PRINCE EDWARD ISLAND
Regulatory & Appeals Commission
Commission de réglementation et d'appels
ÎLE-DU-PRINCE-ÉDOUARD

Date Issued: February 24, 2022
Docket: LA21001
Type: Planning Appeal

INDEXED AS: Don Read v. City of Charlottetown

Order No: LA22-04

BETWEEN:

Don Read

Appellant

AND:

City of Charlottetown

Respondent

ORDER

Panel Members:

J. Scott MacKenzie, Q.C. Chair
M. Douglas Clow, Vice-Chair
Erin T. Mitchell, Commissioner

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

1. INTRODUCTION

1. On January 4, 2021, Don Read (the "Appellant") filed a notice of appeal with the Commission seeking to quash a decision by the City of Charlottetown (the "City") on December 14, 2020 to amend its zoning and development bylaw to facilitate a mixed use development located at Towers Road and Mt. Edward Road (the "Development"). The approval granted by the City was subject to a number of conditions. The first condition is material to this appeal and reads as follows:

> "That the City's Traffic Master Plan ["TMP"] confirms that the development does not conflict with the proposed site plan."

2. BACKGROUND

2. While the Development was being considered, the City was in the midst of developing a TMP for the area in which the Development was located. The TMP was an initiative of the City, and a consulting engineering firm had been commissioned by the City to prepare the TMP. The TMP was not finalized when the impugned decision was made by the City on December 14, 2020.

3. When the decision was made by the City on December 14, 2020, Councillor Duffy, who was the chairperson of the Planning and Heritage Committee, described the relationship between the TMP and the Development as follows:

> "The second one is the master traffic plan and that is commissioned by the City of Charlottetown and it is for the area that I described earlier; the larger area of Sherwood. It has nothing to do with the sanctioned or permission or approval of Sherwood Crossing; it is totally separate. It is just a working document for this Council and future Council to do the right thing when it comes to development and the concern with traffic. Somehow, word got out that the approvals for either anything in the future be it a connector road, Sherwood Crossing would be subjected to or have to pass the mustard with this master traffic plan which is the furthest thing from the truth."

4. On February 22, 2021, the City filed written submissions with the Commission in response to the appeal.

5. On March 5, 2021, the Appellant delivered further written submissions to the Commission in support of the appeal.

6. On May 7, 2021, the City filed a motion with the Commission challenging the jurisdiction of the Commission to hear and decide the appeal. According to the City, the issues raised in the appeal were not justifiable.

7. On May 20, 2021, the Appellant also filed his own motion with the Commission challenging the standing of the developer, APM Commercial (the "Developer"), as represented by Tim Banks ("Banks") to participate in the appeal.

8. On May 26, 2021, the Appellant filed written submissions in response to the motion by the City.

9. On May 25, 2021, the Commission issued a decision regarding the procedure for the motions filed by the parties and the hearing of the appeal. Decisions on the motions were reserved by the Commission.

10. On May 30, 2021, the appeal was heard by the Commission. The Appellant provided his own evidence to the Commission. The City provided evidence from its development officer, Laurel Palmer-Thompson ("Thompson"); its director of planning, Alex Forbes; and its manager of public works, Scott Adams ("Adams"). Banks provided commentary on behalf of the Developer.

11. On June 21, 2021, counsel for the City delivered additional documents and written submissions by email to the Commission.

12. On July 30, 2021, the Appellant delivered written submissions to the Commission.

13. On July 30, 2021, the City delivered written submissions to the Commission.

14. On August 6, 2021, the City delivered further written submissions to the Commission in reply to the submissions by the Appellant.

3. ISSUES

15. The motions filed by the parties raise two preliminary questions. First, the City asserts that the issues raised in the notice of appeal are not justiciable and therefore fall outside the jurisdiction of the Commission. The City asks that the appeal be dismissed. Second, the Appellant asserts that the Developer has no standing to participate in the appeal. The Appellant asks that Banks not be permitted to make submissions or lead evidence before the Commission on behalf of the Developer.

16. The main issue raised in the appeal is the first condition attached to the decision by the City. In essence, the condition required that the Development not conflict with the TMP. According to the Appellant, the appeal "centres" on the proper interpretation of this condition and whether it was satisfied by the City. The Appellant submits that the condition was not satisfied by the City and its decision therefore ought to be set aside. The City, for its part, submits that no error was made and that the decision to approve the Development included the City satisfying itself that there was no conflict with the TMP. According to the City, it considered the draft TMP and information shared by its consultant before making its decision.

