

IN THE MATTER OF AN APPEAL

between

DON READ

(APPELLANT)

v

CITY OF CHARLOTTETOWN

(RESPONDENT)

Written Submissions of the Appellant on Jurisdiction

Introduction

- 1 These submissions set out the Appellant's position on the application by the Respondent (the City) for an order dismissing the appeal on the basis that the issues raised are not *justiciable* issues which are within the Commission's jurisdiction under section 28(1.1) of the Planning Act RSPEI 1988, cP-8 (the Planning Act) regarding all or some of the issues raised in the Notice of Appeal. The Appellant's position is that the Respondent's motion should be denied.

Jurisdiction

- 2 The Appellant agrees and acknowledges that Section 28(1.1) of the Planning Act specifically outlines the powers conferred upon the Commission under the Planning Act to hear an appeal of certain decisions of a municipality regarding planning matters as outlined in the Respondent's motion. However the Appellant denies that the true issues of the appeal are not issues within the Commission's jurisdiction as prescribed by 28(1.1) of the Planning Act.
- 3 The Appellant confirms that it had due regard to Section 28(1.1) of the Planning Act in the preparation of the Notice of Appeal. The Appellant's position is that the grounds included in the Notice of Appeal and the Response to the City's Reply clearly fall within the purview of Section 28(1.1)(b) of the Planning Act and are issues which are justiciable issues regarding planning and development matters.
- 4 The remaining legal authorities relied upon in support of this application are not relevant as the Appellant is not asking the Commission to hear matters which are substantively outside the scope of section 28(1.1) of the Planning Act.

Principle Issues

Primary Grounds of Appeal

- 5 The Motion is grounded on the Respondent's assertion that the grounds for the Notice of Appeal and the Appellant's Response to the City's Reply do not raise *justiciable* issues with respect to planning and development matters, but rather, they say, in essence and substance, the issues raised by the Appellant

primarily relate to the future implementation of a proposed Traffic Master Plan (TMP) – specifically in so far as the TMP contemplates the possible future extension of Spencer Drive to Mount Edward Road. This is simply not correct and is denied.

- 6 The Appellant's issues are *prima facie* as set out in Ground 1 of the Notice of Appeal and specifically in paragraphs 1.1-1.18 of the Appellant's Response to the City's Reply. In summary, the Appellant's case is that the Council was bound by Condition 1 attached to the 9 November Resolution to confirm there were no conflicts **between the development and the final TMP** and it has not done so. Conditions enable development proposals to proceed where otherwise it would be necessary to refuse development approval. 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 approval, 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 the requirement of Condition 1.
- 7 The Respondent is wrong in its assertion that the Appeal does not raise issues related to the Development, and that the Appellant's primary grounds for appeal is that "The City failed to consider the TMP and the TMP Report when making their decision to approve the Application" (paragraph 34 of the motion). The Appellant's case is that the City, in granting the approval, did not confirm that the **Development does not conflict with the TMP**, in accordance with Condition 1, and could not have done so because in its own admission the TMP and TMP Report are still not final documents. Condition 1 expressly requires that the Development shall not conflict with the final TMP. By the very nature of Condition 1, it is a requirement on the Development approval that the Development is in compliance with the final TMP. By virtue of Condition 1, the Development and the final TMP are intrinsically linked.
- 8 This is not a "political question" as the Respondent asserts. This is a question of the legal operation of planning conditions attached to a development approval, and whether or not the Council, in exercising its duty as the planning authority, in approving a rezoning and development concept plan for the Development, satisfied that condition. These are clearly planning matters, and go to the very core of planning principles. The on-going preparation of the TMP and the final approval of the TMP may be a "political question" (which may be subject to appeal in its own right), but that it not what is at issue in **this** appeal.
- 9 The Appellant confirms that the appeal was filed with the Commission pursuant to subsection 28(1.1)(b)(i) of the Planning Act. The issues, which are the subject of this appeal, are clearly issues which fall within the remit of 28(1.1)(b)(i) of the Planning Act, being issues which relate to a decision of the Council to adopt an amendment to a bylaw, including an amendment to a zoning map established in a bylaw.

Actions of the Appellant

- 10 The Respondent is incorrect in its assertion that the Appellant's actions somehow establish that the grounds of appeal do not relate to the Development, but are solely concerned with the TMP. With respect, the Appellant submits that this is nothing more than a misguided attempt to misdirect the Commission with regards to the issue at the heart of this appeal. The Notice of Appeal and the Appellant's Response to the City's Reply, do not make any observations on the detail or particulars of the TMP except in so far as to contradict the City's assertions that it had complied with Condition 1 and that "it clearly and adequately considered the draft TMP prior to approval of the application on 9 November 2020". It is clear the Appellant's grounds of appeal fall within the Commission's jurisdiction as prescribed by article 28(1.1)(b)(i) of the Planning Act.
- 11 The Respondent suggests that comments made by the Appellant at a TMP Public Meeting on 26 April 2021 evidence their assertion that the Appellant is only concerned with matters relating to the TMP and the TMP Report and does not have issues with the Development. As the Commission will be fully aware, it is entirely within the Appellant's right to participate in any public meeting and any public consultation process which is separate and distinct from this appeal, and it certainly does not preclude the Appellant from bringing this appeal. The Respondent states "At that meeting the Appellant spoke and voiced his concern

related to the extension of Spender Drive onto Mount Edward Road. He did not speak to any concerns related to the Application which is under appeal herein". Respectfully, it would have been absurd and improper for the Appellant to raise concerns about the Application which is the subject of this Appeal. As the Respondent is fully aware, the TMP Public Meeting was specifically to discuss the draft TMP. It was not a forum for the Appellant to raise his concerns with the Application.

