INTRODUCTION

1. Landfest Company Limited (the "Appellant") appeals the decision of the Town of Stratford municipal council ("Council" or the "Town") to maintain the current Low Density Residential (R1) zoning (the "Rezoning Application") for parcel numbers 1061175, 106117 and 329011 (the "Subject Property").

See: **Notice of Appeal dated July 30th, 2021.**
Appellant's Pre-Hearing Submissions at TAB 2

2. This case falls in a line of prior decisions of the Island Regulatory and Appeals Commission (the "Commission"), including *Doiron*, *Hanmac* and *Frost-Wicks*. Like the present appeal, *Doiron*, *Hanmac* and *Frost-Wicks* are cases in which the municipal council decided an application differently than was recommended by its staff planner.

See: ***Warren Doiron v. City of Charlottetown*, LA10-06 ("*Doiron*").**
Respondent's Pre-Hearing Submissions at TAB 2

See also: ***Hanmac Inc. v. City of Charlottetown*, LA15-06 ("*Hanmac*").**
Appellant's Pre-Hearing Submissions at TAB 4

See also: ***Jessie Frost-Wicks et al v. City of Charlottetown*, LA20-04 ("*Frost-Wicks*").**
Appellant's Pre-Hearing Submissions at TAB 6

3. In these cases and others, the Commission has confirmed that municipal councils need not always agree with the recommendation of their staff planner, but that they must undertake a careful evaluation of the application before them, provide reasons for their decisions, and these reasons must be based on planning considerations.

See: ***Frost-Wicks, supra*, at paras 34-36.**
Appellant's Pre-Hearing Submissions at TAB 6

4. The present appeal is distinguishable from *Hanmac* and *Frost-Wicks* in that the evidence establishes that those members of Council who voted to maintain the current R1 zoning carefully evaluated the application before them and provided reasons and a planning rationale for their decision.

See: **Written comments received from the Public.**
Record Filed by the Town of Stratford at TABS 14, 17

See also: **June 23rd, 2021 Public Meeting Transcript at pg 175.**
Record Filed by the Town of Stratford at TAB 15

See also: **Planner's Report dated July 5th, 2021 at pg 266.**
Record Filed by the Town of Stratford at TAB 20

See also: **Minutes from July 14, 2021 Council Meeting.**
Record Filed by the Town of Stratford, TAB 25

See also: **Letter to Landfest, dated July 19, 2021.**
Record Filed by the Town of Stratford, TAB 27

5. This case is also distinguishable from *Frost-Wicks* in that the decision to maintain the current R1 zoning on the Subject Property is one which accords with sound planning principles: the current R1 zoning has been in place since at least 1990 – prior to the amalgamation of the Town of Stratford. Since that time, the Town of Stratford has enacted multiple Official Plans and Zoning Bylaws, with corresponding input and approval from planning staff, the public, Council, and the Minister responsible for the *Planning Act*.

See: **Excerpt: 1990 Community of Southport *Zoning & Subdivision Bylaw* and Zoning Map.**
Respondent's Pre-Hearing Submissions at TAB 8

See also: **Royal Gazette dated December 13, 2003 at pg 1204.**
Respondent's Pre-Hearing Submissions at TAB 9

See also: **2003 Zoning Map showing Subject Property Zoned R1.**
Respondent's Pre-Hearing Submissions at TAB 10

6. Even if the Subject Property is also suitable for the PURD zone, that does not render Council's decision to maintain the current R1 zoning contrary to sound planning principles.

7. Indeed, there is no conflict between the current R1 zoning and the Official Plan. As noted by the Town's planner, Blaine Yatabe, while the Official Plan encourages housing variety, it also encourages the preservation of existing neighbourhoods.

See: Planner's Report dated July 5th, 2021 at pg 266. Record Filed by the Town of Stratford at TAB 20

8. The Appellant is not entitled as a matter of law to a favourable decision. There is no such thing as "as of right" rezoning.

9. The Appellant is entitled to a fair process, in which Council carefully considers the application before it and makes its decision based on planning considerations. The evidence establishes that this was done in this case.

10. Therefore, the Town respectfully requests that the appeal be dismissed.

PRELIMINARY MATTER – Jurisdiction to Adjudicate

11. The Town agrees with the Appellant that the Appellant has the right to appeal the decision of Council, and that the Commission has jurisdiction to hear and decide this appeal.

GROUND 1: Council met its duty of procedural fairness, decided the Rezoning Application on its merits, and provided sufficient reasons for its decision.

12. The Appellant and the Town agree that it is incumbent on members of Council to carefully evaluate any rezoning application and to provide sufficient reasons to support its decision.

See: Appellant's Factum, at para 25.
Appellant's Pre-Hearing Submissions, TAB 2

13. The Town asks the Commission to review the Record filed by the Town of Stratford, including:

(a) the Agenda and Minutes of the June 9th, 2021 regular Council meeting **[Record Filed by the Town of Stratford at TAB 8]**;
(b) Written Comments received from members of the public **[Record Filed by the Town of Stratford at TABS 14 and 17]**;
(c) the Planning Report prepared by the Town's planner, Blaine Yatabe **[Record Filed by the Town of Stratford at TAB 20]**;
(d) the Transcript from the June 23rd, 2021 public meeting **[Record Filed by the Town of Stratford at TAB 15]**;
(e) the Minutes from the July 14th, 2021 regular council meeting at which the decision was taken **[Record Filed by the Town of Stratford at TAB 25]**; and
(f) the Letter sent by Mr. Yatabe to the Appellant on July 19th 2021 **[Record Filed by the Town of Stratford at TAB 27]**.

Taken together, the Town submits that the evidence demonstrates that members of Council who voted against the Rezoning Application undertook a careful evaluation of the Rezoning Application, decided the Rezoning Application on its merits, and identified sufficient planning reasons to support their decision.

14. The Appellant asserts that councillors "*did not consider planning principles and, instead, were focused on the cry of residents that opposed the Rezoning Application*".

See: **Appellant's Factum, at para 29.**
Appellant's Pre-Hearing Submissions, TAB 2

15. The Town respectfully disagrees. Members of Council indeed identified planning considerations to support their decision, such as:

(a) The number and extent of variances required by the proposed development (in other words, that the proposed development would not be an 'as of right' development within the PURD zone);

(b) The compatibility with surrounding land uses, given that the subject property is surrounded on three sides by a mature R1 neighbourhood; and

(c) Input received from the public, which Council is mandated to consider by section 3.2.2(f) of the Town's *Zoning and Development Bylaw* #45 (the "*Zoning Bylaw*").

See: **Minutes from July 14, 2021 Council Meeting.**
Record Filed by the Town of Stratford, TAB 25

See also: **Letter to Landfest, dated July 19, 2021.**
Record Filed by the Town of Stratford, TAB 27

See also: **Town of Stratford *Zoning and Development Bylaw* #45 (the "*Zoning Bylaw*") at s. 3.2.2.(f).**
Respondent's Pre-Hearing Submissions at TAB 5

16. It is important to note that residents also identified and considered planning principles in voicing their opposition to the Rezoning Application. These comments informed Council's decision. Indeed, while there were many comments submitted relating to issues like construction noise/dust, drainage issues, and traffic issues, the main thrust of concern raised by residents, which were mirrored in the reasons provided by Council, relate to the compatibility of the proposed development in an area surrounded on three sides by a mature R1 neighbourhood.

17. Here are a few relevant excerpts from comments Council received from residents:

- **Comment #1**

"[…] a PURD designation would so drastically change the neighborhood. As to the proposed changes, concerns about section 4.2-3 of the [Official Plan] being appropriately followed arise:

'3. Stratford is a community that Preserves the character of existing neighbourhoods

To achieve this objective we will:

[…]

b) locate affordable housing developments in areas where they do not conflict with existing residential areas.'

[…]

In all previous public meetings, residents have voiced many concerns from property values; emergency access; traffic, density increases beyond any reasonable level; and others too numerous to mention, but one essential message has always been that residents don't want their community and it's character changed due to the aggressive overbuilding on this small parcel of land." [Underlining in Original]

See: **Redacted Post-Meeting Comments at pgs 218, 219. Record Filed by the Town of Stratford at TAB 17**

- **Comment #2**

"The neighbourhoods surrounding this parcel of land are all well established and well maintained single family units on larger size lots […] The neighbourhood suits single family units not townhomes or multi family units."

See: **Redacted Pre-Meeting Comments at pgs 137, 138. Record Filed by the Town of Stratford at TAB 14**

- **Comment #3**

"When we [redacted] *bought our first house in Stratford 43 years ago, we chose Stratford because of the size of the lots with space so neighbours were not packed in close together. […] When we downsized to* [redacted] *we, and our neighbours at* [redacted] *checked the zoning of the beautiful field across the street from us to make sure it was R1 before buying our properties. When Landfest purchased these fields they knew it was zoned R1 […]. We have been in our houses for 16 years and fully expected to see single family dwellings being built across the street from us, which would be in keeping with the rest of the neighbourhood. This proposed plan would completely change the neighbourhood."*

See: Redacted Pre-Meeting Comments at pg 148.
Record Filed by the Town of Stratford at TAB 14

- **Comment #4**

"The zoning was confirmed R1 when staff, Planning Board and Council looked at it recently and I can not see why it makes sense to change it to PURD now. […] PURD Zoning does not fit the neighbourhood. All of the subdivisions around this area are R1 with single family homes – no duplexes, let alone townhouses (or apartment buildings). […]"

See: Redacted Post-Meeting Comments at pg 222.
Record Filed by the Town of Stratford at TAB 17

- **Comment #5**

"[The Developer is] proposing a high-density rezoning application to be put on land surrounding by low density housing. This developer continues to try to put a square peg in a round hole, it just doesn't fit nor does it reflect or enhance the surrounding neighborhood."

See: Redacted Post-Meeting Comments at pg 231.
Record Filed by the Town of Stratford at TAB 17

- **Comment #6**

"What I do take issue with is maintaining the character of the new homes with the old Reddin Heights homes and the boundary separation between the new and old sub-divisions. […] With the minimum lot size, reduced frontages, and side yard set backs, more single family houses can be built now than the previous 2012 plan. Townhouses are out of character with R-1 homes on three sides of this development."

See: Redacted Post-Meeting Comments at pgs 243, 244. Record Filed by the Town of Stratford at TAB 17

18. Similar comments were made by residents at the Public Meeting on this issue held on June 23rd, 2021, in which all members of Council were in attendance:

- **Comment #7**

"The feedback analysis of only 11% being concerned with the character of the community is misleading […]. So it gets skewed to look like there's more people just complaining about traffic, when it's really the way the community is being designed."

See: June 23rd, 2021 Public Meeting Transcript at pg 169. Record Filed by the Town of Stratford at TAB 15

- **Comment #8**

"[…] The (Official Plan) 4.2, the housing policy is clear […] "identifying opportunities for zoning land potential to allow smaller lot sizes and higher densities," and I quote, "without compromising the character of existing neighborhoods". We have three (R1) around that property, and really putting PURD in that place would compromise."

See: June 23rd, 2021 Public Meeting Transcript at pg 175. Record Filed by the Town of Stratford at TAB 15

19. These planning issues were canvassed in the planning report prepared by the Town's planner, Blaine Yatabe. While Mr. Yatabe recommends that the Subject Property satisfies the requirements of the PURD zone, he also identifies matters in the Official Plan which arguably go against his conclusion. Specifically, he raises Section 4.2 of the Official Plan, sections 1(b) and 3(b) – both of which were raised by residents – and acknowledges that

> *"This could be argued that this proposed development is doing exactly this and creating a higher, denser neighbourhood with more diversity, while still being residential, but having several town homes and smaller lot sizes it is compromising the existing character of the surrounding neighbourhoods." (Underlining Added)*

See: Planner's Report dated July 5th, 2021 at pg 266.
Record Filed by the Town of Stratford at TAB 20

20. Conversely, most of those who wrote in support of the Rezoning Application cite only the need for affordable housing and personal qualities of the Appellant to support their position.

See: Written comments received from the Public
Record Filed by the Town of Stratford at TABS 14, 17.

21. This Commission has confirmed that while the availability of housing is a relevant consideration, it is "*not an overriding principle capable of sustaining any or all development without regard to other relevant factors or sound planning considerations.*"

See: *Frost-Wicks, supra*, at paras 42, 43.
Appellant's Pre-Hearing Submissions at TAB 6

22. This Commission has routinely advised that Councils should seriously consider the recommendations of their professional planning staff and Planning Board. At the same time, this Commission has confirmed that Councils' hands are not tied by

these recommendations, that Council is not a rubber-stamping body, and that Council can render a different decision than was recommended by its planner, so long as it provides a planning rationale for its decision.

See: ***Frost-Wicks, supra*, at paras 34-36.**
Appellant's Pre-Hearing Submissions at TAB 6

See also: ***Doiron, supra*, at para 39.**
Respondent's Pre-Hearing Submissions at TAB 2

23. Only one councillor who voted against the Rezoning Application, Councillor Smith, referenced the input from residents as the sole reason for his decision. And while the Town agrees with the Appellant that so-called "Not In My Back Yard" ("NIMBY") concerns cannot be the sole basis of planning decisions, neither is Council entitled to ignore the input from residents and other interested persons.

24. Indeed, the *Zoning Bylaw* requires Council to consider this input. Additionally, one of the objects of the *Planning Act* is to "*provide the opportunity for public participation in the planning process*".

See: **Town of Stratford *Zoning and Development Bylaw* #45 (the "*Zoning Bylaw*") at s. 3.2.2.(f).**
Respondent's Pre-Hearing Submissions at TAB 5

See also: ***Planning Act*, RSPEI 1988, c P-8 at s. 2(e).**
Respondent's Pre-Hearing Submissions at TAB 6

25. The Legislature intended for decision makers in local planning matters to take resident concerns into account – or else why delegate this authority to an elected body like a municipal council, rather than an appointed one with security of tenure?

26. This point was confirmed by Rowe JA (as he then was) writing for the unanimous Newfoundland and Labrador Court of Appeal prior to his elevation to the Supreme Court of Canada:

> *"42 A politician is not barred from having regard to the views of his or her constituents in making a discretionary decision, including rezoning. The legislature must have intended this, as it is a natural and predictable consequence of conferring authority to make rezoning decisions on City Council rather than conferring such authority on some institution (like the Ontario Municipal Board) whose members are appointed, rather than elected.*
>
> *43 It is not for the courts to tell members of City Council that they are to make discretionary decisions (as was this decision) without regard to the views of affected citizens, persons who are their constitutents. That would run counter to the democratic system. Seanic's submissions on this point must be rejected."*

See: ***St. John's (City) v. Seanic Canada Inc.*, 2016 NLCA 42 at paras 42, 43.**
Respondent's Pre-Hearing Submissions at TAB 4

27. Another issue raised by the Appellant is the sufficiency of the reasons provided by Council. The Appellant wrote:

> *"[…] In addition, the written reasoning provided in the letter dated July 19th, 2021, simply included vague references to concerns and did not provide substantive reasons."*

See: **Appellant's Factum, at para 29**
Appellant's Pre-Hearing Submissions, TAB 2

28. The Town respectfully disagrees. It is not enough to look at the letter dated July 19th, 2021 in isolation. The Appellant, and indeed this Commission, must look at the broader context and available evidence, including the Planner's Report and the Minutes of the July 14th Council Meeting, as well as the July 19th letter.

29. The Ontario Superior Court of Justice recently expounded the applicable legal principles in reviewing the sufficiency of the reasons provided by the Local Planning Appeal Tribunal (an administrative body functionally equivalent to this Commission). Verbeem J wrote:

57 The adequacy of the Tribunal's reasons must be evaluated in accordance with a functional and contextual approach.33 The reasons must be sufficient to: explain why the Tribunal arrived at its decision (by demonstrating a logical connection between the decision and the basis for the decision); provide public accountability; and permit effective appellate review.34 On appellate review of their adequacy, the Tribunal's reasons must be considered and evaluated as a whole, in the context of the evidence and the submissions before it, and with an appreciation of the purpose for which its reasons were delivered.35 The basis for the Tribunal's decision must be discernable, when its reasons are considered in that context36 .

58 The Tribunal is not required to expound upon "how" it arrived at its conclusion in a "watch me think" fashion. In other words, a detailed description of the Tribunal's process in arriving at its decision is unnecessary.37 When explaining the basis for its decision and its logical link to the decision itself, the Tribunal is not required to: set out every one of the findings or conclusions it reached in arriving at its ultimate decision; expound upon evidence which is uncontroversial; detail its findings on each piece of evidence or controverted fact; or recite well-settled legal principles, where the ultimate result turns on the application of such principles to the facts, as found after a consideration of conflicting evidence.38

59 Brevity alone does not render a Tribunal's reasons inadequate. The degree of detail required is a function of the case-specific circumstances. Even brief reasons will be adequate, provided that when read in the context of the evidence and submissions before the Tribunal, the reasons demonstrate that the Tribunal seized and disposed of the substance of the proceeding.39

See: ***CAMPP Windsor Essex Residents Association v. Windsor (City)*, 2020 ONSC 4612 (CanLII) at paras 57-59. Respondent's Pre-Hearing Submissions at TAB 7**

30. In the present matter, members of Council spoke to the planning rationale for their decision at the Council meeting of July 14th. This rationale was briefly recorded and relayed to the Appellant in the letter of July 19th. Taken together, the reasons demonstrate an intelligible planning rationale to support Council's decision. Accordingly, the Town submits that it met its duty of procedural fairness to the Appellant.

31. The Town acknowledges that there is no such thing as absolute discretion, and that it must make decisions on the basis of planning considerations. The Town submits that the Record, including the comments received, transcript of the June 23rd Public Meeting, the Planner's Report, the Minutes of the July 14th Council Meeting, and the Letter to Landfest dated July 19th must be read together. Taken together, the Town respectfully submits that Council can be seen to have considered the Rezoning Application before it and provided the Appellant with an intelligible planning rationale for its decision based on the compatibility of the proposed project with surrounding land uses and protecting the character of the existing neighbourhood. The Appellant is entitled to no more.

See: **Written comments received from the Public Record Filed by the Town of Stratford at TABS 14, 17.**

See also: **June 23rd, 2021 Public Meeting Transcript at pg 175. Record Filed by the Town of Stratford at TAB 15**

See also: **Planner's Report dated July 5th, 2021 at pg 266. Record Filed by the Town of Stratford at TAB 20**

See also: **Minutes from July 14, 2021 Council Meeting. Record Filed by the Town of Stratford, TAB 25**

See also: **Letter to Landfest, dated July 19, 2021. Record Filed by the Town of Stratford, TAB 27**

GROUND 2: Council's decision to maintain the current R1 zoning has merit based on sound planning principles.

32. The Town submits that the Appellant's argument under this ground is effectively to restate the argument advanced under the first ground relating to procedural fairness. Indeed, at para 33 of its factum, the Appellant wrote:

> *"The Appellant submits that the record, in particular the minutes of the Council meeting on July 14th, 2021, demonstrates that there was a lack of planning-related factors discussed by those councillors that voted against the Rezoning Application. Instead, the three councillors were focused only on the alleged issues raised by residents and did not consider the evidence relating to sound planning that was provided by the Applicant or the Town's own planner." [Underlining Added]*

See: Appellant's Factum, at para 33.
Appellant's Pre-Hearing Submissions, TAB 2

33. The Appellant has not raised or even argued that the decision to maintain the current R1 zoning is objectively contrary to sound planning principles. This is because no such argument is reasonably available to the Appellant on the evidence.

34. Indeed, the decision to maintain the Subject Property in the R1 Zone is a decision which accords with sound planning principles: the current R1 zoning has been in place since at least 1990 – prior to the amalgamation of the Town of Stratford. Since that time, the Town of Stratford has enacted multiple Official Plans and Zoning Bylaws, with corresponding input and approval from planning staff, the public, Council, and the Minister responsible for the *Planning Act*.

See: Excerpt: 1990 Community of Southport *Zoning & Subdivision Bylaw* and Zoning Map.
Respondent's Pre-Hearing Submissions at TAB 8

See also: Royal Gazette dated December 13, 2003 at pg 1204.
Respondent's Pre-Hearing Submissions at TAB 9

See also: 2003 Zoning Map showing Subject Property Zoned R1.
Respondent's Pre-Hearing Submissions at TAB 10

35. Thus, this case is distinguishable from *Frost-Wicks* in one crucial respect. In *Frost-Wicks*, the planner determined that the subject lands were not suitable for the rezoning, but the council approved the rezoning anyways – without providing a planning rationale other than the statement of a single councillor that "*my meter certainly flops the way of housing* [...]".

See: *Frost-Wicks, supra*, at paras 4, 9, 10, 11.
Appellant's Pre-Hearing Submissions at TAB 6

36. In the present matter, the Subject Property is, as a matter of sound planning, appropriately zoned R1. The decision not to change the zoning is, therefore, a decision which accords with sound planning principles, even if the lands are also suitable for another zoning designation.

37. This Commission came to a similar result in *Doiron*, which result was upheld by the Prince Edward Island Court of Appeal. In *Doiron*, the majority of the Commission wrote:

> *"[31] In effect, the position of City Council appears to be supported on the basis of consistently adhering to the "plan" earmarked for the neighbourhood; the very same plan which may have guided the residents to purchase homes there. The Commission finds that there is some merit in this "consistent" approach.*
>
> *[32] The majority of the Commission panel finds that the City's decision to deny the proposed rezoning of the subject parcel was in fact reasonable. While the proposed rezoning of the subject property would result in better land use planning than the present zoning; the present zoning is nonetheless reasonable, has support in the Official Plan, and thus the majority of the Commission panel will defer to the decision of City Council. Accordingly, the appeal is denied."*

See: ***Doiron, supra*, at paras 31, 32.**
Respondent's Pre-Hearing Submission at TAB 2

See also: ***Doiron v. Island Regulatory and Appeals Commission*, 2011 PECA 9 (CanLII) at paras 32-36.**
Respondent's Pre-Hearing Submission at TAB 3

38. As raised by several residents in the present matter, as well as the Town's planner, Mr. Yatabe, in his report, while the Official Plan encourages housing variety, it also encourages the preservation of existing neighbourhoods.

See: **Town of Stratford Official Plan at ss. 4.2.1.b and 4.2.3.b.**
Appellant's Pre-Hearing Submissions at TAB 9 pg 26.

See also: **Planner's Report dated July 5th, 2021 at pg 266.**
Record Filed by the Town of Stratford at TAB 20

39. It is important to keep in mind that there is no such thing as 'as of right' rezoning. The Appellant is not entitled as a matter of procedural fairness to a favourable decision. As noted earlier, the Appellant is entitled to a fair process, which the Town of Stratford provided.

40. This point was also confirmed by Rowe JA (as he then was) writing for the unanimous Newfoundland and Labrador Court of Appeal prior to his elevation to the Supreme Court of Canada, in *St. John's (City) v. Seanic Canada Inc.*, 2016 NLCA 42:

> *36 I would emphasize a critical distinction in decision-making by City Council. If a project proponent applies to develop a property and the proposal is (purportedly) in conformity with zoning (and other regulatory requirements), then the proponent is entitled to receive approval to proceed with the project or, if such approval is denied, to be informed of the reasons why approval was denied. If the reasons disclose no valid basis for denying the approval, then the proponent has a right to seek judicial review, with a view to compelling City Council to grant approval.*
>
> *37* ***A different situation exists where a proponent seeks rezoning because the intended project <u>does not conform</u> with the existing zoning.*** *That is the situation here. <u>In such an instance, all that the</u>*

> *proponent can expect is that City Council will consider the rezoning application within the context of the statutory authority conferred on it to make such decisions. If City Council fails to adhere to some procedural requirement set out in the statutory scheme (e.g. it fails to hold a public meeting), then the project proponent can seek to have Council's decision quashed on judicial review on the basis of procedural unfairness. Similarly, if Council bases its decision on factors that are unconnected with the purposes of the statutory scheme (e.g. it denies a rezoning application based on the political affiliation of the project proponent), then again the proponent can seek to have Council's decision quashed on judicial review as such a decision would be unreasonable.* ***But, the proponent has no right to have the rezoning application approved.*** *To repeat, this contrasts with the situation of a project plan that conforms with existing zoning (and other regulatory requirements), in which instance the proponent does have a right to receive approval to proceed with the project."* [Emphasis Added]

See: ***St. John's (City) v. Seanic Canada Inc.*, 2016 NLCA 42 at paras 36, 37.**
Respondent's Pre-Hearing Submissions at TAB 4

41. The evidence establishes that Council carefully considered the Rezoning Application, identified a planning rationale for its decision, and communicated this to the Appellant. Council's decision to maintain the current zoning accords with sound planning principles. The Appellant is entitled to no more.

42. Therefore, the Town requests that the Commission dismiss the appeal.

RELIEF SOUGHT

43. The Town requests that the appeal be denied and that the Commission uphold the July 14th, 2021, decision of Council to maintain the Low Density Residential (R1) zone on the Subject Property.

All of which is respectfully submitted this 10th day of November, 2021.

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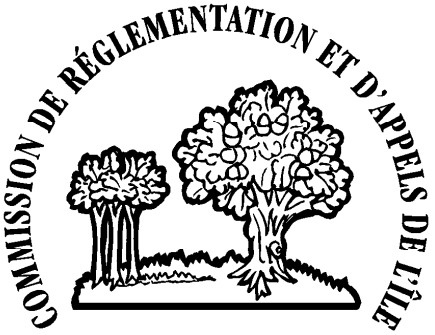

THE ISLAND REGULATORY AND APPEALS COMMISSION
Prince Edward Island
Île-du-Prince-Édouard
CANADA

Docket LA10005
Order LA10-06

IN THE MATTER **of an appeal by Warren Doiron of a decision of the City of Charlottetown, dated March 8, 2010.**

BEFORE THE COMMISSION
on Wednesday, the 14th day of July, 2010.

Maurice Rodgerson, Chair
John Broderick, Commissioner
Anne Petley, Commissioner

Order

Compared and Certified a True Copy

(Sgd.) Philip J. Rafuse

Appeals Administrator
Land, Corporate and Appellate Services Division

IN THE MATTER of an appeal by Warren Doiron of a decision of the City of Charlottetown, dated March 8, 2010.

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IN THE MATTER of an appeal by Warren Doiron of a decision of the City of Charlottetown, dated March 8, 2010.

Appearances & Witnesses

1. For the Appellant Warren Doiron

Counsel:

Jonathan Coady

Witnesses:

Phil Wood
Warren Doiron
Steve Burtram

2. For the Respondent City of Charlottetown

Counsel:

Gordon MacKay, Q.C.

Witness:

Laurel Palmer-Thompson

3. Member of the Public

Dennis Williams

IN THE MATTER of an appeal by Warren Doiron of a decision of the City of Charlottetown, dated March 8, 2010.

Reasons for Order

1. Introduction

[1] The Appellant Warren Doiron (Mr. Doiron), on behalf of his company New Homes Plus Inc. (New Homes) has filed an appeal with the Island Regulatory and Appeals Commission (the Commission) under section 28 of the ***Planning Act***, R.S.P.E.I. 1988, Cap. P-8, (the ***Planning Act***). Mr. Doiron's Notice of Appeal was received on March 29, 2010.

[2] This appeal concerns a March 8, 2010 decision of the City of Charlottetown (the City) to reject an application by New Homes to amend the Future Land Use Map of the City's Official Plan as it pertains to property number 773051 (the subject property), situate at 136 Upton Road, from Low Density Residential to Medium Density Residential and to rezone portions of the subject property from Single-detached Residential (R-1S) to Low Density Residential (R-2) zone and Medium Density Residential (R-3) zone.

[3] After due public notice and suitable scheduling for the parties, the appeal was heard on May 27, 2010 and June 9, 2010.

2. Submissions

New Homes' Position

[4] Counsel for New Homes presented oral submissions to the Commission. Highlights of these submissions appear below.

- City staff and the City's Planning Board recommended that New Homes' rezoning request be approved. Planning Board's recommendation was made after hearing from residents at a public meeting.

- In making its decision to reject the rezoning request, the City did not refer to its Official Plan and its Zoning and Development By-law (the Bylaw). Rather, the City's decision was solely based on the opposition of area residents. In the present matter, the decision of City Council was based on a natural political process not sound planning principles.

- The subject property was acquired in 2008 and is separate from the Sandlewood Park development.

- New Homes is willing to enter into a development agreement with the City.

- While the City has discretion to make a rezoning decision, such discretion is not unfettered or absolute. While City Council is not bound by its staff or Planning Board recommendation, it is required to follow the Planning Act, its Official Plan and its Bylaw.

- The proposed rezoning is endorsed by both planning professionals who testified before the Commission.

[5] New Homes requests that the Commission allow the appeal and rezone the property as recommended by the City's Planning Board.

The City's Position

[6] Counsel for the City presented oral submissions to the Commission. Highlights of these submissions appear below.

- The current zoning of the subject property has been in effect since 1995. Prior to amalgamation in 1995, the subject property was zoned R1 by the former community of West Royalty. In 2007 Mr. Doiron applied to rezone the subject property to a mix of commercial and residential. His application was denied. Thus, Mr. Doiron was well aware of the zoning of the subject property when his company purchased it in 2008.

- The present rezoning application may have been encouraged by City planning staff but it was not encouraged by City Council.

- City Council heard from the public and made the decision to keep the subject parcel zoned R-1S.

- While the evidence before the City Council, and before the Commission, is that the proposed rezoning of the subject property is consistent with sound planning principles, the current zoning is also consistent with sound planning principles. The subject property is designated for single family residential under the Future Land Use Map which forms a part of the City's Official Plan. Therefore, there is no conflict between the current zoning and the Official Plan. In this regard, the situation is very different from that faced in Order LA08-04 *L & A MacEachern Holdings Ltd.* v. *City of Charlottetown.*

- While the Official Plan encourages housing variety, it also encourages the preservation of existing neighbourhoods.

[7] The City requests that the Commission deny the appeal.

3. Findings

[8] After a careful review of the submissions of the parties and the applicable law, it is the decision of the majority of the Commission panel to deny this appeal. The reasons for the Commission's majority and dissenting reasons follow.

[9] Section 26, clauses (e.1) and (e.2) of the ***Interpretation Act***, R.S.P.E.I. 1988, Cap. I-8 reads as follows:

> *26. In an enactment*
>
> *…*
>
> *(e.1) "may" is to be construed as permissive and empowering;*
>
> *…*
>
> *(e.2) "shall" is to be construed as imperative;*

[10] Subsection 28(1.1) of the ***Planning Act*** reads as follows:

> *(1.1) Subject to subsections (1.2) to (1.4), any person who is dissatisfied by a decision of the council of a municipality*
>
> *(a) that is made in respect of an application by the person, or any other person, under a bylaw for*
>
> *(i) a building, development or occupancy permit,*
>
> *(ii) a preliminary approval of a subdivision,*
>
> *(iii) a final approval of a subdivision; or*
>
> *(b) to adopt an amendment to a bylaw, including*
>
> *(i) an amendment to a zoning map established in a bylaw, or*
>
> *(ii) an amendment to the text of a bylaw,*
>
> *may appeal the decision to the Commission by filing with the Commission a notice of appeal.*

[11] The appeal provisions of the ***Planning Act*** are clear. So long as the requirements of subsection 28(1.1) subsections 28(1.2), (1.3) and (1.4) [the bylaw must have been made under the authority of the ***Planning Act***, the Notice of Appeal must have been filed within 21 days after the decision being appealed and, where the appeal is of a bylaw amendment, the 21 day appeal period commences on the date of a Council's final reading of the bylaw amendment] are met, an appellant is permitted and empowered to file an appeal; that is to say, an appellant has a statutory right to file an appeal.

[12] Once an appellant's statutory right to file an appeal has crystallized, the Commission is obligated by law to proceed with the appeal. The Commission shall determine the hearing procedure, shall hear and decide the appeal, shall give reasons for its decision and the municipal decision maker or Minister shall implement the Commission's order. These requirements are set out in subsections 28(7), (8), (9) and (10) of the ***Planning Act*** and read as follows:

> *(7) Subject to adherence to the rules of natural justice, the Commission shall determine its own procedure.*
>
> *(8) The Commission shall hear and decide appeals and shall issue an order giving effect to its disposition.*
>
> *(9) The Commission shall give reasons for its decision.*
>
> *(10) The council or the Minister, as the case may be, shall implement an order made by the Commission.*

[13] In the present appeal, all parties agree that the appeal is properly before the Commission.

[14] Appeals under the ***Act*** generally take the form of a hearing de novo before the Commission. In an often cited decision which provides considerable guidance to the Commission, *In the matter of Section 14(1) of the Island Regulatory and Appeals Commission Act (Stated Case)*, [1997] 2 P.E.I.R. 40 (PEISCAD), Mitchell, J.A. states for the Court at page 7:

> *it becomes apparent that the Legislature contemplated and intended that appeals under the **Planning Act** would take the form of a hearing de novo after which IRAC, if it so decided, could substitute its decision for the one appealed. The findings of the person or body appealed from are irrelevant. IRAC must hear and decide the matter anew as if it were the original decision-maker.*

[15] In previous appeals, the Commission has found that it does have the power to substitute its decision for that of the municipal or ministerial decision maker. Such discretion should be exercised carefully. The Commission ought not to interfere with a decision merely because it disagrees with the end result. However, if the decision maker did not follow the proper procedures or apply sound planning principles in considering an application made under a bylaw made pursuant to the powers conferred by the ***Act***, then the Commission must proceed to review the evidence before it to determine whether or not the application should succeed.

[16] The Commission finds that the above-cited principle, originally applied to decisions concerning building or development permits, and later applied to applications for variances and applications for rezoning, is applicable to the facts of this case. A two-part test is invoked:

- Whether the municipal authority, in this case the City, followed the proper procedures as required in its Bylaw in making a decision on the rezoning application; and
- Whether the City's decision with respect to the proposed rezoning of the land has merit based on sound planning principles.

[17] In the present appeal, there is no indication that the City made a procedural error.

[18] The Commission has had the benefit of the planning expertise of Laurel Palmer-Thompson, who is a development officer for the City and Phil Wood, who the Commission has accepted as an expert witness in the field of urban planning. Both planning professionals agree: the proposed rezoning is consistent with sound planning principles.

[19] The minutes of the City's Council, especially the verbatim minutes of the March 8, 2010 regular meeting of Council, appear to acknowledge that the proposed rezoning "… makes perfectly good sense … from a planning point of view…" and "If you read the notes from Planning staff in the report from planning Board, it is very sound planning principles that they are advocating here…".

[20] Based on the evidence, the Commission finds that the proposed rezoning is consistent with sound planning principles.

[21] However, the key question is whether the City's decision to deny the proposed rezoning has merit based on sound planning principles.

[22] A review of the Official Plan reveals that there are objectives and policies which could be characterized both in support of the proposed rezoning and in support of retaining the status quo.

[23] For example, here are some of the objectives and policies under section 3.2 Sustaining Charlottetown's Neighbourhoods:

> ***Defining Our Direction***
>
> *Our **goal** is to maintain the distinct character of Charlottetown's neighbourhoods, to enhance the special qualities of each, and to help them adjust to the challenges of economic and social transformation.*
>
> *1. Our **objective** is to preserve the built form and density of Charlottetown's existing neighbourhoods, and to ensure that new development is harmonious with its surroundings.*
>
> - *Our **policy** shall be to ensure that the footprint, height, massing, and setbacks of new residential, commercial, and institutional development in existing neighbourhoods is physically related to its surroundings.*
>
> - *Our **policy** shall be to establish an appropriate relationship between the height and density of all new development in mixed-use residential areas of existing neighbourhoods.*
>
> *2. Our **objective** is to allow moderately higher densities and alternative forms of development in any new residential subdivisions which may be established, provided that this development is well planned overall, and harmonious with existing residential neighbourhoods.*
>
> - *Our **policy** shall be to permit moderately higher densities in new neighbourhoods and to permit in-laws suites in residential land use designations and to make provision for higher density residential projects in the Downtown Growth*

Area which is located in the Downtown Core Area and to permit multiple unit developments in suburban areas provided that it is development at a density which will not unduly adversely affect existing low density housing. ***Amended May 25, 2005***

- *Our* ***policy*** *shall be to allow a mix of residential, commercial, institutional, and recreational uses in new subdivisions which are established, provided that there is a comprehensive site plan which ensures that development is well-related to both its internal and external environments.*

[24] As an additional example, here are some of the objectives and policies under section 3.3 Housing Needs and Variety:

Defining Our Direction

Our ***goal*** *is to work with public and private sector partners to create an attractive physical environment and positive investment climate in which the housing requirements of all residents can be met (including those with special needs), and to provide clear direction as to where residential development should take place.*

1. Our ***objective*** *is to encourage development in fully serviced areas of the City, to promote settlement and neighbourhood policies as mechanisms for directing the location of new housing, and to encourage new residential development near centres of employment.*

- *Our* ***policy*** *shall be to ensure that all new multiple dwelling unit buildings are serviced by water and wastewater systems which have the capacity to accept the development proposed.* ***Amended May 25, 2005.***

- *Our* ***policy*** *shall be to base residential densities on the availability of municipal services, education facilities, recreation and open space amenities, transportation routes, and such other factors as the City may need to consider.*

- *Our* ***policy*** *shall be to provide medium density housing styles to meet future housing needs.*

- *Our* ***policy*** *shall be to direct the location of medium rise multiple dwelling unit buildings to the Downtown Growth Area located in the Downtown Core Area.* ***Amended May 25, 2005***

- *Our* ***policy*** *shall be to allow the conversion of upper floors of commercial buildings in the downtown core for residential use.*

2. Our ***objective*** *is to enhance the range of housing available to residents who have special social, economic or physical needs.* ***Amended May 25, 2005***

- *Our* ***policy*** *shall be to work with our partners to address social housing needs, and to encourage its equitable distribution throughout the City.*

- *Our **policy** shall be to allow accessory suites in detached houses, subject to all other applicable land-use and development regulations.*

- *Our **policy** shall be to actively work with our partners to address the housing needs of seniors, to expand the range of affordable housing available to them, and to provide it in neighbourhoods preferred by them.*

[25] The planning professionals favour the proposed rezoning. Based on the written submissions received, a majority of the area residents are opposed to the proposed rezoning.

[26] The non-verbatim minutes of the March 8, 2010 regular meeting of Council provide inadequate support for Council's decision to deny the proposed rezoning. At the first day of the hearing before the Commission, Counsel for the City offered to try to obtain verbatim minutes for the March 8, 2010 meeting. These verbatim minutes were received by the Commission on May 31, 2010.

[27] The verbatim minutes provide the Commission with insight as to the basis for Council's decision. The following remark appears to sum up Council's rationale:

> *Councillor Rob Lantz: I will be very brief because I was going to say something similar to what Councillor MacDonald already said. If you read the notes from Planning staff in the report from Planning Board, it is very sound planning principles that they are advocating here, I think. I agree with Councilor MacDonald that these people bought their property understanding of the circumstances at the time and so did the developer for that matter. I did speak to Planning Board about if these are important principles to use about density, step zoning on the highways and so on and so forth that we start looking at land outside the city that is currently undeveloped or very little development on it and start planning for the future so that we are not having to deal with these rezonings after a certain parcel of land is half developed and there are residents who have certain expectations for their property.*

[28] As previously noted, an appeal hearing before the Commission is a hearing *de novo*. In effect, such a hearing is a hybrid of an appeal, on the record, of the City's decision with a fresh public hearing where new evidence may be heard.

