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Halifax Regional Council
July 3, 2007

TO: Mayor Kelly and Members of Halifax Regional Council

SUBMITTED BY: M.E. Donovan
M.E. Donovan, Director, Legal Services

DATE: June 26, 2007

SUBJECT: London (City) v. RSJ Holdings Inc.

INFORMATION REPORT

ORIGIN

On June 21, 2007, the Supreme Court of Canada released its decision in *London (City) v. RSJ Holdings Inc.*, (2007), S.C.J. 29 (S.C.C.) discussing the importance of holding Council meetings in public rather than “in camera”.

BACKGROUND

In September, 2003, some of the residents of the City of London (“City”) complained to the City about the increase in student housing in their residential neighbourhood. In response, the City’s Planning Committee passed a resolution requesting the City Solicitor to study the issue.

In November 2003, RSJ bought a residential property on Richmond Street with the intention of demolishing the existing building and constructing four individual residential units in its place. Between November, 2003 to January, 2004, RSJ submitted a site plan for approval and applied for both demolition and building permits.

In December, 2003, the City Solicitor delivered a report to the Planning Committee on the prospect of regulating the number of bedrooms in a dwelling unit, and on licensing student housing as a business. There was no reference to an interim control bylaw.

In January 2004, Council, and its Planning Committee, held two closed meetings to debate an interim control bylaw that would impose a one-year freeze on all land development along the Richmond Street Corridor. Within eight minutes of concluding its second closed meeting, the Council introduced and gave three readings to the interim land control bylaw (“bylaw”). The bylaw was passed at the open session without debate or discussion. The City admitted that it breached the statutory requirements under Ontario’s *Municipal Act* requiring, for a closed Council meeting, a resolution stating: (1) that a closed meeting would be held; and (2) the general nature of the matter to be considered at the closed meeting.

RSJ, one of the affected land owners, applied for a court order quashing the bylaw for illegality on the ground that the City discussed and then effectively decided to pass the bylaw at two closed meetings. RSJ relied on section 239(1) of the *Municipal Act*, 2001, generally requiring Council and Committee meetings to be open to public, statutory sections attached as Appendix “A”.

The City countered by arguing that under Ontario’s *Planning Act* an interim control bylaw could be passed without prior notice and without holding a public hearing. Therefore, it was contended, the enactment of the bylaw was a matter in respect of which Council may hold a closed meeting. In an unanimous judgment, the Supreme Court of Canada (S.C.C.) disagreed with the City and held: “the City’s duty to give advance notice and to hold a public meeting at which interested citizens have the right to make representations is entirely distinct from its obligation to hold its meetings in public.”

DISCUSSION

The S.C.C. held that a bylaw was a powerful zoning tool and the power to enact an interim control bylaw was:

an extraordinary one, typically exercised in a situation where an unforeseen issue arises with the terms of an existing zoning permission, as a means of providing breathing space during which time the municipality may study the problem and determine the appropriate planning policy and controls for dealing with the situation.

The S.C.C. found that the requirement to hold an open meeting was a legislative choice to increase transparency and accountability in the decision-making process of local governments. In this case, the enactment of the bylaw, given its effect on land owners, enhanced the need for transparency and accountability. The S.C.C. warned that:

The democratic legitimacy of municipal decisions does not spring solely from periodic elections, but also from a decision-making process that is transparent, accessible to the public, and mandated by law. When a municipal government improperly acts with secrecy, this undermines the democratic legitimacy of its decision, and such decisions, even when intra vires, are less worthy of deference.

The S.C.C. ruled that the interim control bylaw provisions contained in the *Planning Act* did not obviate the statutory requirement to hold public meetings under s. 239 of the *Municipal Act, 2001*. The S.C.C. found that the *Planning Act* only removed both the obligations to give advance notice of the bylaw and to hold a public meeting in regards to the bylaw but did not eliminate the City's obligation to hold its meetings in public. Thus, while RSJ did not have the right to: (1) notice of the City's intention to pass the bylaw; nor (2) any right to make representations at a public hearing in regards to the bylaw; nonetheless, RSJ had the right, along with other citizens, to a transparent and open process which required that Council's discussions be open to the public.