17. The Appellant also raises a number of other secondary issues on appeal. While these issues were discussed by the parties during the course of the appeal process, it was clear from the submissions made to the Commission – and, in particular, those made by the Appellant – that the central issue for decision was the interpretation and effect of the first condition attached to the decision made by the City on December 14, 2020. The reasons of the Commission are therefore focused primarily on answering this question for the parties.

4. DISPOSITION

Motions

18. The motion by the City is dismissed. The approval decision made by the City is specifically listed as an appealable decision in s. 28(1.1) of the *Planning Act*. The appellate jurisdiction of the Commission is statutory in nature, and it is well-settled that the Commission does not have inherent authority. In this case, the impugned decision falls squarely within the jurisdiction assigned to the Commission by the Legislature. To the extent that the City asks the Commission to dismiss the appeal summarily on grounds of justiciability, it is necessary to examine the record as a whole. After reviewing the notice of appeal, the submissions of the parties and the evidentiary record, the true essence of this appeal is the interpretation a condition attached to the amendments approved by the City. That is a justiciable issue grounded in land use planning and properly before the Commission for its determination.

19. The motion by the Appellant is dismissed. The Commission has previously recognized impacted developers as parties to appeals under the *Planning Act*. It is also consistent with the usual practice of the Commission and supported by the Rules of Practice and Procedure ("Rules") published by the Commission. Basic principles of procedural fairness require that a person who might be adversely affected by a statutory decision be given an opportunity to be heard. In this case, the Developer was a party in the underlying application and decision by the City. Standing must be therefore be extended to the Developer in the appeal from that municipal decision. There is no unfairness or prejudice to the Appellant or the City from the participation of the Developer.

Merits

20. The appeal is dismissed. The amendments approved by council were not contingent upon the conditions. They were subject to the conditions. The first condition related to the TMP was therefore not a condition precedent to the amendments approved by the City on December 14, 2020. It was a condition subsequent that must be satisfied by the Developer as permits and approvals are sought from the City moving forward. In other words, the Development must proceed in accordance with the TMP. When the condition is properly characterized, the failure by the City to consider the TMP by reviewing only a draft of the TMP is not fatal to the amendments approved by its council on December 14, 2020. The secondary grounds of appeal raised by the Appellant are also not accepted by the Commission.

5. ANALYSIS

Motion by the City

21. The City filed a motion before the Commission seeking to have the appeal dismissed because, in its view, the issues raised in the appeal were not justiciable and outside the authority conferred by s. 28(1.1) of the Planning Act. In the alternative, the City asked that certain issues raised in the notice of appeal, which related to the TMP, be struck out for want of jurisdiction. A decision on the motion was reserved by the Commission with reasons to follow.

22. To summarize, the City advanced two main submissions in support of the motion. First, the Commission has no inherent jurisdiction and the scope of its authority is defined

in the *Planning Act*. As part of this initial submission, the City directed the Commission to s. 28(1.1) of the *Planning Act* and s. 6(1) of the *Island Regulatory and Appeals Commission Act*. Second, the issues or grounds asserted in the notice of appeal are not justiciable. As part of this second submission, the City directed the Commission to an entry published on Wikipedia and its earlier decision in Order LA09-11.

23. In his response to the motion filed by the City, the Appellant asked that the motion be dismissed. The Appellant submitted that the decision he appealed was one listed in s. 28(1.1) (b) of the *Planning Act*. According to the Appellant, this was not an appeal of the TMP. Rather, it was an appeal of a decision by the City to amend its bylaw to facilitate the Development. As part of that process, the Appellant submitted that the City was required to discuss and consider the TMP. The Appellant also submitted that the City was not correct in asserting that the appeal did not raise issues related to the Development. In his submission, the issues set out in the notice of appeal related specifically to the Development. In support of this submission, the Appellant directed the Commission to the text of the notice of appeal and his response to the City's reply to the notice of appeal.

24. The motion filed by the City, including its request for alternate relief, is dismissed. It is well-settled that the Commission, as a statutory decision-maker, has no inherent authority. It is also well-settled that the only municipal decisions subject to appeal to the Commission under the *Planning Act* are those listed in s. 28(1.1) of the *Planning Act*. Neither the entry published on Wikipedia nor the decision in Order LA09-11 assist the City on this motion.

