STEWART McKELVEY
LAWYERS • AVOCATS

65 Grafton Street, P.O. Box 2140
Charlottetown PE C1A 8B9 Canada tel: 902.892.2485 fax: 902.566.5283
stewartmckelvey.com

File Reference: SM4773-310

July 7, 2020

Jonathan M. Coady, Q.C. and Will G. Cann
Direct Dial: 902.629.4520
Direct Fax: 902.566.5283
jcoady@stewartmckelvey.com

Island Regulatory and Appeals Commission
5th Floor, Suite 501
134 Kent Street
Charlottetown, PE C1A 7L1

Attention: Philip Rafuse

Dear Mr. Rafuse:

Re: Andrea Battison v. City of Charlottetown

We thank both the appellant, Andrea Battison ("Andrea"), and the respondent, City of Charlottetown ("City"), for sharing their written submissions in this matter. In an effort to further facilitate the process, we share these brief and additional thoughts on behalf of the developer, the University of Prince Edward Island. We ask that these submissions be considered by the Island Regulatory and Appeals Commission ("Commission") as part of its review process.

I. The statutory requirements were satisfied by the City.

Section 122 of the *Municipal Government Act* prescribes the requirements for an electronic meeting of council. Subsection 122(3)(b) states that notice of the meeting must be given to the public, including the fact that the meeting will be conducted by electronic means. Subsection 122(3)(c) also states that, where the meeting is a public meeting, the public must be able to "see and hear" the participants in the meeting at a place specified in the notice. These are the statutory minimum requirements that have been fixed by the Legislature for the City when it holds a public meeting by electronic means.

At the outset, it is significant to note that, for the purpose of statutory interpretation, the Legislature chose to require that members of council be able to "hear and speak to each other" while the Legislature chose to require that members of the public be able to "see and hear the meeting's participants." According to the rules of statutory interpretation, this difference in language must be respected and given effect. See *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para. 81.

Subsection 13.3 of the Procedural Bylaw #2018-19 echoes these statutory minimum requirements for a meeting by electronic means.

A review of the record demonstrates that these minimum requirements were met by the City. To the extent that there is a suggestion by Andrea that these requirements were not enough or not sufficient, the proper remedy is to lobby for changes to the legislation or the bylaw. That is not the function of the Commission. It has no such jurisdiction.

II. The record demonstrates that the public had several methods of participation.

The public was notified of the electronic meeting by the City and had a number of means to participate in the process. Those means exceeded the requirements prescribed by statute and included: (i) Webex; (ii) telephone; (iii) livestream video and audio via the internet; (iv) video and audio via screens at City Hall; (v) attendance in person at City Hall; (vi) viewing the meeting package on the City website; (vii) written submissions by mail; and (viii) written submissions by email. Written submissions from the public were accepted by the City until noon on April 30, 2020.

III. No error material to the outcome has been identified.

The Commission has previously held that an error that is technical in nature does not result in a municipal decision being overturned. In LA18-02, the Commission found that the City made a "technical error" when it issued a notice before receipt of design review approval. See LA18-02 at para. 20. The error did not result in unfairness. See LA18-02 at para. 20. It was also "not of sufficient weight to affect the ultimate outcome." See LA18-02 at para. 20. In short, the error was "a technical one." See LA18-02 at para. 29. The appeal was denied by the Commission, and the decision made by the City was confirmed.

No material error has been identified in this case. The City has acknowledged that it made a clerical or typographical mistake in one notice that was published in the newspaper. However, the City has also confirmed that no member of the public was turned away because the City insisted on compliance with that mistaken date. Rather, the record confirms that the deadline for submissions from the public extended beyond the date of the public meeting held by the City.

IV. Summary

In summary, the notice of appeal and the submissions from Andrea sound in disagreement with the processes used for electronic meetings during the COVID-19 pandemic. Changes to the prescribed minimum requirements for such meetings are matters for prospective consideration by legislators and councillors. Those changes are beyond the statutory reach of the Commission and, in this particular case, there has been no material error that could result in the decision by the City being quashed.

