 1963. The appellant's application for a mandatory order was adjourned by Mr. Justice Schatz pending the hearing of the City's application to the Municipal Board, whose approval was necessary to bring the by-law into force. The appellant's appeal was allowed and the further appeal of the Corporation to the Supreme Court of Canada dismissed.

35 Mr. Justice Spence delivered the judgment of the Court. He said at p. 410:

> An owner has a *prima facie* right to utilize his own property in whatever manner he deems fit subject only to the rights of surrounding owners, e.g., nuisance, etc. This *prima facie* right may be defeated or superseded by rezoning if three prerequisites are established by the municipality, (a) a clear intent to restrict or zone existing before the application by the owner for a building permit, (b) that council has proceeded in good faith, and (c) that council has proceeded with dispatch.

and at p. 411:

> I am of the opinion that the approach of the Court of Appeal for Ontario is a sound one. Under the provisions of s. 30(9) of *The Planning Act* the by-law is not in effect unless and until approved by the Municipal Board. Therefore, when Boyd Builders Limited made application for a building permit and later when refused made application for a mandatory order that a building permit be issued, there was no valid by-law in existence prohibiting the grant of such permit. Therefore, Boyd Builders Limited has a *prima facie* right to the permit and upon its refusal a *prima facie* right to a mandatory order that it should be granted. This *prima facie* right may only be defeated if the municipality demonstrates that it has in existence a clear plan for zoning the neighbourhood with which it is proceeding in good faith and with dispatch.

. . . . .

> What the applicant seeks in these proceedings is the enforcement of his common law right, and that common law right should be viewed as of the date of the filing of its application for a permit subject to the common law right being superseded in the fashion I have outlined by events which may occur even after the date of the filing of the application for a permit and before the application for a mandatory order.

36 It is important to note also that Mr. Justice Spence at p. 415 approved the conclusion of Roach, J.A., in the Court of Appeal that in passing the by-law the Council was not acting in good faith:

> It passed that by-law for the express purpose of defeating appellant's *prima facie* right to the permit. It yielded to the protests of some of the other owners in the immediate neighbourhood for whom the Planning Board was "sympathetic". It passed that by-law without any opportunity having been given to the appellant, which was so vitally interested, to make any representations concerning it. Everything that was done to defeat the appellant's *prima facie* right was done behind its back for the obvious purpose of avoiding embarrassment that the appellant's protestations on its own behalf might cause. *It is difficult to think of any stronger evidence of bad faith.*

37 We were referred to several cases in which the pre-requisites stated in the *Boyd* case were considered. Counsel for the appellant cited *Re Bismark Holdings Limited and City of Toronto*, [1973] 3 O.R. 887 (Ont. Div. Ct.). It was there held that mandamus should issue directing the respondents to issue a building permit. Fraser, J., speaking for the Court, quoted at pp. 890,1 the excerpt from the *Boyd* case as to the *prima facie* right of an owner to utilize his land as he wished and which I have set out above and said with respect to it:

> That excerpt is very helpful but was directed to its particular facts. The more recent cases in the Court of Appeal, particularly *R. v. City of Barrie, Ex p. Bernick, supra*, [[1970] 1 O.R. 200, 8 D.L.R. (3d) 52] and *Re Bruce and City of Toronto, supra*, [[1971] 3 O.R. 62, 19 D.L.R. (3d) 386] indicate that the considerations in that excerpt may not be completely exhaustive, and somewhat wider consideration that indicated by it, may, in appropriate cases, be given to the equities as between the citizens of a municipality as represented by its council and the applicant for a building permit.

and continued:

> The respondent city in my view had not satisfied all the requirements that would entitle it to an adjournment, under the principles discussed in the *Boyd* case. To do so it would have to show such a situation that having regard to all the evidence, the Court should exercise its discretion to adjourn the matter until the municipality has had an opportunity of bring [sic] the by-law before the Ontario Municipal Board so as to complete what was necessary from the by-law to be fully effective in law. Quite apart from the specific tests set out in the *Boyd* case, in our opinion, the equities as between the parties were such that no adjournment should be granted.

38 *R. v. City of Barrie, Ex p. Bernick*, supra, was another case where an order of mandamus was applied for and where upon return of the motion the appellants sought an adjournment *sine die* of the application in order that the city might apply to the Ontario Municipal Board for approval of a by-law which rezoned the respondent's lands from C2 to R2. Lieff, J., granted the mandamus but without giving reasons. On the appeal Jessup, J.A., referred to the statement of Spence, J., in the *Boyd* case and expressed the opinion that all of the elements mentioned by Spence, J., as justifying the defeat of an owner's *prima facie* right were present - p. 59. He nevertheless upheld Lieff, J.'s order on the ground that the exercise of his discretion should not be disturbed. Jessup, J.A., asked the question whether injustice would result if Lieff, J.'s "discretion is not interfered with". He concluded that the equities were on the respondent's side. Laskin, J.A., as he then was, in a separate concurring judgment did say that there was a general intent by virtue of the proposed official plan eventually to rezone in accordance with it but "official plans are not irreversible or unamendable" and he did not think that it was clear that there was a manifested intention to pass the particular zoning by-law before the application for a building permit was made. He also pointed out that "In the present case, the municipality may be said to have committed itself to the landowner by the issue of a foundation permit under plans of the whole proposed development which were substantially satisfactory".

39 Among the most recent cases where the *Boyd Builders* case is referred to is *Re Overcomers Church and City of Toronto* (1974), 39 D.L.R. (3d) 491 (Ont. Div. Ct.). In that case Wright, J., who delivered the judgment of the Court, after reviewing authorities as to the meaning of intention said at p. 498:

> These cases illuminate but they do not determine the kind of 'clear intent' required under the much quoted passage of Spence, J. in the *Boyd Builders Ltd.* case, supra. That passage is not a statute. It is an expression designed, we are sure, to be helpful to Judges exercising their discretion to grant an adjournment for the consideration of a municipal by-law by the Ontario Municipal Board. It should not be given a rigid and arbitrary meaning independent of the particular cases in which it becomes material.

and:

> It is clear from the judgment of the Court of Appeal in *Re Donald Bye Excavating Co. Ltd. and City of Peterborough*, [1973] 1 O.R. 139, 30 D.L.R. (3d) 415, that a clear legislative intention can be deduced from acts by the municipality not amounting either to the passing of a by-law or a resolution of intention. This is consonant with the decision of the English Court of Appeal in *Poppett's (Caterers) Ltd. v. Maidenhead Borough Council*, supra.

The necessary intent was found in *Re Donald Bye Excavating Co. and City of Peterborough*, [1973] 1 O.R. 139 (Ont. C.A.), where admittedly the evidence was stronger than in the instant case. There the respondent city had adopted a proposed official plan designating certain lands for industrial use and had also drafted a comprehensive by-law which it intended to pass upon receipt of approval of the official plan by the Minister of Municipal Affairs. Gale, C.J.O., after finding the necessary intent did say at p. 142:

> ... Having in mind the complexities of modern municipal planning, particularly the involvement therein of many agencies other than a municipality, the city in this instance ought to be afforded time to await the Minister's decision with respect to the matter presently before him, which will in large measure resolve the future with respect to the city's intent.

40 I should mention here that we were referred by counsel for the respondent to *Canadian Petrofina Limited and P. R. Martin & City of St. Lambert*, [1959] S.C.R. 453, as being decisive in his favour. There, as stated in the headnote, the plaintiff company applied to the City of St. Lambert for a gasoline station building permit required under by-law 392 then in force and was told that the by-law did not allow the erection of a gasoline station in district D where its property was situated. A few weeks later the city passed by-law 405 which amended by-law 392 and which provided by art. 87C "Gasoline filling stations are prohibited...except in District F." The company applied for a writ of mandamus contending that by-law 392 was ineffective to prohibit the erection in district D and that the adoption of by-law 405 could not defeat the rights already acquired under by-law 392. The trial judge allowed the writ of mandamus but the judgment was reversed by the Court of Appeal. As appears from the judgment of Fauteux, J., speaking for the Supreme Court of Canada on the further appeal to that Court the judges in the Court of Appeal held that, properly interpreted, by-law 392 was effective to prohibit the building of gasoline stations in any of the city districts except F. Rinfret and Choquette, JJ.A., however, had held further that by reason of art. 87C of by-law 405 and the decision of the Privy Council in the *R.C. Separate Schools* case, [1926] A.C. 81, the appellant had no accrued right to a permit when the latter article was adopted since, at that time, the station was neither erected nor in the course of erection, nor had its erection been authorized by by-law. Fauteux, J., had this to say at p. 458,9 with respect to the effect of art. 87C:

> Appellant's contention must be that, having made the application for a permit and deposited the plans at a time when its right to use the land for the proposed purpose was in no way affected by a by-law, it had an accrued right which could not be defeated by the subsequent enactment of art. 87C of by-law 405.
>
> The merit of this proposition is, I think, implicitly negatived on the reasoning of the Judicial Committee in the *City of Toronto Corporation v. Trustees of the Roman Catholic Separate Schools of Toronto*, supra, [[1926] A.C. 81]. While the statutory powers of the city of Toronto differ from those of the respondent city, in that any by-law passed pursuant thereto is restricted in its operation, and while the questions of fact arising in that case are, in some respects, at variance with the admitted facts of this case, the basic principle governing in the matter is the same. What was then said by Lord Cave may

be stated concisely as follows, for the purpose of this case. The whole object and purpose of a zoning statutory power is to empower the municipal authority to put restrictions, in the general public interest, upon the right which a land owner, unless and until the power is implemented, would otherwise have to erect upon his land such buildings as he thinks proper. Hence the status of land owner cannot *per se* ffect the operation of a by-law implementing the statutory power without defeating the statutory power itself. Prior to the passing of such a by-law the proprietary rights of a land owner are then insecure in the sense that they are exposed to any restrictions which the city, acting within its statutory power, may impose.

From this it follows that, while the right to erect includes the right to receive the necessary permit for the erection of the building proposed to be erected in conformity with the law in force for the time being, the latter right is not any more secure than the former to which it is incidental. And if the insecurity attending this incidental right has not yet been removed by the granting of the permit, by the municipal authority acting in good faith, as in the present case, such right cannot become an accrued right effective to defeat a subsequently adopted zoning by-law prohibiting the erection of the proposed building in the area affected.

41 The *Canadian Petrofina* case, indeed, standing with the *R.C Separate Schools* case, is very much in favour of the respondent but both these cases must be considered in the light of *Boyd* - see, *Texaco Canada Limited v. Corporation of Oak Bay* (1969), 68 W.W.R. 366 (B.C.S.C.), where Wilson, J., dealt at length with the *R.C. Separate Schools* case and *Boyd*. He said at p. 380, after quoting Lord Cave:

This, I think, makes it clear that a bylaw passed after the application is made for a building permit to which the applicant had, at the time, a *prima facie* right, may have the effect of defeating the application if the municipal authority acts in good faith. Good faith was not in issue before the Privy Council, it having been conceded (see p. 84) that the council had acted in good faith.

This is as far as the *R.C. Separate Schools* and *Canadian Petrofina Limited* cases take the respondent, leaving the other requirements of the *Boyd* case to be dealt with.

42 I interject here that I have not overlooked provisions of the City Charter, namely, s. 422(1) and s. 424(9), which counsel for the respondent submitted barred the action of the appellant. I do not think those provisions have that effect.

43 After as careful consideration as I can give to the *Boyd* case and cases in which reference has been made to it I am of the opinion that upon the facts which we have before us the discretion of the Court to grant the declaration sought should not be exercised in favour of the appellant and that consequently the appellant is not entitled to the order claimed.

44 I do not think that bad faith can be attributed to the Council in passing the amending By-Law C-217 but that the Council acted in good faith. Its reasons for deferral of the grant of the building permits indicate clearly a desire for proper and orderly planning in the interests of the community of the City of Dartmouth. I consider what was said by Wilson, C.J.S.C., in the *Texaco Canada* case at p. 381 as very much in point:

I suppose that the phrase 'good faith' is here [in the *Boyd Builders* case] used in a special sense. It is hard for me to suspect the 'good faith', as that phrase is ordinarily understood, of a council which seeks to preserve the amenities of an area against a type of building or commercial activity which it regards as undesirable. Certainly it is not suggested that the building inspector or any member of the council had anything to gain personally from the denial to the plaintiff of a building permit.

45 There was, in my view, the requisite intention on the part of the Council to restrict the use of land in the General Zone existing at the time of the application for building permits. I find that intention particularly in the Official Town Plan which had been adopted in 1966 by the Council and was no doubt open to inspection by developers coupled with the proposed municipal development plan. I have had some doubt as to the requirement to move with dispatch to put the intention to rezone into effect. But in considering this question I think it important to have regard to the circumstances existing for a considerable period of time with respect to town planning. The whole question of town planning may fairly be said to have been in a state of radical change affected not only by rapid development but also by altogether new concepts introduced by the new *Planning Act* involving not only the Council but other governmental authorities.

46 I have no doubt here that the equities lie with the respondent. The Council has been charged with the very burdensome task of planning the orderly development of the City which, on the evidence, would have been seriously impeded by the issue of the building permits.

47 For these reasons, I reiterate that the appeal should be dismissed with costs.

***Coffin, J.A.*:**

48 I have had the opportunity of reading the opinion of my brother Cooper and I concur in his conclusions. I agree that there was a requisite intention on the part of Council to restrict the use of the land in the General Zone and that this intention existed at the time of the application for the building permits.

49 In *Re Fairmeadow Developments Ltd. and Town of Markham* (1973), 36 D.L.R. (3d) 168, [1973] 3 O.R. 144, at 155 Lacourciere, J., said:

> In our opinion, the limits and conditions placed on the granting of adjournments in the *Boyd* case, supra, were meant to protect owners, applying in good faith for a building permit, from being frustrated by subsequent zoning restrictions unless the municipality established certain prerequisites: such limits were never meant to assist aggressive developers, such as the applicants, attempting, under the wire so to speak, to obtain permits for a commercial development inconsistent with the known zoning objectives of the municipality.

I am particularly impressed with the words "the known zoning objectives of the municipality". It is the known zoning objectives of the Dartmouth City Council which to me are so relevant in the facts from which the present appeal arises.

50 I agree that the appeal should be dismissed with costs.

natural object. 1. A person likely to receive a portion of another person's estate based on the nature and circumstances of their relationship. — Also termed *natural object of bounty*; *natural object of one's bounty*; *natural object of testator's bounty*. [Cases: Wills ⇨50. C.J.S. *Wills* § 7.] 2. See *natural boundary* under BOUNDARY. 3. See *natural monument* under MONUMENT.

natural obligation. See OBLIGATION.

natural person. See PERSON (1).

natural possession. See POSSESSION.

natural premium. See PREMIUM (1).

natural presumption. See PRESUMPTION.

natural resource. 1. Any material from nature having potential economic value or providing for the sustenance of life, such as timber, minerals, oil, water, and wildlife. 2. Environmental features that serve a community's well-being or recreational interests, such as parks. [Cases: Environmental Law ⇨13.]

Natural Resources Conservation Service. An agency in the U.S. Department of Agriculture responsible for providing information and financial assistance to farmers and ranchers for voluntary conservation programs. • The Service was formerly known as the Soil Conservation Service. — Abbr. NRCS.

natural right. See RIGHT.

natural servitude. See SERVITUDE (2).

natural succession. See SUCCESSION (2).

natural watercourse. See WATERCOURSE.

natural wear and tear. See WEAR AND TEAR.

natural wrong. See *moral wrong* under WRONG.

natural year. See YEAR.

natura negotii (nə-**tyoor**-ə ni-**goh**-shee-ī). [Latin] *Hist.* The nature of the transaction.

nature. 1. A fundamental quality that distinguishes one thing from another; the essence of something. 2. A wild condition, untouched by civilization. 3. A disposition or personality of someone or something. 4. Something pure or true as distinguished from something artificial or contrived. 5. The basic instincts or impulses of someone or something. 6. The elements of the universe, such as mountains, plants, planets, and stars.

natus (**nay**-təs). *adj.* [Latin] Born; (of a child) alive.

nauclerus (naw-**kleer**-əs). *n.* [Latin fr. Greek *naus* "ship" + *klēros* "allotment"] *Roman law.* A shipmaster; a skipper.

naulage (**naw**-lij). *n.* [Old French fr. Law Latin *naulagium* "passage money"] The fare for passengers or goods traveling by ship. See NAULUM.

naulum (**naw**-ləm). *n.* [Latin fr. Greek] *Roman law.* Fare; freights; a shipowner's fee for carrying people or goods from one place to another.

nauta (**naw**-tə). *n.* [Latin fr. Greek *naus* "ship"] *Roman law.* A sailor.

nautae, caupones, stabularii (**naw**-tee, kaw-**poh**-neez, stab-yə-**lair**-ee-ī). [Latin] *Roman law.* Carriers by sea, innkeepers, stablers. • The phrase was used in an edict holding shippers, innkeepers, and stablers for damages to goods entrusted to them for safekeeping (*receptum*). Members of this group were also vicariously liable for the torts of their employees and slaves.

> "The edict is in these terms: 'NAUTAE CAUPONES, QUOD CUIUSQUE SALVUM FORE RECEPERINT NISI RESTITUET JUDICIUM DABO.' This rule, from its expediency, has been, some variations, received into the law of Scotland. 'Masters of this description are liable for their servants, or the acts of guests and passengers: and the extent damage may be proved by the oath of the c William Bell, *Bell's Dictionary and Digest of the Scotland* 737 (George Watson ed., 7th ed. 1890).

nautical, *adj.* Of or relating to ships or sl carriage by sea, or navigation.

nautical assessor. A person skilled in maritin ters who is summoned in an admiralty case the judge on points requiring special expertis

nautical mile. A measure of distance for air navigation, equal to one minute of arc of circle of the earth. • Different measures ha used by different countries because the earth perfect sphere. Since 1959, however, the States has used an international measure for cal mile, set by the Hydrographic Bureau, 6,076.11549 feet, or 1.852 meters.

nauticum fenus (**naw**-ti-kəm **fee**-nəs). *n.* [Gree *kon* "nautical" + Latin *fenus* "interest"] *R civil law.* A loan to finance the transport of g sea; specif., a loan on bottomry made to a tr er of merchandise by ship. • The loan is su an extremely high rate of interest because it have to be repaid unless the ship safely re destination. The *nauticum fenus* is both a l marine insurance. The rate, originally unlim cause of the risks of sea travel, was eventuall at 12%. The money loaned is *pecunia trajectic* ey conveyed overseas). — Also spelled *naut nus*. — Also termed *fenus nauticum*; *nautica foenus nauticum*.

NAV. *abbr.* NET ASSET VALUE.

navagium (nə-**vay**-jee-əm). *n.* [Latin "ship, v *Hist.* A tenant's duty to transport the lord's g ship.

naval, *adj.* 1. Of or relating to ships or shippin or relating to a navy. See NAVY.

naval law. A system of regulations governin forces. See CODE OF MILITARY JUSTICE. [Cases Services ⇨2; Military Justice ⇨507. C.J.S *Services* §§ 5-6; *Military Justice* §§ 6, 66.]

navarch (**nay**-vahrk). *n.* [fr. Greek *naus* "s *archos* "chief"] *Hist.* A master of an armed Also termed *navarchus*. Cf. NAVICULARIUS.

navicularius (nə-vik-yə-**lair**-ee-əs). *n.* [Latin "s er"] *Hist.* A person engaged in the shipping

navigable (**nav**-i-gə-bəl). *adj.* 1. Capable of vessels or vehicles to pass, and thereby us travel or commerce <the channel was barely ble because it was so narrow>. [Cases: N Waters ⇨1. C.J.S. *Navigable Waters* § 1.]

navigable in fact, *adj.* Naturally usable for commerce in the present condition. • A s

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2018 BCSC 392
British Columbia Supreme Court

Kelowna (City) v. Khurana

2018 CarswellBC 588, 2018 BCSC 392, 290 A.C.W.S. (3d) 188, 74 M.P.L.R. (5th) 120

City of Kelowna (Plaintiff) and Surinder Khurana and Seema Khurana (Defendants)

S.D. Dley J.

Heard: March 1, 2018
Judgment: March 13, 2018
Docket: Kelowna S111628

Counsel: B.S. Williamson, for Plaintiff
R. Burke, for Defendants

Subject: Property; Public; Municipal

ACTION by city seeking declarations that defendants' use of property contravened amended by-law.

***S.D. Dley J.*:**

Introduction

1 The defendants own an orchard within the City of Kelowna (the "City"). They were permitted under a prior bylaw to accommodate tourist recreational vehicle ("RV") parking. The City amended the bylaw; the amendments included additional restrictions affecting the defendants' use of their property. The City advertised the proposed changes to the bylaw as "housekeeping" amendments.

2 The City has commenced this action seeking declarations that the defendants' use of their property contravenes the amended bylaw. The defendants argue that the City did not provide proper notice of its intention to change the prior bylaw and, therefore, the amended bylaw is invalid.

3 For the reasons that follow, I conclude that Bylaw No. 10269 is invalid.

Background Facts

4 The City's Zoning Bylaw No. 8000 permitted tourist accommodation on an orchard as a secondary use and allowed RV pads. In 2008, the defendants built ten RV sites. By 2010, there were about 14 of these agri-tourist accommodations built on land zoned as A-1. The City administration decided that changes should be made to the existing bylaw and the A-1 Zone was contemplated to be separated into three zones:

a) A-1: agriculture 1;

b) A-1s: agriculture 1 with secondary suite; and

c) A-1t: agriculture 1 with agri-tourist accommodation.

5 The A-1t zone contemplated significant changes which included minimum lot sizes, limiting accommodation units in proportion to lot size, restricting the number of RVs and allowing for seasonal use only from April 1 to October 31.

6 Section 464 (1) of the *Local Government Act*, R.S.B.C. 2015, c.1 requires a municipality to hold a public hearing before it may adopt a zoning bylaw. The municipality is required to give notice of the public hearing. Section 466 states:

> (1) If a public hearing is to be held under section 464 (1), the local government must give notice of the hearing
>
> (a) in accordance with this section, ...
>
> (2) The notice must state the following:
>
> (a) the time and date of the hearing;
>
> (b) the place of the hearing;
>
> (c) in general terms, the purpose of the bylaw;
>
> (d) the land or lands that are the subject of the bylaw;
>
> (e) the place where and the times and dates when copies of the bylaw may be inspected.
>
> (3) The notice must be published in at least 2 consecutive issues of a newspaper, the last publication to appear not less than 3 days and not more than 10 days before the public hearing . . . .

[My emphasis]

7 The City published the following notice:

> The City of Kelowna is proposing housekeeping amendments to City of Kelowna Zoning Bylaw No. 8000 with respect to general definitions, agri-tourist accommodation and the A 1-Agriculture 1 zone.
>
> [My emphasis]

8 There were three public hearings in respect to amending Bylaw No. 8000. All of the hearings were advertised with the same notice.

9 There were four speakers at the first public hearing. At the second public hearing, nineteen speakers participated including five agri-tourist accommodation license holders and one prospective licensee. Only two speakers participated at the last hearing.

10 There were further changes made to the proposed bylaw on June 28, before the final public hearing.

11 The defendants were never aware of the proposed amendments.

12 On September 23, the City adopted Bylaw No. 10269, which amended Bylaw No. 8000.

13 In its Notice of Civil Claim (Part 1), the City stated the following as statements of fact:

> 13. On September 23, 2010 Council of the City adopted Bylaw 10269 (the "Amending Bylaw") which amended the Zoning Bylaw regulations relating to agritourist accommodation. The Amending Bylaw increased the minimum parcel size on which agri-tourist accommodation was permitted from 2.0 hectares to 4.0 hectares and provided for a sliding scale in which only 5 units of agri-tourist accommodation were permitted on parcels of 4.0 hectares, increasing to a maximum of 10 units on parcels 10.0 hectares or larger. The site coverage was reduced from 10% of the parcel to 5%.
>
> 14. The principal change under the Amending Bylaw was to provide a new definition of agri-tourist accommodation as follows:

> **AGRI-TOURIST ACCOMMODATION** means the seasonal availability of short term accommodation for tourists on a farm, orchard, or vineyard in association with an agri-tourism activity which is subordinate and secondary to the principal agricultural use. Typical uses include but are not limited to seasonal farm cabins, and campsites/recreational vehicle sites. Seasonal, in this instance, means the accommodation must be available for use only between April 1 and October 31 of each year.

15. The new definition did not lessen the requirement that existed prior to the Amending Bylaw that agri-tourist accommodation was a use of accommodating travellers and visitors only and of short-term duration. The effect of the new definition was that it was not lawful to provide or permit any agri-tourist accommodation in the period of November 1 to March 31 in the succeeding year.

The Law

14 *Peterson v. Whistler (Resort Municipality)* (1982), 39 B.C.L.R. 221 (B.C. S.C.) is the leading case dealing with the sufficiency of the notice requirements when a zoning bylaw is being proposed. It sets out the following principles:

a) the statute sets out a code of procedure that must be followed strictly when amending a zoning bylaw;

b) the giving of a proper notice is a condition precedent to the council's authority;

c) if the City fails to satisfy the statutory prerequisite, it is immaterial whether or not the failure caused prejudice;

d) the intent of the proposed bylaw is to be determined from the bylaw and evidence relevant to it; the city council's purpose of enacting the bylaw is not determinative; and

e) it is an objective test as to whether the notice satisfied the statutory requirements.

Peterson at paras. 10-20 and 42.

15 The Court of Appeal endorsed the *Peterson* approach in *Great Canadian Casinos Co. v. Surrey (City)*, 1999 BCCA 619 (B.C. C.A.) at para. 10:

> [10] The most helpful case on the meaning of s. 892(2)(c) of the Municipal Act is the decision of Mr. Justice Rae in the Supreme Court of British Columbia in Peterson v. Whistler (1982), 39 B.C.L.R. 221. At the time the equivalent provision of the Municipal Act read that the notice should: "state in general terms the intent of the proposed bylaw". I do not think the change in wording from "intent" to "purpose" affects what was said by Mr. Justice Rae in this passage at p. 231:
>
> > 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. . . .
>
> It is important to understand, as Mr. Justice Rae said, that it is average citizens who must be kept in mind when deciding whether the notice adequately stated the purpose of the bylaw.

16 Therefore, the narrow question "is whether average citizens would have been reasonably notified of the purpose of the bylaw by the notice": *Great Canadian Casino* at para. 11.

Discussion

17 The whole of the notice must be read in conjunction with the proposed bylaw. The notice clarified the amendments to the existing bylaw as being housekeeping amendments. Would the average citizen reading that notice come to the informed conclusion that he or she should attend the public hearing because the proposed amendments might affect them? I think not.

18 Housekeeping is the descriptive term for the purpose of the bylaw. The *Meriam - Webster Dictionary*, 2018 *sub verbo* "housekeeping", provides the following definitions of "housekeeping":

- the management of a house and home affairs
- the care and management of property and the provision of equipment and services (as for an industrial organization)
- the routine tasks that must be done in order for a system to function or to function efficiently

19 None of the meanings attributable to "housekeeping" accord with anything other than routine tasks to generally maintain the status quo, although that may require some reorganization or movement of things. Thus, the average person upon being advised that a bylaw was to undergo some "housekeeping amendments" would likely conclude that sections might be re-numbered, moved or re-phrased so as to bring clarity or better organization to the document. The average person would not conclude that housekeeping amendments would restrict the number of rental units or the months when revenue could be earned.

20 Although the amendments to the bylaw were greater than as described in the Notice of Civil Claim, the statement of facts in the pleadings reveal significant changes to the bylaw — much more than "housekeeping amendments". This was tantamount to the City advertising for a housekeeper when a renovating contractor was required.

21 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.