25. The Wikipedia entry relies upon principles of law from state and federal courts in the United States as well as decisions from the House of Lords in the United Kingdom. However, justiciability is a rich and complex subject that has been discussed thoroughly in Canada, including by the Supreme Court of Canada.[1] In essence, it involves a determination whether a dispute is a subject matter that is appropriate for a court or tribunal to decide. Not everything is suitable to be judged by a court or tribunal. In the case of a statutory tribunal like the Commission, the inquiry is grounded in its enabling statute. After considering the text, context and purpose of s. 28(1.1) of the *Planning Act*, the Commission must be satisfied that the decision being challenged is one that the Legislature has assigned to it for appeal.

26. In this case, the notice of appeal filed by the Appellant stated that he was appealing a decision by the City to amend its bylaw. The first ground in the notice of motion filed by the City also confirmed that the impugned decision arose from "approving the application of APM Commercial ... to amend the City's Zoning & Development Bylaw." The first paragraph of the written submissions filed by the City in support of the motion further confirmed that the decision under appeal arose from an application "seeking a rezoning" which, by necessity, requires a bylaw amendment. Section 28(1.1) (b) of the *Planning Act* states that any person who is dissatisfied by a municipal decision to adopt an amendment to a bylaw, including an amendment to a zoning map, may appeal to the Commission. This decision by the City falls squarely within the statutory authority assigned to the Commission by the Legislature. The appeal filed by the Appellant is justiciable.

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[1] See e.g. *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26.

27. A close review of Order LA09-11 cements this conclusion.[2] That appeal concerned a decision by the City to redesign the intersection at Allen Street and Mount Edward Road.[3] The general legal authority of the City to lay out and alter public streets was found in the *Charlottetown Area Municipalities Act* and not the *Planning Act*.[4] The decision to realign the intersection was not a decision listed in the class of decisions appealable to the Commission.[5] Missing from Order LA09-11 was any application from a developer to rezone land or any decision by the City to adopt an amendment to its bylaw. For these reasons, Order LA09-11 is different than the appeal presently before the Commission. In this case, the impugned decision is one made pursuant to the *Planning Act* and listed by the Legislature as a decision that can be appealed to the Commission. For these reasons, the motion filed by the City is dismissed.

28. The motion was helpful only to the extent that it served as a reminder to the Commission as to the scope of its authority. The Commission must always maintain control over any appeal that is filed under the *Planning Act*. Evidence and submissions must relate to the purpose and subject of the proceeding. For example, grounds one, two, and three in the notice of appeal filed by the Appellant relate to the Development and the decision made by the City. That decision is one subject to statutory appeal to the Commission. Ground four, on the other hand, relates mainly to a municipal code of conduct that is the subject of a bylaw made under the *Municipal Government Act*.[6] The resolution system in that context is different and outside the authority of the Commission. As an independent, quasi-judicial appellate tribunal, the Commission must regularly separate the relevant from the irrelevant. This appeal was no exception.

Motion by the Appellant

29. The Appellant filed a motion before the Commission for an order directing that the Developer is not a named party or an added intervener in the appeal and that the Developer does not have status to participate in the proceeding. The Appellant also sought an order directing that the proceeding be adjourned to allow the Appellant and the City to reengage in an alternative dispute resolution process which had terminated before the hearing.

30. To briefly summarize the facts relied upon by the Appellant, the Developer applied to the City for amendments to its bylaw in order to facilitate the Development. The City resolved to amend the bylaw. The Appellant filed a notice of appeal with the Commission in relation to that decision. Pursuant to Rules 25 and 35 of the Rules of Practice & Procedure published by the Commission (the "Rules"), the appeal was held in abeyance to facilitate an alternative dispute resolution process. At a certain point, the Developer indicated to the Commission that it was not willing or no longer willing to participate in that process. Upon receipt of this notification, the Commission set a date for the hearing of the appeal.

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[2] *629857 N.B. Inc. et al. v. City of Charlottetown* (November 10, 2009), Docket LA09015, Order LA09-11 [Order LA09-11].

[3] Order LA09-11, *ibid.* at para. 1.

[4] Order LA09-11, *supra* note 2 at para. 21.

[5] Order LA09-11, *ibid.* at para. 21.