Yours truly,

STEWART McKELVEY

Jonathan M. Coady, Q.C. and Will G. Cann

related to public safety and national security: to protect public health and safety and to maintain the security of Canadian society (s. 3(1)(*h*)), and to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks (s. 3(1)(*i*)). The other nine objectives relate to other factors that properly inform the interpretation of the term "national interest" (e.g., "to permit Canada to pursue the maximum social, cultural and economic benefits of immigration" (s. 3(1)(*a*))). The explicit presence of these other objectives in the *IRPA* strongly suggests that this term is not limited to public safety and national security, but that the Parliament of Canada also intended that it be interpreted in the context of the values of a democratic state. Section 34 is intended to protect Canada, but from the perspective that Canada is a democratic nation committed to protecting the fundamental values of its *Charter* and of its history as a parliamentary democracy.

11 objectifs en matière d'immigration. Seuls deux objectifs ont trait à la sécurité publique et à la sécurité nationale : protéger la santé et la sécurité publiques et garantir la sécurité de la société canadienne (al. 3(1)*h*)), et promouvoir, à l'échelle internationale, la justice et la sécurité par le respect des droits de la personne et l'interdiction de territoire aux personnes qui sont des criminels ou constituent un danger pour la sécurité (al. 3(1)*i*)). Les neuf autres objectifs ont trait à différents facteurs dont la présence facilite l'interprétation de l'expression « intérêt national » (p. ex., « permettre au Canada de retirer de l'immigration le maximum d'avantages sociaux, culturels et économiques » (al. 3(1)*a*))). L'énumération expresse de ces autres objectifs dans la *LIPR* donne fortement à penser que cette expression ne porte pas uniquement sur la sécurité publique et sur la sécurité nationale. Elle indique plutôt que le Parlement du Canada voulait également qu'elle soit interprétée dans le contexte des valeurs d'un état démocratique. L'article 34 vise à protéger le Canada, mais dans la perspective du caractère démocratique du Canada, une nation qui entend protéger les valeurs fondamentales de sa *Charte* et de son histoire de démocratie parlementaire.

[79] Accordingly, the Minister's broad implied interpretation of the term "national interest" is also consistent with the purpose of the provision.

[79] Par conséquent, l'interprétation large et implicite que donne le ministre de l'expression « intérêt national » est également conforme à l'objectif de la disposition en question.

(4) Context of the Provision

(4) Le contexte de la disposition

[80] As the Court noted in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, "[t]he preferred approach [to statutory interpretation] recognizes the important role that context must inevitably play when a court construes the written words of a statute" (para. 27). The context of s. 34(2) provides much guidance for the interpretation of the term "national interest".

[80] Comme la Cour l'a indiqué dans l'arrêt *Bell ExpressVu Limited Partnership c. Rex*, 2002 CSC 42, [2002] 2 R.C.S. 559, « [c]ette méthode [d'interprétation législative] reconnaît le rôle important que joue inévitablement le contexte dans l'interprétation par les tribunaux du texte d'une loi » (par. 27). Le contexte entourant le par. 34(2) est d'un grand secours quant à l'interprétation de l'expression « intérêt national ».

[81] First, according to the presumption of consistent expression, when different terms are used in a single piece of legislation, they must be understood to have different meanings. If Parliament

[81] Premièrement, selon la présomption d'uniformité d'expression, lorsque des termes différents sont employés dans un même texte législatif, il faut considérer qu'ils ont un sens différent. Il faut

has chosen to use different terms, it must have done so intentionally in order to indicate different meanings. The term "national interest" is used in s. 34(2), which suggests that what is to be considered by the Minister under that provision is broader than the considerations of whether the individual is "a danger to the security of Canada" (s. 34(1)(*d*)) or whether he or she "might endanger the lives or safety of persons in Canada" (s. 34(1)(*e*)), both of which appear in s. 34(1). If Parliament had intended national security and public safety to be the only considerations under s. 34(2), it could have said so using the type of language found in s. 34(1). It did not do so, however.

