

IN THE MATTER OF AN APPEAL

between

DON READ

(APPELLANT)

v

CITY OF CHARLOTTETOWN

(THE CITY)

FURTHER SUBMISSIONS IN REPLY TO THE CITY'S RESPONSE TO THE NOTICE OF APPEAL

1 FAILURE TO CONSULT ON THE CITY'S TRAFFIC MASTER PLAN WHICH IS RELATED TO, AND RELIES ON A LAND TRANSFER FROM THE DEVELOPMENT

Compliance with Condition 1 of the Resolution of 9 November

- 1.1 The City submits that "it clearly and adequately considered the draft TMP prior to approval of the application on 9 November 2020". In our respectful submission, the City has misunderstood the requirement to consider the TMP in two ways; (1) Condition 1 required consideration of the final TMP, not a 'draft TMP'; and (2) that Condition 1 could only be satisfied by consideration of the final TMP post 9 November resolution.
- 1.2 The City states that the purpose of the meeting on 29 October was to ensure "*the developer's traffic plans were not inconsistent/incompatible with the draft TMP*" (emphasis added). Consistency or otherwise with the "draft TMP" is not what is required by Condition 1. Condition 1 requires that the City's Traffic Master Plan confirms that the development does not conflict with the proposed site plan. Condition 1 does not include, or suggest in any way, that the requirement related to the "draft City Traffic Master Plan". The reference in Condition 1 to the TMP is clearly to the final, approved plan as adopted by Council. This is supported by the numerous emails and Minutes of the Planning Board Meetings which clearly refer to the final report.
- 1.3 In an email dated 15 July 2020 between Scott Adams (Manager of Public Works) and Alex Forbes and Laurel Thompson he noted that "While the study isn't 100% complete, and in the interest of time, I am willing to recommend from a Public Works standpoint that this project moves ahead, conditional the final report confirming the preliminary findings" (emphasis added).
- 1.4 Further, the Minutes of the Planning Board Meeting of 4 August 2020 (TAB 5: page 112) records that:

"The City's master plan is being prepared at this time and staff felt that this development maybe premature. The Manager of Public Works has been in discussion with the traffic consultant who advises that there may not be a need for the north-south connector from Towers Road through the balance of the properties to the north. The report will be done in 4-6 weeks. Staff does not see any issues proceeding to a public consultation as long as the traffic report concludes that the north-south connector is not required, that the access provided on the north of the property is acceptable and that no access to Mount Edward Road for the commercial health care facility".

- 1.5 In her email of 9 September 2020 to Tim Banks, Laurel Thompson reiterates "*However, we need to see the final report to be able to confirm this with certainty to Council next Monday night. There were some Board members who were uncomfortable supporting the application prior to the master plan and the revised site plan for your development being submitted*" (emphasis added) (TAB 39: page 818).
- 1.6 Then on 1 October 2020, at a Special Meeting of Council, the Council decided to defer the application until the Council had the opportunity "*to review the findings of the Traffic Master Plan*" (emphasis added) as confirmed by email from Laurel Thompson to Tim Banks dated 2 October 2020 (TAB 39: pg 849). In her email of the same date to Alex Forbes for review, Ms Thompson noted that the proposed development was discussed in considerable detail in relation to the TMP. It was after this 'considerable discussion' that a decision to defer the application was made.
- 1.7 By the City's own admission, the draft TMP was still in the process of being prepared at the time of the meeting on 9 November, and was still incomplete. If it was intended that Condition 1 could be satisfied by review of the 'draft TMP', as the City suggests, then, the Appellant, respectfully submits this is how it would have been described in the condition. It is clear from excerpts of correspondence set out above, that the Council required sight of the final TMP prior to approving the development. At the time of granting approval, the Council did not even have the final 'draft TMP', let alone the approved TMP and so the Council could not have satisfied itself that the requirements of Condition 1 had been met.
- 1.8 In fact, the TMP is still not approved. The draft TMP was only formally presented to the Council on 22 February 2020 and public consultation is currently ongoing. It is also important to note that the version of the TMP presented to Council on 9 November, is not the same as the draft TMP which is now on the Council's website for public consultation. Any reliance placed on the 'draft TMP' presented to the Council would amount to pre-judgement of the final TMP.
- 1.9 In its Response, the City refers to a Special Meeting of the Council on 29 October 2020, and the presentation from Mark MacDonald, the consultant from CBCL 'who was in the process of preparing the TMP'. The City explains that the purpose of hearing Mr MacDonald was to give the Council an opportunity to hear the *draft* results of the TMP as it related to the development to ensure the developer's traffic plans were not inconsistent/incompatible with the *draft* TMP. The City seems to suggest that this meeting, in some way, satisfies the requirement of Condition 1 of the 9 November resolution. That simply cannot be the case. This meeting predates the 9 November resolution. If it was the case, that the Council had fully consulted on the draft TMP and had satisfied itself that the developer's traffic plans were not inconsistent/incompatible with the draft TMP at the meeting on 29 October, then Condition 1 of the resolution would not have been required.
- 1.10 The City submits that the email of Scott Adams dated 15 July 2020 (TAB 39: page 674) purported to recommend that the application could move forward to resolution. The Appellant respectfully submits, that this misrepresents the meaning and intention of Mr Adams' email, and has been taken out of context. Mr Adams' email is in response to an email from Tim Banks to the Council and others of the same date, in which Mr Banks expressed "*the need to be on the Planning Board agenda for the August 4th meeting to seek a recommendation to have Council on August 14th set a public meeting date for our project*". It was in this context, that Mr Adams replied that the project could move ahead i.e. to a public consultation, not to a resolution. In fact, Mr Adams refers directly to the public meeting, and notes "*I expect to have this report in the next 4-6 weeks, which works well with a public meeting as noted below*". The City further misstates Mr Adams' recommendation asserting that Mr Adams recommended that the project "could move forward, conditional that the final TMP not contradict the preliminary findings of the draft TMP". This is simply not the case. Mr Adams does not refer to the "preliminary findings of the draft TMP". He clearly states that project moving ahead was "conditional [on] the final report confirming the preliminary findings" (emphasis added).

