IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Heritage Trust of Nova Scotia v. Halifax (Regional Municipality), 2007 NSSC 28

Date: 20070226
Docket: SH 265550
Registry: Halifax

Between:

Heritage Trust of Nova Scotia and Howard Epstein

Applicant

- and -

Halifax Regional Municipality

Respondent

- and -

United Gulf Developments Ltd.

Intervenor

D E C I S I O N

Judge: The Honourable Justice Suzanne M. Hood

Heard: December 6 and 7, 2006, in Halifax, Nova Scotia

Written Decision: February 26, 2007

Counsel: Ronald A. Pink, Q.C., for the Applicant
Karen Brown, for Halifax Regional Municipality
Robert G. Grant, Q.C. and Rebecca Druhan for the Respondents

By the Court:

[1] Halifax Regional Council, after a public hearing, approved a development agreement to allow the construction of a building comprised of two towers on the former Texpark lands on Granville Street in downtown Halifax. The applicants seek to quash the decision.

ISSUES

1. Standing of applicants to bring the application;

2. Procedural fairness of the public hearing:

   a) provision of material prior to the hearing;
   b) receipt of information from the developer after the close of the public hearing;

3. Fettering of Halifax Regional Council's discretion;

4. Did Halifax Regional Council err in its decision by considering irrelevant factors?

FACTS

[2] On March 17, 2004, Halifax Regional Municipality (HRM) issued a tender call for the sale and redevelopment of lands at 1591 Granville Street, the former Texpark site. The tender documents referred to the lands being developed pursuant

to a development agreement (p. 5 of Tender, Tab G of Supplemental Record). The tender documents also noted that approval would be required for any structure over forty feet in height pursuant to policies in the Municipal Planning Strategy (pp. 6 and 10 of the Tender, Tab G). Excerpts from the Municipal Planning Strategy (MPS) and Land Use By-law were included on page 15. Under the heading "Design and Infrastructure", the call for tenders stated on pp. 15 and 16:

> *Design and Infrastructure*
>
> The following represents specific design goals for this property and are derived from local planning policies as contained within the Municipal Planning Strategy. They are provided herein for information as these are the principles on which the successful bidder must ensure their development proposal is based on at Development Agreement stage.
>
> **Urban Design and Land Use**
>
> (I) Bulk and Massing
>
> ...
>
> *Tower Component:*
>
> - Orientation of tower is be *(sic)* considered in relation to nearby buildings, viewing from street level and from Citadel Hill
>
> (ii) Architecture
>
> ...
>
> *Tower:*
>
> - Style and materials of any tower should provide an attractive enhancement to the

CBD [Central Business District] skyline;

- Roof design should be innovative and incorporate interesting shape as a counter to existing flat tower roofs.

[3] Further reference to a "tower" was contained at p. 2 of the "Design Guidelines" attached as Schedule "B" to the "Submission Form/Agreement of Purchase and Sale" (Tab J, Supplemental Record).

[4] The in camera report to Halifax Regional Council (HRC) dated May 19, 2004 (Tab H, Supplemental Record) referred on p. 3 to the steps for dealing with the property. on p. 3. Step 2 stated:

Step 2 - Development Agreement (Post Sale)

- The site is designated CBD and zoned General Business and is outside designated view planes.
- Existing MPS policy provides clear direction for design and land use.
- Emphasis on ground floor commercial *(active street)*.
- Architecture to complement 19th century facades in the area, wind and shadow analysis required and underground parking is to be maximized.
- Application and development construction start and completion dates are a condition of Agreement of Purchase and Sale

[5] Page 5 of the staff report again referred to the need for a development agreement for any building greater than forty feet in height. The process was stated as follows (Tab H, Supplemental Record, p. 5):

> ***Development Agreement Process:***
>
> The property has a 'Commercial' designation on the Generalized Future Land Use Map and is zoned C-2 *(General Business)* and within Schedule 'F'. Any building greater than forty feet in height would require a Development Agreement. The application for a Development Agreement would be considered primarily under the Central Business District Policy (CBD) set of the Halifax Municipal Planning Strategy. The process would involve holding a Public Information meeting and then preparing a staff report to the District 12 Planning Advisory Committee and the Heritage Advisory Committee for review and recommendation. Their recommendations would be sent to Peninsula Community Council who has the jurisdiction to hold the required public hearing.

[6] HRC approved the sale to United Gulf in May 2004. Its proposal called for a building with two towers, both over forty feet in height. In November of that

year, United Gulf made its application for the development agreement as required. The application referred to "wind and shadow studies to be completed".

[7] A public information meeting was held on January 19, 2005 (Notice of Public Information Meeting, Tab 2, Volume 2 of the Record) with respect to the proposed development. The Minutes of the Public Information Meeting (Attachment C to Tab 11, Volume 2 of the Record) note that Paul Sampson, Planner, Planning and Development Services, HRM, addressed the meeting as follows:

> Mr. Sampson briefly reviewed the development agreement process, noting:
>
> - Following tonight's meeting, staff will do a detailed review of the policies.
> - There are a number of studies being submitted related to traffic issues, wind and shadows, which will be reviewed by the different departments.
> - Planning Services will prepare a detailed staff report. Prior to the report going to Regional Council, the report will go to the various

committees, who will make a recommendation to Regional Council.

- Following the public hearing, Regional Council will make a decision on the proposal.
- The decision of Regional Council can be appealed to the N.S. Utility and Review Board.

[8] At p. 36, the Minutes reflect that the then president of Heritage Trust of Nova Scotia, Alan Parish, attended the Public Information Meeting and addressed it.

[9] As well, Anne Muecke on behalf of United Gulf made a presentation to the Heritage Advisory Committee (HAC) on February 23, 2005 and the District 12 Planning Advisory Committee (PAC) on February 28, 2005. The minutes of the latter reflect that Ms. Muecke "reviewed with the Committee the shadow study ..." and "advised that work on the wind study ...[is] ongoing. A copy of the presentation is on file." (Minutes at p. 5 of Tab 4, Volume 2, Record)

[10] On April 27, 2005, the proposed development was again on the agenda of the HAC. The minutes reflect references to both wind and shadow (Tab 5, Volume 2, Record). On May 2, 2005, the minutes of PAC show that Ms. Muecke "presented the wind tunnel testing results" including "Mitigation Strategies." The minutes also state "A copy of Ms. Muecke's presentation is on file." (Tab 6, Volume 2, Record) Anne Muecke's Affidavit in para. 21 refers to this and the presentation to which the minutes refer is Exhibit "B" to her affidavit. On the pages after page 18, the Wind Tunnel Results list "Gusting Failure", before, after and after mitigation.

[11] The shadow study was completed on March 21, 2005 (Tab E, Volume 2, Record) and the wind study on May 4, 2005 (Tab D, Volume 1, Record).

[12] Just over one year after the proposal was submitted, HRM staff prepared an eleven page report, with attachments, for HAC and PAC recommending approval of the development agreement. The staff report, dated December 16, 2005, reviewed MPS policies in relation to the project, including those with respect to wind and shadow. The report said at p. 9 (Tab 11, Volume 2, Record):

Wind:

The MPS calls for acceptable wind levels on sidewalks and public open spaces. Wind tunnel testing was done based upon the former Texpark building in place, and based upon the proposed development, with wind mitigation measures in place. The study concluded that the proposed development (with mitigation measures) did not significantly increase wind speeds in the area. Specific wind mitigation measures at street level, such as canopies, wind screens, landscaping and other measures (primarily on Sackville Street) will be required and should be determined at the detailed design stage. The draft development agreement requires that any mitigation measures which encroach into the street right-of-way or which are not in keeping with the conceptual design be approved by Council as a non-substantive amendment to the proposed agreement.

Shadow:

The MPS calls for 'a minimal amount of shadow cast on public open spaces.' The sun's path was modelled for the solstices (December 21st and June 21st) as well as the equinoxes (March 21st and September 21st). Shadow effects on public open spaces (Sackville Landing, Parade Square/St. Paul's Church) and adjacent streets/sidewalks were reviewed. The shadow modelling found that:

- Shadows from the proposed towers will have minimal impact on Sackville Landing and the waterfront in the summer months. On June 21st, shadows will not impact Sackville Landing at all and only reach the boardwalk area north of Bishop's Landing after 7 p.m.
- On December 21st, when shadows are longest, they reach Sackville Landing at approximately 2:45 pm and combine with those of other buildings and continue along the boardwalk area.
- On December 21st, shadows reach Parade Square and St. Paul's Church in the early to mid-morning but leave by approximately 10:30 a.m. Shadows do not reach this location in spring, summer or fall.
- On March 21st and September 21st shadows from the hotel tower reach Sackville Landing in late afternoon (after 3 p.m.), combining with shadows already present from buildings in the area. Shadows from the proposed towers persist into the early evening, reaching the waterfront boardwalk area north of Bishop's Landing.

Shadows on streets and sidewalks during different parts of the day are common in a downtown setting. As the MPS refers to 'public open spaces' and not to streets/sidewalks, shadows on streets/sidewalks caused by buildings within the CBD are expected and generally acceptable. Based on the shadow modelling, there would be minimal shadowing on public open spaces and the proposal meets the intent of Policy 7.6.

[13] The staff report listed HRC's alternatives for dealing with the proposal at pp. 10 and 11 as follows:

ALTERNATIVES

1. Council may approve the development agreement. If this course of action is taken, Council should also discharge the existing development resolution for Lot 1A as it pertains to this proposal (northwest portion of Lot 1A only). This is the recommended course of action.
2. Council may refuse to enter into the development agreement and, in doing so, must provide reasons based on conflict with existing MPS policy. Although this is not the recommended alternative, Council has the discretion to choose this option for the reasons described above.
3. Council may choose to approve the development agreement with modifications which are acceptable to the applicant. Such modifications may require further negotiations with the applicant and/or revisions to the schedules attached to the agreement.

(emphasis in original)

[14] The report had attached to it a draft of the development agreement to be entered into if HRC approved it. It provided in clause 2.12 (p. 18, Tab 11, Volume 2):

2.12 Wind Mitigation Measures

The Developer shall submit a report to the Development Officer prepared by a professional engineer experienced in wind engineering which outlines proposed wind mitigation measures for the development. The report shall specify various mitigation measures/solutions which will result in acceptable wind conditions as identified in the wind study report dated May 4, 2005. Appropriate mitigation measures/solutions shall be approved by the Development Officer prior to the issuance of a Development Permit except those which, in the opinion of the Development Officer, involve a substantial change in the design of the building, those which are not in accordance with the Capital District standards and/or those which require an encroachment license. In these instances, such measures shall be considered by Regional Council as per Sections 2.5 and 3.1(d) prior to the issuance of a Development Permit. Mitigation measures/solutions shall be shown on the building plans submitted for Development Permit approval and completed prior to the issuance of an occupancy permit.

[15] The staff report was considered at PAC and HAC on January 16, 2006 and January 18, 2006 respectively (Tabs 12 and 13). At p. 7 of the former, it was noted:

> Ms. Muecke advised that copies of the shadow, wind, and traffic studies are available for review at this meeting.