22 If the City had simply stated (without any reference to housekeeping) that it was proposing amendments to the bylaw that would increase the minimum lot area, restrict the number of rental units and restrict the months during which rentals could be offered, that would have satisfied the statutory requirement. The average person reading such a notice would then be in an informed position to decide whether to attend the public hearing or seek further information about the proposed changes. 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.

Conclusion

23 I conclude that the City did not satisfy a condition precedent to adopting the bylaw — the City did not state in general terms the intent of the proposed bylaw. The result is that Bylaw No. 10269 is not valid.

24 The defendants shall be entitled to their costs at Scale B.

Action dismissed.

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APPENDIX A. DEFINITIONS

In this by-law, and in accordance with the *Interpretation Act*, R.S.P.E.I. 1988 c. I-8:

a. The word "shall" is to be construed as imperative; and "may" is to be construed as permissive and empowering.
b. Words used in the present tense shall include the future.
c. Words used in the singular shall include the plural, and words used in the plural shall include the singular.
d. The word "use" or "used" shall include "intended to be used",
e. All other words shall carry their customary meaning except for those defined hereinafter.

500 Lot Area means the Heritage Resource area identified within the City of Charlottetown that is generally located south of Euston Street, and is more specifically described in Appendix E.

Abattoir means a use of land, or Building or Structure in which animals are slaughtered and may include the packing, treating, storing, and sale of the product on the premises.

Accessory Building means a detached Building or Structure located on the same Lot as a main Building, and the use of which is incidental or secondary to the main Building.

Active Recreation means recreational activities, such as organized sports that require specialized facilities and Development.

Addition means an Alteration to an existing Building resulting in an increase in the Gross Floor Area of the Building.

Affected Property Owners means the property owner(s) identified on the Assessment Roll in accordance with the *Real Property Assessment Act*, Cap. R-4, R.S.P.E.I. 1988, and as provided to the City by the Province at the beginning of each year (with printed and/or electronic updates throughout the year). The City is responsible for only those names on the latest electronic files for the Assessment Roll to the City when sending notices under the provisions of this by-law.

Affordable Housing means any type of housing whereby the provincial government provides some form of subsidy or rent assistance, including public, non-profit, co-operative housing, or rent supplements for people living in private market housing.

Agricultural and Resource Land Use means the non-intensive use of lands, Buildings or Structures for the production of crops, animal husbandry or other similar uses normally associated with agriculture. Agricultural Resource uses may also include retail or market outlets for the sale of agricultural goods; but shall not include intensive fowl, livestock, a Kennel, or a fox farm operation.

Airport means the use of land or a Building to facilitate the landing and handling of aircraft, their passengers and freight, and may include secondary uses such as a ticket Office, Eating and Drinking

process to a committee or to an agent for investigation and report. The main consideration, in choosing the appropriate procedure, is whether the procedure gives the persons affected a fair opportunity to be heard.

¶2.24 The same procedure is not expected of all tribunals. There is great variety in the types of tribunals and in the types of decisions made by them. The concept of procedural fairness is not a fixed concept. It varies with the context and the interests at stake.[56] "At the heart of this analysis is whether, considering all the circumstances, those whose interests were affected had a meaningful opportunity to present their case fully and fairly." The Supreme Court of Canada has identified the following five factors to be considered in determining what is appropriate.[57]

1. The Nature of the Decision and the Process Followed in Making It

¶2.25 This factor appears to be two quite different factors. The first part refers to whether the decision is of a legislative or policy nature and affects the community as a whole or is an adjudicative decision that turns on questions of fact and law and affects the interests of a single individual. The process is different for a discretionary decision based on the consideration of policy than for an adjudicative decision based on the facts of the case. The other part concerns the statutorily prescribed process for making the decision. Sometimes the prescribed process is an indication of the nature of the decision. That is, the closer the prescribed procedure is to the trial model, the more likely the decision involves an adjudication of an individual case.

¶2.26 To make a discretionary policy decision, a court-type procedure is not expected.[58] Many statutes confer decision-making powers on Cabinet, Ministers and other public officials to enable them to respond to political, economic and social concerns. These types of decisions do not attract a duty of fairness and are subject only to statutorily prescribed procedural requirements.[59] These decision makers may consult anyone and are not

[56] *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] S.C.J. No. 27 at paras. 45-46.

[57] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39 at paras. 21-28.

[58] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39 at para. 23; *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, [2003] S.C.J. No. 59.

[59] *Canada (Attorney General) v. Inuit Tapirisat of Canada*, [1980] S.C.J. No. 99; *Idziak v. Canada (Minister of Justice)*, [1992] S.C.J. No. 97; *Canadian Assn. of Regulated Importers v. Canada (Attorney General)*, [1994] F.C.J. No. 1 (F.C.A.), leave to appeal refused [1994] S.C.C.A. No. 99; *Imperial Oil v. Quebec (Minister of the Environment)*, [2003] S.C.J. No. 59; *Dairy Farmers of Ontario v. Denby*, [2009] O.J. No. 4474 (Ont. Div. Ct.); *Newfoundland and Labrador (Consumer Advocate) v. Newfoundland and Labrador (Public Utilities Board)*, [2005] N.J. No. 83 (N.L.T.D.).

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Supreme Court of Canada

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Mavis Baker, Appellant v. Minister of Citizenship and Immigration, Respondent and The Canadian Council of Churches, the Canadian Foundation for Children, Youth and the Law, the Defence for Children International-Canada, the Canadian Council for Refugees and the Charter Committee on Poverty Issues, Interveners

L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Bastarache, Binnie, JJ.A.

Heard: November 4, 1998
Judgment: July 9, 1999
Docket: 25823

Proceedings: reversing *Baker v. Canada (Minister of Citizenship & Immigration)* (1996), [1996] F.C.J. No. 1726, [1996] F.C.J. No. 1570, 1996 CarswellNat 2693, 1996 CarswellNat 2052, [1997] 2 F.C. 127, 122 F.T.R. 320 (note), 207 N.R. 57, 142 D.L.R. (4th) 554 (Fed. C.A.); affirming *Baker v. Canada (Minister of Citizenship & Immigration)* (1995), [1995] F.C.J. No. 1441, 1995 CarswellNat 1244, 101 F.T.R. 110, 31 Imm. L.R. (2d) 150 (Fed. T.D.)

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John Terry and *Craig Scott*, for Intervener the Charter Committee on Poverty Issues.
Barbara Jackman and *Marie Chen*, for Intervener the Canadian Council of Churches.

Subject: Immigration; Public; Human Rights

Headnote

Immigration and citizenship --- Admission — Application for temporary resident or immigrant visa — Inland applications — Application of humanitarian and compassionate considerations
Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare — Following deportation order, immigration officer refused application under s. 114(2) of Immigration Act for exemption on humanitarian and compassionate grounds to requirement that application for permanent residence be made from outside Canada — Applicant unsuccessfully applied for judicial review — Question was certified regarding whether immigration authorities are required to treat best interests of child as one primary consideration in assessing applicant under s. 114(2) of Act — Question was answered in negative — Applicant appealed — Appeal allowed — Junior immigration officer's notes constituted decision and demonstrated reasonable apprehension of bias — Officer appeared to have drawn conclusions based not on evidence but on fact that applicant was single mother with several children and was diagnosed with mental illness — Failure to give serious consideration to interests of applicant's children was unreasonable exercise of discretion notwithstanding deference that should be given to officer's decision — Reasons also failed to give sufficient weight or consideration to hardship that might be caused to applicant if returned to country of origin.

Immigration and citizenship --- Admission — Application for temporary resident or immigrant visa — Best interests of child
Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and

obtaining welfare — Applicant had four Canadian-born children — Following deportation order, immigration officer refused application under s. 114(2) of Immigration Act for exemption on humanitarian and compassionate grounds to requirement that application for permanent residence be made from outside Canada — Applicant unsuccessfully applied for judicial review — Question was certified of whether federal immigration authorities are required to treat best interests of Canadian child as one primary consideration in assessing applicant under s. 114(2) of Act — Question was answered in negative — Applicant appealed — Appeal allowed — Reasonable exercise of power under s. 114(2) of Act requires close attention to interests and needs of children — Children's rights and attention to their interests are central humanitarian and compassionate values in Canadian society — Interests of children were minimized in manner inconsistent with Canadian humanitarian and compassionate tradition and Minister's guidelines — Reasons for decision did not indicate that decision was made in manner alive, attentive, or sensitive to interests of applicant's children — Failure to give serious consideration to interests of applicant's children was unreasonable exercise of discretion notwithstanding deference that should be given to officer's decision.

Immigration and citizenship --- Appeals to Federal Court of Appeal and Supreme Court of Canada — Certification of questions by Federal Court Trial Division
Section 83(1) of Immigration Act does not require Federal Court of Appeal to address only certified question — Once question has been certified, then Federal Court of Appeal may consider all aspects of appeal lying within its jurisdiction.

Administrative law --- Requirements of natural justice — Right to hearing — Duty of fairness
Duty of fairness is flexible and variable and depends on context of particular statute and rights affected — Participatory rights within that duty ensure that administrative decisions are made using fair and open procedure appropriate to decision being made and its statutory, institutional, and social context with opportunity for those affected by decision to put forward their views and evidence fully and have them considered by decision-maker — Factors for determining requirements of duty include nature of decision being made and process followed in making it, nature of statutory scheme and terms of statute pursuant to which body operates, importance of decision to individuals affected, legitimate expectations of person challenging decision, and choices of procedure made by agency itself — Other factors may also be important when considering aspects of duty of fairness unrelated to participatory rights — Duty of fairness applies to humanitarian and compassionate applications under Immigration Act.

Administrative law --- Requirements of natural justice — Right to hearing — Procedural rights at hearing — Opportunity to respond and make submissions
Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare — Applicant had four Canadian-born children — Following deportation order, immigration officer refused written application under s. 114(2) of Immigration Act for exemption on humanitarian and compassionate (H & C) grounds to requirement that application for permanent residence be made from outside Canada — Applicant unsuccessfully applied for judicial review — Applicant appealed — Appeal allowed on other grounds — Duty of procedural fairness applies to H & C decisions — There was no legitimate expectation that specific procedural rights would be accorded above those normally required by duty of fairness — H & C application is different from judicial decision because it involves exercise of considerable discretion, requires consideration of multiple factors, and is exception to general principles of of Canadian immigration law — Duty of fairness requires that applicant and those whose important interests are affected by decision in fundamental way have meaningful opportunity to present evidence relevant to their case and have it fully and fairly considered — Lack of oral hearing or notice of such hearing does not violate procedural fairness — Opportunity to produce full and complete written documentation was sufficient.

Administrative law --- Requirements of natural justice — Right to hearing — Procedural rights at hearing — Reasons for decision
Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare — Applicant had four Canadian-born children — Following deportation order, immigration officer refused written application under s. 114(2) of Immigration Act for exemption on humanitarian and compassionate (H & C) grounds to requirement that application for permanent residence be made from outside Canada — Applicant unsuccessfully applied for judicial review — Applicant appealed — Appeal allowed on other grounds — Duty of procedural fairness requires written explanation for decision where decision has important significance for individual or where there is statutory right of appeal — Profound importance of H & C decisions to those affected militates in favour of requiring reasons to be provided — Requirement was satisfied by provision of junior immigration officer's notes — Individuals are entitled to fair procedures and open decision-making but in administrative context, this transparency may occur in various ways.

Administrative law --- Requirements of natural justice — Bias — Personal bias — Apprehended
Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare — Applicant had four Canadian-born children — Following deportation order, immigration officer refused application under s. 114(2) of Immigration Act for exemption on humanitarian and compassionate grounds to requirement that application for permanent residence be made from outside Canada — Applicant alleged that there was reasonable apprehension of bias — Applicant unsuccessfully applied for judicial review — Applicant appealed — Appeal allowed — Procedural fairness requires decision to be made free from reasonable apprehension of bias by impartial decision-maker — Duty applies to all immigration officers playing role in decision-making — Immigration decisions require sensitivity and understanding by decision-makers — There must be recognition of diversity, understanding of others and openness to difference — Immigration officer's notes gave impression that conclusion may have been based not on evidence but on fact that applicant was single mother with several children and had been diagnosed with psychiatric illness — Reasonable and well-informed members of community would conclude that reviewing officer did not approach case with impartiality appropriate to decision made by immigration officer.

Administrative law --- Standard of review — Reasonableness — Reasonableness simpliciter
Review of substantive aspects of discretionary decisions is to be approached within pragmatic and functional framework given difficulty in making rigid classifications between discretionary and non-discretionary decisions — Relevant factors include expertise of tribunal, nature of decision being made, language of provision and surrounding legislation, whether decision is polycentric, intention revealed by statutory language, and amount of choice left by Parliament to decision-maker — Discretion must be exercised in accordance with boundaries imposed in statute, principles of rule of law, principles of administrative law, fundamental values of Canadian society, and principles of Canadian Charter of Rights and Freedoms.

Administrative law --- Discretion of tribunal under review — General principles
Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare — Applicant had four Canadian-born children — Following deportation order, immigration officer refused application under s. 114(2) of Immigration Act for exemption on humanitarian and compassionate grounds to requirement that application for permanent residence be made from outside Canada — Applicant unsuccessfully applied for judicial review — Question was certified of whether federal immigration authorities are required to treat best interests of Canadian child as one primary consideration in assessing applicant under s. 114(2) of Act — Question was answered in negative — Applicant appealed — Appeal allowed — Reasonable exercise of power conferred by section requires close attention to interests and needs of children — Children's rights and attention to their interests are central humanitarian and compassionate values in Canadian society — Reasons for decision did not indicate that decision was made in manner alive, attentive, or sensitive to interests of applicant's children — Failure to give serious consideration to interests of applicant's children was unreasonable exercise of discretion notwithstanding deference that should be given to officer's decision.

Immigration and citizenship --- Admission — Appeals and judicial review — Judicial review — Jurisdiction
"Reasonableness simpliciter » is standard of review of discretionary decision under s. 114(2) of Immigration Act and s. 2.1 of Immigration Regulations determining whether humanitarian and compassionate considerations warrant exemption from requirements of Act — Considerable deference should be given to immigration officers exercising powers conferred by Act, given fact-specific nature of inquiry, its role in statutory scheme as exception, fact that decision-maker is Minister of Citizenship and Immigration, and considerable discretion given by wording of statute — However, lack of privative clause, existence of judicial review, and nature of decision as individual rather than polycentric suggest that standard is not as deferential as "patent unreasonableness".

Statutes --- Interpretation — Extrinsic aids — Statutes in pari materia
Applicant entered Canada in 1981 and supported herself for 11 years before being diagnosed as paranoid schizophrenic and obtaining welfare — Applicant had four Canadian-born children — Following deportation order, immigration officer refused application under s. 114(2) of Immigration Act for exemption on humanitarian and compassionate grounds to requirement that application for permanent residence be made from outside Canada — Applicant unsuccessfully applied for judicial review — Question was certified of whether, given that Immigration Act does not expressly incorporate language of Canada's international obligations under International Convention on the Rights of the Child, federal immigration authorities must treat best interests of Canadian child as one primary consideration in assessing applicant under s. 114(2) of Act — Question was answered in negative — Applicant appealed — Appeal allowed — Values in international human rights law assist in statutory interpretation and judicial review — Convention's values recognize importance of being attentive to children's rights and best interests when making decisions relating to and affecting their future — Convention's principles

place special importance on protections for children and on consideration of their interests, needs, and rights — Reasons for decision did not indicate that decision was made in manner alive, attentive, or sensitive to interests of applicant's children and did not consider them important factor in decision — Failure to give serious consideration to interests of applicant's children was unreasonable exercise of discretion.

Étrangers, immigration et citoyenneté --- Admission — Demande de visa à titre de visiteur ou immigrant — Demande effectuée sur le territoire — Demande pour des motifs d'ordre humanitaire

Requérante est entrée au Canada en 1981 et a subvenu à ses besoins pendant 11 ans avant d'être diagnostiquée comme souffrant de schizophrénie avec paranoïa, et d'obtenir de l'assistance sociale — Après l'ordonnance de déportation, l'agent d'immigration a refusé d'exercer le pouvoir discrétionnaire prévu au par. 114(2) de la Loi sur l'immigration, fondé sur des motifs d'ordre humanitaire — Demande de contrôle judiciaire de la requérante a été rejetée — Requérante a formé un pourvoi — Question a été certifiée quant à savoir si les autorités de l'immigration devaient traiter le meilleur intérêt des enfants comme la principale considération au moment d'évaluer la demande de la requérante en vertu du par. 114(2) de la Loi — Pourvoi de la requérante à l'égard de la question certifiée a été rejeté — Requérante a formé un pourvoi — Pourvoi accueilli — Question a reçu une réponse affirmative — Notes de l'agent de l'immigration constituaient une décision et démontraient une crainte raisonnable de partialité — Agent semble avoir tiré des conclusions non fondées sur la preuve mais sur le fait que la requérante était monoparentale, qu'elle avait plusieurs enfants et qu'elle était atteinte d'une maladie mentale — Omission de considérer sérieusement le meilleur intérêt des enfants de la requérante constituait un exercice déraisonnable du pouvoir discrétionnaire, sans tenir compte de la déférence à laquelle la décision de l'agent devrait avoir droit — Loi sur l'immigration, L.R.C. 1985, c. I-2, par. 114(2).

The applicant entered Canada as a visitor in 1981 and continued to remain in the country. She had four Canadian-born children. She supported herself illegally for 11 years before being diagnosed as paranoid schizophrenic. She subsequently collected welfare and underwent treatment at a mental health centre. In 1992 she was ordered deported. An immigration officer refused discretionary action under s. 114(2) of the *Immigration Act* based on humanitarian and compassionate grounds.

In dismissing the applicant's application for judicial review, the motions judge found that the *Convention on the Rights of the Child* did not apply and was not part of domestic law. The motions judge also found that the evidence showed the children were a significant factor in the decision-making process. The motions judge certified a question as to whether the immigration authorities were required to treat the best interests of the child as a primary consideration in assessing an applicant under s. 114(2) of the Act, given that the Act did not expressly incorporate the language of Canada's international obligations with respect to the Convention.

On appeal of the certified question, the court held that the Convention could not have legal effect in Canada as it had not been implemented through domestic legislation. The Convention could not be interpreted to impose an obligation upon the government to give primacy to the interests of the children in deportation proceedings. Finally, because the doctrine of legitimate expectations does not create substantive rights, and because a requirement that the best interests of the children be given primacy by a decision-maker under s. 114(2) of the Act would be to create a substantive right, the doctrine did not apply.

The applicant appealed.

Held: The appeal was allowed.

Per L'Heureux-Dubé J. (Gonthier, McLachlin, Bastarache and Binnie JJ. concurring): The Convention did not give rise to a legitimate expectation that when the decision on the applicant's humanitarian and compassionate grounds application was made, specific procedural rights above what would normally be required under the duty of fairness would be accorded, a positive finding would be made, or particular criteria would be applied. The Convention is not the equivalent to a government representation about how such applications will be decided.

The lack of an oral hearing did not constitute a violation of the requirements of procedural fairness. The opportunity, which was accorded for the applicant or her children to produce full and complete written documentation in relation to all aspects of her application, satisfied the requirements of the participatory rights required by the duty of fairness.

The duty of procedural fairness required a written explanation for the decision, which was done. The junior immigration

officer's notes constituted the decision and were provided to the applicant. However, the notes demonstrated a reasonable apprehension of bias. The notes appeared to link the applicant's mental illness, her training as a domestic worker and the fact that she had eight children in total to the conclusion that she would, therefore, be a strain on the social welfare system for the rest of her life. The conclusion drawn was contrary to the psychiatrist's letter, which stated that with treatment she could remain well and return to being a productive member of society. The statements gave the impression that the junior officer may have been drawing conclusions based not on the evidence before him, but on the fact that she was a single mother with several children, and had been diagnosed with a psychiatric illness.

The failure to give serious consideration to the interests of the applicant's children constituted an unreasonable exercise of discretion, notwithstanding the important deference that should be given to the immigration officer's decision. The reasons failed to give sufficient weight or consideration to the hardship that a return to Jamaica might cause the applicant, given that she had been in Canada for 12 years, was ill and might not be able to obtain treatment in Jamaica, and would necessarily be separated from some of her children. Attentiveness and sensitivity to the importance of the rights of the children, to their best interests, and to the hardship that may be caused to them by a negative decision is essential for a humanitarian and compassionate decision to be made in a reasonable manner. While deference should be given to immigration officers on s. 114(2) judicial review applications, decisions cannot stand when the manner in which the decision was made and the approach taken are in conflict with humanitarian and compassionate values.

Per Iacobucci J. (Cory J. concurring): The certified question should be answered in the negative. An international convention ratified by the executive branch of government is of no force or effect within the Canadian legal system until it has been incorporated into domestic law by way of implementing legislation. The primacy accorded to the rights of children in the Convention is irrelevant unless and until such provisions are the subject of legislation enacted by Parliament.

La requérante est entrée au Canada en 1981 avec le statut de visiteur et y est restée par la suite. Elle a donné naissance à quatre enfants au Canada. Elle a illégalement subvenu à ses besoins pendant 11 ans, soit jusqu'au moment où l'on a diagnostiqué qu'elle souffrait de schizophrénie paranoïaque. Elle a par la suite touché de l'aide sociale et a suivi un traitement dans un établissement de santé. En 1992, une mesure d'expulsion a été prise contre elle. Un fonctionnaire de l'immigration a refusé d'exercer le pouvoir discrétionnaire qui lui était conféré par l'art 114(2) de la *Loi sur l'immigration* et qui était fondé sur des motifs d'ordre humanitaire.

En rejetant la requête en révision judiciaire de la requérante, la juge saisie de la requête a conclu que la *Convention relative aux droits de l'enfant* ne s'appliquait pas et que ses dispositions ne faisaient pas partie du droit interne canadien. Elle a également conclu qu'il ressortait de la preuve que les enfants avaient constitué un facteur important dans le cadre du processus décisionnel. La juge s'est également prononcée sur la question de savoir si, dans le cadre de l'examen d'une requête faite en vertu de l'art. 114(2) de la Loi, les autorités en matière d'immigration étaient tenues de considérer le meilleur intérêt des enfants comme constituant un élément primordial, même si la Loi n'incorporait pas expressément le langage des obligations internationales du Canada en ce qui concerne la Convention .

En se prononçant sur l'appel de la décision portant sur la question certifiée, la Cour d'appel a estimé que la Convention ne pouvait avoir d'effet juridique au Canada, puisqu'elle n'avait pas été intégrée dans la législation nationale. La Convention ne pouvait être interprétée comme imposant au gouvernement l'obligation d'accorder priorité à l'intérêt des enfants dans le cadre des procédures d'expulsion. Enfin, compte tenu que la doctrine de l'attente légitime ne crée pas de droits matériels et qu'imposer à un décideur l'obligation d'accorder la primauté au meilleur intérêt des enfants en vertu de l'art. 114(2) de la Loi serait de nature à créer un droit matériel, la doctrine était inapplicable.

La requérante a formé un pourvoi à l'encontre de la décision.

Held: Le pourvoi a été accueilli.

Le juge L'Heureux-Dubé (les juges Gonthier, McLachlin, Bastarache et Binnie y souscrivant) : La Convention n'a pas créé chez la requérante l'attente légitime que sa demande fondée sur des motifs d'ordre humanitaire et de compassion donnerait lieu à des droits procéduraux particuliers plus étendus que ceux qui seraient normalement exigés en vertu de l'obligation d'équité, qu'une décision favorable serait rendue ou que des critères particuliers seraient appliqués. La Convention ne constituait pas l'équivalent d'une déclaration gouvernementale sur la façon dont les demandes doivent être tranchées.

L'absence d'audience ne contrevenait pas aux exigences imposées en vertu de l'équité procédurale. La possibilité qui avait

été donnée à la requérante ou à ses enfants de produire toute la documentation écrite se rapportant à tous les aspects de sa requête satisfaisait aux exigences relatives aux droits de participation imposées en vertu de l'obligation d'agir équitablement.

L'obligation d'équité procédurale exigeait que les motifs écrits de la décision soient fournis, ce qui a été fait. Les notes de l'agent subalterne constituaient les motifs de la décision et elles ont été fournies à la requérante. Les notes donnaient toutefois lieu à une crainte raisonnable de partialité. Elles semblaient relier les troubles mentaux de la requérante, sa formation comme domestique et le fait qu'elle avait au total huit enfants à la conclusion qu'elle constituerait, par conséquent, un fardeau pour le système d'aide sociale jusqu'à la fin de ses jours. La conclusion tirée allait à l'encontre de la lettre du psychiatre qui indiquait qu'à l'aide d'un traitement, l'état de la requérante pouvait s'améliorer et qu'elle pourrait redevenir un membre productif de la société. Ces notes donnaient l'impression que l'agent subalterne avait tiré ses conclusions, non pas en se fondant sur la preuve qu'il avait devant lui, mais plutôt sur le fait que la requérante était une mère célibataire avec plusieurs enfants et sur le fait qu'elle était atteinte de troubles psychiatriques.

Le défaut de prendre sérieusement en compte l'intérêt des enfants de la requérante constituait un exercice déraisonnable du pouvoir discrétionnaire et ce, malgré le degré élevé de retenue qu'il convient d'observer à l'égard de la décision de l'agent d'immigration. Les motifs n'accordaient pas un poids et une considération suffisants au préjudice qu'un retour en Jamaïque pouvait causer à la requérante compte tenu qu'elle avait vécu pendant 12 ans au Canada, qu'elle était malade, qu'elle ne pourrait probablement pas recevoir des soins en Jamaïque et qu'elle serait inévitablement séparée de certains de ses enfants. L'attention et la sensibilité manifestées à l'égard de l'importance des droits des enfants, à leur meilleur intérêt et au préjudice qu'ils pourraient subir en raison d'une décision rejettant la requête sont les éléments essentiels d'une décision qui doit être prise de façon raisonnable. Même si, dans le cadre des demandes de contrôle judiciaire, il convient de faire preuve de retenue à l'égard des décisions des agents d'immigration rendues en vertu de l'art. 114(2), leurs décisions ne peuvent être maintenues lorsque la façon dont la décision a été rendue et l'approche adoptée sont contraires aux valeurs humanitaires.

Le juge Iacobucci (le juge Cory y souscrivant) : Une réponse négative devrait être donnée à la question certifiée. Une convention internationale ratifiée par le pouvoir exécutif du gouvernement n'a aucun effet en droit canadien tant que ses dispositions ne sont pas incorporées dans le droit interne par une loi les rendant applicables. La primauté accordée aux droits des enfants par la Convention n'est d'aucune pertinence tant et aussi longtemps que ses dispositions n'ont pas été intégrées dans une loi adoptée par le Parlement.

Annotation

There is a lot of clarification material resulting from this unusual decision. One article entitled the "Shame of Shah" is presently being engrossed by the editor. I say "shame" because of the extraordinary encroachment on the Canadian notion of fairness created by the Federal Court of Appeal in *Muliadi v. Canada (Minister of Employment & Immigration)*, 18 Admin. L.R. 243, 66 N.R. 8, [1986] 2 F.C. 205 (Fed. C.A.), and which was so casually proclaimed by the Court of Appeal in *Shah v. Canada (Minister of Employment & Immigration)* (1994), 29 Imm. L.R. (2d) 82, 170 N.R. 238, 81 F.T.R. 320 (note) (Fed. C.A.). It was for the Supreme Court of Canada in *Baker* to lead the way in disposing of this negative virus manifested in *Shah*. If we are going to have an *Immigration Act* inviting applications with signposts such as "Humanitarian and Compassionate," it follows that there is not a limited duty of fairness. The *Shah* dictum of the three Court of Appeal judges was unceremoniously and quickly dumped by the Supreme Court of Canada, but not before this backward looking case was approved without hardly a murmur of dissent in more than a hundred cases that were to follow *Shah*. That is its shame. For if so noble a doctrine of fairness is said to exist by the Supreme Court, how is it that no one else could see it? What limitations were imposed on the juridical eyes and conscience of our jurists not to possess a similar vision that to the Supreme Court was so evident?