Balancing Interests

- 1.11 The City asserts that it had to balance a variety of interests including the developer's right to have his particular application processed in a timely manner, other property owners in the area and City taxpayers.

It is evident from the 1000 pages of appeal documentation produced by the City that the pushing through of an approval on 9 November 2020 only sought to serve the interest of the developer. There is no evidence presented by the City of a material planning consideration which supports or justifies the Council's departure from its resolution of 1 October to defer consideration of the application until it had the opportunity to consider the final TMP. It is not a material planning consideration that a developer's "very last option to secure the property" is going to expire. It is a commercial matter for the developer to secure the necessary property interests for its development.

- 1.12 By email dated 21 September, Councillor Tweel highlighted the tremendous amount of concern, questions and issues raised by the local residents in respect of the development and the traffic studies. He noted his agreement with Councillor McCabe's position that he did not support rushing the process. As early as 21 September 2020, the Council was aware of the serious concerns raised by local residents but chose to not address them (TAB 39: page 826). It is not clear in what way the City asserts that this serves the interests of 'other property owners in the area and City taxpayers'. Those individuals who expressed tremendous concerns are, of course, property owners in the area and City taxpayers.

Consideration of TMP and TIS at 8 September 2020 Planning and Heritage Board

- 1.13 The City asserts that the findings of the draft TMP and TIS were considered by the Development Officer, in consultation with the Chief of Police and Manager of Public Works, and that the consideration of these findings then formed part of the recommendation from the Department to the Board and then to Council. It asserts that this is shown in the September 8 Report 2020 Report from the Department. The Appellant accepts that the TIS was considered in the report, however, in respect on the TMP the Report simply states that *"The City's traffic master plan is currently being carried out and a final report is expected in 4-6 weeks."* That is not a consideration of the findings of the draft TMP. The City is requested to provide specific reference to where the findings of the draft TMP were considered in the 8 September Report.
- 1.14 Furthermore, it is evident that the Councillors were not clear on the TMP and TIS at the Planning Board Meeting on 8 September 2020 (TAB 21: Page 407-409). Councillor McCabe state that she wasn't able to view the TIS when she visited the Developer's website. She also notes that Councillors were told they would receive the TMP to support or not support the traffic plan and they were still waiting on that traffic report. Mr Forbes notes that a copy of the report was expected by the end of the week and commented *"that it would be very helpful for Council in the decision making"*. Councillor McCabe then moved for a deferral on the decision until the Board had more information and an opportunity to consider the TMP before making a final recommendation. Whilst the deferral was ultimately opposed (4-5), this demonstrates that at least nearly half of the Board members felt that more information was required before making a final recommendation.