[16] Both Elizabeth Pacey of Heritage Trust and her husband, Philip Pacey, addressed the meeting. Ms. Pacey, on behalf of Heritage Trust, did not address wind or shadows. Philip Pacey addressed the issue of views from Citadel Hill. Peter Delefes also addressed the Committee "noting that he is a member of Heritage Trust." His concerns were reported as heritage and views. At its next meeting on January 23, 2006, PAC recommended to HRC, *inter alia*, that the development agreement be approved. (Tab 14, Volume 2)

[17] At the HAC meeting of January 18, 2006, Elizabeth Pacey, representing Heritage Trust, spoke in opposition to the development and raised concerns about the scale and design of the buildings and their being out of proportion to adjacent heritage buildings. Philip Pacey, representing Heritage Canada Foundation, also spoke in opposition, referring to heritage policies of the Municipal Planning

Strategy and the towers being in the "vicinity" of Citadel Hill. Peter Delefes, representing Heritage Canada Foundation, also spoke, as did Howard Epstein of the Federation of Nova Scotian Heritage who referred to viewplanes. HAC passed a motion that it would advise HRC that it recommends the development agreement not be approved on the basis that "... the overall potential impacts ... on the adjacent registered historic properties is unacceptable ... ." (p. 7, Tab 13, Volume 2)

[18] At the February 7, 2006 meeting of HRC the Committee reports were considered and a motion was passed to schedule a public hearing. A Supplementary Report was prepared by staff, dated February 24, 2006, for the meeting of February 28, 2006, the date set for the public hearing (Tab 18, Vol. 2). It attached the December 16, 2005 staff report to PAC and HAC and the reports of those committees to Council.

[19] The public hearing commenced on February 28 and continued on March 7. The public participation portion of the public hearing was closed on March 7. HRC then heard from Paul Sampson, Anne Muecke for United Gulf and Ted

Mitchell, the design manager for United Gulf. Ms. Muecke presented the shadow study. They all also answered questions from members of Council.

[20] At the Council Meeting of March 21, 2006, Council received a further report from staff dated March 15 (Tab 22, Volume 3). Anne Muecke presented the wind study. Members of Council had questions for both Ms. Muecke and for staff. Ms. Muecke commented on other concerns raised by members of the public during the public participation portion of the public hearing. Council then entered into debate after which they approved the development agreement by a vote of 15 to 5.

[21] The applicants seek to quash the decision of Halifax Regional Council. Their originating notice (application inter partes), states:

> The grounds for the Application are that the Respondent through its Council, the Halifax Regional Council, erred in law and jurisdiction and breached the rules of procedural fairness and natural justice when it approved the Development Agreement on March 21, 2006, because:
>
> 1. After the close of the public hearing on March 7, 2006, Council received new and relevant information from the proponent developer including:

(a) the full wind study and shadow study referred to in the Halifax Regional Municipality Staff Report dated December 16, 2005; and

(b) presentations by the proponent developer on the wind study and shadow study;

the effect of which was to deprive the public of the opportunity to comment on the new information provided to Council after the close of the public hearing;

2. Prior to the public hearing that commenced on February 28, 2006, the Respondent failed to provide all relevant document to members of the public, including documents referred to in Halifax Regional Municipality Staff Report dated December 16, 2005, such as the wind and shadow studies, the tender documents for the sale of the property, and the Agreement of Purchase and Sale between the Developer and the Respondent;

3. Prior to the public hearing, its Council had fettered its discretion to approve or disapprove the *(sic)* of the Development Agreement on March 21, 2006, when in May, 2004, it contractually

or otherwise bound itself to approve the Development Application as a result of:

(a) the Respondent's tender in March, 2004, for the sale of the property invited proposals for construction of a commercial tower over forty feet in height and

(b) its subsequent acceptance of the offer to purchase by United Gulf Developments Limited in May, 2004, with the full knowledge that United Gulf Developments Limited intended to construct a tower of approximately twenty-six storeys in height on the land, and thereby implicitly warranted Respondent's approval during the subsequent regulatory process;

4. Prior to the public hearing, council had fettered its discretion to approve or disapprove of the Development Agreement on March 21, 2006, because, regardless of the legal effect of the Tender and Agreement of Purchase and Sale, members of council believed that they were required to approve the proposed development agreement because the Respondent sold land to the proponent developer with knowledge that the proponent developer planned to build a tower of approximately 26 storeys in height on the site.

[22] With respect to the wind and shadow studies, the following dates are relevant:

February 28, 2005 - District 12 Planning Advisory Committee Meeting - Anne Muecke reviewed with the Committee the shadow study and advised that work was ongoing with respect to the wind study.

March 21, 2005 - Shadow study completed

April 27 - 2005 - Heritage Advisory Committee Meeting - Anne Muecke advised that she had received "a report on the wind factor" and it would be available by the end of the following week. The shadow study was also mentioned.

May 2, 2005 - District 12 Planning Advisory Committee Meeting - the minutes show that a document entitled "Wind Tunnel Results, Seasonal Analysis of Change in Public Space" was distributed to the Committee. Anne Muecke presented the Wind Tunnel Testing Results including mitigation strategies.

May 4, 2005 - Wind study completed

December 16, 2005 - Staff report to HAC and PAC - the report refers to wind and shadow - the wind and shadow studies quoted above are not attached

January 6, 2006 - Philip Pacey told by Paul Sampson that the studies could not be released without the consent of United Gulf or a successful FOIPOP application (para. 20 Paul Sampson Affidavit)

January 11, 2006 - Philip Pacey's FOIPOP application received by HRM's FOIPOP coordinator (Exhibit C to Affidavit of Philip Pacey)

January 17, 2006 - Howard Epstein requests copies of the wind and shadow studies from Heather Ternoway, Chair of PAC (Exhibit C, Affidavit of Howard Epstein)

February 6, 2006 - Letter from Heather Ternoway, Chair of PAC, to Howard Epstein referring him to Paul Sampson to obtain the studies (Exhibit F, Affidavit of Howard Epstein)

February 22, 2006 - Anne Muecke advises Paul Sampson that United Gulf will make the studies public (para. 28, Paul Sampson Affidavit)

February 23, 2006 - Philip Pacey meets with United Gulf representatives who give him a presentation of the studies and a copy of the wind study (para. 33, Affidavit of Anne Muecke)

February 25, 2006 - Anne Muecke delivers the shadow study to Philip Pacey at his home (para. 34, Anne Muecke Affidavit)

Before public hearing - Emails and letters to Council from the public, a number refer to wind and shadows

February 28, 2006 - Public hearing begins - Howard Epstein makes a presentation to Council

March 1, 2006 - Paul Sampson provides Philip Pacey with a copy of the wind study and shows him the shadow study (para. 31, Affidavit of Paul Sampson)

February 28 to March 7, 2006 - Further emails and letters to Council from members of the public

March 7, 2006 -`Public hearing continues: Philip Pacey makes a presentation and refers to both wind and shadows; public participation portion of the public hearing is closed; Anne Muecke presents the shadow study

March 7 to March 31, 2006 - Further emails and letters to members of Council from the public

March 15, 2006 - Supplementary Staff Report refers to wind and shadow studies *inter alia* and includes a copy of the wind study. The shadow study is not a written study but is contained on two DVD's. The report includes a summary of the wind study prepared by its authors and a summary of the shadow study prepared by United Gulf.

March 16, 2006 - Philip Pacey writes to the Mayor and Council with additional comments on, among other things, the wind and shadow and, in an Appendix, gives "detailed comments on the United Gulf Wind Study" along with an annotated copy of the wind study and diagrams of shadows.

March 21, 2006 - HRC Meeting - Anne Muecke presents the wind study; Council approves the development agreement.

ISSUE 1 - STANDING OF APPLICANTS TO BRING APPLICATION

[23] The intervenor, United Gulf, says that the applicants have no standing to bring this application. The position of the applicants can be summed up by asking the question: If we can't, who can?

[24] Section 189 of the *Municipal Government Act* provides for quashing of decisions of municipal councils. It provides as follows:

Procedure for quashing by-law

189(1) A person may, by notice of motion which shall be served at least seven days before the day on which the motion is to be made,

> apply to a judge of the Supreme Court of Nova Scotia to quash a by-law, order, policy or resolution of the council of a municipality, in whole or in part, for illegality.
>
> (2) No by-law may be quashed for a matter of form only or for a procedural irregularity.
>
> (3) The judge may quash the by-law, order, policy or resolution, in whole or in part, and may, according to the result of the application, award costs for or against the municipality and determine the scale of the costs.
>
> (4) No application shall be entertained pursuant to this Section to quash a by-law, order, policy or resolution in whole or in part, unless the application is made within three months of the publication of the by-law or the making of the order, policy or resolution, as the case may be.

[25] "A person" may apply to quash. No one has disputed that this definition includes Heritage Trust which is a society incorporated in 1959. Its Memorandum of Association is attached as Exhibit A to the Affidavit of Alan Parish who was president of Heritage Trust at the time this application was filed.

[26] The test for standing is a four part test as set out in *Mountain Ash Court Property Owners Assn. v. Dartmouth (City)* (1993), 109 D.L.R. (4th) 738; 127 N.S.R. (2d) 139, 1993 CarswellNS 84 (S.C.). Nathanson, J. referred to *Coalition of Citizens for a Charter Challenge v. Metropolitan Authority* (1993), 122 N.S.R. (2d) 1, 103 D.L.R. (4th) 409 (Sup. Ct.) in para. 9. He then set out the four-part test for standing as follows:

> (a) The justiciability of the cause of action.
>
> (b) Is there a serious question raised as to the invalidity of the legislation or administrative actions?
>
> (c) Has it been established that the applicant is directly affected by the legislation or administrative acts, or, if not, does the applicant have a genuine interest in the validity of the legislation or administrative acts?
>
> (d) Is there another reasonable and effective way to bring the issue before the court?

[27] That decision was appealed (1994), 132 N.S.R. (2d) 74; 115 D.L.R. (4th) 361; 1994 CarswellNS 527 (C.A.). In para. 39 of the Court of Appeal decision, Matthews, J.A. said:

> After review of the facts and the applicable law, in my opinion, the trial judge did not err in granting the respondents' standing. I would dismiss this ground of appeal.

[28] I will now consider the four-part test.

a) Justiciability of the Cause of Action

[29] The *Municipal Government Act* specifically provides for an application to quash a decision of a municipal council. No argument was made that any of the formal requirements set out in s. 189 were not met. The issue is not moot, although the planning appeal has been scheduled and will proceed. I therefore conclude that this is a justiciable issue.

b) Is a serious issue raised about the proceedings before Halifax Regional Council?

[30] Halifax Regional Council has established its procedure for dealing with public hearings and these are set out in Appendix A to Administrative Order Number One (Tab D, Supplemental Record). In addition, the regular rules of HRC

apply to public hearings. (para. 1, Appendix A). The applicants say they were prevented from having relevant material prior to the public hearing and were unable to respond to it when it was disclosed only after the close of the public hearing. These are serious allegations about how the public was treated and how the public hearing was conducted.

[31] Because of the special nature of a public hearing and the requirement for procedural fairness in conducting public hearings, I consider the issues raised to be serious ones concerning public hearings. The application is not a frivolous and vexatious one but one raising important issues about the conduct of public hearings.

c) Are the applicants directly affected or do they have a genuine interest in the validity of the actions of Halifax Regional Council?

[32] Heritage Trust representatives and Howard Epstein spoke as members of the public during the public hearing. As such, they are "directly affected" by the way the hearing was conducted. Furthermore, they have a "genuine interest" in planning matters as is evidenced by their frequent appearances as parties or counsel in planning matters. As such, they have a genuine interest in ensuring Halifax

Regional Council conducts its public hearings in such a way that they can make meaningful representations.