[29] Land use planning for the subject property presents major challenges. On the one hand, the subject property is immediately adjacent to a very recently developed single family residential area. On the other hand, it is adjacent to the arterial highway. The Commission finds that there is support in the text of the Official Plan for both the proposed rezoning and the current zoning. However, the Commission is of the view that the proposed rezoning, as a blend of single family, semi-detached and multi-unit residential housing would simultaneously meet the objectives of preserving the existing neighbourhood and providing housing diversity. The evidence of both planning professionals can be characterized as endorsing the proposed rezoning as superior planning to the status quo. The Commission finds, on the strength of the planning evidence before it, that the proposed rezoning represents better planning than the single family status quo, given the challenges of placing high quality residential development adjacent to a busy perimeter highway.

[30] The Official Plan, text and Future Land Use Map alike, was developed in consultation with members of the public and, presumably, with the advice of a planning professional. The policies and objectives set out in the text of the Official Plan apply, unless targeted to a specific area such as the downtown core, to the City generally. The Official Plan's Future Land Use Map, in a clear and very visual manner, sets out the City's intention as to the type of desired development particular to various areas and neighbourhoods contained within the City. In all likelihood, residents who wonder what the future holds for their neighbourhood will consult the Future Land Use Map rather than read through the various policies and objectives within the text of the Official Plan. The Future Land Use Map indicates that the subject property would be developed for single family residences.

[31] In effect, the position of City Council appears to be supported on the basis of consistently adhering to the "plan" earmarked for the neighbourhood; the very same plan which may have guided the residents to purchase homes there. The Commission finds that there is some merit in this "consistent" approach.

[32] The majority of the Commission panel finds that the City's decision to deny the proposed rezoning of the subject parcel was in fact reasonable. While the proposed rezoning of the subject property would result in better land use planning than the present zoning; the present zoning is nonetheless reasonable, has support in the Official Plan, and thus the majority of the Commission panel will defer to the decision of City Council. Accordingly, the appeal is denied.

[33] RODGERSON, CHAIR (Dissenting): I dissent from the findings of the majority's Decision and Order and would allow the appeal for the reasons that follow.

[34] In the previously cited Supreme Court Appeal Division decision *In the matter of Section 14(1) of the Island Regulatory and Appeals Commission Act (Stated Case)* it was noted that a hearing before the Commission is by way of a hearing *de novo*. The Commission is required to "hear the matter anew". The Commission, as a quasi judicial body must make a decision based both on the record that is before the Commission and the evidence presented and argued by the parties involved. In this matter the overwhelming evidence before the Commission supports rezoning.

[35] An appeal process exists for a reason. It is recourse for those who believe they were not fairly dealt with or that errors were made in the process of the original decision maker. The body being appealed from is a party to the appeal and should take that opportunity to fully explain the decision and how it was reached. To overturn a decision of an elected body is never easy, but to suggest it should not be done is to render the appeal process meaningless.

[36] The Commission rightly gives deference to decisions of municipal councils but in doing so must be satisfied they acted appropriately. The Commission's test on land use planning appeals is to determine whether the proper procedures were followed and sound planning principles applied.

[37] The procedure test is reasonably straight forward – did the municipality properly follow its own Bylaw and procedures in making a decision? In this case it is clear the City Council followed the established procedures.

[38] The test of sound planning principles can be more challenging given that sound planning principles are not clearly defined. What is critical is that evidence be presented that demonstrates "sound planning" was at least considered. In this case the planning department staff and Planning Board clearly considered sound planning principles; the evidence is in the recommendation and Planning Board discussion. It is far less clear what planning factors were considered, let alone relied upon, by the City Council in its decision on the matter. In order to meet the "deference test" sound planning principles cannot be inferred; there must be evidence that they were truly considered.

[39] City Council is not bound by recommendations of their planning department. In fact I believe that they have a public duty to not blindly follow submitted recommendations and to judge the validity of those recommendations. The Council is free to decide in the alternative but they should expect no less of their decision making process than they expect of the basis upon which a staff recommendation is made. In rejecting a recommendation they should demonstrate sound planning reasons for doing so, and if they wish to have the decisions sustained on appeal then it should be clear in the City's decision making process that other factors were considered that support the final decision and give weight to the decision. As it is a planning matter, the final decision should be rooted in planning principles. If the evidence showed that Council fully considered the points raised by Planning Board and then considered the Official Plan and Bylaw to offer reasonable arguments in the alternative, I would be satisfied that sound planning applied to the decision. No substantive evidence was led by the City to demonstrate "sound planning" was even a topic of discussion as Council voted to reject Planning Board's recommendation.

[40] Two witnesses with direct expertise in planning appeared before the Commission at the appeal hearing. One employed by the City of Charlottetown, the other an established expert offered by New Homes. Both witnesses supported the recommendation for rezoning as being based on sound planning principles. Both witnesses quoted sections of the Official Plan to support their position.

[41] In this matter, the fact the Future Land Use Map identifies the subject property as Low Density Residential could be a very strong argument in favour of the Council's decision to reject the Planning Board recommendation. However, there is no evidence the Future Land Use Map was discussed by Council nor relied upon in voting to reject the application.

[42] A scanning of the Official Plan suggests there may be several aspects of the document that could support the decision made by City Council, but none are referenced in the transcript of the Council discussion. There is acknowledgement of the validity of the position advanced by Planning Board and the planning staff, but other than a comment about avoiding spot zoning there is very little in the way of evidence to suggest that sound planning principles were a consideration of Council.

[43] Based on the evidence, it appears the driving factor in the City Council decision was the fact that a number of residents opposed the proposal at the public meeting and through a petition and phone calls.

[44] In comments both to councillors and to the Commission upon appeal, residents objected to the fact there had been previous attempts to rezone the property; twice to industrial and twice to commercial. The present proposal appealed to the Commission retained the current residential designation, but sought a higher density than single family residential for some of the subject property. In a stepped manner, the proposal would have zoned the area adjacent to the arterial highway Medium Density Residential (5.3 acres), then Low Density Residential (2.6 acres) and then Single Detached Residential (6.1 acres). Re-zoning would thus apply to only a portion of the subject parcel. There is no evidence Council considered this information.

[45] The fact that previous attempts at rezoning for dramatically different purposes failed is not evidence sound planning principles were applied to the current application. The Bylaw outlines a detailed process for amendments to the Bylaw and such amendments are fairly common. Each application for a zoning amendment should be considered on its own merits.

[46] The Bylaw requires the Development Officer to advise affected property owners within 100 metres of the subject property. That requirement was met in this case with letters mailed to some 45 property identification numbers. It appears three of those property owners objected to the development, one agreed, while most were silent on the subject. Complaints were received from others beyond the 100 metres as a result of the advertisements for the public meeting, also required by the Bylaw. The fact a substantial majority of property owners within the 100 metre area did not object to the proposal was not referenced by Council.

[47] Some of the reasons advanced by concerned residents against the zoning amendment are not supported by evidence. It was suggested development other than single family homes would lead to rental properties and a drop in land values. No evidence was presented to support this contention, but it was referenced at the Council meeting.

[48] A development agreement could have stipulated the manner in which the property would be developed and the type and style of housing constructed. A development agreement was offered by the Developer prior to the Council decision on the matter but the pros and cons of such a proposal were not considered by Council.

[49] On appeal, the Commission relies on the decision maker's record and on the evidence presented at the Commission's public hearing. The planning principles advanced by the City's staff report, Planning Board's recommendation and the expert witness who testified at the hearing were not adequately refuted by the City. The evidence of Council's action suggests the matter was not cast in a planning focus and more weight was given to political than planning considerations. I would therefore allow the appeal.

4. Disposition

[50] An Order denying this appeal follows.

IN THE MATTER of an appeal by Warren Doiron of a decision of the City of Charlottetown, dated March 8, 2010.

Order

WHEREAS the Appellant Warren Doiron has appealed a decision of the City of Charlottetown, dated March 8, 2010;

AND WHEREAS the Commission heard the appeal at public hearings conducted in Charlottetown on May 27, 2010 and June 9, 2010 after due public notice;

AND WHEREAS the Commission has issued its findings in this matter in accordance with the Reasons for Order issued with this Order;

NOW THEREFORE, pursuant to the ***Island Regulatory and Appeals Commission Act*** and the ***Planning Act***

IT IS ORDERED THAT

1. The appeal is denied.

DATED at Charlottetown, Prince Edward Island, this 14th day of July, 2010.

BY THE COMMISSION:

(Sgd.) *Maurice Rodgerson*
Maurice Rodgerson, Chair (Dissenting)

(Sgd.) *John Broderick*
John Broderick, Commissioner

(Sgd.) *Anne Petley*
Anne Petley, Commissioner

NOTICE

Section 12 of the ***Island Regulatory and Appeals Commission Act*** reads as follows:

> *12. The Commission may, in its absolute discretion, review, rescind or vary any order or decision made by it or rehear any application before deciding it.*

Parties to this proceeding seeking a review of the Commission's decision or order in this matter may do so by filing with the Commission, at the earliest date, a written **Request for Review**, which clearly states the reasons for the review and the nature of the relief sought.

Sections 13(1) and 13(2) of the ***Act*** provide as follows:

> *13.(1) An appeal lies from a decision or order of the Commission to the Court of Appeal upon a question of law or jurisdiction.*
>
> *(2) The appeal shall be made by filing a notice of appeal in the Court of Appeal within twenty days after the decision or order appealed from and the rules of court respecting appeals apply with the necessary changes.*

NOTICE: IRAC File Retention

In accordance with the Commission's Records Retention and Disposition Schedule, the material contained in the official file regarding this matter will be retained by the Commission for a period of 2 years.

IRAC141AA(2009/11)

2011 PECA 9
Prince Edward Island Court of Appeal

Doiron v. Prince Edward Island (Island Regulatory & Appeals Commission)

2011 CarswellPEI 27, 2011 PECA 9, [2011] P.E.I.J. No. 16,
204 A.C.W.S. (3d) 183, 308 Nfld. & P.E.I.R. 84, 958 A.P.R. 84

Warren Doiron, Appellant and Island Regulatory and Appeals Commission and City of Charlottetown, Respondents

David H. Jenkins C.J.P.E.I., John A. McQuaid J.A., Michele M. Murphy J.A.

Heard: April 19, 2011
Judgment: June 3, 2011
Docket: S1-CA-1205

Counsel: Jonathan M. Coady, for Appellant
J. Gordon MacKay, Q.C., for Respondent, City of Charlottetown
Paul D. Michael, Q.C., for Respondent, Island Regulatory and Appeals

Subject: Public; Civil Practice and Procedure; Municipal

Headnote

Municipal law --- Zoning — Rezoning land — Practice and procedure on rezoning

City dismissed developer's application to re-zone his property from single-detached residential (R-15) to low density residential (R-2) zone and medium density residential (R-3) zone — Island Regulatory and Appeals Commission dismissed developer's appeal, having found that city's decision was reasonable, decision had support in city's Official Plan, and there was some merit in "consistent" approach — Developer appealed — Appeal dismissed — In reaching its decision, commission embarked on its own independent and analytical review and judgment of issues before it — Commission exercised its discretion properly, assessed appropriate factors and did not err in interpreting city's Official Plan — It is within province of commission to agree with council's decision, or it could substitute its decision for one appealed — Commission gave some weight to council's decision but it did not rubber stamp it — Commission made its own decision on merits of application and therefore, properly conducted appeal — Commission did not fetter itself by use of guidelines — Guidelines provided good road map for commission to assist in ensuring that statutory authority of commission had been exercised properly.

Municipal law --- Planning appeal boards and tribunals — Miscellaneous

City dismissed developer's application to re-zone his property from single-detached residential (R-15) to low density residential (R-2) zone and medium density residential (R-3) zone — Island Regulatory and Appeals Commission dismissed developer's appeal, having found that city's decision was reasonable, decision had support in city's Official Plan, and there was some merit in "consistent" approach — Developer appealed — Appeal dismissed — In reaching its decision, commission embarked on its own independent and analytical review and judgment of issues before it — Commission exercised its discretion properly, assessed appropriate factors and did not err in interpreting city's Official Plan — It is within province of commission to agree with council's decision, or it could substitute its decision for one appealed — Commission gave some weight to council's decision but it did not rubber stamp it — Commission made its own decision on merits of application and therefore, properly conducted appeal — Commission did not fetter itself by use of guidelines — Guidelines provided good road map for commission to assist in ensuring that statutory authority of commission had been exercised properly.

Table of Authorities

Cases considered by *Michele M. Murphy J.A.*:

Booth, Re (2004), 1 M.P.L.R. (4th) 187, *(*sub nom. *Booth v. Island Regulatory & Appeals Commission)* 242 Nfld. & P.E.I.R. 29, *(*sub nom. *Booth v. Island Regulatory & Appeals Commission)* 719 A.P.R. 29, 2004 CarswellPEI 75, 2004 PESCAD 18 (P.E.I. C.A.) — referred to

Hopedale Developments Ltd. v. Oakville (Town) (1964), 47 D.L.R. (2d) 482, [1965] 1 O.R. 259, 1964 CarswellOnt 175 (Ont. C.A.) — considered

Island Telecom Inc., Re (2001), 2001 PESCAD 27, 2001 CarswellPEI 107, (sub nom. *Island Telecom Inc. v. Island Regulatory & Appeals Commission)* 207 Nfld. & P.E.I.R. 161, (sub nom. *Island Telecom Inc. v. Island Regulatory & Appeals Commission)* 620 A.P.R. 161 (P.E.I. C.A.) — referred to

Prince Edward Island (Island Regulatory & Appeals Commission), Re (1997), (sub nom. *Reference re s. 14(1) of the Island Regulatory & Appeals Commission Act (P.E.I.))* 153 Nfld. & P.E.I.R. 287, (sub nom. *Reference re s. 14(1) of the Island Regulatory & Appeals Commission Act (P.E.I.))* 475 A.P.R. 287, 40 M.P.L.R. (2d) 258, 1997 CarswellPEI 62, (sub nom. *Island Regulatory & Appeals Commission Act, Re)* 149 D.L.R. (4th) 411 (P.E.I. C.A.) — considered

Prince Edward Island (Tax Commissioner) v. Maritime Dredging Ltd. (1997), (sub nom. *Provincial Tax Commissioner (Prince Edward Island) v. Maritime Dredging Ltd.)* 157 Nfld. & P.E.I.R. 80, (sub nom. *Provincial Tax Commissioner (Prince Edward Island) v. Maritime Dredging Ltd.)* 486 A.P.R. 80, (sub nom. *Provincial Tax Commissioner v. Maritime Dredging Ltd.)* 98 G.T.C. 6068, [1997] 2 P.E.I.R. 78, 1997 CarswellPEI 113 (P.E.I. C.A.) — referred to

Stafford v. Newfoundland (Milk Marketing Board) (1987), 67 Nfld. & P.E.I.R. 198, 206 A.P.R. 198, 1987 CarswellNfld 222 (Nfld. T.D.) — considered

Statutes considered:

Island Regulatory and Appeals Commission Act, R.S.P.E.I. 1988, c. I-11

Generally — referred to

s. 13(4) — referred to

Planning Act, R.S.P.E.I. 1988, c. P-8

Generally — referred to

s. 28(1.1) [en. 2006, c. 15, s. 2] — considered

s. 28(1.1)(b)(i) [en. 2006, c. 15, s. 2] — considered

APPEAL by developer from decision of Island Regulatory and Appeals Commission dismissing his appeal of city's decision dismissing his application to re-zone his property.

***Michele M. Murphy J.A.*:**

1 The appellant, Warren Doiron, appeals a decision of the Island Regulatory and Appeals Commission (the "Commission") dated July 14, 2010. The Commission denied the appeal whereby the appellant land developer sought a rezoning of his property in the City of Charlottetown from Single-Detached Residential (R-15) to Low Density Residential (R-2) zone and Medium Density Residential (R-3) zone.

Facts

2 On January 7, 2008, the appellant acquired through his company New Homes Plus Inc. vacant lands located at 136 Upton Road. The lands are located immediately adjacent to the Charlottetown Perimeter Highway and zoned single-detached residential.

3 The current zoning of the property has been in effect since 1995. Prior to amalgamation in 1995, the property was zoned single-detached residential by the former Community of West Royalty. In 2007 the appellant applied to the City of Charlottetown to rezone the property to a mix of commercial and residential zoning. The application was denied.

4 The appellant made an application to rezone a portion of the property to low density and medium density residential. Both the Planning Department and the Planning Board of the City of Charlottetown (the "City") recommended approval of the application. A public meeting was also held by the respondent City. On March 8, 2010, the City denied the appellant's request to rezone the property. The appellant appealed to the Commission.

5 By a majority decision, the Commission denied the appeal. The Commission found that the City's decision to deny the proposed rezoning of the property was in fact reasonable, the decision had support in the City's Official Plan, and there was some merit in the "consistent" approach. The appellant appeals the decision to this Court.

Issues

6 The appellant states that the appeal raises the following issues:

> a. whether the Commission erred in failing to exercise the authority conferred upon it by the ***Planning Act***, R.S.P.E.I. 1988, c. P-8;
>
> b. whether the Commission erred in fettering its authority under the ***Planning Act*** and the ***Island Regulatory and Appeals Commission Act***, R.S.P.E.I. 1988, c. I-11 ("IRAC Act");
>
> c. whether the Commission erred by considering irrelevant factors or by failing to consider relevant factors; and
>
> d. whether the Commission erred in its interpretation of the City of Charlottetown Official Plan (the "Official Plan").

7 The primary issue in this case is whether the Commission properly exercised its jurisdiction by conducting a proper inquiry by a hearing *de novo* and by giving full consideration to all matters it was called upon to decide.

Disposition

8 For the reasons that follow, I would dismiss the appeal.

Standard of Review

9 This court has previously determined that questions of law or jurisdiction arising from decisions of the Commission shall be reviewed on a standard of correctness. See: *Prince Edward Island (Tax Commissioner) v. Maritime Dredging Ltd.*, [1997] P.E.I.J. No. 112, 157 Nfld. & P.E.I.R. 80 (P.E.I. C.A.), paras.16-17; *Island Telecom Inc., Re*, 2001 PESCAD 27 (P.E.I. C.A.), at paras.14-15; *Booth, Re*, 2004 PESCAD 18 (P.E.I. C.A.), at para.4.

10 Both the appellant and respondent City agree that the matters in issue before this court attract the correctness standard.

Analysis

11 The *Planning Act* provides in s.28(1.1)(b) that:

> ... any person who is dissatisfied by a decision of the council of a municipality
>
> (b) to adopt an amendment to a bylaw, including
>
> (i) an amendment to a zoning map established in a bylaw,
>
> may appeal the decision to the Commission by filing with the Commission a Notice of Appeal.

12 Appeals conducted pursuant to s.28(1.1) of the *Planning Act* are to be conducted by way of a hearing *de novo*. This principle was articulated by this court in the *Reference* case. See: *Prince Edward Island (Island Regulatory & Appeals Commission), Re*, [1997] P.E.I.J. No. 70 (P.E.I. C.A.). This case was referred to the Court by the Commission for clarification of the scope of its jurisdiction in hearing appeals pursuant to the *Planning Act*.

13 Mitchell J.A., writing for the Court, stated at paragraph 9 of the decision:

> When one considers the provisions of s.28 and s.37 in conjunction with the provisions of the ***Island Regulatory and Appeals Commission Act*** setting forth, the composition, functions and powers of IRAC and takes into account that often the appeal will be the first opportunity for all of the interested parties to fully participate, it becomes apparent that the Legislature contemplated and intended that appeals under the ***Planning Act*** would take the form of a hearing *de novo* after which IRAC, if it so decided, could substitute its decision for the one appealed. The findings of the person or body appealed from are irrelevant. IRAC must hear and decide the matter anew as if it were the original decision-maker.

Ground 1

14 The appellant argued that the Commission did not exercise its legislated authority on a *de novo* basis and instead focused solely on the reasonableness of Council's decision.

15 The City argued that the Commission conducted a thorough and independent evaluation of the relevant evidence put before it and made its own findings on a *de novo* basis. The City also argued that the Commission compared its findings against those of Council to determine whether Council had the legal authority to do what it did.

16 In its majority decision, the Commission, when it commenced its reasoning analysis, first cited the *Reference* case. Then it acknowledged that it had the power to substitute its decision for that of the municipal decision maker. The Commission also recognized that such discretion should be exercised carefully and that it should not interfere with a decision merely because it disagrees with the end result.

17 In this case, the Commission considered a number of factors in determining the issue on appeal. The Commission heard the evidence of two planning professionals; reviewed the verbatim minutes of the City's Council; reviewed the Official Plan and its objectives and policies; reviewed the Future Land Use Map; and acknowledged the opposition and support of a number of residents by the public process which is designed for such. The Commission also had the benefit of the record which was before City Council. I find that in reaching its decision, the majority of the Commission embarked on its own independent and analytical review. I would also find that the Commission made their own findings based on the evidence presented.

18 The fact that the Commission agreed with the appellant that the proposed rezoning would result in better land use planning is not determinative. It is a conclusion the Commission could make. The Commission considered all of the evidence and arrived at a different result. The Commission recognized competing arguments and found that the City's position was also based on sound planning principles. The Commission considered the existing zoning and that the City is not required to approve spot rezoning. The Commission also considered the "consistent" approach for neighbourhood development in finding the present zoning is reasonable as well.

19 There is a difference between deferring to a decision made and giving weight to a decision. This was illustrated in the case of *Stafford v. Newfoundland (Milk Marketing Board)*, [1987] N.J. No. 200, 67 Nfld. & P.E.I.R. 198 (Nfld. T.D.). The case involved an application to quash a decision of the Appeal Tribunal of the Milk Marketing Board. The Board set a minimum retail price for milk and the applicant appealed the decision to the Appeal Tribunal. The Tribunal in dismissing the appeal simply deferred to the discretion of the Board. The applicant sought an order quashing the decision and the application was allowed. Cameron J. found that the Appeal Tribunal ought to have made a decision on the merits. At page 4, para. 3, she stated:

> There is a great difference in giving weight to the view of the Board and holding as the Appeal Tribunal did that it would not disturb the findings of the Milk Marketing Board if they were wrong on the merits if it exercised its discretion properly and reasonably.

20 It is within the province of the Commission to agree with the decision of Council, or as Mitchell J.A. stated in the *Reference* case," if it so decided, could substitute its decision for the one appealed" [emphasis mine]. The Commission gave some weight to the decision of City Council but it did not rubber stamp it. The Commission made its own decision on the merits of the application and therefore, properly conducted the appeal.

Ground 2

21 The appellant's second ground of appeal stated that the Commission erred by fettering its authority pursuant to both the *Planning Act* and *IRAC Act*. The appellant submitted that anything that interferes with autonomy and requires discretion to be exercised in a particular way is an unlawful fetter on discretion. This position is inconsistent with this Court's findings in the *Reference* case where it stated at para.10:

> ... IRAC does not have unfettered discretion or unbridled power to deal with and decide appeals as it likes. It would be bound to hear, consider, and decide the issues of the case in accordance with the requirements and objects of the ***Planning Act***.

22 The appellant argued that the Commission's discretion was fettered as a result of it invoking a two-part test which was formulated in a prior Commission decision relating to an appeal by *Dr. and Mrs. Vincent Adams v. City of Summerside* on January 27, 1997. The appellant argued that by adopting an inflexible two-part test for the exercise of its *de novo* authority under the *Planning Act*, the Commission converted what was intended to be discretionary power into a hard and fast rule. In so doing, the appellant argued, the Commission fettered its decision-making authority — authority that was conferred for the specific purpose of enabling the Commission to consider each case on its merits.

23 In the present case, the Commission stated at para.16 of its decision:

> ... A two-part test is invoked:
>
> • Whether the municipal authority, in this case the City, followed the proper procedures as required in its Bylaw in making a decision on the rezoning application; and
>
> • Whether the City's decision with respect to the proposed rezoning of the land has merit based on sound planning principles.

24 The City argued that the Legislature has granted the Commission wide discretion within which to exercise its authority. The City submitted the *IRAC Act* provides that, the Commission, either on its own accord or through its executive, may make its own rules and regulations governing administration, general procedure and the conduct of a hearing.

25 In *Hopedale Developments Ltd. v. Oakville (Town)* (1964), [1965] 1 O.R. 259 (Ont. C.A.), 266, McGillivray J.A., writing for the Court, stated the issue before the Court as follows:

> ... did the Board by announcing a policy by which it proposed to guide itself, and by stating that the application did not accord with that policy, then refuse to exercise its independent judgment in the matter before it.

26 Although the issue in the *Hopedale* case is different, the case does stand for the proposition that administrative tribunals have a right to formulate general principles by which they are to be guided. However, in doing so, they must not fetter their discretion and must give the fullest hearing and consideration to the whole of the problem before it. See: *Hopedale*, p.5.

27 In the present case the Commission did not fetter itself. All matters entitled to be considered were considered, were weighed, and were determined. The Commission found:

> a. The Official Plan and Future Land Use Map were developed in consultation with members of the public and presumably with the advice of a planning professional. In all likelihood, residents who wonder what the future holds for their neighborhood will consult the Future Land Use Map rather than read through the various policies and objectives within the text of the Official Plan. The Future Land Use Map indicates that the subject property would be developed for single family residences. (See: Commission Decision, para.30).
>
> b. There is some merit in the "consistent" approach. That is, the position of City Council appears to be supported on the basis of consistently adhering to the plan earmarked for the neighborhood. (See: Commission Decision, para.31).

c. The present zoning is nonetheless reasonable and has support in the Official Plan. (See: Commission Decision, para. 32).

28 In the *Hopedale* case, the court found that the Board, notwithstanding its problematic guidelines, had given full consideration to all matters before it. I find that in the present case the Commission did not fetter itself by the use of the guidelines. The guidelines in the present case provide a good roadmap for the Commission to assist in ensuring that the statutory authority of the Commission has been exercised properly. The Commission, with the use of the guidelines, gave full consideration to the evidence before it and came to its conclusions regarding the merits of the application.

Ground 3

29 The appellant argued in his third ground of appeal that the Commission erred by considering irrelevant factors or by ignoring relevant factors. The appellant argued that any consideration by the Commission of the reasonableness of Council's decision caused the Commission to fall into error.

30 As I stated previously in these reasons, the Commission came to its own independent conclusion after considering the evidence before it. The Commission found the decision of Council to be reasonable, that is, that it was a tenable and plausible decision and conclusion to reach in all the circumstances. This, in no way, indicates the Commission was deferring its decision without conducting its own independent evaluation.

31 The appellant also contends that the Commission fettered its discretion by considering the public input of the residents. This argument is without merit as the Commission has a statutory obligation to consider the views of the public. It was also incumbent upon the Commission to consider the public concerns which had been voiced to Council during the public consultation phase. The minutes referencing the public concern were adduced as evidence before the Commission. It was necessary pursuant to the *Planning Act*, as interpreted in the *Reference Case*, to consider all evidence before it when evaluating the merits of the application.

Ground 4

32 The appellant's final ground of appeal contends that the Commission erred in its interpretation of the Official Plan. The appellant argued that the property was a "new development" which is distinguished, he argues, from an "existing neighborhood." The appellant stated that, as the property was a new development, the prospective policies of the Official Plan applied. Those policies, to name a few, included: a provision of affordable housing for all sectors of the population; alternative forms of development in new residential subdivisions; and the enhancement of housing options for residents to meet future need.

33 The appellant alleged that the Commission fell into error when it relied on the principles and policies applicable to an "existing neighborhood." The appellant stated that the Commission disregarded the prospective principles in favor of a consistent adherence to the Future Land Use Map.

34 The appellant also argued that the Commission misinterpreted the meaning of the use of the Future Land Use Map. The appellant stated that the map was a concept plan and that the Future Land Use Map does not dictate the zoning of a parcel of land.

35 I would not accept this argument as the Commission did concede that the appellant's plan for rezoning "would result in better land use planning than the present zoning." (See: Commission Decision, para. 32). The City submitted that the Commission properly considered the fact that the Future Land Use Map showed the subject parcel zoned as Single-Detached Residential. The City stated that the Commission appropriately found merit in the approach of adhering to the "plan" earmarked for the neighborhood since the plan might have been an impetus by residents for the purchase of their particular properties.

36 It could not be concluded that the Commission misinterpreted the Official Plan or the Commission did not consider the objectives of the Official Plan in its consideration of the Future Land Use Map.

Conclusion

37 I find in reaching its decision, the majority of the Commission embarked on its own independent and analytical review and judgment of the issues before it. The Commission exercised its discretion properly, assessed the appropriate factors and did not err in interpreting the Official Plan of the City.

Costs

38 There will be no award of costs to any party in this matter as the City concedes there are no special reasons to order costs as required by s-s.13(4) of the *Island Regulatory and Appeals Commission Act*.

***David H. Jenkins C.J.P.E.I.*:**

I AGREE:

***John A. McQuaid J.A.*:**

I AGREE:

Appeal dismissed.

2016 NLCA 42
Newfoundland and Labrador Court of Appeal

St. John's (City) v. Seanic Canada Inc.

2016 CarswellNfld 323, 2016 NLCA 42, 1181 A.P.R. 100, 269 A.C.W.S. (3d) 565, 381 Nfld. & P.E.I.R. 100, 51 M.P.L.R. (5th) 196, 5 Admin. L.R. (6th) 10

CITY OF ST. JOHN'S (APPELLANT) AND SEANIC CANADA INC. (RESPONDENT)

J.D. Green C.J.N.L., M.H. Rowe, M.F. Harrington JJ.A.

Heard: March 9, 2015; April 10, 2015
Judgment: August 15, 2016
Docket: 201401H0055

Proceedings: reversing *Seanic Canada Inc. v. St. John's (City)* (2014), 66 Admin. L.R. (5th) 139, 19 M.P.L.R. (5th) 55, 345 Nfld. & P.E.I.R. 283, 1074 A.P.R. 283, 2014 NLTD(G) 7, 2014 CarswellNfld 19, David B. Orsborn C.J.T.D. (N.L. T.D.)

Counsel: Ian F. Kelly Q.C., for Appellant
Michael J. Crosbie Q.C., for Respondent

Subject: Civil Practice and Procedure; Property; Public; Municipal; Human Rights

Headnote

Municipal law --- Zoning — Rezoning land — Judicial review

Applicant company applied to change zoning designation of parcel of land in order to accommodate development of land for seniors' assisted living residence facilities — Even though company's proposal was consistent with City's municipal plan and supported by city officials, City Council decided to refer it to public meeting in light of opposition by residents of area — At public meeting, Councillor C, whose ward included land in question, spoke strongly against proposal — Council voted to deny application to amend zoning by-law — Company's application for judicial review was granted in part, on basis that councillor C had prejudged issue, and matter was remitted back to Council for reconsideration in which C could only participate if he confirmed that he did not have closed mind — City appealed; company cross-appealed — Appeal allowed; cross-appeal dismissed — Application judge properly found that decision whether to rezone was legislative/policy making and not adjudicative in nature — Rezoning decision was discretionary decision, requiring council to have regard to "relevant planning considerations" — As project did not conform with existing zoning, all that company could expect was that City Council would consider application within context of statutory authority conferred on it, with procedural fairness and consideration of relevant factors — City Council was not required to give reasons for decision beyond debate preceding vote — Transcript of City Council debate showed that councillors referred to factors of traffic and parking, accessibility for seniors, need for seniors' homes, and lack of effect on property values, which were all valid planning concerns — Three councillors, including C, referred to opposition by residents of area as part of their rationale for voting against rezoning — Politicians were not barred from having regard to views of constituents in making discretionary decisions such as rezoning — Legislature must have intended this, as it was natural and predictable consequence of conferring authority to make rezoning decisions on city council rather than some institution, like Ontario Municipal Board, with appointed members — It was not for courts to tell members of City Council that they were to make discretionary decisions without regard to views of affected constituents.

Municipal law --- Zoning — Rezoning land — Jurisdiction and powers

Applicant company applied to change zoning designation of parcel of land in order to accommodate development of land for seniors' assisted living residence facilities — Even though company's proposal was consistent with City's municipal plan and supported by city officials, City Council decided to refer it to public meeting in light of opposition by residents of area — At public meeting, Councillor C, whose ward included land in question, spoke strongly against proposal — Council voted to deny application to amend zoning by-law — Company's application for judicial review was granted in part, on basis that

councillor C had prejudged issue, and matter was remitted back to Council for reconsideration in which C could only participate if he confirmed that he did not have closed mind — City appealed; company cross-appealed — Appeal allowed; cross-appeal dismissed — Application judge properly found that decision whether to rezone was legislative/policy making, given decision-making process in stages of hearing citizens' views on application, analysis by city officials, debate by City Council, and finally Council vote — Process did not involve application of substantive rules, as elected body of City Council had considerable discretion to apply their political judgment in examining practical and policy concerns — City Council clearly had authority to decide rezoning applications so issue of vires was not in question — As project did not conform with existing zoning, all that company could expect was that City Council would consider application within context of statutory authority conferred on it, with procedural fairness and consideration of relevant factors.

Administrative law --- Requirements of natural justice — Bias — General principles

Applicant company applied to change zoning designation of parcel of land in order to accommodate development of land for seniors' assisted living residence facilities — Even though company's proposal was consistent with City's municipal plan and supported by city officials, City Council decided to refer it to public meeting in light of opposition by residents of area — At public meeting, Councillor C, whose ward included land in question, spoke strongly against proposal — Council voted to deny application to amend zoning by-law — Company's application for judicial review was granted in part, on basis that councillor C had prejudged issue, and matter was remitted back to Council for reconsideration in which C could only participate if he confirmed that he did not have closed mind — City appealed; company cross-appealed — Appeal allowed; cross-appeal dismissed — Application judge properly decided that rezoning decision was not adjudicative decision, so he did not err in concluding that relevant test for bias was "closed mind" rather than "reasonable apprehension of bias" — Applying "closed mind" test in way according with realities facing elected officials, it did not require official to remain in state of uncertainty until instant before vote was taken but only when official refused to consider what they were supposed to consider — Councillor C addressed relevant planning issues, including traffic concerns and accessibility of services for seniors, while bearing in mind views of his constituents — Application judge erred in law in application of closed mind test, as C's participation in debate and vote on rezoning were proper in circumstances.

Municipal law --- Council members — Impartiality

Applicant company applied to change zoning designation of parcel of land in order to accommodate development of land for seniors' assisted living residence facilities — Even though company's proposal was consistent with City's municipal plan and supported by city officials, City Council decided to refer it to public meeting in light of opposition by residents of area — At public meeting, Councillor C, whose ward included land in question, spoke strongly against proposal — Council voted to deny application to amend zoning by-law — Company's application for judicial review was granted in part, on basis that councillor C had prejudged issue, and matter was remitted back to Council for reconsideration in which C could only participate if he confirmed that he did not have closed mind — City appealed; company cross-appealed — Appeal allowed; cross-appeal dismissed — Mayor's discussion of project with concerned citizens, including statement that he "shared their concerns", was not conflict of interest but ordinary work of elected office holder — Opposition to project by his daughter's in-laws was too remote to constitute conflict of interest — Mayor's absence during debate and vote on rezoning application was complete answer to any concerns relating to conflict of interest — Applying "closed mind" test for bias in way according with realities facing elected officials, it did not require official to remain in state of uncertainty until instant before vote was taken but only when official refused to consider what they were supposed to consider — Councillor C addressed relevant planning issues, including traffic concerns and accessibility of services for seniors, while bearing in mind views of his constituents — Application judge erred in law in application of closed mind test, as C's participation in debate and vote on rezoning were proper in circumstances.

Administrative law --- Practice and procedure — On application for certiorari — Costs

Applicant company applied to change zoning designation of parcel of land in order to accommodate development of land for seniors' assisted living residence facilities — Even though company's proposal was consistent with City's municipal plan and supported by city officials, City Council decided to refer it to public meeting in light of opposition by residents of area — At public meeting, Councillor C, whose ward included land in question, spoke strongly against proposal — Council voted to deny application to amend zoning by-law — Company's application for judicial review was granted in part, on basis that councillor C had prejudged issue, and matter was remitted back to Council for reconsideration in which C could only participate if he confirmed that he did not have closed mind — City appealed; company cross-appealed — Appeal allowed; cross-appeal dismissed — Company received 50 per cent of its costs based on its partial success, but factual basis underpinning costs award

no longer existed, as city had succeeded in all respects on appeal — As issues of alleged bias and closed mind test in municipal context had not been previously subject of authoritative adjudication in this jurisdiction, discretion would be exercised to order each party to bear on costs on appeal and lower level.

Table of Authorities

Cases considered by *M.H. Rowe J.A.*:

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Congrégation des Témoins de Jéhovah de St-Jérôme-Lafontaine c. Lafontaine (Municipalité) (2004), 2004 SCC 48, 2004 CarswellQue 1545, 2004 CarswellQue 1546, 323 N.R. 1, *(*sub nom. *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village))* 241 D.L.R. (4th) 83, 49 M.P.L.R. (3d) 157, 17 Admin. L.R. (4th) 165, *(*sub nom. *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village))* [2004] 2 S.C.R. 650, 121 C.R.R. (2d) 261, 2004 CSC 48 (S.C.C.) — considered

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Keefe v. Edmonton (City) (2002), 2002 ABQB 1098, 2002 CarswellAlta 1683, 329 A.R. 149, 38 M.P.L.R. (3d) 299, 2 Admin. L.R. (4th) 230, [2003] 9 W.W.R. 753, 16 Alta. L.R. (4th) 388 (Alta. Q.B.) — considered

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Old St. Boniface Residents Assn. Inc. v. Winnipeg (City) (1990), 46 Admin. L.R. 161, 2 M.P.L.R. (2d) 217, [1991] 2 W.W.R. 145, 75 D.L.R. (4th) 385, 116 N.R. 46, 69 Man. R. (2d) 134, [1990] 3 S.C.R. 1170, 1990 CarswellMan 383, 1990 CarswellMan 235 (S.C.C.) — considered

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Save Richmond Farmland Society v. Richmond (Township) (1990), 46 Admin. L.R. 264, [1990] 3 S.C.R. 1213, 116 N.R. 68, 2 M.P.L.R. (2d) 288, 75 D.L.R. (4th) 425, [1991] 2 W.W.R. 178, 52 B.C.L.R. (2d) 145, 1990 CarswellBC 282, 1990 CarswellBC 768 (S.C.C.) — considered

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Vasiliopoulos v. Dosanjh (2008), 2008 BCCA 399, 2008 CarswellBC 2145, 84 B.C.L.R. (4th) 45, [2009] 1 W.W.R. 18, 63 C.P.C. (6th) 201, 261 B.C.A.C. 80, 440 W.A.C. 80 (B.C. C.A.) — considered

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Urban and Rural Planning Act, 2000, S.N. 2000, c. U-8

Generally — referred to

Tariffs considered:

Rules of the Supreme Court, 1986, S.N. 1986, c. 42, Sched. D

R. 55, App., Pt. A, column 3 — referred to

APPEAL by city; CROSS-APPEAL by applicant company from judgment reported at *Seanic Canada Inc. v. St. John's (City)* (2014), 2014 NLTD(G) 7, 2014 CarswellNfld 19, 19 M.P.L.R. (5th) 55, 1074 A.P.R. 283, 345 Nfld. & P.E.I.R. 283, 66 Admin. L.R. (5th) 139 (N.L. T.D.), granting in part its application for judicial review of city's refusal to rezone land.

