

IN THE MATTER OF AN APPEAL

between

DON READ

(APPELLANT)

v

CITY OF CHARLOTTETOWN

(RESPONDENT)

Written Submissions of the Appellant on the post hearing submissions and further evidence of the Respondent

Introduction

- 1 These submissions set out the Appellant's position on (1) the incorrect oral evidence of Ms Palmer Thompson at the hearing on 31 May 2021 and (2) the request to submit further evidence made by the Respondent (the City) on 21 June 2021.

Incorrect evidence of Ms Palmer Thompson

- 2 In Mr Hooley's email of 21 June 2021, he explains:-

"It is apparent that the as-signed final version of the Development Agreement (the "DA") does not expressly reference Condition #1 to Council's Resolution of November 9, 2020 (the "Resolution") approving the Sherwood Crossing project (the "Development"). Ms. Palmer-Thompson's recollection when she gave oral evidence was that the final DA did include reference to Condition #1 of the Resolution. However, upon check, when the City went back through the record – as well as double checking their paper and e files it became apparent that the final version of the DA did not in fact reference Condition #1. In retrospect, it appears that her recollection and thus her evidence at the hearing was not accurate. Accordingly, the City requests that her evidence stand corrected. The Rules of Court provide for a witness to correct evidence they gave which they later realize upon check to not be correct. I do not believe the Commission's Rules include a similar provision but it would we submit fall within its general powers to determine its own procedure to allow her evidence to stand corrected".

- 3 With respect, it is not simply that Ms Palmer Thompson's evidence was not accurate. Ms Palmer Thompson not only falsely confirmed that the Development Agreement had been signed, she also repeatedly gave evidence that the Development Agreement included Condition 1 of the Resolution, and that it was the inclusion of Condition 1 in the Development Agreement which demonstrates compliance with that Condition.
- 4 At the hearing, Ms Palmer Thompson was asked whether the Development Agreement had been signed. She responded "Yeah". She then carries on to give a general overview of what would be included in the Development Agreement and she stated "Well these conditions would be one" (referring to the conditions included in the Resolution). Refer to 32.20 onwards of the Planning LA21001 Hearing Audio-PM Session.

5 When asked to explain the difference between development and site plan in the context of Condition 1, Ms Palmer Thompson explained, *"I think this should of actually read the City's traffic master plan confirms that the development does not conflict with the proposed, it should have been, traffic master plan as opposed to the site plan."* (Refer to 46.22 onwards of the Planning LA21001 Hearing Audio-PM Session.) This cannot be what was meant by Condition 1. It would be irrational to have to confirm that the 'traffic master plan does not conflict with the traffic master plan'. It is clear that Ms Palmer Thompson was unsure of the meaning and effect of Condition 1.

6 When questioned by the Panel as to the meaning of Condition 1, and how it related to the Development Agreement, Ms Palmer Thompson stated:

"why we put that in there is because if in the future the context of the area changed and we need it, that connector, say 20 years down the road, we can go back to the developer and say ok we need that at this time – so that's locked into the development agreement, that is one of the conditions in the development agreement, but as it stands right now there is no need for it and there likely will not be any need for it in the future but it is a backup in case there is a requirement".

She carried on and confirmed, *"That first condition will go into the development agreement. That's a condition in the development agreement"*.

7 When asked whether she considered it a condition of the approval, Ms Palmer Thompson stated *"No - that is a condition of the rezoning and the comprehensive development plan. Not of the approval of the building permit. This is in the development agreement which mandates the approval for the overall development of the site"*. For clarity, it is the Appellant's position that the conditions attach to the Resolution of 9 November, not the building permit (which as far as the Appellant is aware has not yet been applied for).

8 Further, when asked by the Panel about her recommendation to the planning board to approve the rezoning application and the development concept plan, Ms Palmer Thompson confirmed her recommendation was to approve the application subject to the conditions attached to the Resolution. She explained that this was on the basis that the Council could go back and rely on those conditions because *"it is a condition of the development agreement and it is a condition of that approval for the concept plan."* However, Condition 1 is not a condition of the Development Agreement. To the extent that the Council relied on the recommendation of Ms Palmer Thompson in approving the Resolution, it relied on incorrect information. This calls into question the validity of the resolution made by the Council.

9 The City sought to have Ms Palmer Thompson certified as an expert witness which she duly was. An expert witness:

(1) has an overriding duty to the Commission to provide independent, impartial and honest evidence;

(2) has a duty to state the assumptions and facts upon which their evidence is based – in addition, the expert must fully inform themselves of any fact that could detract from their evidence;

(3) must confine themselves to matters within their scope of expertise; and

(4) must act with due care, skill and diligence.

10 Contrary to the extensive and repeated evidence provided by Ms Palmer Thompson, Condition 1 is not included in the Development Agreement nor was the Development Agreement signed at the time she gave her evidence. The evidence of Ms Palmer Thompson relating to the Conditions attached to the Resolution, the inclusion of Condition 1 in the Development Agreement, and the relationship between the Conditions and the Resolution and the operation of the Development Agreement is wholly incorrect. Furthermore, her assertions as to the operation of Condition 1 and the Development Agreement were repeated without care. Either Ms Palmer Thompson was seeking to provide evidence with the aim of

strengthening the City's case, or it was wholly outside her expertise. In the case of the latter she had a duty to inform the Panel of that fact and defer to other witnesses who might have had the appropriate expertise.