[33] The intervenor submits that I should consider the applicants' relationship to the lands which were the subject of the public hearing. In my view, this is a misconception of the issue before this court. The issue is only indirectly the lands; they are the issue at the planning appeal. However, on this application, the issue is the proper conduct of the public hearing itself. The *Municipal Government Act* places no residential requirement on those who can speak as members of the public at a public hearing. Nor does the Administrative Order. The latter does set out limitations on the length of presentations, how to get on the speakers' list, etc., but does not require anyone wishing to speak to have a required "connection" to the subject lands. It might be argued that those who have standing <u>might</u> be restricted to residents or taxpayers of Halifax Regional Municipality but that is not the issue before me.

[34] Cowan, C.J.T.D. concluded in *Heritage Trust of Nova Scotia v. Nova Scotia (Provincial Planning Appeal Board)* (1981), 50 N.S.R. (2d) 352, 1981

CarswellNS 282 (N.S.S.C., T.D.) that any citizen of Halifax had standing in a matter relating to the Citadel. He said in paras. 49-50:

> 49 However, it seems to me that the preservation of an amenity in the City of Halifax, such as the Citadel, is a matter which concerns and affects not only owners of adjacent properties, or owners of properties in the immediate neighbourhood or only residents of the immediate neighbourhood. In my opinion, it is a matter which affects the citizens of Halifax generally and it is my view that the individual plaintiffs have standing to bring the action for a declaration with respect to the validity of the council's decision of February 28, 1980.
>
> 50 While the corporate plaintiffs are not technically resident, as individuals are, in the city, their interests are such that I am of the opinion that they also have standing to bring such an action.

[35] He also said in *Heritage Trust* at paras. 53 and 54 as follows:

> 53 Examples are given of cases where standing has been found to exist and this includes the case of an adjoining landowner who objects to a grant of interim development permission. I note, however, that, at p. 421 there is a discussion of the standing of a person who has a right

to be heard before an administrative tribunal, and the following statement appears:

> A person who has a right to be heard before an administrative tribunal has *locus standi* to challenge a decision of the tribunal on the ground that the hearing that he was afforded was inadequate, and, frequently, on other grounds as well.

54 In this case the individual plaintiffs, Elizabeth Pacey and Philip Pacey, appeared before the council of the city at the public hearing held with respect to the proposed development and one of the grounds of attack on the later decision of the council is that these plaintiffs were not treated with fairness. I am of the opinion that, in the circumstances, they, at least, are persons aggrieved and have standing.

[36] In *Saskatchewan Action Foundation for the Environment Inc. v. Saskatchewan (Minister of Environment and Public Safety)*, [1992] S.J. No. 3 (C.A.), the court dealt with the issue of standing. Sherstobitoff, J.A. said (at p. 11 of 24 of the Quicklaw version):

> The appellant has status since the very nature and purpose of the legislation is to allow for public consultation ...

[37] The circumstances in this case are distinguishable from those in *Friends of the Public Gardens v. Halifax (City)* (1985), 68 N.S.R. (2d) 433 (N.S.S.C.T.D). In that case, there was no public hearing and there was no right of public input into the decision of Halifax City Council. I conclude that the applicants are both directly affected and have a genuine interest in the issues before this court.

d) Is there another reasonable and effective way to bring the issue before the court?

[38] There is an appeal from the decision of HRC to the Nova Scotia Utility and Review Board (UARB) with respect to Council's approval of the development agreement. However, the jurisdiction of the Utility and Review Board is to determine if the decision of HRC reasonably carries out the intent of the Municipal Planning Strategy (s. 251(2) *Municipal Government Act*). The UARB has no jurisdiction to inquire into the procedure followed by a municipal council in coming to its conclusion.

[39] In *Halifax (County) v. Maskine*, [1992] N.S.J. No. 292 (C.A.), the Board was found to be in error in considering council's procedure. Jones, J.A. said at p. 4 (Quicklaw version):

> The Board entered into a detailed examination of the procedures followed by the Council in arriving at its decision. Those issues were not relevant to the issues before the Board.

[40] The Board's limited jurisdiction was referred to by the Board in *Federation of Nova Scotian Heritage*, Re, 2005 NSUARD 105 (the Midtown Tavern appeal). In para. 129, the Board referred to the *Maskine* decision and said in para. 129:

> [129] Since **Maskine**, the Board has (as was done in **Colborne**) defined its task in an appeal such as the present one as being solely that of determining whether or not the approval, or refusal to approve, by a council is one which can be seen as reasonably consistent with the intent of the M.P.S., or not. How council got to that decision – e.g., whether by an allegedly bad procedure or a good one, or by an allegedly bad thought process, or a good one – is a matter which the Board (applying its interpretation of **Maskine**) has repeatedly stated to be irrelevant. The Board has regarded such alleged errors, and the

> granting of a remedy, if any, to be a matter solely within the jurisdiction of the Nova Scotia Supreme Court, and lying outside the jurisdiction of the Board.

[41] Howard Epstein, for the appellants in that case, urged the Board to reconsider its approach and to conclude that it has equal and parallel jurisdiction to the Supreme Court to deal with procedural or other defects in Council's process. The Board reviewed the wording of the *Municipal Government Act* and concluded as follows in para. 137:

> [137] In the result, the Board finds that it is the effect of the **Municipal Government Act**, together with such decisions as **Maskine**, that the Board has only limited jurisdiction in appeals of the type presently before it. In the view of the Board, if a party were to establish that council had misconducted itself in a matter (whether with respect to fairness, natural justice, or, as Mr. Epstein would argue, an action of such grievous significance as to amount to a 'flouting' of the M.P.S.), the only remedy for such a procedural error would be through judicial review, i.e., through recourse to the Supreme Court, not to this Board.

[42] The situation was quite different than was the case in *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561 where the Senate Committee on appeal was unlimited in its powers. The intervenor has also referred to *South Centre Merchants Assn. v. Halifax (City)* (1994), 135 N.S.R. (2d) 373 (S.C.). The applicants there were denied standing because the issue they raised was more appropriately dealt with at the NSUARB. The applicants had applied to re-zone the lands in Bayers Lake to prevent retail uses and Council's refusal to grant that re-zoning was on appeal to the NSUARB. There was another "reasonable and effective way to bring this issue before the Court." (para. 27)

[43] To the contrary was *Mountain Ash, supra*, where there was no provision for a planning appeal and the only means to have the matter litigated was through the courts. Nathanson, J. said at para. 15:

> 15 Further, I find that there is not any other reasonable and effective way to bring the issue before the courts. The *Planning Act,* supra, provides for an appeal of many types of decisions of a municipal unit regarding development permits or planning matters, including refusal of a development permit (s. 85), amendment or refusal to amend a Land Use By-Law (s. 70), approval of a development agreement or an

amendment to a development agreement (s. 78), and refusal to enter into a development agreement (s. 79). However, the Planning Act does not provide an appeal of the issuance of a development permit. In short, there is no other legal avenue available to the applicants to seek an effective remedy by way of judicial review of the decision of the Development Officer.

Conclusion On Standing

[44] I exercise my discretion to grant these applicants standing because they raise a serious issue about the procedure at the public hearing, a procedure in which they were entitled to participate and which can be challenged in no other way. It is principally because of the serious question raised about Council's procedure that these applicants have standing. It does not mean that every time proponents or opponents disagree with what a municipal council decides at a public hearing that they will always have standing: there must always be a serious question about the conduct of the hearing.

ISSUES 2, 3 and 4 - INTRODUCTION TO SUBSTANTIVE ISSUES

[45] HRC has a dual role in planning matters: a legislative role and a quasi-judicial one. In this regard, it is quite different from other legislative bodies such as Parliament when the House is in session and provincial legislatures when in session. The latter two establish bodies to make quasi-judicial decisions from which there is either a right of appeal or the availability of judicial review. The legislative actions of all three levels of government can be challenged in the courts and politicians at all three levels of government face their electorate in elections. In addition to the above, municipal governments in Nova Scotia can have some of their decisions in planning matters challenged by appeals pursuant to the *Municipal Government Act.* Those appeals are heard by the Nova Scotia Utility and Review Board.

[46] This dual role was referred to by the Alberta Court of Appeal in *Valdun Development Ltd. v. Calgary (City)*, [1997] A.J. No. 447 (C.A.). In para. 21, the court said:

> 21 The scheme of the planning legislation and the case law interpreting it indicate that the powers exercised by council in circumstances such as this are both legislative and judicial.

[47] The *Municipal Government Act* states in s. 190, part VIII under the heading PLANNING AND DEVELOPMENT that one of the purposes of that Part of the *Act* is to

> 190 (c) establish a consultative process to ensure the right of the public to have access to information and to participate in the formulation of planning strategies and by-laws, including the right to be notified and heard before decisions are made pursuant to this Part;
>
> ...

[48] The *Act*, in s. 204, requires there to be a public participation program. Section 206 provides for public hearings. Flowing from the requirements of the *Act*, s. 12 of HRM's MPS provides for citizen participation. It provides: "Objective: Citizen participation as a necessary part of all planning processes within the City, in forms to be developed in consultation with the community." One of the policies with respect to citizen participation is 12.4 which provides:

> 12.4 The City shall develop procedures for consulting the public on decisions which will affect the planning or development of the City. These procedures shall pay particular attention

> to the timing of public access to information, the methods for providing it, and the need of individuals and groups to have an adequate time period for review prior to final City Council decisions.

[49] The appendix to HRM's Administrative Order 1 Respecting Procedures of the Council sets out specific provisions with respect to the conduct of public hearings. (Administrative Order 1, Tab D to Supplemental Record). The portions of Appendix "A" which I consider relevant to this application are as follows:

> (6) Before the Public Hearing is opened, staff will provide an explanation of the matter being considered and the staff recommendation to Council. Following the staff presentation, members of Council may ask staff questions of clarification only.
>
> (13) Speakers addressing Council should do so with proper decorum. Speakers' comments must be specifically related to the subject of the Public Hearing, directed to the Presiding Officer and limited to five minutes. There is no opportunity at the hearing to debate points of view expressed by other speakers.

(14) The role of council at a Public Hearing is to listen to the public. Members of Council shall not debate nor challenge the comments being offered by the Speaker. Following a speaker's presentation, Members of Council may ask questions of the speaker, seeking clarification of the points they have raised. Members of Council shall not enter into dialogue with the public during the Public Hearing.

(16) When the last speaker from the public has been heard, the Presiding Officer shall provide the applicant (if one) with an opportunity to briefly respond to points raised by speakers.

(17) When the Public Hearing has been closed, staff will be provided an opportunity to briefly respond to points raised by the speakers.

(18) Council will then proceed to immediately consider the approval or disapproval of the matter under consideration and reach a decision. The Council decision will start with a motion from a member of Council (to refuse or approve the matter under consideration, or approve it in an amended form). The consideration of the motion is subject to the regular rules of procedure and debate. No further public presentations will be heard. In some instances, particularly

> when Council members need more time to consider what they have heard, or require further information from staff, the Council may defer the debate and decision until a later date, usually at the next regular meeting.

[50] If there were no planning legislation, land owners could develop their lands as they saw fit. Historically, that was the case. Planning legislation, like the provisions in the *Municipal Government Act*, and previously in various Planning Acts, gives municipal governments a decision making role with respect to the development of land. Such legislation also provides for public participation. If it were otherwise, the municipal government and the land owners would deal with the land owners' lands with no, or at least no formal, input from members of the public.

