HALIFAX
REGIONAL MUNICIPALITY

PO Box 1749
Halifax, Nova Scotia
B3J 3A5 Canada

Item No. 8.1 2

Halifax Regional Council
October 16, 2007
In Camera
October 23, 2007

TO: Mayor Kelly and Members of Halifax Regional Council

SUBMITTED BY: M.E. Donovan

M.E. Donovan, Director, Legal Services

DATE: October 9, 2007

SUBJECTS: **Legal Advice on Public Hearing Process**

PRIVATE & CONFIDENTIAL
INFORMATION REPORT

ORIGIN

At the September 25, 2007 Regional Council meeting, questions arose concerning:

1) information received by a Councillor after the close of a public hearing, and

2) the polling by the media on how the Councillor intended to vote after the close of the public hearing.

BACKGROUND

Appendix "A" to Administrative Order One provides the policies governing public hearings. Appendix "A" provides that written submissions must be received by the Clerk's office by 3:00 pm on the advertised Public Hearing date. If Council desires to consider **any** written submissions received after 3:00 pm but before the closing of the public hearing, a two-thirds vote of the members present is required to suspend the 3:00 pm rule.

Once a public hearing is closed, according to Administrative Order One, there should be no further submissions to Council from the public, whether orally or in writing. Administrative Order One expressly states: "No further public presentations will be heard".

DISCUSSION

Additional Information After the Close of the Public Hearing

Where a municipal council considers a submission by an opponent or proponent of development after the close of a public hearing, a Council may be required to hold further public hearings on the additional submissions. In discussing two further submissions received from the developer after the public hearing had been held, the Nova Scotia Supreme Court stated:

> *74... The principles of natural justice require that there must be fuller and earlier disclosure than provided for in (a); that council should not receive evidence or representations after the date of the public hearing or, if it does, it shall disclose the same to all other parties who will then have a fair opportunity to respond; and that interested persons making representations at public hearings before council will have the opportunity to make full and meaningful presentation of their cases, including replies.*
>
> *Friends of the Public Gardens v. Halifax (City), (1984), 65 N.S.R. (2d) 297 (N.S.S.C.).*

In relation to a supplementary staff report received by Council after the close of a public hearing, a subsequent public hearing is not always required. In discussing a subsequent report in relation to a bylaw which was considered by Council without the opponents being heard, Taggart J.A. of the Ontario Court of Appeal stated:

> *... I wish to make it clear that I do not question the right of a municipal council, following the conclusion of public hearings, to receive advice concerning a by-law, such as the one now under consideration, from its municipal staff or from experts retained by council to advise it....*
>
> *Re Bourke and Township of Richmond*, (1978), 87 D.L.R. (3d) 349.

However, while it may be appropriate for a council to seek out "advice" from its staff following a public hearing without being obligated to make affected persons privy to that advice and to afford them an opportunity to respond, a subsequent public hearing is required where the "advice" contains fresh material. This was considered in the *Williams Lake* case where the Nova Scotia Court of Appeal stated:

> *35 Whether the supplementary report contains any "fresh material of an evidentiary nature" or any new facts or information is a factor in determining whether its consideration by Community Council amounts to procedural unfairness. Whether those alleging such unfairness had information which had not been presented earlier to the decision maker can be another factor:*
> ...

> *50 In summary, an opportunity to respond to material prepared by staff, and considered by the Community Council after the close of a public hearing is not required in every instance. Such an opportunity should be provided where the material* ***contains new information*** *relevant to the municipal planning strategy or was put forward by a proponent or opponent advocating for a particular result. This was not the situation in this case. In my view, the Chambers judge did not err in finding no breach of procedural fairness as a result of the consideration of the supplementary report by the Community Council. Nor am I persuaded that any patent injustice has resulted: Williams Lake Conservation Co. v. Halifax (Regional Municipality), (2004), N.S.J. No. 232 (N.S.C.A.). [emphasis added]*

In two recent decisions, the courts have discussed the obligation of municipalities to ensure fairness during public hearings. In discussing whether the City of Vancouver provided sufficient disclosure to allow CPR to participate meaningfully in a public hearing, the Supreme Court of Canada, in a 2006 decision, said:

