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Halifax Regional Council
March 27, 2007

TO: Mayor Kelly and Members of Halifax Regional Council

SUBMITTED BY: M.E. Donovan, Director, Legal Services & Risk Management

DATE: March 6, 2007

SUBJECT: **Heritage Trust of Nova Scotia and Howard Epstein v. Halifax Regional Municipality and United Gulf Developments Ltd (Former Texpark)**

INFORMATION REPORT

ORIGIN

This report arises from an application in the Supreme Court of Nova Scotia by Heritage Trust of Nova Scotia and Howard Epstein to quash the decision of Council which approved a development agreement to allow the construction of a building comprised of two towers on the former Texpark lands on Granville Street in Halifax.

BACKGROUND

On March 21, 2006, Regional Council approved the entering into of a Development Agreement (DA) with United Gulf Developments Ltd. (UGDL) for the development of the former Texpark site. The approval included two 26-27 storey towers of a twisted design.

Heritage Trust and Howard Epstein (the Applicants) filed an application in the Supreme Court of Nova Scotia to quash the decision of Council. The Applicants claimed that Council erred in law and jurisdiction and breached the rules of procedural fairness and natural justice when it approved the DA because:

1. After the close of the public hearing, Council received new and relevant information from the developer including the full wind and shadow studies and presentations by the developer regarding the studies;

2. Prior to the public hearing HRM failed to provide all relevant documentation to members of the public including the wind and shadow studies, the tender documents for the sale of the property and the Agreement of Purchase and Sale between UGDL and HRM;

3. Prior to the public hearing Council fettered its discretion to approve or disapprove the DA when it contractually or otherwise bound itself to approve the DA as a result of the tender and subsequent acceptance of the offer to purchase with full knowledge that UGDL intended to contruct a tower of 26 storeys in height;

4. Prior to the public hearing, Council fettered its discretion to approve or disapprove the DA because members of Council believed they were required to approve the DA (i.e. considered irrelevant matters) because HRM sold land to UGDL with knowledge that the developer planned to build a tower of 26 storeys.

The Application was heard in the Supreme Court of Nova Scotia on December 6 and 7, 2006. The Supreme Court released its decision to deny the application in January 2007 without reasons. On February 26, 2007, the Supreme Court released its reasons for its decision to deny the application to quash Council's decision.

DISCUSSION

The Supreme Court, in its discussion of the matter, confirmed that the appropriate standard of review of procedural fairness is "correctness". Courts must decide whether the procedures used by a tribunal, board, council or other body acting quasi-judicially are fair. The Court stated that the rules of natural justice apply but their content depends on a number of factors: "including the terms of the statute pursuant to which the body operates, the nature of the particular function of which it is seized,

and the type of decision it is called upon to make".

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The Court went on to say that to determine the degree of procedural fairness required, the factors to be considered are:

1. The nature of the decision and whether Council was acting legislatively or quasi-judicially;
2. The nature of the statutory scheme and the terms of the statute;
3. The importance of the decision to the individual affected; and
4. The legitimate expectations of those challenging the decision and council's choice of procedure.

After the Court reviewed all of the above factors, it concluded that the duty of procedural fairness in a situation like this one is moderate to fairly high. The hearing was a public hearing but not one involving a few residents in a local neighbourhood but one with broader policy considerations. HRM was entitled to and did establish its own procedures for conducting public hearings with which the applicants were familiar and there were no representations that special provisions would be made for them.

Disclosure of Information Prior to the Public Hearing

On the issue of the allegation of failure by HRM to provide copies of the tender documents, agreement of purchase and sale and the wind and shadow studies at all or in sufficient time for the public to participate meaningfully in the public hearing, the Court considered what is required of a municipality in terms of providing material.

Tender Documents

The Court opined that the Supreme Court of Canada established the standard for disclosure as being sufficient to allow for meaningful participation in the hearing. With respect to the tender documents the Court found that the brief references to them in the staff report of December 16, 2005 were insufficient to make these documents relevant to the public hearing with respect to the approval of a DA. In fact it was made clear that there was no obligation to buy the land back from UGDL if Council did not approve the DA. Further, even if they were relevant, the Court found that the tender and report were provided to Mr. Pacey prior to the public hearing.

Wind and Shadow Studies

With respect to the disclosure of the wind and shadow studies, the Court noted that Council did not have the studies prior to the public hearing. The Court further noted that both Epstein and Pacey did

request a copy of the studies. The Court stated as follows at paragraph 139:

> [139] However, Philip Pacey and Howard Epstein both asked for these studies. Unfortunately, the position of HRM, or at least that of the planner responsible for dealing with this proposal on behalf of HRM, was based upon the mistaken belief that the studies were subject to FOIPOP provisions of the *Municipal Government Act* until released to Council. Although this issue was not before me for decision, it appears to me that this is an erroneous interpretation of the FOIPOP provisions in the MGA. The studies were provided to staff to address policies in the MPS about wind and shadow. It is difficult to understand how they could, under the circumstances, be considered to be confidential.