One of the corollary aspects of this case is that: where there is no fairness, it allows bias, prejudice and unfairness to creep in. Look at the findings of the Supreme Court of Canada in *Baker* at para. 48:

In my opinion, the well-informed member of the community would perceive bias when reading Officer Lorenz's comments. His notes, and the manner in which they are written, do not disclose the existence of an open mind or the weighing of the particular circumstance of the case *free from stereotypes* . . . His use of capitals to highlight the number of Ms. Baker's children may also suggest to a reader that this was a reason to deny her status.

[Emphasis mine]

The learned L'Heureux Dubé J. goes on to deal with the appropriate test of a choice of three when dealing with applications under s. 114(2) of the *Immigration Act*, and the test is reasonableness simpliciter.

She goes on to find that it must be reasonable to deal with the interests of the children of the applicant and that they are nowhere dealt with by the decision-makers. She states, at para. 65:

. . . I believe that the failure to give serious weight and consideration to the interests of the children constitutes an unreasonable exercise of the discretion conferred by the section, notwithstanding the important deference that should be given to the decision of the immigration officer . . .

and later, at para. 76:

Therefore, both because there was a violation of the principles of procedural fairness owing to a reasonable apprehension of bias, and because the exercise of the H & C discretion was unreasonable, I would allow the appeal.

Another matter arising out of *Baker* now being argued by justice lawyers is that the reasons and, indeed, the CAIPS notes can now be read in from the record as evidence. Justice lawyers are using any argument to avoid the making of an affidavit in judicial review applications and thus exposing immigration officers to cross-examination.

This matter was convincingly and clearly dealt with by the Court of Appeal in *Wang v. Canada (Minister of Employment & Immigration)*, 12 Imm. L.R. (2d) 178, 121 N.R. 243, [1991] 2 F.C. 165, 40 F.T.R. 239 (note) (Fed. C.A.).

However, since the notes of Lorenz and the CAIPS notes were read by the court in the *Baker* case, can it be said that the law in *Wang* is now being overruled? I would submit not.

In a judicial review application, under the rules, an applicant can call for the record, and indeed it is often so done. This is not unlike productions required by parties, which occur in a superior court of a province. In such cases, when called upon under the rules, a defendant, or indeed a plaintiff, must submit to production and make an affidavit that the documents produced are totally those that are within the possession and power of the litigant to produce.

However, the productions are not evidence for the party producing such documentation, as he must prove the documents that are produced by him and not otherwise admitted. But this does not prevent the other party from producing and putting such documents into evidence, as these productions from the opponents' point of view constitute an admission.

Therefore, an applicant can put in such record as he requires without proving anything, but this does not mean that the respondent can call up such record as he requires, as evidence of the contents therein. It must be provided by affidavit of one who has personal knowledge.

Moreover, if the document is one that is necessary for the respondent to call into evidence and he fails to do so, then there is an adverse inference to be taken that, had he called the evidence in the ordinary way, it would not have been in his favour.

Commentaire

Cette décision particulière clarifie plusieurs éléments. Un article intitulé « La honte de Shah » est en voie de rédaction par l'éditeur. Je dis « honte » à cause de l'empiètement extraordinaire sur la notion canadienne d'équité créée par la Cour fédérale d'appel dans la cause *Muliadi c. Canada (Ministre de l'Emploi & de l'Immigration)*, 18 Admin. L.R. 243, 66 N.R. 8, [1986] 2 C.F. 205 (C.A. féd.) et qui fut suivie sans retenue par la Cour d'appel dans *Shah c. Canada (Ministre de l'Emploi & de l'Immigration)*, [1994] 29 Imm. L.R. (2d) 82, 170 N.R. 238, 81 F.T.R. 320 (note) (C.A. féd.). Il revenait à la Cour suprême du Canada, dans *Baker*, de disposer de ce virus négatif établi dans l'affaire *Shah*. Si nous avons une *Loi sur l'immigration* invitant les demandes en affichant des motifs « humanitaires et de compassion », il s'ensuit qu'il n'existe pas de limite à l'équité. La maxime de *Shah* établie par trois juges de la Cour d'appel fut écartée rapidement et sans cérémonie par la Cour suprême du Canada, mais pas avant que ce jugement, qui représentait un pas en arrière, n'ait été appliqué dans une centaine de cas, sans même provoquer un murmure de dissidence. C'est là sa honte. Puisque cette noble doctrine de l'équité fut reconnue par la Cour suprême du Canada, comment se fait-il que personne d'autre ne l'ait reconnue? Quelle limite fut imposée sur la perception et la conscience juridique de nos juristes pour qu'ils ne possèdent pas une vision qui semble si évidente à la Cour suprême du Canada?

Un des aspects corollaires de cette cause est : lorsqu'il n'y a pas d'équité, cela fait place aux préjugés, à l'arbitraire et à l'injustice. Lisons cet énoncé du par. 48 de l'arrêt *Baker* de la Cour suprême du Canada :

Á mon avis, les membres bien informés de la communauté percevraient la partialité dans les commentaires de l'agent Lorenz. Ses notes, et la façon dont elles sont rédigées, ne témoignent ni d'un esprit ouvert ni d'une *absence de stéréotypes* dans l'évaluation des circonstances particulières de l'affaire. . . . L'utilisation de majuscules par l'agent pour souligner le nombre des enfants de Mme Baker peut également indiquer au lecteur que c'était là une raison de lui refuser sa demande.

[notre emphase]

La savante Juge L'Heureux-Dubé établit la règle de trois appropriée lorsque confrontée à l'application de l'art. 114(2) de la *Loi sur l'immigration* et cette règle est établie simplement sur l'aspect raisonnable de la décision.

Elle détermine qu'il est raisonnable de considérer l'intérêt des enfants de la requérante et que les décideurs ne traitaient pas de cet aspect. Elle énonce, au par. 65 :

. . . j'estime que le défaut d'accorder de l'importance et de la considération à l'intérêt des enfants constitue un exercice déraisonnable du pouvoir discrétionnaire conféré par l'article, même s'il faut exercer un degré élevé de retenue envers la

décision de l'agent d'immigration. . . .
Plus loin, au para. 76 :
En conséquence, parce qu'il y a eu manquement aux principes d'quité procédurale en raison d'une crainte raisonnable de partialité, et parce que l'exercice du pouvoir en matière humanitaire était déraisonnable, je suis d'avis d'accueillir le présent pourvoi.
Un autre aspect émanant de l'affaire *Baker* est maintenant plaidé par les avocats du ministère de la justice est à l'effet que les motifs, et bien sûr les notes des CAIPS, peuvent être présentées à titre de preuve. Les avocats du ministère utilisent tous les arguments pour éviter le dépôt d'affidavits lors des demandes de contrôle judiciaire pour ainsi éviter de soumettre les officiers à un contre-interrogatoire.
Cette question fut réglée de façon claire et convaincante par la Cour d'appel dans l'affaire *Wang c. Canada (Ministre de l'Emploi & de l'Immigration)*, 12 Imm. L.R. (2d) 178, 121 N.R. 243, [1991] 2 C.F. 165, 40 F.T.R. 239 (note) (C.A. féd.).
Par contre, pouvons-nous prétendre que la règle établie dans *Wang* est maintenant renversée puisque les notes de Lorenz et des CAIPS furent lues par la Cour dans l'affaire *Baker*? Je soumets que non.
Selon les règles, le requérant peut demander le dépôt du dossier lors d'une demande de contrôle judiciaire et ceci se fait fréquemment. Cet aspect est similaire à la production de documents par les parties lors de procédures devant la Cour supérieure d'une province. Dans ce cas, selon les règles, le défendeur ou le demandeur doit déposer un affidavit à l'effet que les documents produits représentent la totalité des pièces qu'il a en sa possession et qu'il peut produire.
Par ailleurs, le dépôt de documents ne constitue pas de la preuve pour la partie qui les produit puisqu'elle doit en établir la preuve s'ils ne sont pas autrement admis. Cela n'empêche pas l'autre partie au litige de produire ces documents en preuve puisque leur dépôt par l'adversaire constitue une admission.
En conséquence, un requérant peut déposer un tel dossier sans prouver quoi que ce soit. Mais cela ne veut pas dire que l'intimé peut invoquer ce dossier, s'il le désire, pour en établir le contenu. Ceci doit être fait par voie d'affidavit de la part de la personne qui a la connaissance personnelle des faits.

Cecil L. Rotenberg, Q.C.

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Slaight Communications Inc. v. Davidson, 26 C.C.E.L. 85, [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416, (sub nom. *Davidson v. Slaight Communications Inc.)* 93 N.R. 183, 89 C.L.L.C. 14,031, 40 C.R.R. 100 (S.C.C.) — considered

Statutes considered by/Législation citée par *L'Heureux-Dubé J.* (*Gonthier, McLachlin, Bastarache* and *Binnie JJ.* concurring):

Canadian Charter of Rights and Freedoms/Charte canadienne des droits et libertés, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11/Partie I de la Loi constitutionnelle de 1982, constituant l'annexe B de la Loi de 1982 sur le Canada (R.-U.), 1982, c. 11
Generally/en général — referred to

Criminal Code/Code criminel, R.S.C./L.R.C. 1985, c. C-46
Pt./partie XX.1 [en./ad. 1991, c. 43, s. 4] — referred to

Immigration Act/Loi sur l'immigration, R.S.C./L.R.C. 1985, c. I-2
s. 3(c) — considered

s. 9(1) — considered

s. 70(5) [en./ad. 1995, c. 15, s. 13(3)] — referred to

s. 82.1(1) [rep. & sub./abr. et rempl. 1992, c. 49, s. 73] — considered

s. 83(1) [rep. & sub./abr. et rempl. 1992, c. 49, s. 73] — considered

s. 114(2) [rep. & sub./abr. et rempl. 1992, c. 49, s. 102(11)] — considered

Statutes considered by/Législation citée par *Iacobucci J.* (*Cory J.* concurring):

Canadian Charter of Rights and Freedoms/Charte canadienne des droits et libertés, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11/Partie I de la Loi constitutionnelle de 1982, constituant l'annexe B de la Loi de 1982 sur le Canada (R.-U.), 1982, c. 11
Generally/en général — referred to

Immigration Act/Loi sur l'immigration, R.S.C./L.R.C. 1985, c. I-2
s. 114(2) [rep. & sub./abr. et rempl. 1992, c. 49, s. 102(11)] — considered

Treaties considered by/Traités citée par *L'Heureux-Dubé J.* (*Gonthier, McLachlin, Bastarache* and *Binnie JJ.* concurring):

Convention on the Rights of the Child, 1989, G.A. Res. 44/25; [1992] C.T.S. 3; 28 I.L.M. 1456
Preamble — referred to

Article 3 ¶ 1 — considered

Article 3 ¶ 2 — considered

Article 9 ¶ 1 — considered

Article 9 ¶ 2 — considered

Article 9 ¶ 3 — considered

Article 9 ¶ 4 — considered

Article 12 ¶ 1 — considered

Article 12 ¶ 2 — considered

United Nations General Assembly, 1959, Declaration on the Rights of the Child
Preamble — considered

United Nations General Assembly, 1948, Universal Declaration of Human Rights, G.A. Res. 217(III)A
Generally — referred to

Treaties considered by/Traités citée par *Iacobucci J.* (*Cory J.* concurring):

Convention on the Rights of the Child, 1989, G.A. Res. 44/25; [1992] C.T.S. 3; 28 I.L.M. 1456
Generally — considered

Regulations considered by *L'Heureux-Dubé J.* (*Gonthier, McLachlin, Bastarache* and *Binnie JJ.* concurring):

Immigration Act, R.S.C./L.R.C. 1985, c. I-2
Immigration Regulations, 1978, SOR/78-172

s. 2.1 [en. SOR/93-44]

APPEAL by applicant from judgment reported at *Baker v. Canada (Minister of Citizenship & Immigration)* (1996), [1996]

F.C.J. No. 1726, [1996] F.C.J. No. 1570, 1996 CarswellNat 2693, 1996 CarswellNat 2052, [1997] 2 F.C. 127, 122 F.T.R. 320 (note), 207 N.R. 57, 142 D.L.R. (4th) 554 (Fed. C.A.), dismissing applicant's appeal from judgment dismissing application for judicial review of immigration officer's refusal of application under s. 114(2) of *Immigration Act* for exemption on humanitarian and compassionate grounds to requirement that application for permanent residence be made from outside Canada.

POURVOI de la requérante à l'encontre du jugement publié à (1996), 142 D.L.R. (4th) 554, 207 N.R. 57, 122 F.T.R. 320 (note), [1997] 2 F.C. 127 (C.A. Féd.), rejetant l'appel de la requérante du jugement publié à (1995), 31 Imm. L.R. (2d) 150, 101 F.T.R. 110 (C.Féd. (1re inst.)), rejetant sa demande de contrôle judiciaire du refus, par l'agent d'immigration, d'exercer son pouvoir discrétionnaire en vertu du par. 114(2) de la *Loi sur l'immigration* pour des motifs d'ordre humanitaire.

***L'Heureux-Dubé J.* (*Gonthier, McLachlin, Bastarache* and *Binnie JJ.* concurring):**

1 Regulations made pursuant to s. 114(2) of the *Immigration Act*, R.S.C., 1985, c. I-2, empower the respondent Minister to facilitate the admission to Canada of a person where the Minister is satisfied, owing to humanitarian and compassionate considerations, that admission should be facilitated or an exemption from the regulations made under the Act should be granted. At the centre of this appeal is the approach to be taken by a court to judicial review of such decisions, both on procedural and substantive grounds. It also raises issues of reasonable apprehension of bias, the provision of written reasons as part of the duty of fairness, and the role of children's interests in reviewing decisions made pursuant to s. 114(2).

I. Factual Background

2 Mavis Baker is a citizen of Jamaica who entered Canada as a visitor in August of 1981 and has remained in Canada since then. She never received permanent resident status, but supported herself illegally as a live-in domestic worker for 11 years. She has had four children (who are all Canadian citizens) while living in Canada: Paul Brown, born in 1985, twins Patricia and Peter Robinson, born in 1989, and Desmond Robinson, born in 1992. After Desmond was born, Ms. Baker suffered from post-partum psychosis and was diagnosed with paranoid schizophrenia. She applied for welfare at that time. When she was first diagnosed with mental illness, two of her children were placed in the care of their natural father, and the other two were placed in foster care. The two who were in foster care are now again under her care, since her condition has improved.

3 The appellant was ordered deported in December 1992, after it was determined that she had worked illegally in Canada and had overstayed her visitor's visa. In 1993, Ms. Baker applied for an exemption from the requirement to apply for permanent residence outside Canada, based upon humanitarian and compassionate considerations, pursuant to s. 114(2) of the *Immigration Act*. She had the assistance of counsel in filing this application, and included, among other documentation, submissions from her lawyer, a letter from her doctor, and a letter from a social worker with the Children's Aid Society. The documentation provided indicated that although she was still experiencing psychiatric problems, she was making progress. It also stated that she might become ill again if she were forced to return to Jamaica, since treatment might not be available for her there. Ms. Baker's submissions also clearly indicated that she was the sole caregiver for two of her Canadian-born children, and that the other two depended on her for emotional support and were in regular contact with her. The documentation suggested that she too would suffer emotional hardship if she were separated from them.

4 The response to this request was contained in a letter, dated April 18, 1994, and signed by Immigration Officer M. Caden, stating that a decision had been made that there were insufficient humanitarian and compassionate grounds to warrant processing Ms. Baker's application for permanent residence within Canada. This letter contained no reasons for the decision.

5 Upon request of the appellant's counsel, she was provided with the notes made by Immigration Officer G. Lorenz, which were used by Officer Caden when making his decision. After a summary of the history of the case, Lorenz's notes read as follows:

> PC is unemployed - on Welfare. No income shown - no assets. Has four Cdn.-born children- four other children in Jamaica- HAS A TOTAL OF EIGHT CHILDREN

> Says only two children are in her "direct custody". (No info on who has ghe [*sic*] other two).
>
> There is nothing for her in Jamaica - hasn't been there in a long time - no longer close to her children there - no jobs there - she has no skills other than as a domestic - children would suffer - can't take them with her and can't leave them with anyone here. Says has suffered from a mental disorder since '81 - is now an outpatient and is improving. If sent back will have a relapse.
>
> Letter from Children's Aid - they say PC has been diagnosed as a paranoid schizophrenic. - children would suffer if returned -
>
> Letter of Aug. '93 from psychiatrist from Ont. Govm't. Says PC had post-partum psychosis and had a brief episode of psychosis in Jam. when was 25 yrs. old. Is now an out-patient and is doing relatively well - deportation would be an extremely stressful experience.
>
> Lawyer says PS [*sic*] is sole caregiver and single parent of two Cdn born children. Pc's mental condition would suffer a setback if she is deported etc.
>
> This case is a catastrophy [*sic*]. It is also an indictment of our "system" that the client came as a visitor in Aug. '81, was not ordered deported until Dec. '92 and in APRIL '94 IS STILL HERE!
>
> The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN-BORN CHILDREN. Do we let her stay because of that? I am of the opinion that Canada can no longer afford this kind of generosity. However, because of the circumstances involved, there is a potential for adverse publicity. I recommend refusal but you may wish to clear this with someone at Region.
>
> There is also a potential for violence - see charge of" assault with a weapon" [Capitalization in original.]

6 Following the refusal of her application, Ms. Baker was served, on May 27, 1994, with a direction to report to Pearson Airport on June 17 for removal from Canada. Her deportation has been stayed pending the result of this appeal.

II. Relevant Statutory Provisions and Provisions of International Treaties

7 *Immigration Act*, R.S.C., 1985, c. I-2

> **82.1** (1) An application for judicial review under the *Federal Court Act* with respect to any decision or order made, or any matter arising, under this Act or the rules or regulations thereunder may be commenced only with leave of a judge of the Federal Court — Trial Division.
>
> **83.** (1) A judgment of the Federal Court — Trial Division on an application for judicial review with respect to any decision or order made, or any matter arising, under this Act or the rules or regulations thereunder may be appealed to the Federal Court of Appeal only if the Federal Court — Trial Division has at the time of rendering judgment certified that a serious question of general importance is involved and has stated that question.
>
> **114.** ...
>
> (2) The Governor in Council may, by regulation, authorize the Minister to exempt any person from any regulation made under subsection (1) or otherwise facilitate the admission of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

Immigration Regulations, 1978, SOR/78-172, as amemded by SOR/93-44

2.1 The Minister is hereby authorized to exempt any person from any regulation made under subsection 114(1) of the Act or otherwise facilitate the admission to Canada of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

Convention on the Rights of the Child, Can. T.S. 1992 No. 3

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

. . . . .

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

III. Judgments

A. Federal Court -- Trial Division (1995), 101 F.T.R. 110 (Fed. T.D.)

8 Simpson J. delivered oral reasons dismissing the appellant's judicial review application. She held that since there were no reasons given by Officer Caden for his decision, no affidavit was provided, and no reasons were required, she would assume, in the absence of evidence to the contrary, that he acted in good faith and made a decision based on correct

principles. She rejected the appellant's argument that the statement in Officer Lorenz's notes that Ms. Baker would be a strain on the welfare system was not supported by the evidence, holding that it was reasonable to conclude from the reports provided that Ms. Baker would not be able to return to work. She held that the language of Officer Lorenz did not raise a reasonable apprehension of bias, and also found that the views expressed in his notes were unimportant, because they were not those of the decision-maker, Officer Caden. She rejected the appellant's argument that the *Convention on the Rights of the Child* mandated that the appellant's interests be given priority in s. 114(2) decisions, holding that the Convention did not apply to this situation, and was not part of domestic law. She also held that the evidence showed the children were a significant factor in the decision-making process. She rejected the appellant's submission that the Convention gave rise to a legitimate expectation that the children's interests would be a primary consideration in the decision.

9 Simpson J. certified the following as a serious question of general importance under s. 83(1) of the *Immigration Act*: "Given that the Immigration Act does not expressly incorporate the language of Canada's international obligations with respect to the International Convention on the Rights of the Child, must federal immigration authorities treat the best interests of the Canadian child as a primary consideration in assessing an applicant under s. 114(2) of the Immigration Act?"

B. Federal Court of Appeal (1996), [1997] 2 F.C. 127 (Fed. C.A.)

10 The reasons of the Court of Appeal were delivered by Strayer J.A. He held that pursuant to s. 83(1) of the *Immigration Act*, the appeal was limited to the question certified by Simpson J. He also rejected the appellant's request to challenge the constitutional validity of s. 83(1). Strayer J.A. noted that a treaty cannot have legal effect in Canada unless implemented through domestic legislation, and that the Convention had not been adopted in either federal or provincial legislation. He held that although legislation should be interpreted, where possible, to avoid conflicts with Canada's international obligations, interpreting s. 114(2) to require that the discretion it provides for must be exercised in accordance with the Convention would interfere with the separation of powers between the executive and legislature. He held that such a principle could also alter rights and obligations within the jurisdiction of provincial legislatures. Strayer J.A. also rejected the argument that any articles of the Convention could be interpreted to impose an obligation upon the government to give primacy to the interests of the children in a proceeding such as deportation. He held that the deportation of a parent was not a decision" concerning" children within the meaning of article 3. Finally, Strayer J.A. considered the appellant's argument based on the doctrine of legitimate expectations. He noted that because the doctrine does not create substantive rights, and because a requirement that the best interests of the children be given primacy by a decision-maker under s. 114(2) would be to create a substantive right, the doctrine did not apply.

III. Issues

11 Because, in my view, the issues raised can be resolved under the principles of administrative law and statutory interpretation, I find it unnecessary to consider the various *Charter* issues raised by the appellant and the interveners who supported her position. The issues raised by this appeal are therefore as follows:

> (1) What is the legal effect of a stated question under s. 83(1) of the *Immigration Act* on the scope of appellate review?
>
> (2) Were the principles of procedural fairness violated in this case?
>
> (i) Were the participatory rights accorded consistent with the duty of procedural fairness?
>
> (ii) Did the failure of Officer Caden to provide his own reasons violate the principles of procedural fairness?
>
> (iii) Was there a reasonable apprehension of bias in the making of this decision?
>
> (3) Was this discretion improperly exercised because of the approach taken to the interests of Ms. Baker's children?

I note that it is the third issue that raises directly the issues contained in the certified question of general importance stated by

Simpson J.

IV. Analysis

A. Stated Questions Under s. 83(1) of the Immigration Act

12 The Court of Appeal held, in accordance with its decision in *Liyanagamage v. Canada (Secretary of State)* (1994), 176 N.R. 4 (Fed. C.A.), that the requirement, in s. 83(1), that a serious question of general importance be certified for an appeal to be permitted restricts an appeal court to addressing the issues raised by the certified question. However, in *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.) at para. 25, this Court held that s. 83(1) does not require that the Court of Appeal address only the stated question and issues related to it:

> The certification of a "question of general importance" is the trigger by which an appeal is justified. The object of the appeal is still the judgment itself, not the certified question.

Rothstein J. noted in *Ramoutar v. Canada (Minister of Employment & Immigration)*, [1993] 3 F.C. 370 (Fed. T.D.), that once a question has been certified, all aspects of the appeal may be considered by the Court of Appeal, within its jurisdiction. I agree. The wording of s. 83(1) suggests, and *Pushpanathan* confirms, that if a question of general importance has been certified, this allows for an appeal from the judgment of the Trial Division which would otherwise not be permitted, but does not confine the Court of Appeal or this Court to answering the stated question or issues directly related to it. All issues raised by the appeal may therefore be considered here.

B. The Statutory Scheme and the Nature of the Decision

13 Before examining the various grounds for judicial review, it is appropriate to discuss briefly the nature of the decision made under s. 114(2) of the *Immigration Act*, the role of this decision in the statutory scheme, and the guidelines given by the Minister to immigration officers in relation to it.

14 Section 114(2) itself authorizes the Governor in Council to authorize the Minister to exempt a person from a regulation made under the *Act*, or to facilitate the admission to Canada of any person. The Minister's power to grant an exemption based on humanitarian and compassionate (H & C) considerations arises from s. 2.1 of the *Immigration Regulations*, which I reproduce for convenience:

> The Minister is hereby authorized to exempt any person from any regulation made under subsection 114(1) of the Act or otherwise facilitate the admission to Canada of any person where the minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

For the purpose of clarity, I will refer throughout these reasons to decisions made pursuant to the combination of s. 114(2) of the Act and s. 2.1 of the Regulations as "H & C decisions".

15 Applications for permanent residence must, as a general rule, be made from outside Canada, pursuant to s. 9(1) of the Act. One of the exceptions to this is when admission is facilitated owing to the existence of compassionate or humanitarian considerations. In law, pursuant to the *Act* and the regulations, an H & C decision is made by the Minister, though in practice, this decision is dealt with in the name of the Minister by immigration officers: see, for example, *Jiminez-Perez v. Canada (Minister of Employment& Immigration)*, [1984] 2 S.C.R. 565 (S.C.C.), at p. 569. In addition, while in law, the H & C decision is one that provides for an *exemption* from regulations or from the *Act*, in practice, it is one that, in cases like this one, determines whether a person who has been in Canada but does not have status can stay in the country or will be required to leave a place where he or she has become established. It is an important decision that affects in a fundamental manner the future of individuals' lives. In addition, it may also have an important impact on the lives of any Canadian children of the person whose humanitarian and compassionate application is being considered, since they may be separated from one of their parents and/or uprooted from their country of citizenship, where they have settled and have connections.

16 Immigration officers who make H & C decisions are provided with a set of guidelines, contained in chapter 9 of the *Immigration Manual: Examination and Enforcement*. The guidelines constitute instructions to immigration officers about how to exercise the discretion delegated to them. These guidelines are also available to the public. A number of statements in the guidelines are relevant to Ms. Baker's application. Guideline 9.05 emphasizes that officers have a duty to decide which cases should be given a favourable recommendation, by carefully considering all aspects of the case, using their best judgment and asking themselves what a reasonable person would do in such a situation. It also states that although officers are not expected to "delve into areas which are not presented during examination or interviews, they should attempt to clarify possible humanitarian grounds and public policy considerations even if these are not well articulated".

17 The guidelines also set out the bases upon which the discretion conferred by s. 114(2) and the regulations should be exercised. Two different types of criteria that may lead to a positive s. 114(2) decision are outlined -- public policy considerations and humanitarian and compassionate grounds. Immigration officers are instructed, under guideline 9.07, to assure themselves, first, whether a public policy consideration is present, and if there is none, whether humanitarian and compassionate circumstances exist. Public policy reasons include marriage to a Canadian resident, the fact that the person has lived in Canada, become established, and has become an "illegal de facto resident", and the fact that the person may be a long-term holder of employment authorization or has worked as a foreign domestic. Guideline 9.07 states that humanitarian and compassionate grounds will exist if "unusual, undeserved or disproportionate hardship would be caused to the person seeking consideration if he or she had to leave Canada". The guidelines also directly address situations involving family dependency, and emphasize that the requirement that a person leave Canada to apply from abroad may result in hardship for close family members of a Canadian resident, whether parents, children, or others who are close to the claimant, but not related by blood. They note that in such cases, the reasons why the person did not apply from abroad and the existence of family or other support in the person's home country should also be considered.

C. Procedural Fairness

18 The first ground upon which the appellant challenges the decision made by Officer Caden is the allegation that she was not accorded procedural fairness. She suggests that the following procedures are required by the duty of fairness when parents have Canadian children and they make an H & C application: an oral interview before the decision-maker, notice to her children and the other parent of that interview, a right for the children and the other parent to make submissions at that interview, and notice to the other parent of the interview and of that person's right to have counsel present. She also alleges that procedural fairness requires the provision of reasons by the decision-maker, Officer Caden, and that the notes of Officer Lorenz give rise to a reasonable apprehension of bias.