12 It is not clear on what basis the Respondent is asserting that those representations can be taken into account by the Commission in these proceedings. These are not submissions made by the Appellant in this appeal nor are they relevant to this appeal. This is simply a further example of the Respondent attempting to divert the Commission from consideration of the real issues of the appeal.

13 Further, the Respondent seems to be asserting that the fact that the Appellant did not attend the Public Meeting to hear the Application on 26 August 2020, in some way precludes the Appellant from raising issues at a later stage and bringing an appeal. Section 28(1.1) of the Planning Act provides that:

*"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 development permit,

(i.1) an occupancy permit, in relation to a matter under this Act or the regulations,

(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."*
(emphasis added)

Section 28 makes provision for any person to file an appeal provided that it is filed within 21 days after the date of the decision being appealed. There is no requirement for the Appellant to have made prior representations on the application as part of the public consultation process. This appeal was filed in time and was acknowledged and accepted by the Commission on 5 January 2021 as a valid appeal.

14 It is regrettable that the City sought fit to only provide 7 days' notice for a public meeting taking place during the summer holidays. 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.

15 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".

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

16.1.1 **"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.

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."

17 The Respondent states that "the Appellant has not outlined any issues specifically with or about the Development *per se*". This is not correct and is denied. In the Response to the City's Reply, the Appellant raised the following issues:-

- In paragraphs 1.1-1.18 the Appellant raises concerns that the City has not confirmed that the developer's traffic plans are not inconsistent/incompatible with the TMP.
- In paragraphs 2.1 – 2.4 the Appellant raises specific concerns with the Developer's Traffic Impact Assessment.
- In paragraphs 3.1-3.5 the Appellant raises specific concerns relating to the Developer's failure to assess Cumulative Impacts of the Development.

These are all issues which relate to the Development. It is simply not correct that the Appellant has not outlined any issues which specifically relate to the Development.

The TMP as a purely traffic matter

18 In paragraphs 40 – 43 of the Motion, the Respondent seems to be suggesting that the TMP is a traffic matter only, and falls wholly within the City's powers as the Traffic Authority under the Highway Traffic Act, RSPEI 1988, cH-5. The Appellant has not questioned the power of the City to instruct the preparation of the TMP. The issue is that the Respondent, in exercising its duty as the planning authority, did not confirm that the **Development does not conflict with the TMP**, in accordance with Condition 1 of the resolution of 9 November, and could not have done so because in its own admission the TMP and TMP Report are still not final documents.

19 Furthermore, it is not correct that the TMP is a traffic matter only and falls wholly within the City's powers as Traffic Authority. At the public meeting on 26 April 2021, Mr Adams expressly stated:-

"This will be reviewed by planning to be looked at to be put forward as a bylaw. This is the first look at it to hear what public are saying and how we can incorporate some of these changes into what feedback we are receiving. I believe there will be another public meeting with planning and they will follow their policies".

20 Whilst the preparation and procurement of a TMP may fall within the City's powers as Traffic Authority, it is clear that the approval and adoption of the plan is considered to fall within the City's powers as Planning Authority, as it rightly should, given that traffic and transportation issues are material planning and development considerations.

- 21 In relation to paragraphs 44-46, these are issues which the Respondent itself asserts are not justiciable by the Commission, and are not issues raised by the Appellant in this appeal, and are not relevant to this application.

Fairness

- 22 In relation to paragraph 46, the Respondent asserts that it would not be fair for the City to hold up the Developer simply because the City undertook a transportation study. It is not the case that the Developer was held up because of an unrelated transportation study. That misrepresents the position as presented in the Record and outlined in the Response to the City's Reply. The City in its consideration of the Application, on the basis of good planning and sustainable development principles, determined that the Development approval could only be granted where it was confirmed that the Development and the TMP did not conflict. That has not occurred, and could not have occurred as in the City's own admission the TMP is still in draft.

Conclusion

- 23 The Respondent is wrong in its assertion that the Appeal does not raise issues related to the Development, and that the Appellant's primary grounds are related to the Spencer Drive extension arising out the TMP. The Appellant's primary issue is that the City, in granting the approval, did not confirm that the **Development does not conflict with the TMP**, in accordance with Condition 1, and could not have done so because in its own admission the TMP and TMP Report are still not final documents. The Appellant also raises issues relating to the adequacy of the Developer's TIS and cumulative impacts.
- 24 The grounds of the appeal are issues which clearly fall within Commission's jurisdiction under Section 28(1.1) of the Planning Act and are planning and development matters. The Respondent's motion should be denied.