[6] R.S.P.E.I. 1988, c. M-12.1.

31. In support of his motion, the Appellant argued that Rule 11(2) states that the Commission, upon receipt of a notice of appeal, may grant status to all named parties and to an intervener who applies to intervene in accordance with the Rules. According to the Appellant, the Developer is not a "named party" in this appeal because it was not "named on the face of the Notice of Appeal, the Respondent's reply, or the Appellant's Response."[7] Moreover, the Developer is not an "intervener" because it has not applied to intervene in accordance with the Rules. Since the Developer was not named as a party by the Appellant and did not apply to be an intervener, the Developer does not have status to participate in this appeal. The Commission is alleged to have erred in ending the alternative dispute resolution process and setting the matter down for a hearing.

32. In response to these submissions, the Developer delivered to the Commission a copy of Order LA95-19.[8] In that decision, the Commission found that the developer was a necessary party to the appeal. The developer had applied for, and received, a development permit that was then appealed to the Commission. In the words of the Commission, any decision reached by the Commission "may affect the rights of the [d]eveloper" and the developer was therefore a party to the appeal proceeding.[9] For its part, the City noted that developers had always traditionally participated in appeals before the Commission and adopted the position that the Developer had a substantial interest in the outcome of the appeal.

33. The motion filed by the Appellant is dismissed. When a notice of appeal is filed with the Commission under the *Planning Act*, the Commission determines the parties to the appeal. While the Appellant states carefully that the Developer was not named on the face of his notice of appeal, a review of the whole notice of appeal filed with the Commission confirmed that the impugned decision by the City was in relation to an application made by the Developer. The Developer was also named in the decision document attached to the notice of appeal filed by the Appellant. It is the usual practice of the Commission to accord party status to any developer who was a party to the underlying decision being appealed. This practice accords with the basic requirements of procedural fairness. In the present case, the Commission reviewed the notice of appeal from the Appellant and followed its usual practice by naming the Developer as a party to the appeal. The Developer had status to participate in this proceeding.

34. The Appellant started this appeal under section 28(1.1) of the *Planning Act*. The *Planning Act* does not prescribe the parties to an appeal. It identifies appealable decisions. It therefore falls to the Commission – under its broad authority to govern its own procedure – to develop rules and practices to determine which persons or entities are entitled to participate as parties in an appeal. The Rules and practices of the Commission do not grant an appellant the discretion to select or omit a respondent (or other parties) necessary for an appeal. This is evident from the standard form notice of appeal that is prescribed by the Commission. It does not require an appellant to identify the parties to the appeal; rather, it merely requires the appellant to identify the Minister or municipal council whose decision is being appealed. Once the decision-maker has been identified, the Rules and practices of the Commission determine the

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[7] Written submissions on the motion at para. 4.

[8] *Sobeys Inc. v. Dept. of Provincial Affairs & Attorney General* (November 15, 1995), Docket LA95010, Order LA95-19 [Order LA95-19].

[9] Order LA95-19, *ibid.*

parties to the appeal. Rule 4(t) provides that the "respondent" to an appeal is the original decision-maker whose decision is under appeal. Rule 4(r) provides that the parties to an appeal are the "appellant, respondent, or developer." An appellant has no discretion in selecting these participants.

35. The practice of the Commission is to grant a developer status as a party to an appeal if the developer was a party to the underlying decision being appealed from.[10] This practice accords with the basic principles of procedural fairness, which require that any party who might be adversely affected by a decision be given an opportunity to be heard by the decision-maker.[11] They also require that any party to a proceeding under appeal be given standing in the appeal.[12]

36. In the present case, the Developer was a party in the underlying proceeding that was appealed by the Appellant. It is also clear that the Developer may be adversely affected by the decision of the Commission. Even the Appellant's notice of motion acknowledges that the Developer has a "distinct and substantial interest in the proceedings."[13] The Developer therefore had status to participate as a party in the proceeding. This decision accorded with the Rules, past practice of the Commission, and with the basic principles of procedural fairness.

37. The submission of the Appellant is predicated on the assertion that not all "parties" to an appeal have status to participate in the appeal. In advancing this argument, the Appellant acknowledges that a developer may be a "party" to an appeal as defined in Rule 4(r). The Appellant notes, however, that Rule 11(2) permits the Commission, upon receipt of a notice of appeal, to grant status to a "named party". From this, the Appellant reasons that there is a distinction between a "party" to an appeal and a "named party" to an appeal, and that only the latter has status to participate in the proceeding.