***M.H. Rowe J.A.*:**

INTRODUCTION

1 This appeal engages the principles of procedural fairness that are applicable to decision-making by a municipal council relating to a land-development proposal that would have involved an amendment to the municipality's zoning by-laws.

2 Seanic Canada Inc. ("Seanic") sought to develop a parcel of land within the City of St. John's for a seniors' assisted living residence facility. The existing zoning did not permit that type of proposed development. Its application for a development permit was rejected by City officials. Seanic then applied to change the zoning designation to accommodate the development. Its proposed amendment was consistent with the City municipal plan. City officials supported the change and the ultimate development and, according to Seanic, encouraged it to push the proposal forward. As a result, Seanic expended money on, amongst other things, a land use assessment report.

3 Residents in the area of the proposed development who opposed the development opposed the zoning change. They expressed concerns about traffic, view obstruction and potential reduction in property values, amongst other things. At a regular meeting, Council decided that Seanic's application for rezoning be referred to a public meeting chaired by a member of Council.

4 Representatives of Seanic attended the public meeting and made a presentation explaining its proposal. A number of residents spoke against the rezoning and the development. Several municipal councillors were present and also expressed views. Councillor Wally Collins, whose ward included the land in question, spoke strongly against the proposal. A subsequent vote by Council denied Seanic's application to amend the zoning by-law. Seanic sought judicial review of Council's decision.

FACTS

5 In 2005, Seanic applied to City Council for rezoning. As a result of negative public response, Seanic asked City Council to defer consideration of the rezoning application.

6 In 2007, Seanic again applied to City Council for rezoning. In due course, a public meeting was scheduled concerning the project.

7 At that meeting on October 26, 2010, a number of citizens indicated their opposition to the project, based on obstruction of views, traffic issues and possible reduction in nearby property values.

8 Seanic requested that Council defer a vote on its rezoning application. Council decided to proceed with its decision.

9 On November 1, 2010, City Council rejected the rezoning application.

10 Seanic sought judicial review of City Council's rejection of the rezoning. A judge of the Trial Division quashed City Council's decision and remitted the matter to it. The judge did so on the basis that Council had not provided reasons to Seanic for its decision to proceed with the vote, rather than defer it, as Seanic had requested. That decision by the Trial Division judge is not the subject of this appeal.

11 City Council convened another public meeting on February 23, 2012; again, nearby residents voiced opposition to the project. At its March 12, 2012 meeting, Council considered Seanic's rezoning application.

12 Councillor Collins moved that Seanic's application for rezoning be rejected. The transcript of the debate on that motion is set out in the annex to this decision.

13 Councillors Collins, O'Leary, Hickman, Brennan, Hanlon and Duff voted for the motion to reject the rezoning. Councillors Tilley, Galgay and Hann voted against the motion (they favoured the rezoning). The motion to reject the rezoning thus carried by six to three.

14 Seanic again sought judicial review. It said that Mayor O'Keefe was biased, as he was actively involved with area residents who opposed the project. Seanic also said that Mayor O'Keefe was in a conflict of interest as his daughter's parents-in-law lived close to the project property.

15 As well, Seanic said that Councillor Collins (who was the ward councillor for the area) was biased against the project, as he voiced opposition to it from an early stage.

16 Further, Seanic said that Councillor Collins had prejudged the issue when it came before Council for debate and a vote. This was based, in particular, on statements he made at the February 23, 2012 public meeting, the minutes of which read in part:

> Councillor Collins also spoke against the proposed development and assured residents that he will be voting against the Application when it is referred to council based upon the information and feedback he was receiving from residents.

The transcript of the meeting indicates that Councillor Collins also said that he was "dead set against" the project.

17 In cross-examination during the judicial review hearing, Councillor Collins said that at the October 26, 2010 public meeting he had assured his constituents that he would be voting against the project.

18 Finally, Seanic said that City Council failed to provide adequate reasons for its March 12, 2012 decision.

19 By way of relief, Seanic sought:

(1) an order of the Court granting the rezoning; and

(2) solicitor-client costs.

20 In his decision (2014 NLTD(G) 7 (N.L. T.D.)), a judge of the Trial Division held:

(1) Mayor O'Keefe was not in a conflict of interest;

(2) Councillor Collins did not show bias against the rezoning application;

(3) however, Councillor Collins *did* prejudge the issue before it was debated and voted on by City Council on March 12, 2012; and

(4) the debate by City Council on the rezoning application at the March 12, 2012 meeting constituted sufficient reasons for Council's decision.

21 Based on the foregoing, the Trial Division judge ordered:

(1) the March 12, 2012 decision to reject the rezoning application be quashed and the matter be remitted to Council for reconsideration; and

(2) Seanic receive 50% of its party-and-party costs (column 3), as it had succeeded in part.

22 As well, while it was not part of the order, the Trial Division judge offered a "suggestion" that if Councillor Collins were prepared to confirm at a meeting of Council that he did "not have a closed mind" on the rezoning application, then Councillor Collins could participate in Council's decision on the rezoning. Otherwise, Councillor Collins should "[recuse] himself from further deliberations and should [refrain] from voting".

23 City Council appealed the foregoing decision. It seeks to have the quashing of Council's March 12, 2012 set aside; it also seeks costs.

24 Seanic has cross-appealed seeking the relief that it sought before the Trial Division, as well as solicitor-client costs.

ISSUES

(1) What is the standard of review applicable to the determinations by the Trial Division judge that are in issue in the appeal and cross-appeal?

(2) What was the nature of Council's decision on rezoning?

(3) In its debate, did Council have regard to factors not relevant to "planning decisions"?

(4) Was Council required to give reasons for its decision beyond the debate preceding the vote on rezoning?

(5) Was Mayor O'Keefe in a conflict of interest?

(6) Was Councillor Collins biased; did he prejudge the issue?

(7) If Councillor Collins was biased or if he prejudged the issue, does this affect the validity of Council's March 12, 2012 decision?

(8) If Council's decision was properly quashed because of Councillor Collins' participation, would that disqualify other councillors who participated in the March 12, 2012 decision from participating in subsequent consideration and a decision on the rezoning application?

(9) Should Councillor Collins be permitted to participate in a new rezoning decision if he asserts that he has an "open mind"?

(10) Should the Court order the granting of the rezoning application?

(11) What order for costs should be made?

ANALYSIS

(1) Standard of Review

25 The standard of review will vary depending on the issue. It is settled law that for findings of fact the standard is palpable and overriding error, as it is for mixed questions of fact and law, save for extricable questions of law where the standard is as it is for questions of law, that is correctness.

(2) The Nature of the Decision

26 The Trial Division judge described the legislative scheme under which City Council took the rezoning decision:

> [24] The process for applying for approval of a proposed development is summarized in an Information Bulletin prepared by the City and made available to developers. I set out the relevant extracts:
>
> **DEVELOPMENT INFORMATION BULLETIN:**
>
> ***REZONING PROPERTY AND TEXT AMENDMENTS TO THE ST. JOHN'S DEVELOPMENT REGULATIONS***

This is one in a series of Development Information Bulletins prepared to assist Property Owners and Developers to undertake specific types of development in the City of St. John's. Please contact the Department of Planning for further Information on other Bulletins available in the series.

INTRODUCTION

The St. John's Municipal Plan contains the policies adopted by the St. John's Municipal Council for land use and development of the City. The regulations that implement these policies are contained in the *St. John's Land Use Zoning and Subdivision Regulations*, commonly referred to as the St. John's Development Regulations. The Urban and Rural Planning Act requires that the Development Regulations be consistent with the policies of the Municipal Plan. Both documents have been adopted and approved under this Act.

The Development Regulations are used to regulate land use and development in the City. They contain a series of zoning maps, a description of the uses permitted in each specified zone, and a variety of standards for development and/or subdivision.

ZONING INFORMATION

Any person requiring information on zoning, should first locate the property involved on the zoning maps available from the City's Department of Planning, and establish what uses are permitted and what development standards apply to the property. City staff can assist.

AMENDMENT

Occasionally, a development may be proposed which does not meet the requirements of the City's regulations. Applicants for such developments are advised to discuss them with the Department of Planning prior to seeking an amendment. Two types of amendments are recognized:

1. Rezoning

A change of the zoning, and in some cases, the Municipal Plan designation of a property, to allow a proposed development to proceed which otherwise would have been turned down.

2. Text Amendment

A change in the development standard or regulations text of the Development Regulations, and in some cases a change in a policy of the Municipal Plan, which would allow a proposed development to proceed which otherwise would have been turned down.

Planning staff can advise of the amendment procedure. Applications for rezoning are site-specific and therefore usually initiated by the applicant for a specific development. Applications for a text amendment often have a broader application; although they may be initiated by a specific development, they may have an affect on many areas of the city. ...

Once the application has been officially accepted for processing, the following steps occur:

1. The Department of Planning gathers background information and refers the application to other departments and public agencies as required.

2. A report is submitted to the Planning and Housing Committee of the St. John's Municipal Council. The Committee normally meets monthly to consider land use planning issues and rezoning applications and to make recommendations to Council on same.

3. The Planning and Housing Committee brings its recommendations to the next Regular Meeting of Council for consideration. Council then decides whether to accept the recommendations. In the case of rezoning applications, the *Urban and Rural Planning Act* requires that the City provide an opportunity for public comment.

The City publishes a public notice of the proposed amendment in a local newspaper and mails notices to property owners within a 150 metre radius of the subject property. Council usually sets up a Public Meeting to discuss the application in more detail.

4. The Public Meeting is organized by City staff and chaired by a Councillor. The Public Meeting is advertised in the newspaper at least 10 days beforehand. Notices are mailed to property owners within 150 metres of the site, at least 14 days beforehand. The general public is invited to attend. The applicant is asked to attend and present information about the application. City staff will also be present to discuss the proposed amendment.

5. The minutes of the Public Meeting are forwarded to Council at its next Regular Meeting for consideration. Council then decides whether to proceed further with the rezoning. If Council agrees to proceed, Council will adopt the amendments and forward all relevant documentation to the Department of Municipal & Provincial Affairs for review.

6. When the Department of Municipal & Provincial Affairs confirms that there is no Provincial interest involved, the City will appoint an Independent Commissioner to convene a Public Hearing to discuss the proposed rezoning.

7. The general public is invited to attend the Public Hearing. The Hearing is advertised in a local newspaper and by, mail-out notice at least 14 days beforehand. The applicant will be asked to attend and present information on the application. City staff will also be present to discuss the proposed amendment.

8. The general public is invited to send in written submissions. In the event no written objections or concerns have been received by two (2) days before the date of the Public Hearing, the Hearing may be cancelled.

9. After the Public Hearing is held, the Commissioner submits a written report to Council, normally within thirty (30) days. The report will note people's comments and concerns and make a recommendation to Council on whether the amendment should be approved, modified, or rejected. Council is not bound by the recommendations of the Commissioner but does consider them fully.

10. The Commissioner's report is tabled for consideration at a Regular Meeting of Council. Council then decides whether to approve the amendments. The approved amendments are forwarded to the Minister of Municipal & Provincial Affairs for registration. The amendment comes into legal effect when the Minister's notice of registration is published in *The Newfoundland Gazette*. ...

MUNICIPAL PLAN AMENDMENTS

Some rezoning applications and text amendments to the Department Regulations require an amendment to the Municipal Plan. The Department of Planning will advise if this applies to a specific application. ...

[25] Although over the years there were multiple public and Council meetings addressing Seanic's application, the process outlined in the Bulletin reflects essentially the process followed in this case up until the Council's final decision to reject the application in March 2012. Accordingly the process ended at Step 5.

[26] The Bulletin refers to the Municipal Plan and to the St. John's Development Regulations. The development of land in St. John's is governed by the provisions of these documents, both created under the *URPA*.

12. A plan and development regulations are binding upon

(a) municipalities and councils within the planning area governed by that plan or those regulations; and

(b) a person undertaking a development in the area governed by that plan or those regulations.

[27] The Development Regulations must be consistent with the Municipal Plan — *O'Dea v. St. John's (City)*, 2004 CarswellNL 306 (T.D.).

[28] But the regulatory structure is intended to be flexible and capable of amendment — s. 25 of URPA. Sections 14 - 24 of URPA set out a detailed process for amendment, including provisions for public consultation, a report to Council on the public hearing and a public debate and vote on the matter by Council. It is this process that is summarized in the Bulletin reproduced above.

[29] Section 5.5 of the Development Regulations sets out the details of the procedure of public notification and the holding of public meetings. The Regulations also give some direction to Council when considering applications for development:

5.1.3 Discretionary Powers

(1) Compatibility with the Municipal Plan

In considering an application for approval to carry out Development, Council shall take into account the policies expressed in the Municipal Plan and any further scheme, plan or regulation pursuant thereto.

Where the requirements appear inadequate to meet the policies of the Municipal Plan or any document pursuant thereto, or where requirements have not been specified in these Regulations or are left to the discretion of Council, Council may establish the necessary requirements. ...

5.2.5 Reasons for Refusing Permit

Council or an Officer shall, when refusing a permit or attaching conditions to a permit, state the reasons in terms of the criteria used in exercising discretionary powers as provided in Section 5.1.3.

[30] The Municipal Plan makes a number of references to the need for flexibility in its application and for awareness of the need for future amendments. The following extracts are illustrative: (my underlining throughout)

1 Purpose and Scope

A municipal plan is a document with text, maps, and other illustrations that expresses a municipality's policies for planning, use, and future development of land. The *St. John's Municipal Plan* guides the use of all land and property in the City of St. John's in the overall interest of the municipality and its citizens. [p. I-1]

The St. John's Land Use Zoning and Subdivision Regulations, commonly called the *St. John's Development Regulations*, implement the policies of the *St. John's Municipal Plan* and area subordinate to it. The Development Regulations are the primary regulations used to process development applications in St. John's. [p. I-5]

2.1.2 General Land Use Map

The General Land Use Map (Map III-1) sets out the Land Use Districts corresponding to the policies in Part III. The map describes the future development of the city. Since development is influenced by a variety of factors, some of which are difficult to predict or control, the General Land Use Map is designed to be a flexible guide for development and zoning. [p. I-6]

2.2 PLAN AMENDMENT PROCEDURE

The *St. John's Municipal Plan* is written to guide development in the context of a Vision for the City's future that establishes broad goals that are expected to hold over the life of this Plan revision. However, conditions can change: areas may evolve from one land use toward another or developers may propose ideas or developments with merit that were not foreseen when the plan was revised.

For these and other reasons, a municipal council can change any portion of its Municipal Plan, through a formal amendment process provided under Section 25 of the *Urban and Rural Planning Act*. Future amendments are expected as a natural evolution of the municipal planning process. The amendment process reflects the fact that the St. John's Municipal Plan is a dynamic document not a static one.

The Act requires that council consult the public before proceeding to amend the plan. When considering an amendment or amendments, Council shall evaluate the proposed amendment against the goals, objectives, and purposes of the Municipal Plan before deciding to accept or reject a new policy. The process is provided for in Provincial legislation because it is essential to ensuring that the Plan is flexible and responsive. [p. I-7&8]

III CITY-WIDE OBJECTIVES AND POLICIES

1 URBAN FORM

The broadest objective of land use policies is to facilitate an efficient pattern of development. Generally, this means building a compact city. A compact city makes better use of its infrastructure and needs less roadways. With shorter distances to travel to work and shopping, car trips are reduced and transit use is facilitated. Often too, parks, schools, and facilities can be used more intensively, meaning the same investment will serve more people. [p. III-3]

1.2.3 Residential Development

The City shall:

1. increase densities in residential areas where feasible and desirable from a general planning and servicing point of view;

2. encourage a compatible mix of residential buildings of varying densities in all zones;

3. encourage conservation, compact renewal, and infill in the older parts of the City; and

4. minimize sprawl by encouraging large-scale integrated developments in all expansion areas.

1.2.4 Mixed Use

The City shall encourage the mixture of land uses in all areas. [p. III-4]

2 RESIDENTIAL

Perhaps the single most important function of municipal government is assisting in the provision of suitable, affordable, and attractive environments for housing of all groups in the population. Residential development is by far the largest category of urban land use in St. John's. As such, it has a major influence on the character of the city and the quality of life of its inhabitants. Residential environments, furthermore, are arguably more sensitive to other land uses and, therefore, require a higher degree of protection from other types of development.

Residential Districts are areas that will be developed primarily for residential purposes. Within these Districts the functioning of the evolving residential environment will be protected from other residential or non-residential land use that may be determined to be incompatible. That being said, it is implicit in the Vision for the City of St. John's and in the foregoing objectives and policies pertaining to Urban Form that the City will encourage mixed land use and higher

> density development where it is opportune. Provisions are included to allow the development of neighbourhood-supportive commercial uses like convenience stores, day care centres, and parking areas. Policies also encourage the supply of housing through the proactive initiative of the City, and through infill and intensification. [p. III-10] ...

(Underlining by the Trial Division judge.)

27 In his decision, the Trial Division judge relied on decisions of the Supreme Court of Canada, as follows:

> [34] There is no question that when considering an application for rezoning, a municipal authority, in the absence of specific legislative provisions, owes the applicant a duty of procedural fairness. In *Congrégation des témoins de Jéhovah de St.-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, the Supreme Court of Canada considered the content of this duty. Of course, the content of the duty will vary according to the circumstances and the regulatory framework. Chief Justice McLachlin said, at paragraph 5:
>
> > 5. The content of the duty of fairness on a public body varies according to five factors: (1) the nature of the decision and the decision-making process employed by the public organ; (2) the nature of the statutory scheme and the precise statutory provisions pursuant to which the public body operates; (3) the importance of the decision to the individuals affected; (4) the legitimate expectations of the party challenging the decision; and (5) the nature of the deference accorded to the body: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. In my view and having regard to the facts and legislation in this appeal, these considerations require the Municipality to articulate reasons for refusing the Congregation's second and third rezoning applications.
>
> [35] Of the first factor, the Chief Justice said this, at paragraph 6:
>
> > 6. The first factor — the nature of the decision and the process by which it is reached — merges administrative and political concerns. The decision to propose a draft by-law rezoning municipal territory is made by an elected council accountable to its constituents in a manner analogous to that in which Parliament and the provincial legislatures are accountable to their own: *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at para. 51. This decision is moreover tempered by the municipality's charge to act in the public interest: *Toronto (City) v. Trustees of the Roman Catholic Separate Schools of Toronto*, [1926] A.C. 81 (P.C.), at p. 86. What is in the public interest is a matter of discretion to be determined solely by the municipality. Provided the municipality acts honestly and within the limits of its statutory powers, the reviewing court is not to interfere with the municipal decision unless "good and sufficient reason be established": *Kuchma v. Rural Municipality of Tache*, [1945] S.C.R. 234, at p. 243 (*per* Estey J.); see also *Norfolk v. Roberts* (1914), 50 S.C.R. 283, at p. 293; *In re Glover and Sam Kee* (1914), 20 B.C.R. 219 (S.C.), at pp. 221-22; *Re Howard and City of Toronto*, [1928] 1 D.L.R. 952 (Ont. S.C., App. Div.), at p. 965.
>
> [36] And of the fifth factor, she said at paragraph 11:
>
> > 11. The fifth factor — the nature of the deference due to the decision maker — calls upon the reviewing court to acknowledge that the public body may be better positioned than the judiciary in certain matters to render a decision, and to examine whether the decision in question falls within this realm. Municipal decisions on rezoning fall within the sphere in which municipalities have expertise beyond the capacity of the judiciary, thus warranting deference from reviewing courts. However, this factor may not carry much weight where, as here on the second and third applications for rezoning, there is no record to indicate that the Municipality has actually engaged its expertise in evaluating the applications.
>
> [37] Her conclusion, at paragraphs 12 - 13:
>
> > 12. The five *Baker* factors suggest that the Municipality's duty of procedural fairness to the Congregation required the Municipality to carefully evaluate the applications for a zoning variance and to give reasons for refusing them. This conclusion is consistent with the Court's recent decision in *Prud'homme v. Prud'homme*, [2002] 4 S.C.R. 663, at para. 23, holding that municipal councillors must always explain and be prepared to defend their decisions. It is also

> consistent with *Baker*, where it was held, at para. 43 dealing with a ministerial decision, that if an organ of the state has a duty to give reasons and refuses to articulate reasons for exercising its discretionary authority in a particular fashion, the public body may be deemed to have acted arbitrarily and violated its duty of procedural fairness.
>
> 13. Giving reasons for refusing to rezone in a case such as this serves the values of fair and transparent decision making, reduces the chance of arbitrary or capricious decisions, and cultivates the confidence of citizens in public officials. Sustained by both law and policy, I conclude that the Municipality was bound to give reasons for refusing the Congregation's second and third applications for rezoning. This duty applied to the first application, and was complied with. If anything, the duty was stronger on the Congregation's second and third applications, where legitimate expectations of fair process had been established by the Municipality itself.

[38] In *Lafontaine*, the municipality's decision was apparently not reached at a public meeting; it was communicated in writing, reproduced at paragraph 27:

> 27. The Municipality responded by letter, dated August 24, 1993. Again, it refused the application for rezoning. Again, it offered no reasons. This time it did not even tell the Congregation that land was available in Zone P-3. The Municipality contented itself with asserting — erroneously — that since the Legislature had conferred discretion upon it, the Municipality was not required to offer any justification for refusing the Congregation's rezoning application:
>
> > [TRANSLATION] You have made a number of applications to amend the zoning by-law. The Legislature has given the municipal council the responsibility for exercising this power, which is discretionary. Upon careful consideration, the municipality of Lafontaine has decided not to take action in respect of your applications. The municipal council of Lafontaine is not required to provide you with a justification and we therefore have no intention of giving reasons for the council's decision.
> >
> > [Emphasis added by Supreme Court of Canada.]

[39] The Congregation asked the Court to order that its rezoning application be granted. But the Court refused, saying at paragraph 32:

> 32. The Congregation argues that this remedy is inadequate because it fears that the Municipality will once again refuse its application, this time with proper reasons. Accordingly, it asks this Court to order the Municipality to grant its rezoning application. But such an order presupposes that the Congregation is entitled to a favourable decision by the Municipality in the proper exercise of its discretion. Having already discussed the broad scope of the municipal power to pursue its urban planning program with fairness, in good faith and with a view to the public interest, I take no position on this matter.

[40] The matter was remitted to the Municipality "to be considered in accordance with these reasons and in observance of the lawful exercise of discretionary authority". (Paragraph 35).

[41] In another decision released in 2004, the Supreme Court of Canada considered a municipality's liability in damages arising out of the amendment of a by-law. In *Enterprises Sibeca Inc. v. Frelighsbury (Municipality)*, the Court said this of the nature of the functions of a municipal council — at paragraph 24:

> ... Municipalities perform functions that require them to take multiple and sometimes conflicting interests into consideration. To ensure that political disputes are resolved democratically to the extent possible, elected public bodies must have considerable latitude. Where no constitutional issues are in play, it would be inconceivable for the courts to interfere in this process and set themselves up as arbitrators to dictate that any particular interest be taken into consideration. They may intervene only if there is evidence of bad faith. The onerous and complex nature of the functions that are inherent in the exercise of a regulatory power justify incorporating a form of protection both in civil law and at common law. ...

28 Having addressed the general law with respect to municipal council decisions regarding zoning, the Trial Division judge then turned to the statutory scheme under which City Council made the decision in question:

> [43] The governing legislation — in particular s. 16 of [the Urban and Rural Planning Act] contemplates that a municipal council will adopt (or reject) a rezoning application by majority vote. In this case, the vote of Council was conducted in public after each councillor had spoken to the matter. The Council meeting was the final step in the lengthy process that included public meetings, Council committee meetings and the receipt of a number of written and oral submissions from those both for and against the development.
>
> [44] Council is required by the Development Regulations — reflecting part of the content of the duty of procedural fairness — to give reasons for a decision to refuse approval. The reasons must relate to the criteria applied in the exercise of Council's discretion, essentially the policies expressed in the Municipal Plan and other relevant plans or regulations.
>
> [45] This reflects the fact that Council does not have unfettered discretion to refuse an application for development. Its discretion must be exercised, and be seen to be exercised, within the boundaries established by the regulatory framework.
>
> . . .
>
> [48] Whether or not Council's reasons are adequate is an assessment that must reflect the context in which the decision is being made. Council has the discretion to reject the advice and opinions of its professional staff; councillors are entitled to form their own views on relevant planning considerations; councillors are not required, as an adjudicator may be, to outline any evidence in support of their conclusions, although they may choose to do so. On the other hand, Council is required to demonstrate that its decision was not influenced by considerations outside the planning process.
>
> [49] I reiterate that this is a decision being taken by majority vote of elected representatives in a public forum. It seems to me to be appropriate that in such a setting, any consideration of the adequacy of reasons supporting a majority vote should start from the premise that all councillors are aware of the Municipal Plan, its purposes and objectives, of the reports prepared by City staff and of the general thrust of the various views that have been expressed — for and against — in the process culminating in the final Council meeting.
>
> [50] The report of the debate — read as a whole and with the recognition that it is in the form of a debate in which conflicting views may be expressed — should show that Council is aware that it is debating a rezoning application; that the views put forward — construed generously — relate to considerations relevant to property development; and that the final decision could not be said to be arbitrary, in bad faith, or based on considerations outside the ambit of the regulatory framework. ... for rejection gave the developer an indication of whether or not further work on the proposal would be productive.

29 Seanic's view of the decision taken by City Council is fundamentally different. Seanic submits that the decision whether to rezone was adjudicative (quasi-judicial). Counsel for Seanic set out his positon as follows:

> 74. The Applications Judge examined the issue of whether the City's decision concerning the Rezoning Application was legislative or quasi-judicial in the context of the duty to give reasons and the principles of administrative fairness such as the factors outlined in *Congrégation des Témoins de Jéhovah de St-Jérôme-Lafontaine c. Lafontaine (Municipalité)*, 2004 CarswellQue 1545 (S.C.C.) ("*Lafontaine*"), which in turn was relying on the factors explained in *Baker v. Canada (Minister of Citizenship & Immigration)*, 1999 CarswellNat 1124 (S.C.C.). (Reference: Decision paragraphs 34-53).
>
> 75. The Applications Judge erred in failing to consider whether he was reviewing an *intra vires* or *ultra vires* municipal decision. He did not consider the *Baker v. Canada* factors with respect to the issue of bias; rather his focus was upon the duty to give reasons. In the context of Council's obligation to give reasons, the Applications Judge stated (at paragraph 47):
>
> > Councillors are elected politicians. In making decisions on applications for development, they are performing an administrative act in furtherance of their ability and duty to regulate and control development in the city. Although

> making a decision which affects the interests of one or more persons or companies, they are not adjudicators. Decisions are by majority vote, and different Councillors may have different reasons for voting as they do.
>
> (Emphasis added.)

76. In *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] S.C.J. No. 14 (S.C.C.), the Supreme court of Canada noted the difference between review of *intra vires* and *ultra vires* municipal decisions and set out three criteria that identify whether a decision is adjudicative or legislative/policy making: (i) whether there was an adversarial hearing; (ii) whether the application of substantive rules to individual cases was involved; and (iii) whether the decision would have a substantial impact on the rights of the parties.

77. The Applications Judge erred by not considering whether he was dealing with an *intra vires* or *ultra vires* decision [or], the three criteria above ....

. . . . .

78. The Applications Judge failed to recognize that the Rezoning Application (the Public Meeting, the Public Meeting minutes and written submissions and the Council Meeting discussion and decision) involved an adversarial hearing. When the process is considered as a whole, the Rezoning Application involved the application of the substantive rules of *Municipal Plan* and *Development Regulations* to the situation of an individual property owner. It also involved a significant impact on the rights of Seanic, as well as the neighbouring property owners who were disputing the matter.

79. In accordance with *Nanaimo*, all of these circumstances point to the conclusion that — contrary to the thinking of the Applications Judge — the Rezoning Application was an adjudicative hearing before City Council.

. . . . .

82. In addition, the Applications Judge did not consider previous cases that employed an analysis of the duty of procedural fairness in the situation of contested municipal rezoning applications: *Keefe v. Edmonton (City)*, 2002 CarswellAlta 1683 (Alta. Q.B.) affirmed 2005 CarswellAlta 442 (Alta. C.A.) and *P.J.D. Holdings Inc. v. Regina (City)*, 2010 CarswellSask 776 (Sask. Q.B.). Both of these cases considered the *Baker v. Canada* factors and concluded that when a municipal council decides a dispute between neighbouring property owners concerning the development of a specific property, council makes a judicial or quasi-judicial decision, *not* a legislative decision.

83. Therefore, council decisions on re-zoning applications of the within sort import a high degree of procedural fairness. The municipality in these quasi-judicial re-zoning processes must be prepared to meet a high "content level" of the fairness duty in order for their decision on the Rezoning Application to accord with procedural fairness.

84. The Applications Judge concluded that he should apply the reasonableness standard by asking whether the Council "was alive to the question at issue". However, the 'alive to the question at issue' approach is for *intra vires* decisions and the conclusion and approach of the Applications Judge runs contrary to *Nanaimo*: reviewing whether an adjudicative decision of Council was *ultra vires* clearly attracts the correctness standard of review, not reasonableness. The Applications Judge should have decided whether the Council correctly considered, exercised, and justified its statutory discretion under the Development Regulations.

85. On the issue of bias, the Applications Judge quite rightly referred to *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, 1990 CarswellMan 235 (S.C.C.) and the *Save Richmond Farmland Society v. Richmond (Township)*, 1990 CarswellBC 282 (S.C.C.) re-zoning cases, which stand as seminal jurisprudence in that area of law.

86. However, the nature of the cases decided in *Old St. Boniface* and *Save Richmond* were quite different from Seanic's case. Unfortunately, the Application judge failed to note that Seanic's case (like the *Keefe* and *PJD Holdings* cases, but unlike the *Old St. Boniface* and the *Save Richmond* cases), is not a case of broad public policy. Thus, although *Old St. Boniface* and *Save Richmond* were placed further toward the legislative end of the spectrum of classifying administrative decisions, Seanic's case is rightly placed on the quasi-judicial end of the spectrum because the nature of the dispute relates more to a decision arbitrating private interests [rather than] wide policy decisions.

. . . . .

90. Applying the *Baker* factors to the within preceeding, the following points are critical.

91. Seanic's Rezoning Application did not involve a large parcel of land or broad planning issues like those involved with development issues concerning large areas like Quidi Vidi Village or Galway. It involved a small parcel of land and whether zoning should be changed so that the Seniors Development could be built on the Property. While the idea of a seniors facility in the West End of St. John's was of some general interest to seniors in the city, the potential development and rezoning was of specific and particular focused concern to property owners located in the immediate area of the Property.

92. The within proceeding was a situation where legislation had already been passed by the City in the form of the *Municipal Plan* and *Development Regulations*, which set out the planning policies concerning this and other locations. When dealing with the rezoning, Council was not legislating any new planning policy or rules; rather, Council was merely applying existing planning policies and rules set out in the *Municipal Plan* and the *Development Regulations* to the circumstances of this particular property.

93. By contrast with *Lafontaine*, this case is not akin to Parliament (or the provincial legislature) passing legislation. It is more like a planning board or local board of appeal deciding, after representations and planning evidence by neighbours, whether, based upon the *Municipal Plan* and *Development Regulations*, a zoning amendment or municipal permit should be granted and what conditions should be involved.

94. Most importantly, this proceeding involved a dispute between neighbouring property owners concerning how existing planning rules and policies should be applied to the Property; a dispute which has direct impact on the rights of the property owners in this location, not the City in general. Thus, the nature of this Rezoning Application is adjudicative, not legislative, in accordance with the criteria stated in *Nanaimo*.

. . . . .

97. To summarize, the Rezoning Application was primarily a dispute between neighbours that the City was being asked to determine based upon existing planning policies and rules — not a legislative or policy decision. Consequently, this *Baker* factor militates toward a high degree of procedural fairness.

98. The statutory background at play was discussed at paragraphs 18-42 above. The Rezoning Application was governed by existing legislated rules — by the URPA, the *Municipal Plan* and the *Development Regulations*.

99. The URPA required a public meeting and a decision and vote at a Council Meeting by the City Councillors after consideration of the representations arising from the public meeting. A Development Information Bulletin issued by the City set out in writing the Public Meeting and Council Meeting process. The Public Meeting was to be chaired by a member of Council. The notice of the Public Meeting was to be put in a local newspaper and specifically mailed to property owners within a 150-metre radius of the subject property.

100. Both the public and Seanic were asked to attend and present information about the application, and City staff were to be in attendance in order to discuss the Rezoning Application. Council members (other than the Meeting chair) were not asked or required to be in attendance or to speak; however minutes of the Public Meeting were to be forwarded to the Council for Consideration at Council's next regular meeting.

101. The *Municipal Plan* stated how the City Council was to deal with rezoning applications. Section 2.2 of the Municipal Plan stated:

> When considering an amendment or amendments, counsel shall evaluate the proposed amendments against the goals, objectives, and purposes of the municipal plan before deciding to accept or reject a new policy.

102. Section 5.2.5 of the *Development Regulations* also specifically stated:

> Council or an officer shall, when refusing or attaching conditions to a permit, state the reasons in terms of the criteria used in exercising discretionary powers as provided in section 5.1.3.

103. Section 5.2.5 of the *Development Regulations* is Council's own express statement that it must state its reasons in terms of the criteria used in exercising discretionary powers as provided in section 5.1.3 when refusing or attaching conditions to a permit. Further, section 5.5 of the Development Regulations made it mandatory that Council consider the record produced by the Public Meeting. Section 5.5 stated:

> The City Clerk shall cause to be recorded the proceedings of the Public Meeting and these proceedings, together with any written representations, shall be considered by Council when it makes its decision on the matter, which is the subject of the Public Meeting.
>
> (Emphasis added.)

104. All of the above provisions point to the adjudicative nature of the re-zoning decisions made by Council. Then, on top of that, there is no right of appeal from this adjudicative decision. This Baker factor indicates a high degree of procedural fairness.

(Underlining by counsel for Seanic.)

30 Seanic sought to distinguish *Lafontaine* and the other Supreme Court of Canada cases relied on by the Trial Division judge on the basis that the facts in those cases differ from those in this case. I do not find that persuasive. While there are factual differences, what was relied on by the Trial Division judge were the broad principles outlined by the Supreme Court of Canada in the cases to which he referred, most notably what Chief Justice McLachlin wrote in *Lafontaine* regarding municipal rezoning decisions. In my view, those principles apply in this case.

31 Seanic's position is based largely on *Nanaimo (City) v. Rascal Trucking Ltd.*, 2000 SCC 13, [2000] 1 S.C.R. 342 (S.C.C.), which (in the words of Seanic's Factum),

> ... set out three criteria that identify whether a decision is adjudicative or legislative/policy making: (i) whether there was an adversarial hearing; (ii) whether the application of substantive rules to individual cases was involved; and (iii) whether the decision would have a substantial impact on the rights of the parties.

32 The problem with the foregoing is that it does not fit with the nature of the decision by City Council. First, there was no "adversarial hearing"; rather, there was an application by Seanic, there were the views of interested citizens, there was analysis by municipal officials, there was debate by City Council and, in the end, there was a vote by City Council. Thus, the decision-making process consisted of several stages, involving multiple actors, engaged in diverse ways, quite different from an adversarial/adjudicative process. Second, the process did not involve "the application of substantive rules". While the statutory scheme focuses on proper land use planning, it accords considerable discretion to a body (City Council) comprised of elected persons who, by the nature of their office, apply political judgment as an integral part of their decision-making; they are engaged in examining practical and policy concerns rather than a set of rules or fixed criteria in the exercise of their discretion.

33 Further to this, Seanic relies on a distinction between *intra vires* and *ultra vires* decisions of Council. Given the facts of this case, that is not a relevant distinction. City Council has authority to decide rezoning applications; the issue of *vires* is, thus, not in question. Rather, the proper lens for judicial review of City Council's decision is the test of "reasonableness" as set out by the Supreme Court of Canada in *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.). Seanic does not argue that City Council's decision was unreasonable; rather, Seanic argues that the decision was incorrect (by reference to the standard of correctness) or that it was *ultra vires* (i.e. taken without jurisdiction). But, as I have indicated, *vires* is not in issue and correctness is not the relevant standard of review.

34 Beyond this, I would note the line of analysis set out by counsel for St. John's:

[9] There is a fundamental fallacy with Seanic's argument both on the Appeal and the Cross-Appeal. Seanic argues in effect that its application to change the Development Regulations to re-zone the property is compatible with the Municipal Plan and that the City therefore must approve the change in the zoning and change the Development Regulations. This argument is based on a fundamental fallacy that the proposed amendment must be preferred over the existing zoning. Such a conclusion is incorrect in law.

[10] The Municipal Plan and the existing Development Regulations were created following all of the requirements of URPA. They reflect and embody appropriate planning and development principles and policies. They have been prepared by professional planners. They have been through public hearing processes. They have been approved by the City Council. And they have been approved by the Minister of Municipal Affairs. This property is currently zoned Residential Low Density (R1) in the Development Regulations. The R1 zoning reflects the application of proper planning and development principles and policies.

. . . . .

13. ... Anyone can apply to change the zoning designation of a property by submitting an application and paying a fee of $300.00. That will begin a process which may possibly lead to a change in the zoning. But there is no entitlement to a change in zoning. There is no presumption in favour of change. At the end of the process, Council may decide that it wishes to retain the existing zoning designation which has already been established in accordance with sound planning principles and policies.

14. In this case, Seanic sought to change the existing Residential Low Density (R1) zoning under the Development Regulations to the Apartment Special (AA) Zone which permits an apartment building of three (3) stories (up to 12 meters) and to introduce "Personal Care Home" as a Discretionary Use in the AA Zone. These changes are compatible with the Municipal Plan in the sense that the proposed use would not require an amendment to the broader policies contained in the Plan. But compatibility with the Plan just gets Seanic to the starting line for consideration; it does not entitle Seanic to a change in zoning.

15. Seanic argues that its proposed change is compatible with the Municipal Plan and meets appropriate planning principles. But the decision for City Council is not a choice between Seanic's proposal and something which is incompatible with the Municipal Plan and proper planning principles. Rather, the decision for City Council is a choice between Seanic's proposal and the existing zoning which already complies with proper planning principles.