[51] Municipal governments, before enacting planning legislation, must hear from the public. Public hearings allow municipal government legislative bodies to hear from members of the public in support of or opposed to, among other things, re-zonings and development agreements.

[52] By means of public hearings, municipal governments are able to make better decisions on these issues within the context of previously approved municipal planning strategies which are also the subject of public input. As Southin, J.A. said in *Jones v. Delta* (1992), 92 D.L.R. 94th) 714 (B.C.C.A.) at para. 69:

> 69 In my opinion, the Legislature requires such hearings [public hearings] so that aldermen may be informed of everything that electors and others affected wish to bring to their attention concerning the subject matter of the bylaw.

[53] Rowles, J.A. said at para. 45 of *Pitt Polder Preservation Society v. Pitt Meadows (District)*, [2000] B.C.J., No.1305, 2000 BCCA 415:

> 45 A public hearing on land use and zoning bylaws serves at least two important functions: it provides an opportunity for those whose interests might be affected by such a decision to make their views known to the decision-maker and it gives the decision-maker the benefit of public examination and discussion of the issues surrounding the adoption or rejection of the proposed bylaw.

[54] The *Municipal Government Act* contains appeal provisions. The test is whether the decision made by the municipal council reasonably carries out the intent of its Municipal Planning Strategy. The *Act* provides:

> 251(1) The Board may
>
> (a) confirm the decision appealed from;
>
> (b) allow the appeal by reversing the decision of the council to amend the land-use by-law or to approve or amend a development agreement;
>
> ...
>
> (2) The Board shall not allow an appeal unless it determines that the decision of council or the development officer, as the case may be, does not reasonably carry out the intent of the municipal planning strategy or conflicts with the provisions of the land-use by-law or the subdivision by-law.

[55] This application is not an appeal from the decision of HRC. Several issues raised tangentially during this hearing are, among others, matters for appeal, not for this court:

1. reliability of the wind and shadow studies;

2. whether Citadel Hill is in the "vicinity" of the subject lands;

3. whether Citadel Hill is a "public open space" within the wording of the M.P.S.

Procedural Fairness Generally

[56] The standard of review of issues of procedural fairness is one of correctness. This was not in dispute among the parties. Courts decide whether the procedures used by a tribunal, board, council or other body acting quasi-judicially are fair. Procedural issues are not subject to the pragmatic and functional analysis, only substantive issues are. Russell, J.A. in *Keefe* v. *Clifton Corp.*, [2005] A.J. No. 371, (2005) ABCA 144 referred in para. 13 to the Supreme Court of Canada decision in *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 S.C.C. 29 as follows:

> A distinction must be drawn between procedural and substantive issues. Only the latter are subject to a pragmatic and functional analysis ... . Binnie, J. stated at para. 100: 'It is for the courts, not the Minister, to provide the legal answer to procedural fairness questions.'

[57] Municipal councils owe a duty of procedural fairness when dealing with planning matters at public hearings. 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". (*Old St. Boniface Residents Assn. Inc. v. Winnipeg (City),* [1990] 3 S.C.R. 1170, [1990] S.C.J. No. 137 at para. 44). In *Old St. Boniface*, the appellant had relied on *Wiswell v. Metropolitan Corporation of Greater Winnipeg*, [1965] S.C.R. 512, but Sopinka, J. said in para. 44:

> **Wiswell** must be read in light of comparatively recent changes that have occurred in applying the rules of natural justice.

[58] He continued in that paragraph to discuss the change in approach since *Wiswell*:

> 44 ... This change in approach was summarized in Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission), [1989] 2 S.C.R. 879. I stated (at pp. 895-96):

> Both the rules of natural justice and the duty of fairness are variable standards. Their content will depend on the circumstances of the case, the statutory provisions and the nature of the matter to be decided. The distinction between them therefore becomes blurred as one approaches the lower end of the scale of judicial or quasi-judicial tribunals and the high end of the scale with respect to administrative or executive tribunals. Accordingly, the content of the rules to be followed by a tribunal is now not determined by attempting to classify them as judicial, quasi-judicial, administrative or executive. Instead, the court decides the content of these rules by reference to all the circumstances under which the tribunal operates.

[59] Earlier in the same year in which *Old St. Boniface* was decided, the Supreme Court of Canada rendered its decision in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653; 1990 S.C.J. No. 26. That case involved a school board which had dismissed a contract employee. In para. 24, Justice L'Heureux-Dubé discussed the general duty of fairness. She said:

> 24 The existence of a general duty to act fairly will depend on the consideration of three factors: (i) the nature of the decision to be made

> by the administrative body; (ii) the relationship existing between that body and the individual; and (iii) the effect of that decision on the individual's rights. This Court has stated in Cardinal v. Director of Kent Institution, supra, that whenever those three elements are to be found, there is a general duty to act fairly on a public decision-making body.

[60] At para. 46, she said:

> 46 Like the principles of natural justice, the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case.

She then quoted the passage from *Canada Human Rights Commission* quoted above in *Old St. Boniface*.

[61] She continued in para. 49:

> 49 It must not be forgotten that every administrative body is the master of its own procedure and need not assume the trappings of a court. The object is not to import into administrative proceedings the rigidity of all the requirements of natural justice that must be observed by a court, but rather to allow administrative bodies to work out a system that is flexible, adapted to their needs and fair. As pointed out by de Smith (Judicial Review of Administrative Action (4th ed. 1980), at p. 240), the aim is not to create 'procedural perfection' but to achieve a certain balance between the need for fairness, efficiency and predictability of outcome. ...

[62] Interestingly, although concurring in the result, Sopinka, J., writing for the minority, concluded in *Knight* that no duty of procedural fairness was owed in that case.

[63] Subsequent to the decision in *Knight*, the Alberta Court of Appeal dealt with an appeal from a decision refusing to quash a municipal by-law in *Atkins v.*

Calgary (City), [1994] A.J. No. 950 (C.A.). At paras. 6 to 9, Kerans, J.A. considered how "judicial" the decision of Calgary City Council was, saying:

> 6 ... But much of the argument of the appellants on all seven grounds proceeds on the assumption that the process before City Council, as it struggled to decide whether to enact the amendment, was like a trial in court. But can it be said that this was to be a 'judicial' process? I will first answer that question.
>
> 1. The Nature of the Decision-making Process before City Council
>
> 7 The jury trial is the paradigm of the judicial process. The trial is everything. Nothing is to be decided nor discovered elsewhere. Jurors, unlike legislators, are selected precisely because they know nothing and are committed to no position about the matters about to be investigated. Stern rules govern the hearing process, and the jurors are to be above even the suspicion of bias. No judge, or juror, should meet privately with interested parties. The case must be decided only on what comes out at the hearing. Strict rules govern what is relevant to decision. Jurors do not negotiate their votes with other jurors. A judge or juror who had any sort of person dealings, even respectable and unassociated

dealings, with an interested party before the trial may well step down to avoid any reasonable apprehension of bias.

8 Parliament is the paradigm of the political process. Public hearings, and indeed public debate, are but a part of the decision-making process. Private discussion also occurs, and also private submissions and even negotiation. Public commitment to a course of action before any hearing or debate is not frowned upon; on the contrary, it is an accepted part of the practice of politics. While some may view modern democratic politics with disdain, Professor Bernard Crick described it thus:

> Politics arises from accepting the fact of the simultaneous existence of different groups. hence different interests and different traditions, within a territorial unit under a common rule ... But the establishing of political order is not just any order at all; it marks the birth, or the recognition, of freedom. For politics represents at least some tolerance of differing truths, some recognition that government is possible, indeed best conducted, amid the open canvassing of rival interests.

Bernard Crick: In Defence of Politics, (London: Weidenfeld and Nicholson, 1962) at 14.

9 The key question is which paradigm best fits the process that engaged Council in this case. The Supreme Court, in Old St. Boniface Residents Association Inc. v. Winnipeg (City) et al., [1990] 3 S.C.R. 1170, 116 N.R. 46; [1991] 2 W.W.R. 145 (S.C.C.) rejected any attempt to force any new form of proceeding into one or the other traditional pattern. It said instead that modern administrative hearings might fall anywhere along a spectrum between the two extremes. Selection of the right point in the spectrum requires examination of the nature of the decision asked of the tribunal, and of the rules established by the governing statute. At first sight, one might see the process that leads to the enactment of a by-law as purely legislative, not judicial, to be governed largely by the cut and thrust of politics, and not by the rules of natural justice. One cannot, however, label the process before council as politics-as-usual simply because the decision is a legislative act. One must look further. Similarly, one cannot say that the process is judicial simply because a public hearing is required.

[64] Kerans, J.A. went on in para. 14 to consider the function of a public hearing saying:

> 14 S. 139 of the Planning Act requires a council in a case like this to hold a public hearing. In my view, the purpose of the rule is to assure members of the public a fair opportunity to be heard; it does not, however, require that the hearing be inclusive. agree with the British Columbia Court of Appeal in Jones v. Delta, [1992 16 W.W.R. 1, 11 M.P.L.R. (2d) 1 (B.C.C.A.): I would not extend in every case, the right to be heard to a right to demand of the councillors that they decide the case only on what they hear at the public hearing. The undoubted duty of council to exercise its powers fairly does not go that far, at last not in a case where the question before council involves matters of public and legislative policy, and not just a fair resolution of a dispute between citizens on the basis of sound planning principles.

[65] Kerans, J.A. concluded in paras. 19 and 20:

> 19 On the other hand, I see nothing in any of this to suggest that the procedure in every case should be anything other than fair. The legislation does not repeal the general obligation of a local government

> to exercise its powers fairly. See Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police, [1979] 1 S.C.R. 311. The amendment, however, tells me that I should not necessarily equate fairness with an inclusive hearing.
>
> 20 The dividing line, I suggest, may be the nature of the issues before a council. When the proposed re-designation is about one parcel, and the dispute is between two citizens, and when no larger question of public policy is engaged , I would expect that, in the absence of some special reason, the hearing would be inclusive and decisive. In other cases, especially when larger political questions arise, the role of a council is much more legislative than judicial and the hearing should be seen by all as nothing more than one aspect of the decision process.

[66] Subsequently, in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; [1999] S.C.J. No. 39, Justice L'Heureux-Dubé, again wrote for the majority. In that case, a woman with Canadian born children was ordered to be deported. She applied in writing for an exemption forwarding other written material in support. A letter from a senior Immigration official denied her request with no reasons. After obtaining the notes made by the

investigating officer and used by the official in making his decision, she applied for judicial review of the decision.

[67] L'Heureux-Dubé, J. set out five factors which are relevant in determining the content of the duty of procedural fairness in a given case. She said in paras. 23 to 27:

> 23 ... One important consideration is the nature of the decision being made and the process followed in making it. In Knight, supra, at p. 683, it was held that 'the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making'. The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness. ...
>
> 24 A second factor is the nature of the statutory scheme and the 'terms of the statute pursuant to which the body operates': Old St. Boniface, supra, at p. 1191. The role of the particular decision within the

statutory scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed when a particular administrative decision is made. Greater procedural protections, for example, will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted. ...

25. A third factor in determining the nature and extent of the duty of fairness owed is the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated. This was expressed, for example, by Dickson J. (as he then was) in Kane v. Board of Governors of the University of British Columbia, [1980] 1 S.C.R. 1105, at p. 1113:

> A high standard of justice is required when the right to continue in one's profession of employment is at stake ... . A disciplinary suspension can have grave and permanent consequences upon a professional career.