Councillor Duffy's statement of 14 December

- 1.15 The City asserts that Councillor Duffy's statement does not contradict the 9 November 2020 resolution condition and does not serve as evidence that the TMP was not properly considered in reaching the Council's decision. In making this assertion, the City refers to Mr Duffy's statement "that the decision was not contingent on the TMP but that the TMP had a bearing on the outcome". We respectfully submit, this is not accurate and misrepresents the legal effect of conditions attached to a planning permission.
- 1.16 Conditions enable development proposals to proceed where otherwise it would be necessary to refuse planning permission. Conditions are legal requirements, which must be complied with in order for a development to proceed, or continue its ongoing operation (depending on the condition). By attaching Condition 1 to the permission, the Council bound itself that it needed to review and consider the final TMP to satisfy itself that there were no conflicts between the development and the final TMP, otherwise it needed to refuse the permission. The Council has still not satisfied itself requirement of Condition 1.

Hanmac Inc v City of Charlottetown

- 1.17 In paragraph 31 of *Hanmac v Charlottetown*, the Commission acknowledged that it does have the power to substitute its decision for that of the municipal or ministerial decision maker. In arriving at a decision of whether the Commission may take such action, the Commission set out a two stage test to be used as a guideline in determining an appeal. The first limb of that test considers:

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

- 1.18 The Appellant respectfully submits that the Council failed the first stage of this test, in that it did not and has not complied with its own procedure, as set by Condition 1. The Council has not had regard to the final TMP, and could not have had regard to the final TMP, as there is no final, approved TMP. The Council was bound by Condition 1 to confirm there were no conflicts between the development and the final TMP and it has not done so. As such, the City has not followed proper process and procedure as required, and therefore, the Appellant submits, that in those circumstances the Commission is fully entitled to substitute its decision for that of the City.

2 FAILURE OF THE TRAFFIC IMPACT ASSESSMENT TO ADEQUATELY ASSESS TRAFFIC GROWTH RATES

- 2.1 The Appellant accepts that the TIS was prepared by professional traffic engineers, however the Appellant does not accept that it needs to present expert evidence to provide evidence of a growth rate of 1.5% or 2.5% for the province. This data is publically available and accessible direct from Statistics Canada. Refer to Figure 1 below.

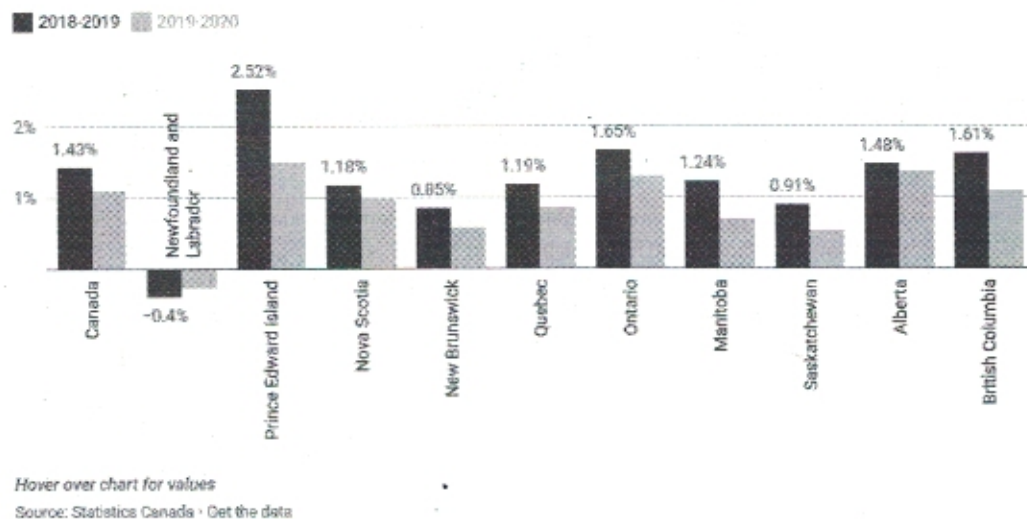


Figure 1 – PEI Population Growth

- 2.2 Furthermore data from Statistics Canada provide figures for Charlottetown over the last five years (2016-2020 inclusive). This shows a growth rate of 12.3% over this period. Refer to Figure 2 below.