tenir pour acquis que le législateur a délibérément choisi des termes différents dans le but d'indiquer un sens différent. L'expression « intérêt national » est employée au par. 34(2). Cette mention indique que les facteurs dont le ministre doit tenir compte pour l'application de cette disposition ont une portée plus large que les considérations consistant à savoir si la personne constitue « un danger pour la sécurité du Canada » (al. 34(1)*d*)) ou si cette personne est « susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada » (al. 34(1)*e*)), deux considérations énumérées au par. 34(1). S'il avait voulu que la sécurité nationale et la sécurité publique soient les seuls éléments à considérer suivant le par. 34(2), le législateur aurait pu l'énoncer en employant des termes du genre de ceux employés au par. 34(1). Or, il ne l'a pas fait.

[82] In a similar vein, the terms "national security", "danger to the public" and "endanger the safety of any person" each appear several times elsewhere in the *IRPA*. In light of the presumption of consistent expression, "national interest" cannot be synonymous with any of these terms. Rather, the use of the term "national interest" implies that the Minister is to carry out a broader analysis under s. 34(2). Contrary to what the Federal Court of Appeal held in the case at bar, in determining whether a person's continued presence in Canada would not be detrimental to the national interest, the Minister must consider more than just national security and whether the applicant is a danger to the public or to the safety of any person.

[82] Dans le même ordre d'idées, les expressions « sécurité nationale », « danger pour la sécurité publique » ou « danger pour [. . .] la sécurité d'autrui » sont employées à plusieurs reprises ailleurs dans la *LIPR*. Suivant la présomption d'uniformité d'expression, l'expression « intérêt national » ne peut être synonyme de l'une ou l'autre de ces expressions. L'emploi des mots « intérêt national » indique plutôt que le ministre doit procéder à une analyse plus générale au regard du par. 34(2). Contrairement à la conclusion de la Cour d'appel fédérale en l'espèce, en déterminant si la présence d'une personne au Canada ne serait nullement préjudiciable à l'intérêt national, l'examen du ministre ne doit pas se limiter à la sécurité nationale et à la question de déterminer si le demandeur constitue un danger pour la sécurité publique ou pour la sécurité d'autrui.

[83] Second, if s. 34(2) were concerned solely with the danger an applicant poses to the security of Canada, it would be impossible for a person found to be inadmissible under s. 34(1)(*d*) ("being a danger to the security of Canada") to obtain relief under s. 34(2). This is an absurd interpretation which must be avoided.

[83] Deuxièmement, si le par. 34(2) concernait uniquement le danger que pose le demandeur pour la sécurité du Canada, il serait impossible pour la personne interdite de territoire en vertu de l'al. 34(1)*d*) (« constituer un danger pour la sécurité du Canada ») d'obtenir une dispense aux termes du par. 34(2). Il s'agit là d'une interprétation absurde, à éviter.

[84] Third, the respondent argues that, because of the possibility of H&C relief under s. 25 of

[84] Troisièmement, l'intimé soutient qu'en raison de la possibilité qu'une personne obtienne une

120. Requirement to attend

(1) The chief administrative officer shall attend all council and council committee meetings, including meetings that are closed to the public, unless a matter in relation to the chief administrative officer is the subject of the closed meeting.

Recording of minutes

(2) Where, pursuant to subsection (1), the chief administrative officer is excluded from a closed meeting, the mayor shall designate a person to record the minutes of the meeting as required by section 116 and that person shall sign the minutes in the place of the chief administrative officer. *2016,c.44,s.120.*

121. Special meetings

(1) A special meeting of the council shall be called by the chief administrative officer when requested in writing to do so by

(a) the mayor; or

(b) a majority of council members.

Notice

(2) Notice of the date, time and place of the special meeting and the nature of the business to be transacted at the special meeting shall be given at least 24 hours before the time of the meeting

(a) to the public through local media or other means as prescribed by procedural bylaw; and

(b) to the council members by providing a copy of the notice to each council member at the place to which the member has directed such notices be sent.