...

26 Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances. Our Court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights: Old St. Boniface, supra, at p. 1204; Reference re Canada Assistance Plan (B.C.), [1991] 2 S.C.R. 525, at p. 557. As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. if the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness ...

... Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the 'circumstances' affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.

27 Fifth, the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances. Brown and Evans, supra, at pp. 7-66 to 7-70. While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints. ...

28 I should note that this list of factors is not exhaustive. These principles all help a court determine whether the procedures that were followed respected the duty of fairness. Other factors may also be important, particularly when considering aspects of the duty of fairness unrelated to participatory rights. The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.

[68] Decisions in Nova Scotia before *Baker* and *Old St. Boniface* have considered procedural fairness by municipal councils in land use planning matters. In *Heritage Trust of Nova Scotia v. Nova Scotia (Provincial Planning Appeal Board), supra*, Cowan, C.J.T.D. referred to *Wiswell* and quoted fairly extensively from it. In particular, he quoted from pp. 522 and 579 of *Wiswell* in para. 127:

> 127 ...
>
> and, at p. 522:-
>
> The matter being, as I have stated, a quasi-judicial one, Metro was in law required to act fairly and impartially: See St. John v. Fraser [FN2], at p. 452. In the language of Lord Loreburn in *Board of Education v. Rice* [FN3], at p. 182: '...they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything.'
>
> The obligation of a municipal body in carrying out its responsibilities is aptly and correctly stated by Masten, J.A., in *Re Howard and City of Toronto* [FN4], at p. 576:
>
> > In dealing with a proposed by-law which involves a conflict of interests between private individuals who are affected, the council,

> while exercising a discretion vested in it by statute, acts in a quasi-judicial capacity ... and its preliminary investigations and all subsequent proceedings ought to be conducted in a judicial manner, with fairness to all parties concerned.

and at p. 579:

> The council is empowered in cases like this to adjudicate between conflicting interests.
>
> In performing that duty councils are bound, like courts of justice, to see that every person interested is afforded full opportunity of presenting his views and contentions. The powers conferred on the council carry with them an obligation to see that every one affected gets British fair play, not only from the council itself when passing the by-law, but from its officers and committees in the preliminary steps leading up to the final result.

[69] Later, Nathanson, J. dealt with the subject in *Friends of the Public Gardens v. Halifax (City),* [1984] N.S.J. No. 83, (1984) 65 N.S.R. (2d) 297 (N.S.S.C.T.D.). He said in para. 37:

> 37 A council has a legislative jurisdiction and a quasi-judicial jurisdiction. In the case of the latter, council must conduct its proceedings in the same general way that a Court does; it is subject to rules of natural justice. In the case of the former, council is sovereign within limits, as one would expect a Legislature to be, and to a large extent is able to make its own rules. The distinction is important because certiorari lies in an inquiry concerning quasi-judicial jurisdiction, but does not lie in an inquiry as to legislative jurisdiction.

[70] He continued in para. 38, referring to *Wiswell*:

> 38 Whether the jurisdiction is legislative or quasi-judicial in any particular case will depend upon the circumstances, including the nature of the inquiry, the power purported to be exercised, the rules applicable to the tribunal and the subject matter being dealt with: see Russell v. Duke of Norfolk, [1949] 1 All E.R. 109 (C.A.) (per Tucker L.J. at p. 110) and R. v. Institutional Head of Beaver Creek Correctional Camp; Ex parte McCaud, [1969] 1 C.C.C. 37, 5 C.R.N.S. 317, 2 D.L.R. (3d) 545 at 548-89 (Ont. C.A.). The latter case is also authority for the proposition that, where individual civil rights may be affected, the

> tribunal has a duty to act judicially. In Lord Nelson Hotel Ltd. v. Halifax (1972), 33 D.L.R. (3d) 98 (N.S.C.A.), Jones J. pointed out at p. 106 that proceedings under the Planning Act affect the rights of property owners and, in considering a re-zoning application, council exercises a judicial function. The leading case in this area is Wiswell v. Metro Corp. of Greater Winnipeg, [1965] 51 D.L.R. (2d) 754 where Hall J. at p. 763 approved 'specificity' as the test of whether the legislative jurisdiction or the quasi-judicial jurisdiction was controlling. The latter controls in the case of: '... a specific decision made upon a specific application concerned with a specific parcel of land ...' The words quoted describe the circumstances of the present case with accuracy.

[71] In my view, these decisions must now be considered in light of the Supreme Court of Canada decisions in *Knight*, *Baker* and *Old St. Boniface*.

[72] I now turn to the five factors set out in *Baker*.

1. The Nature of the Decision and the Process Followed in Making It

[73] The first factor to be considered is the nature of the decision and the process followed in making that decision. To say that HRC was acting quasi-judicially does not answer this question. Quasi-judicial decisions can require varying degrees of procedural fairness. One must analyze the nature of the decision itself and the way in which it was made. HRC was making a decision about whether to enter a development agreement for a parcel of land in the Central Business District of Halifax several blocks below Citadel Hill, one block below Barrington Street and two to three blocks up from the harbourfront. The land had been owned by HRM but had been conveyed to United Gulf. Most, if not all, of the speakers at the public hearing did not live near the lands. Many addressed broad policy issues such as how the CBD should be developed and where tall buildings should be located. Some expressed concern about heritage conservation and protection of views from Citadel Hill.

[74] Where a decision of a municipal council involves broad policy issues, a lesser duty of procedural fairness is required than when its decision affects neighbouring property owners. In *Keefe v. Edmonton (City)*, [2002] A.J. No. ,

1602, (2000) ABQB 1098, J.L. Smith, J. referred to *Valdun*, *supra*, and said at para. 24:

> 24 The bylaw touches upon six lots that are privately owned. The party that proposed the bylaw change is a private developer. The developer is a neighbour in the one block area where the development is proposed. The applicants are also residents in that small area. The difference between the existing zoning and that sought by the developer is from 2 ½ story, single-family townhomes to a 5 storey, 61 suite condominium-style apartment with a significant increase in the number of residents. The main issue before Council essentially touched upon increased traffic in the immediate area and on the resultant traffic safety concerns for residents within the cul-de-sac, and residents coming into and exiting from Clifton Place and the lane between Clifton Place and 125 Street. In my view, Council was making a specific decision upon a specific application regarding a specific parcel of land, or a small issue between neighbours. These factors lean towards the quasi-judicial end of the spectrum.

[75] She also referred to "broader based policy issues" (para. 25) and said in paras. 26 and 27:

> 26 The respondents argue that the broader policy issues discussed indicate this zoning decision was closer to the legislative end of the spectrum, citing Guimond v. Vancouver (City of) (1999), 7 M.P.L.R.(3d) 44 (B.C.S.C.), Petherbridge v. Lethbridge (City of) (2000), 274 A.R. 159 (Q.B.) and Atkins, supra. I do not agree. These cases dealt with both larger developments and larger amounts of land, and focussed on broad policy issues and long-range community planning. I am of the view that the broader considerations that were touched on in this case do not change the character of this dispute from primarily a dispute between neighbours.
>
> 27. The fact that this decision was primarily a dispute between neighbours indicates a higher duty of procedural fairness.

[76] The decision was upheld on appeal in *Keefe v. Clifton Corp.*, *supra*. In para. 16, Russell, J.A. said:

> In the reasons, the reviewing judge in this case noted the nature of the decision making process involved specific concerns about increased

> traffic and potential impact on residents in the immediate vicinity of the proposed development. We are not persuaded that conclusion was incorrect.

[77] There is a continuum between decisions that are more legislative and those that are more judicial. This was not a decision like that in *Keefe, supra,* where residents of a small local neighbourhood on a cul-de-sac were affected. Nor is it a decision affecting a huge parcel of land where broad policy considerations are more at play. However, because of the importance of the location of the subject lands and the nature of the considerations surrounding the development of lands in the CBD, I conclude it falls on the continuum somewhat closer to the legislative end. I therefore conclude that this factor leans towards a lesser duty of procedural fairness.

2. The Nature of the Statutory Scheme and the Terms of the Statute

[78] The second factor to be considered is the nature of the statutory scheme and the terms of the statute. The decision in this case was to be made after a public hearing and following the guidelines for public participation set out in the

Municipal Government Act and the Municipal Planning Strategy. The *Municipal Government Act* provisions are quite general, requiring, among other things, the establishment of a "consultative process", insuring "access to information" and "the right ... to be heard". Section 204(3) provides:

> (3) The content of a public participation program is at the discretion of the council, but it shall identify opportunities and establish ways and means of seeking the opinions of the public concerning the proposed planning documents.

[79] "Planning documents" is a defined term. In s. 191 (n), the definition refers to the municipal planning strategy, land use by-laws and subdivision by-laws. There is no specific reference to the content of the public participation program with respect to entering development agreements. Section 205 provides that before Council adopts "planning documents" (as defined) there must be a public hearing. Section 206 sets out the requirements for a public hearing yet does not specify how it is to be conducted. Section 206(4) provides:

> (4) Copies of the proposed documents or portions of the documents shall be provided to a person, on request, upon payment of a reasonable

> fee set by the council, by policy, sufficient to recover the cost of providing the copies.

[80] Section 230(2) requires a public hearing before the approval of a development agreement.

[81] These are very general provisions and, in my view, leave to municipal governments decisions about how to carry out these requirements. Because they are not specific, they indicate a lesser duty of procedural fairness. All that is required is to have a consultative process; ensure access to information without being more specific as to what information is to be provided, when and by whom, other than to say that the MPS, land use by-law, subdivision by-law or amendments are to be provided; and provide an opportunity to be heard at a public hearing without specifying the rules governing such hearings.

[82] With respect to the elements specified in the *Municipal Government Act*, the duty of procedural fairness is fairly high. That includes requirements that a public hearing be held, that notice be given, that a consultation process be established and that "planning documents" to be considered be provided to the public.

[83] In *Keefe* (Queen's Bench), *supra*, J.L. Smith, J. said in paras. 29 and 30:

> 29 The purpose of the statutorily mandated public hearing is to assure members of the public a fair opportunity to be heard and make their views known: Atkins, supra at para. 14. Additionally, the hearing provides the decision-makers with the benefit of public examination and discussion of the issues concerning the adoption or rejection of the proposed bylaw to ensure the best decision is made, to increase public acceptance, and to dispel any perception of arbitrariness or bias. This participatory process is intended to be a meaningful examination and discussion of the issues material to the Council's decision: Pitt Polder Preservation Society v. Pitt Meadows (District of) (2000), 77 B.C.L.R. (3d) 54 (C.A.) at paras. 45-47, 63.
>
> 30 The importance placed on public hearings in the MGA indicates that the duty of procedural fairness with respect to the right to be heard will be fairly high.

In the appeal decision, Russell, J.A. agreed with J.L. Smith, J. in this regard (para. 17).

[84] Because a public hearing is required, a consultative process was in effect and information was provided, I conclude that the duty of procedural fairness with regard to the right to be heard is fairly high. It would be higher if Council's decision was final, but there is an appeal procedure.

3) The Importance of the Decision to the Individual/Individuals Affected

[85] The third factor to be considered is how important the decision is to those affected.