19 In addressing the fairness issues, I will consider first the principles relevant to the determination of the content of the duty of procedural fairness, and then address Ms. Baker's arguments that she was accorded insufficient participatory rights, that a duty to give reasons existed, and that there was a reasonable apprehension of bias.

20 Both parties agree that a duty of procedural fairness applies to H & C decisions. The fact that a decision is administrative and affects "the rights, privileges or interests of an individual" is sufficient to trigger the application of the duty of fairness: *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643 (S.C.C.) at p. 653. Clearly, the determination of whether an applicant will be exempted from the requirements of the Act falls within this category, and it has been long recognized that the duty of fairness applies to H& C decisions: *Sobrie v. Canada (Minister of Employment & Immigration)* (1987), 3 Imm. L.R. (2d) 81 (Fed. T.D.) at p. 88; *Said v. Canada (Minister of Employment & Immigration)* (1992), 6 Admin. L.R. (2d) 23 (Fed. T.D.); *Shah v. Canada (Minister of Employment & Immigration)* (1994), 170 N.R. 238 (Fed. C.A.).

(1) Factors Affecting the Content of the Duty of Fairness

21 The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As I wrote in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 (S.C.C.) at p. 682, "the concept of procedural fairness is eminently variable, and its content is to be decided in the specific context of each case". All of the circumstances must be considered in order to determine the content of the duty of procedural fairness: *Knight* at pp. 682-83; *Cardinal*, *supra*, at p. 654; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170 (S.C.C.), *per* Sopinka J.

22 Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

23 Several factors have been recognized in the jurisprudence as relevant to determining what is required by the common law duty of procedural fairness in a given set of circumstances. One important consideration is the nature of the decision being made and the process followed in making it. In *Knight*, *supra*, at p. 683, it was held that "the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making". The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness. See also *Old St. Boniface*, *supra*, at p. 1191; *Russell v. Duke of Norfolk*, [1949] 1 All E.R. 109 (Eng. C.A.) at p. 118; *Syndicat des employés de production du Québec & de l'Acadie v. Canada (Human Rights Commission)*, [1989] 2 S.C.R. 879 (S.C.C.) at p. 896, *per* Sopinka J.

24 A second factor is the nature of the statutory scheme and the "terms of the statute pursuant to which the body operates": *Old St. Boniface*, *supra*, at p. 1191. The role of the particular decision within the statutory scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed when a particular administrative decision is made. Greater procedural protections, for example, will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted: see D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 7-66 to 7-67.

25 A third factor in determining the nature and extent of the duty of fairness owed is the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated. This was expressed, for example, by Dickson J. (as he then was) in *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105 (S.C.C.) at p. 1113:

> A high standard of justice is required when the right to continue in one's profession or employment is at stake.... A disciplinary suspension can have grave and permanent consequences upon a professional career.

As Sedley J. (now Sedley L.J.) stated in *R. v. Higher Education Funding Council* (1993), [1994] 1 All E.R. 651 (Eng. Q.B.), at p. 667:

> In the modern state the decisions of administrative bodies can have a more immediate and profound impact on people's lives than the decisions of courts, and public law has since *Ridge v. Baldwin*, [1963] 2 All E.R. 66, [1964] A.C. 40 been alive to that fact. While the judicial character of a function may elevate the practical requirements of fairness above what they would otherwise be, for example by requiring contentious evidence to be given and tested orally, what makes it "judicial" in this sense is principally the nature of the issue it has to determine, not the formal status of the deciding body.

The importance of a decision to the individuals affected, therefore, constitutes a significant factor affecting the content of the duty of procedural fairness.

26 Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. Our Court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights: *Old St. Boniface*, *supra*, at p. 1204; *Reference re Canada Assistance Plan (Canada)*, [1991] 2 S.C.R. 525 (S.C.C.) at p. 557. As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness: *Qi v. Canada (Minister of Citizenship & Immigration)* (1995), 33 Imm. L.R. (2d) 57 (Fed. T.D.); *Mercier-Néron v.*

Canada (Minister of National Health & Welfare) (1995), 98 F.T.R. 36 (Fed. T.D.); *Bendahmane v. Canada (Minister of Employment & Immigration)*, [1989] 3 F.C. 16 (Fed. C.A.). Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded: D.J. Mullan, *Administrative Law* (3rd ed. 1996), at pp. 214-15; D. Shapiro, "Legitimate Expectation and its Application to Canadian Immigration Law" (1992), 8 *J.L. & Soc. Pol'y* 282, at p. 297; *Canada (Attorney General) v. Canada (Human Rights Tribunal)* (1994), 76 F.T.R. 1 (Fed. T.D.). Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.

27 Fifth, the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances: Brown and Evans, *supra*, at pp. 7-66 to 7-70. While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints: *I.W.A. Local 2-69 v. Consolidated Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282 (S.C.C.), *per* Gonthier J.

28 I should note that this list of factors is not exhaustive. These principles all help a court determine whether the procedures that were followed respected the duty of fairness. Other factors may also be important, particularly when considering aspects of the duty of fairness unrelated to participatory rights. The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

(2) Legitimate Expectations

29 I turn now to an application of these principles to the circumstances of this case, to determine whether the procedures followed respected the duty of procedural fairness. I will first determine whether the duty of procedural fairness that would otherwise be applicable is affected, as the appellant argues, by the existence of a legitimate expectation based upon the text of the articles of the Convention and the fact that Canada has ratified it. In my view, however, the articles of the Convention and their wording did not give rise to a legitimate expectation on the part of Ms. Baker that when the decision on her H& C application was made, specific procedural rights above what would normally be required under the duty of fairness would be accorded, a positive finding would be made, or particular criteria would be applied. This Convention is not, in my view, the equivalent of a government representation about how H& C applications will be decided, nor does it suggest that any rights beyond the participatory rights discussed below will be accorded. Therefore, in this case there is no legitimate expectation affecting the content of the duty of fairness, and the fourth factor outlined above therefore does not affect the analysis. It is unnecessary to decide whether an international instrument ratified by Canada could, in other circumstances, give rise to a legitimate expectation.

(3) Participatory Rights

30 The next issue is whether, taking into account the other factors related to the determination of the content of the duty of fairness, the failure to accord an oral hearing and give notice to Ms. Baker or her children was inconsistent with the participatory rights required by the duty of fairness in these circumstances. At the heart of this analysis is whether, considering all the circumstances, those whose interests were affected had a meaningful opportunity to present their case fully and fairly. The procedure in this case consisted of a written application with supporting documentation, which was summarized by the junior officer (Lorenz), with a recommendation being made by that officer. The summary, recommendation, and material was then considered by the senior officer (Caden), who made the decision.

31 Several of the factors described above enter into the determination of the type of participatory rights the duty of procedural fairness requires in the circumstances. First, an H & C decision is very different from a judicial decision, since it involves the exercise of considerable discretion and requires the consideration of multiple factors. Second, its role is also,

within the statutory scheme, as an exception to the general principles of Canadian immigration law. These factors militate in favour of more relaxed requirements under the duty of fairness. On the other hand, there is no appeal procedure, although judicial review may be applied for with leave of the Federal Court — Trial Division. In addition, considering the third factor, this is a decision that in practice has exceptional importance to the lives of those with an interest in its result — the claimant and his or her close family members — and this leads to the content of the duty of fairness being more extensive. Finally, applying the fifth factor described above, the statute accords considerable flexibility to the Minister to decide on the proper procedure, and immigration officers, as a matter of practice, do not conduct interviews in all cases. The institutional practices and choices made by the Minister are significant, though of course not determinative factors to be considered in the analysis. Thus, it can be seen that although some of the factors suggest stricter requirements under the duty of fairness, others suggest more relaxed requirements further from the judicial model.

32 Balancing these factors, I disagree with the holding of the Federal Court of Appeal in *Shah*, *supra*, at p. 239, that the duty of fairness owed in these circumstances is simply "minimal". Rather, the circumstances require a full and fair consideration of the issues, and the claimant and others whose important interests are affected by the decision in a fundamental way must have a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered.

33 However, it also cannot be said that an oral hearing is always necessary to ensure a fair hearing and consideration of the issues involved. The flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations. The Federal Court has held that procedural fairness does not require an oral hearing in these circumstances: see, for example, *Said*, *supra*, at p. 30.

34 I agree that an oral hearing is not a general requirement for H & C decisions. An interview is not essential for the information relevant to an H& C application to be put before an immigration officer, so that the humanitarian and compassionate considerations presented may be considered in their entirety and in a fair manner. In this case, the appellant had the opportunity to put forward, in written form through her lawyer, information about her situation, her children and their emotional dependence on her, and documentation in support of her application from a social worker at the Children's Aid Society and from her psychiatrist. These documents were before the decision-makers, and they contained the information relevant to making this decision. Taking all the factors relevant to determining the content of the duty of fairness into account, the lack of an oral hearing or notice of such a hearing did not, in my opinion, constitute a violation of the requirements of procedural fairness to which Ms. Baker was entitled in the circumstances, particularly given the fact that several of the factors point toward a more relaxed standard. The opportunity, which was accorded, for the appellant or her children to produce full and complete written documentation in relation to all aspects of her application satisfied the requirements of the participatory rights required by the duty of fairness in this case.

(4) The Provision of Reasons

35 The appellant also submits that the duty of fairness, in these circumstances, requires that reasons be given by the decision-maker. She argues either that the notes of Officer Lorenz should be considered the reasons for the decision, or that it should be held that the failure of Officer Caden to give written reasons for his decision or a subsequent affidavit explaining them should be taken to be a breach of the principles of fairness.

36 This issue has been addressed in several cases of judicial review of humanitarian and compassionate applications. The Federal Court of Appeal has held that reasons are unnecessary: *Shah*, *supra*, at pp. 239-40. It has also been held that the case history notes prepared by a subordinate officer are not to be considered the decision-maker's reasons: see *Tylo v. Canada (Minister of Employment & Immigration)* (1995), 90 F.T.R. 157 (Fed. T.D.) at pp. 159-60. In *Gheorlan v. Canada (Secretary of State)* (1995), 26 Imm. L.R. (2d) 170 (Fed. T.D.), and *Chan v. Canada (Minister of Citizenship & Immigration)* (1994), 87 F.T.R. 62 (Fed. T.D.), it was held that the notes of the reviewing officer should not be taken to be the reasons for decision, but may help in determining whether a reviewable error exists. In *Marques v. Canada (Minister of Citizenship & Immigration)* (1995), 116 F.T.R. 241 (Fed. T.D.), an H & C decision was set aside because the decision making officer failed to provide reasons or an affidavit explaining the reasons for his decision.

37 More generally, the traditional position at common law has been that the duty of fairness does not require, as a general rule, that reasons be provided for administrative decisions: *Northwestern Utilities Ltd. v. Edmonton (City)* (1978), [1979] 1

S.C.R. 684 (S.C.C.); *Supermarchés Jean Labrecque Inc. v. Québec (Tribunal du travail)*, [1987] 2 S.C.R. 219 (S.C.C.) at p. 233; *Public Service Board of New South Wales v. Osmond* (1986), 159 C.L.R. 656 (Australia H.C.) at pp. 665-66.

38 Courts and commentators have, however, often emphasized the usefulness of reasons in ensuring fair and transparent decision-making. Though *Northwestern Utilities* dealt with a statutory obligation to give reasons, Estey J. held as follows, at p. 706, referring to the desirability of a common law reasons requirement:

> This obligation is a salutary one. It reduces to a considerable degree the chances of arbitrary or capricious decisions, reinforces public confidence in the judgment and fairness of administrative tribunals, and affords parties to administrative proceedings an opportunity to assess the question of appeal....

The importance of reasons was recently reemphasized by this Court in *R. v. Campbell*, [1997] 3 S.C.R. 3 (S.C.C.) at pp. 109-10.

39 Reasons, it has been argued, foster better decision making by ensuring that issues and reasoning are well articulated and, therefore, more carefully thought out. The process of writing reasons for decision by itself may be a guarantee of a better decision. Reasons also allow parties to see that the applicable issues have been carefully considered, and are invaluable if a decision is to be appealed, questioned, or considered on judicial review: R.A. Macdonald and D. Lametti, "Reasons for Decision in Administrative Law" (1990), 3 *C.J.A.L.P.* 123, at p. 146; *Williams v. Canada (Minister of Citizenship & Immigration)*, [1997] 2 F.C. 646 (Fed. C.A.) at para. 38 Those affected may be more likely to feel they were treated fairly and appropriately if reasons are given: de Smith, Woolf, & Jowell, *Judicial Review of Administrative Action* (5th ed. 1995), at pp. 459-60. I agree that these are significant benefits of written reasons.

40 Others have expressed concerns about the desirability of a written reasons requirement at common law. In *Osmond*, *supra*, Gibbs C.J. articulated, at p. 668, the concern that a reasons requirement may lead to an inappropriate burden being imposed on administrative decision-makers, that it may lead to increased cost and delay, and that it" might in some cases induce a lack of candour on the part of the administrative officers concerned". Macdonald and Lametti, *supra*, though they agree that fairness should require the provision of reasons in certain circumstances, caution against a requirement of "archival" reasons associated with court judgments, and note that the special nature of agency decision-making in different contexts should be considered in evaluating reasons requirements. In my view, however, these concerns can be accommodated by ensuring that any reasons requirement under the duty of fairness leaves sufficient flexibility to decision-makers by accepting various types of written explanations for the decision as sufficient.

41 In England, a common law right to reasons in certain circumstances has developed in the case law: see M.H. Morris, "Administrative Decision-makers and the Duty to Give Reasons: An Emerging Debate" (1997), 11 *C.J.A.L.P.* 155, at pp. 164-168; de Smith, Woolf & Jowell, *supra*, at pp. 462-65. In *R. v. Civil Service Appeal Board*, [1991] 4 All E.R. 310 (Eng. C.A.), reasons were required of a board deciding the appeal of the dismissal of a prison official. The House of Lords, in *R. v. Secretary of State for the Home Department* (1993), [1994] 1 A.C. 531 (U.K. H.L.), imposed a reasons requirement on the Home Secretary when exercising the statutory discretion to decide on the period of imprisonment that a prisoner who had been imposed a life sentence should serve before being entitled to a review. Lord Mustill, speaking for all the law lords on the case, held that although there was no general duty to give reasons at common law, in those circumstances a failure to give reasons was unfair. Other English cases have held that reasons are required at common law when there is a statutory right of appeal: see *Norton Tool Co. v. Tewson*, [1973] 1 W.L.R. 45 (N.I.R.C.) at p. 49; *Alexander Machinery (Dudley) Ltd. v. Crabtree*, [1974] I.C.R. 120 (N.I.R.C.).

42 Some Canadian courts have imposed, in certain circumstances, a common law obligation on administrative decision-makers to provide reasons, while others have been more reluctant. In *Orlowski v. British Columbia (Attorney General)* (1992), 94 D.L.R. (4th) 541 (B.C. C.A.) at pp. 551-52, it was held that reasons would generally be required for decisions of a review board under Part XX.1 of the *Criminal Code*, based in part on the existence of a statutory right of appeal from that decision, and also on the importance of the interests affected by the decision. In *R.D.R. Construction Ltd. v. Nova Scotia (Rent Review Commission)* (1982), 55 N.S.R. (2d) 71 (N.S. T.D.), the court also held that because of the existence of a statutory right of appeal, there was an implied duty to give reasons. Smith D.J., in *Taabea v. Canada (Refugee Status Advisory Committee)* (1979), [1980] 2 F.C. 316 (Fed. T.D.), imposed a reasons requirement on a Ministerial decision relating to refugee status, based upon the right to apply to the Immigration Appeal Board for redetermination. Similarly, in the context of evaluating whether a statutory reasons requirement had been adequately fulfilled in *Boyle v. New Brunswick*

(Workplace Health, Safety & Compensation Commission) (1996), 179 N.B.R. (2d) 43 (N.B. C.A.), Bastarache J.A. (as he then was) emphasized, at p. 55, the importance of adequate reasons when appealing a decision. However, the Federal Court of Appeal recently rejected the submission that reasons were required in relation to a decision to declare a permanent resident a danger to the public under s. 70(5) of the *Immigration Act*: *Williams*, *supra*.

43 In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required. This requirement has been developing in the common law elsewhere. The circumstances of the case at bar, in my opinion, constitute one of the situations where reasons are necessary. The profound importance of an H& C decision to those affected, as with those at issue in *Orlowski*, *R. v. Civil Service Appeal Board*, and *R. v. Secretary of State for the Home Department*, militates in favour of a requirement that reasons be provided. It would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached.

44 In my view, however, the reasons requirement was fulfilled in this case, since the appellant was provided with the notes of Officer Lorenz. The notes were given to Ms. Baker when her counsel asked for reasons. Because of this, and because there is no other record of the reasons for making the decision, the notes of the subordinate reviewing officer should be taken, by inference, to be the reasons for decision. Accepting documents such as these notes as sufficient reasons is part of the flexibility that is necessary, as emphasized by Macdonald and Lametti, *supra*, when courts evaluate the requirements of the duty of fairness with recognition of the day-to-day realities of administrative agencies and the many ways in which the values underlying the principles of procedural fairness can be assured. It upholds the principle that individuals are entitled to fair procedures and open decision-making, but recognizes that in the administrative context, this transparency may take place in various ways. I conclude that the notes of Officer Lorenz satisfy the requirement for reasons under the duty of procedural fairness in this case, and they will be taken to be the reasons for decision.

(5) Reasonable Apprehension of Bias

45 Procedural fairness also requires that decisions be made free from a reasonable apprehension of bias, by an impartial decision-maker. The respondent argues that Simpson J. was correct to find that the notes of Officer Lorenz cannot be considered to give rise to a reasonable apprehension of bias because it was Officer Caden who was the actual decision-maker, who was simply reviewing the recommendation prepared by his subordinate. In my opinion, the duty to act fairly and therefore in a manner that does not give rise to a reasonable apprehension of bias applies to all immigration officers who play a significant role in the making of decisions, whether they are subordinate reviewing officers, or those who make the final decision. The subordinate officer plays an important part in the process, and if a person with such a central role does not act impartially, the decision itself cannot be said to have been made in an impartial manner. In addition, as discussed in the previous section, the notes of Officer Lorenz constitute the reasons for the decision, and if they give rise to a reasonable apprehension of bias, this taints the decision itself.

46 The test for reasonable apprehension of bias was set out by de Grandpré J., writing in dissent, in *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369 (S.C.C.) at p. 394:

> ...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information... [T]hat test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

This expression of the test has often been endorsed by this Court, most recently in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 (S.C.C.) at para. 11, *per* Major J.; at para. 31, *per* L'Heureux-Dubé and McLachlin JJ.; and at para. 111, *per* Cory J.

47 It has been held that the standards for reasonable apprehension of bias may vary, like other aspects of procedural fairness, depending on the context and the type of function performed by the administrative decision-maker involved: *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 (S.C.C.); *Old St. Boniface*, *supra*, at p. 1192. The context here is one where immigration officers must regularly make decisions that

have great importance to the individuals affected by them, but are also often critical to the interests of Canada as a country. They are individualized, rather than decisions of a general nature. They also require special sensitivity. Canada is a nation made up largely of people whose families migrated here in recent centuries. Our history is one that shows the importance of immigration, and our society shows the benefits of having a diversity of people whose origins are in a multitude of places around the world. Because they necessarily relate to people of diverse backgrounds, from different cultures, races, and continents, immigration decisions demand sensitivity and understanding by those making them. They require a recognition of diversity, an understanding of others, and an openness to difference.

48 In my opinion, the well-informed member of the community would perceive bias when reading Officer Lorenz's comments. His notes, and the manner in which they are written, do not disclose the existence of an open mind or a weighing of the particular circumstances of the case free from stereotypes. Most unfortunate is the fact that they seem to make a link between Ms. Baker's mental illness, her training as a domestic worker, the fact that she has several children, and the conclusion that she would therefore be a strain on our social welfare system for the rest of her life. In addition, the conclusion drawn was contrary to the psychiatrist's letter, which stated that, with treatment, Ms. Baker could remain well and return to being a productive member of society. Whether they were intended in this manner or not, these statements give the impression that Officer Lorenz may have been drawing conclusions based not on the evidence before him, but on the fact that Ms. Baker was a single mother with several children, and had been diagnosed with a psychiatric illness. His use of capitals to highlight the number of Ms. Baker's children may also suggest to a reader that this was a reason to deny her status. Reading his comments, I do not believe that a reasonable and well-informed member of the community would conclude that he had approached this case with the impartiality appropriate to a decision made by an immigration officer. It would appear to a reasonable observer that his own frustration with the "system" interfered with his duty to consider impartially whether the appellant's admission should be facilitated owing to humanitarian or compassionate considerations. I conclude that the notes of Officer Lorenz demonstrate a reasonable apprehension of bias.

D. Review of the Exercise of the Minister's Discretion

49 Although the finding of reasonable apprehension of bias is sufficient to dispose of this appeal, it does not address the issues contained in the "serious question of general importance" which was certified by Simpson J. relating to the approach to be taken to children's interests when reviewing the exercise of the discretion conferred by the Act and the regulations. Since it is important to address the central questions which led to this appeal, I will also consider whether, as a substantive matter, the H & C decision was improperly made in this case.

50 The appellant argues that the notes provided to Ms. Baker show that, as a matter of law, the decision should be overturned on judicial review. She submits that the decision should be held to a standard of review of correctness, that principles of administrative law require this discretion to be exercised in accordance with the Convention, and that the Minister should apply the best interests of the child as a primary consideration in H & C decisions. The respondent submits that the Convention has not been implemented in Canadian law, and that to require that s. 114(2) and the regulations made under it be interpreted in accordance with the Convention would be improper, since it would interfere with the broad discretion granted by Parliament, and with the division of powers between the federal and provincial governments.

(1) The Approach to Review of Discretionary Decision-Making

51 As stated earlier, the legislation and regulations delegate considerable discretion to the Minister in deciding whether an exemption should be granted based upon humanitarian and compassionate considerations. The regulations state that "[t]he Minister *is ... authorized to*" grant an exemption or otherwise facilitate the admission to Canada of any person "*where the Minister is satisfied* that" this should be done "owing to the existence of compassionate or humanitarian considerations". This language signals an intention to leave considerable choice to the Minister on the question of whether to grant an H & C application.

52 The concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries. As K.C. Davis wrote in *Discretionary Justice* (1969), at p. 4:

> A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction.

It is necessary in this case to consider the approach to judicial review of administrative discretion, taking into account the "pragmatic and functional" approach to judicial review that was first articulated in *Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. Union des employés de service, local 298*, [1988] 2 S.C.R. 1048 (S.C.C.) and has been applied in subsequent cases including *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 (S.C.C.) at pp. 601-7, *per* L'Heureux-Dubé J., dissenting, but not on this issue; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 (S.C.C.); *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.); and *Pushpanathan*, *supra*.

53 Administrative law has traditionally approached the review of decisions classified as discretionary separately from those seen as involving the interpretation of rules of law. The rule has been that decisions classified as discretionary may only be reviewed on limited grounds such as the bad faith of decision-makers, the exercise of discretion for an improper purpose, and the use of irrelevant considerations: see, for example, *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2 (S.C.C.) at pp. 7-8; *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231 (S.C.C.). A general doctrine of "unreasonableness" has also sometimes been applied to discretionary decisions: *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.* (1947), [1948] 1 K.B. 223 (Eng. C.A.). In my opinion, these doctrines incorporate two central ideas — that discretionary decisions, like all other administrative decisions, must be made within the bounds of the jurisdiction conferred by the statute, but that considerable deference will be given to decision-makers by courts in reviewing the exercise of that discretion and determining the scope of the decision-maker's jurisdiction. These doctrines recognize that it is the intention of a legislature, when using statutory language that confers broad choices on administrative agencies, that courts should not lightly interfere with such decisions, and should give considerable respect to decision-makers when reviewing the manner in which discretion was exercised. However, discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manouevre contemplated by the legislature, in accordance with the principles of the rule of law (*Roncarelli v. Duplessis*, [1959] S.C.R. 121 (S.C.C.)), in line with general principles of administrative law governing the exercise of discretion, and consistent with the *Canadian Charter of Rights and Freedoms* (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (S.C.C.)).

54 It is, however, inaccurate to speak of a rigid dichotomy of "discretionary" or "non-discretionary" decisions. Most administrative decisions involve the exercise of implicit discretion in relation to many aspects of decision making. To give just one example, decision-makers may have considerable discretion as to the remedies they order. In addition, there is no easy distinction to be made between interpretation and the exercise of discretion; interpreting legal rules involves considerable discretion to clarify, fill in legislative gaps, and make choices among various options. As stated by Brown and Evans, *supra*, at p. 14-47:

> The degree of discretion in a grant of power can range from one where the decision-maker is constrained only by the purposes and objects of the legislation, to one where it is so specific that there is almost no discretion involved. In between, of course, there may be any number of limitations placed on the decision-maker's freedom of choice, sometimes referred to as" structured" discretion.

55 The "pragmatic and functional" approach recognizes that standards of review for errors of law are appropriately seen as a spectrum, with certain decisions being entitled to more deference, and others entitled to less: *Pezim*, *supra*, at pp. 589-90; *Southam*, *supra*, at para. 30; *Pushpanathan*, *supra*, at para. 27. Three standards of review have been defined: patent unreasonableness, reasonableness *simpliciter*, and correctness: *Southam*, at paras. 54-56. In my opinion the standard of review of the substantive aspects of discretionary decisions is best approached within this framework, especially given the difficulty in making rigid classifications between discretionary and non-discretionary decisions. The pragmatic and functional approach takes into account considerations such as the expertise of the tribunal, the nature of the decision being made, and the language of the provision and the surrounding legislation. It includes factors such as whether a decision is "polycentric" and the intention revealed by the statutory language. The amount of choice left by Parliament to the administrative decision-maker and the nature of the decision being made are also important considerations in the analysis. The spectrum of standards of review can incorporate the principle that in certain cases, the legislature has demonstrated its intention to leave greater choices to decision-makers than in others, but that a court must intervene where such a decision is outside the scope of the power accorded by Parliament. Finally, I would note that this Court has already applied this framework to statutory

provisions that confer significant choices on administrative bodies, for example, in reviewing the exercise of the remedial powers conferred by the statute at issue in *Southam*, *supra*.

56 Incorporating judicial review of decisions that involve considerable discretion into the pragmatic and functional analysis for errors of law should not be seen as reducing the level of deference given to decisions of a highly discretionary nature. In fact, deferential standards of review may give substantial leeway to the discretionary decision-maker in determining the" proper purposes" or "relevant considerations" involved in making a given determination. The pragmatic and functional approach can take into account the fact that the more discretion that is left to a decision-maker, the more reluctant courts should be to interfere with the manner in which decision-makers have made choices among various options. However, though discretionary decisions will generally be given considerable respect, that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.

(2) The Standard of Review in This Case

57 I turn now to an application of the pragmatic and functional approach to determine the appropriate standard of review for decisions made under s. 114(2) and Regulation 2.1, and the factors affecting the determination of that standard outlined in *Pushpanathan*, *supra*. It was held in that case that the decision, which related to the determination of a question of law by the Immigration and Refugee Board, was subject to a standard of review of correctness. Although that decision was also one made under the *Immigration Act*, the type of decision at issue was very different, as was the decision-maker. The appropriate standard of review must, therefore, be considered separately in the present case.

58 The first factor to be examined is the presence or absence of a privative clause, and, in appropriate cases, the wording of that clause: *Pushpanathan*, at para. 30. There is no privative clause contained in the *Immigration Act*, although judicial review cannot be commenced without leave of the Federal Court — Trial Division under s. 82.1. As mentioned above, s. 83(1) requires the certification of a serious question of general importance by the Federal Court — Trial Division before that decision may be appealed to the Court of Appeal. *Pushpanathan* shows that the existence of this provision means there should be a lower level of deference on issues related to the certified question itself. However, this is only one of the factors involved in determining the standard of review, and the others must also be considered.