Notice of change

(3) If a council changes the date, time or place of a special meeting, the chief administrative officer shall give at least 24 hours' notice of the change, in accordance with subsection (2),

(a) to all council members; and

(b) to the public.

Limitation

(4) No business other than that stated in the notice shall be transacted at a special meeting unless all members are present and unanimously agree to deal with other matters. *2016,c.44,s.121.*

122. Electronic meeting of council

(1) Subject to subsection (3), a council meeting may be conducted by electronic means if

(a) authorized by council's procedural bylaw; and

(b) the council members are unable to meet in person.

***Idem*, council committee**

(2) Subject to subsection (3), a council committee meeting may be conducted by electronic means at any time if authorized by council's procedural bylaw.

Public meeting by electronic means

(3) A meeting shall only be conducted by electronic means if

(a) the electronic means by which the meeting is conducted enable, at a minimum, the council and council committee members participating in the meeting to hear and speak to each other;

(b) notice is given to the public of the meeting, including that it will be conducted by electronic means; and

(c) where the meeting is a public meeting,

(i) facilities are provided to enable the public to see and hear the meeting's participants at a place specified in the notice, and

(ii) a municipal employee is in attendance at the place specified in the notice.

Participation by telephone, etc.

(4) Where authorized to do so by council's procedural bylaw, a council or council committee member who is unable to attend a meeting of council or the council committee in person may participate in the meeting by telephone or by electronic means that meet the requirements of clause (3)(a).

Member deemed present

(5) A council or council committee member participating by telephone or electronic means in a meeting in accordance with this section is considered to be present at the meeting.

Required information

(6) Where

(a) a council or council committee member is participating in a meeting conducted by electronic means; and

(b) there is a report or recommendation to be considered in respect of a matter before the council or council committee,

the council or council committee member shall take part in the debate and voting on that matter only if the member has before him or her a copy of the report or recommendation to be considered. *2016,c.44,s.122.*

Division 2 - Bylaws and Resolutions

123. Mode of exercise of powers of council

(1) The powers of a council shall only be exercised by either bylaw or resolution.

Council's discretion

(2) Unless expressly required to be exercised by bylaw, the powers of a council may be exercised by bylaw or resolution.

Restriction

(3) Where this Act states that a council may do a thing by bylaw the council shall, if it chooses to do that thing, do so by means of a bylaw. *2016,c.44,s.123.*

124. Bylaw procedure

A bylaw is validly made if

(a) it is read and formally approved by a majority of the council members present and voting on two occasions at meetings of the council held on different days;

SECTION 120 requires the chief administrative officer to attend all council and council committee meetings, unless a matter in relation to the chief administrative officer is the subject of the meeting.

SECTION 121 requires the chief administrative officer to call a special meeting of the council when requested in writing to do so by the mayor or a majority of the council members.

SECTION 122 authorizes a council or council committee to meet electronically where authorized to do so by council's procedural bylaw and where the other specified conditions are met.

SECTION 123 provides that a council shall exercise its powers either by bylaw or resolution. Unless there is an express requirement for the making of a bylaw, council can use its discretion. The section also clarifies that where the Act states that a council may do a thing by bylaw the council shall, if it chooses to do that thing, do so by means of a bylaw.

SECTION 124 establishes the procedure for making a valid bylaw.

SECTION 125 provides for a limited exception to the requirement in section 124 that the bylaw be read if copies of the proposed bylaw have been made available to the public prior to the meeting. The section also provides that a proposed bylaw may be amended after its first reading.

SECTION 126 provides that the power to make a bylaw or resolution includes the power to amend or repeal the bylaw and amend or rescind the resolution.

SECTION 127 provides that the required first and second readings of a proposed bylaw are nullified if the bylaw is not formally passed within two years from the date of first reading.