16. The decision is a policy or legislative decision for Council. Council is required to provide an opportunity to be heard in accordance with URPA and previous case authority. But Council is not deciding a *lis* or a dispute between parties. Council is deciding a matter of public policy, whether to amend the Development Regulations to change the zoning. ...

17. Council does not need "evidence" in order to reject the proposed change. The existing zoning is already compliant with URPA and proper planning. Council's decision to retain the existing zoning is simply a policy choice that Council is entitled to make.

. . . . .

23. The [Supreme Court of Canada in *Old St. Boniface*, *supra*] rejected allegations of bias in respect of a councillor who had openly supported a proposed development. The Court pointed out at paragraph 90 that "the role of a municipal councillor is quite different from that of the chairman of the National Energy Board...". The Court continued the contrast at paragraph 91, pointing out that "...members of the National Energy Board do not have political or legislative duties. Prejudgment of issues is not inherent in the nature of their extra-adjudicative functions". The Court thus indicated the inherent political and legislative nature of councillors' functions which permits a degree of pre-judgment.

24. The Court concluded that what is to be avoided is personal interest, not partiality by reason of pre-judgment. The Court stated at paragraph 92:

> 92 I would distinguish between a case of partiality by reason of prejudgment on the one hand and by reason of personal interest on the other. It is apparent from the facts of this case, for example, that some degree of prejudgment is inherent in the role of a councillor. That is not the case in respect of interest. There is nothing inherent in the hybrid functions, political, legislative or otherwise, of municipal councillors that would make it mandatory or desirable to excuse them from the requirement that they refrain from dealing with matters in respect of which they have a personal or other interest. It is not part of the job description that municipal councillors be personally interested in matters that come before them beyond the interest that they have in common with the other citizens in the municipality. Where such an interest is found, both at common law and by statute, a member of council is disqualified if the interest is so related to the exercise of public duty that a reasonably well-informed person would conclude that the interest might influence the exercise of that duty. This is commonly referred to as a conflict of interest: See *Re Blustein*, [1967] 1 O.R. 604, 61 D.L(R. (2d) 659 (H.C.); Moll *v. Fisher* (1979), 23 O.R. (2d) 609, 8 M.P.CR. 266, 96 D.L.R. (3d) 506 (Div. Ct.); *Ctee. for Justice*, supra; and *Valente u. R.*, [1985] 2 S.C.R. 673, 49 C.R. (3d) 97, 37 M.V.R. 9, 23 C.C.C. (3d) 193, 24 D.L.R. (4th) 161, 19 C.R.R. 354, 14 O.A.C. 79, 64 N.R. 1

Old St. Boniface Residents Assn. Inc. v. Winnipeg (City), 1990 CarswellMan 235 (S.C.C.)

. . . . .

27. ... In *Nanaimo (City) v. Rascal Trucking Ltd.*, the Court recognized that municipalities are political bodies. "To a large extent council decisions are necessarily motivated by political considerations and not by an entirely impartial application of expertise." (para. 32) The Court continued at paragraph 35:

> 35 In light of the conclusion that Nanaimo acted within its jurisdiction in passing the resolutions at issue, it is necessary to consider the standard upon which the courts may review those *intra vires* municipal decisions. Municipal councillors are elected by the constituents they represent and as such are more conversant with the exigencies of their community than are the courts. The fact that municipal councils are elected representatives of their community, and accountable to their constituents, is relevant in scrutinizing *intra vires* decisions. The reality that municipalities often balance complex and divergent interests in arriving at decisions in the public interest is of similar importance. In short, these considerations warrant that the *intra vires* decision of municipalities be reviewed upon a deferential standard.

Nanaimo (City) v. Rascal Trucking Ltd., [2000] S.C.J. No. 14 (S.C.C.)

28. In 2003, in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, the Supreme Court of Canada embraced a broad and purposive approach to the interpretation of municipal statutes affirming that, absent any challenge on constitutional grounds, it is for the municipality to decide the best interests of its citizens.

United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City), 2004 CarswellAlta 355 (S.C.C.)

29. In 2004, in *Congregation des temoins de Jehovah de St-Jerome-Lafontaine v. Lafontaine (Municipality)*, the Court considered the refusal of a municipality to re-zone a property to permit a place of worship. The municipality gave no explanation for its decision. The Court remitted to the municipality the matter for re-consideration. ... The Court stated:

> 6 The first factor — the nature of the decision and the process by which it is reached — merges administrative and political concerns. The decision to propose a draft by-law rezoning municipal territory is made by an elected council accountable to its constituents in a manner analogous to that in which Parliament and the provincial legislatures are accountable to their own: *Godbout c. Longueuil (Ville)*, [1997] 3 S.C.R. 844 (S.C.C.), at para. 51. This decision is moreover tempered by the municipality's charge to act in the public interest: *Toronto (City) Roman Catholic Separate School Board v. Toronto (City)* (1925), [1926] A.C. 81 (Ontario P.C.), at p. 86. What is in the public interest is a matter of discretion to be determined solely by the municipality. Provided the municipality acts honestly and within the limits of its statutory powers, the reviewing court is not to interfere with the municipal decision unless "good and sufficient reason be established": *Kuchma v. Tache (Rural Municipality)*, [1945] S.C.R. 234 (S.C.C.), at p. 243 *(per*

> Estey J.); see also *Norfolk v. Roberts* (1914), 50 S.C.R. 283 (S.C.C.), at p. 293; *Glover v. Kee* (1914), 20 B.C.R. 219 (B.C. C.A.), at pp. 221-22; *Howard v. Toronto (City)*, [1928] 1 D.L.R. 952 (Ont. C.A.), at p. 965.
>
> [Emphasis added]

Congrégation des Témoins de Jéhovah de St-Jérôme-Lafontaine c. Lafontaine (Municipalité), 2004 CarswellQue 1545 (S.C.C.)

. . . . .

> 33. In this case, councillors were considering an application to re-zone the property from its existing R1 zoning to Apartment Special (AA) zoning. Council had before it essentially two choices. One choice was to maintain the existing zoning. The existing zoning had been prepared, examined and approved in accordance with all of the processes and procedures set forth in URPA. It met proper planning policies and principles. The second choice was to change the zoning as proposed by Seanic. After following all of its required processes and procedures, Council decided to retain the existing zoning. That was a legislative decision based upon policy choices that Council was entitled to make in the exercise of its discretion and judgment.
>
> 34. The decision falls within a range of reasonable outcomes available to Council under the URPA. The decision conforms with the regulatory scheme set up by the Legislature embodied in the URPA. Council did not act for any improper purpose or in bad faith. Consequently, there is no basis upon which the Court can interfere with Council's decision.
>
> (Underlining by counsel for St. John's.)

35 The foregoing analysis supports the conclusion that the Trial Division judge did not err when he decided that the rezoning decision was not an adjudicative decision, rather it was discretionary, having regard to "relevant planning considerations". (See para. 48 of the decision under appeal, reproduced above in para. 28 of this decision.)

36 I would emphasize a critical distinction in decision-making by City Council. If a project proponent applies to develop a property and the proposal is (purportedly) in conformity with zoning (and other regulatory requirements), then the proponent is entitled to receive approval to proceed with the project or, if such approval is denied, to be informed of the reasons why approval was denied. If the reasons disclose no valid basis for denying the approval, then the proponent has a right to seek judicial review, with a view to compelling City Council to grant approval.

37 A different situation exists where a proponent seeks rezoning because the intended project does *not* conform with the existing zoning. That is the situation here. In such an instance, all that the proponent can expect is that City Council will consider the rezoning application within the context of the statutory authority conferred on it to make such decisions. If City Council fails to adhere to some procedural requirement set out in the statutory scheme (e.g. it fails to hold a public meeting), then the project proponent can seek to have Council's decision quashed on judicial review on the basis of procedural unfairness. Similarly, if Council bases its decision on factors that are unconnected with the purposes of the statutory scheme (e.g. it denies a rezoning application based on the political affiliation of the project proponent), then again the proponent can seek to have Council's decision quashed on judicial review as such a decision would be unreasonable. But, *the proponent has no right to have the rezoning application approved*. To repeat, this contrasts with the situation of a project plan that conforms with existing zoning (and other regulatory requirements), in which instance the proponent *does* have a right to receive approval to proceed with the project.

(2) Did Council have Regard to Planning Factors?

38 When one reads the transcript of the City Council debate preceding the vote, key factors referred to by Councillors were:

- Collins (the ward councillor): traffic concerns; lack of accessible amenities for seniors
- Galgay: no problems with respect to traffic; no effect on property values
- O'Leary: traffic concerns; poor accessibility to the site by seniors; public opposition

- Tilley: need for more seniors homes
- Hickman: traffic concerns; lack of accessible amenities for seniors; public opposition.
- Hann: need for more seniors homes
- Breen: traffic concerns
- Hanlon: parking concerns
- Duff: parking concerns; lack of accessible amenities for seniors; opposed to "spot zoning" that is incompatible with surrounding land use
- Collins (closing debate): public opposition.

39 Concerns regarding traffic, parking and compatibility of the project with surrounding land use are all valid planning concerns. The same is true of accessibility to amenities by seniors, in a situation where Council was being asked to exercise their discretion to change the zoning so that the land could be used as the site for a seniors home.

40 The same can be said for the Councillors who favoured rezoning because they wanted to see more housing for seniors. They wished to exercise their discretion in favour of rezoning in order to support a valid public policy goal, albeit one not directly related to land use planning.

41 Finally, there were three councillors (Collins, Hickman and O'Leary) who gave as part of their rationale for voting against the rezoning application the fact that persons living in the vicinity of the proposed project were opposed to it.

42 A politician is not barred from having regard to the views of his or her constituents in making a discretionary decision, including rezoning. The legislature must have intended this, as it is a natural and predictable consequence of conferring authority to make rezoning decisions on City Council rather than conferring such authority on some institution (like the Ontario Municipal Board) whose members are appointed, rather than elected.

43 It is not for the courts to tell members of City Council that they are to make discretionary decisions (as was this decision) without regard to the views of affected citizens, persons who are their constitutents. That would run counter to the democratic system. Seanic's submissions on this point must be rejected.

(4) Was Council Required to Give Reasons for its Decision Beyond the Debate Preceding the Vote?

44 Based on the foregoing, notably the discretionary nature of the rezoning decision and the content of the debate, there is no basis in law to require City Council to provide additional reasons for its decision. The judicial review judge did not err in his conclusion that the debate in the Council chambers was sufficient to comply with the duty to give reasons.

(5) Was Mayor O'Keefe in a Conflict of Interest?

45 Seanic said that Mayor O'Keefe was in a conflict of interest because he discussed the proposed project with concerned citizens and told them that he shared their concerns. This is not a conflict of interest; this is the ordinary work of an elected office holder.

46 Seanic further said that Mayor O'Keefe was in a conflict of interest because his daughter's parents-in-law lived near the proposed project and opposed it. This is too remote to constitute a conflict of interest.

47 Mayor O'Keefe was also not present during the debate nor did he vote on the rezoning application. This is a complete answer to any concerns relating to conflict of interest.

(6) Was Ward Councillor Collins Biased; Did He Prejudge the Issue?

48 Here is what the Trial Division judge wrote with respect to whether Councillor Collins was biased or had prejudged the issue:

> [60] Seanic asserts that Mayor O'Keefe had prejudged the issue and was biased because of his involvement with opponents of the process. The evidence, which I accept, is that the mayor spoke throughout the process to those for and against the development. The assertion of either bias or prejudgment on the part of the Mayor is not supported by the evidence and, as previously noted, the mayor did not vote on the final decision.
>
> [61] Seanic also asserts that Councillor Collins demonstrated prejudgment in that he came to the Council meeting on March 12 having made up his mind to reject the application, based primarily on the opposition of area residents.
>
> [62] Councillor Collins testified in a forthright manner. He acknowledged that in the public meeting of October 26, 2010 he answered, in response to a question from a member of the public, that he would be voting against the proposal. At the subsequent Council meeting on November 1, 2010, he referred to the project as "just crazy". He remained consistent in his position.
>
> [63] He confirmed that his mind was made up before the Council meeting on March 12, 2012; he went on to indicate that he would probably vote for the project if the residents were in favour of it.
>
> [64] The evidence satisfies me that Councillor Collins had, before the Council meeting of March 12, 2012, completely made up his mind to reject the proposal, that his rejection was primarily based on the opposition from area residents, and that he was not open to be persuaded by any argument or representation to the contrary.
>
> [65] The issue of bias in the sense of prejudgment has been discussed in at least three decisions of the Supreme Court of Canada.
>
> [66] In *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, the Supreme Court of Canada considered prejudgment in the context of a contested rezoning by the City of Winnipeg. A councillor who voted for the rezoning had previously expressed his support for the application during consideration by the City's Finance Committee. The majority judgment, written by Justice Sopinka, first sets out the circumstances under which the council makes zoning decisions. It is not dissimilar to the process in St. John's.
>
> . . . . .
>
> [67] After discussing a number of authorities, [Justice Sopinka] concludes at paragraph 57:
>
> > 57. In my opinion, the test that is consistent with the functions of a municipal councillor and enables him or her to carry out the political and legislative duties entrusted to the councillor is one which requires that the objectors or supporters be heard by members of Council who are capable of being persuaded. The Legislature could not have intended to have a hearing before a body who has already made a decision which is irreversible. The party alleging disqualifying bias must establish that there is a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile. Statements by individual members of Council while they may very well give rise to an appearance of bias will not satisfy the test unless the court concludes that they are the expression of a final opinion on the matter, which cannot be dislodged. In this regard it is important to keep in mind that support in favour of a measure before a committee and a vote in favour will not constitute disqualifying bias in the absence of some indication that the position taken is incapable of change. The contrary conclusion would result in the disqualification of a majority of Council in respect of all matters that are decided at public meetings at which objectors are entitled to be heard.

[68] This test was confirmed in *Save Richmond Farmland Society v. Richmond (Township)*, [1990] 3 S.C.R. 1213, at paragraphs 47 - 48. See also on this point *Newfoundland Telephone Co. v. Newfoundland (Public Utilities Board)*, [1992] 1 S.C.R. 623 at paragraph 27.

[69] Did Councillor Collins come to the Council meeting on March 12, 2012 with a closed mind, so determined to vote against the proposal such that any representation or argument to the contrary would be futile? The evidence satisfies me that the answer is yes. In this case, the situation is more troubling since, in my assessment, Councillor Collins' mind was closed primarily because of the opposition of those who elected him and not because of legitimate planning considerations. Although Councillor Collins did express concerns about traffic, safety and amenities, these were not, in my assessment, the considerations which persuaded him to vote as he did. They were concerns which were subject to being overridden by the wishes of his constituents.

[70] The closed mind test is a stringent test. It reflects the nature of the process and the fact that discretionary decisions are being made by an elected body whose members may well be participants in various aspects of what may be a prolonged approval process, who will be the recipients of entreaties from those who elected them, and who may be required during an election campaign to take positions on divisive development issues. A degree of prejudgment, perhaps to a significant degree, is to be expected as a lengthy consultation and public process approaches completion.

[71] Nonetheless, a vote by Council on a rezoning application is expected to be a considered vote following deliberation and debate by Council. It is a vote on a proposal on which a developer, as in this case, may have expended significant resources, often at the direction of the municipality. The regulatory regime governing development — in particular its recognition of the evolutionary nature of municipal planning — requires that councillors bring a degree of independent judgment to their deliberations and decisions. Even though they are elected, councillors, in this context, are not a simple proxy for their electors; they are entrusted with the development of the municipality in accordance with the Municipal Plan and regulations.

[72] When the time comes for a vote on a development proposal, fairness to the applicant and adherence to the regulatory regime for property development require that each councillor listen to the views expressed by his or her colleagues, respect and be governed by the criteria against which the discretionary authority is to be exercised and, where there has been a degree of prejudgment, honestly and objectively consider whether his or her position should be maintained.

[73] In this case, Councillor Collins did not do that. As noted, I am satisfied that his mind was closed and that any representations to the contrary would be futile.

49 In this appeal, Seanic took the position that the Trial Division judge was mistaken as to the nature of the rezoning decision, that it was adjudicative and, therefore, the test to be applied was "reasonable apprehension of bias", rather than "closed mind". As well, Seanic said that whichever test one applies, Councillor Collins fell afoul of it.

50 In this regard, counsel for Seanic argued:

130. The Supreme Court of Canada has noted that the inquiry as to whether a person is biased is "highly fact-specific" (Reference: *Wewaykum Indian Band v. Canada*, [2003] SCJ No. 50 at paragraph 77). The Supreme Court of Canada has also approved of the comment that:

> This is a corner of the law in which the context, and the particular circumstances, are of supreme importance.
>
> Ref: *Wewaykum*, paragraph 77

131. With regard to the issue of bias, there are two tests: 1) with regard to tribunals that are on the adjudicative end of the spectrum; and 2) with regard to tribunals which are on the legislative or policy-making end of the spectrum. The test concerning an administrative tribunal that is exercising an adjudicative function is known as the reasonable apprehension of bias test.

. . . . .

132. The test concerning an administrative tribunal that is exercising legislative or policymaking functions is known as the "closed mind" test, which requires significant prejudgment by the impugned decision-maker:

> The party alleging disqualifying bias must establish that there is a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which is being adopted, would be futile. Statements by individual members of council, while they may very well give rise to an appearance of bias, will not satisfy the tests unless the court concludes that they are the expression of a final opinion on the matter, which cannot be dislodged. In this regard it is important to keep in mind that support in favour of a measure before a committee and a vote in favour will not constitute disqualifying bias in the absence of some indication that the position taken is incapable of change.
>
> Ref: *Old St. Boniface Residence Association Inc. v. Winnipeg (City)*, Op. Cit., at paragraph 94.

133. The closed-mind test deliberately sets a higher threshold and is a harder test to satisfy than the reasonable apprehension of bias test. Moreover, it is an inescapable conclusion that if bias in accordance with the closed mind test has been found, then bias in accordance with the reasonable apprehension of bias test has also been found.

134. The appropriate test respecting Seanic's Rezoning Application, where the City was acting on the adjudicative end of the spectrum, should have been the reasonable apprehension of bias test.

135. Accordingly, the Applications Judge erred in law by selecting the closed mind test. However, this legal error by the Applications Judge does not fatally affect his ultimate findings, because the Applications Judge also concluded that Councillor Collins had prejudged the matter enough to satisfy the closed mind test.

136. The finding that Councillor Collins had prejudged the matter was principally a fact-finding decision. This factual finding made by the Applications Judge also satisfies the reasonable apprehension of bias test: since he concluded that the comments and actions of Councillor Collins demonstrated a closed mind, it inevitably follows that those same comments and actions demonstrate a reasonable apprehension of bias.

51 As noted in paragraph 35 above, I have concluded that the Trial Division judge did not err when he decided that council's rezoning decision was not an adjudicative decision, rather it was discretionary, having regard to the "relevant planning considerations". Thus, the Trial Division judge did not err when he concluded that the relevant test was the "closed mind" test.

52 This leads to the question whether in applying that test the Trial Division judge erred. Counsel for St. John's submitted that the Trial Division judge did so. He argued as follows:

> 32. Chief Justice Orsborn at paragraphs 69 and 72 of his decision states that Councillor Collins had a closed mind when it came time to vote on Seanic's development proposal. This conclusion reflects a fundamental misunderstanding about how the process works. At the March 12, 2012 Council meeting, the councillors were expected to have considered all the material and submissions from the consultation process and have made up their minds. The vote on March 12, 2012 was the end of the process that initially began in 2007.
>
> . . . . .
>
> 44. The Learned Trial Judge erred in law with respect to the "closed mind" test and its application in this case. Mr. Collins was the ward councillor for the area affected by the rezoning application. He was entitled to form his opinions as the matter progressed, as he considered the application, read the various reports and listened to the concerns of the area residents. After considering the matter, he formed his opinion that the rezoning application should be rejected based on all the facts and legitimate planning concerns, also shared and articulated by his fellow councillors. It defies logic to find that Councillor Collins, having formed his opinion after giving the matter due consideration, should be disqualified due to bias at the time of the final vote, simply for expressing his views in Council. Making a motion to reject the rezoning application and explaining his reasons for doing so are a permissible exercise of the councillor's duties and powers.

45. Councillors are elected officials accountable to their constituents. They have a mandate to form and express opinions on policy matters such as planning and zoning. They have an obligation to listen to the views of the constituents in their ward regarding planning and zoning decisions for that ward. It is perfectly permissible for a ward councillor to listen to the views of his constituents and form and express his opinions, particularly at the decision stage. This is a permissible expression of a discretionary political power and cannot be grounds to overturn a decision of Council.

. . . . .

58. It is difficult to see how Councillor Collins' comments differ much from the others who voted against the rezoning application. They all cite traffic concerns, topography, parking, the lack of amenities available to seniors, all properly acknowledged by Chief Justice Orsborn as valid planning concerns. They also discuss the concerns of the residents in the area, clearly another valid planning concern. This factor seems to be diminished or even challenged by the reasoning of the learned Chief Justice given that he finds it problematic that Councillor Collins' main concern was the views of his constituents.

. . . . .

60. It cannot be said that Councillor Collins had a "closed mind" in the sense that his decision was tainted by *legally impermissible* bias when the comments provided are his reasons for his decision. This is akin to a Judge providing reasons for judgment. Obviously, coming to conclusions about a matter as part of one's deliberations after having heard the case does not amount to bias. *Vasiliopoulos v. Dosanjh*, 2008 CarswellBC 2145 (B.C. C.A.). The ward councilor moving the motion to reject the rezoning application obviously had his mind made up and was required to express his reasons for reaching the conclusion that he did. Every other councillor had also made up his or her mind, voted and expressed their reasons. Councillor Collins' comments do not constitute *impermissible* bias at that stage of the rezoning process. They simply reflect the reasons for the councillor's decision to move to reject the rezoning application, which included concerns raised by his constituents, a perfectly permissible exercise in the circumstances.

53 Based on the foregoing, I would state the following:

(a) The "closed mind" test needs to be applied in a way that accords with the realities facing elected officials. It does not require an elected official to remain in a state of uncertainty until the instant before a vote is taken. Rather, a "closed mind" exists when someone refuses to consider what they are supposed to consider, in this case "relevant planning considerations".

(b) I cannot agree with Seanic's submission that Councillor Collins was biased against the project and that he prejudged the decision because he opposed it based on the views of his constituents. Councillor Collins did what we expect politicians to do; he listened to his constituents on matters relevant to the issues under consideration. Where the decision to be taken is discretionary (as it was here), elected officials are entitled to do so. That is part of the normal process of politics in a democracy. It is not "bias". (An example of bias would be if Councillor Collins opposed the project for some invalid purpose, e.g. if he opposed it because he wished to cause harm to a proponent who had supported a rival candidate.)

(c) It would be an error to say that bias exists because a councillor takes into account the views of his constituents when considering relevant concerns, e.g. traffic. It would be no less an error to say a councillor has a "closed mind" because he tells his constituents that he shares their views regarding relevant concerns.

(d) As to prejudging the issue, it is too artificial, too much at odds with the role of a politician to require him or her to proclaim until the moment before a vote is taken that he or she continues to have an "open mind" on the issue when almost certainly he or she does not. That is not reality. That is not practicality. And the law should be neither unrealistic nor impractical.

(e) Councillor Collins addressed relevant planning issues, including traffic concerns and the accessibility of services for seniors in his consideration of Seanic's application for rezoning. The fact that he approached such issues bearing in mind the views of his constituents did not undermine the legitimacy of his participation in the debate and the vote by Council.

54 Accordingly, I find that the Trial Division judge erred in law in his application of the closed mind test. Councillor Collins' participation in the Council debate and his vote on the rezoning application offended no law; they were proper in the circumstances.

(8) If Councillor Collins was Biased or if He Prejudiced the Issue Does this Affect the Validity of Council's March 12, 2012 Decision?

55 In light of the foregoing, this issue does not arise.

(9) Should Other Councillors Be Disqualified From Participating in a Subsequent Decision on the Rezoning Application?

56 In light of the foregoing, this issue does not arise.

(10) Should Councillor Collins be Permitted to Participate If He Asserts He Has an "Open Mind"?

57 In light of the foregoing, this issue does not arise.

(11) Should An Order Be Made By The Court Granting The Rezoning Application?

58 In light of the foregoing, this issue does not arise.

(12) Costs

59 In the Trial Division, Seanic received 50% of its costs based on its partial success there. However, City Council has succeeded in all respects in this appeal and cross-appeal. Thus, the factual basis underpinning the Trial Division judge's exercise of discretion in awarding costs no longer exists.

60 This case dealt with alleged bias and the application of the "closed mind" test in the municipal context; these issues have not been previously the subject of authoritative adjudication in this jurisdiction. Bearing this in mind and having regard to this Court's decisions in such cases as *RBC Dominion Securities Inc. v. Dawson* (1994), 114 Nfld. & P.E.I.R. 187 (Nfld. C.A.) (para. 46) and *Genge v. Parrill*, 2007 NLCA 77, 272 Nfld. & P.E.I.R. 199 (N.L. C.A.) (at 207), I would exercise my discretion as to costs and order that each party bear their own costs here and in the Trial Division.

CONCLUSION

61 I would allow the appeal by St. John's and dismiss the cross-appeal by Seanic. I would set aside the order quashing Council's decision of March 12, 2012 as that decision was validly taken. Each party should bear their own costs.

***J. D. Green C.J.N.L.*:**

I Concur:

***M. F. Harrington J.A.*:**

I Concur:

Appeal allowed; cross-appeal dismissed.

Annex

Councillor Wally Collins:

..., I move rejection of this application, can I get a seconder?

I had a lot to say about it but I will stick to the facts really why it is not appropriate to go there. Number one, that intersection is still the most dangerous intersection in St. John's, and for us to put one more car there is really, I mean, we're putting it not even the length of this building (80 ft., 27 metres) we are putting a senior home right in the middle of that intersection. So I disagree, that's number one.

Number two, the topography of it, where it's to on the hill there. I mean there's sure going to be lots of water coming down over that. Once you take the side of that hill out, there's icy conditions down there now, there's nowhere .... If there's anybody in a wheelchair, there's no sidewalks for them to push them down over the street and number three, there's nothing for seniors to do there. There's nothing to go to only Tim Horton's and you got to cross a four lane highway just to get to that. Anybody that done any research on seniors homes, it should be a flat area and there should be some amenities that you can go to like a doctor's office, a dentist, a drug store so they can get their medicine, even a grocery store, somewhere that they can kill their day. You know they can walk around and talk to people, but up there on the side of that hill, as far as I am concerned it don't make common sense to put that up there.

Acting Mayor Duff:

Councillor Galgay and then Councillor O'Leary.

Councillor Galgay:

Your Worship, I will be voting for the project that's proposed by Seanic. I had voted for it before and I am going to vote for it again. To me it's a total issue of "not in my backyard", and I am going to take the arguments for rejection and to hopefully knock down the "straw man" or the "straw women" that are involved in this particular issue.

Number one, we have heard about property in that particular area being devaluated. That is pure unadulterated nonsense. And the examples I give is if you go down King's Bridge Road you have a service station there, and in the weekend's paper in the real estate section, you have one house going for 1.1 million and you have another house going for 1.3 million, you have Forest Road, these huge mansions from the turn of the century which are selling for a fortune, are bordering the Sheraton Hotel and if you were to go there tomorrow the prices would not be down because of the Sheraton. So I would to debunk that particular argument.

The issue of traffic is a non issue. You have 50 or 60 assisted seniors living complex. Number one, if you look at the traffic report in the minutes, you will notice there that there would be no significant increase in traffic because of the presence of an assisted senior citizens complex in that particular area. Now let's be serious about it. Do you expect seniors in the assisted living home all to be up on the morning at 8:00 or 9:00 o'clock with the cars coming out on Kilbride Road or in the afternoon hitting that gas and joining all the other cars that are coming out in that particular area. So the argument that you know the presence of this particular complex is going to suddenly cause disruption and an increase in traffic and on it goes is pure nonsense.

I would like to point out, your Worship that the goal of a Municipal Plan is evolutionary. It is a growth document. It encourages density, so I see no problem with that particular home going in there. I also point out, if you walk along Bowring Park, I encourage people to go. I think it's further west of the Bungalow. My wife and I went out last week and we looked across the highway and what do we see first, the Irving Oil gas station. What do we see beyond that, an open field where the proponent is going to put this much needed seniors complex. It would be an addition to that neighbourhood. The people should be rejoicing that senior citizens are coming in to this particular neighbourhood. And here we are in a situation where we have an aging population, not only in Newfoundland and Labrador but if you look at the statistics here in St. John's in the next ten to fifteen years many of us would be of that particular age or state where we could avail of that particular complex. So it's unobtrusive, it's not invasive and I don't see what all the fuss is about.

I, your Worship, support it for those reasons. Staff had told us that it has merit to be considered. So having said that, number one, I voted the last time for it. I haven't changed my mind because I haven't seen any significant arguments or issues or reasons that would make me change my vote at this present moment. For those reasons I will be supporting the presence of a much

needed seniors assisted living complex in the west end of St. John's in that particular area and I would hope other areas of this City would also be open and we get rid of this "not in my backyard" syndrome.

Acting Mayor Duff:

Councillor O'Leary and then Councillor Tilley.

Councillor O'Leary:

Thank you Madam Mayor and members of Council. As a voted representative of the public with a promise for responsible City planning, I am once again opposing the application by Seanic Canada Inc. for the rezoning of Old Petty Harbour Road/ Dorsey's Lane/Carrondale Drive.

Seanic Canada Inc. was represented by Legal Counsel at this recent public meeting whereby Mr. Michael Crosbie presented statements that Council were being "populist" and "whimsical" in our decision making process, alluding to Council's decision making as somehow irresponsible. In fact, and in response to these statements, I would say that the community should be reflected by the desire of the population and that we are elected to be the voice of the people.

In amidst of our Municipal Plan Review process recently kicked off with a highly successful Mayor's Symposium, we are conducting many avenues for public input into our Municipal Plan Review and it is imperative that our efforts focus on positive visioning on the future of our neighbourhoods and act as agents of responsible City planning.

In the recent public hearing on the potential rezoning of the area to accommodate a seniors three story seniors living residence, the overwhelming number of residents in the nearby area stated their case as to why they opposed this application in an incredibly articulate fashion. This is not a case of NIMBY and we are all certainly aware of the need for more seniors housing in our community, especially in the west end. But this issue is not about seniors living, rather it is an issue of whether this is an appropriate location and I stand firm once again that this application does not meet acceptable standards for rezoning.

None of my rational for rejecting the rezoning of this property has to do with public/private views as Councillor Galgay has spoken to. The reasons that I have chosen to oppose this once again are as a result of an incomplete assessment of the traffic impacts in its entirety in the Petty Harbour Road, Bay Bulls Road and Huntingdale Drive Area. Staff have studied only one component of the LUAR of a much larger area that has profound existing traffic and safety issues. Safety has to be the number one issue in this particular development.

The implementation of traffic lights has been proposed but will not solve the traffic problems that the residents presently have and this development will create further congestion and stress to the residents.

A series of retaining walls will be necessary as a result of the incredible sloping grade. This grade will also prove problematic for seniors walking down a dangerous slope winter time in icy conditions with a lack of existing sidewalks. Accessibility would be very difficult.

One of the residents, Sara Colborne Penney, a local resident advocating for the safety issue in the neighbourhood, researched the City of Waterloo who commissioned Dr. Boydell on the topic of appropriate locations for seniors housing and the results indicated: Seniors supportive housing should be integrated into the surrounding neighbourhood. It should ideally be located in an area that is safe, attractive and provides access to community amenities including transit, shopping, services, parks and recreation and activities. Ideally a post office, public library, medical and dental offices and a community centre should be within two blocks. In addition, a comfortable walking environment, especially since we are not providing lots of parking and such for people who apparently do not drive cars, should include sidewalks that are wide enough and in good condition and crosswalks that are clearly separated from the vehicular flow and the topography that is flat. As Ms. Colborne Penney also stated, given these parameters, this is clearly not a good location for a seniors complex and I must concur with her statements. They are not next to amenities, it's a treacherous incline, insufficient sidewalks in an area of already established traffic issues for the City to try to resolve in future efforts, and the seniors would be isolated.

So aside from that, there are environmental impacts and you know how I feel about environmental issues and the soil retention issues and the run-off issues. On such a steep grade there will be impacts.

Finally, the issues I have brought forward do not even address the negative impacts on the already existing residents, but again the issue is about this spot is not an appropriate location for this particular development, so I will not be supporting a rezoning.

Acting Mayor Duff:

Councillor Tilley.

Councillor Tilley:

Yes Madam Deputy I will be voting for the proposal. When this project came to Council previously I voted for it. Staff says that the project certainly merits consideration. There was a tremendous need in our community for seniors assisted living the last time and I think that's only increased by now. I stressed in my platform when I ran for Council that I would do everything in my power for seniors. Seniors need our support for this type of facility that certainly meets their needs and their concerns. We are an aging community, and this facility would be an asset to seniors.

Deputy Major Duff:

Anyone else? Councillor Hickman.

Councillor Hickman:

Thanks Deputy Major. This is the second time, I think perhaps third time we have reviewed this and I voted against the proposal so I will be voting in favour of the motion to reject.

I haven't seen any new information that would change my mind. I personally feel that we do have a traffic problem at the bottom of Old Petty Harbour Road that we need to take care of in any event. I don't think the number of cars that would be generated by this project is an issue so therefore we are assuming that people will be picked up by their families or they are going to be walking. There's no question that activity and exercise for seniors is important and on nice days for them to get out and walk. Maybe that's not reason enough legislatively to not support it, but I personally don't feel it's a great location for that. There are no services available. Many of these services are approximate to other seniors facilities that are built on major roads or in level areas that are more accessible for seniors.

I think that historically that area up that hill was always private farm land or just open space. It was rezoned a number of years ago for R1. A lot of it is developed. This particular part was not developed, so to me it is sitting there perfectly situated for an R1 infill and I question why it is not being considered by either this proponent or someone else for that purpose. So, if indeed this were to be rejected, if the proponent is interested in seniors assisted living, perhaps they will be looking for another site to do that, based on some of the information that he or she aren't here.

Also my only other point I really want to make is that we were all elected democratically. Every single issue that comes before us we vote on and we have voted on this before and now we are asked to vote on it again. So I think democracy is what's in action here and it is based on our knowledge and our experience as Councillors, the input from staff, from the proponent, from citizens and other facts that we have to take into account, not just what one person believes is right is what the picture provides. And there is no question as well in my mind that the neighbours are important and the neighbourhood is important and I certainly will be supporting Councillor Collins' motion.

Acting Mayor Duff:

Okay. Councillor Hann and then Breen.

Councillor Hann:

Yes, Deputy Mayor, I voted for this when it first came before Council and I can't support this motion to reject. It's been a very contentious issue and I think I've read more reports on this application than I have on any other application since I've been around here. The only thing I can say that has not — well it's already been said — that we have a significant need for this kind of operation in the city, assisted living for seniors. And as you know I've been actively involved in terms of looking at the future for seniors with the Mayor's Advisory Committee on Seniors, and we have a significant report coming to Council on Age Friendly Communities and so on, which is a project that we have been doing with Memorial University, but that's for the future. But there is a serious need because we are going to look 15 or more years down the road and I think our aging population in excessive of 40 percent will be 55 and over. So we are growing older each and every month and each and every year and I don't think municipalities, not only ours but other municipalities, are planning for the inevitable when we reach the point of our majority of our population is 55 or 60 plus and that's why we have to take a serious look at it. So I don't think there's anything changed since I voted the last time so I will be voting rejection.

Acting Mayor Duff:

Councillor Breen.

Councillor Breen:

Yes, Deputy Mayor, last time this came before Council I voted against it and like my colleagues, I haven't seen anything new in this proposal or anything that wasn't in the last proposal that is markedly different. I am concerned there about the traffic. I am concerned about the intersection. I think the intersection really before any further development happens in that area, that intersection needs to be dealt with. It's very dangerous and it certainly is a problem for me.

I do have a problem with the location of the building inside that R1 Zone surrounded by the R1 houses. I think it doesn't have any street frontage at all. It's got a narrow laneway but you know that I am sure may not be the big issue, but the big issue for me is the traffic. It's that intersection and it needs a lot of work. I also found that this issue became a little off the rails a little. This became an issue about seniors and it's not about seniors. Everybody knows that we need seniors facilities and nobody is voting against seniors. That would be like voting against our mothers and fathers and our brothers and sisters. We are dealing here with an application that we have to vote on and given the application and given where it's located and given what I've seen and what I think at that intersection and the troubles that are there, I can't support this application.

Acting Mayor Duff:

Councillor Hanlon.

Councillor Hanlon:

Well I waited until last because this is by far the biggest struggle I've had since I'm on Council, to determine this one. I mean look at this — this is the first time I've seen an addendum to our regular Council agenda with different documentation all on this one issue.

Acting Mayor Duff:

I think this is just all the stuff that was sent in that Karen put together.

Councillor Hanlon:

That's what I'm saying. So we don't often get that and believe me it was a lot of late night reading over the weekend, as well as I purposely tried to avoid talking to the developers on this issue, I would like people to know. I wanted to rely on staff and the project that was put forward and I am trying to take the personal side out of it which when I went through a lot of the letters from the residents, it appeared to me "not in my backyard" was evident when they were talking about their views and how a project of this magnitude would disrupt their lives for a couple of years with the construction and the fact that it was R1 when

they bought it and it should stay that way. But that's not how it works. We have the right as Council to change the zoning if we so feel it fit, just like we don't' [*sic*] have the right to say that it should be open space behind you as it's publically owned by someone else, privately owned.

So it was very difficult to pull out the personal side and I was on the fence all along as I was today but that's why I wanted to hear my fellow colleagues and I also spoke to some of our legal advisors as well and I did think it was very strong "not in my backyard" but at the end of the day I am going to vote with you, Councillor Collins, because I am very uncomfortable with that intersection. And that's the only thing that I am going to stand on here is the traffic and I feel that... I lived in Richmond Hill. I sold half the houses up in Richmond Hill. I lived there for six years. I think it's actually a beautiful area for a seniors home. I disagree with someone saying that it isn't. I think it's a good area but I do not agree with the parking as it is now. I've been out there several times before and it's saying that it's going to be a couple of years. We have it in the works, but it's not done. So I am uncomfortable, very uncomfortable with the parking situation, so for that reason and that reason alone I will be voting with Councillor Collins for rejection.

Acting Mayor Duff:

Well I guess that leaves it up to me since if I am counting right, it's 4 to 4 and like you Councillor Hanlon I..... 5 to 3, well I think in fairness I will state my own thing anyway.

I did not support this the first time around. I have really struggled with it for the reasons that you have Councillor Hanlon that we are very much in favour of seniors and very cognizant for more seniors development. My concern with this is strictly based on planning and the specific location. Not even the wider location of Kilbride or the Goulds. I think this is spot zoning. This is a site that is totally surrounded on all side by single family detached housing. Our Plan also speaks to compatibility and I think that you could not say there is compatibility in scale or form. What you're doing is in a cube of single family housing, inserting a fairly large institutional type building.