59 The second factor is the expertise of the decision-maker. The decision-maker here is the Minister of Citizenship and Immigration or his or her delegate. The fact that the formal decision-maker is the Minister is a factor militating in favour of deference. The Minister has some expertise relative to courts in immigration matters, particularly with respect to when exemptions should be given from the requirements that normally apply.

60 The third factor is the purpose of the provision in particular, and of the Act as a whole. This decision involves considerable choice on the part of the Minister in determining when humanitarian and compassionate considerations warrant an exemption from the requirements of the Act. The decision also involves applying relatively "open-textured" legal principles, a factor militating in favour of greater deference: *Pushpanathan*, *supra*, at para. 36. The purpose of the provision in question is also to *exempt* applicants, in certain circumstances, from the requirements of the Act or its regulations. This factor, too, is a signal that greater deference should be given to the Minister. However, it should also be noted, in favour of a stricter standard, that this decision relates directly to the rights and interests of an individual in relation to the government, rather than balancing the interests of various constituencies or mediating between them. Its purpose is to decide whether the admission to Canada of a particular individual, in a given set of circumstances, should be facilitated.

61 The fourth factor outlined in *Pushpanathan* considers the nature of the problem in question, especially whether it relates to determination of law or facts. The decision about whether to grant an H & C exemption involves a considerable appreciation of the facts of that person's case, and is not one which involves the application or interpretation of definitive legal rules. Given the highly discretionary and fact-based nature of this decision, this is a factor militating in favour of deference.

62 These factors must be balanced to arrive at the appropriate standard of review. I conclude that considerable deference should be accorded to immigration officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role within the statutory scheme as an exception, the fact that the decision-maker is the Minister, and the

considerable discretion evidenced by the statutory language. Yet the absence of a privative clause, the explicit contemplation of judicial review by the Federal Court — Trial Division and the Federal Court of Appeal in certain circumstances, and the individual rather than polycentric nature of the decision, also suggest that the standard should not be as deferential as "patent unreasonableness". I conclude, weighing all these factors, that the appropriate standard of review is reasonableness *simpliciter*.

(3) Was this Decision Unreasonable?

63 I will next examine whether the decision in this case, and the immigration officer's interpretation of the scope of the discretion conferred upon him, was unreasonable in the sense contemplated in the judgment of Iacobucci J. in *Southam*, *supra*, at para. 56:

> An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it.

In particular, the examination of this question should focus on the issues arising from the serious question of general importance stated by Simpson J.: the question of the approach to be taken to the interests of children when reviewing an H & C decision.

64 The notes of Officer Lorenz, in relation to the consideration of "H&C factors", read as follows:

> The PC is a paranoid schizophrenic and on welfare. She has no qualifications other than as a domestic. She has FOUR CHILDREN IN JAMAICA AND ANOTHER FOUR BORN HERE. She will, of course, be a tremendous strain on our social welfare systems for (probably) the rest of her life. There are no H&C factors other than her FOUR CANADIAN-BORN CHILDREN. So we let her stay because of that? I am of the opinion that Canada can no longer afford this kind of generosity.

65 In my opinion, the approach taken to the children's interests shows that this decision was unreasonable in the sense contemplated in *Southam*, *supra*. The officer was completely dismissive of the interests of Ms. Baker's children. As I will outline in detail in the paragraphs that follow, I believe that the failure to give serious weight and consideration to the interests of the children constitutes an unreasonable exercise of the discretion conferred by the section, notwithstanding the important deference that should be given to the decision of the immigration officer. Professor Dyzenhaus has articulated the concept of "deference as respect" as follows:

> Deference as respect requires not submission but a respectful attention to the reasons offered or which could be offered in support of a decision...
>
> (D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286.)

The reasons of the immigration officer show that his decision was inconsistent with the values underlying the grant of discretion. They therefore cannot stand up to the somewhat probing examination required by the standard of reasonableness.

66 The wording of s. 114(2) and of regulation 2.1 requires that a decision-maker exercise the power based upon "*compassionate* or *humanitarian* considerations" (emphasis added). These words and their meaning must be central in determining whether an individual H & C decision was a reasonable exercise of the power conferred by Parliament. The legislation and regulations direct the Minister to determine whether the person's admission should be facilitated owing to the existence of such considerations. They show Parliament's intention that those exercising the discretion conferred by the statute act in a humanitarian and compassionate manner. This Court has found that it is necessary for the Minister to *consider* an H & C request when an application is made: *Jiminez-Perez*, *supra*. Similarly, when considering it, the request must be evaluated in a manner that is respectful of humanitarian and compassionate considerations.

67 Determining whether the approach taken by the immigration officer was within the boundaries set out by the words of the statute and the values of administrative law requires a contextual approach, as is taken to statutory interpretation generally: see *R. v. Gladue*, [1999] 1 S.C.R. 688 (S.C.C.); *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at paras. 20-23. In my opinion, a reasonable exercise of the power conferred by the section requires close attention to the interests and needs of children. Children's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society. Indications of children's interests as important considerations governing the manner in which H& C powers should be exercised may be found, for example, in the purposes of the Act, in international instruments, and in the guidelines for making H & C decisions published by the Minister herself.

(a) The Objectives of the Act

68 The objectives of the Act include, in s. 3(*c*):

> to facilitate the reunion in Canada of Canadian citizens and permanent residents with their close relatives from abroad;

Although this provision speaks of Parliament's objective of *reuniting* citizens and permanent residents with their close relatives from abroad, it is consistent, in my opinion, with a large and liberal interpretation of the values underlying this legislation and its purposes to presume that Parliament also placed a high value on keeping citizens and permanent residents together with their close relatives who are already in Canada. The obligation to take seriously and place important weight on keeping children in contact with both parents, if possible, and maintaining connections between close family members is suggested by the objective articulated in s. 3(*c*).

(b) International Law

69 Another indicator of the importance of considering the interests of children when making a compassionate and humanitarian decision is the ratification by Canada of the *Convention on the Rights of the Child*, and the recognition of the importance of children's rights and the best interests of children in other international instruments ratified by Canada. International treaties and conventions are not part of Canadian law unless they have been implemented by statute: *Francis v. R.*, [1956] S.C.R. 618 (S.C.C.) at p. 621; *Capital Cities Communications Inc. v. Canada (Radio-Television & Telecommunications Commission)* (1977), [1978] 2 S.C.R. 141 (S.C.C.) at pp. 172-73. I agree with the respondent and the Court of Appeal that the Convention has not been implemented by Parliament. Its provisions therefore have no direct application within Canadian law.

70 Nevertheless, the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review. As stated in R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 330:

> [T]he legislature is presumed to respect the values and principles contained in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred. [Emphasis added.]

The important role of international human rights law as an aid in interpreting domestic law has also been emphasized in other common law countries: see, for example, *Tavita v. Minister of Immigration*, [1994] 2 N.Z.L.R. 257 (New Zealand C.A.) at p. 266; *Vishaka v. Rajasthan*, [1997] 3 L.R.C. 361 (S.C. India) at p. 367. It is also a critical influence on the interpretation of the scope of the rights included in the *Charter*: *Slaight Communications*, *supra*; *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.).

71 The values and principles of the Convention recognize the importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future. In addition, the preamble, recalling the Universal Declaration of Human Rights, recognizes that "childhood is entitled to special care and assistance". A similar emphasis on the importance of placing considerable value on the protection of children and their needs and interests is also contained in other international instruments. The United Nations *Declaration of the Rights of the Child* (1959), in its preamble, states that the child "needs special safegards and care". The principles of the Convention and other international instrumnts place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and

rights. They help show the values that are central in determining whether this decision was a reasonable exercise of the H & C power.

(c) The Ministerial Guidelines

72 Third, the guidelines issued by the Minister to immigration officers recognize and reflect the values and approach discussed above and articulated in the Convention. As described above, immigration officers are expected to make the decision that a reasonable person would make, with special consideration of humanitarian values such as keeping connections between family members and avoiding hardship by sending people to places where they no longer have connections. The guidelines show what the Minister considers a humanitarian and compassionate decision, and they are of great assistance to the Court in determining whether the reasons of Officer Lorenz are supportable. They emphasize that the decision-maker should be alert to possible humanitarian grounds, should consider the hardship that a negative decision would impose upon the claimant or close family members, and should consider as an important factor the connections between family members. The guidelines are a useful indicator of what constitutes a reasonable interpretation of the power conferred by the section, and the fact that this decision was contrary to their directives is of great help in assessing whether the decision was an unreasonable exercise of the H & C power.

73 The above factors indicate that emphasis on the rights, interests, and needs of children and special attention to childhood are important values that should be considered in reasonably interpreting the "humanitarian" and" compassionate" considerations that guide the exercise of the discretion. I conclude that because the reasons for this decision do not indicate that it was made in a manner which was alive, attentive, or sensitive to the interests of Ms. Baker's children, and did not consider them as an important factor in making the decision, it was an unreasonable exercise of the power conferred by the legislation, and must, therefore, be overturned. In addition, the reasons for decision failed to give sufficient weight or consideration to the hardship that a return to Jamaica might cause Ms. Baker, given the fact that she had been in Canada for 12 years, was ill and might not be able to obtain treatment in Jamaica, and would necessarily be separated from at least some of her children.

74 It follows that I disagree with the Federal Court of Appeal's holding in *Shah*, *supra*, at p. 239, that a s. 114(2) decision is "*wholly* a matter of judgment and discretion" (emphasis added). The wording of s. 114(2) and of the regulations shows that the discretion granted is confined within certain boundaries. While I agree with the Court of Appeal that the Act gives the applicant no right to a particular outcome or to the application of a particular legal test, and that the doctrine of legitimate expectations does not mandate a result consistent with the wording of any international instruments, the decision must be made following an approach that respects humanitarian and compassionate values. Therefore, attentiveness and sensitivity to the importance of the rights of children, to their best interests, and to the hardship that may be caused to them by a negative decision is essential for an H & C decision to be made in a reasonable manner. While deference should be given to immigration officers on s. 114(2) judicial review applications, decisions cannot stand when the manner in which the decision was made and the approach taken are in conflict with humanitarian and compassionate values. The Minister's guidelines themselves reflect this approach. However, the decision here was inconsistent with it.

75 The certified question asks whether the best interests of children must be a primary consideration when assessing an applicant under s. 114(2) and the regulations. The principles discussed above indicate that, for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable.

E. Conclusions and Disposition

76 Therefore, both because there was a violation of the principles of procedural fairness owing to a reasonable apprehension of bias, and because the exercise of the H & C discretion was unreasonable, I would allow this appeal.

77 The appellant requested that solicitor-client costs be awarded to her if she were successful in her appeal. The majority of this Court held as follows in *Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.) at p. 134:

> Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties.

There has been no such conduct on the part of the Minister shown during this litigation, and I do not believe that this is one of the exceptional cases where solicitor-client costs should be awarded. I would allow the appeal, and set aside the decision of Officer Caden of April 18, 1994, with party-and-party costs throughout. The matter will be returned to the Minister for redetermination by a different immigration officer.

***Iacobucci J.* (*Cory J.* concurring):**

78 I agree with L'Heureux-Dubé J.'s reasons and disposition of this appeal, except to the extent that my colleague addresses the effect of international law on the exercise of Ministerial discretion pursuant to s. 114(2) of the *Immigration Act*, R.S.C., 1985, c. I-2. The certified question at issue in this appeal concerns whether federal immigration authorities must treat the best interests of the child as a primary consideration in assessing an application for humanitarian and compassionate consideration under s. 114(2) of the Act, given that the legislation does not implement the provisions contained in the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, a multilateral convention to which Canada is party. In my opinion, the certified question should be answered in the negative.

79 It is a matter of well-settled law that an international convention ratified by the executive branch of government is of no force or effect within the Canadian legal system until such time as its provisions have been incorporated into domestic law by way of implementing legislation: *Capital Cities Communications Inc. v. Canada (Radio-Television & Telecommunications Commission)* (1977), [1978] 2 S.C.R. 141 (S.C.C.). I do not agree with the approach adopted by my colleague, wherein reference is made to the underlying values of an unimplemented international treaty in the course of the contextual approach to statutory interpretation and administrative law, because such an approach is not in accordance with the Court's jurisprudence concerning the status of international law within the domestic legal system

80 In my view, one should proceed with caution in deciding matters of this nature, lest we adversely affect the balance maintained by our Parliamentary tradition, or inadvertently grant the executive the power to bind citizens without the necessity of involving the legislative branch. I do not share my colleague's confidence that the Court's precedent in *Capital Cities*, *supra*, survives intact following the adoption of a principle of law which permits reference to an unincorporated convention during the process of statutory interpretation. Instead, the result will be that the appellant is able to achieve indirectly what cannot be achieved directly, namely, to give force and effect within the domestic legal system to international obligations undertaken by the executive alone that have yet to be subject to the democratic will of Parliament

81 The primacy accorded to the rights of children in the Convention, assuming for the sake of argument that the factual circumstances of this appeal are included within the scope of the relevant provisions, is irrelevant unless and until such provisions are the subject of legislation enacted by Parliament. In answering the certified question in the negative, I am mindful that the result may well have been different had my collegue concluded that the appellant's claim fell within the ambit of rights protected by the *Canadian Charter of Rights and Freedoms*. Had this been the case, the Court would have had an opportunity to consider the application of the interpretive presumption, established by the Court's decision in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (S.C.C.), and confirmed in subsequent jurisprudence, that administrative discretion involving *Charter* rights be exercised in accordance with similar international human rights norms.

Appeal allowed.
Pourvoi accueilli.

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2008 ABQB 12
Alberta Court of Queen's Bench

Airport Self Storage & R.V. Centre Ltd. v. Leduc (City)

2008 CarswellAlta 25, 2008 ABQB 12, [2008] A.W.L.D. 766, [2008] A.W.L.D. 833, [2008] A.W.L.D. 834, 165 A.C.W.S. (3d) 170, 42 M.P.L.R. (4th) 27, 439 A.R. 105, 75 Admin. L.R. (4th) 147, 86 Alta. L.R. (4th) 253

Airport Self Storage and R.V. Centre Ltd. (Applicant) and City of Leduc (Respondent)

D.R.G. Thomas J.

Heard: October 17, 2007
Judgment: January 4, 2008 *
Docket: Edmonton 0703-10282

Counsel: Frederick A. Laux, Q.C. for Applicant
Kelsey L. Becker Brookes for City of Leduc
James W. Murphy, Q.C. for Randall Engineering Ltd.
Victor E. Howard for 1162101 Alberta Ltd. (now Air International Park & Store Inc.)

Subject: Public; Property; Municipal

APPLICATION by neighbour pursuant to s. 536 of *Municipal Government Act* for order declaring by-law invalid and for order setting aside developer's development permit.

***D.R.G. Thomas J.*:**

Introduction

1 This is a decision on an application under s. 536 of the *Municipal Government Act* ("*MGA*") for an order declaring Bylaw #681-2007 ("Bylaw 681") invalid on the ground that it was passed by the Council ("Council") of the City of Leduc ("City") without the Applicant having received proper notice of the public hearing held prior to adoption of Bylaw 681. The Applicant also seeks an order setting aside Development Permit No. 0711000104 ("Permit #2").

Background Facts

2 The Applicant is the owner of a parcel on which it operates a facility providing outdoor access storage space to a variety of tenants.

3 The Applicant's business is located across the street from another property ("the Lands") on which the Respondent Air International Park & Store Inc. ("the Developer") proposes the construction of a new building.

4 On October 24, 2006 the City Development Officer ("the DO") issued Development Permit No. 06100140 ("Permit #1") for a 'Commercial Warehouse with Surveillance Suite' on the Lands which are located within a C-3 District. That C-3 District is a zoning category under the City's Land Use Bylaw ("LUB").

5 As an adjacent land owner the Applicant was given written notice by the City of the issuance of Permit #1. On November 2, 2006 the Applicant appealed the DO's decision to issue Permit #1 to the City Subdivision and Development Appeal Board ("the SDAB") on the grounds that the proposed use was neither a permitted nor a discretionary use in the C-3 District.

6 A hearing was held before the SDAB on November 28, 2006 and the Applicant made written and oral submissions to that tribunal. On December 8, 2006 the SDAB denied the appeal of the Applicant and upheld the DO's decision to issue Permit #1 on the basis that the proposed development of an enclosed self-storage building with office, surveillance suite and service vehicle parking was sufficiently similar to the permitted and discretionary uses of the C-3 District and was in keeping with the general purpose of that C-3 District.

7 The Applicant filed a motion in the Court of Appeal for leave to appeal the SDAB decision and leave was granted on April 17, 2007 on two legal questions.

8 The full appeal to the Court of Appeal had not been argued at the time this application was heard.

9 On June 11, 2007 City Council gave first reading to Bylaw 681 to amend the LUB. The effect of Bylaw 681 was to establish a new land use category being "Commercial Storage Facility" which defines the category in such a way as to encompass the storage use contemplated by the Developer in Permit #1 and which in turn is the subject of the appeal to the Court of Appeal.

10 The Record returned on this application ("the Record") contains a Minute of the Council meeting held on Monday, June 11, 2007 at which Bylaw 681 was considered and given first reading:

> **The Planning and Development Department received a request from Randall Engineering Ltd. to add 'commercial storage facilities' as a permitted use in the C-3 Land Use District.** (emphasis added)
>
> Currently there is no use listed in the Land Use Bylaw specifically for storage facilities. Existing storage facilities were approved as a discretionary use similar to the permitted and discretionary uses within the M-1 Land Use District.
>
> Existing facilities are one storey metal buildings divided into separate storage units accessible by overhead doors directly from an internal roadway. The architectural design and building material of these structures lend themselves to a more industrial type land use than a commercial type land use and, therefore, are located in the M-1 Industrial — Light Industrial District.
>
> The C-3 Land Use District is intended to accommodate a broad range of businesses including those that serve vehicular traffic and are generally located adjacent to arterial roadways and primary and secondary highways.
>
> **A new type of storage facility is being proposed for lands adjacent to the southbound QE II and Sparrow Drive in a C-3 Land Use District. This facility will be multi-storey with an interior loading and unloading dock. The architectural design of the building is suited for a commercial land use district. From the exterior, one would not know that the building is used as a storage facility.** (emphasis added)
>
> **Administration supports the concept of the commercial-type storage facility and believes that it can fit well within certain commercial Land Use Districts due to its aesthetic character.** Within the City of Leduc there are some C-3 Land Use Districts that are not located adjacent to arterial roadways or primary and secondary highways that may not be suitable for a storage facility of any type. Because of this, it is Administration's suggestion that this land use be limited to a discretionary use rather than a permitted use in the C-3 Land Use District. This allows the DO to use discretion on whether to approve the development or not. (emphasis added)
>
> **Randall Engineering Ltd. did apply for this type of development under the current C-3 Land Use District and was given discretionary approval as a similar use to the permitted and discretionary uses within that District. The decision of the Development Officer was appealed. The City's Subdivision and Development Appeal Board upheld the decision of the Development Officer. However, that decision is currently being challenged through the Courts. The leave to appeal the Board's decision includes the grounds that the Board did not give adequate reasons for their decision. Listing commercial storage facilities as a specific use will allow the Development Officer to make a decision that is not based on similarities to other uses in the district, and upon an appeal of the decision, will give the Subdivision and Development Appeal Board a substantive reason for their decision.** (emphasis added)

Administration supports adding 'commercial storage facilities' as a discretionary use in the C-3 Land Use District which will allow for distinctive and architecturally enhanced storage facilities in optimal locations within the City of Leduc.

11 Notice of a public hearing to be held on June 25, 2007 in respect to Bylaw 681 was advertised in the June 8, June 15 and June 22, 2007 editions of the Leduc Representative, a newspaper with circulation in the City and surrounding areas.

12 On June 25, 2007 the statutory public hearing was held in respect of the Bylaw 681. After the public hearing was concluded and closed, Council gave second and third reading to Bylaw 681, it was adopted and signed into law.

13 The Record also contains a Minute of the June 25, 2007 Council meeting which dealt further with Bylaw 681:

IV. PUBLIC HEARING

Public Hearing **A. Mayor Krischke declared open a Public Hearing regarding Bylaw No.681-2007, a bylaw to amend Section 95 (b) of the Land Use Bylaw — Discretionary Uses in the C4 Land Use District (Commercial Storage Facilities)**

1. Written Submissions

Mayor Krischke advised that no written submissions were received in response to the Notice of Public Hearing that was advertised in the June 8, 2007 and June 15, 2007 editions of the Leduc Representative.

2. Presentations

Administration provided an overview of the bylaw. Mr. Parrish also indicated that Randall Engineering Ltd. did apply for this type of development under the current C-3 Land Use District and was given discretionary approval as a similar use to the permitted and discretionary uses within that District. The decision of the Development Officer was appealed, and the City's Subdivision and Development Appeal Board upheld the decision of the Development Officer. However, that decision is currently being challenged through the Courts. (emphasis added)

Developer **Council heard a presentation from Mr. Bruce Wohlgemuth of Randall Engineering. Mr. Wohlgemuth indicated that there has been a delay of 6 months to this point.** He has also performed some research into other municipalities with similar zoning and different types of discretionary uses. Mr. Wohlgemuth indicated that no hazardous materials or chemicals will be stored in the facility, which is a state of the art, green facility that utilizes geothermal technology, has sprinklers and virtually self sufficient. Household and office materials are proposed to be the stored items, and parking is permitted on one Level of the underground parkade that is heated. There will also be 150 above ground stalls for vehicle storage. There will be approximately 900 units of various sizes in the facility; they performed a marketing study to determine that there is a need for this capacity in local area. Mr. Wohlgemuth indicates that he operates a business in Nisku and this is showcase retirement project. (emphasis added).

Ms. Tomte **Council recognized Ms. Tomte of 4213-47 Street who asked if this was the appropriate time to amend the bylaw if the matter is before the courts. Mr. Parrish replied that he has checked with both the City Solicitor and the Chair of the Subdivision Development Appeal Board regarding the matter and there neither has given any indication that it is inappropriate to proceed.** (emphasis added)

In response to the Mayor, there were no further presentations; therefore, the Mayor declared the Public Hearing closed. (emphasis added).

14 On July 9, 2007 employees of the Applicant came across a news article in the Leduc Representative, which stated that a public hearing had been held before City Council on June 25, 2007 in respect of certain amendments of the LUB which had been applied for by the Developer.

15 On July 10, 2007, sixteen days after the passing of Bylaw 681, the DO issued Permit #2, for a Commercial Warehouse with Surveillance Suite on the Lands. As an adjacent property owner, the Applicant received written notice of the issuance of Permit #2 by mail.

16 On July 23, 2007 the Applicant appealed the decision to issue Permit #2 to the SDAB on the grounds the Applicant had not received notice of the proposal to hold a public hearing and adopt Bylaw 681. On August 31, 2007 the SDAB denied the appeal of the Applicant and upheld the decision of the DO in respect to Permit #2.

17 The Applicant had not received written or oral notice of the proposed public hearing which had been held on June 25, 2007 either from the City or any other person. The Applicant states that if it had received notice of that public hearing it would have made oral and written submissions to City Council in opposition to the adoption of Bylaw 681.

18 The Applicant states further that the effect of the passing of Bylaw 681 and the issuance of Permit #2 was an attempt by City Council to render the appeal to the Court of Appeal moot and was also to assure issuance of a valid development permit to the Developer for its proposal on the Lands located across the street from the Applicant's property and existing business.

Issues

19 Did the City breach a requirement of procedural fairness when it failed to provide personalized written notice to the Applicant of the public hearing in respect to proposed Bylaw 681 thereby rendering that Bylaw invalid?

20 If Bylaw 681 is invalid should Permit #2 be set aside?

Analysis

21 This is an application for judicial review which raises an issue of procedural fairness. On such an application the standard of review is correctness as measured by the factors set out in *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39 (S.C.C.); *Edmonton Police Assn. v. Edmonton (City)*, [2007] A.J. No. 584, 2007 ABCA 184 (Alta. C.A.).

22 The five factors from *Baker*, *supra* to be considered in deciding whether procedural fairness exists in a given set of circumstances include:

> (a) the nature of the decision being challenged and the process followed in making that decision;
>
> (b) the nature of the applicable statutory scheme and the terms of the governing statute;
>
> (c) the importance of the decision to the person affected by it;
>
> (d) the legitimate expectations of the person challenging the decision; and
>
> (e) the extent of deference to be accorded to the procedures chosen by the decision maker.

23 These factors will be reviewed followed by a weighing exercise to determine if there has been a failure on the part of the Council to comply with a requirement of procedural fairness in the circumstances present here.

A. The nature of the decision being challenged and the process followed in making that decision.

24 This factor involves an examination of the functions performed by the body making the decision. These functions are characterized and placed on a notional spectrum. At one end of the spectrum are purely legislative functions which attract requirements of minimal procedural fairness. At the other end of that notional spectrum are judicial or quasi judicial functions which attract a higher standard of fairness.

25 Bylaw 681 amended the LUB by adding one discretionary use to the C-3 District. The Respondents argue that this was a text amendment to the LUB which has general application throughout the City. Text amendments involving broad policy considerations would typically be seen as involving a purely legislative function.

26 However, there are some unusual circumstances here. As shown by the first paragraph of the Minute of the June 11, 2007 meeting, the application for the amendment contained in Bylaw 681 came from a consultant acting on behalf of the Developer. A review of that Minute also indicates that the Council was made well aware of the appeal to the Court of Appeal in respect to Permit #1.

27 A review of the Minute of June 25, 2007 reveals that the agent of the Developer spoke to Council at the public hearing and appears to have complained about a six month delay in respect of the development proposed by the Developer on the Lands across from the Applicant's business. Further, Council was also reminded of the challenge to Permit #1 in the courts. From this information it had to be obvious to the members of Council that there was a dispute between neighbours over the development proposal for the Lands which was to be accommodated by the amendment to the LUB through the passage of Bylaw 681.

28 The City wishes to portray Bylaw 681 as a typical text amendment and as an example of a bylaw taking into account broader public policy considerations. It may be that some elements of Bylaw 681 do involve broader public policy considerations but the fact is that this particular amendment to the LUB came forward for consideration because Randall Engineering, the agent of the Developer, had applied for it. Further, that same consultant spoke in favour of the passing of Bylaw 681 at the public hearing held on June 25. Clearly, the Developer was proposing the adoption by Council of Bylaw 681 as a means of circumventing the ongoing challenge to Permit #1 in the Court of Appeal.

29 Given that there was an obvious dispute between neighbours rather than some sort of neutral text amendment involved in the passage of Bylaw 681, it is appropriate to impose a higher duty of procedural fairness in this circumstance. This is more toward the judicial end of the spectrum than the purely legislative. See *Keefe v. Edmonton (City)*, [2002] A.J. No. 1602, 2002 ABQB 1098 (Alta. Q.B.).

B. The nature of the applicable statutory scheme and the terms of the governing statute.

30 Planning processes in Alberta are governed by the *MGA* which for many years has required extensive public participation in the processes which involve amendments to zoning bylaws. Indeed, Part 7 of the *MGA* carries the title "Public Participation". Measures to facilitate public participation include requirements to publish notices of and to hold public hearings and generally give the right to persons affected by decisions an opportunity to be heard in respect of proposed land use changes. Part 7 of the MGA reflects a clear legislative intent that municipal councils should adopt procedures which will facilitate participation in the approval of revisions to land use regulations.