In reaching its conclusion, the S.C.C. drew a distinction between: (1) a citizen's right to notice and participation, and (2) his or her right to observe municipal government in process. The open meeting requirement concerned the latter while the *Planning Act* only removed requirements for the former. It follows, that while the City acted within its power in passing the bylaw, the failure to have the discussions at a public meeting necessitated quashing the bylaw.

In summary, Ontario's *Planning Act* only eliminated the requirements for notice and a public hearing when considering an interim control bylaw; however, it did not remove the general requirements under the *Municipal Act* that Council's meetings be opened to the public. Likewise, the, *Municipal Act* did not allow closed meetings for interim land control bylaw matters. Thus, all discussions on the bylaw had to be conducted in an open public session.

Similar to the City of London, there were interim growth controls imposed on development in HRM pending adoption of the Regional Plan. On January 22, 2004, Regional Council passed a motion requesting the Minister of Service Nova Scotia and Municipal Affairs issue a Ministerial Order under the *MGA*, to establish an interim planning area and that Regional Council initiate an amendment to all relevant Municipal Planning Strategies and Bylaws in HRM to place interim growth controls. Unlike the actions of City of London, Regional Council's motion was passed in open Council, providing the opportunity for the public to observe the discussion of Council, and for the public to participate in the subsequent amendments.

BUDGET IMPLICATIONS

There are no budget implications associated with this report.

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

1. Appendix "A"

A copy of this report can be obtained online at <http://www.halifax.ca/council/agendasc/agenda.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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APPENDIX "A"

Ontario's *Municipal Act*, 2001, states:

239. (1) Except as provided in this section, all meetings shall be open to the public.

(2) A meeting or part of a meeting may be closed to the public if the subject matter being considered is,

- (a) the security of the property of the municipality or local board;
- (b) personal matters about an identifiable individual, including municipal or local board employees;
- (c) a proposed or pending acquisition or disposition of land by the municipality or local board;
- (d) labour relations or employee negotiations;
- (e) litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;
- (f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose;
- (g) a matter in respect of which a council, board, committee or other body may hold a closed meeting under another Act. [emphasis added]**

239 (4) Before holding a meeting or part of a meeting that is to be closed to the public, a municipality or local board or committee of either of them shall state by resolution,

- (a) the fact of the holding of the closed meeting; and
- (b) the general nature of the matter to be considered at the closed meeting.

Ontario's *Planning Act* states:

34 (12) Before passing a by-law under this section, except a by-law passed pursuant to an order of the Municipal Board made under subsection (11) or (26),

- (a) the council shall ensure that,
 - (i) sufficient information and material is made available to enable the public to understand generally the zoning proposal that is being considered by the council, and
 - (ii) at least one public meeting is held for the purpose of giving the public an opportunity to make representations in respect of the proposed by-law; and

(b) in the case of a by-law that is required by subsection 26(9) or is related to a development permit system, the council shall ensure that at least one open house is held for the purpose of giving the public an opportunity to review and ask questions about the information and material made available under subclause (a)(i).

(13) Notice of the public meeting required under subclause (12)(a)(ii) and of the open house, if any, required by clause (12)(b),

(a) shall be given to the prescribed persons and public bodies, in the prescribed manner; and

(b) shall be accompanied by the prescribed information

38. (1) Where the council of a local municipality has, by by-law or resolution, directed that a review or study be undertaken in respect of land use planning policies in the municipality or in any defined area or areas thereof, the council of the municipality may pass a by-law (hereinafter referred to as an interim control by-law) to be in effect for a period of time specified in the by-law, which period shall not exceed one year from the date of the passing thereof, prohibiting the use of land, buildings or structures within the municipality or within the defined area or areas thereof for, or except for, such purposes as are set out in the by-law.

(2) The council of the municipality may amend an interim control by-law to extend the period of time during which it will be in effect, provided the total period of time does not exceed two years from the date of the passing of the interim control by-law.

(3) No notice or hearing is required prior to the passing of a by-law under subsection (1) or (2) but the clerk of the municipality shall, in the manner and to the persons and public bodies and containing the information prescribed, give notice of a by-law passed under subsection (1) or (2) within thirty days of the passing thereof. [emphasis added]

(4) Any person or public body to whom notice of a by-law was given under subsection (3) may, within sixty days from the date of the passing of the by-law, appeal to the Municipal Board by filing with the clerk of the municipality a notice of appeal setting out the objection to the by-law and the reasons in support of the objection.