I also have concern that it is back lot development. It is not fronting on a public street and I have concern that the pathway that is going over there, well they have taken out one house to create the access to this enclosed space, it is deficient in terms of our Development Regulations. It isn't sufficiently wide. I have concern that there is an unresolved parking issue. I don't think this is going to create tons of cars but there is an unresolved parking issue in that area and a very substandard intersection which I don't think we are going to have the funding to do very much about in the short term and the distance between that small single family lot, which is the only exit in and out of this development and the intersection is deficient in terms of our Development Regulations. So my concerns are with that specific site not being an appropriate site for this type of development. I think there are actually other sites even in that area that might be appropriate. I don't have a problem with the development itself. If you could take it and put it somewhere else that had frontage, that had more amenities near it that wasn't on a slope, there are all kinds of issues, I would probably support it, but I cannot support it on that particular site for those reasons.

From a pure planning point of view too, Councillor Galway was referencing the goal of the Municipal Plan. Well actually the goal of the Municipal Plan zoning regulation is to guide the orderly development of a community and that doesn't mean that every time you get a zoning application you have to say yes to it. One of the reasons we go to public hearing is to hear the views of neighbours or other property owners and then we have to weigh that. We have to look at it. Some of the things that were said I totally disagree with. Some of the things that you raise, Councillor Galgay, I totally agree with you. I don't think they were concerns that I would take into account, but overall I don't think I can support — I know I can't support this development in that location.

So I now call the question... Oh, you can close debate if you like.

Councillor Collins:

Yes, your Worship, on what Councillor Tilley said about the seniors, I mean I guess there's 20 seniors living there now, the Murphy's, the Aylward's, the Densmore's, the Crane's. You know, what about them? They are going up behind their houses, the ambulances in the night time more and what Councillor Galgay said, I mean he said it's not going to increase any traffic, but I

mean people got to work there. Delivery trucks got to go back and forth. So they are not all going to walk to work. So it's going to increase the traffic problem there in that intersection, I don't care what anyone says.

The letters of support — there's 125 letters of support but there's only one of them from Kilbride and that guy lives up the road about a mile and one-half. It's 125 letters of support. I got a petition with 189 letter but they are all from the neighbourhood you know what I mean. So they are the ones that's going to be impacted, not the one's out in the east end of town. So while though they support seniors, do they support a seniors home in that spot?

And probably the last thing too, like they are saying they need seniors homes in the west end. We got 4 seniors homes in the Goulds. I don't know but 5, but there's 4 there I think for sure. We got one there on Heavy Tree Road, we got St. Luke's there on Road De Luxe, we got Agnes Pratt there on Topsail Road and we got Bishop Meaden Manor and I think it's McLaughlin Street. Plus there's another on there on top of Mount Pearl and another one there by Fun and Fast. We got lots of seniors home in the west end. I don't know what they are talking about that. But the traffic is the main thing for me — that traffic intersection is torture.

Acting Mayor Duff:

Ok, I will call the question, all in favour of the motion to reject? One, two, three..., Ok opposed....?

The motion is carried.

TOWN OF STRATFORD
ZONING AND DEVELOPMENT BYLAW # 45

Bylaw effective date: Oct 18, 2019

Amendment No. 45A- Effective Date: April 8, 2019

Amendment No. 45B- Effective Date: October 18, 2019

Town of Stratford
PRINCE EDWARD ISLAND

Imagine that!

3. BYLAW AND PLAN AMENDMENTS

3.1. AMENDMENT APPLICATIONS

3.1.1. A requested change to either the text of this Bylaw or the Zoning Map shall be considered a zoning amendment and must be consistent with Official Plan.

3.1.2. Council may amend an Official Plan policy to enable a zoning amendment, including statements and/or the General Land Use Plan, but any such Official Plan amendment shall precede or be concurrent with the zoning amendment.

3.1.3. A Person who seeks an amendment to this Bylaw or the Official Plan shall file a written and signed application.

3.1.4. An application under this Section shall include such information as may be required for the purpose of adequately assessing the appropriateness of the proposal, including but not limited to:

(a) a preliminary site plan showing proposed land uses, any subdivisions, Buildings, means of servicing, traffic access and parking; and

(b) an assessment of any potentially significant Development impacts on Town or other public infrastructure, the existing development character of the area, and the natural environment.

3.1.5. The Applicant shall, at the time of submitting the application, deposit with the Town the application fee and other required fees in accordance with the fee schedule established by Council.

3.2. AMENDMENT PROCEDURES

3.2.1. The Planning, Development and Heritage Committee shall review each amendment request and make a recommendation to Council, within accordance to Section 19 of The Planning Act .

3.2.2. The Planning, Development and Heritage Committee and Council shall consider the following general criteria when reviewing applications for Development Bylaw or Official Plan amendments, as applicable:

(a) conformity with all requirements of this Bylaw;

(b) conformity with the Official Plan;

(c) conformity with provincial land use policies pursuant to the Planning Act;

(d) suitability of the site for the proposed Development including the preservation of existing site features and earthworks as proposed;

(e) compatibility of the proposed Development with surrounding land uses, including both existing and projected uses;

(f) any comments from residents or other interested Persons;

(g) adequacy of existing infrastructure such as water, sewer, road, stormwater, electrical services, and parkland.

(h) the economic and environmental viability of any proposed utility, road extensions or development and maintenance of public open spaces;

(i) impacts from the proposed Development on all modes of transportation, including access and safety;

(j) compatibility of the proposed Development with surrounding environmental, aesthetic, scenic and heritage features;

(k) impacts on Town finances and budgets;

(l) other matters as specified in this Bylaw; and

(m) other matters as considered relevant by Council.

3.2.3. Council shall hold a public meeting to solicit input from residents on the proposed amendment request. At least seven clear days prior to the public meeting, the Development Officer shall post the date, time and place of the public meeting, together with the nature of the proposed amendment in general terms:

(a) in a newspaper circulating in the area and at least two occasions.

3.2.4. Council shall also provide written notice of the amendment request to all Property Owners wholly or partially within 150 metres (490 feet) of the boundaries of the subject property and shall place a sign on the land being proposed for re-zoning indicating that a re-zoning request has been received.

3.2.5. Following the public meeting, Council shall formulate a decision on the proposed amendment. Council shall have the authority to determine whether an amendment request is approved, modified, or denied. The applicant shall be notified in writing of the decision.

3.2.6. Nothing in this Bylaw restricts the right of the Town to initiate its own amendment requests.

3.2.7. Related Official Plan and Bylaw amendments shall be considered concurrently by Council, provided that the application for both amendments are posted on the same public and written notices, and that the Official Plan amendment precedes and receives approval before the zoning amendment.

3.2.8. Council retains the right to deny any amendment request, without holding a public meeting, if such request is deemed to be inconsistent with this Bylaw or the Official Plan.

6. VARIANCES FROM THE DEVELOPMENT BYLAW

6.1. VARIANCES FROM THE DEVELOPMENT BYLAW

6.1.1. Council may authorize a minor Variance not exceeding 10% from the provisions of this Bylaw if the Variance is appropriate in accordance with this Section.

6.1.2. Variance applications shall demonstrate one of the following be considered against the following tests for justifying a Variance approval:

(a) the Lot in question has peculiar conditions, including small Lot size, irregular Lot shape, or exceptional topographical conditions, which make it impractical to develop in strict conformity with Bylaw standards;

(b) strict application of all Bylaw standards would impose undue hardship on the Applicant by excluding the Applicant from the same rights and privileges for reasonable Use of his/her Lot as enjoyed by other persons in the same Zone; or

(c) the Variance is consistent with the intent and purpose of the Official Plan

6.1.3. Authorization for a Variance shall be documented and recorded in writing.

6.1.4. No Variance shall be granted where the difficulty experienced is the result of intentional or negligent conduct of the Applicant in relation to the Property.

6.1.5. Where Council deems that a Variance application could have a significant effect on adjacent properties or properties in the general vicinity, Council may require that a public meeting be held.

6.1.6. Where a variance in excess of ten percent (10%) is being requested, Council shall forward a notification letter to property owners who own parcel(s) of lands which are located in whole (or in part) within sixty-one metres (61m) or two hundred feet from any lot line of the parcel being proposed for the variance.

6.1.7. Notwithstanding Subsection 6.1.1, a Development Officer can approve or deny a variance up to 5%.

11.2. LOW DENSITY RESIDENTIAL ZONE (R1)

11.2.1. GENERAL

Except as otherwise provided in this Bylaw, all Buildings and parts thereof erected, placed or altered or any land used in an R1 Zone shall conform with the provisions of this Section.

11.2.2. PERMITTED USES

No Building or part thereof and no land shall be used for purposes other than:

i. Single Dwellings;
ii. Secondary Dwelling Units;
iii. Home Occupations;
iv. Active and Passive Recreation;
v. Accessory Buildings;
vi. Private Garages; and
vii. General Agricultural Uses.

11.2.3. CONDITIONAL USES

The following Conditional Uses subject to such terms and conditions as shall be imposed by Council:

i. Duplex or Semi Detached Dwellings (up to 20% of units in a Block);
ii. Prior to the issuance of a Development Permit for a Conditional Use, Council shall ensure that property owners that directly about the subject Property are notified in writing of details of the proposed Development and asked to provide their comments.

11.2.4. SPECIAL PERMIT USES

(a) Notwithstanding Section 11.2.2 above, Council may issue a Development Permit for the following uses subject to such terms and conditions as Council deems necessary:

i. Duplex or Semi Detached Dwellings (up to 40% of units in a Block);
ii. Neighbourhood Child Care Facilities;
iii. Child Care Centres;
iv. Convenience Stores;
v. Health Clinics;

vi. Group Homes;

vii. Community Care Facilities; or

viii. Day Care Homes.

(b) Prior to the issuance of a Development Permit for a Special Permit Use Council shall ensure that it conforms to Section 11.1.4(b) of this Bylaw.

11.2.5. **SEASONAL DWELLINGS**

(a) Existing approved Seasonal Dwelling Lots intended for seasonal development may be used for the purpose of developing a Seasonal Residence or Seasonal Dwelling, subject to the following:

i. the Development shall conform to the Lot requirements in Section 11.2.6.

ii. the Property Owner shall agree to enter into a Development Agreement with the Town stipulating that:

ii.i. the Developer and/or Property Owner shall be responsible for the provision of any roads, sewer services or water supply;

ii.ii. the Property Owner shall agree to pay all future costs related to the extension of the services noted in *subsection (ii.i)* above;

ii.iii. Council may require that any on-site sewage systems be designed and certified by a professional engineer licensed to practice in the Province of Prince Edward Island and the Property Owner shall submit a Landscaping plan and/or grading plan to minimize the visual effect of the engineered on-site sewage system, if deemed necessary by the Development Officer;

ii.iv. the maximum Lot coverage shall not be greater than ten percent (10%) of the Lot;

ii.v. the Property Owner shall be responsible for the cost of registering the above noted Development Agreement in the Province's Land Registry.

(b) Notwithstanding Subsection 11.2.5(a) above, all Development in the R1 Zone shall be serviced by municipal sewer and water supply.

11.2.6. **LOT REQUIREMENTS**

(a) The following requirements shall apply to Development in an R1 Zone:

Requirement	Standard
Minimum Lot Area	700 sq. m (7535 ft.)
Minimum Frontage	22 m (72 ft.)
Minimum Circle Diameter to be Contained Within the Boundaries of the Lot	N/A
Minimum Front Yard	4.5 m (15 ft.)
Minimum Rear Yard	4.5 m (15 ft.)
Minimum Side Yard	2.5 m (8 ft.)
Minimum Flankage Yard	4.5 m (15 ft.)
Maximum Building Height	11 m (36 ft.)

(b) In addition to the above requirements, all Lots shall also conform to the Provincial Minimum Lot Standards as noted in the table in SCHEDULE A: MINIMUM LOT SIZE STANDARDS

(c) Notwithstanding the above requirements, within existing approved subdivisions, Council may require that new developments conform with the Development standards and Development character which has been established, even if these standards exceed the minimum standards stated above.

(d) Maximum Lot Coverage shall be 30%, provided however, that Council may permit coverage up to 40% where it deems there would not be an adverse impact on adjoining properties, subject to such terms and conditions as may be established by Council.

11.3. MEDIUM DENSITY RESIDENTIAL ZONE (R2)

11.3.1. GENERAL

Except as otherwise provided in this Bylaw, all Buildings and parts thereof erected, placed or altered or any land used in a R2 Zone shall conform with the provisions of this Section.

11.3.2. PERMITTED USES

No Building or part thereof and no land shall be used for purposes other than:

i. Single Dwellings;
ii. Duplex or Semi Detached Dwellings (up to 40% of units in a Block);
iii. Townhouse Dwellings having up to three (3) dwelling units (up to 40% of units in a Block);
iv. Secondary Dwelling Units;
v. Home-based Child Care Facilities;
vi. Neighbourhood Child Care Facilities;
vii. Health Clinics;
viii. Parks and Playgrounds;
ix. Active and Passive Recreation;
x. Accessory Buildings; and
xi. Private Garages.

11.3.3. CONDITIONAL USES

The following Conditional Uses subject to such terms and conditions as shall be imposed by Council:

i. Duplex up to 100% of the block;
ii. Town House Dwellings or Row House Dwellings having up to six (6) Dwelling Units (owned either individually or as Condominiums); and
iii. Group Homes.

11.3.4. SPECIAL PERMIT USES

(a) Notwithstanding the above section, Council may issue a Development Permit for the following uses subject to such terms and conditions as Council deems necessary:

i. Community Care Facilities;

ii. Town House Dwellings or Row House Dwellings having up to six (6) Dwelling Units, owned either individually or as Condominiums, and can be up to 40% of units in a Block;

iii. Senior Homes;

iv. Child Care Centres; and

v. Convenience Stores.

(b) Prior to the issuance of a Development Permit for a Special Permit Use Council shall ensure that it conforms to Section 11.1.4(b) of this Bylaw.

11.3.5. **SERVICING**

All new Development in an R2 Zone shall be serviced by municipal sewer services where municipal water services exist.

11.3.6. **LOT REQUIREMENTS**

(a) For Single Dwellings, the Lot requirements shall be the same as in the Low Density Residential Zone; and

(b) Lot requirements for Duplex and Semi Detached Dwellings shall be as follows:

Requirement	Standard w/ Municipal Sewer
Minimum Lot Area	910 sq. m (9800 sq. ft.)
Minimum Frontage	30 m (100 ft.) or 15 m (50 ft.) for each unit.
Minimum Circle Diameter to be Contained Within the Boundaries of the Lot	N/A
Minimum Front Yard	4 m (13 ft.)
Minimum Rear Yard	4.5 m (15 ft.)
Minimum Side Yard	3 m (10 ft.)
Minimum Flankage Yard	5 m (17 ft.)
Maximum Building Height	11 m (36 ft.)

(c) Lot requirements for Townhouse Dwellings shall be as follows:

Requirement	Standard
Minimum Lot Area	300 sq. m (3229 sq. ft.) per unit; or 200 sq. m (2153 sq. ft.) per unit if parking is provided in the rear yard and accessed by a private lane that is buffered from all buildings and a minimum out door private amenity area of 25 sq. m per Dwelling is provided.
Minimum Frontage	9 m (29.5 ft.) per unit; or 8 m (26 ft.) per unit if parking is provided in the rear yard and accessed by a private lane that is buffered from all buildings and a minimum out door private amenity area of 25 sq. m per Dwelling is provided.
Minimum Front Yard	5 m (17 ft.); or 3 m (10 ft.) if parking is provided in the rear yard and accessed by a private lane that is buffered from all buildings and a minimum out door private amenity area of 25 sq. m per Dwelling is provided.
Minimum Rear Yard	4.5 m (15 ft.)
Minimum Side Yard	3 m (10 ft.)
Minimum Flankage Yard	5 m (17 ft.)
Maximum Building Height	11 m (36 ft.)

11.3.7. Maximum Lot coverage for any Town House Dwelling or Row House Dwelling shall be 40%, calculated based on the aggregate of all attached Dwelling Units and the aggregate of the Lots upon which they are situated.

11.3.8. All Lots shall conform to the Provincial Minimum Lot Standards as noted in SCHEDULE A: MINIMUM LOT SIZE STANDARDS.

11.4. MULTIPLE UNIT RESIDENTIAL ZONE (R3)

11.4.1. GENERAL

Except as otherwise provided in this Bylaw, all Buildings and parts thereof erected, placed or altered or any land used in an R3 Zone shall conform with the provisions of this Section.

11.4.2. PERMITTED USES

No Building or part thereof and no land shall be used for purposes other than:

i. Duplex Dwellings and Semi Detached Dwellings;
ii. Townhouse Dwellings up to six (6) units;
iii. Multiple Attached Dwellings;
iv. Home Occupations;
v. Home-based Child Care Facilities;
vi. Neighbourhood Child Care Facilities;
vii. Senior Homes;
viii. Supportive Housing;
ix. Accessory Buildings;
x. Private Garages.

11.4.3. CONDITIONAL USES

The following Conditional Uses subject to such terms and conditions as shall be imposed by Council:

i. Apartments with over 12 units;
ii. Community Care Facilities;
iii. Public and/or Private Assisted Care Facilities.

11.4.4. SPECIAL PERMIT USES

(a) Notwithstanding Subsection 11.4.2 above, Council may issue a Development Permit for the following uses subject to such terms and conditions as Council deems necessary:

i. Child Care Facilities;
ii. First Floor Commercial;
iii. Health Clinics;
iv. Convenience Stores;
v. Child Care Centres;
vi. Hospitals.

(b) Prior to the issuance of a Development Permit for a Special Permit Use, Council shall ensure that it conforms to Section 11.1.4(b) of this Bylaw.

11.4.5. **LOT REQUIREMENTS**

(a) The following requirements shall apply to Development in an R3 Zone:

i. For Single, Duplex, or Semi Detached Dwellings and Townhouse Dwellings, the Lot requirements shall be the same as in the Medium Density Residential Zone; and

ii. For Multiple Attached Dwellings, the Lot requirements shall be as follows:

Requirement	Standard
Minimum Lot Area	810 sq. m (9000 sq. ft.) plus 135 sq. m (1500 sq. ft.) for each Dwelling Unit.
Minimum Frontage	30 m (98 ft.)
Minimum Front Yard	3 m (10 ft.)
Minimum Rear Yard	4.5 m (15 ft.)
Minimum Side Yard	4.5 m (15 ft.)
Minimum Flankage Yard	5 m (16 ft.)
Maximum Building Height	10.5 m (35 ft.)

(b) Notwithstanding the above Lot requirements, Council may authorize reduced Lot requirements where the Applicant agrees to provide underground parking.

(c) Notwithstanding the above Lot requirements, Council may impose restrictions on the number of Dwelling Units where, in the opinion of Council, the Development would create unsafe traffic conditions.

(d) All Lots shall also conform to the Provincial Minimum Lot Standards as noted in SCHEDULE A: MINIMUM LOT SIZE STANDARDS.

11.4.6. **DENSITY**

The maximum density in a R3 Zone shall be no greater than 25 Dwelling Units per acre.

11.5. PLANNED UNIT RESIDENTIAL DEVELOPMENT ZONE (PURD)

11.5.1. GENERAL

Except as otherwise provided in this Bylaw, all Buildings and parts thereof erected, placed or altered or any land used in a PURD Zone shall conform with the provisions of this Section.

11.5.2. PERMITTED USES

No Building or part thereof and no land shall be used for purposes other than:

i. Single Dwellings;
ii. Duplex Dwellings and Semi Detached Dwellings;
iii. Townhouse Dwellings up to six (6) units (owned either individually, or as Condominiums);
iv. Home Occupations;
v. Home-based Child Care Facilities;
vi. Neighbourhood Child Care Facilities;
vii. Active and Passive Recreation;
viii. Parks and Playgrounds;
ix. Accessory Buildings;
x. Private Garages.
xi. Public and/or Private Assisted Care Facilities.

11.5.3. SPECIAL PERMIT USES

(a) Notwithstanding Subsection 11.5.2 above, Council may issue a Development Permit for the following uses subject to such terms and conditions as Council deems necessary:

i. Group Child Care Centre;
ii. Community Care Facility;
iii. Public/ and or Private Assisted Care facilities;
iv. Child Care Facilities;
v. Health Clinics;
vi. Multiple Attached Dwellings; and
vii. First Floor Commercial.

(b) Prior to the issuance of a Development Permit for a Special Permit Use Council shall ensure that it conforms to Section 11.1.4(b) of this Bylaw.

11.5.4. SERVICING

All Development in a PURD Zone shall be serviced by municipal sewer services and a municipal water supply system.

11.5.5. **LOT REQUIREMENTS**

(a) The following requirements shall apply to Development in a PURD Zone:

i. For Single, Duplex, Semi Detached dwellings and Townhouse Dwellings the Lot requirements shall be the same as Medium Density Residential;

ii. For Multiple Attached Dwellings, the Lot requirements shall be the same as section 11.4.5(a)ii in the Multi Unit Residential Zone.

(b) Notwithstanding subsections (i)(ii) and (iii) above, Council may approve innovative housing forms with less than a minimum Lot requirements provided that in the opinion of Council all other Sections of this Bylaw are complied with and that the application involves the Development of at least twenty (20) Dwelling Units and at least one (1) Block of land, and subject to the following:

i. Prior to the development of a preliminary site plan to receive their input prior to the development of a preliminary Development Scheme;

ii. Council shall require the Applicant to submit a detailed Development Plan review;

iii. All subdivisions and/or developments shall be subject to a Subdivision Agreement and/or Development Agreement that may include, but not limited to, the following:

iii.i. Subdivision requirements pursuant to Section 4 of this Bylaw;

iii.ii. Building types within the Development;

iii.iii. a schedule of styles and design, with emphasis placed on the placement of buildings relative to surrounding uses and streets;

iii.iv. a schedule of Subdivision and/or Development phases.

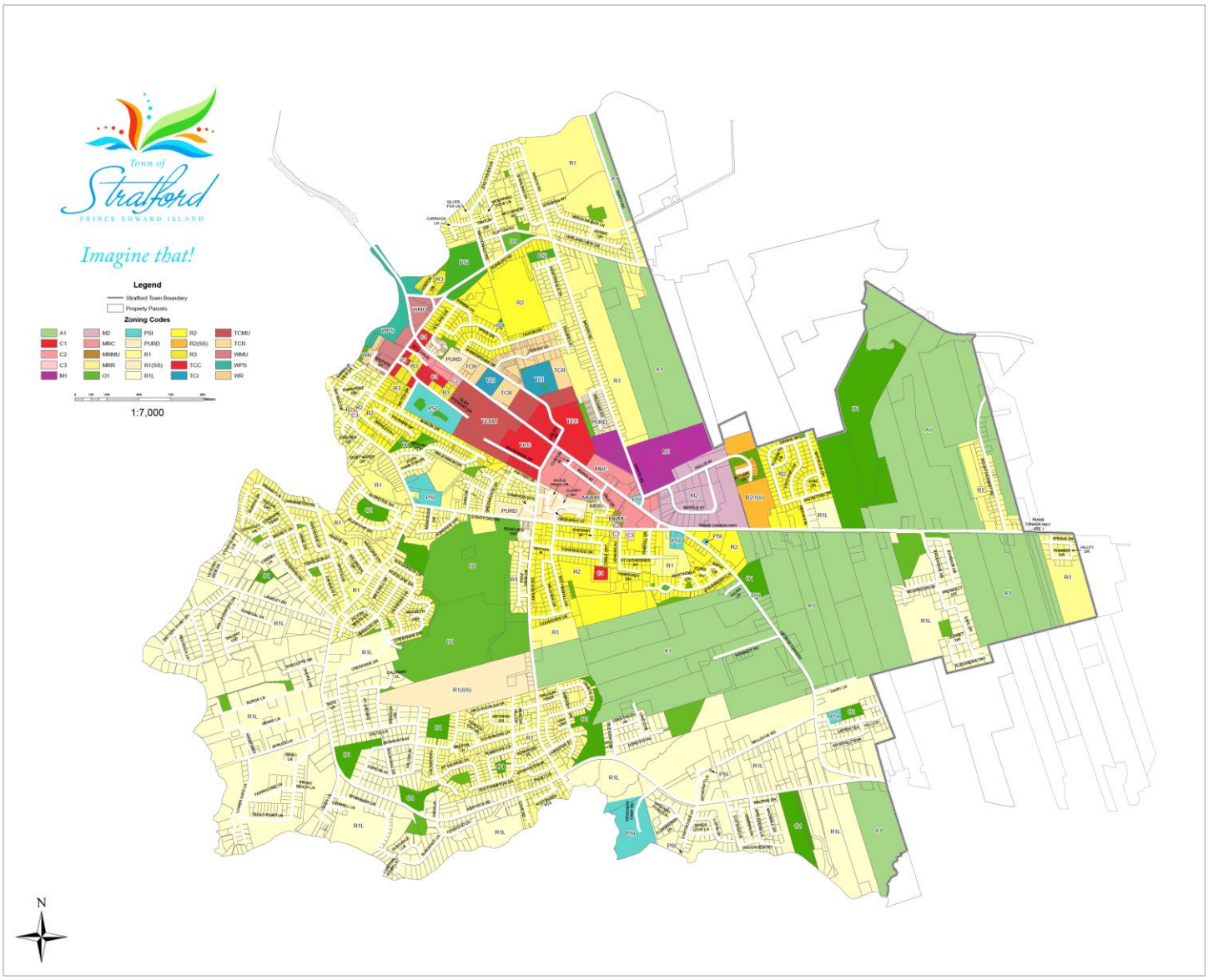
iv. All Developments shall be developed only in accordance with an approved Development Scheme and the provisions of the any Subdivision Agreements or Development Agreements;

v. Council may require the establishment of an incorporated homeowners' association to own and maintain any lands or facilities held in common.

11.5.6. **DENSITY**

The maximum density in a PURD Zone shall be no greater than ten (10) Dwelling Units per acre, or fifteen (15) dwelling units per acre if parking is provided in the rear yard and accessed by a private lane that is buffered from all buildings and a minimum outdoor private amenity area of 25 sq. m. per Dwelling is provided.

APPENDIX A - TOWN OF STRATFORD ZONING MAP



PRINCE EDWARD ISLAND
ÎLE-DU-PRINCE-ÉDOUARD

PLANNING ACT

(h) "**official plan**" means a plan for a municipality adopted under Part III;

(i) "**planning board**" means a planning board or joint planning board appointed under Part III;

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

(j.1) "**state of emergency**" means a state of emergency declared by the Minister of Justice and Public Safety or a mayor under the *Emergency Measures Act* R.S.P.E.I. 1988, Cap. E-6.1, or a public health emergency declared under the *Public Health Act* R.S.P.E.I. 1988, Cap. P-30.1;

(k) "**subdivision**" means

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

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

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

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

(l) "**subdivision agreement**" means an agreement between a council and a developer whereby the developer undertakes to provide basic services in order to develop a plan of subdivision. *1988, c.4, s.1; 1991, c.18, s.22; 1993, c.29, s.4; 1994, c.46, s.1 {eff.} March 31, 1995; 1995, c.29, s.1 {eff.} Oct. 14/95; 1997,c.20,s.3; 2000,c.5,s.3; 2009,c.73,s.2; 2010,c.31,s.3; 2012,c.17,s.2; 2014,c.40,s.1; 2015,c.28,s.3; 2016,c.44,s.277; 2017,c.10,s.1(2); 2019,c.1,s.3; 2017,c.61,s.35(2); 2021,c.14,s.1.*

OBJECTS

2. Objects

The objects of this Act are

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

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

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

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

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

CITATION: CAMPP Windsor Essex Residents Association v. Windsor (City)
2020 ONSC 4612
DIVISIONAL COURT FILE NO.: DC-20-151
DATE: 20200729

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

BETWEEN:	
CAMPP Windsor Essex Residents Association Moving Party (Appellant)	Eric K. Gillespie and Kathleen Coulter, for the Moving Party (Appellant)
– and –	
The Corporation of the City of Windsor, Windsor Regional Hospital and 386823 Ontario Limited Responding Parties (Respondents)	Jennifer L. King, Liane Langstaff and Peter Gross for the Responding Party (Respondent), Corporation of the City of Windsor Kim Mullin, Brian Gover, and Dragana Rakic, for the Responding Party (Respondent), Windsor Regional Hospital
	HEARD: May 6 and 11, 2020

REASONS ON MOTION FOR LEAVE TO APPEAL TO THE DIVISIONAL COURT
brought pursuant to s. 37 of the *Local Planning Appeal Tribunal Act, 2017*, S.O. 2017, c. 23, Sched. 1

VERBEEM J.:

Nature of the Motion

[1] CAMPP Windsor Essex Residents Association ("CAMPP"), moves for an order for leave to appeal to the Divisional Court from the order of the Local Planning Appeal Tribunal (the Tribunal or the LPAT) dated December 3, 2019 (the decision), which dismissed CAMPP's appeals against the City of Windsor's (the City) decisions to: approve Official Plan Amendment No. 120 (OPA 120); and enact Zoning By-law Amendment No 132-2018 (the ZBA).[1]

[2] OPA 120 and the ZBA enact the necessary land use provisions to, among other things, locate a new "regional" acute care hospital in the southeast part of the City. The planning process surrounding those instruments was highly publicized and attracted significant notoriety in the City and its surrounding areas. Although CAMPP does not oppose the development of a new regional hospital, it reasons that it should be located elsewhere in the City.

[3] It is common ground that an appeal from a decision of the LPAT lies to this court only with leave and then only on a question of law.[2] This court does not have jurisdiction to entertain an appeal from an LPAT decision on a question of fact or a question of mixed fact and law, absent an identified extricable legal question. Broadly stated, CAMPP asserts that in arriving at its decision, the Tribunal engaged in several errors of law, including: misinterpreting and misapplying certain policies set out in the Provincial Policy Statements (PPS) and the City's Official Plan (the OP) that are applicable to the planning instruments; providing inadequate reasons to support its decision; and misapprehending the evidence before it, by making factual determinations both in the absence of supporting evidence and without considering relevant evidence material to the issues that CAMPP raised.

[4] In its factum, CAMPP identifies four proposed grounds of appeal for which it says leave to appeal should be granted:

1. Did the LPAT err in law by finding the proposed OPA and ZBA complied with the requirements of the PPS and the City's OP regarding the provision of emergency services?

2. Did the LPAT err in law by finding sufficient consultation with First Nations took place as required under the PPS and the City's OP?

3. Did the LPAT err in law by failing to provide reasons addressing issues relating to the PPS and OP and submissions advanced by CAMPP regarding climate change impacts?

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[1] OPA 120 was adopted and the ZBA was enacted on September 17, 2018.
[2] *Local Planning Appeal Tribunal Act, 2017*, S.O. 2017, c. 23, Sched. 1, s. 37(1).

4. Did the LPAT err in law by relying on expert evidence provided by the City conflicting with other evidence provided by the City, that was never resolved?

[5] The responding parties submit that leave ought not to be granted for any of the identified proposed grounds of appeal because CAMPP has failed to establish the necessary criteria justifying leave, which I will outline later in these reasons. As a result, they say the motion should be dismissed.

[6] In order to properly contextualize the parties' positions, I will set out the nature of the relevant planning instruments, the nature of the evidence and proceedings before the LPAT and aspects of the findings supporting its decision. Then, I will identify and apply the legal principles applicable to the relief CAMPP requests in the context of each of CAMPP's proposed grounds of appeal and explain why CAMPP's motion must be dismissed.

Nature of the Planning Instruments

[7] The planning process that resulted in OPA 120 and the ZBA was initiated by the Windsor Regional Hospital's (WRH) desire to develop a new regional acute care hospital within the area of land that is the subject of OPA 120.[3] Regional hospitals provide a wide range of functions and serve broad geographic areas. It is anticipated that the new hospital will serve both the residents of the City and the residents of its surrounding areas in Essex County. Following the planned transition of acute care services to the new regional hospital, medical services will continue to be offered by the City's two existing hospitals, albeit with a shift in their primary focus.

[8] OPA 120 creates a planning framework for the future expansion of a 400-hectare (ha) area located in the southeast part of the City. It designates specific portions of that area, which have historically been used for agricultural purposes, for a mix of employment, residential and institutional uses. The planned institutional use relates to the hospital's proposed location. The ZBA establishes the necessary zoning to locate the new hospital within the OPA 120 area

The Uncontested Land Use Planning Background

[9] In paragraphs 24-28 of its reasons, the Tribunal sets out the relevant planning background,[4] which is uncontested and generally consists of the following.

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[3] Tribunal Reasons, at para. 6.

[4] The evidence with respect to the planning background predating the approval of OPA 120 was detailed before the LPAT in paragraphs 9-31 of the affidavit of Justina Nwaesei sworn February 26, 2019, a professional Land Use Planner employed by the City and a member of its Planning Department.

[10] Development planning for the OPA 120 area began in 1996, as part of the City's plan for its future growth. The process resulted in the Minister of Municipal Affairs and Housing approving a Boundary Adjustment Agreement in 2002, pursuant to which the City acquired over 2,500 ha of land from the Town of Tecumseh ("the transferred land"). The transferred land is situated in an area described in the City's OP as the "Sandwich South Planning District" and it is partially comprised of the land that is the subject of OPA 120. When acquired, the transferred land was in agricultural use, primarily, crop production.

[11] In 2007, following a mandatory Municipal Comprehensive Review[5], the City adopted Official Plan Amendment 60 (OPA 60), which brought the transferred land into the City's settlement area and designated various future urban uses (including employment areas), open spaces and natural heritage areas, within the OPA 60 area. OPA 60 was approved by the Ontario Municipal Board (OMB)[6] in 2007. The land in the OPA 60 area was not designated as agricultural. Instead, most of the land, including the area subsequently contemplated by OPA 120, was identified as an Agricultural Transition Area, in which urban development is conditional on the completion of secondary plans and the availability of municipal servicing and infrastructure.

[12] Before OPA 120 was adopted, two other Official Plan Amendments were approved by the City (and the OMB) in respect of distinct areas of land within the OPA 60 settlement.[7] Those planning instruments designated an area lying to the west of the OPA 120 area for institutional, residential and open space uses. Development has now proceeded in that area.

[13] Prior to the approval of OPA 120, the City took several other steps in preparation for the development of the OPA 60 area, including: installing a trunk sanitary sewer servicing the area; completing an Environmental Assessment that set out the future arterial road network for the area; and engaging in an on-going process to complete a Master Drainage and Stormwater Management Plan (SWM Master Plan) for the area.

The Relevant Health Care Planning Background

[14] Apart from the land use planning process that resulted in the eventual adoption of OPA 120 and the enactment of the ZBA, the Tribunal received evidence concerning the health care planning process undertaken by WRH in respect of the establishment of the new regional hospital intended to serve the City of Windsor and the County of Essex.[8] The development of the new hospital is part of a broader health care plan referred to as the

[5] The review was designed to assess the appropriateness of converting the transferred lands to future urban use.
[6] The LPAT's predecessor.
[7] The East Pelton Secondary Plan was adopted through OPA 74 in 2010 and OPA 94 in 2016.
[8] The evidence concerning the Health Care Planning Background was largely set out in: the Enhanced Municipal Record though a Background Report prepared by MHBC Planning, which was retained by Windsor Regional Hospital to prepare and submit planning applications to the City with respect to OPA 120 and the ZBA and Planning Justification Reports prepared by the City; as well as the affidavit of Carol Wiebe sworn February 26, 2019 (at paras. 17 and 74-75), a principal of MHBC Planning, which was filed in the LPAT appeal.

Windsor-Essex Hospitals System (WEHS), which was established in 2015 in order to introduce major system reforms related to hospital and health care services for the Windsor-Essex area.

[15] As planned, the new hospital requires a site measuring 20 ha that is located near regional transportation facilities. As a result of a process that was completed *before* WRH submitted the OPA 120 and ZBA planning applications to the City, WRH selected a site for the new hospital within the OPA 120 area. In accordance with the provisions of OPA 60, development of the selected site and surrounding area required the City's approval of a related secondary plan.

[16] Consequently, WRH retained MHBC Planning (MHBC) to carry out the requisite planning work to support a proposed secondary plan for the area surrounding the hospital's selected site (the County Road 42 Secondary Plan) and a zoning amendment by-law to permit the hospital to be located at the chosen site. Among other things, MHBC completed Planning Background and Justification reports that included City-wide population and employment-growth projections for the relevant planning period of 2016-2036. The projections were relied on to establish the existence of sufficient "need" to justify the development of the OPA 120 area. WRH also obtained other studies supporting the development of the area including: servicing background investigation studies and transportation background and impact studies.

The Planning Applications

[17] On January 23, 2018, WRH submitted applications to the City for approval of the County Road 42 Secondary Plan and the ZBA. Prior to doing so, it held three well-attended public information sessions.

[18] After the planning applications were submitted, the City: made them available, together with WRH's studies, on the City's website; circulated them to relevant municipal departments, public agencies and other entities including local First Nations communities (Walpole Island First Nation and Caldwell First Nation) for comment; and ultimately, held a lengthy public meeting to discuss the applications. During that process, CAMPP provided oral and written submissions to the City, in which it opposed the County Road 42 Secondary Plan and the ZBA. Among other things, CAMPP expressed concern over: the accuracy and methodology of MHBC's growth management analysis; the secondary plan's approach to transit; and the proposed servicing of the OPA 120 area.

[19] In response to CAMPP's concerns, WRH provided the City with responding submissions from both MHBC and its transportation consultants, as well as, additional growth management analysis performed by the Altus Group Inc. (Altus Group), a land economics consultant. The Altus Group conducted a peer-review of MHBC's growth management analysis and determined that its approach was reasonable. However, Altus Group concluded that the development of an even greater quantity of land than that calculated by MHBC was required to accommodate the City's projected residential and employment land demand during the relevant planning period.

[20] In accordance with the requirements of the *Planning Act*,[9] on August 13, 2018, Windsor City Council held a public meeting to consider the County Road 42 Secondary Plan and the ZBA. Apart from the materials submitted by the WRH, Council had before it, submissions from various stakeholders, including CAMPP. Council also received reports from members of the City's planning department that concluded that the proposed secondary plan and the ZBA were consistent with the PPS and the ZBA conformed with the City's OP.[10]

[21] Council adopted the secondary plan through OPA 120 and passed the ZBA on September 18, 2018.

CAMPP's Appeals to the LPAT

[22] CAMPP commenced distinct appeal proceedings before the LPAT, respectively challenging the City's decisions to approve OPA 120 and enact the ZBA, pursuant to ss. 17(24) and 34(19) of the *Planning Act* and requested that the Tribunal allow the appeals and return OPA 120 and the ZBA to the City for a new decision.[11] WRH was granted party status in the appeal proceedings.