SECTION 128 provides that each bylaw must be in writing and that a copy bearing the authorized signatures and sealed with the municipality's corporate seal shall be kept in the register of bylaws. Copies of the bylaws are available for inspection and copies shall be provided to any person on the payment of a reasonable fee.

SECTION 129 requires that a certified copy of each bylaw passed by a council must be filed with the Minister.

SECTION 130 establishes that date on which a bylaw comes into force.

The hon. Leader of the Third Party.

Dr. Bevan-Baker: Thank you.

This is in section 119, closed meetings, (4). It says that the matters discussed in camera should be made public when, and I quote, "confidentiality is no longer required." I'm just wondering how that is determined. Is that in council, or is that unilaterally by the chair, or again would that fall under the bylaws of the municipality?

Samantha Murphy Manager: The argument for confidentiality would have to fall under those categories set out in subsection (1), so –

Dr. Bevan-Baker: Okay, I figured that's what it was, but I just wanted to make sure.

Thank you.

Chair: Any other questions on 54? 55? 56?

The hon. Member from Rustico-Emerald.

Mr. Trivers: Yes. I'm looking at public meeting by electronic means and participation by telephone, and I just wanted to say kudos to you. It's great to see that in the legislation to allow people to meet more easily. Well done.

I was wondering if you can give an example of 122(3)(c)(i): "facilities are provided to enable the public to see and hear the meeting's participants at a place specified in the notice…"

Could you give an example of what would qualify?

Mr. Mitchell: Library.

Samantha Murphy Manager: Yeah, I suppose it could be a library. What we're picturing is if – and first of all, we don't expect this particular provision to be used all that frequently. We expect it's more likely that one person would call into a meeting than all of council would hold a meeting electronically, but if they were to do so there'd be a requirement that a space be set up where members of the public could still see and hear whether it's –

Mr. Mitchell: It could be in the chambers, it could be in the library, it could be wherever the technical ability to do so would be, would qualify, I'm sure.

Mr. Trivers: Chair?

Chair: The hon. Member from Rustico-Emerald.

Mr. Trivers: Would this eliminate the ability for members of the public to connect from their home? I notice that (3)(c)(ii) says: "a municipal employee is in attendance at the place specified in the notice."

Samantha Murphy Manager: It doesn't mean that it has to be broadcast. It means that it needs to be observed in a location. It could, as the minister was saying, be the council chambers where the public can come in and watch and it'd be onto some sort of screen that's broadcast to that location.

Mr. Mitchell: It's not to limit anything. It's to allow council to be present whatever the situation is. They may be out-of-province or something.

Chair: The hon. Member from Rustico-Emerald.

Mr. Trivers: If I want to connect in from my home and I can see and hear the meeting's participants, there's a number of different ways to do that, but there's no municipal employee with me. Am I still allowed to do that? Or would –

Samantha Murphy Manager: This is not to prohibit that, but it does mean that for those who do not have Internet connectivity, there's some place they can go and physically watch.

Mr. Trivers: Ah, okay. Thank you.

Chair: Any other questions on page 56? 57?

The hon. Leader of the Third Party.

Dr. Bevan-Baker: This is right at the bottom of page 57, section 130(2). You need ministerial approval for some bylaws, and I'm just wondering what the mechanism for that is, and how that approval is given. Is that –

Application

(7) Bylaws giving effect to an interim planning policy do not apply in respect of any development for which application is made prior to the date of the receipt by the council of the proposed interim planning policy from the planning board. *1988, c.4, s.10; 1995, c.29, s.5 {eff.} Oct. 14/95.*

OFFICIAL PLAN

11. Opportunity for public input

(1) Before recommending to the council the adoption of an official plan or any review of an official plan, the planning board shall give an opportunity to residents and other interested persons to make representations.