31 Section 692 of the *MGA* requires that a municipal council must hold a public hearing respecting a proposed bylaw in accordance with s. 230 of that same statute. That latter section requires that the public hearing occur during a regular or special meeting where the municipal council must hear from any person or group, or persons representing them, or who claim to be affected by the proposed bylaw and who have complied with the procedures established by the particular municipal council. In *Keefe*, *supra* Smith, J. emphasized the importance placed on public hearings in the *MGA* and suggested that the duty of procedural fairness with respect to the right to be heard will be fairly high. As counsel for the Applicants has noted under Alberta law the decision of a municipal council on a zoning amendment is final and binding and there is no right of appeal. This in turn elevates the degree of fairness required, see *Baker*, *supra* at para. 24.

C. The importance of the decision to the individual affected.

32 The Applicant's parcel and the existing use carried out thereon is across the street from the Lands owned by the Developer. The Applicant asserts that the proposed development will cause traffic congestion, will have a negative impact on the value of the Applicant's property and that overbuilding relative to demand could result in land use concerns such as blight. The City argues that there is no evidence that this will occur.

33 The chronology of events set out above shows that the Applicant has, from the outset, expressed concerns with respect to the development proposed by Developer on the Lands. The Applicant raised these issues before the SDAB when Permit #1 was under appeal. Further, the fact that the Applicant has taken an expensive legal challenge to the Court of Appeal and also in this Court in respect to Bylaw 681 indicates that it is seriously concerned about what is happening to its property.

34 These facts indicate that a fairly high duty of procedural fairness should be required in the circumstances. See also *Keefe*, *supra* at 2002 ABQB 1098 (Alta. Q.B.) at paras. 31 and 32.

D. The legitimate expectations of the party challenging the decision.

35 The law on the doctrine of legitimate expectations was stated clearly and succinctly by Smith, J. in *Keefe*, *supra* at paras. 33-34.

36 The question here is whether the City as an entity encompassing the Council, the DO and the City Planning Department conducted themselves in such a way as to give rise to a reasonable and legitimate expectation on the part of the Applicant that it would be informed if particular rules of the planning regime in the City and which affected it were going to be changed to its detriment.

37 The Applicant had been informed by written notices delivered by mail about the issuance of both Permit #1 and Permit #2 and of the decision of the SDAB in respect to the unsuccessful appeal in respect to Permit #1. The Applicant was involved in serious litigation over the issuance of Permit #1. In all of these circumstances it is reasonable that the Applicant would expect to be consulted about and specifically informed in respect to a proposal to change the land use regulations on the Lands located immediately across the street from its parcel. This is especially so if the enabling bylaw would virtually guarantee that the that the proposed development could proceed to construction without any further input from the Applicant.

38 The Applicant has established a reasonable and legitimate expectation that it would get a notice about the public hearing to be held in respect to Bylaw 681 on June 25, 2007.

E. The level of deference to be accorded to the procedures chosen by the decision maker.

39 Normally, considerable deference should be given to the procedures selected by a municipal council for the giving of notification of public hearings. In this case the Council had complied with the basic requirements of the *MGA* and had run advertisements in respect of the public hearing in the June 8, June 15, and June 22 editions of the Leduc Representative. Should it have gone further in the process sense and ensured that the Applicant was fully aware of the Council's intention to consider Bylaw 681 on June 25?

40 The City argues that there is no evidence of bad faith in failing to provide an additional and personal written notice to the Applicant. I do not agree with that assertion. In my view there is evidence of a lack of good faith on the part of the City. The Council must be taken as knowing that passage of Bylaw 681 and the issuance of a new development permit, such as Permit #2, could defeat the litigation commenced by the Applicant in respect to Permit #1. In addition, there are a number of other circumstances present here which cause me concern starting with the fact that an agent of the Developer applied for the so called text amendment, a rather unusual beginning to what is now argued to be a policy decision being made in the broader public interest. When an apparently disinterested citizen asked during the public hearing about the propriety of proceeding with Bylaw 681 in the face of ongoing legal proceedings that concern was dismissed by City administrative officials advising the Council. Finally, I note how quickly Permit #2 issued on July 11, a mere sixteen days after Bylaw 681 had been adopted.

41 In the normal course deference should be given to a municipal council but not in circumstances where it appears that the decision maker was going out of its way to defeat the interests of one affected resident in favour of another. In such cases very little deference, if any, should be paid to the municipal council when it has failed to select a procedure which would be fair to a person who the council knows or should know has a legitimate interest in the changes in land use policies and bylaws which affect that particular person.

42 In conclusion, I am not prepared to pay any significant deference to the procedures adopted by the Council in this case. The circumstances here demanded a more or proactive role on the part of the Council to reach out to the Applicant, to notify it and to include it in the public discussion of Bylaw 681.

Weighing the Factors

43 The final step in the analysis is to weigh these factors as a whole and come to a conclusion as to whether there has been a denial of procedural fairness in the particular circumstances of this case. Has the failure to provide specific notice to the Applicant caused this problem? When all of the factors present here and as reviewed above are taken into account it is my view that the Council had a high duty of procedural fairness and should have given specific personalized written notice to the Applicant of the public hearing to be held in respect to Bylaw 681. Such notice was not given to the Applicant and that failure by the City renders the Bylaw invalid.

Prejudice

44 The City suggests that if a finding of procedural unfairness is made that I should exercise my discretion and refuse to quash Bylaw 681 because the Applicant has not shown that it has suffered any prejudice and further that "the process was not so devoid of procedural fairness that the administration of justice has been brought into disrepute".

45 In my view the Applicant has shown prejudice and the proof of that is in the speedy issuance of Permit #2 which would have allowed the development on the Lands to which the Applicant objected. That together with the passing of Bylaw 681 which could render moot the challenge to Permit #1, caused prejudice to the legal rights of the Applicant to pursue its appeal on which leave had been granted.

46 Bylaw 681 was processed in such a way as to ignore the clearly stated concerns and interests of the Applicant. In these circumstances the City is not entitled to an exercise of discretion in its favour.

Conclusion

47 Bylaw 681 is declared invalid because of the failure by Council to give proper notice to the Applicant of the public hearing. Permit #2 is dependent on the validity of Bylaw 681 which I have declared invalid and therefore Permit #2 is also quashed.

48 The Applicant shall have its costs of this application against both Respondents.

Application granted.

Footnotes

* Corrigenda issued by the Court on January 10, 2008 and August 12, 2008 have been incorporated herein.

1965 CarswellMan 24
Supreme Court of Canada

Wiswell v. Greater Winnipeg (Metropolitan)

1965 CarswellMan 24, [1965] S.C.R. 512, 51 W.W.R. 513, 51 D.L.R. (2d) 754

Wiswell et al (Plaintiffs) Appellants v. Metropolitan Corporation of Greater Winnipeg (Defendant) Respondent

Cartwright, Martland, Judson, Hall and Spence, JJ.

Judgment: April 9, 1965

Counsel: *D. J. Jessiman, Q.C.*, and *A. K. Twaddle*, for plaintiffs, appellants.
D. C. Lennox and *J. McNairnay*, for defendant, respondent.

Subject: Civil Practice and Procedure; Property; Public; Municipal

***Cartwright, J.*:**

1 In this appeal I agree with the conclusion of my brother Hall and, subject to one reservation, with his reasons.

2 I do not find it necessary to decide whether the bylaw which is attacked was void, and propose to deal with the appeal on the assumption that it was merely voidable. On that assumption, I agree with the reasons of my brother Hall for holding that, even if the bylaw was voidable only, the appellants' action was not barred by sec. 206 (5) (added 1962, ch. 97) of *The Metropolitan Winnipeg Act*, 1960, ch. 40.

3 I wish to add a reference to the decision of the court of appeal for Ontario in *Re Gordon and De Laval Co.*, [1938] O.R. 462, in which Middleton, J.A., with whose reasons all the other members of the court agreed, said at p. 468:

> The Municipal Act, RSO, 1937, ch. 266, provides machinery for summarily determining the validity or invalidity of municipal by-laws. This machinery had not been invoked within the time limited by the statute. This did not deprive the Supreme Court of its jurisdiction to set aside the by-law or to pronounce a declaratory decree concerning its validity.

4 In my opinion, this passage, whether or not it was strictly necessary to the decision, correctly states the law and is applicable to the circumstances of the case at bar.

5 I would dispose of the appeal as proposed by my brother Hall.

***Martland, J.* concurs with Hall, J.:**

***Judson, J.* (dissenting):**

6 In spite of the wide range of the argument on this appeal, the issue is very narrow. The trial judge quashed an amending zoning bylaw for want of notice. This judgment was reversed on appeal (1964) 48 W.W.R. 193, Schultz and Guy, JJ.A. dissenting. The sole question is whether adequate notice was given. There is no statutory requirement that any notice be given. The requirements are to be found in the metropolitan council's own procedural resolution for amendments to zoning bylaws. Without setting out the section in full, it provides for advertising in at least two newspapers and by the posting of notices by the applicant for the amendment on the premises which are the subject matter of the proposed amendment. The criticism of the newspaper advertising by counsel for the appellant is, in my opinion, without foundation. It was clear and prominent and should have come to the notice of the appellants. They left the task of perusing advertising to a paid official of their association. He was away at

the time of the advertising and his office assistants failed to see it. It is not disputed that there was no posting of notices on the property and that there was no resolution of council dispensing with this, as there could have been.

7 The majority in the court of appeal held that even if the notice was defective for lack of the posting, the most that could have been made of this omission was to find that the bylaw was voidable only and not void, that it had to be attacked within a three months limitation period, and that, no such attack having been made, the bylaw must stand. The trial judge and the dissenting judges in the court of appeal held that the bylaw was void and could be attacked in an action for a declaration of invalidity even after the three months limitation period had elapsed.

8 Both the trial judge and the majority in the court of appeal found that the bylaw was passed in good faith and in the public interest.

9 I do not think that it helps one towards a solution of this case to put a label on the form of activity in which the metropolitan council was engaged when it passed this amending bylaw. Counsel for the municipality wants to call it legislative and from that he argues that they could act without notice. The majority of the judges prefer the term "quasi-judicial." However one may characterize the function, it was one which involved private rights in addition to those of the applicant and I prefer to say that the municipality could not act without notice to those affected. But I think that they gave clear, reasonable and adequate notice and that failure to direct the posting of notices pursuant to their own internal regulations, which were subject to their own control, does not affect the validity of their bylaw. This bylaw was within the municipal function. The failure to post notices does not go to the question of jurisdiction nor is posting a condition precedent to the exercise of the statutory power. I think that this bylaw was validly enacted and was not open to any successful attack either by way of motion to quash or by way of action.

10 I would dismiss the appeal with costs.

***Hall, J.*:**

11 This is an appeal from the judgment of the court of appeal for Manitoba (1964) 48 W.W.R. 193, allowing the appeal of the respondent from the judgment of Smith, J. of the Court of Queen's Bench in which he held that bylaw No. 177 of the metropolitan corporation of Greater Winnipeg was invalid.

12 On April 13, 1962, the council of the metropolitan corporation of Greater Winnipeg passed bylaw No. 177, rezoning from "R1" single-family district to "R4A" multiple-family district the following land:

> In the City of Winnipeg, in the Province of Manitoba, being in accordance with the Special Survey of the said City and being Lots Forty to Forty-five, both inclusive, which lots are shewn on a plan of survey of part of Lot Forty-five of the Parish of Saint Boniface registered in the Winnipeg Land Titles Office as No. 308, excepting out of said Lots Forty-four and Forty-five all that portion coloured pink on Plan 5262 taken for a road diversion by the City of Winnipeg.

13 This land is situate at the northwest corner of the intersection of Academy Rd. and Wellington Cresc. and comprises approximately 3.4 acres. It is bounded on the north by the Assiniboine River, on the east by Academy Rd. and the approach to the Maryland Bridge, on the south by Wellington Cresc. on which it fronts, and on the west by the easterly boundary of the Shrine Hospital property. The site is located immediately to the west of and adjacent to the south end of Maryland Bridge. Wellington Cres. up to Academy Rd., and Academy Rd. itself, are both designated as major thorough-fares under the draft development plan of the metropolitan corporation of Greater Winnipeg. Lots 43, 44 and 45, comprising approximately 1.8 acres were at all times relevant to this action owned by the late Dr. B. J. Ginsburg. Lots 40, 41 and 42, comprising the most westerly three lots of the area rezoned and forming an area of approximately 1.6 acres were at all times relevant to this action owned by Mr. Joseph Harris.

14 The appellants, who are members of an unincorporated association known as the Crescentwood Home Owners Association, brought action on their own behalf and on behalf of all other members of the association to have said bylaw No. 177 of the respondent declared invalid. The Crescentwood Home Owners Association is comprised of residents of the Crescentwood area in the city of Winnipeg which includes the tract covered by bylaw No. 177. The overall objective of the association has been to

maintain the area in question as a single-family dwelling area. The association had consistently opposed any at tempts to have the area or any part of it rezoned or used for any purpose other than for single-family units.

15 In 1956, Dr. Ginsburg obtained two orders from the zoning board of the city of Winnipeg permitting him to erect on his property an eight-storey, 64-suite apartment block. The granting of these orders was opposed by the association which also unsuccessfully appealed both orders to the municipal and public utility board. The orders were for one year and were renewed from year to year *ex parte* and without notice to the association and were in force and effect on April 1, 1961, when the metropolitan corporation of Greater Winnipeg succeeded the city of Winnipeg in jurisdiction over zoning matters.

16 On November 22, 1961, Messrs. Johnston, Jessiman, Gardner & Johnston, as solicitors for the appellants, wrote the respondent as follows:

> The Metropolitan Corporation of Greater Winnipeg,
> 100 Main Street,
> Winnipeg, Manitoba.
> Attention: Mr. John Pelletier
> Dear Sirs:
>
> **Re: City of Winnipeg Zoning Board Orders**
>
> We act on behalf of the Crescentwood Home Owners Association.
>
> As you know, the City of Winnipeg Zoning Board granted one year extensions to many of the orders made by it just prior to all zoning functions being taken over by Metro in April, 1961. We are interested in what our client's position is in respect to two such orders, namely, Z46/56 and Z113/57. The particulars of these two orders are as follows:
>
> (1) Z46/56 — on February 14th, 1956, the City of Winnipeg Zoning Board granted this order varying the Z. 1 restrictions applicable to the land commonly known as 3 Academy Road and 387 Wellington Crescent, being lot 43 and part of lots 44 and 45, D.G.S. 43/45 St. Boniface, plan 308, to permit the construction and maintenance of an eight storey apartment building containing sixty-four suites and twelve maids' rooms. The said order stipulated that it would automatically expire one year from February 14th, 1956, unless satisfactory operations to construct the said apartment building were completed or an extension of time granted by the Board.
>
> (2) Z113/57 — On April 23rd, 1957, the Board granted order No. Z113/57 varying the R.1 restrictions applicable to a triangular portion of land at the north-west corner of Wellington Crescent and Academy Road to permit the said land to be used in conjunction with adjoining land, being the land described in the preceding paragraph, for the construction and maintenance of the said apartment building in accordance with plans filed with the Board. This order was likewise to expire within one year unless construction was commenced or an extension granted within that period.
>
> The said orders have been extended by the Board from year to year. The last extension granted in respect to Z46/56 expires on February 14th, 1962, while that granted in respect to Z113/57 expires on April 23rd, 1962. On behalf of our client we opposed both applications which were granted by the Board on the dates as indicated and appealed both orders to the Municipal and Public Utility Board which were dismissed.
>
> Our understanding is that the Board extended its orders upon an *ex parte* application being made to it for renewal. Orders Nos. Z46/56 and Z113/57 have been renewed four and three times respectively, without any notice of such application for renewal being given to our client.
>
> Subsection (3) of section 82 of *The Metropolitan Winnipeg Act*, 1960, ch. 40, appears to provide that the Metro Council has all the rights and powers possessed by the Winnipeg Zoning Board.

It would be much appreciated if you would send us a letter advising what policy the Metro Council is adopting towards applications to renew the validity of zoning orders of the Winnipeg Zoning Board such as Z46/56 and Z113/57. We submit that under the circumstances relating to these two orders, no further extensions should be granted by the Council. If this policy were followed it would mean that unless satisfactory operations to construct the said apartment building have been completed before the last extensions granted by the Board expire then a new application to vary the R. 1 restrictions applying to the said land will have to be made to the Board of Adjustment. Such a policy would ensure that our client would have an opportunity to make representations against such an application if it felt it was in its interest to do so.

In the alternative, if the Council decides to entertain applications to renew such orders then we ask that notice be given to our client so that it will have the opportunity to be heard at the hearing of such an application.

Yours truly,
Johnston, Jessiman, Gardner & Johnston,
WPR: dm Per: [Sgd.] W. P. Riley.

17 On or about December 22, 1961, Dr. Ginsburg applied to the metropolitan corporation of Greater Winnipeg to further extend these zoning board orders to April 30, 1963. The application was first heard by the committee on planning on January 4, 1962, at which time Mr. D. J. Jessiman, Q.C., representing the association, opposed the granting of the proposed extension of time on the zoning board orders. The planning committee recommended that the orders be extended until April 30, 1963. The application with the recommendation of the director of planning was dealt with by the metropolitan council on January 11, 1962. Mr. Jessiman again appeared to oppose the granting of the extension of time being asked for. The metropolitan council overruled the objection and extended the time to April 30, 1963.

18 Meanwhile, Dr. Ginsburg had requested the metropolitan corporation by letter, dated December 27, 1961, to rezone his land from "R1" to "R4A." On January 29, 1962, the director of planning, after a meeting of the technical committee, composed of staff members of the corporation, had considered the application, recommended to the planning committee that both the Ginsburg and Harris land be rezoned to an appropriate multiple-family dwelling category.

19 At its meeting of February 1, 1962, the committee on planning concurred in the recommendation of the director and instructed the director to proceed with the usual publication of a notice of public hearing. Subsequently, on March 1 and March 8, 1962, a notice appeared in the *Winnipeg Free Press* and the *Winnipeg Tribune* advising of the meeting to be held on March 12.

20 At the committee on planning meeting on March 12, no one appeared in opposition to the application for rezoning. The committee recommended to council that all six lots, i.e., the Ginsburg and the Harris property, be rezoned to "R4A" classification, a multiple-family district. Council accepted the recommendation of the planning committee and subsequently bylaw No. 177 was passed on April 13, 1962. In the meantime, Dr. Ginsburg had died.

21 On November 28, 1963, the appellants issued a statement of claim asking for a declaratory judgment to the effect that bylaw No. 177 was invalid.

22 On December 18, 1963, the respondent issued a building permit to Welbridge Holdings Limited of Winnipeg who had taken over the Ginsburg interests to erect on the lands in question a 12-storey high-rise apartment block to contain 166 suites, the dimensions of the building being 166'×198'9". The appellants amended their statement of claim on January 20, 1964, claiming a declaration that the said building permit was invalid and should be cancelled.

23 The Crescentwood Home Owners had no notice or knowledge of Dr. Ginsburg's application to rezone from "R1" to "R4A."

24 The appellants contended: (1) That the association should have had notice of the application to rezone as aforesaid and, not having been notified or given an opportunity to oppose the application to rezone, bylaw No. 177 was null and void; (2) That bylaw No. 177 was not passed in good faith and in the public interest, but was, in fact, passed for Dr. Ginsburg's benefit only and was void.

25 The appellants rely on par. 10 of the metropolitan council's resolution which it adopted as the procedure to be followed in connection with applications to amend zoning bylaws and town planning schemes. Par. 10 of that resolution reads:

> 10. Public notice shall be given by advertising in at least two newspapers having a general circulation in the Metropolitan Area each week for at least two weeks before the hearing. The Director of Planning shall notify the municipality in which the land is situated of the proposed amendment and the time and place when the Committee on Planning will consider the amendment. The Director of Planning shall give to the applicant notices to be posted by the applicant on the premises which are the subject of the proposed amendment. Such notices must be erected by the applicant not less than 14 days before the date set for the hearing and shall be in such form as the Director of Planning may from time to time prescribe ....

26 Notice of Dr. Ginsburg's application to rezone was published in two newspapers having a general circulation in the metropolitan area, the *Winnipeg Tribune* and the *Winnipeg Free Press* in the issues of March 1 and March 8, 1962. The size of the advertisements was criticized, but it must be accepted that the advertisements were in the type and format usually used for legal notices of various kinds. The notice in question dealt with four applications, two in the city of Winnipeg, one in the rural municipality of Assiniboia and one in the rural municipality of St. Vital. In so far as it dealt with the area in question in this appeal, the notice read:

> **The Metropolitan Corporation of Greater Winnipeg— Zoning Notice**
>
> Take Notice that the Planning Committee of the Metropolitan Corporation of Greater Winnipeg will hold a public hearing at 2:00 p.m., Monday, March 12, 1962, in the Council Chambers, 100 Main Street, for the purpose of considering a re-zoning of the following areas and permitting certain specific uses on particular properties:
>
> 1. City of Winnipeg
>
> . . . . .
>
> (b) Northwest corner Wellington Crescent and Academy Road. From 'R1' (One-family) District to 'R4A' (Multiple-family) District property situated on the Northwest Corner of Wellington Crescent and Academy Road more particularly described as Lots 40 to 45 inclusive, Plan 308, D.G.S. 45 Parish of St. Boniface except that portion of Lot 45 shown on Plan 5262 reserved for a road diversion by the City of Winnipeg. It is proposed to erect a multi-storey luxury apartment block on this property.

27 However, the second requirement of par. 10 above as to notices to be posted by the applicant on the premises was not complied with. No notices were posted on the premises. No reason for this omission or explanation therefor was given and it appears that the metropolitan council proceeded to deal with the application on the basis that the requirements of said par. 10 had been complied with.

28 The respondent took the position that in enacting bylaw No. 177 it was engaged in a legislative function and not in a quasi-judicial act and that it had the right to proceed without notice to interested parties despite its own procedure resolution before mentioned.

29 I agree with Freedman, J.A. when, on this aspect of the matter, he says at p. 194:

> But to say that the enactment of bylaw No. 177 was simply a legislative act is to ignore the realties and the substance of the case. For this was not a bylaw of wide or general application, passed by the metropolitan council because of a conviction that an entire area had undergone a change in character and hence was in need of re-classification for zoning purposes. Rather this was a specific decision made upon a specific application concerned with a specific parcel of land. Metro had before it the application of Dr. Ginsburg, since deceased, for permission to erect a high-rise apartment building on the site in question. Under then existing zoning regulations such a building would not be lawful. To grant the application would require a variation in the zoning restrictions. Many residents of that area, as Metro well knew, were opposed to such a variation, claiming that it would adversely affect their own rights as property holders in the district. In proceeding to enact bylaw No. 177 Metro was essentially dealing with a dispute between Dr. Ginsburg, who wanted the zoning requirements

to be altered for his benefit, and those other residents of the district who wanted the zoning restrictions to continue as they were. That Metro resolved the dispute by the device of an amending bylaw did indeed give to its proceedings an appearance of a legislative character. But in truth the process in which it was engaged was quasi-judicial in nature; and I feel I must so treat it.

Then counsel argues as well that the governing statute does not call for notice. Hence, he says, notice was not required. I am unable to accept this contention. A long line of authorities, both old and recent, establish that in judicial or quasi-judicial proceedings notice is required unless the statute expressly dispenses with it. The mere silence of the statute is not enough to do away with notice. In such cases, as has been said, the justice of the common law will supply the omission of the legislature. Some of the authorities dealing with this subject are referred to by Kirby, J. in the recent case of *Camac Exploration Ltd. v. Oil and Gas Conservation Board of Alta.* (1964) 47 W.W.R. 81.

30 The fact is that the association did not see the notice which was published in the *Winnipeg Tribune* and the *Winnipeg Free Press* on March 1 and 8, 1962. An explanation as to why the association did not see the advertisement published in the *Winnipeg Tribune* and the *Winnipeg Free Press* is that Mr. S. Greene, who was secretary of the association at the relevant time and who died prior to the trial, was out of Winnipeg on holidays at that period in March, 1962. Metro could not, of course, be expected to know this. However, it was stated in evidence by Mr. Johnston, who was president of the association at the time in question, that if the placards contemplated by par. 10 of the procedure resolution had been erected on the premises for the 14-day period before the date set for the hearing he would certainly have seen them. He testified further that if he or some other member of the association had seen the placards, the association would have taken certain action to oppose the application on March 12. It may be worth observing that on March 1, 1962, Metro notified Messrs. Keith & Westbury, solicitors for Dr. Ginsburg, that the application to rezone the property would be considered by the planning committee of Metro at a public hearing to be held at 2:00 p.m., Monday, March 12, 1962, and the letter concluded with this paragraph: "You or an accredited representative should attend this meeting in accordance with section 80 of the Metropolitan Winnipeg Act." No similar or any notice was sent to the association and as it was no one from the association appeared to oppose the application when it came before Metro council on March 12, 1962. It is manifest that had the association received notice of the hearing or had it been aware that the application was to be dealt with on March 12, 1962, it would have had counsel present to object to the rezoning. The association had, on January 11, 1962, opposed extending the zoning board orders which Dr. Ginsburg had obtained in 1956 and which had been renewed from year to year until 1961. Although Metro knew of the association's pronounced interest in any rezoning of the property in question, it did not communicate with it when Dr. Ginsburg applied on December 27, 1961, to rezone from "R1" to "R4A," nor did Metro, when all the interested parties were before it, make any reference to that new application when on January 4, 1962, and on January 11, 1962, counsel for the association opposed further extending the 1956 orders permitting Dr. Ginsburg to erect a 64-suite apartment building. Moreover, Metro, on January 23, 1962, wrote Messrs. Johnston, Jessiman, Gardner & Johnston as follows:

Messrs Johnston, Jessiman, Gardner & Johnston,
Barristers,
3rd Floor, Natural Gas Bldg.,
265 Notre Dame Avenue,
Winnipeg 2, Manitoba.
Att: Mr. D. J. Jessiman.
Dear Sirs:

Please be advised that at its meeting held on January 11th, 1962, the Metropolitan Council granted an extension of Winnipeg Zoning Board Orders Z46/56 and Z113/57 in favour of Dr. B. J. Ginsburg, insofar as they affect No. 3 Academy Road and No. 587 Wellington Crescent, and more particularly described as Lot 43 and part of Lots 44 and 45, D.G.S. 43/45, St. Boniface, Plan 308 to April 30th, 1963, the said orders allowing the applicant to construct a 64 suite apartment block in the above noted site.

Yours truly,

[Sgd.] D. C. Lennox,
D. C. Lennox,
RGP/nm Secretary.

31 This letter refers to the orders permitting a 64-suite apartment building without in any way referring to the new application to rezone and to erect a 12-storey, 166-suite apartment building which was then actually under consideration. Metro was aware at this time that Dr. Ginsburg did not intend proceeding with the eight-storey, 64-suite project.

32 What are the legal consequences of the manner in which Dr. Ginsburg's application to rezone was dealt with by the respondent? The matter being, as I have stated, a quasi-judicial one, Metro was in law required to act fairly and impartially: See *St. John v. Fraser*, [1935] S.C.R. 441, at 452, 64 C.C.C. 90, affirming [1935] 2 W.W.R. 64, 49 B.C.R. 502, 64 C.C.C. 57. In the language of Lord Loreburn in *Board of Education v. Rice*, [1911] A.C. 179, at 182, 80 LJKB 796: "... they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything."

33 The obligation of a municipal body in carrying out its responsibilities is aptly and correctly stated by Masten, J.A. in *Re Howard and Toronto (City); Re Sweet and Toronto (City)* (1928) 61 O.L.R. 563, at p. 576:

> In dealing with a proposed by-law which involves a conflict of interests between private individuals who are affected, the council, while exercising a discretion vested in it by statute, acts in a quasi-judicial capacity ... and its preliminary investigations and all subsequent proceedings ought to be conducted in a judicial manner, with fairness to all parties concerned.