- 11 For these reasons Ms Palmer Thompson's expert evidence cannot be given due weight as it is clear that she had not read all of the relevant papers before giving her evidence, and she either did not have the relevant expertise or she misled the Panel. Her evidence should therefore be disregarded, if not wholly, then at least in so far as it relates to Condition 1 and the Development Agreement.
- 13 Additionally, to the extent that Ms Palmer Thompson also provided evidence that Condition 1 specifically relates to the need for a north/south corridor through the Development must also be disregarded. It is clear that Ms Palmer Thompson did not understand the meaning of Condition 1 (giving her explanation of its meaning as set out above), and she did not understand the operation or effect of Condition 1. The City has not produced any documentary evidence which supports its position, or the position of Ms Palmer Thompson that Condition 1 related specifically to the need for a north/south corridor through the Development or that the condition is forward looking only. If that was what was intended by Condition 1 then that is exactly how it would have been drafted.
- 14 As Mr Hooley states, the Commission Rules of Practice and Procedure do not provide for a witness to correct evidence they have given which they later realise to not be correct. Ms Palmer Thompson's evidence goes to the very nature of the operation of Condition 1, which is the core question of this appeal. It is something which one would have expected to be within the knowledge of the planning officer assigned to a development application and who was providing advice/recommendations to the planning board. Given the significance and extent of the errors in the evidence given by Ms Palmer Thompson, the Appellant submits that it would not be equitable for her evidence to simply stand corrected and in the interests of fairness should be disregarded at least in so far as it relates to the meaning and effect of Condition 1 and the Development Agreement.

The Issuance of the Development Agreement

- 15 The City has not explained why the development agreement was not produced to the Panel, as requested at the hearing, immediately upon identifying that the agreement had not been signed and that the evidence of Ms Palmer Thompson was untrue. It is most unusual for such a significant error in the evidence giving by a 'certified expert' to be left uncorrected for 3 weeks, whilst Mr Hooley had knowledge of the false statements made by his experts at a much earlier date. With respect, it is not relevant that this has been an unprecedented period of development for the City. Mr Hooley and the City were directed to produce the Development Agreement to the Panel in the course of the hearing, and they delayed in doing so. Of course, it was open to Mr Hooley to update the Commission and the parties to the appeal at the earliest possible opportunity as to (1) the error in Ms Palmer Thompson's evidence; and (2) that the Development Agreement was unsigned, and confirm that the fully executed Development Agreement would follow in early course.
- 16 Mr Hooley states that Mr Banks signed the agreement on 15 April 2021. If that is correct, that is only 5 weeks before the hearing. Mr Banks must have been aware that it was not fully executed, but in confirming to the Panel that it had been signed he did not seek to correct the evidence of Ms Palmer Thompson.
- 17 Furthermore, the City has not explained why the Development Agreement is dated incorrectly. The date of an Agreement is the date on which the last of the Parties executes the Agreement. The documents provided by the City record that the final signatory signed the Development Agreement on 15 June 2021. As such, the date of the Development Agreement is 15 June 2021 (not 15 April 2021).

Additional Documents Produced by the Respondent

- 17 The City has also requested to submit additional documents, albeit late, namely:-

(a) *An email thread between CBCL, Scott Adams, Alex Forbes and Council;*

(b) *The Memorandum / Report from CBCL to Scott Adams dated September 11, 2020 regarding "Traffic Implications of a new North South Street" which was annexed to the email thread (the draft September CBCL Report).*

- 18 The City asserts that this email thread and draft September CBCL Report confirms that there was no "conflict" between the Transportation Master Plan and the Sherwood Crossing development concept plan and as such, Condition 1 is satisfied. That simply is not true. This proposition is not supported by the evidence contained in the record (refer to the Appellant's Further Submissions in Reply to the City's Response to the Notice of Appeal).
- 19 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. Therefore, even after the City had the draft September CBCL Report, Council decided to defer the application until it had the opportunity to review the findings of the Traffic Master Plan.
- 20 In its Response to the Notice of the Appeal, 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. Firstly, 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 confirm that the development does not conflict with the proposed site plan. Secondly, this was subsequent to the issuance of the draft September CBCL Report. Therefore, it is clear that even having had the benefit of the draft September CBCL Report the Council considered that it needed further information on the results of the TMP.
- 21 These additional documents produced by the City do not provide evidence of material planning considerations which support or justify 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. The City seems to suggest that this draft September CBCL Report, in some way, satisfies the requirement of Condition 1 of the 9 November resolution. That simply cannot be the case. This report predates the 9 November resolution. If it was the case that the Council had fully consulted on the draft September CBCL Report 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.

The Appellant's Grounds of Appeal

- 22 It is disappointing that the City continues to purposely misstate the grounds of this appeal. The City's continued assertion that the Appellant's concern with the Sherwood Crossing development plainly centres upon the future east/west extension of Spencer Drive to Mount Edward Road opposite where it would intersect with Ash Drive, is simply not true.
- 23 It is not correct to say that the focus of this legal challenge is on a theoretical north/south connector through Sherwood Crossing. That is clearly evidenced by the submissions the Appellant has made to the Commission. There is no reference to the east/west extension of Spencer Drive; Ash Drive; or the theoretical north/south connector in either the Notice of Appeal, or the Appellant's Further Submission in Reply to the City's Response to the Appeal.

- 24 Whilst the City may have made it its case that Condition 1 is only relevant in so far as the TMP was considering a north/south connector through Sherwood Crossing, that is not the Appellant's case. Furthermore, the City has not presented any evidence that supports this assertion. Condition 1 is concerned with the TMP in its entirety. It is not restricted to east/west or north/south connectors. If that is what was intended by Condition 1, then that is how it would have been drafted.
- 25 The basis of the Appellant's appeal clearly centres on Condition 1 and the failure of the Council to confirm that there was no conflict with the final TMP prior to granting the final resolution on 14 December 2020.