Public meeting

(2) The board shall hold at least one public meeting, notice of which is published on at least two occasions in a newspaper circulating in the area indicating

(a) in general terms, the content of the official plan or review of the official plan and the proposed implementing bylaws;

(b) the date, place and time of the meeting, which shall be held not less than seven clear days after the date of publication of the notice;

(c) the location at which copies of the proposed official plan or review of the official plan or proposed bylaws may be inspected during office hours; and

(d) that residents and other interested persons are invited to attend and make representations concerning the plan or review.

Minutes of meeting

(3) The planning board shall maintain a record of the proceedings at the public meeting and, in particular, of the objections and representations made by residents and other interested persons. *1988, c.4, s.11.*

12. Official plan

An official plan shall include

(a) a statement of economic, physical, social and environmental objectives;

(b) a statement of policies for future land use, management and development, expressed with reference to a specified period not exceeding fifteen years;

(c) proposals for its implementation, administration and the periodic review of the extent to which the objectives are achieved. *1988, c.4, s.12.*

13. Approval by planning board

The planning board shall recommend to the council the adoption of an official plan if approved by a vote of the majority of the members of the board present and voting at a meeting thereof. *1988, c.4, s.13.*

14. Adoption of plan

(1) The council may adopt an official plan by resolution.

MUNICIPAL PLANNING BYLAWS

16. Municipal planning bylaws

A council may make bylaws implementing an official plan for the municipality. *1988, c.4, s.16.*

17. Approval of Minister

The bylaws shall be subject to the approval of the Minister and shall be effective on the date of approval by the Minister. *1988, c.4, s.17.*

18. Notice of meeting

(1) Before making any bylaw the council shall

(a) give an opportunity to residents and other interested persons to make representations; and

(b) at least seven clear days prior to the meeting, publish a notice in a newspaper circulating in the area indicating in general terms the nature of the proposed bylaw and the date, time and place of the council meeting at which it will be considered.

Bylaw amendment requiring official plan amendment

(2) Where a bylaw amendment requires an amendment to the official plan pursuant to subsection 15(2), the council may consider the official plan amendment concurrently with the bylaw and shall

(a) indicate in general terms, in the notice published under clause (1)(b), the nature of the proposed plan amendment; and

(b) give the planning board an opportunity to comment on the plan amendment prior to adoption of the amendment. *1988, c.4, s.18.*

19. Procedure

A bylaw shall be made in accordance with the following procedure:

(a) it is read and formally approved by a majority of councillors on two occasions at meetings of the council held on different days;

(b) after it is read a second time, it is formally adopted by resolution of the council;

(c) it is signed by the mayor or chairman, the administrator and the Minister and formally declared to be passed, and sealed with the corporate seal of the municipality;

(d) the minutes of the meeting record the name of the bylaw and the fact that it is passed; and

(e) a copy of the bylaw bearing the signature of the mayor or chairman, the administrator and the Minister is entered into the register of bylaws retained by the administrator. *1988, c.4, s.19.*

20. Bylaws

(1) The powers of a council to make bylaws includes the power to make bylaws applicable within the municipality with respect to all of the matters set out in clauses 8(1)(a) to (q) except clauses (i), (l) and (p) as if

(a) references to the Crown were references to the municipality;

pursuant to the *Municipal Government Act* R.S.P.E.I. 1988, Cap. M-12.1;

277. (1) The *Planning Act* R.S.P.E.I. 1988, Cap. P-8, is amended by this section. *Planning Act*

(2) Clause 1(g) of the Act is repealed and the following substituted:

(g) "municipality" means a municipality as defined in the *Municipal Government Act* R.S.P.E.I. 1988, Cap. M-12.1; municipality

278. (1) The *Police Act* R.S.P.E.I. 1988, Cap. P-11.1, is amended by this section. *Police Act*

(2) Subclause 1(u)(v) of the Act is repealed and the following substituted:

(v) any other police department that is established for a municipality as defined in the *Municipal Government Act* R.S.P.E.I. 1988, Cap. M-12.1;

279. (1) The *Provincial Court Act* R.S.P.E.I. 1988, Cap. P-25, is amended by this section. *Provincial Court Act*

(2) Subsection 6(1) of the Act is amended by the deletion of the words "all other towns and villages in the province**" and the substitution of the words "**all other municipalities in the province**".**

(3) Clause 6(2)(d) of the Act is repealed and the following substituted:

(d) have the power, authority and jurisdiction to try municipal ticket offences under a bylaw made pursuant to the *Municipal Government Act* R.S.P.E.I. 1988, Cap. M-12.1.