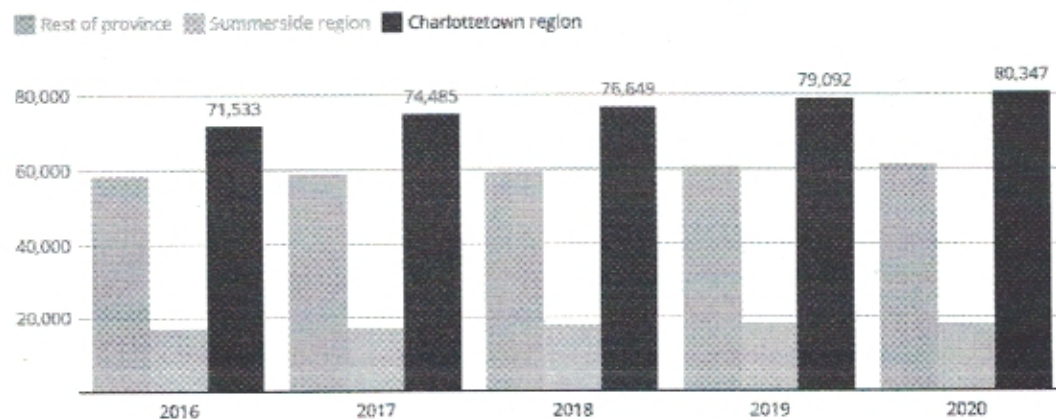


Figure 2 - PEI population growth 2016-2020

- 2.3 Whilst the Appellant acknowledges the use of assumed growth rates, like the 1% growth rate used in the TIS, is appropriate in circumstances where specific and relevant data is not available, it should not be used as a substitute for real and accurate data. At the very least, the current and historical data for the Province, and Charlottetown, should have been taken into account in setting the relevant growth rate for the TIS. This has not been done. There is no evidence in the TIS, that current and accurate data was used to inform the adoption of a 1% growth rate for Charlottetown. Agencies such as the Canadian Institute of Transportation Engineers and the Canadian Transportation Agency as well as industry best practice mandates that the best available data be used in the first instance in the preparation of a traffic report, and only where actual data is not available, assumed values should be used. Furthermore, there is no source reference for the 1% growth rate, or justification for its relevance to Charlottetown, save to state that it is typical of urban municipalities in the Maritimes. The Appellant respectfully submits that this is not sufficient for the purposes of a TIS. The City is requested to provide the relevant source for the 1% figure.
- 2.4 By choosing a value which is typical for urban municipalities in the Maritimes (which may or may not be applicable for other Maritime regions) fails to take into account the best available data from Statistics Canada and, the Appellant submits, grossly under-estimates the actual growth rates for Charlottetown.

3 FAILURE TO ASSESS CUMULATIVE TRAFFIC IMPACTS

- 3.1 The Appellant does not dispute that the TIS evaluates traffic in existing conditions, in future conditions without the development, and future conditions with the development. However, this is not an assessment of cumulative impacts. The assessment is limited to scenarios which look at traffic with and without the development only at various time horizons.
- 3.2 Cumulative impacts are the addition of many minor or significant effects, including effects of other projects, to create larger, more significant effects. While a single activity may itself result in a minor impact, it may, when combined with other impacts (minor or significant), result in a cumulative impact that is collectively significant. For example, effects on traffic due to an individual project may be acceptable however it may be necessary to assess the cumulative impacts taking account of traffic generated by other permitted or planned projects. It can also be prudent to have regard to the likely future environmental loadings arising from the development of zoned lands in the immediate environs of the proposed project.

3.3 In addition to the Sherwood Greens development, currently under construction on Towers Roads, the Appellant is aware of over 1000 residential units as well as other commercial units to be constructed in the immediate vicinity of the development within the West Royalty Commercial Area. These projects have not been factored into the assessment. The City cannot be suggesting that these projects currently being constructed, and the future planned projects are accounted for in the 1% growth rate assumed in the TIS. The density of the future development in the vicinity of the development site far exceeds the assumed growth, and as such a cumulative impact assessment of these projects and any other relevant plans or projects should have been carried out in order to comply with good planning and sustainable development principles.