[23] CAMPP raised in excess of 20 enumerated issues in support of its appeals before the LPAT, which included assertions that: there was insufficient justification to support the designation of the OPA 120 area for development; aspects of OPA 120 were inconsistent with the policies expressed in the PPS; and the ZBA was inconsistent with the PPS and it did not conform to the policies in the City's OP. Pursuant to the provisions of the *Planning Act* then in effect, "*consistency*" and "*conformity*" were the only available grounds of appeal in respect of the planning instruments.[12] As the appellant, the onus was on CAMPP to establish any inconsistency or non-conformity that it asserted. Statutorily, the LPAT was required to: dismiss the appeal against the approval of OPA 120, unless it determined that it was inconsistent with the PPS; and dismiss the appeal against the ZBA unless it determined that it was inconsistent with the PPS or it did not conform to the City's OP.[13]

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[9] R.S.O. 1990, c. P.13.
[10] See Planning Reports S97/2018 at pp. 45-46 and S98/2018 at pp. 28-30.
[11] In addition to CAMPP's appeals, two other entities appealed against OPA 120 to the LPAT. One of those appeals was withdrawn before it was heard. The other was heard and determined together with CAMPP's appeals. CAMPP is the only party that seeks leave to appeal the LPAT's decision to the Divisional Court. CAMPP brought the only appeal before the LPAT against the ZBA.
[12] Pursuant to s. 17(24.0.1) of the *Planning Act*, owing to the City's status as a single-tier municipality with its own OP and no applicable provincial plan, the only permissible basis of appeal (at the time) against the City's adoption of the OPA 120 was inconsistency with a PPS issued under s. 3(1) of the *Planning Act*. For similar reasons, pursuant to s. 34(19.0.1) of the *Planning Act*, at the time of CAMPP's appeal, the only permissible bases to appeal against the enactment of the ZBA were that it was inconsistent with a PPS and/or it failed to conform with the City's OP.
[13] *Planning Act*, ss. 17(49.3) and 34(26.2).

[24] The evidentiary record before the Tribunal was limited by the provisions of the *Planning Act* and the *Local Planning Appeal Tribunal Act, 2017* ("LPATA") to the information that was before City Council when it adopted OPA 120 and enacted the ZBA (as set out in the Enhanced Municipal Record), the affidavits that the parties filed before the Tribunal, participant statements and the evidence of any witnesses examined by the Tribunal. In this instance, the Tribunal declined to request that any party produce a witness for examination.

[25] I will not exhaustively detail all of the challenges CAMPP raised to the planning instruments before the Tribunal, nor will I review all of the documentary evidence that was before it, which totals in excess of one thousand pages. Rather, I will refer to the specific issues and evidence before the Tribunal that are relevant to each of the proposed grounds of appeal for which CAMPP now seeks leave, when addressing the proposed grounds, respectively, later in these reasons.

[26] The LPAT heard submissions from the parties' counsel during a three-day hearing in October 2019 and issued its decision and related reasons on December 3, 2019.

[27] Throughout its reasons, the Tribunal was clear that the issues that were properly before it *did not include* the health care planning process that lead to the selection of the hospital site. It affirmed that its task was to determine, from a land use planning perspective, whether OPA 120 and the ZBA are consistent with the PPS and whether the ZBA conforms with the City's OP. It explained that in so doing, it was not required to determine whether the selected hospital site was the "*best site for a regional hospital*", nor was the proceeding before it "*an appeal of the health care planning process, its criteria for site selection, or the alternative sites evaluated but not chosen.*"[14] The Tribunal's findings in that regard are not challenged by CAMPP.

[28] After what it described as a full consideration of the record, the parties' submissions and the cases submitted, the LPAT found that CAMPP did not meet its onus to demonstrate OPA 120 and the ZBA fail the statutory consistency and conformity tests and it concluded that OPA 120 is consistent with the PPS and the ZBA is consistent with the PPS and conforms to the OP. [15] As a result, the Tribunal ordered that CAMPP's appeals be dismissed.

[29] CAMPP now seeks leave to appeal from the Tribunal's decision to the Divisional Court. Below, I will review the legal principles applicable to the relief CAMPP requests.

The Legal Principles Applicable to the Determination of Whether Leave to Appeal Ought to Be Granted

[30] An appeal from a decision of the LPAT lies to this court only with leave, which may only be granted on a question of law. In accordance with the legislative regime enacted by the

[14] Tribunal Reasons, at para 5.
[15] Tribunal Reasons, at para. 89.

Local Planning Appeal Tribunal Act, the court's role in local land use planning disputes is limited. The court functions as the "overseer of the legality of the process"[16], tasked with ensuring the law is understood and applied appropriately by those charged with making the planning decisions.[17] It is well understood that planning matters involve policy decisions as much or more than legal ones. It is not the role of the court to balance competing policies, weigh subjective aesthetics or to make the political compromises that underlie planning decisions.[18] The Legislature has assigned to the LPAT alone, the task of balancing factual and policy considerations underlying planning decisions. The role of the court is limited to ensuring that when the LPAT exercises its exclusive decision-making authority, it applies the proper legal principles.[19]

[31] To obtain leave to appeal in respect of a proposed ground of appeal, the moving party must generally establish each of the following criteria:[20]

(a) the proposed ground of appeal raises one or more questions of law;

(b) there is reason to doubt the correctness of the Tribunal's decision with respect to the question(s) of law raised; and

(c) the question of law is of sufficient "general or public importance" to merit the attention of the Divisional Court.

[32] Questions of law generally involve questions about the identification and scope of the correct applicable legal test. Questions of fact generally concern determinations of what took place. Questions of mixed law and fact generally concern questions about whether the facts satisfy the applicable legal test.[21] Applying the law, as interpreted, to the facts, as found, is quintessentially a question of mixed fact and law.[22] Absent an extricable legal error in the interpretation or application of the law, the result of such an exercise is not fodder for an appeal brought pursuant to s. 37 of the LAPTA.

[33] In determining whether a proposed ground of appeal raises a question of law, the factual findings of the LPAT are entitled to a very high degree of deference.[23] However, in some instances, a Tribunal's factual findings may result from an error of law alone, particularly in circumstances in which the Tribunal: finds facts in the absence of evidence; errs with respect to the legal effect of the facts as found; assesses evidence based on an incorrect

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[16] *My Rosedale Neighbourhood v. Dale Inc.*, 2019 ONSC 6631 (Div. Ct.), at para. 33.
[17] *My Rosedale Neighbourhood*, at para. 32.
[18] *My Rosedale Neighbourhood*, at para. 32.
[19] *My Rosedale Neighbourhood*, at para. 3.
[20] *Hobo Entrepreneurs Inc. v. Sunnidale Estates Ltd.*, 2013 ONSC 715, at para. 11; *Snowden v. The Corporation of the Township of Ashfield-Colborne-Wawanosh*, 2017 ONSC 6777 (Div. Ct.), at para. 11; *My Rosedale Neighbourhood*, at para. 4.
[21] *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 35.
[22] *My Rosedale Neighbourhood*, at para. 11.
[23] *Ontario (Minister of Municipal Affairs and Housing) v. Miller*, 2014 ONSC 6131 (Div. Ct.), [2014] O.J. No. 5431, at para. 22.

legal principle; or fails to consider all of the relevant evidence.[24] Nonetheless, it remains that a Tribunal decision that is unsullied by material legal error is not amenable to appeal.

[34] In this instance, CAMPP raises a number of issues with respect to the adequacy of the Tribunal's reasons determining certain aspects of CAMPP's challenges to the planning instruments. A decision-maker's failure to provide functionally adequate reasons for its decision constitutes an error of law. I will further address the legal principles applicable to the determination of the adequacy of the Tribunal's reasons later below.

[35] The existence of a "reason to doubt" the correctness of the Tribunal's decision with respect to the question(s) of law raised by a proposed ground of appeal does not require a finding that the Tribunal's decision is "wrong" or "unreasonable", or even that it is probably so. It is sufficient that the moving party demonstrate that the legal issues that are engaged, are open to "very serious debate".[25]

[36] In determining whether there is reason to doubt the correctness of the Tribunal's decision with respect to the legal question raised, it is appropriate to consider that if leave is granted, the appellate court will review the decision on a standard of correctness, without deference to the Tribunal's determination of questions of law arising from the *Planning Act*, its "home statute". The Legislature has subjected the LPAT's administrative decision-making regime to appellate oversight by the court, thereby signaling that it expects the court to scrutinize the LPAT's decisions, on questions of law, in accordance with an appellate standard of review.[26] The standard of review for an asserted error of law is correctness.[27]

[37] An assessment of whether there is reason to doubt the correctness of the impugned decision with respect to the legal question raised must be made by considering it as a whole, while remaining mindful that the subject of an appeal is the Tribunal's decision itself and not its reasons for decision.[28] Doubt as to legal correctness must be based on the totality of the Tribunal's decision, not one isolated paragraph or phrase. "It is not appropriate, when determining the issue of leave to appeal, to select fragments of the decision and parse them under microscopic scrutiny to the detriment of an overall analysis of the decision as a whole."[29]

[38] The determination of whether the question of law raised by a proposed ground of appeal is of "sufficient general or public importance to merit the attention of the Divisional Court", is a function of the nature of the legal issue engaged by the proposed ground, as

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[24] *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197, at paras. 25-32.
[25] *McCutcheon v. Westhill Redevelopment Co.*, [2008] O.J. No. 3206 (Div. Ct.), at para. 10; *Toronto (City) v. SheppBonn Ltd.,* 2014 ONSC 5964, at para. 18; *Hobo Entrepreneurs Inc. v. Sunnidale Estates Ltd.,* at para. 15; and *Richmond Hill Naturalists v. Corsica Developments Inc.*, 2013 ONSC 7894 (Div. Ct.), [2013] O.J. No. 5996, at para. 24.
[26] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at paras. 36 and 37.
[27] *Vavilov*, at paras. 37; and *Housen* v. *Nikolaisen*, 2002 SCC 33, [2002] S.C.R. 235, at para. 8.
[28] *Snowden*, at para. 11.
[29] *Concerned Citizens of King (Township)* v. *King (Township),* [2000] O.J. No. 3517 (S.C.), at para. 10.

opposed to the specific parties or the specific property involved. The identified legal issue, itself, must be of sufficient importance to justify leave.[30] The asserted error of law must concern a matter that it is of general public importance or that is otherwise important to the development of the law and administration of justice. As a result, the determination of whether this analytical criterion is met may engage considerations of the frequency with which the particular legal issue arises and whether the issue has an effect for most municipalities in Ontario.[31]

[39] In accordance with the foregoing principles, I will now consider and determine each of CAMPP's proposed grounds of appeal.

The Principles Applied

[40] In my view, CAMPP has failed to demonstrate that leave to appeal should be granted with respect to any of the grounds of appeal that it proposes. As a result, its motion must be dismissed. In the reasons that follow, I will examine the nature of each of CAMPP's proposed grounds of appeal, in turn, together with the parties' respective positions. I will then explain why CAMPP has failed to establish that leave ought to be granted with respect to any of its proposed grounds.

[41] Prior to doing so, I generally observe that CAMPP's position with respect to each of its proposed grounds, apart from the second ground which I will address separately below, raises a question or questions of law, most of which relate to the adequacy of the Tribunal's reasons and its asserted material misapprehensions of the evidence. Reading the Tribunal's reasons as a whole, in the context of the evidence and submissions that were before it, it is patently discernable that the aspects of CAMPP's proposed grounds of appeal that raise actual questions of law, alone, carry no chance of success. In other words, there is no reason to doubt the correctness of the Tribunal's decision with respect to the questions of law that CAMPP has raised.

[42] In arriving at the foregoing conclusion, I remind mindful of my gatekeeping role as a judge determining a leave to appeal motion, as opposed to an appellate court determining an appeal on its merits. However, in order to determine if leave to appeal on any particular proposed ground is justified, I must assess whether the moving party, CAMPP, has demonstrated there is reason to doubt the correctness of the Tribunal's decision with respect to the identified question(s) of law. That determination necessarily requires a preliminary assessment of the merits of the proposed grounds of appeal. In this instance, a preliminary assessment of the merits of the proposed grounds that raise a question of law, fails to disclose any merit or chance of success associated with any of them. Although errors of law are asserted by CAMPP, there is no serious debate to be had as to whether the Tribunal engaged in such errors.

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[30] *Ontario (Legislative Assembly) v. Avenue-Yorkville Developments Ltd*, 2011 ONSC 258 (Div. Ct.), [2011] O.J. No 110, at para. 37; *Snowden*, at para. 11.
[31] *Snowden*, at para. 11.

[43] As a result, although CAMPP's position with respect to proposed grounds 1, 3 and 4, respectively, raise questions of law, leave is not justified for any of those grounds because there is no reason to doubt the correctness of the Tribunal's decision with respect to the legal questions raised.

[44] Leave to appeal is also not warranted in respect of CAMPP's position with respect to its second proposed ground of appeal. CAMPP raises a number of asserted legal errors in relation to this ground, but those asserted errors predominantly result from CAMPP's misapprehension of the Tribunal's express reasoning, as set out in its reasons. The remaining issues that CAMPP asserts in respect of its second proposed ground, raise questions of mixed fact and law for which leave cannot be granted.

[45] In the context of the foregoing findings, it is unnecessary to determine whether any of the proposed grounds of appeal raise a question of law that is of sufficient public general importance to merit the attention of the Divisional Court.

[46] I will now explain, in more detailed terms, the basis for the findings above.

Proposed Ground 1:

Did the LPAT err in law by finding the proposed OPA and ZBA complied with the requirements of the PPS and the City's OP regarding the provision of emergency services?

The Position of the Parties

[47] CAMPP argues that the Tribunal erred in law, when it found that OPA 120 and the ZBA are consistent with the applicable policies prescribed by the PPS and that the ZBA conforms to the policies of the City's OP regarding the provision of emergency services, including OP policy 4.2.7.3, which requires the municipality *"to encourage emergency services in close proximity to where people live*".[32]

[48] CAMPP identifies three asserted errors of law in support of this ground of appeal.

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[32]In its submissions to the Tribunal, CAMPP cited several other PPS policies with which it said the OPA 120 and ZBA were inconsistent and several policies in the City's OP with which it said the ZBA did not conform (all of which relate to the provision of emergency services) as follows:

a. The PPS directs the coordination of emergency management to support efficient and resilient communities (policy 1.2.3), and the strategic location of infrastructure and public service facilities to support the effective and efficient delivery of emergency management services (policy 1.6.4);

b. OP Policy 1.1.1(f) specifically addresses the accessibility needs of persons with disabilities and older persons by requiring that "land use barriers which restrict their full participation in society" be identified, prevented and removed. The OP also calls for an integration of institutions *within* the City's neighbourhoods (6.1.6).

[49] First, in determining that the ZBA conforms with OP policy 4.2.7.3, the Tribunal made a material factual finding in *the absence of any supporting evidence*. CAMPP contends that contrary to the requirements of OP policy 4.2.7.3, the evidence before the Tribunal established that *no one* lives in close proximity to the proposed regional hospital site, which is currently undeveloped greenfield land. Although OPA 120 designates certain land in the vicinity of the hospital's proposed location for residential use, it remains that: there were no constructed residences in that area, at the time of the LPAT hearing; and the Tribunal did not receive evidence that a developer (or anyone else) had committed to future residential construction "in close proximity" to the proposed hospital site. The Tribunal's conclusions with respect to the ZBA's conformity was, therefore, anchored in impermissible and unsupported speculation that the emergency services that will be provided by the regional hospital will be "in close proximity" to where people live.

[50] Second, CAMPP essentially contends that in arriving at its conclusion concerning the ZBA's conformity, the Tribunal erred in law by failing to engage in a quantitative consideration of the available evidence concerning the population densities of different areas of the City. Specifically, the evidence revealed that if fully developed, the lands designated for residential use in the OPA 120 area will support a maximum population of 7,000 residents. By contrast, Windsor's more centrally located Wards (2, 3, 4 and 5) have a combined population of approximately 100,000 people. CAMPP posits that it is "highly problematic" that the Tribunal concluded that a policy requiring the City "*to encourage the location of emergency services in close proximity to where people live*" is satisfied by having a hospital in an area with 7,000 people, while there are 100,000 people living in another area of the City.

[51] Third, CAMPP asserts that the Tribunal erred in law by failing to provide adequate reasons for its conclusions regarding the ZBA's "consistency" and "conformity", respectively, with the PPS and OP policies applicable to emergency services. In particular, it characterizes the Tribunal's analysis of OP policy 4.2.7.3, as solely limited to a conclusion that "*it is not possible for every service to be in close proximity to all residents*".

[52] Finally, CAMPP submits that the questions of law that arise from this asserted ground are public, important and merit the Divisional Court's attention because the planning for a regional hospital is, by definition, a matter of both general and public importance.

[53] The responding parties submit that this proposed ground of appeal fails to satisfy all of the requirements for leave. First, it does not raise a question of law. Instead, the essence of CAMPP's complaint concerns the weight that the LPAT afforded to CAMPP's evidence and the findings of fact that the LPAT made on the record before it. CAMPP does not seek a legal interpretation of the policy provisions it cites, nor does it expressly raise an issue with the Tribunal's interpretation of the PPS and OP policies. The application of the PPS and OP policies, as interpreted, to the specific facts, as found by the Tribunal, is "quintessentially a question of mixed fact and law." CAMPP has failed to identify any extricable legal errors that it alleges the LPAT made in that regard.

[54] Second, the LPAT's factual findings are supported by the evidence it received and its reasons reflect a careful consideration of that evidence.

[55] Third, the proposed ground does not raise a question of law of "sufficient general or public importance" to merit the attention of the Divisional Court. The dispute concerns the use of a specific property. The importance of the institution involved (a hospital), alone, does not render the legal issues assertedly raised by this ground to be of sufficient importance to justify leave.

Disposition

[56] For the following reasons, I am not persuaded that leave to appeal ought to be granted with respect to this proposed ground. While I am satisfied that the issues of whether the Tribunal made factual findings in the absence of evidentiary support and the asserted inadequacy of its reasons raise "questions of law", the moving party has failed to establish that there is reason to doubt the correctness of the Tribunal's decision as it relates to those questions. I will explain by first addressing the adequacy of the Tribunal's reasons concerning issues of "consistency" and "conformity" with the "emergency services" policies that CAMPP raised before the Tribunal.

(i) Adequacy of the Tribunal's Reasons for its Findings of Consistency and Conformity with "Emergency Services" Policies

The Applicable Legal Principles

[57] The adequacy of the Tribunal's reasons must be evaluated in accordance with a functional and contextual approach.[33] The reasons must be sufficient to: explain why the Tribunal arrived at its decision (by demonstrating a logical connection between the decision and the basis for the decision); provide public accountability; and permit effective appellate review.[34] On appellate review of their adequacy, the Tribunal's reasons must be considered and evaluated as a whole, in the context of the evidence and the submissions before it, and with an appreciation of the purpose for which its reasons were delivered.[35] The basis for the Tribunal's decision must be discernable, when its reasons are considered in that context[36].

[58] The Tribunal is not required to expound upon "how" it arrived at its conclusion in a "watch me think" fashion. In other words, a detailed description of the Tribunal's process in arriving at its decision is unnecessary.[37] When explaining the basis for its

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[33] The legal principles applicable to the determination of the adequacy of the Tribunal's reasons, as set out below, were largely developed in the context of judicial proceedings. Generally, they apply equally to the determination of the adequacy of an administrative Tribunal's reasons for decision: see *Vavilov* at paras. 79-81.
[34] See *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at para. 24; and *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at para. 15 and 55.
[35] See *R.E.M.*, at paras. 35 and 55.
[36] See *R.E.M.*, at para. 55.
[37] See *R.E.M.*, at para. 17.

decision and its logical link to the decision itself, the Tribunal is not required to: set out every one of the findings or conclusions it reached in arriving at its ultimate decision; expound upon evidence which is uncontroversial; detail its findings on each piece of evidence or controverted fact; or recite well-settled legal principles, where the ultimate result turns on the application of such principles to the facts, as found after a consideration of conflicting evidence.[38]

[59] Brevity alone does not render a Tribunal's reasons inadequate. The degree of detail required is a function of the case-specific circumstances. Even brief reasons will be adequate, provided that when read in the context of the evidence and submissions before the Tribunal, the reasons demonstrate that the Tribunal seized and disposed of the substance of the proceeding.[39]

The Principles Applied

[60] Applying the foregoing principles, there is no reason to doubt the correctness of the Tribunal's decision with respect to the legal question of the adequacy of its reasons for finding the requisite consistency and conformity between the planning instruments and the PPS and OP policies related to the location of emergency services. Patently, the Tribunal's reasons, read as a whole, clearly demonstrate that in arriving at its decision dismissing CAMPP's appeals, it seized the substance of the "location of emergency services" issues that CAMPP raised, which it then determined through findings made on accepted aspects of the evidence available to it. The Tribunal's reasons explain why the Tribunal arrived at its findings, in a manner that permits meaningful appellate review. I will explain the foregoing conclusions below.

[61] In its submissions, CAMPP characterizes an isolated phrase from the Tribunal's reasons, in which it states that "*it is not possible for every emergency service to be located in close proximity to all residents*", as being "inadequate" to explain the Tribunal's conclusion that the ZBA conforms with OP policy 4.2.7.3. The balance of CAMPP's identified issues, concerning this proposed ground, also relate to OP policy 4.2.7.3. However, the scope of this proposed ground of appeal is expressed in broader terms. Its wording refers to the consistency between both OPA 120 and the ZBA and the emergency services policies of the PPS and the ZBA's conformity with the OP policies related to those type of services.

[62] During its submissions before the Tribunal, CAMPP raised a number of PPS and OP policies, apart from OP policy 4.2.7.3, in support of its positions that the planning instruments were inconsistent and non-conforming, which the Tribunal comprehensively addressed in its reasons at: paragraphs 52-61, under the heading "Location and Design"; and paragraphs 62-73, under the heading "Mobility". In so doing, the Tribunal's reasons disclose that the reasoning process underwriting its related consistency and conformity

[38] See *R.E.M.*, at paras. 18-20.
[39] See *R.E.M.*, at paras. 35, 43-44, 51 and 55-56.

findings is not limited to a single statement that "*it is not possible for every emergency service to be located in close proximity to all residents*."

[63] Instead, in its analysis of the "Location and Design" issues that were raised through CAMPP's evidence and submissions, the Tribunal:

a) adverts to the specific PPS and OP policies founding CAMPP's "location and design" challenges, including those related to the location of emergency services (para. 54);

b) sets out the parties' positions with respect to the consistency and conformity of the planning instruments, arising from CAMPP's asserted location and design challenges (paras. 52-53);[40]

c) adverts to aspects of the affidavit evidence concerning consistency and conformity with the specific PPS and OP policies that CAMPP cited in support of its location and design challenges, as adduced by: CAMPP from Jennifer Keesmaat, registered professional planner; the City from Justina Nwaesei, registered professional planner; and the WRH from Carole Wiebe, consulting planner with MHBC (paras. 55, 57 and 61)[41];

d) finds that OPA 120 is consistent with the PPS because: it comprehensively plans for the City's growth (as justified by evidence of the needs analyses that the Tribunal accepted) and it provides a mix of uses, densities, modes of transportation and a fiscally responsible approach to phasing and costs of municipal services (para. 57);

e) finds that the "ZBA for the new hospital location" is consistent with the PPS and conforms with the OP (para. 58). In so doing, the Tribunal acknowledges the possibility that a hospital located in another area of the City could also be found to satisfy the policies of the PPS, but reiterated that its task was to not to review

[40] Before the Tribunal, CAMPP contended that the "OPA 120 location and design" is inefficient, car dependent not transit supportive, costly to service and contrary to downtown support. CAMPP raised similar concerns over the ZBA, with an emphasis on downtown viability, brownfields redevelopment and accessibility.

[41] The functional adequacy of the Tribunal's reasons must be considered in the context of not only CAMPP's submissions but the evidence that was before it. In paragraphs 28-63 of her affidavit evidence, Ms. Wiebe explains why the provisions of OPA 120, including the location of the planned hospital institutional use, are consistent with each policy of the PPS that CAMPP raised in its submissions to the Tribunal. In paragraphs 64-143 of her affidavit, she explains why the provisions of the ZBA, including the location of the planned regional hospital, are consistent with the PPS and conform with each of the OP policies that CAMPP raised. Similarly, in her affidavit evidence (paragraphs 64-66, 71, 72 and 92) Ms. Nwaesei explains why OPA 120 is consistent with the PPS policies that CAMPP raised. Conversely, in her affidavit, Ms. Keesmaat did not specifically identify any inconsistency or non-conformity between the emergency services policies of the PPS or the OP and the planning instruments, although she did adopt the positions that CAMPP itself expressed in its appeal case synopses before the Tribunal.

the site selection process for the new hospital, but rather, to determine, on the evidence, whether the ZBA permitting a hospital at the proposed location met the requisite consistency and conformity tests (para. 58)[42];

f) finds that: OPA 120 and the ZBA adequately respond to the PPS requirement to provide public service facilities to meet current and projected needs; the proposed hospital location will be in a planned area of the city adjacent to residential and commercial areas accessible by walking, cycling and transit; the planned transit services to the hospital will ensure access for those persons from a distance who cannot, or choose not, to drive; area road connections and improvements, as well as, provisions for active modes of travel have been planned through EA approvals; and, to support downtown employment and services, existing hospital sites in and closer to the City centre are planned for adaptive re-use, including the provision of numerous health care services guided by the region-wide WEHS plan (para 59);

g) finds that the policies expressed in the City's OP reflect the same planning themes as the PPS and that its analysis of OPA 120's consistency with the PPS applies equally to the ZBA's conformity with the OP (para. 60); and

h) finds, specifically, at para. 61 of its reasons:

> The OP encourages emergency services in close proximity to where people live (s. 4.2.7.3) and seeks to integrate institutions within the City's neighbourhoods [OP policy 6.1.6]. Campp argues that the ZBA fails to achieve both intentions. The Tribunal concurs with Ms. Wiebe's response that emergency services include fire, police, ambulance and other services, as well as an acute care hospital, and that it is not possible for every service to be in close proximity to all residents. The proposed site will provide service to all residents whether nearby, across the City or in the outlying areas served by the [Windsor-Essex Hospitals System]. Again, the hospital site is part of a comprehensively planned growth area of the City that will be connected to adjacent residential, commercial, business park and natural areas.

[64] The Tribunal's full reasons demonstrate that when determining that the ZBA conforms with the OP policies that CAMPP raised in this aspect of its LPAT appeal, the Tribunal did not restrict its analysis to the single isolated phrase upon which CAMPP now relies.

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[42] The Tribunal also concludes that: the question of "how best to deliver health care services" was not a land use planning issue; and rather than seeking approval for the proposed hospital location, the relevant planning applications sought approval for the *implementing land use policies and regulations that arise from the decision to locate the new regional hospital* at the planned location.

On the evidence it accepted, it determined that there was a need to designate land in the OPA 120 area for residential use because the City's anticipated demand for new housing during the applicable planning period (2016-2036) could not be accommodated entirely by infilling and intensifying residential land otherwise available in previously developed areas of the City. It made similar findings with respect to the need to designate land in the OPA 120 area for employment use. In turn, those findings support its conclusion that the hospital will be connected to adjacent residential and commercial areas, among others, that are accessible by walking, cycling and transit. Those findings directly inform the Tribunal's determination that the ZBA conforms to OP Policy 4.2.7.3. The Tribunal also expressly considered the evidence concerning the planned transit services and active modes of transit for those residents at a distance who cannot, or choose not, to drive, and made corresponding factual determinations supporting its findings of consistency and conformity with the PPS and OP policies raised by CAMPP in relation to the issue of accessibility of emergency services said to be posed by the hospital's proposed location.[43]

[65] As a result of the foregoing, I am not persuaded that CAMPP has demonstrated any reason to doubt the correctness of the Tribunal's decision with respect to the legal question of the asserted inadequacy of its reasons. In the context of the evidence and submissions before it, the Tribunal's reasons, read as a whole, adequately explain the basis for its determination that OPA 120 and the ZBA are consistent with the PPS and the ZBA conforms to the OP, including "location of emergency services" policies. The reasons reflect that the Tribunal had regard for: the evidence before it, the submissions of the parties; and the applicable PPS and OP policies. Its findings are responsive to the substance of the issues raised by the parties, founded in the evidence before it, and they support its decision.

[66] I now turn to CAMPP's assertion that the Tribunal made a material finding of fact without any evidentiary support.

(ii) CAMPP's Assertion of a Factual Finding Unsupported by the Evidence

[67] As a question of law, there is no reason to doubt the correctness of the Tribunal's decision, on the basis that there was no evidence to support its factual finding that the new hospital will be located in close proximity to where people live, which was material to its conclusion that the ZBA conforms with the emergency services polices expressed in the OP. In arriving at its conclusion, aspects of the Tribunal's factual findings were made with direct evidentiary support and other aspects constituted reasonable inferences that were reasonably capable of being drawn from the evidence before it. I will explain.

[68] Paragraph 61 of the Tribunal's reasons, which is set out previously, founds this aspect of CAMPP's proposed ground of appeal. The responding parties correctly submit that the Tribunal's finding that "it is not possible for every [emergency] service to be in close

[43] At paragraphs 62-73 of its Reasons, the Tribunal specifically addresses and ultimately finds consistency between the planning instruments and the PPS policies and conformity between the ZBA and the policies of the OP related to the mobility, transportation and accessibility issues that CAMPP raised.

proximity to all residents" is directly supported by the affidavit evidence of Ms. Wiebe, which the Tribunal accepted. At paragraphs 137-138 of her affidavit, Ms. Wiebe deposes:

> The new regional acute care hospital site will provide a major institutional use in an area that is planned to accommodate projected future growth over the 20 year planning horizon. Further, the hospital will be a regional facility serving residents of the City as well as the surrounding municipalities that are part of the Windsor-Essex Hospitals System.
>
> Emergency services include the provision of fire, police, ambulance and emergency preparedness services. The full range of services including health care services will be available throughout all parts of the City including the downtown and the County Road 42 Secondary Plan [OPA 120] Area. It is not possible for a single emergency service, such as a hospital, to be in close proximity to every resident in the City.

[69] However, CAMPP reasons that the Tribunal did not receive evidence that the new hospital will be located in close proximity to where people live because *no one* presently lives in the OPA 120 area and there was no evidence establishing an existing commitment to future residential development in that area. Therefore, it argues that on the evidence, the Tribunal could not find that the ZBA conformed with OP policy 4.2.7.3.

[70] CAMPP's position fails to appreciate the totality of the evidence before the Tribunal, from which a reasonable inference can be drawn that the portions of the OPA 120 area designated for residential use will, in fact, be used for such a purpose during the applicable 20-year planning period and therefore, people will live in close proximity to the proposed hospital site. The projected future residential growth in the area of the hospital's planned location, to which Ms. Wiebe refers in her affidavit, was quantitatively addressed through MHBC's evidence calculating that 133 ha of land designated for residential use is *required* in the OPA 120 area, in order to accommodate the City's projected demand for new housing (a function of both population growth and a decline in household size), during the relevant planning period. The Tribunal also received evidence from land economist, Daryl Keleher of the Altus Group, who concluded that while reasonable, MHBC's analysis likely *underestimated* the amount of residential land that will be *required* to accommodate the City's housing demand to 2036.

[71] The Tribunal accepted the evidence of Ms. Wiebe and Mr. Keleher and found that: the area designated for residential use in OPA 120 was reasonable, especially given its likelihood to underrepresent the potential demand (para. 50); there was no evidence to support CAMPP's submission that the MHBC and Altus Group growth projections and land needs calculations are flawed (para. 50); roughly half of the City's anticipated demand for new housing derives from population growth and the other half derives from a decline in household size (para. 51); a City-wide total estimate of 6,900 new dwelling units are required through 2036 (para. 51); and one half of the new units were expected to

be accommodated through infilling and intensification (in existing developed areas of the City) with the other half being accommodated within the OPA 120 area (para. 51).

[72] It the context of its factual findings set out above (which are amply supported by the evidence that was before it), the Tribunal was well positioned to draw a reasonable inference – as opposed to merely speculating – that the emergency services associated with the proposed location of the new hospital within the OPA 120 area will be in close proximity to where people live. The accepted evidence established that the City's projected housing demand over the relevant planning period cannot be accommodated solely through infilling and intensification and the City's additional demand for housing *will be met* through the designated residential land in the OPA 120 area. Logically and reasonably, it was open to the Tribunal to infer that as new residential demand materializes during the applicable planning period, it will be met, in part, by the development of new housing in the OPA 120 area and, as a result, the emergency services associated with the hospital will be located in close proximity to where people live.

[73] Since the challenged aspect of the Tribunal's findings has evidentiary support, there is no reason to doubt the correctness of the Tribunal's fact finding, as a matter of law, on the basis that the impugned finding was made in the absence of any evidence. This aspect of CAMPP's proposed ground of appeal does not merit leave.

(iii) CAMPP's Assertion that the Tribunal's Findings of Consistency and Conformity are Not Rationally Supported by the Evidence

[74] With respect to a question of law, there is no reason to doubt the correctness of the Tribunal's decision on the basis of CAMPP's submission that the available evidence does not rationally support its consistency and conformity findings concerning the PPS and OP emergency services policies, respectively. Indeed, in its submissions, CAMPP does not suggest that the evidence fails to rationally support the Tribunal's findings of consistency with the PPS. Rather, its focus is the Tribunal's finding of conformity between the ZBA and OP policy 4.2.7.3. In support of its position, CAMPP effectively posits that when it determined that issue of conformity, the Tribunal was not only required to consider whether the ZBA "encouraged the location of emergency services in close proximity to where people live", it was also required to engage in a comparative analysis of the projected population of the OPA 120 area with the population of other areas of the City and ultimately, to find "non-conformity" because other areas are more populated.

[75] There is no reason to doubt the correctness of the Tribunal's decision, with respect to a question of law, because it did not expressly engage in the quantitative analysis that CAMPP urges. The Tribunal's finding that the hospital's emergency services will be located in close proximity to where people live, which had evidentiary support, satisfies the express language of the subject OP policy. CAMPP's position suggests that notwithstanding the OP's express policy of "encouraging emergency services in close proximity to where people live", the OP *impliedly* requires such encouragement with respect to where *"most"* people live. That approach is neither mandated nor supported

by the express language of the OP policy at issue. CAMPP has not identified any legal principle or authority establishing that, as a matter of law, a comparative assessment of the number of people that will reside in close proximity to emergency services in a proposed development and those that would reside in close proximity to such services if located elsewhere, was required to be undertaken by the Tribunal, in order to reach a finding of conformity with the subject OP policy.

[76] As a result of the foregoing, there is no reason to doubt the correctness of the Tribunal's fact finding, as a matter of law, on the basis that it is not rationally connected to the evidence that was before it. Its factual findings are clearly supported by the evidence and its finding of conformity is consistent with the express language of the OP. CAMPP has not demonstrated that in the circumstances anything more was required, as a matter of law.

(iv) Conclusion on The Proposed Ground of Appeal Related to the Tribunal's Findings of Consistency and Conformity with the PPS and OP "Emergency Services" Policies

[77] While CAMPP may quarrel with the aspects of the evidence that the Tribunal preferred in arriving at its findings of consistency and conformity, absent an identified extricable error of law, the manner in which the Tribunal weighed the evidence cannot constitute a ground of appeal restricted to a question of law, alone. CAMPP has not identified any legal error or error in principle disclosed by the record or the Tribunal's reasons that supports any apprehension that the Tribunal erred, in law, in the manner in which it weighed and accepted the evidence, in arriving at its conclusions of consistency and conformity in respect of the PPS and OP policies related to emergency services.

[78] For all of the reasons above, the moving party has failed to demonstrate that leave to appeal should be granted for this proposed ground of appeal.

Proposed Ground 2:

Did the LPAT err in law by finding sufficient consultation with First Nations took place as required under the PPS and the City's OP?

Nature of the Issue

[79] CAMPP asserts that in arriving at its decision, the Tribunal erred, in law, in its interpretation and application of: PPS policy 1.2.2, which states that "*Planning authorities are encouraged to coordinate planning matters with Aboriginal communities*"; and policy 10.2.1.14 of the City's OP, which provides that "*Consultation with First Nations will take place as part of a development application or detailed planning study*". Specifically, CAMPP contends that contrary to the PPS and OP, the City

did not coordinate planning matters with Aboriginal communities, nor did it consult with any First Nations as part of the process surrounding WRH's planning applications. [44]

The Evidence and Submissions Before the Tribunal

[80] The Tribunal received uncontradicted evidence that on March 5, 2018, the City attempted to send an email communication together with copies of WRH's planning applications to relevant municipal departments and external entities including the local First Nations communities of Walpole Island First Nation and Caldwell First Nation.[45] The City's accompanying email correspondence requested that its recipients provide their comments to Ms. Nwaesei no later than March 26, 2018. Unfortunately, the City's original correspondence intended for Walpole Island First Nation was sent to the wrong email address[46]. Understandably, the City did not receive a response from Walpole Island First Nation by March 26, 2018.

[81] Ms. Nwaesei forwarded "reminder" email correspondence to Walpole Island First Nation (together with other entities from which a response had not yet been received) on March 26, 2018, in which, among other things, she advised that "*today is the date for comments regarding [the WRH planning applications]*" and further directed "*if you have not sent your comment, please do so ASAP*." The delivery of the reminder email initially failed because it was also sent to the wrong email address. Subsequently, Ms. Nwaesei identified the error and sent the reminder to the correct address, during the late afternoon of March 26, 2018.

[82] The Walpole Island First Nation did not respond to the reminder email, at any time and it did not contact the City in relation to WRH's planning applications, at all, prior to the approval and enactment of the planning instruments in September 2018.

[83] The uncontradicted evidence before the Tribunal also indicates that Ms. Nwaesei spoke with an individual ostensibly associated with the Caldwell First Nation on April 10, 2018. After their conversation, she sent him email correspondence indicating that she was "*Looking forward to a response from the Caldwell First Nations*." There was no evidence before the Tribunal that the Caldwell First Nation sent a response to the City or that it attempted to further communicate or consult with the City, with respect to the planning applications. There was also no evidence before the Tribunal that the City engaged in any further efforts to *directly* contact or consult with either of the First Nations in respect of the planning applications.

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[44] The basis for this proposed ground of appeal is founded solely in the asserted inconsistency and non-conformity between the planning instruments and the PPS and OP. In its submissions before the LPAT, CAMPP acknowledged that it did not allege that the City engaged in a breach of a legal duty to consult pursuant to s. 35 of the *Constitution Act, 1982*.

[45] Affidavit of Justina Nwaesei, para 63.

[46] The email correspondence was sent to "janet.macbeth@wifu.org". The correct address was ostensibly "janet.macbeth@wifn.org."

[84] In accordance with the requirements of the *Planning Act*, the City published notice of the August 13, 2018 public meeting related to OPA 120 and the ZBA in the Windsor Star newspaper on June 27, 2018 and again on July 7, 2018.

[85] In the context of the evidence set out above, CAMPP posited before the Tribunal that the City failed to fulfill what CAMPP characterized as its obligations under PPS policy 1.2.2 and policy 10.2.1.14 of the OP "*to consult with affected indigenous communities in the hospital site selection process*".[47] In so doing, CAMPP: submitted that a process of consultation consisting of a single email is inconsistent with a municipal government's obligation under the Truth and Reconciliation Commission's Call to Action; and asserted that "*not only was there inadequate consultation, there was no consultation at all*."