280. (1) The *Real Property Assessment Act* R.S.P.E.I. 1988, Cap. R-4, is amended by this section. *Real Property Assessment Act*

(2) Clause 1(1)(k) of the Act is repealed and the following substituted:

(k) "person" includes a person other than the Minister, and includes a firm, company, association and a municipality as defined in the *Municipal Government Act* R.S.P.E.I. 1988, Cap. M-12.1; person

281. (1) The *Real Property Tax Act* R.S.P.E.I. 1988, Cap. R-5, is amended by this section. *Real Property Tax Act*

City's record. Both Hurnick and Banks also expanded upon their presentations during their testimony at the hearing.

18. On November 14, 2017, the Amendment passed first and second reading.[25] On November 27, 2017, the Amendment passed third reading.[26]

Issues

19. Condo Corp raised a number of arguments in its appeal. The Commission has distilled these arguments in light of the evidence at the hearing. Condo Corp makes three primary submissions:

    a. Did the City fail to follow the proper procedure as set out in its Bylaw and err by issuing notice of a public meeting before APM obtained conditional design review approval?

    b. Did the City err by failing to follow the advice of its planning staff?

    c. Is the decision of the City to permit the Development consistent with good or sound planning principles?

Analysis

A. Design Review Standards Procedure

20. Condo Corp argued that the City erred in failing to obtain conditional design review approval before issuing notice of the November 2, 2017 public meeting. Condo Corp contends that this approval is required under section 9.10.1 of the Bylaw. The Commission agrees, but finds that this technical error was not material and did not result in any unfairness. The deficiency was also not of sufficient weight to affect the ultimate outcome of the appeal.

21. Section 9 of the Bylaw sets out design review standards that apply to the 500 Lot Area of the City (the "Area"), including the Downtown Neighbourhood Zone where the Property is located. Witnesses for the City explained to the Commission that the design review process was created to recognize the unique history and structure of the Area and to ensure that future development is compatible with its special character. In essence, the design review process provides an additional level of oversight, including a review by the heritage board for the City and an external architect.

22. The design reviewer considers a proposed building's exterior appearance with reference to the design standards in the Bylaw and the 500 Lot Standards and Guidelines (the "Guidelines").[27] According to the City, the reviewer provides comments and indicates if the proposal meets the design standards and the Guidelines. The reviewer does not re-design the building.

---

[25] Exhibit R1, Tab 24.

[26] Exhibit R1, Tab 31.

[27] See also, Bylaw, ss.9.8-9.9.

23. It was not contested that the Development, being a new construction project with more than four units, was subject to the design review process.[28] It was also not strenuously contested that the Development was a "substantive application."[29] Substantive applications are subject to "all applicable provisions" of the Bylaw, including the design review standards."[30]

24. The application by APM sought to increase the maximum storey height in the Bylaw (from three storeys to four storeys),[31] which triggered a public consultation process (a public meeting).[32] The Commission heard testimony that, where section 4.79 of the Bylaw is engaged, the City follows the process set out in section 4.29 of the Bylaw.[33] The process was described by the City as being "rigorous."

25. Section 9.10.1.b of the Bylaw states that substantive applications "must first receive conditional approval from the external design reviewer prior to public notification being sent on any other matters."

26. The City argues that section 9.10 of the Bylaw was not engaged by APM's application because it only applies to applications where there is no requirement for a public meeting; that is, the section creates a public consultation process where there otherwise would be none. The Commission disagrees with the City's position. Section 9.10 of the Bylaw distinguishes between public *notification* and public *consultation*. Section 9.10.1 applies to applications that require public *notification* under the Bylaw. It clearly provides that conditional design review must be completed before that *notification* is issued. Section 9.10.2 goes on to add an additional and more onerous public *consultation* process in two specific instances, neither of which is applicable in this case.