> *38 ... this Court affirmed a duty of procedural fairness in making administrative decisions. Such decisions must be made 'using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context .... Moreover, those affected by the decision must be given the opportunity to put forward their views and evidence, and have them considered by the decision-maker: Canadian Pacific Railway Co. v. Vancouver (City), (2006), S.C.J. No. 5 (S.C.C.).*

Even more recently, the Nova Scotia Supreme Court, in discussing the development of a building comprised of two towers on the former Texpark lands on Granville Street, Justice Hood discussed the standard for disclosure to the public of information as being "sufficient to allow for meaningful participation in the hearing": *Heritage Trust of Nova Scotia v. Halifax (Regional Municipality)*, (2007), N.S.J. 79 (N.S.S.C.).

Citizens will correspond with their respective elected councillors on matters before Regional Council, even after the public hearing is closed and Councillors will listen to those public concerns. However, the councillor should not consider this information when voting on a matter. A councillor should only consider: (1) the written submissions received by the Clerk's office by 3:00 pm on the date of the advertised Public Hearing date or, if a 2/3 majority voted to suspend the rule, that additional written information that was received before the public hearing closed, (2) the comments of the actual speakers at the public hearing, and (3) the staff report and presentation, if any. Any additional information that arises from the public after the public hearing closes is new information which: (1) the public did not have an opportunity to comment upon at the public hearing and, (2) in the case of a member of the public communicating with an individual Councillor, is new information that may not be known by all the Councillors voting on the matter. In either event, the new information should not be considered by the member when voting.

Polling of Councillors by the Media

In discussing the role of a Councillor when considering a matter before Council, the Supreme Court of Canada has stated:

> *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. [emphasis added]*
>
> *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, (1990), S.C.J. No. 137.

More recently, the Nova Scotia Supreme Court has said that:

> *17 [16] A further obligation on municipal councils is to base their decisions, and be seen to base their decisions, on nothing other than relevant material in front of them; said differently,* ***they must not enter the decision making process with a bias or closed mind.*** *.... [emphasis added]*
>
> *Nova Scotia (Human Rights Commission) v. Annapolis (County), (2005), N.S.J. No. 469 (N.S.S.C.).*

In *Save Richmond Farmland Society v. Richmond (Township)*, (1990), 3 S.C.R. 1213 (S.C.C.), the Supreme Court of Canada considered a case where an Alderman voted in favour of two zoning by-laws enacted by the Council and subsequently declared invalid by the court on technical grounds. When a new by-law was introduced to achieve the same purpose as the quashed by-laws, the Alderman stated publicly that he would not change his mind regardless of what was said at the public hearings although he would listen attentively to the proceedings. **In a subsequent television interview, the Alderman said he favoured rezoning of the land and that it would take something significant to change his mind. During the public hearing, objections were raised to the Alderman's continued participation on the ground that he had predetermined the issue**

but he did not reply to the objections. The Alderman participated in the vote, which passed by a five-to-four margin. The Supreme Court of Canada held that the Alderman had not reached a final opinion which could not have been dislodged, and, accordingly, he was not disqualified by bias.

As can be seen from the above, the law requires that a Councillor approach a matter capable of being persuaded. Informing the media of the way he or she intends to vote gives the appearance that the councillor has predetermined the issue and is not capable of being persuaded, although undoubtedly no member polled in this respect of the proposed amendments to A-300 has predetermined the issue and therefore is presumably no issue with respect to A-300. As in *Save Richmond*, this appearance opens the decision of the Councillor to review by the court and brings to mind the warning of the trial judge in *Save Richmond* that:

> *...[the Alderman had] walked as close to the line of reasonable conduct in this situation as one could walk without falling into the abyss. He has jeopardized his role as a member of Council on this important issue and, in so doing, has jeopardized the rights of the constituents who elected him to have him participate in the democratic process .*

Therefore, in future, it is highly recommended that councillors decline any request to respond to a poll on how they intend to vote on an issue involving a public hearing.

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

None.

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.

Report Prepared by : Derk Slaunwhite, Solicitor, 490 4655