The Court after reviewing all of the facts, however, found that in the circumstances the public had sufficient disclosure to allow it to participate meaningfully in the public hearings and that Council had fulfilled its duty of fairness in the circumstances of this case.

The Court stated that, while there were flaws in the provision of information, perfection is not the standard. In the view of the Court it was an error to deny production of the material submitted to HRM by a developer which material was reviewed by staff in making its recommendation about the proposed development. However, Mr. Pacey received a copy of the wind study before the public hearing and was shown the shadow study prior to the public hearing. The Court considered that the wind and shadow issues were not mentioned at the public hearing for the first time; that staff reviewed them and commented on them in the staff report. Ultimately the Court stated:

> [M]embers of the public are entitled to have what members of Council have at the outset of the public hearing. No one suggests the report of staff and attachments which addressed wind and shadows were not available. The public had what councillors had and at least one person had more.

The Court concluded:

> ... in this case that the requirements of procedural fairness (moderate to fairly high) did not require HRM to provide the studies to the public before the public hearing. It may have been preferable but was not mandated in all the circumstances of this case.

As such the public had sufficient information in this case to be able to participate meaningfully.

Even if HRM should have provided the studies earlier, the Court reasoned that there would be substantial inconvenience to hold another public hearing one year later and that in this case, there was no substantial prejudice to the Applicants or to the public generally as the issues of wind and shadow were fully canvassed before Council.

Receipt of Information from Developer after close of public hearing

With respect to the issue of receipt of information from the developer after the close of the public hearing, the Court reviewed the Williams Lake decision and stated that in its view that case does not stand for the proposition that in every case where a developer is heard after the close of the public hearing, the hearing must be re-opened. The question for the Court was whether the information was new information that required the re-opening of the public hearing so the public could comment or whether it was clarification or provision of additional information on matters already raised. If it was the latter, the Court stated that the re-opening would only have allowed the opponents to the development an opportunity to repeat their earlier concerns.

The Court found that the issues of wind and shadow were not new issues addressed for the first time after the close of the public hearing. Nor did the substance of the developer's proposal change as a result of the presentation of this information. Either of those things would have required the public hearing to be re-opened. The Court concluded that the additional information was in the nature of "clarification" and "resolution of problems raised at the public hearing." Therefore there was no harm to the integrity of the process.

The Court concluded that had the public hearing been re-opened it would have merely provided public an opportunity to reiterate their concerns about wind and shadow.

Fettering of Discretion

The Applicants claimed that HRM fettered its discretion by the terms of the call for tenders and by entering into an agreement of purchase and sale which referred to a tower. They referred to the wording of both and claimed that this meant that HRM expected a tower to be constructed on the lands. In doing so, they claimed Council pre-judged the DA application. HRM argued that it cannot legally fetter its discretion and that there was no evidence that it did so.

The Court found that HRM could have done little more than it did to ensure it did not fetter its discretion and concluded that it did not do so.

Considering Irrelevant Matters

The Applicants claimed that Council considered irrelevant factors in making its decision to approve the DA. Specifically they referred to comments of specific Councillors; those of Councillor Streatch and Uteck and argued that the comments made by those Councillors prejudiced the rest of the Council in debate. The Court found that there was no merit to this argument. The Court found, after reviewing the entirety of the comments made by those two Councillors, that they considered relevant planning matters. Further the Court opined that even if those Councillors had taken a stand in favour of the development, they are not disqualified unless it is shown that their minds could not be changed. In this case there was no evidence that they were not capable of being persuaded. In fact,

the Court reviewed all of the comments by all the Councillors who spoke and found that they all considered relevant planning matters.

Summary and Conclusion of the Court

The Court found in favour of HRM and refused the application to quash the decision of Council with costs payable by the Applicants to HRM.

BUDGET IMPLICATIONS

N/A

FINANCIAL MANAGEMENT POLICIES / BUSINESS PLAN

This report complies with the Municipality's Multi-Year Financial Strategy, the approved Operating, Capital and Reserve budgets, policies and procedures regarding withdrawals from the utilization of Capital and Operating reserves, as well as any relevant legislation.

ATTACHMENTS

A copy of this report can be obtained online at http://www.halifax.ca/council/agendasc/cagenda.html then choose the appropriate meeting date, or by contacting the Office of the Municipal Clerk at 490-4210, or Fax 490-4208.

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