38. This argument must be rejected. A review of the Rules as a whole demonstrates that "parties" – and not just "named parties" – have status to participate in an appeal. For instance:

    - Rule 1(3)(a) provides that the Rules are intended to ensure that "all parties to a proceeding are afforded a reasonable opportunity to be heard."

    - Rule 25(2) provides that alternative dispute resolution is available if "preferred by the parties".

    - Rule 32 provides that the Commission may hold a preliminary hearing "on its own initiative or at the request of any party."

    - Rule 46 states that the Commission "may request parties to file any further information, material or documents that the Commission considers necessary."...

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[10] See e.g. Order LA20-04; Order LA19-01; and Order LA17-06.

[11] See Sara Blake, *Administrative Law in Canada*, 6th ed. (Toronto: LexisNexis Inc., 2017) at 11 [Blake].

[12] Blake, *ibid.* at 178 [emphasis added].

[13] Notice of motion at para. 18.

39. These Rules demonstrate that a "party" to an appeal is expected to play an active role in the appeal proceedings. Finally, Rule 9 is clear that substance prevails over form in all matters before the Commission.[14]

40. For these reasons, the Developer had status to participate as a party in the appeal. No prejudice or unfairness resulted to any party because the matter was set down for a hearing and heard by the Commission. The alternative dispute resolution process is a discretionary mechanism available to the Commission that, in some cases, may be used by the Commission for the purpose of resolving an issue or matter in dispute. In this case, the most just, expeditious, and efficient determination of this matter was to have it heard and decided by the Commission.

41. Banks was, therefore, given an opportunity to participate in the appeal on behalf of the Developer. Unfortunately, the commentary delivered by Banks was generally directed to the City and other audiences, or it was related to subjects outside the authority of the Commission. For these reasons, the submissions made by Banks did not assist the Commission with determining the actual merits of this appeal.

TMP

42. The Appellant submits that the City failed to consider the TMP when it made its decision to approve the application related to the Development on December 14, 2020. This failure is evidenced by the fact that the TMP was not finalized as of that date and, in fact, was only presented to council for the City in early 2021. The City therefore could not have satisfied itself that the first condition was met and the Development was consistent with the TMP. In the words of the Appellant, 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)."[15] According to the Appellant, the City was bound to review and consider the TMP to ensure that there were no conflicts with the Development. The City did not (and has not) done so.

43. The Appellant also argues that, while the City seeks to demonstrate that the first condition was satisfied through its consideration of the draft TMP and internal correspondence between Adams and Thompson related to the draft TMP, the text of the condition does not speak of a draft. Rather, it speaks only of the TMP. The Appellant submits that this must be a reference to the TMP in its final form.

44. The Appellant further describes the statement of Councillor Duffy on December 14, 2020 as a "complete contradiction" with the first condition attached to the amendments at first reading on November 9, 2020. In the words of the Appellant, the TMP and the Development were not "totally separate" and, in fact, the first condition bound the City to review the TMP before the Development could proceed.

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[14] See also *Island Regulatory and Appeals Commission Act*, R.S.P.E.I. 1988, c. I-11, s. 10.

[15] Further submissions in reply at para. 1.16.

45. The City, on the other hand, argues that the condition was in fact considered and satisfied. The City pointed to a special meeting of council on October 29, 2020 where the draft findings in the TMP were discussed as they related to the Development. The City also pointed to an email from Adams to Thompson, who indicated that the application could move forward provided the final TMP did not contradict the draft TMP. The application was then approved by council for the City on November 9, 2020 subject to five conditions, including the first condition related to the TMP. According to the City, it "clearly and adequately considered the draft TMP" before approving the application.[16] In later written submissions, the City also submitted that the first condition "became superfluous" following the discussions of its municipal council on October 29, 2020 and November 9, 2020.[17]

46. As for the statement made by Councillor Duffy on December 14, 2020, the City submitted that the statement was accurate and that the decision to approve the Development was not contingent on the TMP. Rather, it was a relevant consideration when deciding whether to grant approval for the Development.[18]

47. At the hearing, the City also placed much emphasis on the evidence of Thompson, who was responsible for processing the application by the Developer. Thompson testified before the Commission that the TMP was in process, but considered, while the Development was under review by the City. She interpreted the first condition as referring to the "proposed" TMP.[19] Thompson also told the Commission that the first condition attached to the approval decision by the City had been incorporated into a signed development agreement with the Developer.[20]

48. This evidence was presented to demonstrate that the first condition had been considered by the City. Unfortunately, the City confirmed after the hearing that the development agreement was not signed by the City until June 15, 2021 and the agreement did not include the first condition that council had attached to its approval decision on December 14, 2020. In light of this new information, the Commission has given less weight to the evidence of Thompson. The Commission also does not accept her construction or interpretation of the first condition. There is no text referring to a draft or proposed TMP.