34 And, at p. 579:

> The council is empowered in cases like this to adjudicate between conflicting interests.
>
> In performing that duty councils are bound, like courts of justice, to see that every person interested is afforded full opportunity of presenting his views and contentions. The powers conferred on the council carry with them an obligation to see that every one affected gets British fair play, not only from the council itself when passing the bylaw, but from its officers and committees in the preliminary steps leading up to the final result.

35 Guy, J.A. (Schultz, J.A. concurring), after referring to these quotations, went on to say at p. 205:

> The evidence disclosed so much correspondence and discussion over such a lengthy period of time, that it is not open to the Metro council to rely on the argument that this was a legislative bylaw for the good of the community, in the public interest, in good faith, and initiated by Metro council itself in an attempt to 'better the lot of' the inhabitants of the metropolitan area as a whole. In the light of all of the evidence, it is clear that the passage of this bylaw was simply the end result of a plan conceived and carried forward by Dr. Ginsburg and his solicitors.
>
> This in turn indicates that the bylaw was passed in the interest of one person directly and would only indirectly benefit the metropolitan area as a whole. This, of course, goes to the matter of public interest.
>
> The fact that written notice of a hearing of February 1, 1962 and March 12, 1962, was sent to Dr. Ginsburg's solicitors *and not to the home-owners*, despite the fact that the opposing interests of the home-owners were known to Metro, not only places Metro in an untenable position from the standpoint of equitable justice, but emphasizes the argument that the passage of this bylaw was indeed to benefit one person and had little if any regard for the public interest as a whole.

36 The point to be decided is whether the failure to post the placards on the premises and proceeding to hold hearings on Dr. Ginsburg's application to rezone in the absence of the association when Metro knew that the association would oppose any such application and was actually opposing the extension applications at that very time, vitiated bylaw No. 177 and rendered it a nullity.

37 I am of opinion that the bylaw was void in the particular circumstances of this case. It was not merely the failure to post the placards but the manifest ignoring of the fact known to it that the association would oppose the bylaw and that the association had been advised by the letter of January 23, 1962 (Ex. 1) that the orders of 1956 had been extended to April 30, 1963, for the eight-storey, 64-suite apartment block, leaving the association with no reason to believe or expect that the concurrent application to rezone was at that very time being processed without its knowledge.

38 The obligation on a body with the power to decide not to act until it has afforded the other party affected a proper opportunity to be heard is aptly stated by Lord Reid in *Ridge v. Baldwin*, [1964] A.C. 40, [1963] 2 W.L.R. 935, [1963] 2 All E.R. 66 as follows, at p. 81:

> Then there was considerable argument whether in the result the watch committee's decision is void or merely voidable. Time and again in the cases I have cited it has been stated that a decision given without regard to the principles of natural justice is void and that was expressly decided in *Wood v. Woad* (1874) LR 9 Ex 190, 43 LJ Ex 153. I see no reason to doubt these authorities. The body with the power to decide cannot lawfully proceed to make a decision until it has afforded to the person affected a proper opportunity to state his case.

39 Having arrived at the conclusion that the bylaw was void, there remains for determination the question whether the appellants' action was barred by the provisions of sec. 206 (as amended 1962, ch. 97) of *The Metropolitan Winnipeg Act*, which reads as follows:

> 206. (4) Any resident of the metropolitan area may apply to a judge of the Court of Queen's Bench in chambers to quash a by-law of which the metropolitan council in the manner in which, and for the reasons for which, a by-law of a municipal council may be quashed under sections 390 to 391 and 393 to 395 of The Municipal Act and those sections and subsection (2) of section 290 of that Act apply, *mutatis mutandis*, to an application made under this subsection and in particular, substituting the expression 'metropolitan corporation' for 'municipal corporation' and 'secretary' for 'clerk.'
>
> (5) No application under subsection (4) shall be entertained unless it is made within three months from the passing of the by-law.

40 This section cannot be invoked as a bar to the action. The law in this regard is stated by *Rogers* in *The Law of Canadian Municipal Corporations*, vol. 2, p. 893, as follows:

> ... if a by-law is within the power of the council and remains unimpeached within the time limited, it is validated by the effluxion of time.
>
> It must be stressed, however, that the curative effect of a failure to quash a by-law is limited to by-laws which are merely voidable and not void. The courts have made a distinction between these two classes of illegal by-laws. A voidable by-law is one that is defective for non-observance or want of compliance with a statutory formality or an irregularity in the proceedings relating to its passing and is therefore liable to be quashed whereas a void by-law is one that is beyond the competence to enact either because of complete lack of power to legislate upon the subject matter or because of a non-compliance with a prerequisite to its passing.

41 Even if the bylaw was voidable only as argued by the respondent, I do not think that sec. 205 of *The Metropolitan Winnipeg Act* would bar the action for a declaratory judgment declaring the bylaw invalid. The section in question appears to provide a summary procedure to quash bylaws of the metropolitan council but it does not apply to an action such as this. There is nothing in the section depriving the appellants of their right to bring an action to have the bylaw declared invalid: *Wanderers Invt. Co. v. Winnipeg (City)*, [1917] 2 W.W.R. 197, at 205, 27 Man. R. 450.

42 In view of my finding that the bylaw was void for want of notice and for failure to give the appellants an opportunity to oppose the application to rezone, I do not find it necessary to deal with the second ground that bylaw No. 177 was not passed in good faith and in the public interest.

43 I would, accordingly, allow the appeal and restore the judgment of Rhodes Smith, J. with costs throughout.

***Spence, J.* concurs with Cartwright, J.:**

2009 PESC 35
Prince Edward Island Supreme Court

Souris (Town) v. Jarvis

2009 CarswellPEI 67, 2009 PESC 35, 181 A.C.W.S. (3d) 1023,
292 Nfld. & P.E.I.R. 10, 65 M.P.L.R. (4th) 136, 902 A.P.R. 10

The Town of Souris (Applicant) and Henry Jarvis and/or Anne McPhee and William (Billy) MacMaster (Respondents)

Wayne D. Cheverie J.

Heard: August 31, 2009
Judgment: October 26, 2009
Docket: S1-GS-23256

Counsel: John W. Hennessey, Q.C. for Applicant
J. Melissa MacKay for Respondents

Subject: Public; Property; Municipal

APPLICATION by municipality for order declaring that respondent was in breach of by-law, mandatory order requiring removal of mobile home, permanent injunction, and costs.

***Wayne D. Cheverie J.*:**

1 The applicant is the Town of Souris ("Souris"). Its authority to enact bylaws to give effect to its official plan is derived from the *Planning Act*, R.S.P.E.I. 1988, Cap. P-8 (the *"Act"*). In 2002, Souris made its Zoning and Subdivision Control (Development) Bylaw under authority granted to it under s. 16 of the *Act*. Required Ministerial approval was granted on February 27, 2002. Section 4.47 of the bylaw provided that mobile homes shall not be permitted to be located within the Town of Souris.

2 The respondents, Anne McPhee and William MacMaster ("McPhee" and "MacMaster") purchased the Souris Trailer Park in 2005. They rent space in their park to qualified tenants. During the summer of 2008, the respondent, Henry Jarvis ("Jarvis") placed his mobile home on a lot in the trailer park. Souris alleges Jarvis knew he was prohibited from the placement of his mobile home in the park at that time, but did so anyway. Efforts to have Jarvis remove his mobile home from the park have failed. Therefore, Souris brings this application (as amended) for:

> 1. An order declaring Jarvis is in breach of Souris' bylaw prohibiting mobile homes;
>
> 2. A mandatory order requiring Jarvis to remove, forthwith and at his cost and expense, his mobile home from within the Town of Souris;
>
> 3. A permanent injunction enjoining Jarvis from placing any mobile home within the boundaries of the Town of Souris, so long as the bylaws of the Town of Souris prohibit such placement; and
>
> 4. Costs on a substantial indemnity basis.

3 Several affidavits were filed in support of the application and each of the respondents filed affidavits in opposition. Although accorded the opportunity, neither counsel conducted any cross-examination on these affidavits. Notwithstanding the fact there was no cross-examination, the following chronology of events is clear from the affidavit of Shelley MacInnis, Souris

Administrator, sworn on the 29th day of June, 2009 as confirmed in part by the Jarvis affidavit sworn on the 3rd day of August, 2009. The chronology of events, which I find as facts, are as follows:

1. August 18, 2008 - Jarvis made an application to Souris to move his mobile home into the Town of Souris.

2. August 19, 2008 - Jarvis is informed by Souris that his application is denied because mobile homes are not permitted in the town.

3. August 21, 2008 - Souris confirms its denial of the permit to Jarvis by letter from MacInnis to him refunding his application fee and citing the bylaw prohibiting the location of mobile homes in the town.

4. August 21, 2008 - Jarvis locates his mobile home in the Souris Trailer Park.

5. August 29, 2008 - McPhee and MacMaster appeal the denial of the permit to Jarvis to the Island Regulatory and Appeals Commission ("IRAC").

6. October 21, 2008 - IRAC conducts a public hearing at which it hears the appeal filed by McPhee and MacMaster.

7. November 24, 2008 - IRAC issues written reasons supporting its order denying the McPhee and MacMaster appeal and in the course of doing so, IRAC confirmed Souris correctly applied its bylaw and official plan in reaching its decision to deny Jarvis' application.

8. December 8, 2008 - by letter, all three respondents request Souris to issue a special permit to allow Jarvis to keep his mobile home in the park.

9. Souris agrees to allow Jarvis to remain in the trailer park for a six month period, on the condition he will move his mobile home outside the Town of Souris by June 12, 2009. This agreement was reduced to a Memorandum of Understanding dated December 12, 2008 and signed by the town and all three respondents on that date. Souris entered into this agreement on compassionate grounds since it maintained it did not have the authority to issue a "Special Permit" as requested by the respondents.

10. As of the date of this hearing, Jarvis continues to locate his mobile home in the Souris Trailer Park.

Position of the parties

Town of Souris

4 Souris argues Jarvis has breached its bylaw prohibiting the location of mobile homes within its town boundaries. The relevant portion of its zoning and development bylaw is found in s. 4.47 and s-s. 4.42(1) which read as follows:

> **4.47 Mobile Homes**
>
> Mobile Homes shall not be permitted to be located within the municipality.
>
> . . . . .
>
> **4.42 Non-Conforming Uses**
>
> (1) Subject to the provisions of this Bylaw, a building or structure, or use of land, buildings or structures lawfully in existence on the effective date of approval of this Bylaw may continue to exist;...

Based on the facts as I have found them, Souris then moved under s. 24 of the *Act* to have its bylaw enforced by application to this Court to restrain Jarvis from keeping his mobile home in the Souris Trailer Park. Souris seeks relief as provided for in s-s. 24(2) of the *Act* which allows this Court to grant any one or more of the following:

(a) a declaration that an act engaged in or about to be engaged in by a person is or will be a breach of any bylaw or regulation or provision of this Act;

(b) an injunction restraining any person from breaching or continuing to breach any such bylaw, regulation or provision;

(c) an order directing any person to comply with the requirements of any such bylaw, regulation or provision and directing that compliance be carried out under the supervision of a named person; and

(d) such other order as the court or judge may determine.

5 The position adopted by Souris is quite straightforward. It is of the view it enacted a valid bylaw in furtherance of its official plan and part of that bylaw prohibits the location of mobile homes within its boundaries. Jarvis made an application in 2008 to locate his mobile home within the town boundaries and was denied. The owners of the trailer park sought to have that denial reversed and took their case to IRAC. After a full hearing, IRAC denied the appeal whereupon McPhee, MacMaster, and Jarvis asked Souris to issue a special permit to, in effect, exempt them from the operation of the bylaw. Souris responded by saying it had no such power, but, given the time of year and on compassionate grounds, it allowed Jarvis to remain in the park until June, 2009. Jarvis refuses to leave the park and Souris now asks this Court to issue the relief sought because Jarvis has breached its bylaw and despite alternate efforts to accommodate him in the meantime, he continues to breach that bylaw.

The respondents

6 Jarvis, McPhee, and MacMaster raise three arguments in response to Souris' application, any one of which they say is sufficient to deny the injunction requested. Those arguments may be summarized as follows:

1. They are entitled to have the mobile home located in the Souris Trailer Park based on the principle of non-conforming use;

2. Procedural fairness was not adhered to in enacting the bylaw and amending the official plan;

3. The bylaw in question is unfair, represents unequal treatment and is a discriminatory use of zoning power.

I shall address each of these arguments in turn.

1. Non-conforming use

7 The respondents rely on the following definition of non-conforming use:

A non-conforming use is a use for which a building or land is lawfully occupied at the time a restricted area by-law becomes effective but which does not comply with the zoning regulations of the by-law applying to the district in which it is located.

(*Canadian Planning & Zoning - Canadian Law of Planning and Zoning* (2d), Ian MacF. Rogers, Q.C., Alison Scott Butler, Q.C., Thomas Carswell: 2005 Toronto, p. 6-2.)

8 The respondents argue this definition, when coupled with s-s. 4.42(1) of the bylaw which refers to the "use of land" in existence on the effective date of the bylaw, provides an exemption for them from the operation of the bylaw. They argue the land on which Jarvis' mobile home currently sits was a legal use of the land prior to 2002 when the current bylaw was enacted. They say the use of this land has not changed and, therefore, Jarvis is entitled to move his mobile home onto a lot in the Souris Trailer Park on which had been located a mobile home previously. In support of this argument, the respondents refer to and take comfort in the decision of DesRoches J., as he then was, in the case of *Prince Edward Island Museum & Heritage Foundation v. Charlottetown (City)*, [1998] P.E.I.J. No. 20 (P.E.I. T.D.), where at para. 29 of his decision, DesRoches J. quotes with approval an Ontario Supreme Court decision as follows:

[29] Applying the Central Jewish Institute decision, Ferguson J. held in O'Sullivan Funeral Home Ltd. v. Sault Ste. Marie (1961), 28 D.L.R. (2d) 1 (Ont. S.C.) that a non-conforming use of premises, however slight, as of the date of the passing of a restrictive by-law, entitles the occupier to maintain the use in respect of the premises as a whole.

9 It is common ground among the parties that the Souris Trailer Park was owned by Mr. Alfred Fraser in 2002 when the bylaw in question was enacted. In particular, it appears from the affidavit of Shelley MacInnis sworn on the 11 th day of August, 2009, which speaks to the history of the enactment of the current bylaw prohibiting mobile homes, that a public meeting was held on November 26, 2001, which was attended by Mr. Fraser. Apparently he had some concerns relating to the front and rear yard setbacks for mini homes allowed in his trailer park, which concerns were considered by the Souris Council and incorporated into the bylaws and amended official plan in February, 2002.

10 By letter dated September 7, 2004 from McPhee and MacMaster to the Town of Souris (see Exhibit "C", MacInnis affidavit of July 29, 2009), they indicate they are interested in purchasing Fraser's trailer court, and they express the understanding that only mini homes are allowed to be moved into the park (and not mobile homes), but seek verification in writing that the existing lots are sufficient in size to accommodate the new mini homes. According to their counsel, McPhee and MacMaster went on to purchase the trailer park in 2005 from Fraser. Therefore, it is reasonable to conclude McPhee and MacMaster were aware of the restrictions of the 2002 bylaw when they purchased the property in 2005. How, then, can they rely on the principle of non-conforming use? The simple answer is they cannot rely on this principle. The reason they cannot so rely is because the principle of non-conforming use exists to protect those persons who had mobile homes in the trailer park before the new bylaw made it illegal to do so.

11 This argument was addressed by IRAC in its decision of November 24, 2008. (IRAC Order LA08-08, Exhibit "D", MacInnis affidavit of July 29, 2009.) In its reasoning process, IRAC cited s. 4.47 and s-s. 4.42(1) of the bylaw and also considered policy PR-6 of the Official Plan which is found at para. 10 of its decision as follows::

Policy PR-6: Prefabricated Homes

It shall be the policy of Council to not discriminate against housing forms based solely on the method of construction. Older style mobile homes which have a unique style and character shall no longer be permitted to be located within the Town. The current mobile home court shall be designated as a Mini-Home park and only modern CSA approved mini-homes shall be permitted. Mini-homes shall also be permitted in residential areas only where they are compatible with adjacent residences in terms of size and architectural style. Larger "modular" homes shall be permitted in all residential areas.

Plan Action:

- The current mobile home park shall be monitored and the owners required to maintain their units in an appropriate manner. When units become delapitated [sic], Council shall take action to encourage their removal.

- Modern "mini-homes" shall be permitted within the existing mobile home park or as a "special permit use" but only when they are deemed to be architecturally compatible with adjacent homes.

- Larger, "modular homes" shall be permitted in all residential zones.

- No further mobile home courts shall be located in the Town but consideration may be given to the establishment of a "mini-home" subdivision if it is developed to a high standard and well segregated from existing neighbourhoods.

[Emphasis Added]

Following a consideration of those sections of the bylaw and official plan, IRAC concluded as follows at paras. 13 and 14:

[13] Section 4.47 of the Bylaw appears to prohibit mobile homes in the Town. Subsection 4.42(1) of the Bylaw appears to temper this prohibition and the Town acknowledges that mobile homes which were situate in the Town prior to the

approval of the Bylaw and Official Plan remain. Ms. McPhee and Mr. MacMaster contend that the inclusion of the phrase "use of land" would allow the Park to continue lawful uses permitted prior to the approval of the Bylaw. They therefore contend that mobile homes ought to be permitted to move into the Park.

[14] Based on a reading of the Bylaw alone, the Commission would be inclined to agree with the Bylaw interpretation provided by Ms. McPhee and Mr. MacMaster. However, when reading Policy PR-6 as a whole, the Commission finds that the intention of the Official Plan is to prevent mobile homes from being moved into the Park and the Town while permitting those already in place to remain. Subsection 15(2) of the ***Planning Act*** provides that the Official Plan prevails over any conflict or inconsistency between the Official Plan and the Bylaw.

The foregoing reasoning and analysis are correct, and IRAC was justified in dismissing the appeal before it.

12 IRAC was the appropriate body to consider the denial of Jarvis' application, and it is conceded before me that no application for judicial review of that decision was launched by McPhee and MacMaster. Therefore, I am of the view that none of the respondents can raise that argument again in this application when they did not pursue any judicial review of the IRAC decision. The issue is *res judicata*.

13 However, for the sake of completeness, if the issue is not *res judicata*, then I would adopt the analysis and conclusion of the IRAC decision to dispose of the argument in any event. Indeed, the quote from DesRoches J. in the *Heritage Foundation* case further supports the position that the respondents here cannot invoke the principle of non-conforming use where clearly that case stands for the proposition that it is the entitlement of "the occupier" to rely on that principle. A fair interpretation of "the occupier" in this case would be the individual having a mobile home on the lot in question before the enactment of the bylaw and not Jarvis who placed his mobile home on that same lot in the full knowledge such location was prohibited. Likewise, McPhee and MacMaster can take no comfort in this principle. Therefore, the argument advanced by the respondents based on the principle of non-conforming use must fail.

2. Procedural fairness

14 The respondents submit they were not accorded the requirement of procedural fairness when Souris enacted the bylaw and amended its official plan. They argue the Supreme Court of Canada decision in *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), applies to the case at bar and when the five factors referred to in *Baker* are considered in conjunction with the requirements of ss. 11 and 18 of the *Act*, they conclude the duty owed to them was breached.

15 While I will deal with the procedural requirements set out in ss. 11 and 18 of the *Act*, my reading of the *Baker* case leads me to the conclusion it does not apply to the facts before me. In *Baker*, the appellant was ordered deported by an immigration officer. The officer determined there were no humanitarian or compassionate grounds upon which to exempt Baker from the regulations which otherwise required her to be deported. In making his decision, the immigration officer was exercising authority delegated to him under the *Immigration Act*, R.S.C., 1985, c. I-2. In doing so, he was exercising a quasi-judicial function akin to a tribunal as that term is understood in administrative law. The fact situation in *Baker* prompted both parties to that appeal to agree the duty of procedural fairness applies to such humanitarian and compassionate decisions. This in turn led the Supreme Court of Canada to articulate the five factors that must be considered by a court in determining whether procedural fairness has been properly considered and applied.

16 In the case at bar, Souris was not making a judicial or quasi-judicial decision when passing its zoning bylaw to give effect to its official plan. This is a legislative function and not a judicial function. As the Supreme Court noted at para. 23 of *Baker*, the more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness. When Souris proceeded to develop its official plan and pass its bylaws to give effect to that official plan, it was acting legislatively and its determinations in no way resembled judicial decision making. As long as Souris adhered to and followed the provisions of the *Act*, then it is not subject to the requirements of procedural fairness as articulated in *Baker*. In that sense, the *Baker* case has no application to the case at bar.

17 However, Souris must act in accordance with the provisions of the *Act*. Two particular sections have been referred to by the respondents in this context. They are ss. 11 and 18 which provide as follows:

> 11.(1) Before recommending to the council the adoption of an official plan or any review of an official plan, the planning board shall give an opportunity to residents and other interested persons to make representations.
>
> (2) The board shall hold at least one public meeting, notice of which is published on at least two occasions in a newspaper circulating in the area indicating
>
> (a) in general terms, the content of the official plan or review of the official plan and the proposed implementing bylaws;
>
> (b) the date, place and time of the meeting, which shall be held not less than seven clear days after the date of publication o the notice;
>
> (c) the location at which copies of the proposed official plan or review of the official plan or proposed bylaws may be inspected during office hours; and
>
> (d) that residents and other interested persons are invited to attend and make representations concerning the plan or review.
>
> (3) The planning board shall maintain a record of the proceedings at the public meeting and, in particular, of the objections and representations made by residents and other interested persons.
>
> . . . . .
>
> 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.
>
> (2) Where a bylaw amendment requires an amendment to the official plan pursuant to subsection 15(2), the council may consider the official plan amendment concurrently with the bylaw and shall
>
> (a) indicate in general terms, in the notice published under clause (1)(b), the nature of the proposed plan amendment; and
>
> (b) give the planning board an opportunity to comment on the plan amendment prior to adoption of the amendment.

Section 11 sets out the prerequisites before an official plan or a review of an official plan is recommended to Town Council. The MacInnis affidavit sworn on the 11th day of August, 2009, together with the exhibits attached thereto, clearly demonstrate that the requirements of s. 11 were met. In particular, a notice of a public meeting was published on two occasions, at least seven days prior to the scheduled meeting of November 26, 2001. The notice, which appears as Exhibit "A", advises residents of the opportunity to make representations concerning proposed major revisions to the Souris Official Plan and implementing Development Bylaw; identifies the public meeting will be held Monday, November 26, 2001 at 7:30 p.m. at the Eastern Kings Regional Services Centre; and that copies of the documents are available at the Town Office in Souris.

18 The respondents argue that as affected parties they were given insufficient notice of the proposed official plan and implementing bylaws. This statement is without merit because McPhee and MacMaster were not entitled to any more notice

than any other interested person as required by s. 11 of the *Act*. They were entitled to no more specific notice than any other resident of the Town of Souris who would be governed by the proposed official plan and bylaws.

19 The second argument advanced by the respondents is that the provisions of s. 18 of the *Act* were not complied with. They argue Council did not give seven days notice to amend its bylaw as required by para. 18(1)(b) of the *Act*. The facts appear to be that at the public meeting on November 26, 2001, Mr. Fraser, who owned the trailer park at the time, raised some concerns about setbacks. At its February 18, 2002 meeting, the Souris Council sought to address those concerns by amending the bylaw as it related to setbacks. This required Souris to rescind the development bylaw in order to enact the required amendment because the official plan takes precedence over the development bylaw. This is what the Council did. (See Exhibit "C" to MacInnis affidavit of August 11, 2009.) The evidence suggests only this one small amendment to the entire bylaw was passed in 2002 to accommodate the concerns of Mr. Fraser.

20 The evidence before me does not disclose that the required seven days notice was given. This may call into question the legality of that particular specific amendment, but that does not affect the balance of the other bylaws or the entire official plan. I am of the view that with the exception of the lack of this latter seven days notice, Souris acted in accordance with the requirements of the *Act* in bringing forward its official plan and then enacting its bylaws to give effect to that plan.

21 In addition to my conclusion that the legislative process was followed with the exception that I noted, the presumption of validity applies. It is presumed that, in this case, the official plan and bylaws have, in fact, been validly enacted and, therefore, are to be given legal effect unless and until a court of competent jurisdiction declares them to be invalid. The burden of establishing that invalidity is on the respondents. The presumption of validity is thus a rule of law and a rule of evidence, rather than a role of interpretation. (See *Sullivan on the Construction of Statutes*, 5th ed. at p. 458.) The respondents have not discharged the burden on them as to the validity of the bylaw prohibiting mobile homes within the Souris town boundaries.

22 Therefore, the respondents' reliance on procedural fairness as contemplated by the *Baker* case is misplaced in the current fact situation. In addition, its extended argument that procedural fairness was violated in the manner in which the bylaw was enacted is not persuasive.

3. Unequal treatment and discriminatory use of zoning power

23 The respondents argue there was a lack of fairness, openness and impartiality when the bylaw in question was enacted and the official plan was amended without the participation of those affected. The respondents also suggest the presence of bad faith on the part of Souris in implementing its plan and bylaws. I can find nothing in the evidence at this hearing to support such a suggestion. To the contrary, it appears to me Souris was responsive to Mr. Fraser's concerns back in 2001 such that it amended its bylaw to address his concerns. All required notices of the first meeting to consider the official plan and bylaws were properly given. McPhee and MacMaster were well aware of the restrictive bylaw when they purchased the trailer park in 2005. I do not know whether they encouraged Jarvis to place his mobile home in their park or not, but the evidence clearly indicates Jarvis was advised he wasn't allowed to do so, but nevertheless went ahead and moved his trailer onto the lot in the trailer park.

24 By their own admission, McPhee and MacMaster are in the business of renting lots in their park to persons such as Jarvis, so they certainly have a monetary interest in his ability to do so. One might infer McPhee and/or MacMaster encouraged Jarvis to act in contravention of the bylaw, or at the very least acquiesced in such breach. Notwithstanding the actions of the respondents, Souris attempted to resolve the issue amicably. It participated in the appeal before IRAC and then entered into the Memorandum of Understanding so as to allow Jarvis to remain in his mobile home in the park over the winter months. It gave him until June 12, 2009 to make other arrangements for his mobile home, and still Jarvis did not leave. There are certainly no indicators of bad faith on the part of Souris, but the same may not be said of the respondents.

25 On the issue of bad faith, the respondents referred the court to the case of *H.G. Winton Ltd. v. North York (Borough)* (1978), 20 O.R. (2d) 737 (Ont. Div. Ct.). In that case the bylaw was enacted in bad faith and was found to be discriminatory. The court found the council acted unreasonably and arbitrarily without the degree of fairness, openness and impartiality required of a municipal government. Those findings were unassailable according to the facts of that case.

26 In *Winton*, the applicant agreed to sell his property for use as a church. The zoning in effect permitted such a use and had done so for over 25 years. The proposed church received confirmation in writing that its construction was permitted in this area, whereupon the applicant sold his property to the church. Within a few weeks after the agreement was signed, the municipality re-zoned the property and the immediate surrounding area so as to prohibit church uses. In doing so, the council did not have any material or studies from the planning board or planning staff before it, as was its usual practise. All it had was a rate payers' petition and a letter submitted by neighbouring property owners requesting the area remain as residential use. On those facts alone, it is clear bad faith and discrimination were front and centre in that case. The applicant there was the subject of unfair and unequal treatment and was discriminated against. The law in *Winton* is sound, but it has no application to the facts before me. I can find nothing in the evidence before me to support the respondents in this argument and therefore they have failed to persuade me the bylaw is unfair and represents unequal treatment and is a discriminatory use of zoning power.