[86] In *Baker, supra*, an example was given where a high standard of procedural fairness would be required: where a person's "profession or employment is at stake ..." (para. 25 quoted above)

[87] In *Knight*, *supra,* the decision was with regard to the dismissal of a contract employee. In *Baker*, *supra*, the issue involved deportation of a woman with children born in Canada.

[88] In *Keefe*, *supra*, L.J. Smith, J. concluded the effect of the development would be great upon the few long time residents living near the subject lands (para. 31). On appeal she was upheld, Russell, J.A. saying in para. 19:

> Regarding the import of the decision, the reviewing judge concluded that the potential impact of the proposed Bylaw on both the traffic and the residents in the vicinity of the proposed development, demonstrated the import of the City's determination on the matter.

[89] As L'Heureux-Dubé, J. said in *Baker* at para. 25:

> 25 .... The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated.

[90] The duty of procedural fairness is high in professional or employment situations and in immigration matters. The individuals being heard are personally greatly affected.

[91] People like the local residents in *Keefe* are affected to a lesser degree. Their daily lives would be affected by such things as traffic and safety issues. The duty of procedural fairness is fairly high.

[92] As L'Heureux-Dubé, J. said at para. 25 of *Baker*:

> ... The importance of a decision to the individuals affected, therefore, constitutes a significant factor affecting the content of the duty of procedural fairness.

[93] Although concerned about the overall impact of the development on the central business district, positive or negative, those who participated in the public hearing are not affected in the sense of someone whose livelihood, right to remain in Canada or neighbourhood is affected. Many felt very strongly one way or the other about this proposed development but the focus of this factor is the effect upon them personally or upon their lives. Counsel's decision was not one, like in *Keefe*, *supra*, where its role was in essence to arbitrate what was "primarily a dispute between neighbours" (para. 26 Queen's Bench decision). In my view, the present situation is not similar to *Keefe* because it is not a local issue affecting the lives of residents of a neighbourhood but one with broader policy implications for

the entire community.   HRM's decision here was accordingly somewhat more on the legislative side. For this reason, I conclude that the duty of procedural fairness is a moderate one.

4. Legitimate Expectations of Those Challenging the Decision and

5. Council's Choice of Procedure

[94] The fourth factor to consider is the legitimate expectations of those challenging the decision. The fifth factor is Council's choice of procedure. In my view, these factors are so closely related that I will deal with them together.

[95] The applicants' expectations are based upon the *Municipal Government Act*, the Municipal Planning Strategy and Halifax Regional Council's own Administrative Order. HRM has authority to establish its own procedures for public hearings within the rather general guidelines set out in the *Municipal Government Act* referred to above.

[96] A high degree of deference is accorded to a municipality having set its own procedural rules as long as they provide for procedural fairness. Some of the procedures set out in Appendix A to the Administrative Order were specifically considered in *Williams Lake Conservation Co. v. Halifax (Regional Municipality)*, [2003] N.S.J. No. 465 (S.C.). In that decision, McDougall, J. concluded there was

nothing procedurally unfair about the five minute time limit on oral presentations which could be supplemented by written comments.

[97] The relevant provisions have been set out previously under the heading "Facts". To summarize, they provide that:

1. A written summary (including email or fax) can be sent at any time before Council makes its decision (3);

2. Before the public hearing opens, staff will make a presentation, following which questions may be asked by members of Council for clarification only (6);

3. The speakers will be called in order in which they signed up following which anyone who has not signed up may speak (7 & 8);

4. Each speaker has five minutes and no opportunity is provided for speakers to debate each other (13);

5. Council members are not to debate with or enter into dialogue with speakers but may ask questions for clarification (14);

6. After the last speaker from the public has been heard, the applicant is given an opportunity to briefly respond to points raised by the speakers (16);

7. After the close of the public hearing, staff will have an opportunity to briefly respond to points raised by the speakers (17);

8. Council will then enter debate (18).

[98] Although Council may defer the debate end decision "particularly when Council members need more time to consider what they have heard, or require further information from staff", "no further public presentations will be heard" (18). However, written submissions will continue to be received at any time before Council makes its decision and they "shall be provided to Council" (4).

[99] Section 25 of the Administrative Order (Tab D, Supplemental Record) deals with information provided to members of Council and to the public. It provides:

Information To Be Provided to Members

25. (1) On the **Friday** next preceding each regular meeting of the Council, the Clerk shall cause to be delivered to each member at the address which each member has recorded in writing with the Clerk, the following:

a) agenda;

b) copy of each report which is to be considered;

c) copy of each motion to be considered if the motion or the purport thereof is not indicated on the agenda;

d) information agenda.

(2) The Clerk shall make the agenda immediately available to the public and the other information referred to subsection(1) available to the general public at 9:00 a.m. on the Monday next preceding each regular meeting.

(3) Where an item on the agenda has a notation indicating that the report will be circulated other than with the agenda package listed in subsection (1), the report shall be delivered, faxed or circulated to all members of Council as soon as it is practical prior to the regular meeting of Council, and the report shall be provided to all members of Council as near as is reasonably possible at the same time, and in no event shall the report be made available to the public prior to the report having been provided to all members of the Council.

[100] These procedural rules provide a basis for the expectations of the applicants. Furthermore, both are very familiar with the public hearing process. Howard Epstein was a member of Council and was also counsel for Heritage Trust, Elizabeth Pacey, Philip Pacey and others in *Heritage Trust v. Nova Scotia (Provincial Planning Appeal Board), supra*. He was also counsel for two of the parties appealing the decision of HRC with respect to the Midtown Tavern (*Midtown Tavern and Grill Ltd.* 2005 NSUARB 105). Heritage Trust was a party in both cases just mentioned and among those participating in those appeals were Elizabeth Pacey, Philip Pacey and Alan Parish. Heritage Trust was also one of the respondents in the Midtown Tavern's appeal to the Nova Scotia Court of Appeal (*Midtown Tavern and Grill Ltd. v. N.S. (UARB)*, [2006] N.S.J. No. 418, 2006 N.S.C.A. 115. It was an appellant in *Heritage Trust of Nova Scotia v. N.S. (UARB),* [1994] N.S.J. 50. Earlier still, Heritage Trust was a participant in the appeal by ATC Properties Ltd. to the Municipal Board, which decision was rendered on August 10, 1984.

[101] There has been no suggestion that the applicants had a right to greater procedural options that would normally be expected because of specific representations made by HRM. For example, they were not told they would have an opportunity to rebut the developer's remarks. In fact, it was made clear that the public participation part of the public hearing had ended. Furthermore, Councillor Sloane, at the March 21, 2006 Council Meeting, commented "... it seems a little odd that we would have this information after the public part when the public should have been ... privy to this so they could actually respond to it in their actual remarks, which they weren't." (p. 10 of the Minutes, Tab 21, Vol. 3 of the Record). Mayor Kelly asked the municipal solicitor for clarification to which Ms. Donovan replied "Councillor, this public hearing process in dealing with planning matters is not intended to be adversarial or to be a debate." (p. 10 of the Minutes)

[102] In *Keefe*, (Q.B.), the applicants were residents of a small local neighbourhood which would be affected by the re-zoning. Traffic was an important issue and they had retained a transportation expert who attended the public hearing. The hearing was not concluded on that date and the applicants were told they would have "a reasonable opportunity to respond to new information or basically to rebut things" at the adjourned date. However, the

applicants' transportation expert could not attend on the adjourned date because of illness. The applicants had requested that he attend by speaker phone which was permitted by the Council's rules but the request was in error denied. At the adjourned date, the City's Transportation & Streets Department produced an earlier report the transportation expert had prepared. The developer used it to attack his credibility and the transportation expert, not being present, had no opportunity to respond to it. L.J. Smith, J. quashed the bylaw saying in para. 51:

> In this case the applicants were entitled to the opportunity to rebut this prejudicial representation ... .

[103] On the appeal, Russell, J.A. upheld the lower court decision. She said in para. 20:

> 20 With respect to the legitimate expectations of the persons challenging the proposed Bylaw, the chambers judge noted that at the June 18th hearing, council had represented that presenters would be able to respond to new information arising after their initial presentation, on the adjournment date. Given the emphasis on traffic concerns during the initial hearing, we agree that such a representation would create a

> legitimate expectation that the respondents' consultant would and could participate further on the adjournment date. ...

[104] The applicants in this case had been through the planning process many times, as councillor, counsel for parties and as parties. They knew how public hearings were conducted. They had not been told, as the applicants in *Keefe* had been, that they would have a further opportunity to speak. In fact, the contrary was expressed. The question of whether this public hearing was handled properly in that regard will be discussed after the content of the duty of procedural fairness is determined.

[105] There is deference to HRM's ability to decide its own procedure. Furthermore, there were no representations made to the applicants that raised their expectations that there would be a procedure other than the usual.

Conclusion

[106] Having reviewed all five factors, I conclude that the duty of procedural fairness in a situation like this is moderate to fairly high. The hearing was a public

one but not one involving a few residents in a local neighbourhood but one with broader policy considerations. HRM was entitled to and did establish procedures for conducting public hearings with which the applicants were familiar and there were no representations that special provisions would be made for them.

[107] As a result of this conclusion, the public hearing in this specific matter was less judicial and more legislative. The trappings of a trial like those described in *Atkins*, *supra*, do not therefore apply. Nor was it purely a legislative procedure as was described in that decision.

ISSUE NO. 2 (a) - PROVISION OF MATERIAL PRIOR TO THE HEARING

[108] The applicants say that HRM failed in its duty of procedural fairness in this case because it did not provide copies of the tender documents, agreement of purchase and sale and wind and shadow studies at all or in sufficient time to provide them with an opportunity to examine them in order to fully participate in the public hearing. They say in their written submissions (para. 63 of the applicants' first submissions):

> To meet its duty of procedural fairness, Halifax Regional Council must make all documents and other material referred to and relied upon by Council, its Committees or staff of the HRM when preparing recommendations for Council, during the development agreement process, available to the public.

[109] In the context of a moderate to fairly high duty of procedural fairness what is required of the municipality in terms of providing material?

[110] The applicants rely upon the decision of Nathanson, J. in *Friends of the Public Gardens v. Halifax (City)*, *supra*, and upon the Supreme Court of Canada decision in *Pitt Polder, supra*, as support for this proposition. In *Friends of the Public Gardens*, Nathanson, J. concluded that Halifax City Council violated principles of natural justice in depriving the applicant of "a full and equal opportunity to present its case" (quoting from heading 6, after para. 65). He referred to *Wiswell*, *supra*, *Kane v. University of British Columbia Board of Governors*, [1980] 31 N.R. 214 (S.C.C.) and *Board of Education v. Rice*, [1911] A.C. 179 (H.L.) and concluded in para. 73:

> Applying these principles, it will be seen that the applicant did not have the benefit of full disclosure and did not have the opportunity to make its case.

[111] However, as stated above, the principles in *Wiswell* have been qualified by decisions such as *Baker* and *Old St. Boniface*. Nathanson, J. concluded that the public hearing process was quasi-judicial (para. 40) and, accordingly, concluded that the public hearing must be conducted like a trial with full disclosure and even a right of cross-examination. (para. 72.) However, in my view, the conclusion that a public hearing by a municipal council must be conducted like a trial is no longer the law.

[112] The British Columbia Court of Appeal in *Pitt Polder*, *supra,* established what I consider to be the high-water mark in terms of disclosure in advance of public hearings. However, in my view, its conclusions must be looked at in the context of the unusual circumstances of that case. Subsequent decisions have not gone so far.