49. For the reasons that follow, the Commission is not persuaded by this ground of appeal. The submissions of the Appellant characterize the first condition related to the TMP as a condition precedent to the amendments approved by the City. The Commission does not accept this characterization in light of the text of the resolution and the surrounding context. The submissions of the City ignore the proper characterization of the first condition and instead seek to demonstrate that the condition was in fact satisfied. The problem with this position, of course, is that the TMP was not completed when the City made the

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[16] Response to the notice of appeal at page 3.

[17] Post-hearing submissions dated August 6, 2021 at page 3.

[18] Response to the notice of appeal at page 4.

[19] Transcript of testimony of Thompson at page 24 and lines 21-24.

[20] Transcript of testimony of Thompson at page 18 and line 1.

impugned decision on December 14, 2020. The Commission does not accept this position advanced by the City.

50. Read in its full context, the first condition is a condition subsequent. The resolution read on November 9, 2020 and adopted on December 14, 2020 "approved" amendments to the bylaw and official plan "in order to facilitate a mixed-use development." That approval was "subject to" five conditions, including requirements that the development not conflict with the TMP, the parties sign development agreement and a roads and services agreement, the conveyance of a future road, and the receipt of a revised site plan. These conditions all related to the future mixed-use development that was being facilitated and moving forward. They were not conditions precedent to the amendments approved by council for the City. In other words, the approval was not "contingent upon" the conditions. It was "subject to" the conditions.

51. The conditions were subsequent to the amendments approved by the City. As the Appellant himself acknowledged in his written submissions, 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)."[21] In this case, the text and context of the first condition support the conclusion that it was a condition subsequent that the Developer had to (and must continue to) satisfy in order for the Development to continue forward. Otherwise, the Developer will not be in a position to obtain the requisite permits from the City.

52. If the Development conflicts with the TMP at any point, then the condition subsequent attached to the approval by the City would be grounds for denying permits and approvals going forward. For example, in order to obtain a development permit, the Developer must satisfy the City that its proposed work complies with the bylaw (see ss. 3.3.1, 3.3.8, and 3.3.9(a)). The approval granted by the City on December 14, 2020 forms part of that bylaw (see appendices B and I, including amendment no. 23). If the work being proposed by the Developer in the future conflicts with the TMP, then grounds for denying a permit would be available to the City (see s. 3.3.9(a)).

53. The enforcement of conditions subsequent is a matter for the discretion of the City and not subject to appeal before the Commission. However, when making appealable decisions in the future that are subject to such conditions, they may be considered by the Commission pursuant to s. 28(1.1) of the *Planning Act*. This appeal was not taken from any subsequent permit or approval granted by the City. In this case, there was no interim planning policy in place pursuant to s. 10 of the *Planning Act* while the City was considering and deciding the application by the Developer for amendments to the bylaw and official plan. That application therefore had to be determined by the City according to the bylaw in place when the completed application was received. The condition subsequent attached by council to its decision was consistent with this surrounding context.

54. The position adopted by the City at the hearing was not persuasive. The first condition attached to the approval given by council for the City did not refer to

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[21] Further submissions in reply at para. 1.16.

a proposed or draft TMP. A draft is just that – a draft that is subject to change. While the Commission accepts that council considered information and preliminary findings related to the TMP before it approved the amendments sought by the Developer, the City did not – and could not have – considered whether the Development conflicted with the TMP because the TMP had not yet been completed. The first condition was a condition subsequent aimed at ensuring that the Development progressed in a manner consistent with the TMP. That obligation continues. The legal effect of the condition is a separate and open question because the Commission has no present evidence in the record as to the current status of the TMP.