Disposition

27 In deciding this application in favour of Souris, I agree with their counsel's submission that this case is fundamentally about the rule of law. Souris went about enacting its official plan and subsequent bylaws in an open, fair, and transparent way. Souris is the duly elected body representing the residents of the Town of Souris. It is its responsibility to enact bylaws which govern all citizens of that municipality. The respondents, particularly Jarvis, have chosen to openly act in defiance of Souris' bylaw prohibiting mobile homes within its boundaries. Such actions by citizens cannot be tolerated. To do so, at a minimum, erodes a fundamental principle of a democratic society and at worst leads to chaos.

28 For all of the foregoing reasons, Souris is entitled to relief. The relief sought by Souris is contained in s-s. 24(2) of the *Act*. It asks that I exercise my discretion and declare the respondent, Henry Jarvis, is in breach of the Town of Souris Zoning and Subdivision Bylaws, ss. 4.28 and 4.47. I am prepared to make such an order because, in my view, Jarvis has clearly breached, and continues to be in breach, of those bylaws.

29 Pursuant to para. 24(2)(b) of the *Act*, Souris seeks an injunction against Jarvis requiring him to remove forthwith and at his cost and expense, his mobile home from within the Town of Souris. The authority reposed in me by this paragraph is statutory and not equitable. Souris urges me to exercise my discretion and grant the mandatory injunction sought and in support of that submission refers to the case of *Maple Ridge (District) v. Thornhill Aggregates Ltd.* (1998), 162 D.L.R. (4th) 203 (B.C. C.A.). In that case the British Columbia Court of Appeal had this to say about the difference between a statutory injunction and an equitable injunction at para. 7:

> The source for the injunction in the case under appeal is statutory, and not equitable. Factors that might be considered by a court in an application for an equitable injunction will be of limited, if any, application to the grant of a statutorily based injunction. See: Shaughnessy Heights Property Owners' Association v. Northup (1958), 12 D.L.R. (2d) 760 (B.C.S.C.) at 763, where Macfarlane J. said:
>
> > Mr. Guild's primary submission was that the remedy that the statute provides is a remedy by way of injunction, that the action being in equity, failure on the part of the Association over many years to enforce the Act raises an equity against the plaintiff. Mr. McFarlane says this is not an equitable proceeding; nor is the remedy by way of an injunction asked for in this action an equitable remedy; that the action is based on a statute and the remedy asked is a statutory remedy. Here again I think the reasons of the Court of Appeal make it clear that the right of action is a right based on the statute. As that judgment is unreported, I quote the relevant part of the reasons. Mr. Justice O'Halloran says: "In my judgment the statute speaks clearly and leaves no room for doubt as to its purpose, namely, that any violation of the statute such as occurred here, or any attempted violation, may be restrained by injunction. Proof of violation or attempted violation in my judgment is the sole essential to obtain an injunction. For these reasons I would dismiss the appeal".

And at para. 9 of the same decision, the court goes on to say:

> 9 Where an injunction is sought to enforce a public right, the courts will be reluctant to refuse it on discretionary grounds. To the extent that the appellants may suffer hardship from the imposition and enforcement of an injunction, that will not outweigh the public interest in having the law obeyed.

30 On the strength of this authority, I am satisfied a mandatory order should issue requiring the respondent, Henry Jarvis, to remove, at his cost and expense, his mobile home from within the Town of Souris. The time lines for such removal I shall address shortly.

31 For the same reasons that prompt me to grant the order requiring Jarvis to remove his mobile home, I am also convinced he ought to be prohibited from placing any mobile home within the boundaries of the Town of Souris, so long as the bylaws of the Town of Souris prohibit such action. In granting the injunctive relief sought by the Town of Souris, I am aware such orders may cause some hardship to the respondents, particularly Henry Jarvis. However, any such hardship is trumped by the public interest in having the bylaw obeyed.

32 Notwithstanding Souris' request that I order Jarvis to remove his mobile home forthwith, I am not going to accede to that request. Had I been in a position to render judgment on this application on August 31, 2009 after hearing argument, I would have given Jarvis two months to remove his mobile home. That would have given him until October 31, 2009 to comply with the order. It is now late October. We are into the Fall season and Winter fast approaches. If I were to give Jarvis two months from this date to move his mobile home, that would take him into late December. That is not reasonable in the circumstances. Therefore, he is ordered to remove his mobile home from within the Town of Souris at his cost and expense on or before May 1, 2010. In the event he fails to do so, Souris may remove the mobile home from the trailer park with the cost and expense of doing so to be borne by Jarvis.

Costs

33 Costs are always in the discretion of the court. They may be awarded on a partial indemnity basis or a substantial indemnity basis, or on a full indemnity basis. Counsel for all parties have made submissions with respect to costs subject to the decision on the merits of this application and the ability to file a formal bill of costs.

34 Given the facts as I have found them and the orders I have made, it is my view costs ought to be awarded to Souris. McPhee and MacMaster argue no costs should be awarded against them since no relief was sought against them. Counsel for Souris submits there is a claim against them and it is for costs. Furthermore, he argues those costs should be on a substantial indemnity basis.

35 Although the primary relief sought by Souris relates to Jarvis removing his mobile home outside the town boundaries, it is clear to me the respondents McPhee and MacMaster have been closely involved from the beginning. They are the ones who own and operate the trailer park where Jarvis placed his mobile home. It was not Jarvis who appealed the denial of his permit to IRAC - it was McPhee and MacMaster. They were also involved with Jarvis in petitioning Souris for extended permission allowing Jarvis' mobile home to remain in the park. They were signatories to the Memorandum of Understanding. Considering these factors, it would be unfair to saddle Jarvis alone with the costs of this application.

36 Rather than further increasing the cost of this litigation beyond what it is to date by having counsel prepare a bill of costs and allowing them to speak to that bill of costs, I am fixing the costs of this half-day motion in the amount of $3,000 jointly and severally against all three respondents, which shall be paid within 30 days of the date of these reasons.

Order accordingly.

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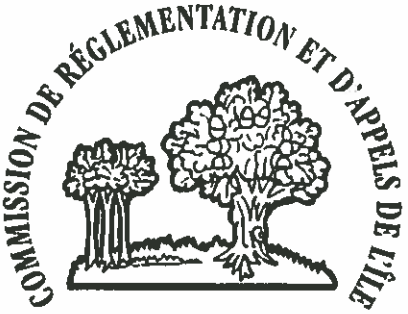

THE ISLAND REGULATORY AND APPEALS COMMISSION
Prince Edward Island
Île-du-Prince-Édouard
CANADA

Docket LA11005
Order LA12-02

IN THE MATTER of an appeal by Atlantis Health Spa Ltd. of a decision of the City of Charlottetown, dated November 14, 2011.

BEFORE THE COMMISSION
on Tuesday, the 19th day of June, 2012.

Allan Rankin, Vice-Chair
Maurice Rodgerson, Chair
Jean Tingley, Commissioner

Order

IN THE MATTER of an appeal by Atlantis Health Spa Ltd. of a decision of the City of Charlottetown, dated November 14, 2011.

Contents

IN THE MATTER of an appeal by Atlantis Health Spa Ltd. of a decision of the City of Charlottetown, dated November 14, 2011.

Appearances & Witnesses

1. For the Appellant Atlantis Health Spa Ltd.

   Counsel:

   Jonathan Coady

   Witnesses:

   Paul J. Madden
   William Chandler

2. For the Respondent City of Charlottetown

   Counsel:

   David W. Hooley, Q.C.
   Nathan Beck, Articled Clerk

   Witnesses:

   Hope Gunn
   Laurel Palmer-Thompson
   Philip Wood

3. Members of the Public (who spoke at the hearing)

   Jeffrey Briggs
   Donald Martin

4. For the Commission

   Counsel:

   Horace Carver, Q.C.

   Appeals Administrator:

   Philip J. Rafuse

   Recording Secretary:

   Dawn Murphy

[33] The Commission finds that Council's decision-making process erred in law as they failed to decide the fate of Atlantis' application on its merits according to the process set out in the present law. Further, the City's decision making process was unfair to Atlantis as it proceeded to decide its application on an irrelevant matter. Deference to a decision maker is earned when the decision maker follows the process set out by the law and is fair to all parties. The City followed its decision making process in *Doiron* and thus earned deference from the Commission. In the present case, however, the City's decision making process did not follow the process required by the Bylaw and thus the Commission is unable to show deference to the City's decision in the present appeal.

[34] The Commission will therefore review the evidence before it to determine whether or not Atlantis' application will succeed, thus deciding the matter anew as if it were the original decision maker.

Testimony of Paul J. Madden

[35] Mr. Madden is the principal of Atlantis. He has municipal council experience, having served for 18 years on a municipal council in Newfoundland. He has been involved in the fields of construction and development since 1980. Approximately 8 years ago he was approached by the Charlottetown Area Development Corporation (CADC) about the concept of establishing a spa in Charlottetown. He subsequently developed the existing condominium/spa project. The infrastructure (water, sewer, electricity transformers) for a second building is in place and he contributed to the cost of such infrastructure.

[36] Mr. Madden testified that in his view, the City's rejection of his latest proposal for development is not based on sound planning principles. He expressed concern that he never received a reason for the rejection from Council. Don Poole, then the City's Manager of Planning, informed him that the City wanted a vibrant downtown, with developments that were open for business on a year round basis. Mr. Madden noted that he offered to sell the unused land back to CADC. Prior to pursuing the present project, he spoke with Philip Wood. Mr. Wood suggested that he apply for a larger building, "apply for 8 stories and they will give you 4".

[37] Mr. Madden told the Commission that Bill Chandler designed the proposed building for the latest application. Mr. Madden noted that he had some input in the design as well. He submitted that they took design features of the existing spa/condominium building and Founders Hall. The proposed building will be kept 60 feet away from Founders Hall. It will also be stepped back so not to harm the streetscape view.

[38] Mr. Madden testified that he never was advised by the City or CADC of any restrictions or freeze on development on the waterfront.

Procedure

(2) Following the adoption of the official plan by the council, the plan

(a) shall continue to be available for public inspection at the office of the municipality;

(b) shall be submitted to the Minister for approval accompanied by a copy of the notice given under subsection 11(2) and a copy of the minutes of the public meeting. *1988, c.4, s.14; 1994, c.46, s.4 {eff.} Sept. 1/94.*

15. Procedure following Minister approval

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

(a) the plan becomes the official plan for the area;

(b) a copy of the official plan as approved by the Minister shall be published in the Gazette;

(c) the Minister shall deposit a copy of the official plan, certified by the chairman as a true copy, in the office of the Registrar of Deeds for the county to which the plan relates; and

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

Bylaws, conformity with plan

(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. *1988, c.4, s.15; 1991, c.1, s.1; 1991, c.18, s.22; 1994, c.46, s.4 {eff.} Sept. 1/94; 1995, c.29, s.6 {eff.} Oct. 14/95.*

15.1 Review

(1) The council of a municipality shall review its official plan and bylaws at intervals of not more than five years and shall by resolution confirm or amend them and where the official plan and by laws were made or last reviewed more than three years before the date on which this section comes into force the council shall review them within three years of that date.

Declaration nullifying municipal bylaws

(2) Where a council fails to comply with subsection (1), the Lieutenant Governor in council may, by order, declare that the official plan and bylaws, or parts thereof, are null and void.

Effect of order

(3) Where an order is made under subsection (2),

(a) the regulations made under clause 7(1)(c) or section 8, or such parts of them as are specified in the order, apply in the municipality in which the council has jurisdiction;

(b) to the extent that the official plan or bylaws are declared null and void, the Minister has exclusive jurisdiction with respect to subdivision approvals, development permits and building permits in the municipality, but any such approval or permit issued before the date of the order is valid if it complied with the official plan and bylaws in force at the time of issue. *1995, c.29, s.7 {eff.} Oct. 14/95.*

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

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*

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.

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)

accelerate the rate of private sector investment, and to protect and restore architectural details on designated buildings.

The Action

Proposed Action	Responsibility	Time Frame
Create a Heritage Strategy	City & public & private partners	short-term
Hire heritage co-ordinator	City	short-term
Designate heritage properties and areas	City	on-going
Review the existing Great George Street preservation area.	City	short-term
Review the merits of an incentive program	City & Province	mid-term

3.8 Establishing a Sustainable Community

Starting Point

Charlottetown could and should be more sustainable than it presently is. That means the residents of Charlottetown should all be working together to create a safe, productive environment while not compromising social and economic benefits, nor development prospects for future generations. The City must begin to address how it can best utilize all community resources in order to contribute to long-term community viability and resident quality of life, now and for the future. This is a roadmap which leads to sustainable community development ... a means by which the residents of Charlottetown can work together as equals towards more effectively using collective resources (personal, physical, and financial) to achieve common purposes.

It is very likely that before long, the fortunes of all municipalities will, to some degree, be determined by how environmentally stable they are. Those that take steps now to become more sustainable will be in a much more competitive position. The communities which will ultimately prosper are those that have sufficient foresight to protect water quality and to ensure its adequate supply; those that manage their waste effectively, by reducing its generation and knowing where and how it should be properly disposed of; those that reduce energy consumption and know how to use it efficiently; and those that ensure, as much as anyone community can, that the air they breathe is clear and fresh.

"Quality of life" is becoming a more significant factor in determining people's satisfaction with where they live. It is therefore important for Charlottetown to take a leadership position in laying the groundwork now to protect and enhance the quality of life for its residents, and to create a welcoming environment which attracts new residents and businesses.

The process of becoming a sustainable community will be a long one. It does not occur overnight and it does not occur without effort and some sacrifice. The policies articulated in this sub- section of the ***CHARLOTTETOWN PLAN*** begin this process of change. These policies address the need to educate residents and business people about human impact on the environment and how attitudes and actions must change; the opportunities which can be created by saving water and energy, and ensuring that air quality is maintained; and the need to respect and protect natural areas.

In 1987, Prince Edward Island was the first Canadian province to adopt a Conservation Strategy. Now, as Charlottetown approaches the 21st century, it is important to ensure that the leadership demonstrated

then is continued by current and future generations of residents who would like their City to become a sustainable community.

Defining Our Direction
Our **goal** is to create a sustainable community which, over time, will be able to become more self sufficient and to thrive socially, environmentally and economically.

1. Our **objective** is to ensure that economic activities within Charlottetown can be sustained by the carrying capacity of the environment.

    - Our **policy** shall be to progressively incorporate the environmental cost of doing business into the day-to-day operations of the City of Charlottetown.
    - Our **policy** shall be to work with our private and public sector partners to create a program designed to educate and guide households and businesses in how to become more environmentally sensitive and efficient.
    - Our **policy** shall be to encourage the development industry to facilitate energy and water conservation through innovative building and subdivision design and siting, landscaping, and provision of infrastructure.
    - Our **policy** shall be to make municipal operations and practices consistent with the environmental standards of the provincial and federal governments.

2. Our **objective** is to create a balance between urban development and the natural environment.

    - Our **policy** shall be to adhere to the objectives and policies set out in this plan regarding a
    - Growth Management Strategy for the City.

    - Our **policy** shall be to require that large-scale development proposals be evaluated on their long-term and cumulative impact on the environment.

    - Our **policy** shall be to create a tree development program and guidelines so as to protect trees on public and private property, incorporate trees and landscaping into the design of new developments, and generally increase tree canopy throughout the City.

    - Our **policy** shall be to require that all new development protect topsoil and prevent conditions which result in the erosion of topsoil and/or the creation of stormwater management problems.

3. Our **objective** is to work with the province to review, identify, and protect all natural areas and wildlife habitats considered to be of aesthetic, biological, ecological, or geological importance for the benefit and enjoyment of present and future generations.

    - Our **policy** shall be to require that sites considered by Council to be of aesthetic, biological, ecological, or geological importance be designated and protected as Natural Areas in accordance with the Provincial Natural Areas Protection Act or with a private Stewardship Agreement.

    - Our **policy** shall be to require that any proposed development adjacent to a designated Natural Area should respect and endeavour to incorporate natural elements into its design and construction, and to maintain the property in a manner sympathetic to its environment.

- Our **policy** shall be to examine the large tracts of rural land within City boundaries to determine if there are areas which should be acquired to preserve and protect them in their natural state.

- Our **policy** shall be to require the preparation of an Environmental Impact Statement (EIS) for any new development which, in the City's judgment, could have a significant environmental impact on the land, water, or air (including noise).

4. Our **objective** is to provide a waste management system which will accommodate development while also encouraging reduction, re-use, and recycling practices.

    - Our **policy** shall be to create for Charlottetown a comprehensive waste- management strategy in the next two years.

    - Our **policy** shall be to take immediate action to initiate discussions with the provincial government in order to identify the location of a new land-fill site.

5. Our **objective** is to ensure that Charlottetown's air quality is not endangered by actions taken by the public or private sectors.

    - Our **policy** shall be to collaborate with the province to develop appropriate air quality standards within Charlottetown.

    - Our **policy** shall be to work with the province to identify sources of air pollution and to undertake measures to collectively reduce or eliminate this contamination.

The Environment for Change

The ***CHARLOTTETOWN PLAN*** and sustainable community development go hand in hand. Each looks well into the future to anticipate and consider how to effectively address opportunities and constraints. Each are critical to the long-term stability and health of the community. The objectives and policies of this sub-section provide an opportunity for the residents of Charlottetown to make a difference locally, and in so doing, contribute to global environmental improvement. These are the first steps which lead Charlottetown toward becoming a sustainable community.

The policies in this sub-section incorporate the environmental cost of doing business into the City's day-to-day operations and make its operational practices consistent with provincial and federal environmental standards. This demonstrates the City's willingness to act responsibly and demonstrate to others what steps can be taken to become more sustainable. The City also wants to work with partners to create a comprehensive waste-management strategy; to develop a program to educate and guide households and businesses about how to become more environmentally friendly; and to encourage innovations in building and subdivision design which will collectively benefit the community. These are all important initiatives which will create a sound physical and economic environment for growth.

The ***CHARLOTTETOWN PLAN*** demonstrates the City's commitment to minimizing negative impacts on the local environment. All new developments will be required to protect topsoil and prevent conditions which erode topsoil or create storm-water management conditions. Correspondingly, large-scale development projects will be evaluated on their long-term and cumulative impact on the environment, and the Planning Board has been authorized to require the preparation of an Environmental Impact Statement (EIS) when it is deemed necessary.

The Action

Proposed Action	Responsibility	Time Frame
Continue discussions with the Province about the location of the new land-fill site	City & Province	short-term
Develop guidelines for the sustainable design of buildings and subdivisions	City & Province	mid-term
Establish an environmental accounting system	City	mid-term
Create a comprehensive waste management strategy	City	mid-term
Create an education program targeting households and businesses to guide them in how to become more sustainable	City and its partners	mid-term
Develop a GIS inventory of natural areas and rural lands considered to be of importance to the City's future	City & Province	mid-term
Prepare necessary documentation for introducing an Environmental Impact Program for Charlottetown	City & Province	mid-term
Establish an air quality monitoring system	City & Province	mid-term

3.9 Developing Transportation Modes

Starting Point

An efficient transportation system is a distinguishing feature of orderly municipal administration. In the wake of amalgamation, the City of Charlottetown is faced with several challenges to improve its transportation network. The municipality is now responsible for a greatly expanded street network due to the transfer of infrastructure from the provincial to the municipal government following amalgamation. This has occurred at a time when traffic levels are expected to increase with the opening of the Confederation Bridge on June 1, 1997.

Charlottetown's transportation system also encompasses much more than its street network. Indeed, in many urban areas across the country there is an increasing demand for infrastructure and programs to serve transportation modes other than automobiles. A growing awareness of the environment and the benefits of a healthy lifestyle has led to an increased demand for improved transit service and more facilities for pedestrians and bicyclists such as the creation of the Routes to Nature and Health. The provision of these services must be balanced with the traditional demands to improve street capacities and parking levels. Recent federal government initiatives such as the new airport and marine port policies will also have an impact on Charlottetown's transportation system. However, until these policies are fully defined, it will be difficult to predict their consequences.

A comprehensive transportation plan was last prepared for the region in 1979. The provincial and municipal governments, acting on several recommendations from that plan, constructed a portion of the Charlottetown Perimeter Highway, the Waterfront Arterial Highway, and are presently expanding the Hillsborough River Bridge. Nevertheless, several recommendations from that Plan were not acted upon and were identified as issues again during the ***CHARLOTTETOWN PLAN*** consultation process. As a result, there is more pressure than ever to make the existing road network as efficient as possible

1. Our **objective** is to strike a steering committee composed of officials from the three levels of government, non-governmental organizations, the medical community, and the private sector to pursue initiatives in health care development.

    - Our **policy** shall be to strike a steering committee who will be responsible for exploring the development and delivery of health care initiatives.

The Environment for Change

Pursuing the development and delivery of health care initiatives, especially those which may meet the needs of seniors, is another tangible means by which Charlottetown can position itself in front of the forces of economic and social transformation. Demographic change will have profound implications for all Canadian cities over the next 20-30 years. A number of leading demographic analysts have argued that the presence of good health care facilities can serve as a strong incentive to attract relatively prosperous new retirees whose arrival will create additional demand for goods and services.

While Charlottetown and many other cities have a sound acute health care system, few centres offer specialized clinical facilities which meet the specific health care needs of seniors... and can combine it with the ambiance of a small urban community. The development and delivery of these health care initiatives would provide a valuable medical resource for Island seniors, and would help energize the local economy. It would also enable Charlottetown to elevate itself amongst other communities in Canada who are seeking to attract and benefit from the presence of more seniors.

The Action

Proposed Action	Responsibility	Time Frame
Strike a steering committee composed of government, non-government, medical community & private sector representatives	City, Province, medical community & private sector	Short-term

4.8 Appropriate Industrial Development

Starting Point

Charlottetown should be taking steps to position itself for appropriate industrial growth. With the completion of the Confederation Bridge, the City should now be moving to compete with other Maritime communities, and to reclaim its share of industrial development occurring within the province. This will continue to be a challenge until an industrial growth strategy is devised, and a well-coordinated team approach to using industrial lands in the City is applied.

With the exception of the West Royalty Industrial Park which is managed by Enterprise PEI, there is no co-ordination of appearance, operation, or promotion of properties within the City's industrial zones. This is not a unique situation: many municipalities have industrial lands which are not managed. However, as the economic centre of the province, it is very important for Charlottetown to better align itself so it can compete against the advantages offered by other Maritime cities. Halifax and Moncton have industrial parks which have been planned, serviced, packaged, and promoted in a comprehensive fashion. While Enterprise PEI has been doing this with the West Royalty Industrial Park for more than two decades, there are presently only eight acres available for development in that location. It is therefore time to carefully consider the manner in which new industry can be attracted to Charlottetown ... and where that industry can flourish.

To begin with, the City needs to develop its own industrial development strategy. It must decide what the municipality and its partners consider to be target markets for industrial growth. It must also be clear with regard to the role it wishes to play with its partners in promoting, prospecting, developing, and packaging industrial lands. Different classifications of industrial use will help to focus the types of development suitable for particular locations within the City, and thereby minimize land-use conflicts. Efforts should also be made to ensure that existing industrial activities offer greater compatibility with adjoining lands. This can be accomplished through a number of different techniques including limiting the hours of operation, or the addition of landscaping features, such as berms or screening.

It is also important for the City to establish what types of industrial uses are appropriate within its boundaries, where they should be located, what servicing requirements may be necessary, and what potential environmental impacts or land-use conflicts may arise from development. Council should ensure that all industrial uses, from light to heavy, have adequate measures in place to prevent or mitigate pollution that could threaten the quality and quantity of surface and ground water resources, and the quality of the air (including noise). Moreover, Council should also require the proponent to pay for new municipal water and wastewater transmission lines, where such services are required.

Defining Our Direction

Our **goal** is to create new land-use categories which reflect the types of industrial development that are appropriate for Charlottetown, to designate tracts of land for them, and to work with public and private sector partners to stimulate this type of growth.

1. Our **objective** is to create new industrial land-use categories which reflect the evolutionary changes in that sector of the economy.

    - Our **policy** shall be to clearly delineate three different classes of industrial use: Business Park, Light Industrial, and Heavy Industrial.

    - Our **policy** shall be to establish as one of the City's industrial zones a Business Park zone which is intended for offices, research organizations, and light industries which are predicated on high technology or research.

    - Our **policy** shall be to establish a Light Industrial zone which is intended for industrial activities which do not create obvious land-use conflicts.

    - Our **policy** shall be to establish a Heavy Industrial zone which is intended for industries that may cause land-use conflicts, or may be best located adjacent to or near by the City's major arterial routes. This class would include bulk storage of environmentally sensitive or dangerous goods.

2. Our **objective** is to continue to support the growth of industry in Charlottetown by directing specific types of development to areas which are best suited to those uses.

    - Our **policy** shall be to work with our partners to ensure all prospective investors are provided with the support and information necessary for them to make informed location decisions about their business or industry.

3. Our **objective** is to ensure that industrial zones do not detract from Charlottetown's character and appeal.

- Our **policy** shall be to ensure that all industrial uses have adequate measures in place to prevent or mitigate pollution that could threaten the quality and quantity of surface and ground water resources, and the quality of the air (including noise).

- Our **policy** shall be to work with property owners in established industrial zones to minimize unsightliness and to create a uniform standard for the appearance and upkeep of properties.

- Our **policy** shall be to minimize the land-use conflicts which might exist or arise between existing industrial zones and their non-industrial neighbours.

- Our **policy** shall be to establish uniform, but distinct design standards for all new business parks and industrial zones.

4. Our **objective** is to position Charlottetown to compete with other industrial locations in the Maritimes.

    - Our **policy** shall be to create an Industrial Development Strategy as part of a larger Charlottetown Economic Strategy.

    - Our **policy** shall be to seek new investment by working with public and private sector partners to ensure a well-coordinated and effective team approach to marketing industrial lands in Charlottetown.

    - Our **policy** shall be to partner with others to acquire and service land for the development of a new generation of industrial parks and business parks which have services and facilities that are state of the art.

The Environment for Change

One of the recurring themes of ***CHARLOTTETOWN PLAN*** is the importance to this City of protecting and promoting its charm, as well as capitalizing on its quality of life. The policies contained in this sub-section are directed at improving the appearance of industrial properties and creating a positive investment climate for businesses and industries which might be drawn to Charlottetown because of its ambiance and its ample and well-serviced industrial lands. The policies allow for the provision of sufficient new categories of industrial zones to meet the evolving needs of industrial development, especially those types of uses which are appropriate for this municipality.

The University Avenue-Mt. Edward Road Institutional area may be considered appropriate as a future Business Park location. When a concept plan(s) is carried out at this locations, or demand materializes, a determination can be made about whether or where to locate additional Business Parks. At this juncture, there may be merit in locating a Business Park on or adjacent to UPEI between the Animal Pathology Lab and the Food Technology Centre.

Light Industrial designations are clustered in Parkdale and to the south of MacAleer Drive, east of the rails-to-trails line and north of Cannon Drive in the Sherwood Industrial area.

The Sherwood Industrial area has been designated as a combination of Heavy Industry, Light and Business Park zones due to its mix of industrial uses and transportation links to the Provincial arterial highway system. In addition, this area is relatively removed from residential uses. As this location is in

proximity to the perimeter highway it could see future suitability for use by transportation-related companies.

The City and its partners may find it in their best interest to acquire land in this area for a number of reasons including to:

- facilitate the re-location of existing, isolated industrial uses which are no longer compatible with surrounding uses;
- assemble with partners a substantial parcel of land to service, package, and promote as readily available industrial property suitable for heavy industry/transportation uses; and
- establish a buffer area to help minimize land-use conflicts with neighbouring properties.

The Action

Proposed Action	**Responsibility**	**Time Frame**
Create an Industrial Development strategy	City & partners	Short-term
Create uniform standards for the appearance and upkeep of existing industrial locations	City & partners	Short-term
Proceed with physical improvements to industrial parks	City & partners	On-going
Work with partners to more aggressively market Charlottetown as an industrial centre	City & partners	On-going
Assemble, service, and promote industrial properties	City & partners	Mid-term