[113] In *Pitt Polder, supra*, a "public information package" was made available to the public. A number of reports were not included in it. The "public information package" did not contain summaries of or comments on the reports by staff because the Director of Planning Services had not requested that they be provided to the municipality at all before the public hearing (para 58 *Pitt Polder*). Nor was any member of the public permitted to copy the reports since they could not remove them from the meeting room (para. 61). The chambers judge considered them "very relevant" (para. 10). The reports were only made available at the public hearing: they included an environmental assessment, traffic study, agricultural impact report and municipal tax impact report. The latter two were entirely new, the former two were updated reports from a previous re-zoning request. An archeological assessment was also presented at the public hearing and a commentary on it was also made available at the public hearing. The director of Development Services requested the reports to be obtained but did not require the developer to provide them before the public hearing.

[114] The chambers judge concluded the reports were "highly relevant" but declined to quash the by-laws granting the re-zoning because she concluded the public had "a reasonable opportunity to be heard" (para. 36).

[115] The Court of Appeal disagreed. Rowles, J.A. referred to a number of British Columbia cases. She referred, in para. 49, to *Karamanian v. Township of Richmond* (1982), 138 D.L.R. (3d) 760 (B.C.S.C.) She said:

> 49...the undisclosed documents were the reports and recommendations of the planning committee and the planning department along with the supporting documents, <u>all of which had been considered by council</u>... (my emphasis)

[116] Rowles, J.A., in para. 49, quoted Wallace at p. 766 of *Karamanian:*

> ... To make an intelligent assessment of the effect of a by-law on one's property and to be able to question proponents of the by-law one should be informed of the matters considered by the planning committee, the rationale for their recommendation, and such other relevant material <u>considered by council</u> when it adopted the committee's recommendations and decided a public hearing be held. Anything less than full disclosure of the relevant information restricts the scope of the analysis and the consequent representation a homeowner might otherwise make

> to council at the public meeting. Leaving homeowners ignorant of pertinent information in the possession of the council frustrates the objective of a public meeting and denies those homeowners whose property is affected by the by-law a full opportunity to be heard at a fair and impartial public hearing. (my emphasis)

[117] Rowles, J.A. said that, in *Eddington v. Surrey (District)*, [1985] B.C.J. No. 125 (C.A.), the reports had been provided to Council members but not to the public. She also quoted from *Harrison v. Richmond (City)* (1993), 14 M.P.L.R. (2d) 261 (B.C.S.C.). At para. 52, she quoted Finch, J. at p. 272 who referred to the municipality disclosing "all relevant material which is considered by council or its committee ...". (my emphasis)

[118] Rowles, J.A. concluded that, where the public received reports only at the public hearing, the procedure was unfair (para. 62). That occurred when no summaries of the reports or even reference to them had been made before the public hearing. Planning staff had not even received or reviewed them. The

subject of the reports was in essence a complete surprise to the public at the public hearing. These were "matters" that arose for the first time at the public hearing.

[119] Subsequently, the British Columbia Court of Appeal and the Supreme Court of Canada dealt with disclosure in *Canadian Pacific Railway Co. v. Vancouver (City)*, [2004] B.C.J. No. 653, 2004 BCCA 1992 and [2006] S.C.J. No. 5, 2006 SCC 5 respectively. At para. 96 of the Court of Appeal decision, Esson, J.A. referred to *Pitt Polder, supra*, saying:

> I think it is fair to say that Pitt Polder is widely regarded as having gone further than any prior decision in imposing a duty on council to make broad and effective disclosure to members of the public who may wish to oppose an enactment of the bylaw.

He concluded however that many of the documents sought by C.P.R. were not relevant (para. 102).

[120] At the Supreme Court of Canada, McLachlin, C.J. wrote for the court. She referred to *Baker*, and said at para. 38:

> 38 In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 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' (para. 22 per L'Heureux-Dube J.). 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.

[121] In considering the content of the notice of the public hearing, she said in para. 46:

> 46 ... what is required is fairness, not perfection.

[122] In my view, this an accurate way to assess all the elements of procedural fairness. The process must be fair but it need not be perfect.

[123] McLachlin, C.J. referred to *Pitt Polder* in para. 55:

> 55 A municipality must provide the proposed by-law and 'reports and other documents that are material to the approval, amendment or

rejection of the [by-law] by local government' prior to the public hearing (*Pitt Polder Preservation Society v. Pitt Meadows (District)* 2000 12 M.P.L.R. (3d) 1, 2000 BCCA 415, at para. 54)

[124] She continued in paras. 56 and 57:

> 56 For the reasons that follow, I conclude that the City's disclosure met this standard. It was entirely consistent with the goal of planning for the future development of the city. The *Vancouver Charter* conferred broad planning powers on the City without procedural requirements. Nevertheless, the City chose to hold a public hearing on the issue of planning for the corridor, and CPR was given sufficient disclosure to allow it to participate meaningfully in that hearing and present its case.
>
> 57 CPR complains that written submissions to City Council from the public were not made available to it, nor to those people who attended the public hearing. However, the City made these document available to the public through the City Clerk's office prior to, and during, the hearing. This is standard practice for public hearings. The documents were also assembled in a binder on a table at the front of the hearing

> room for review and were summarized by Dr. McAfee at the hearing. This constituted sufficient disclosure.

[125] The Supreme Court of Canada has established the standard for disclosure as being sufficient to allow for meaningful participation in the hearing. In that case, it should be noted that, although there was no requirement for a public hearing, the party complaining was the landowner directly affected by Council's decision.

[126] Even before the Supreme Court of Canada decision in *CPR*, the British Columbia Supreme Court and Court of Appeal had backtracked somewhat on *Pitt Polder*. In *Wilde v. Metchosin (District)*, [2004] B.C.J. No. 1215, 2004 B.C.S.C. 782, the applicant's argument was that (at para. 7):

> 7 ... at no time was she provided with the correspondence, information and reports to and from the developer, to and from the respondent's staff, and to and from the solicitors for the respondent. In the result, he argues that she was unable to engage in a meaningful debate as she did not have in her possession the material and information in the possession of Council.

[127] Vickers, J. placed the onus on those seeking information to specify what they were asking for (para. 19). He also commented that "No binder is put together containing all the information that is available to members of Council" (para. 17).

[128] When the matter went on appeal to the British Columbia Court of Appeal, Low, J.A. wrote for the court and, in para. 11, referred to *Pitt Polder* and the comment on it made by Esson, J.A. at para. 96 (quoted above). Low, J.A. concluded in para. 13:

> 13 In the present case, the appellant argued that the respondent's employees complied only with specific requests for documents and did not provide all information that was before council. This argument is without substance. There was abundant evidence that electors, including the appellant, received documents they requested and that one or more of them had access to the relevant file.

[129] I note that in these cases (except CPR) what was complained of was not having material members of Council had.

[130] I now turn to the specific material the applicants said was not disclosed. It falls into two categories: 1) tender documents and agreement of purchase and sale for the subject lands; and 2) the wind and shadow studies.

1. Tender documents and agreement of purchase and sale

[131] The applicants say these were relevant because they were referred to in the December 16, 2005 staff report and were referred to in debate by members of Council. The staff report of December 16, 2005, on p. 5, says the following:

> **Purchase and Sale Agreement:**
>
> The bulk of the proposed development site was acquired from the Municipality in May 2004 through Public Tender, United Gulf Developments was the successful proponent with a bid of $5,360,000. Ownership of the land has been transferred to United Gulf. HRM is under no obligation to renegotiate the sale price or buy back the land if Council does not approve the proposed development. The MPS policies and public hearing process were highlighted in the tender document. Any risk associated with approval of the proposed development is unconditionally assumed by United Gulf.

That staff report is attached to the report to Council dated February 24, 2006 (Tab 18, Vol. 2)

[132] Portions of the tender documents and the agreement of purchase and sale have been quoted above under the heading "Facts".

[133] In debate, Councillor Streatch briefly referred to HRM having sold the property (pp. 77-78, Tab 23, Volume 3) and Councillor Uteck also referred to Council's award of the tender (p. 91). I cannot conclude that these brief references to the tender and agreement of purchase and sale are sufficient to make these documents relevant to the public hearing with respect to the approval of a development agreement. It was made clear in the staff report quoted above that there was no obligation to buy the land back from United Gulf if HRC did not approve the development agreement. In any event, the issues before Halifax Regional Council, issues such as height, views and viewplanes, heritage, wind, shadow and open space, would have been the same had the lands been purchased by United Gulf from a third party.

[134] In any event, the tender and the report to Council recommending its approval were provided to Philip Pacey on February 7, 2006, prior to the public hearing (see the Affidavit of Philip Pacey, para. 4 and Exhibits A, B & C to that Affidavit).

2. Wind and shadow studies

[135] Wind and shadows were always issues with respect to this development. It could be said they are always issues when a proposal for a tall building is being considered. The Municipal Planning Strategy in fact addresses these issues. Policy 7.5 and Policy 7.6 provide (pp. 25-26, attachment B to Tab 11, Volume 2):

> 7.5 The design of new developments in the CBD should be such that normal wind levels on outdoor pedestrian routes and in public open spaces will be acceptable.
>
> 7.6 The design of new developments in the CBD should be such that there will be a minimal amount of shadow cast on public open spaces.

[136] The studies are contained at Tabs 1-D and 1-E, Volumes 1 and 2 of the Record respectively. In her Affidavit, Anne Muecke relates how they came to be prepared and the format used for presentation. Her affidavit says in part:

> 14. United Gulf commissioned Conner Architects & Planners ... to create a three dimensional animated digital model to demonstrate the movement of shadows in a continuous sequence from dawn to dusk on four dates. ...
>
> 15. United Gulf engaged Rowan Williams Davies & Irwin Inc. ... to prepare a study of the impact which the Project would have upon pedestrians in the area surrounding the site. ...

[137] These subjects were addressed in the staff report (quoted previously under the heading "facts"). That staff report was prepared for District 12 PAC and HAC. As mentioned above, these topics were discussed at meetings of both.

[138] It is noteworthy, in my view, that HRC did not have these studies before the start of the public hearing. It did not in fact receive them until after the close of the public portion of the public hearing. The wind study was attached to a

supplemental report to HRC dated March 15 and the shadow study was presented visually at the Council meeting on March 21.

[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.

[140] That is the position Paul Sampson took when the request by Philip Pacey was made. Paul Sampson's affidavit, para. 20, says in part as follows:

> ... I advised Dr. Pacey that a copy of the documents could only be produced by HRM Planning and Development Services if the Developer who commissioned the reports consented to the release of

the documents or pursuant to a Freedom of Information Act application seeking production of the documents.

[141] He did not consider them to be "accessible to the public" (para. 42) until after February 22 when Anne Muecke advised him United Gulf would release them (para. 42). This was six days before the public hearing. He also noted that no one except Philip Pacey, Howard Epstein and Alan Parish (then president of Heritage Trust) requested documents from him (para. 41).

[142] However, his affidavit also sets out that, at the public information meeting on January 19, 2005, he advised everyone present that the studies would be submitted by the developer (para. 13). He said (para. 14) he was provided with these:

(1) Discs containing shadow study and original summary submitted on February 11, 2005 with revised summary submitted on March 21, 2005; ...

...

(3) Wind report submitted on May 6, 2005.