The Tribunal's Findings

[86] The Tribunal addresses CAMPP's submissions concerning inconsistency and non-conformity as a result of inadequate consultation at paragraphs 35-42 of its reasons. Ultimately, it was satisfied that OPA 120 and the ZBA are consistent with the PPS and the ZBA conforms with the OP regarding consultation with Aboriginal communities. In arriving at its conclusion, the Tribunal accepted that "*coordination and consultation connote discussion, which implies a two-way conversation*". The Tribunal was also mindful that the PPS "*encourages*" but does not "*mandate*" the coordination of planning matters with Aboriginal communities. It reasoned that in furtherance of a consultation process: the City is required to provide reasonable notice, but it cannot force a party to the table; and an interested stakeholder bears some responsibility to respond to an invitation to participate in the process, whether the invitation arises from direct email, published notice, or general knowledge in the community (paras. 39-40).

[87] From a factual perspective, the Tribunal found that: WRH's planning applications "were highly publicized throughout the City"; the hospital planning process was "extensive and controversial"; and by the time WRH made its applications, "the record suggests that a full understanding of the proposal was widespread" (para. 39). It then determined that "in the circumstances of these community-wide and publicly known issues, the City encouraged full participation of all stakeholders" (para. 41). Finally, it found that "through the various channels, the City took reasonable steps to invite First Nations to enter into consultation as contemplated by the OP" (para. 41).

[88] The Tribunal concluded its analysis by: observing that in hindsight, more could have been done to consult with local Indigenous communities; and acknowledging the Truth and Reconciliation Commission of Canada's directives "in support of finding new ways to engage fairly, openly and equally" (para. 42). It then found that "*in the case at hand, the statutory requirements of notice were satisfied, and even in the absence of more, the*

[47] See Written Outline of oral submissions of CAMPP (before the Tribunal) – Issue 23 "Failure to consult with Indigenous communities".

City's efforts at consultation are considered sufficient to satisfy the policies" (emphasis added) (para. 42).

The Position of the Parties in Relation to the Proposed Ground of Appeal

[89] CAMPP presently asserts that as a matter of law, through its interpretation and application of the PPS and OP, there is reason to doubt the correctness of the Tribunal's determination of the issues related to the sufficiency of the City's "consultation" with First Nations, and correspondingly, its findings of consistency and conformity. Specifically, CAMPP suggests that the Tribunal erred by:

(i) conflating the concepts of "notice" and "consultation", while elsewhere finding that consultation involves a "two-way" communication, which did not take place, in fact;

(ii) failing to consider CAMPP's submissions regarding policies promoting reconciliation, as expressed in a portion of the recommendations of the Truth and Reconciliation Commission of Canada, which it referenced in its submissions to the Tribunal; and

(iii) failing to give proper effect to its own conclusion that "more could have been done to consult", which CAMPP characterizes as an explicit finding that the OP was not followed. CAMPP reasons that if more *could have been* done then, as a matter of law, *more had to be done* to discharge the OP's mandatory requirement to consult.

[90] Finally, CAMPP submits that proper consultation with First Nations is an issue of both general and public importance.

[91] The responding parties contend that the challenges CAMPP asserts in relation to the Tribunal's findings on the issue of consultation, raise questions of mixed fact and law that cannot form the basis of an appeal to the Divisional Court. They submit that CAMPP: has failed to articulate any extricable legal errors that it would rely on in its proposed appeal; it does not engage with the text of the PPS or the OP that it relies on; and it cites no case law to support its position. Finally, to the extent that CAMPP impugns the Tribunal's legal analysis, its criticisms are based on a mischaracterization of the Tribunal's reasons.

Disposition

[92] For the reasons that follow, I accept the responding parties' position that leave to appeal ought not to be granted for this proposed ground, as it does not raise a question of law with respect to which there is reason to doubt the correctness of the Tribunal's decision.

[93] It is patently discernable from a plain reading of the Tribunal's reasons that many of the issues that CAMPP identifies as "legal errors" result from its misapprehension of the Tribunal's express reasoning. I will explain.

[94] First, in reading the Tribunal's reasons as whole, there is no doubt that the Tribunal did not conflate the notions of "notice" and "consultation". Instead, it treats them as distinct concepts in its analysis. The Tribunal recognized that "consultation" implied a two-way communication process. It then made specific findings as to why that type of communication did not occur in this instance, which focused on the lack of response from the First Nations, to what the Tribunal determined to be the City's reasonable steps: to provide the First Nations with notice of the planning applications, through several methods including, but not limited to, direct email; to invite the First Nations to enter into consultation; and to encourage the full participation of all potential stakeholders.

[95] In finding consistency and conformity with the PPS and the OP, respectively, the Tribunal did not find that "reasonable notice" will always equate to "sufficient consultation". Rather, its findings suggest that consultation in the form of two-way communication between the City and the First Nations did not occur because the First Nations did not respond to reasonable notice and reasonable steps by the City to invite the First Nations to participate in that process. CAMPP has not identified an extricable "question of law" or legal error upon which it challenges the findings above, nor has it cited any legal authority suggesting that such findings result from an error in principle.

[96] To the contrary, I accept WRH's submission that the Tribunal's approach and reasoning with respect to the issue of consultation, generally, accords with the principles expressed in the jurisprudence concerning the Crown's constitutional duty to consult. Pursuant to those principles, consultation requires an adequate process, not a perfect one. Consultation is regarded as a "two-way street" where the Crown is obligated to provide notice, disclose information and discuss any issue raised by the Indigenous group in response to the notice. The Indigenous group also has obligations, which include asserting its right as clearly and early as possible.[48] Once afforded a meaningful opportunity to participate, affected Aboriginal rights-holders are empowered to decide whether to become involved in the consultation process, or not. They are not required to do so.[49]

[97] Although the Tribunal was not dealing with an assertion that the City had a constitutional duty to consult, its reasoning is consistent with the foregoing principles. CAMPP has failed to identify any legal authority suggesting that the Tribunal erred in law by applying those principles, when determining the issues of consistency and conformity. There is no reason to doubt the correctness of the Tribunal's decision in that regard.

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[48] *Wauzhushk Onigum Nation v. Minister of Finance (Ontario)*, 2019 ONSC 3491 (Div. Ct.), at paras. 144 and 159.
[49] *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41, at paras. 22, 47 and 51.

[98] Similarly, CAMPP does not identify any legal authority specific to the "duty to consult" that supports its contention that since the Tribunal found that "in hindsight more could have been done to consult local Indigenous communities", then, as a matter of law, the City was necessarily required to engage in more steps to consult with First Nations than those in which it was found to have engaged. Conversely, the legal authorities cited by the responding parties demonstrate that even when the Crown discharges its constitutional duty to consult, it is not required to meet a standard of perfection and that the determination of issues such as the adequacy of notice in the context of the duty to consult, must be made based on the case-specific circumstances.[50]

[99] The Tribunal's express reasoning is clearly consistent with the foregoing principles. Despite finding that in hindsight more "could have been done", the Tribunal expressly found that in the *case-specific circumstances before it*, the City's efforts to initiate consultation, to which a response was not received, were sufficient to satisfy the relevant PPS and OP policies. CAMPP has failed to persuasively establish any reason to doubt the correctness of the Tribunal's decision in relation to a question of law, in that regard.

[100] Finally, contrary to CAMPP's position that the Tribunal failed to consider its submissions regarding the recommendations of the Truth and Reconciliation Commission of Canada, the Tribunal expressly cited and considered the Commission's directives in its reasons, before it arrived at its findings with respect to consistency and conformity.

[101] The balance of the issues that CAMPP raises in support of this proposed ground of appeal serve to challenge the Tribunal's findings of fact and mixed fact and law, rather than to identify an asserted error of law, alone. Leave to appeal cannot be granted with respect to such challenges. In arriving at that conclusion, I adopt the reasoning expressed in *Cardinal* v. *Windhill Green Fund LPV*[51], in which this court held that the determination of the adequacy of a municipality's efforts to discharge its duty to consult with Indigenous communities, which arises from a PPS policy or a policy set out in the municipality's OP, is a question of mixed fact and law. I accept that as an accurate characterization of the nature of such a finding and one that is applicable in this instance, notwithstanding CAMPP's position to the contrary.

[102] I remain mindful that CAMPP posits that the circumstances in *Cardinal* distinguishingly differ from those in this instance, because in the former an actual consultation process occurred, while in the latter, no consultation occurred, notwithstanding the mandatory requirement to consult prescribed by the City's OP. However, I am not persuaded that a distinguishing difference exists. In each instance, the operative issue remained whether,

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[50] *Chippewas of the Thames First Nation*, at paras. 44-46 and 51.
[51] 2016 ONSC 3456 (Div. Ct.), at paras. 23 and 26-27.

in the *case-specific circumstances*, the subject municipality engaged in adequate efforts to discharge its duty to consult.

[103] In the present case, the Tribunal clearly recognized and accepted the existence of the City's duty to consult and found on the evidence that the City discharged its duty through: its reasonable steps to provide notice of the planning applications to the First Nations; its reasonable steps to invite the First Nations to enter into consultation as contemplated by the OP, to which no response was received; and its encouragement of full participation of all potential stakeholders. In turn, those findings of mixed fact and law were supported by the Tribunal's specific factual determinations, which have been previously detailed above. While I am mindful that CAMPP disputes aspects of the foregoing findings, given their respective factual and mixed legal and factual nature, leave to appeal cannot be granted on the basis of those disputes, alone. Moreover, CAMPP has failed to identify any extricable question of law related to any of the foregoing findings. As a result, the statutory requirement for leave is not met with respect to the issues CAMPP raises in relation to those findings.

[104] For the foregoing reasons, the moving party has failed to establish that leave to appeal ought to be granted in respect of this proposed ground of appeal.

Proposed Ground 3:

Did the LPAT err in law by failing to provide reasons addressing issues relating to the PPS and OP and submissions advanced by CAMPP regarding climate change impacts?

Position of the Parties

[105] CAMPP asserts that the Tribunal erred in law by failing to provide adequate reasons addressing CAMPP's submissions that OPA 120 and the ZBA are inconsistent with the PPS policies related to climate change and the ZBA does not conform to similar policies expressed in the City's OP. CAMPP posits that although the Tribunal *stated* the relevant PPS and OP climate change polices in its reasons, it failed to specifically assess climate change issues and related evidence, in the form of participant statements that were before it. As a result, there is reason to doubt the correctness of the Tribunal's decision. Since climate change is one of the most important issues facing every community in Ontario, the issue raised by the proposed ground of appeal is a matter of general and public importance.

[106] The responding parties contend that CAMPP has failed to demonstrate that there is a reason to doubt the correctness of the Tribunal's decision on the basis of the adequacy of its reasons related to the planning instruments' consistency and conformity with PPS and OP policies related to climate change. To the contrary, read as a whole, in the context of the evidence, the arguments and the proceedings, the Tribunal's reasons: are responsive to the live issues in the proceeding and the parties' key arguments; and disclose an intelligible basis for the outcome, capable of meaningful appellate review. Finally, the legal issue raised by the proposed ground is whether the Tribunal failed to provide

adequate reasons related to certain PPS and OP policies. That question is case specific and not of sufficient public or general importance to merit the attention of the Divisional Court.

Disposition

[107] I accept the responding parties' position that leave ought not to be granted for this proposed ground of appeal. When measured against the legal principles applicable to the determination of the adequacy of the Tribunal's reasons, there is no reason to doubt the correctness of the Tribunal's decision. I will explain.

[108] Reasons for a decision must be adequate, not perfect. The functional adequacy of the Tribunal's reasons is determined in the context of the evidence and submissions before it, with a recognition that a reviewing court cannot expect a decision-maker to "respond to every argument or line of possible analysis" or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion".[52] In its reasons, the Tribunal expressly referred to the relevant PPS and OP "climate change" policies that CAMPP cited and it made findings relevant to the primary aspects of CAMPP's "climate change policies" positions which, in turn, support its consistency and conformity conclusions. In the case-specific circumstances, there is no reason to doubt the correctness of the Tribunal's decision on the basis that its reasons related to consistency and conformity with PPS and OP climate change policies are, as a matter of law, inadequate. The reasons, read as whole, in the context of the evidence, the submissions and the proceeding, adequately explain the basis of the Tribunal's findings of consistency and conformity, in a manner that permits meaningful appellate review. I will explain below.

[109] The evidence before the Tribunal came in the form of a voluminous written record. Apart from its oral submissions before the Tribunal, which were detailed, CAMPP also delivered a "Written Summary of oral submissions"[53], that set out 23 main issues forming the basis of its LPAT appeals. "Climate change impact" and policies related thereto, were not among CAMPP's identified main issues. Instead, CAMPP cited certain PPS and OP policies related to climate change (together with other policies unrelated to climate change) and provided corresponding written commentary, as part of other aspects of its challenges to the planning instruments, namely: (i) Issue 5 – "Unjustified, Uneconomical Expansion"; (ii) Issue 17 – "Public Health and Flooding"; (iii) Issue 19 – "Delivery of Healthcare Services, Efficient and Resilient Communities"; and (iv) Issue 20 – "Transit & Active Transportation". [54]

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[52] *Vavilov*, at para. 128.

[53] That document also forms part of the record on this motion.

[54] PPS and/or OP policies related to climate change are also reproduced in CAMPP's Written Summary of oral submissions under headings: Issue 2 – Not an Efficient Development Pattern; Issue 3 – Premature Development; and Issue 18 – Brownfield Land, Premature Development.

[110] Correspondingly, in its reasons, the Tribunal seized the substance of the issues that CAMPP identified as key or central to its consistency and conformity challenges, addressing them as follows: (i) Unjustified, Uneconomical Expansion – paragraphs 52-61; (ii) Public Health and Flooding – paragraphs 74-81; (iii) Resilient Communities – paragraphs 74-81; and (iv) Transit & Active Transportation – paragraphs 62-73.[55] In so doing, the Tribunal also made findings that address the issues and evidence that CAMPP now relies, in support of this asserted ground of appeal.

[111] Specifically, as part of its submissions that OPA 120 constituted "unjustified, uneconomical development", CAMPP asserted that OPA 120 was inconsistent with PPS policy 1.1.3.2(a)[56] and it referred to participant statements: asserting that air quality and pollution will likely be worsened by the development of the OPA 120 area (and related infrastructure); and predicting that greenhouse gas emission will increase as a result of "expanding the established footprint of the City of Windsor, in particular, coupled with the limited availability of transit to and from the new subdivision". CAMPP further posited that the environmental impacts associated with both the development of the OPA 120 area and the location of the hospital therein, would result in: loss of greenfield land used for agricultural purposes; flooding risk in the OPA 120 area; and an increase in greenhouse gas emissions, resulting from an increase in the frequency of vehicular travel and travel distance associated with accessing hospital services in the OPA 120 area, which CAMPP asserted was inconsistent with PPS 1.1.8.[57]

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[55] Issues related to Inefficient Development Pattern, Premature Development and Brownfield Land, are addressed by the Tribunal at paras. 52-61 of its reasons.

[56] PPS policy 1.1.3.2(a) states:

> Land use patterns within settlement areas shall be based on: a) densities and a mix of land uses which: 1. efficiently use land and resources; 2. are appropriate for, and efficiently use, the infrastructure and public service facilities which are planned or available, and avoid the need for their unjustified and/or uneconomical expansion; 3. minimize negative impacts to air quality and climate change, and promote energy efficiency; 4. support active transportation; 5. are transit-supportive, where transit is planned, exists or may be developed; and 6. are freight-supportive (emphasis added).

[57] PPS policy 1.1.8 states: Planning authorities shall support energy conservation and efficiency, improved air quality, reduced greenhouse gas emissions and climate change adaptation through land use and development patterns that:

(a) Promote compact form and structure of nodes and corridors;
(b) Promote the use of active transportation and transit in and between residential, employment (including commercial and industrial) and institutional uses and other areas;
(c) Focus major employment commercial and other travel-intensive land uses on sites which are well served by transit where this exists or is to be developed, or designing these to facilitate the establishment of transit in the future;
(d) …
(e) Improve the mix of employment and housing uses to shorten commute journeys and decrease transportation congestion.

[112] As explained below, there is no reason to doubt the correctness of the Tribunal's decision with respect to the legal question of the adequacy of its reasons related to the foregoing issues.

[113] First, CAMPP's concerns over the potential increased pollution and greenhouse gas emissions posed by the development of the OPA 120 area (and related infrastructure) and the "expansion of the City's urban foot print" (and similar concerns expressed in the participant statements that CAMPP relied on before the Tribunal), posited against the wisdom of any development of, or urban expansion in, the OPA 120 area, at all.

[114] Nonetheless, the Tribunal found that the City's plan to develop the OPA 120 area was long standing. Since its acquisition in 2007, the OPA 120 area has consistently formed part of the City's settlement, intended to accommodate its future growth. The Tribunal accepted the uncontradicted evidence that the provisions of OPA 120, itself, did not bring the OPA 120 area into the City's urban settlement. OPA 60 had previously designated the OPA 120 area for various future urban uses and ceased its designation for agricultural purposes.

[115] The Tribunal also found that OPA 120 constituted a "comprehensive planning framework to guide the development of the next phase of Windsor's anticipated development" (para. 2). It then found that consistent with the City's obligation pursuant to PPS policy 1.1.2, which the Tribunal recognized, the evidence established the requisite *present need* to justify the development of the OPA 120 area for, among other things, residential and employment uses. The Tribunal determined that even with brownfield redevelopment in the City's existing urban areas, the development of the OPA 120 greenfield area is "required to meet the land needs for residential and employment uses in the City over the planning period to 2036" (emphasis added) (para. 57).

[116] In the result, despite CAMPP's reliance on participant statements that expressed concern over potentially worsening air quality, pollution and greenhouse gas emissions posed by the "construction, development, land intensification and maintenance" of infrastructure in the OPA 120 area, it remains that the Tribunal's reasons intelligibly explain its findings that the planning instruments, permitting the development of that area, were consistent with the PPS and conformed with the OP. Specifically, in the context of its finding of the City's longstanding plan to develop the area to accommodate its future growth, the Tribunal found that the development of the OPA 120 area was now *required*, in order to meet the City's land needs in a manner consistent with PPS policy 1.1.2.

[117] Second, the Tribunal expressly addresses CAMPP's submissions that OPA 120 will result in urban development of agricultural land in active use, thereby resulting in an inconsistency with PPS policy 1.1.3 (which is designed to protect resources and greenfield land). In so doing, the Tribunal expressly found that while active farmland exists in the OPA 120 area, from a planning perspective, that land has not been designated as "agricultural" since 2007, when OPA 60 was approved and the area was placed in the City's settlement boundary and designated for future urban use (para. 85). The Tribunal also determined that the development of the active farmland in the OPA

120 area was not premature because the needs analysis that it accepted justified development of that land since "*both the [OPA 120] area and existing infill cites within the City are required to meet the population's growing demand for urban land uses*" (emphasis added) (para. 84).

[118] The Tribunal's reasons also explain the manner in which OPA 120's agricultural transition policy supports its findings of consistency. At paragraphs 84-87 of its reasons, the Tribunal expressly considered the provisions of OPA 120 that prescribe a demand-based approach to the conversion of active farmland to urban use, pursuant to which tracts of land in the subject area are permitted to remain in crop production until it is actually necessary to utilize the land for urban use. The Tribunal found that OPA 120's approach to agricultural transition: is consistent with the PPS policies that "*fervently protect agricultural land, especially prime land, unless fully justified for other uses*"; constitutes the very basis of land use planning envisioned by the PPS; and results in "*the efficient use of urban land and avoids the premature conversion of agricultural land*" (paras. 85-87).

[119] Third, the Tribunal's reasons expressly address and dispose of the substance of CAMPP's identified "climate change" policies issues founded in concern over flooding in the OPA 120 area. As part of its challenge to the ZBA before the Tribunal, CAMPP submitted, among other things, that the ZBA did not conform to relevant PPS policies because "locating the new hospital (and surrounding subdivision) on greenfield land will place Windsor at a greater risk of flooding".[58] At paragraphs 80-81 of its reasons, the Tribunal reviews aspects of the evidence that it received concerning "stormwater management and drainage", and makes related findings of fact in support of its conclusion that "*[OPA 120] and the ZBA satisfy the consistency and conformity tests and…the City will ensure that the new hospital and other developments with[in] the [OPA 120] area will not be located on hazardous land*." In the foregoing paragraphs, the Tribunal explains the basis for its consistency and conformity conclusions, in a manner that permits appellate review.

[120] Finally, the Tribunal's reasons address and dispose of the substance of CAMPP's submission that the location of the new hospital will result in increased greenhouse gas emissions, as a result of an anticipated increase in vehicular travel associated with the new site. In its Written Outline of oral submissions before the Tribunal under the heading "Issue 20 – Transit & Active Transportation Issues, CAMPP posited that the ZBA is inconsistent with PPS policy 1.8.1[59], because the distance and frequency of vehicle trips to the new hospital will be greater for residents living in the central part of the City than that which they currently experience when accessing the City's two existing hospital sites. In turn, CAMPP reasoned that increased vehicle use and travel distance will increase traffic congestion, energy use and greenhouse gas emissions, contributing to climate change.

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[58] See CAMPP's Written Outline of oral submissions "Issue 17 – Public health and flooding".
[59] Reproduced previously above.

[121] In its reasons, the Tribunal expressly acknowledged: CAMPP's submission that OPA 120 is inconsistent with several PPS policies because, among other things, it's location and design are inefficient, *car dependent* and not transit supportive (para. 52) and; that CAMPP raised several issues of mobility, *including distance*, transit, accessibility, active transportation and *vehicle trips* (para. 62). Through the course of its reasons, the Tribunal made findings that specifically address the multi-part criteria of PPS policy 1.8.1, including:

(i) OPA 120 comprehensively planned for the City's growth as justified by the needs analysis it accepted (para. 57);

(ii) OPA 120 provides for a mix of uses, densities and modes of transport (para. 57);

(iii) the hospital's location within a planned area of the City, will be adjacent to residential, commercial, business park and natural areas accessible by walking, cycling and transit (paras. 59 and 61);

(iv) planned transit services will ensure access for persons traveling from a distance who cannot, or choose not, to drive (para. 59)

(v) separate Environmental Assessment approvals related to OPA 120 provide for active modes of travel in relation to the OPA 120 area (para. 59);

(vi) the new hospital is intended to serve a region and the proposed hospital site will provide service to all residents whether nearby, across the City or in the outlying areas served by the WEHS (paras. 61 and 71)

(vii) the policies set out in OPA 120 provide that a full range of transportation options are promoted at every opportunity, guidelines for each phase of the development within the OPA 120 area will address transportation including trails and cycling routes and mixed-use areas will support public transit, walking and cycling (para. 67); and

(viii) OPA 120 was prepared in conjunction with transportation planning and "provisions and plans" have been made to ensure transit and active forms of transportation are incorporated in the build-out of the OPA 120 area (para. 68);

[122] In the context of its findings above, the Tribunal expressly acknowledged CAMPP's submission that when compared to the City's two existing hospital sites, the proposed site for the new hospital will generate, on average, a 27 percent increase in travel distance (para. 69). The Tribunal then explained that its task was not to compare one hospital site to another, or the existing hospital sites to the proposed site. Instead, its focus was whether the planning instruments met the consistency and conformity tests set out in the *Planning Act* (para. 71). The Tribunal further reasoned that although it may be "ideal" to locate all large services and facilities, such as a hospital, in the centre of an urban area, which would minimize the total travel distance of all residents to those facilities, such

ideals are not practical or possible in the actual and gradual evolution of a City. In particular, it found that Windsor's downtown area is not presently "centered" in the City, which has grown from its northern river-side location (para. 72). Finally, the Tribunal determined that the mobility and accessibility issues related to the OPA 120 area that CAMPP raised, are addressed by the City's policy commitment to servicing the hospital site with public transit and by its integration with existing and future neighbourhoods, business areas and transportation corridors (para. 72).

[123] The foregoing findings: were immediately preceded by the Tribunal's recitation of various PPS policies, including policy 1.8.1[60]; and were made, in part, in response to CAMPP's submissions with respect to the anticipated increased distance that some residents will be required to travel in order to attend the new hospital location. CAMPP's position and submissions about increased vehicular traffic and travel time/distance comprised the substance of this aspect of its position with respect to the "increased greenhouse gas" emissions posed by the OPA 120 and the ZBA. In the context of its factual findings, the Tribunal's reasons explain why it found that OPA 120 and the ZBA were consistent with the PPS and the ZBA conformed with the OP, notwithstanding the travel frequency and distance issues raised by CAMPP.

[124] In summary, the Tribunal addressed the substance of CAMPP's various "climate change policies" submissions as part of its determination of the broader enumerated main issues raised by CAMPP. The Tribunal identified the relevant PPS and OP "climate change" policies, acknowledged CAMPP's positions, and explained its dispositive findings of consistency and conformity. The Tribunal was not required to discuss all the evidence (including participant statements), expressly consider every issue, explain the basis for every one of its findings, or address every argument raised by CAMPP. In the foregoing context, there is no reason to doubt the correctness of the Tribunal's decision with respect to the legal question of the adequacy of its reasons related to CAMPP's submissions concerning "climate change policies". Leave for this proposed ground of appeal is therefore denied.

Proposed Ground 4:

Did the LPAT err in law by relying on expert evidence provided by the City conflicting with other evidence provided by the City, that was never resolved?

The Issue

[125] In this proposed ground of appeal, CAMPP effectively contends that in arriving at its findings that the requisite "need" to justify the development of the OPA 120 area existed, the Tribunal "misapprehended the evidence" because it failed to reconcile: a discrepancy between the employment-growth projection evidence it ultimately accepted and other asserted conflicting evidence adduced by the City; and an asserted incompatibility

[60] Tribunal Reasons, at para. 63.

between evidence of City-wide employment-growth projections and population-growth projections. CAMPP also takes issue with the adequacy of the Tribunal's reasons because the Tribunal did not expressly refer to the asserted conflicting evidence about employment-growth projections.

[126] Some context is warranted.

The Evidence and Proceedings Before the Tribunal

[127] In finding that the requisite "need" prescribed by PPS 1.1.2 existed, the Tribunal accepted Ms. Wiebe's (MHBC) evidence about the City's projected employment growth over the applicable 20-year planning period. It also found favour with the evidence of the Altus Group's Mr. Keleher concerning his subsequent peer-review analysis of MHBC's growth projections. CAMPP did not adduce evidence about the City's projected employment growth, from its own qualified expert.

[128] MHBC concluded that during the planning period, designated land is required in the OPA 120 area to accommodate the City's anticipated 20-year demand for new "employment land", after accounting for infilling and intensification of the City's existing developed areas. MHBC began its analysis by referring to a "Study of the Need for Employment Lands" prepared for the City in 2008.[61] The study projected that between 2007 and 2026 the number of jobs in the City at "fixed places of work" would grow by 21,140 under a base case scenario. That projection was then incorporated into the provisions of the City's OP. Not all of the projected jobs were expected to be on lands specifically designated for employment. Rather, the study projected a demand for employment lands sufficient to accommodate an additional 9,445 jobs in the period from 2007 to 2026.

[129] In its analysis, MHBC recognized that the employment rate in Windsor declined in the period from 2006 to 2011, and steadily increased thereafter. To account for the City's economic history, MHBC used the prior study's anticipated job growth on lands specifically designated for employment (i.e. 9,445 new jobs), as a projection to the year 2031 instead of 2026. MHBC also determined that the available supply of employment land within the developed areas of the City, in January 2018, was sufficient to accommodate 6,880 new jobs. It calculated that there was "need" to designate an additional 143.5 ha of land in the OPA 120 area for employment use, to accommodate the remaining 2,565 projected new jobs "on lands specifically designated for employment".[62]

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[61] The prior study was not prepared by MHBC or the Altus Group.

[62] MHBC also projected that a total of 6,993 jobs would be generated through development of the OPA 120 area, but not all of them would be "new" jobs. It acknowledged that many of the jobs would not be realized until sometime after 2031. Further, MHBC concluded that although the hospital itself would generate approximately 3,000 jobs, many of those jobs would be transferred from the other existing hospital sites in the City. It projected that a planned business park in the OPA 120 area should reach employment densities of 50 jobs per ha, but the development of lands for that purpose would likely be undertaken after 2031. Finally, it estimated that excluding the hospital jobs, a total of 1,900 jobs would be accommodated in the OPA 120 area by 2031.

[130] Mr. Keleher opined that MHBC conducted its growth analysis in a reasonable manner, and he adopted its methodology in his own analysis of the City's projected employment land need. Unlike MHBC, Mr. Keleher had the benefit of 2016 census data available to him when he performed his analysis. Ultimately, he concluded that MHBC's projection of the amount of land required in the OPA 120 area for employment use was understated by approximately 30 ha. Mr. Keleher also deposes that: MHBC's estimate of employment-land need is consistent with the City-wide employment forecast already set out in s. 1.1.3 of the City's Official Plan; and MHBC's estimate of employment-land need strives to "implement the policies and forecasts of the OP by ensuring that the City has sufficient employment land available to plan for 2036".

[131] Mr. Keleher 's evidence discloses that apart from MHBC's analysis, the City received employment projections relevant to the OPA 120 area as part of Hemson Consulting Limited's (Hemson) 2018 Sandwich South Development Charge Amendment Background Study. That study projects that between 2018 and 2036, 10,997 new jobs will be added in the City's Sandwich South area, which includes the OPA 120 area. Relevant excerpts from the study are appended to Mr. Keleher's affidavit. Prior to swearing his affidavit, Mr. Keleher made similar observations in correspondence to City council dated August 9, 2018. In his correspondence, among other things, he cited Hemson's employment-growth projections from its 2018 Development Charge Amendment Study and indicated that the City had also received employment-growth projections, on a City-wide basis, in a 2015 City-wide Development Charge Background Study that was also conducted by Hemson. The results of the 2015 study are not set out in Mr. Keleher's correspondence nor his affidavit evidence before the Tribunal.

[132] In the appeal record it filed with the Tribunal, CAMPP excerpted a *very brief portion* of the 2015 Hemson Development Charge Study, ostensibly forecasting employment growth of an additional 2,600 jobs in the City by 2025[63], which CAMPP asserts is evidence that conflicts with the employment-growth projection evidence from MHBC and Altus Group. The excerpt was accompanied by a "hyperlink" provided by CAMPP to a full copy of the 2015 Hemson study, maintained on the City's website. CAMPP did not refer to the content of the 2015 Hemson study nor its asserted conflict with the growth projection evidence, in either of its LPAT case synopses or its Written Summary of oral submissions that it filed with the Tribunal. Instead, CAMPP raised the 2015 Hemson study excerpt in support of a very brief reply submission to the Tribunal that Hemson's 2015 projection of 2,600 additional jobs could not be reconciled with the evidence relied on by the responding parties, which projected 21,000 additional jobs.

[133] The City and WRH objected to CAMPP's submission, arguing that the 2015 Hemson study was not part of the record and, in any event, the full document was not available to the Tribunal. In response, CAMPP posited that since the 2015 study was "mentioned" in Mr. Keleher's August 2018 correspondence, which formed part of the Enhanced

[63] The excerpt, in its entirety states: "Employment in Windsor is forecast to grow by approximately 2,600 employees over the next ten-years, 600 of which will be in new non-residential space."

Municipal Record, the entire content of the 2015 Hemson study formed part of the LPAT record. Nonetheless, after raising the asserted conflicting employment-growth projections, CAMPP withdrew its efforts to file additional documentation from the 2015 Hemson study with the Tribunal.

[134] The Tribunal found OPA 120 to be consistent with PPS policy 1.1.2. In arriving at that finding, the Tribunal:

(i) expressly acknowledges CAMPP's position that: OPA 120 is premature and unnecessary for the City to meet its population and employment projections; and the methodology used to calculate land needs that the responding parties relied on, is flawed (para. 44);

(ii) expressly acknowledges the responding parties' position that CAMPP fundamentally misunderstood the results of the growth management analyses conducted by MHBC and the Altus Group (para. 45);

(iii) cites PPS 1.1.2 (para. 46);

(iv) expressly refers to the substance of MHBC's analytical approach to the City's projected growth in demand for both residential and employment land during the 20-year planning period (para. 47);

(v) finds that MHBC's growth management analysis justifies the need for residential and employment land in the OPA 120 area (para. 47);

(vi) expressly refers to the substance of Mr. Keleher's evidence (paras 48-49);

(vii) finds that no apprehensions were raised by Altus Group's peer-review of MHBC's land needs study, as to the justification for the residential and employment areas in OPA 120 and its peer-review suggests that the OPA 120 area could have been larger (para. 49);

(viii) finds that the needs analysis required by the PPS is met through the MHBC study, the "robust" Altus Group peer-critique and the conservative MHBC results (all of which the Tribunal found to be "thoroughly substantiated studies") (para 50);

(ix) finds the land designated for employment uses in the OPA 120 area is reasonable, especially given its likelihood to understate potential demand (para. 50);

(x) finds there is no evidence to support CAMPP's assertion that the projections and land needs calculations adduced by the responding parties are flawed (para.50);

(xi) finds two-thirds of the City's projected employment land needs will be met through existing properties and the remaining one-third will be accommodated in

> the OPA 120 area, which are allocations that represent a reasonable approach, consistent with the PPS when planning for a growing City (para. 51).

Position of the Parties

[135] CAMPP asserts that the Tribunal erred in law by failing to address evidence and submissions that CAMPP now says were *central* to its position that there was insufficient "need" to justify the designation of "employment land" in the OPA 120 area. It reasons that MHBC's evidence projecting 21,140 new jobs in the City during the planning period, which the Tribunal accepted, conflicts with the excerpt from the 2015 Hemson City-wide Development Change Study, which projected total job growth of 2,600 jobs from 2015 to 2025. The Tribunal failed to address that conflict in its reasons, despite CAMPP's reply submission on the point. As a result, it erred in law.

[136] CAMPP also contends that the Tribunal erred in law by failing to expressly address the reasonableness of MHBC's evidence of projected employment growth of 21,140 jobs, in the context of OPA 120's own projection of City-wide population growth of 7,751 persons by 2031 (and a potential decline in population from 2031 to 2036, owning to "an aging demographic"). CAMPP asserts that it is not possible to reconcile the evidence of 21,000 plus new jobs in a Region with a population growth of less than 8,000 prospective employees. It says the Tribunal erred in law by failing to expressly confront and resolve that issue.

[137] Finally, CAMPP argues that proceeding with a development that will affect hospital services for the Region, as well as hundreds of acres currently used as farmland, is a matter of general and public importance.

[138] The responding parties contend that the true nature of CAMPP's complaint is one of mixed fact and law, for which leave cannot be granted. Specifically, CAMPP quarrels with the Tribunal's final conclusion, following the weighing of affidavit evidence and argument. Further, the Tribunal's decision with respect to the evidence of "need" accords with the parties' submissions before it. The Tribunal understood CAMPP's submissions asserting that there was "insufficient need to justify OPA 120" and gave reasons why the needs analyses provided by WRH's consultants was accepted. There is no reason to doubt the correctness of the Tribunal's reasons.

[139] Finally, this proposed ground of appeal does not raise a question of law that is of sufficient public or general importance to merit the attention of the Divisional Court. The controlling issue is not whether planning for a hospital is important. The issue is whether the specific legal questions raised by CAMPP, concerning alleged conflicting evidence and the adequacy of the Tribunal's reasons, meets the requisite legal criteria for leave. They do not because the questions are specific to the circumstances of the present case.

Disposition

[140] I accept that this proposed ground of appeal raises questions of law, with respect to the adequacy of the Tribunal's reasons and its asserted failure to address evidence and submissions now said by CAMPP to have been central to its position before the Tribunal. However, I do not find that when the Tribunal's reasons are considered in the context of the totality of the evidence and the parties' submissions, there is reason to doubt the correctness of the Tribunal's decision, with respect to a question of law, because it made findings consistent with the MHBC employment land needs analysis, without expressly referring to the 2015 Hemson study excerpt. I will explain by first identifying the legal principles applicable to CAMPP's assertion that the Tribunal erred in law through a misapprehension of evidence, by failing to consider evidence that was relevant to a material issue.

[141] A misapprehension of evidence may involve: a failure to take into account an item or items of evidence relevant to a material issue; a mistake about the substance of the evidence; or a failure to give proper effect to evidence.[64]

[142] A stringent standard of review applies to a ground of appeal advanced as a misapprehension of evidence. Not every misapprehension of evidence renders a trial unfair or results in a miscarriage of justice. An appellate court must determine the nature and extent of an alleged misapprehension and its significance to the decision under review.[65] The relevant evidence must: relate to matters of substance rather than detail; must be material, rather than peripheral, to the decision-maker's reasoning; and must relate to essential parts of the reasoning process rather than narrative. In other words, the evidence must play *an essential part* in the reasoning process resulting in the ultimate decision.[66] When assessing this proposed ground of appeal, it is important to distinguish between minor variations in evidence and major inconsistencies. A decision-maker is not required to refer to every inconsistency in the evidence.[67] However, where a piece of *critical* evidence is omitted from the reasons and the appellate court concludes it was a piece of evidence the decision-maker was required to examine, it can be reversible error.[68]

[143] In arriving at its decision, the Tribunal was required to consider all of the relevant evidence material to the issues of consistency and conformity, but it was not obliged to expressly discuss all of the evidence on any given point or answer each and every argument of counsel, in its reasons. While the failure to consider all of the evidence is an error of law, unless the reasons demonstrate this was not done, the failure to record the fact of it having been done is not a proper basis for concluding that there was an error of law in that respect.[69]

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[64] *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.), at p. 538.
[65] *Morrissey*, at p. 541.
[66] *R. v. Lohrer*, 2004 SCC 80, [2004] 3 S.C.R. *732*, at para. 2.
[67] *R. v. Sweitzer*, 2013 ONCA 60, at para. 1; *R. v. D.T.*, 2014 ONCA 44, at para. 78.
[68] *R. v. K.A.*, 2013 ONCA 410.
[69] *R v. Tippett*, 2015 ONCA 697, at para. 51.

[144] Guided by the legal principles above and for the reasons below, assuming the excerpt from the 2015 Hemson study was properly before the Tribunal as evidence, the Tribunal's failure to specifically *refer* to that evidence in its reasons, does not provide reason to doubt the correctness of the decision on the basis that the Tribunal failed to "*consider* all of the evidence". I reach that conclusion for a number of reasons, which are set out below.

[145] First, the Tribunal's reasons, as a whole, do not demonstrate that it *failed to consider* all of the relevant evidence in arriving at its decision. After acknowledging CAMPP's position regarding the alleged flawed analysis and calculations underwriting the MHBC and Altus Group's respective projections, the Tribunal engaged in a reasoned and considered acceptance of MHBC's evidence about projected employment growth during the planning period from 2016 to 2036. Among other things, the Tribunal concluded that MHBC's analysis was reasonable, its study was thoroughly substantiated and there was no evidence to support CAMPP's suggestion that the MHBC's projections and calculations were flawed. As I will explain below, the latter finding is consistent with the nature and evidentiary quality of the 2015 excerpt, measured in the context of the evidence as a whole. It is also consistent with the Tribunal considering the excerpt and determining in the context of the totality of the evidence, that it did not support CAMPP's contention that MHBC's analysis and calculations were flawed.