55. In summary, the first condition related to the TMP was not a condition precedent to the amendments approved by the City on December 14, 2020. It was a condition subsequent that continues, and it is a requirement that, amongst many others, must be satisfied by the Developer as permits and approvals are sought for the Development moving forward. When the condition is properly characterized, the failure by the City to consider the TMP, and not just a draft of the TMP, is not fatal to the amendments approved by its council on December 14, 2020. The appeal on this ground is therefore dismissed.

Traffic Impact Assessment

56. The Appellant submitted that the traffic impact assessment ("TIA") obtained by the Developer and relied upon by the City suffered from two main deficiencies. First, it was argued that the TIA failed to adequately assess traffic growth rates based on real and available data from Prince Edward Island and Charlottetown. Instead, the TIA was based on a typical growth rate (1%) for urban municipalities. Second, it was argued that the TIA failed to consider cumulative traffic impacts, including those from activities and projects other than the Development itself. According to the Appellant, the focus of the TIA was the impact of the Development only.

57. The Commission is not persuaded by this ground of appeal. While expert evidence to the contrary is not necessary in order to challenge the conclusions in an expert assessment like the TIA, that type of evidence or something similar to it can be helpful. In this case, the Commission heard no such evidence to the contrary. The Appellant did raise legitimate questions about the TIA based on its contents and publicly available data; however, they were not of such materiality to be fatal to the TIA and the reliance upon it by the City. The Commission must also guard against requiring a developer to assume obligations that extend beyond their property or development and are properly the responsibility of a municipality.

58. The submissions of the Appellant were matters touching on the weight to be given to the TIA by the Commission as evidence. In this case, the Developer provided the TIA to the City, the City reviewed the TIA with its professional staff, and the TIA was considered to be sufficient to satisfy the City in this particular case. While the Commission places less weight on the TIA than appears to have been assigned to it by the City in light of the submissions made by the Appellant, the Commission remains satisfied that the TIA confirms that there will be no operational issues with the Development in terms of traffic.

For these reasons, there was no basis for the City to deny approval based on the TIA in this particular case.

Code of Conduct

59. The Appellant submitted that the City failed to carry out satisfactory public consultation in accordance with its Council Code of Conduct Bylaw ("Code"). In support of this submission, the Appellant pointed to the concerns raised by a number of residents as well as a resource handbook published for local municipal governments. The Appellant contended that satisfying the minimum standards for notice and public participation was not enough in this context and inconsistent with the spirit of the duties assigned to a municipal council.

60. The Commission is not persuaded by this ground of appeal. The Code establishes its own resolution processes that are distinct from the statutory appeal process found in s. 28 of the *Planning Act*. No grant of authority is given to the Commission under the Code. Unless the conduct of a municipal council or one of its members involves a breach of procedural fairness while considering an application under the *Planning Act*, the Commission has no authority to make determinations under the Code. The evidence before the Commission in this case confirms that the bylaw requirements for posting public notice, mailing notices to neighbouring properties, publishing notice, and holding a public meeting were satisfied by the City. The Commission finds no breach of procedural fairness in the circumstances.

6. RECOMMENDATIONS

61. The submissions and record before the Commission revealed that residents in and around the area that includes the Development have concerns about the future direction and flow of traffic in the area, including the creation of new public roads and connections to existing ones. These concerns are best addressed by the City through future public consultations. Meaningful engagement has been challenging during the COVID-19 pandemic. When public health restrictions are lessened or lifted, the Commission encourages the City, including its council, leadership and professional staff, to engage meaningfully with residents in the area about future plans for the direction and flow of traffic. As this appeal has illustrated, they have helpful information and perspectives to share with the City.

62. The Commission further recommends that in future the City ensure that its records of decision are drafted in such a way as to provide certainty and clarity as to the decision being made, not only to applicants, but to the general public as well.

7. CONCLUSION

63. For the reasons above, the appeal is dismissed.

64. The Commission thanks the Appellant and the City for their thorough submissions in this matter.

IT IS ORDERED THAT

1. The appeal is hereby dismissed.

DATED at Charlottetown, Prince Edward Island, Thursday, February 24, 2022.

BY THE COMMISSION:

(sgd) J. Scott MacKenzie

J. Scott MacKenzie, Q.C., Chair

(sgd) M. Douglas Clow

M. Douglas Clow, Vice-Chair

(sgd) Erin T. Mitchell

Erin T. Mitchell, Commissioner