3.4 The City asserts that the Appellant has not produced any cogent expert evidence to support its contention that many roads/junctions are already near or at capacity. The Appellant asserts that it does not need to produce such evidence, as those conclusions are deduced from the TIS directly. The Appellant refers to the section 2.3 of the TIS (TAB 3: page 12) which states:

*"The results show that some of the lane groups at the intersections at Capital Drive/Spencer Avenue/University Avenue/Malpeque Road **are operating near capacity**. The southbound through lane is operating with volume-to-capacity (v/c) ratios at or above 0.85 for both peak hours but the levels-of-service are at acceptable LOS D and LOS E respectively. The northbound through lane **is operating at the threshold** of v/c ratios of 0.85 during the pm peak hour but with satisfactory LOS D" (emphasis added).*

3.5 In its response, the City asserts that the Development Agreement between the Developer and the Council satisfies the requirement for a cumulative impact assessment. A Development Agreement is not, and does not include, an assessment of cumulative impacts. It is a private agreement between the Developer and the Council in respect of the transfer of land. This is not relevant to the Commission's consideration of the need for a cumulative impact assessment and the adequacy of the TIS.

4 FAILURE TO CARRY OUT SATISFACTORY AND APPROPRIATE PUBLIC CONSULTATION IN ACCORDANCE WITH THE COUNCIL CODE OF CONDUCT

4.1 The Appellant notes the City's response in respect of Ground 4 of the Appeal, and respectfully disagrees.

4.2 Concerns relating to public engagement in respect of the development and the TMP were raised by Councillors at the 4 August Planning Board Meeting (TAB 5: pages 113-114). Additionally, as noted at paragraph 1.12 above, as early as 21 September 2020, the Council was aware of the serious concerns raised by local residents but chose to not address them (TAB 39: page 826). It is not clear in what way the City asserts that this serves the interests of the public.

4.3 The Appellant refers to the Local Government Resource Handbook: Guide to the Municipal Government Act 2nd Edition dated 21 January 2021 (Appendix 1). Requirements for public input recognise the important role that the public plays in the decision-making process (**the Resource Handbook**). The Resource Handbook highlights that "receiving public input enables council to provide comprehensive information on a proposal to citizens and obtain their input on the proposal before making a final decision. Knowing the views of the public will assist council to make the best possible decision on behalf of all citizens and ratepayers in the municipality".

4.4 The Resource Handbook also recommends strategies to encourage attendance at public meetings including:-

4.4.1 **"Additional advertising above and beyond any advertising required by legislation.**

Advertising can be provided through the local newspaper, the municipality's website and social media accounts, or by posting notices in frequently visited public places (e.g. the library, recreation centre). Distributing newsletters to residents and property owners, and inserts in utility

bills are examples of other options. The notice should clearly state how the public can participate; for example, by making a presentation to council.

4.4.2 Ensure that a detailed information package is available well in advance.

This ensures that citizens have ample time to review the package before the meeting. Council should try to ensure that citizens have a reasonable understanding of proposals being considered by council, so that they can ask meaningful questions and provide council with informed comments. At a minimum, an information package should include information about the reason for council's proposal, the cost of the proposal, options that have been considered by council, and the impact on residents and property owners as a whole, as well as on specific property owners or stakeholder groups."

- 4.5 Whilst it may be the case that the City satisfied the notice requirements as per the legislation, the Appellant submits that in circumstances where the Council was aware of the tremendous amount of concerns of the local residents, and a number of Councillors who shared those concerns, that meeting the minimum requirements for public participation was not sufficient and not in the spirit of the Council's duties.
- 4.6 In circumstances where the approval could lead to the consenting of the construction of the development before any proper assessment by the City of its impacts on the TMP and where it is feasible for this to happen with no public consultation of the TMP being carried out, there is a risk of great prejudice to public participation rights.
- 4.7 The City asserts that it received 43 letters of support and 6 letters of concern over the development and that these are presented at TAB 14. The documents contained at TAB 14 do not accord with these figures. There are 22 letters of support and 2 letters of concern presented. The City is requested to produce a copy of letters of support and letters of concern which have not been presented or otherwise advise the Commission of the correct figures.
- 4.8 The Appellant highlights that all of the 22 letters of support produced in TAB 14 have been made by commercial entities which are either directly or indirectly involved in the construction industry and as such would have a vested interest in such a development going ahead. The Appellant notes that there are no letters of support from individuals or local residents.