27. The text chosen by the City in section 9.10.1 of the Bylaw requires conditional design review to be completed before notification is issued of the public meeting contemplated under section 4.29 of the Bylaw. Conditional approval by a design reviewer was not obtained before the City issued its notice of the public meeting in October 2017. As the record shows, the design review process was not initiated by the City until March 2018.[34] This was an error.

28. However, as counsel for the City noted in his closing submissions, nothing turns on this error.

29. It is well-established that the Commission hears appeals by way of a hearing *de novo*. Given that the City erred in failing to obtain conditional approval from a design reviewer before issuing notice of the public meeting, the Commission can and has reviewed APM's submission to the design reviewer and the subsequent reports.[35] Upon review, the

[28] Bylaw, s.9.3.12.
[29] Bylaw, s.9.3.12.
[30] Bylaw, s.9.8.1.
[31] Bylaw, s.4.79.2.
[32] Bylaw, s.4.29.
[33] As per the Bylaw, s.4.79.1.b.
[34] Exhibit D2.
[35] Exhibits D2-D4.

Commission finds that approval was ultimately granted.[36] In the circumstances of this case, the City's error was, therefore, a technical one.

30. The plans submitted for design review were filed with the Commission by APM.[37] The development submitted for design review appears to the Commission to be substantially similar to that put forward at the public meeting.[38] For example, neither development has patios on the ground floor, or balconies on the second floor, adjacent to the Rochford Condominium.[39]

31. The Commission also notes that the recommendations from the design reviewer do not speak to Condo Corp's main concerns regarding proximity, parking, or density. The design reviewer recommended changes to the building entrance, including materials and detailing.[40] These changes were made by APM and accepted by the design reviewer.[41]

32. In conclusion, the Commission is not persuaded that a different result would have followed had design review been completed before the City provided notice of the public meeting. The plans submitted by APM and approved by the design reviewer are substantially similar to the plans presented by APM at the public meeting. The Commission does not accept Condo Corp's argument that the public did not know at the public meeting what APM was proposing to build. The public meeting was attended by members of Condo Corp. Hurnick, for example, made a rebuttal presentation. Further, the modifications suggested by the design reviewer (and, ultimately, accepted by APM) did not relate to the complaints raised by Condo Corp at the public meeting or the hearing of the appeal. The weight of the evidence before the Commission did not demonstrate that this error was material to the application or resulted in any prejudice to Condo Corp or the public.

B. Failure to Follow Advice from Planning Staff

33. Condo Corp argues that the City did not follow the advice of its planning staff who recommended approval of the Amendment "subject to receipt of final pinned survey plans, design review approval, and the signing of a development agreement." Condo Corp relies on the text of the Council resolution on November 14, 2017[42] and argues that the text of the Bylaw should have been amended to include these conditions. Condo Corp contends that this error means that a future developer – not necessarily APM – is now able to, as-of-right, develop a four-storey, 23-unit apartment dwelling on the Property.

34. The City submitted that these requirements were conditions subsequent upon approval of the Amendment and not conditions forming part of the Amendment itself. In other words, the conditions would have to be fulfilled by APM or any other developers at further stages in the development process, culminating with a building permit issued upon conditions included in a development agreement. The City noted that the resolution filed in the record was an attachment to the draft development agreement.[43] The Commission heard

---

[36] Exhibit D4. See also, the Heritage Board Resolution dated April 19, 2018. Exhibit D5.
[37] Exhibit D3.
[38] Exhibit R2.
[39] Exhibit R1, Tabs 1; Exhibit R2 (supplementary record); Exhibit D1; Exhibit D3.
[40] Exhibit D2.
[41] Exhibit D4.
[42] Exhibit R1, Tab 25.
[43] Exhibit R1, Tab 35.