[146] Second, although the Tribunal did not expressly refer to the 2015 excerpt in its reasons, it was not required to do so, in the circumstances before it. It was not necessary for the Tribunal to refer to every inconsistency in the evidence, or to expressly consider every issue raised, discuss all the evidence, or address every argument made by CAMPP.[70] As presented, the 2015 Hemson study excerpt did not give rise to a "major inconsistency" or "significant evidentiary conflict" and it did not unequivocally contradict MHBC's employment-growth analysis evidence. The excerpt is not temporally comparable to the MHBC growth-projection evidence. The job growth projections in the excerpt are made over a 10-year period that ends 11 years before the end of the planning period applicable to OPA 120, the latter of which informed the MHBC and Altus Group analyses.

[147] Third, the 2015 excerpt, on its face, does not inform one of the primary challenges to the MHBC and Altus projections that CAMPP advanced before the Tribunal, namely, "flawed methodology and calculations". The methodology and analysis engaged in by both MHBC and the Altus Group is transparently disclosed in the report and affidavit evidence that was before the Tribunal. Conversely, the 2015 excerpt that CAMPP quoted and relied on before the Tribunal is limited to a single conclusory statement of opinion in the absence of: an articulated basis for the opinion; disclosure of the methodology upon which it is based; and disclosure of the identity and qualifications of the individual expressing the opinion. The Tribunal's ability to place weight on the excerpted opinion was circumscribed, in the foregoing circumstances. After objection, CAMPP abandoned

[70] *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788, at para. 30.

its efforts to put further documentation from the 2015 Hemson study before the Tribunal, which, if admitted, may have informed the issues above.

[148] Fourth, the 2015 excerpt was not Hemson's "final word" on employment-growth projections. The Tribunal received evidence of a more contemporaneous analysis from Hemson, in the form of its 2018 Development Charge Amendment Study, that projected employment growth of nearly 11,000 jobs in the City's Sandwich South area (which includes the OPA 120 area), during the planning period applicable to OPA 120. The uncontradicted evidence before the Tribunal indicates that Hemson's 2018 projections were consistent – not in conflict – with MHBC's employment-growth analysis.

[149] Fifth, apart from the issues that detract from the significance of any evidentiary conflict arising from the 2015 Hemson study, the record discloses that CAMPP did not position the 2015 excerpt as "central evidence" on a key issue before the Tribunal. CAMPP did not reproduce or integrate the impugned excerpt nor advance any arguments specific to its asserted effect on the assessment of the employment growth evidence relied on by the responding parties, in its LPAT case synopses nor its written outline of oral submissions before the Tribunal, and it did not reference the 2015 Hemson study when it identified the key issues in its case synopsis related to OPA 120.[71] Instead, CAMPP first raised the 2015 Hemson study excerpt in a brief reply submission, which its counsel characterized as a "small portion" of the reply submissions[72], stating[73]:

> The response that we are making is to paragraph 86 of the Hospital submissions, page 27, where there's a projection of 21,000 jobs. Again, it does not appear to be reconcilable to say that Hemson is saying 2600 jobs, which is in the evidence at the location I've just said, with the 21, 000 job number.

[150] CAMPP's limited submission concerning the excerpt from the 2015 Hemson study did not address: the potential disparity between the employment projections set out in the excerpt and the employment projections that were already incorporated in the City's OP (which were consistent with MHBC's analysis); the disparity between Hemson's 2015 projection and Hemson's 2018 projections; the fact that the 2015 excerpt's growth projections applied to a time period that significantly differed from the planning period applicable to OPA 120; nor the Tribunal's ability to safely rely on the excerpted opinion, in the absence of evidence concerning the methodology from which it was derived and the identity and qualifications of the individual expressing it.

[151] In all of the circumstances, there is no reason to doubt the correctness of the Tribunal's decision simply because it did not expressly refer to the 2015 excerpt in its reasons. Even in the absence of an express reference to the excerpt, the Tribunal's reasons explain why

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[71] See Case Synopsis: PL180842 at para 4.
[72] Transcript of CAMPP's Reply Submissions before the Tribunal at page 6.
[73] Transcript of CAMPP's Reply Submissions before the Tribunal at page 61-62.

it accepted the employment-growth projection evidence that it did. It was not necessary for the Tribunal to specifically state in its reasons that it was accepting MHBC's evidence "notwithstanding the 2015 Hemson excerpt". It is clear that the Tribunal's reasons do not demonstrate that it failed to undertake a consideration of all the evidence in relation to the ultimate issue of consistency. Therefore, the fact that the excerpt was not expressly referred to in its reasons is not a proper basis for concluding that there is reason to doubt the correctness of its decision.

[152] The moving party has failed to demonstrate that there is reason to doubt the correctness of the Tribunal's decision in respect of a question of law arising from the assertion that it engaged in a material misapprehension of the evidence by accepting projected employment growth evidence from MHBC and Altus Group, without expressly referring to the excerpt from the 2015 Hemson study in its reasons.

[153] Similarly, CAMPP's submission that the Tribunal erred in law, by failing to provide adequate reasons addressing the effect it gave to the 2015 Hemson study excerpt does not constitute a reason to doubt the correctness of the Tribunal's decision. The focus of this aspect of the Tribunal's reasons is whether OPA 120 is consistent with PPS policy 1.1.2 because sufficient need existed to justify development of a designated growth area. The Tribunal's reasons explain why it accepted the evidence of projected employment growth from MHBC. It made positive findings with respect to the quality of that evidence and the corroborative support it received from the Altus Group peer-review study, which are set out above. The Tribunal's reasons make clear that its reasoned acceptance of MHBC's evidence founds its determination that the development of the OPA 120 area is not premature, and that OPA 120 is, therefore, consistent with PPS policy 1.1.2. In arriving at its conclusion, the Tribunal's reasons seize and dispose of the central issue before it, by intelligibly explaining the basis for its decision in a manner that permits meaningful appellate review.

[154] I now turn to the second aspect of this proposed ground of appeal. CAMPP posits that the LPAT erred in law by failing to resolve its submission that "it is not possible to reconcile 21,000 plus new jobs in a Region with a population growth of less than 8,000".[74] CAMPP reasons that if *the City's* population only grows by 7,750 people during the planning period and its working-age population is in decline, it will be impossible to fill 21,000 projected new jobs.

[155] There is no reason to doubt the Tribunal's decision with respect to a question of law, as a result of this aspect of the proposed ground. The totality of the evidence before the Tribunal does not support the "irreconcilable conflict" urged by CAMPP. There was ample evidence before the Tribunal capable of supporting its findings with respect to projected employment growth in a manner that is consistent with the population-growth projection set out in the OPA 120, itself.

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[74] Both figures refer to City-wide growth projections.

[156] Mr. Keleher provides uncontradicted evidence that the employment-growth projection that formed part of the City's OP before OPA 120, which is consistent with the projection of 21,140 new jobs in Windsor by 2031, had already accounted for the City's shifting population dynamics upon which CAMPP now relies.[75]

[157] Further, there was no evidence before the Tribunal suggesting that the City-wide employment growth projected by MHBC was limited to new employment positions filled exclusively by residents of the City, itself. Instead, the Tribunal received uncontradicted expert evidence concerning: the anticipated population growth in the County of Essex surrounding the City; and the potential impact of such growth on the City's employment growth. Mr. Keleher deposes that data from the 2016 census demonstrates that between 1996 and 2016, the County experienced a greater growth in its population (29,108 persons) than the City (19,494 persons); and the Essex County Official Plan projects that the County's population will grow by 30,745 persons between 2016 and 2031, which is also greater than the growth projected for the City over a similar period of time.[76] He explains that depending on the inflow of employees from outside the City, it will be possible for the City to experience employment growth even though the City's working-age population is projected to decline. Economic centres, such as Windsor, often have the highest activity rates (the ratio of population to jobs) while surrounding areas typically have lower activity rates. Therefore, while "population" and "the number of jobs" in a City are related, there can be deviations in their respective rates of growth.[77]

[158] Therefore, the evidence, as a whole, does not support the existence of the "irreconcilable evidentiary conflict" that is said to found this aspect of CAMPP's proposed ground of appeal. The evidence before the Tribunal explains why, in general, a municipality's population growth and employment growth can deviate, and provides data with respect to the County's anticipated population growth that is capable of explaining the case-specific deviation that founds CAMPP's position. In the absence of a demonstrable "irreconcilable conflict" in the evidence, there is no reason to doubt the correctness of the Tribunal's decision, as a matter of law, on the basis that it failed to expressly confront the alleged evidentiary conflict in its reasons.

[159] For the foregoing reasons, the moving party has failed to demonstrate that there is reason to doubt the correctness of the Tribunal's decision with respect to any question of law that arises from this proposed ground of appeal. As a result, leave to appeal with respect to this proposed ground is denied.

Conclusion on Motion for Leave to Appeal

[160] For all of the reasons set out above, I am not persuaded that the moving party has met its onus to establish that leave to appeal should be granted with respect to any of its

[75] Keleher Affidavit, at paras. 67-68.
[76] Keleher Affidavit, at paras. 92-95.
[77] Keleher Affidavit, at paras. 69-71.

proposed grounds of appeal. The motion shall therefore be dismissed. I will address the issue of costs below.

Costs

[161] Pursuant to the parties' partial agreement on costs, given their success on the leave to appeal motion, each of the responding parties is to be awarded partial indemnity costs of that motion in the amount of $10,000 plus HST, *in the event* that costs are determined to be payable by CAMPP. In the ordinary course, costs would follow the event and costs of the motion would be awarded against CAMPP.

[162] However, CAMPP submits that the court should exercise its discretion to order that no costs are payable by it, on the basis that it is a public interest litigant. In that regard, it relies on the reasoning expressed in *Citizens for Riverdale Hospital v. Bridgepoint Health Service and City of Toronto* (October 9, 2007) Ontario 85/07 (Div. Ct.) and *Incredible Electronics Inc. v. Canada (Attorney General)* (2006), 80 O.R. (3d) 723 (S.C.).

[163] The responding parties submit that costs in the agreed upon amount should be awarded in their favour. They dispute CAMPP's status as a public interest litigant. They reason that CAMPP's status as a "residents group" is only one factor to be considered in the court's exercise of its discretion with respect to costs. It does not automatically entitle CAMPP to preferential costs treatment. In all the circumstances, the interests of justice require CAMPP to pay costs. In addition, the City argues that its citizens should not be compelled to bear all of the City's legal costs because a small group of citizens brought unsuccessful motions before the court.

[164] In determining the parties' differences, I will start by deciding whether CAMPP ought to be regarded as a "public interest litigant" for the purpose of the disposition of costs issues. The criteria applicable to that determination is set out in *Durham Citizens Lobby for Environmental Awareness and Responsibility Inc. v. Durham (Regional Municipality)*, 2011 ONSC 7143, at para. 51 as follows:

> (a) the proceeding involves issues the importance of which extends beyond the immediate interests of the parties involved;
>
> (b) the litigant has no personal, proprietary or pecuniary interest in the outcome of the proceeding, or, if he or she has an interest, it clearly does not justify the proceeding economically;
>
> (c) the issues have not been previously determined by a court in a proceeding against the same defendant;
>
> (d) the defendant has a clearly superior capacity to bear the costs of the proceeding; and
>
> (e) the litigant has not engaged in vexatious, frivolous or abusive conduct.

[165] CAMPP argues that it meets all the criteria set out above. It says that it has raised previously undetermined issues that address community interests outside of its membership, including: the provision of emergency services; the consideration of climate change; and adequate consultation with Indigenous communities. Further, it has no pecuniary interest in the outcome of the proceeding and there is no evidence that it has engaged in "vexatious, frivolous or abusive conduct."

[166] The responding parties do not dispute that CAMPP satisfies the second and third criteria applicable to the "public interest litigant" determination. They also take no issue with the fifth criterion, in the context of CAMPP's leave to appeal motion, but they do not make the same concession in respect of CAMPP's preliminary motions to adduce fresh evidence and to amend its notice of motion for leave to appeal, which I will discuss later in these reasons.

[167] For the reasons that follow, I am satisfied that CAMPP meets the criteria of a public interest litigant in the context of its leave to appeal motion.

[168] In the circumstances of this proceeding (a motion for leave to appeal), the issues that CAMPP raised transcend the interests of the parties and engage broad societal concerns of importance to the community. In arriving at that conclusion, I have remained mindful that the determination of whether the importance of the issues in the proceeding transcend the interests of the parties, requires the court to consider the importance of the specific issues raised in the legal proceeding, as opposed to the grand goals of the purported public interest litigant: see *Durham Citizens Lobby*, at para. 54. I, therefore, accept the responding parties' position that CAMPP's wider goal of opposing the selected site for the new hospital does not inform the first requirement of the public interest litigant test.

[169] However, I do not accept the responding parties' submission that CAMPP's "complaints and questions" about the adequacy of the Tribunal's reasons that founded its leave to appeal motion fail to transcend the interests of the parties. Although the responding parties' position finds some support in the costs endorsement quoted in *Yerex v. CYM Toronto Acquisition LP*, 2019 ONSC 2862, at para. 17, the circumstances of this case are more nuanced.

[170] Although the determination of the public interest litigant issue is not informed by CAMPP's broader goal related to the chosen hospital site, in my view, when deciding that issue, it is appropriate to consider the underlying subject matter to which the Tribunal's asserted legal errors are said to relate. The majority of CAMPP's proposed grounds of appeal were primarily founded in its assertions that the Tribunal erred in law, because: several aspects of its reasons were inadequate; and it materially misapprehended evidence. All of the issues that were the subject of CAMPP's claims of inadequate reasons and misapprehension of evidence were, by their nature, matters of public interest in the sense that they engaged broad societal concerns of significant importance to the community, in particular ensuring that land use planning is implemented in a manner that is consistent and conforms with applicable policies related to: residents' accessibility to

emergency services; permitting the development of greenfield land only when necessary; and minimizing the impact of urban development on air quality and greenhouse gas emissions.

[171] The legal issue of "adequacy of reasons", itself, also consists of a public interest element since adequate reasons function, in part, to ensure public accountability in the decision-making process. I do not suggest that an assertion of inadequate reasons will be sufficient to satisfy the first requirement of the public interest litigant test, in every case. However, in this instance, based on the subject matter of the asserted inadequacies in the Tribunal's reasons, I am satisfied that CAMPP has established that "the proceeding involves issues, the importance of which extends beyond the immediate interest of the parties involved".

[172] I now turn to the disputed fourth criterion of the public interest litigant test, specifically, whether the responding parties have "a clearly superior capacity to bear the costs of the proceeding". I accept that both the City and WRH have the capacity to bear their own costs of the motion for leave to appeal and that their respective capacities to bear costs are likely greater than CAMPP's capacity, in that regard. But, as the City correctly submits, that does not necessarily dispose of the issue.

[173] I accept the City's position that its financial resources are entirely dependant on its taxpayers and, as a result, a determination that CAMPP is not obligated to pay any costs to the City, despite the City's success on the motion, would effectively shift the financial burden of CAMPP's unsuccessful motion from one group of concerned citizens (CAMPP) to all of the City's citizens. Since the parties have agreed that in the event CAMPP is ordered to pay costs, it will do so on a partial indemnity basis, the City's residents will be forced to bear a portion of the legal expenses the City incurred in responding to CAMPP's leave motion, even if costs in the agreed upon amount are awarded in the City's favour. In the event that a costs award is not made in the City's favour, those residents will likely be required to pay even more. In the circumstances of this proceeding, such a result would not be fair, just or reasonable.

[174] Despite CAMPP's pursuit of the result it believed was in the public interest, it remains that its effort to secure leave to appeal to the Divisional Court was unsuccessful because its proposed grounds of appeal failed to identify any question of law, for which there was reason to doubt the correctness of the Tribunal's decision. In short, its motion for leave lacked any merit.

[175] In the circumstances of this case, I am persuaded to follow the reasoning in *Southgate Public Interest Research Group v. Southgate (Township)*, 2012 ONSC 6961, at paras. 54-56. The City's ability to bear its costs is entirely offset by the fact that an order that CAMPP pay no costs, would compel the City's residents to bear all the City's costs occasioned by CAMPP, in its pursuit of relief that was patently unjustified. Therefore, while I accept that CAMPP may be characterized as a public interest litigant, I am not persuaded that it should be relieved of an obligation, as the unsuccessful party, to pay costs to the City. Its status as a public interest litigant does not automatically immunize it from an award of costs, rather, it remains a factor to be considered by the court in

exercising its discretion with respect to costs. After such consideration, I am of the view that in the circumstances of this case, it would be unjust, unfair and unreasonable to deny the City its costs of the leave motion.

[176] Similarly, I am not persuaded that CAMPP's status as a public interest litigant ought to immunize it from an award of costs in favour of WRH. As I indicated above, CAMPP's position on each of its proposed grounds of appeal was without merit. Nonetheless, WRH, a publicly funded hospital, was required to incur legal expenses to respond to CAMPP's leave motion. In my view, a costs disposition that compelled WRH to bear the entirety of its costs, in the circumstances of this case, would be an unfair, unjust and unreasonable result. In the absence of the parties' partial agreement on costs, I would have concluded that owing to CAMPP's status as a public interest litigant, the quantum of costs it would otherwise be obligated to pay to WRH should be reduced. I would have found the appropriate reduction to be 25 percent of the partial indemnity quantum otherwise determined by the court. For reasons set out previously, I would have found that no basis existed to justify a reduction in the quantum of costs payable by CAMPP to the City.

[177] However, based on the parties' written costs submissions, they have apparently framed the impact of a finding of public interest litigant as a binary issue for the court's determination – specifically whether CAMPP should be relieved of <u>any</u> obligation to pay costs on the leave motion, should it be found to be a public interest litigant. If it is determined that CAMPP should not be so relieved, the agreement contemplates that CAMPP will be

ordered to pay costs in the agreed upon amount. In that regard, CAMPP's submissions state:

> <u>In the event that costs are awarded, the parties have agreed to the following quantum</u>:
>
> - On the Motion for Leave to Appeal, **$20,000.00 +HST** is to be awarded to CAMPP if CAMPP is successful. **$10,000.00 +HST each** <u>is to be</u> awarded to the City of Windsor and Windsor Regional Hospital if the respondents are successful. [Emphasis added by underline.]
>
> At the same time, CAMPP respectfully takes the position that no costs should be awarded against it because it is a public interest litigant.

[178] For reasons set out above, I do not give effect to CAMPP's position that no costs should be awarded against it. Instead, I find that costs should be awarded in favour of the responding parties. In those circumstances, the parties have agreed to a fixed quantum expressed to the court as follows, "in the event costs are awarded the parties have agreed to the following quantum … $10,000 plus HST each is to be awarded to [the City] and [WRH] if the respondents are successful."

[179] Therefore, as a term of the order dismissing the leave to appeal motion, CAMPP will be ordered to pay, as costs of its motion for leave to appeal: the sum of $11,300, inclusive of HST in the amount of $1,300, to the Corporation of the City of Windsor and the sum of $11,300, inclusive of HST in the amount of $1,300, to Windsor Regional Hospital.

[180] I now turn to the issues of costs related to CAMPP's unsuccessful preliminary motions to: amend its notice of motion for leave to appeal to include considerations of COVID-19 in this case; and to adduce fresh evidence with respect to COVID-19, in the context of its leave to appeal motion. These motions were argued and dismissed for oral reasons on May 6, 2020, with the issue of costs reserved for determination together with the costs issues arising from the leave to appeal motion.

[181] Similar to the leave to appeal motion, the parties dispute whether CAMPP should be relieved of any obligation to pay costs, despite its lack of success on the preliminary motions. In the event that costs are awarded against CAMPP, the parties dispute the appropriate indemnity basis (partial or substantial) for the award. They have, however, agreed on a quantum for each basis. The agreed upon partial indemnity quantum, in the event costs are awarded, is $5,000, plus HST to be split between the responding parties. The agreed upon substantial indemnity quantum is $8,000, plus HST, to be split between the responding parties.

[182] I have previously determined that CAMPP should not to be insulated from a costs award in relation to its leave to appeal motion, despite its status as a public interest litigant. CAMPP's similar request in relation to its preliminary motions carries even less merit. The preliminary motions had no chance of success, as a matter of law. The binding appellate authority that this court was compelled to apply established that fresh evidence is not admissible on a motion for leave to appeal. On that basis alone, CAMPP's fresh evidence motion could not succeed. In addition, from a policy perspective, there was good reason not to accede to CAMPP's request to reopen the evidentiary record on an issue that was not raised before the LPAT (COVID-19), particularly in circumstances in which the Tribunal's decision could only be appealed on a question of law, alone.

[183] In its submissions on the preliminary motions, CAMPP also conceded that if its request for leave to adduce fresh evidence was not granted, its motion to amend its notice of motion for leave to appeal should be dismissed. In my view, from their inception, the preliminary motions were destined to fail.

[184] In the circumstances, I am persuaded that costs in respect of the preliminary motions should be awarded against CAMPP in favour of both responding parties. In that regard, I adopt, by analogy, the reasoning expressed in *Hamiltonians for Progressive Development v. Hamilton (City)*, 2014 ONSC 420, at para. 2:

> Counsel, in their submissions, have quite properly addressed the several issues that arise when public interest litigation is before the court. Those issues must be considered when determining whether costs should be awarded on the dismissed leave to appeal motion, but it is not so clear

> that they should govern a disposition on a threshold or preliminary procedural point**.** Surely, a public interest litigant, represented by experienced counsel who has been made aware that no time indulgence will be granted, must be held to the same procedural requirements as a private litigant. For that reason alone, [Hamiltonians for Progressive Development] cannot be permitted to avoid an award of costs being made against it.

[185] In this instance, CAMPP brought preliminary motions to expand the evidentiary record before this court on a factual issue that was not before the Tribunal and could not have influenced its decision. As a matter of law, its effort in that regard was misguided. The relief sought could not be granted. The responding parties were compelled to incur legal expenses to respond to CAMPP's motions. As a result, it would be unfair, unjust and unreasonable to permit CAMPP to avoid an award of costs against it.

[186] In determining the disputed issue of the appropriate "indemnity basis" for the costs to be awarded, I am mindful of the discretion afforded to the court pursuant to s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, and the factors that ought to be considered when making an award, which are set out in rule 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (including whether any step in the proceeding was improper, vexatious or unnecessary). Although I find CAMPP's preliminary motions to be misguided and wholly unnecessary, I do not find that the motions were vexatious, motivated by bad faith, or brought for an extraneous purpose. In my view, the motions resulted from CAMPP's excessive cautiousness in the context of a developing global pandemic. In all of the circumstances, the absence of legal merit associated with CAMPP's preliminary motions provides good reasons to make an award of costs against it. However, I do not find the circumstances justify an order of costs made on a substantial indemnity basis. In my view, a costs award on a partial indemnity basis accords with a fair, just and reasonable result.

[187] For the foregoing reasons, CAMPP shall be ordered to pay costs in the agreed upon amount of $2,825, inclusive of $325 in HST, to each of the responding parties as costs of CAMPP's preliminary motions.

Terms of the Order

[188] An order will go with the following terms:

1. CAMPP's motion for leave to appeal is dismissed;

2. CAMPP shall pay the sum of $11,300, inclusive of HST in the amount of $1,300, to the Corporation of the City of Windsor and the sum of $11,300, inclusive of HST in the amount of $1,300, to Windsor Regional Hospital, as costs of the leave to appeal motion.

3. CAMPP shall pay the sum of $2,825, inclusive of HST in the amount of $325, to the Corporation of the City of Windsor and the sum of $2,825, inclusive of HST

in the amount of $325, to Windsor Regional Hospital as costs of its motions to adduce fresh evidence and amend its notice of motion for leave to appeal.

Original signed by *Justice Gregory J. Verbeem*
Gregory J. Verbeem
Justice

Released: July 29, 2020

CITATION: CAMPP Windsor Essex Residents Association v. Windsor (City)
2020 ONSC 4612
DIVISIONAL COURT FILE NO.: DC-20-151

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

BETWEEN:

CAMPP Windsor Essex Residents Association

Appellant

– and –

The Corporation of the City of Windsor, Windsor Regional Hospital and 386823 Ontario Limited

Respondents

REASONS ON MOTION FOR LEAVE TO APPEAL TO THE DIVISIONAL COURT brought pursuant to s. 37 of the *Local Planning Appeal Tribunal Act, 2017*, S.O. 2017, c. 23, sched. 1

Released: July 29, 2020

Zoning & Subdivision Bylaws

SOUTHPORT

community of southport inc.

1990

Bylaws of the COMMUNITY OF SOUTHPORT enacted pursuant to Section 16 of the Planning Act, RSPEI 1988, P-8

First reading, the 20th day of September, 1990.

Second reading, the 9th day of October, 1990.

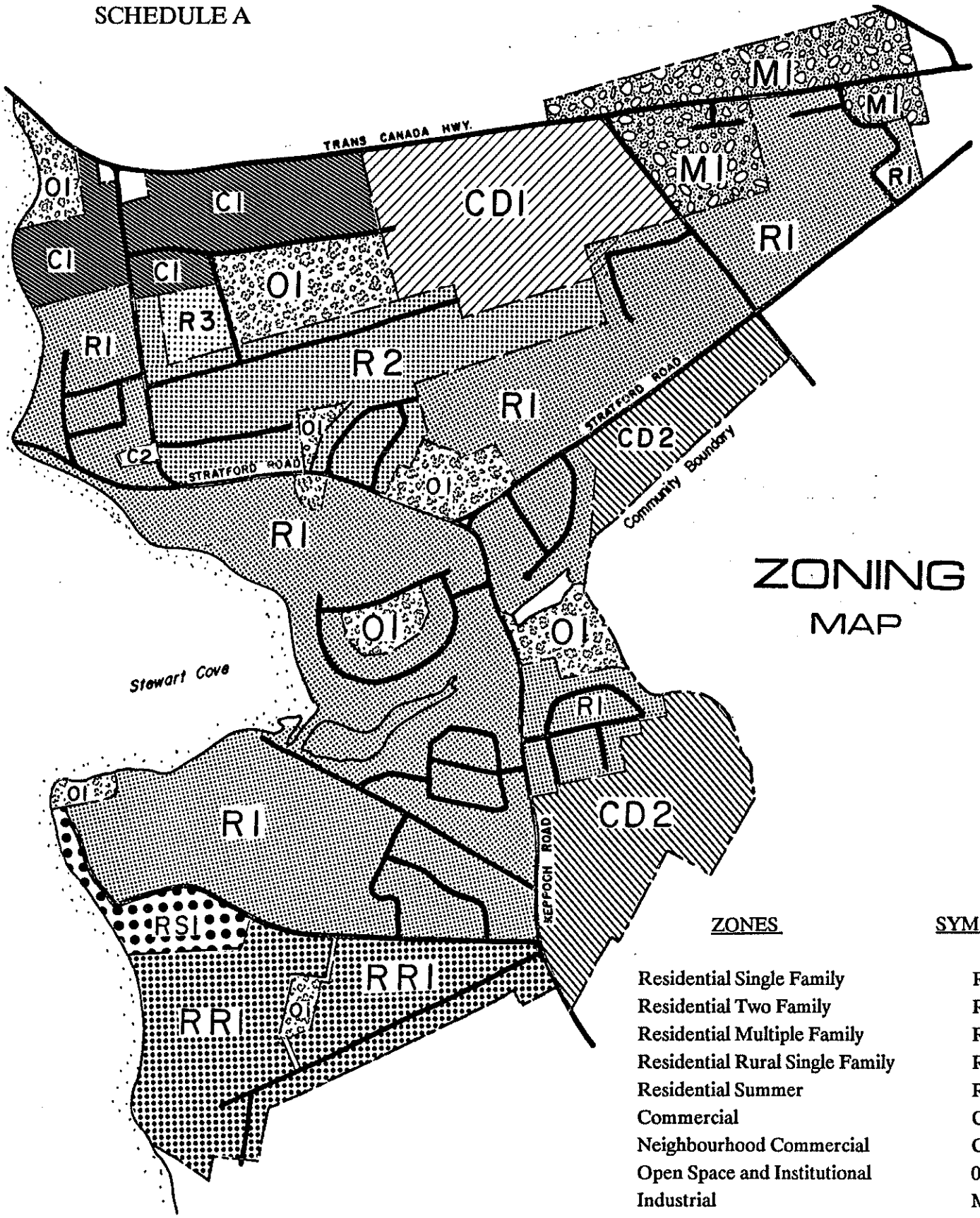
Chairman

Administrator
(Community Seal)

Approved by the Minister of Community and Cultural Affairs pursuant to Section 17 of the Planning Act, RSPEI, 1988 P-8., on the 17th day of October, 1990.

Leonce Bernard
Minister
Community and Cultural Affairs

SCHEDULE A



ZONING MAP

ZONES	SYMBOLS
Residential Single Family	R1
Residential Two Family	R2
Residential Multiple Family	R3
Residential Rural Single Family	RR1
Residential Summer	RS1
Commercial	C1
Neighbourhood Commercial	C2
Open Space and Institutional	01
Industrial	M1
Comprehensive Development	CD1
Comprehensive Housing Development	CD2

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Charlottetown, Prince Edward Island, December 13th, 2003

CANADA
PROVINCE OF PRINCE EDWARD ISLAND
IN THE SUPREME COURT - ESTATES DIVISION

TAKE NOTICE that at all persons indebted to the following estates must make payment to the personal representative of the estates noted below, and that all persons having any demands upon the following estates must present such demands to the representative within six months of the date of the advertisement:

Estate of: Date of the Advertisement	Personal Representative: Executor/Executrix (Ex) Administrator/Administratrix (Ad)	Place of Payment
JOHNSTONE, Gerald Long River Kensington RR#2 Prince Co., PE December 13th, 2003 (50-11)*	George A. Lyle Donald Johnstone (EX.)	Lyle & McCabe PO Box 300 Summerside, PE
WATSON, Gloria Theresa Summerside Prince Co., PE December 13th, 2003 (50-11)*	Urban Cameron Sister Mary Deighan (EX.)	David R. Hammond, QC 740A Water Street Summerside, PE
YOUNG, Forbes Grenville Riverview New Brunswick December 13th, 2003 (50-11)*	Emma Young (EX.)	Allen J. MacPhee Law Corporation PO Box 238 Souris, PE
LIDSTONE, Carman George Toronto Ontario December 6th, 2003 (49-10)	Claude Winslow Lidstone Merrill Blake Lidstone (EX.)	J. Allan Shaw Law Corporation PO Box 40 Alberton, PE
MacAUSLAND, Harry Metherall Bloomfield Prince Co., PE December 6th, 2003 (49-10)	Rosamund Pearl MacAusland (EX.)	J. Allan Shaw Law Corporation PO Box 40 Alberton, PE

**Indicates date of first publication in the Royal Gazette.*

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http://www.gov.pe.ca/royalgazette

PUBLIC NOTICE

Notice is hereby given that in accordance with the *Planning Act, R.S.P.E.I, 1988*, the Minister of Community and Cultural Affairs has given his approval to the **Town of Cornwall Official Plan - 2003**, effective December 5, 2003

A copy of the Town of Cornwall Official Plan - 2003 will be filed with the Registrar of Deeds for Queens County, and will also be available for public inspection at the Town of Cornwall administration office.

Ron MacMillian QC
Deputy Minister

50

PUBLIC NOTICE

Notice is hereby given that in accordance with the *Planning Act, R.S.P.E.I, 1988*, the Minister of Community and Cultural Affairs has given his approval to the **Town of Stratford Revised Official Plan**, effective December 5, 2003

A copy of the Town of Stratford Revised Official Plan has been filed with the Registrar of Deeds for Queens County, and will also be available for public inspection at the Town of Stratford administration office.

Ron MacMillian QC
Deputy Minister

50

INDEX TO NEW MATTER
December 13th, 2003

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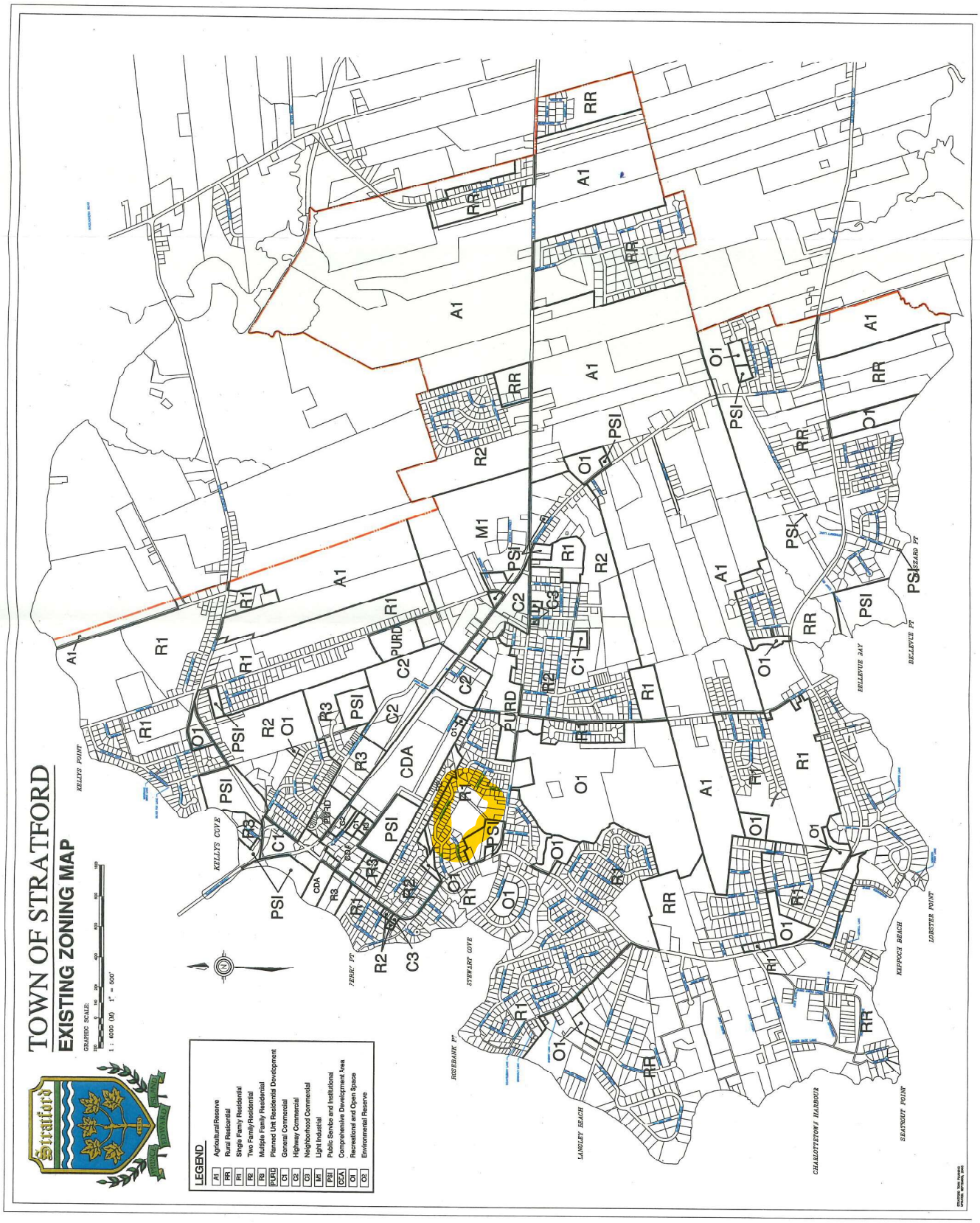
TOWN OF STRATFORD
EXISTING ZONING MAP
GRAPHIC SCALE
1 : 4000 (A) 1" = 600'
LEGEND
A1 Agricultural Reserve
RR Rural Residential
R1 Single Family Residential
R2 Two Family Residential
R3 Multiple Family Residential
PURD Planned Unit Residential Development
C1 General Commercial
C2 Highway Commercial
C3 Neighborhood Commercial
M1 Light Industrial
PSI Public Service and Institutional
CDA Comprehensive Development Area
O1 Recreational and Open Spaces
O2 Environmental Reserve
KELLYS POINT
KELLYS COVE
FERRY PT
STEWART COVE
ROSEBANK PT
LANGLEY BEACH
CHARLOTTETOWN HARBOUR
SEAVOUT POINT
LOBSTER POINT
KEPPOCH BEACH
BELLEVUE PT
BELLEVUE BAY

ISLAND REGULATORY AND APPEALS COMMISSION

IN THE MATTER OF LANDFEST COMPANY LTD. v. TOWN OF STRATFORD

(Appeal LA21018)

WITNESS LIST

Submitted on behalf of the Town of Stratford

The Town of Stratford intends to call the following witnesses:

1. Kevin Reynolds, CET – Director of Planning, Development & Heritage
2. Blaine Yatabe, Town Planner

ISLAND REGULATORY AND APPEALS COMMISSION

IN THE MATTER OF LANDFEST COMPANY LTD. v. TOWN OF STRATFORD

(Appeal LA21018)

WILL SAY STATEMENT – BLAINE YATABE

---

1. Blaine Yatabe is a Registered Professional Planner (RPP) and a Member of the Canadian Institute of Planners (MCIP). He is the Town Planner with the Town of Stratford.

2. Mr. Yatabe has worked in planning for 17 years and has been the Town Planner for the Town of Stratford for approximately 4 years.

3. Mr. Yatabe will speak to the report he prepared for the Planning Board in the present rezoning application for parcel numbers 1061175, 1061167 and 329011 (the "Subject Property").

4. Mr. Yatabe will speak to the relevant provisions of the Official Plan and the *Zoning and Development Bylaw*.

5. Mr. Yatabe will speak to the public meeting and the comments received from the public.

6. Mr. Yatabe will speak to the Notification Letter he wrote to the Appellant.

ISLAND REGULATORY AND APPEALS COMMISSION

IN THE MATTER OF LANDFEST COMPANY LTD. v. TOWN OF STRATFORD

(Appeal LA21018)

WILL SAY STATEMENT – KEVIN REYNOLDS

---

1. Kevin Reynolds is the Director of Planning, Development & Heritage with the Town of Stratford.

2. Mr. Reynolds has worked in planning with the Town of Stratford for over 20 years.

3. Mr. Reynolds will speak to the timeline and specifics of the present rezoning application for parcel numbers 1061175, 1061167 and 329011 (the "Subject Property"), as well as the history of these parcels.

4. Mr. Reynolds will speak to the relevant provisions of the Official Plan and the *Zoning and Development Bylaw*.

5. Mr. Reynolds will discuss the role of his department and how it is distinguished from the role of Council in administering rezoning applications.

6. Mr. Reynolds will speak to the public meeting and the comments received from the public.