[143] His affidavit and that of Anne Muecke and the minutes of the meetings disclose that the wind and shadow studies were discussed at PAC and HAC meetings. That has been referred to under the heading "facts".

[144] Anne Muecke states in her affidavit that the material she presented at the meeting with PAC on May 2, 2005 was filed and available in the office of HRM's City Clerk (para. 22, Affidavit). This is uncontradicted.

[145] She attached to her affidavit as Exhibit "B" her presentation on the wind study. Paul Sampson attached as Exhibit "B" to his affidavit the material presented to District 12 PAC on May 2, 2005.

[146] Anne Muecke says in her affidavit that she provided Philip Pacey with a copy of the wind study on February 23, 2006 and a copy of the shadow study on February 25, 2006. She had also presented "the Wind and Shadow information" to him on February 23, 2006 (paras. 33 & 34, Affidavit).

[147] In paragraphs 23 to 28 of her affidavit, Anne Muecke details efforts made to inform Heritage Trust about the project through Alan Parish, its then president.

[148] Howard Epstein attended the District 12 PAC meeting on January 16, 2006 and addressed the committee on behalf of the Federation of Nova Scotia Heritage (Affidavit of Howard Epstein, para. 7 and attached Minutes, Exhibit “B”, p. 8). He subsequently wrote to the committee chair, Heather Ternoway, on January 17, 2006 (Exhibit “C,” Affidavit). In his letter he asked for “an opportunity to inspect the studies” (p. 2, para. 4). In that same paragraph he said: “Again, on the matter of fairness in the process, if the committee has seen the studies on traffic, wind, and/or shadow, then, they too should be available for inspection by concerned members of the public.” The studies were not given to committee members.

[149] Paul Sampson’s affidavit relates his dealings with Howard Epstein with respect to this project between January 26 and February 3, 2006. Howard Epstein says in para. 13 of his affidavit that Paul Sampson left him a voice mail message advising that HRM would not provide copies of the studies. Paul Sampson says he did provide to Howard Epstein the things he requested in items 3 and 5 of his letter (paras. 24-26, Sampson Affidavit).

[150] Heather Ternoway, Chair of District 12 PAC, did not write to Howard Epstein until February 6, 2006. She copied her letter to Paul Sampson, among others (para. 12, Epstein Affidavit, Exhibit "F").

[151] Howard Epstein spoke at the public hearing on February 28 and wrote to HRC on February 16, 2006 (Exhibit "I", Epstein Affidavit). He wrote again on March 21, requesting that the public hearing be re-opened "to allow the public the opportunity to study the wind and shadow studies ... [and] comment on those studies" (Exhibit "R" Epstein Affidavit).

[152] The question for me is whether HRC fulfilled its duty of procedural fairness in this regard. The test is that set out in *CPR* by McLachlin, C.J. Did the public have sufficient disclosure to allow it to participate meaningfully in the public hearing? I conclude it did in the circumstances of this case and considering the level of procedural fairness called for.

[153] It is arguable that the meaning of subsection (3) of s. 25 of Administrative Order One is that members of the public are not entitled to information which has not been provided to members of Council dealing with a particular issue. Members

of Council did not have the wind and shadow studies at all before the public hearing and received the wind study only with a supplementary report from staff dated March 15 and saw the shadow study presented on March 31, both of which occurred after the close of the public hearing.

[154] Certainly there were flaws in the provision of information but perfection is not the standard. In my view, 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, Philip Pacey did receive the wind study, a written report, and he received it before the public hearing. According to the affidavits of Anne Muecke and Paul Sampson, he received it from each. Anne Muecke provided it to him on February 23 and Paul Sampson gave him a copy on March 1. He therefore had a copy of it before he made his presentation to HRC on March 7 and commented on it within the five minutes he and others were allotted for their oral presentations. He said it was a very poor study and should not be relied upon. He commented on the number of failures in the safety category (p. 74, Tab 21, Volume 3). He also had an opportunity to write to Council about it and provided his comments on an annotated copy of it. (This is included in Vol II of Exhibit A attached to the

affidavit of Jan Gibson, HRM's Clerk, behind the Tab marked "Submitted for HRC Meeting March 21, 2006)

[155] It is also important to note that it was not provided to HAC or PAC. Nor did members of Council have it before the public hearing began. In effect, at least one member of the public had more information than the members of Council. Nevertheless, wind was a subject addressed many times by speakers at the public hearing. Similarly, members of Council asked questions about wind effects. Details of the measures to mitigate wind effects were to be incorporated at the design stage.

[156] The shadow study was not a written study but one contained on DVD's with a written summary. Philip Pacey had been shown it by United Gulf on February 23 and a copy of the disk was delivered to him on February 25. He referred to it within his allotted five minutes for remarks to Council (pp. 73 & 74 of Tab 21, Volume 3). He said:

> ... this development would cast shadows on Citadel Hill in the morning. In fact, it would block the sunrise from Citadel Hill in the morning and it would also cast shadows on Sackville Landing.

[157] Had no one been aware that wind and shadow were issues or that the developer had studies done, one of the purposes of the public hearing would have been thwarted, that is, so councillors can have the benefit of public examination and discussion of the issues (paraphrasing para. 45 of *Pitt Polder*). (my emphasis)

[158] Furthermore, staff in its December 15, 2005 report, had reviewed the studies and commented on them. That is the role of staff. The staff report was available to Council members and to the public and it discussed the issues of wind and shadow. These issues were not mentioned for the first time at the public hearing. Furthermore, that report was directed first to HAC and PAC in early 2006.

[159] At least one member of the public had obtained the studies which Council members did not have. In *Wilde*, Low, J.A. commented on a situation where members of Council had information most of the public did not. He said in para. 13:

> 13 In the present case, the appellant argued that the respondent's employees complied only with specific requests for documents and did not provide all information that was before council. This argument is

> without substance. There was abundant evidence that electors, including the appellant, received documents they requested and that one or more of them had access to the relevant file. ...

Accordingly, members of Council had the benefit of his views about them. In any event, because wind and shadow were addressed at every step of the procedure from HAC and PAC, to staff reports, to many who spoke at the public hearing and wrote or emailed, it was clear these were issues Council had to grapple with. As a result of the concerns that were raised, members of Council had questions for staff and for the developer about these very issues.

[160] The content of the duty of procedural fairness is moderate to fairly high in this case. It may be different in different circumstances.

[161] The public hearing is not a trial during which Council sits as a judge as counsel for the applicants seems to suggest. He used words referring to HRC having "to judge" the issue and called them the "trier of fact." He also referred to "evidence" at the public hearing (p. 27 of Submissions of the Applicant). In my

view, this overstates the quasi-judicial part of HRC's dual role when conducting public hearings.

[162] There is no requirement for anyone to file briefs or copies of experts' reports in advance for the other side to view. Unlike some trials, a public hearing is not a duel of experts. It is not a debate and there is no opportunity for cross-examination. Each speaker is allotted five minutes to make his or her views known on the issues. In addition, unlike a trial, members of the public can provide further submissions after the public participation part of the public hearing has ended and at any time until Council makes its decision. In my view, these differences from a trial demonstrate the distinction between a consultation process and an adversarial one.

[163] Members 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.

[164] I conclude 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.

[165] I therefore conclude that the public had sufficient information to participate meaningfully in the public hearing and for individuals to bring points of view forward.

[166] In any event, even if HRM should have provided the studies earlier, which I have not concluded was required, I have a discretion to exercise with respect to remedy. As Huband, J.A. said in para. 20 of *Save the Eaton's Building Coalition v. Winnipeg (City)*, [2002] M.J. No. 414, 2002 MBCA 140 (C.A.):

> 20 There is, in these circumstances, a discretion to be exercised with respect to remedy. The learned motions judge cited the following quotation from the text of Professor S.A. de Smith, Judicial Review of Administrative Action, 3d ed. (London: Stevens & Sons Limited, 1973) at 123 (at para. 67):
>
> > [M]uch may depend upon the particular circumstances of the case in hand. Although 'nullification is the natural and unusual consequence of disobedience,' breach of procedural or formal

> rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature, or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced, or if serious public inconvenience would be caused by holding them to be mandatory, or if the court is for any reason disinclined to interfere with the act or decision that is impugned.

[167] There would be substantial inconvenience in having a further public hearing one year later. The appeal at the NSUARB is underway or and one year has already passed since the matter was before HRC. If the prejudice to the public was significant that would not be determinative. However, in all the circumstances of this case, I find there was no substantial prejudice to the applicants or to the public generally. The issues of wind and shadow were fully canvassed before HRC and this is evident from the Record. I would accordingly exercise my discretion not to grant the application.

ISSUE NO. 2 (b) - RECEIPT OF INFORMATION FROM DEVELOPER AFTER CLOSE OF PUBLIC HEARING

[168] The question for this court is whether, based upon a moderate to fairly high content of procedural fairness, the receipt by HRC of information after the close of the public hearing vitiated the public hearing process.

[169] The applicants say Halifax Regional Council received new information after the close of the public hearing. They say the information was "new", not clarification, because it gave more detail on the wind and shadow issues which was not previously disclosed. They say any additional information received by Council after the close of the public hearing can only come from staff not the developer, as was the case here, unless the public hearing is re-opened to give the public an opportunity to respond.

[170] The applicants rely on *Williams Lake*, *supra*. In that case, the community council which was to make the re-zoning decision, received a supplementary report from staff after the close of the public hearing. The appellants in that case said the *audi alteram partem* principle was breached because they did not have an opportunity to respond to the supplementary report. The application was dismissed and they appealed. Oland, J. said in para. 10:

> 10 That report was to clarify comments from the community, to answer questions posed by the councillors, and to provide additional information. The Chair then indicated that the public hearing was closed. In response to a question from the floor, she advised that the public would not have an opportunity to respond to the further staff report that had been requested.

[171] She said in para. 29:

> 29 In my view, the Chambers judge did not apply any wrong principle of law and no patent injustice has resulted. The supplementary report was prepared by planning staff and not by any interested party. Moreover, there is nothing in that report in the nature of new information or new evidence or new issues or changed positions. Finally, it is not apparent that Williams Lake had any further new material to put forward to the Community Council. ...

[172] In para. 30, Oland, J.A. quoted from the decision of the Chambers judge, McDougall, J. as follows:

> ...

> 21 The timing of the supplemental report might possibly have been a concern if it had been substantially altered to include things not mentioned in the initial report or if it had resulted in a different recommendation based on completely different factors.
>
> 22 This is not the case here. Staff, by way of the supplemental report, addressed the issues raised by concerned members of the public by providing additional information to clarify these points. As well they provided answers to the questions put to them by members of the CCC.
>
> 23 Based on the foregoing I am not convinced that there has been any procedural unfairness nor a denial of natural justice. The process of public participation required of the [Chebucto Community Council] under the Municipal Government Act has been conducted fairly, in my opinion.

[173] In para. 31, Oland, J.A. said:

> 31 Where a municipal council considers submission by an opponent or proponent of development after the close of a public hearing, it is generally required to hold further public hearings. ...

[174] In my view, the critical word is "generally". Under what circumstances, does that general rule apply such that a further public hearing must be held? *Williams Lake* did not address a situation like that here and that was recognized by Oland, J.A. when she said in para. 32:

> 32 Here, unlike the situation in Friends of the Public Gardens, supra the material considered by the Community Council was not submitted by or on behalf of a proponent or an opponent to the proposed re-zoning. The supplementary report was prepared by municipal planning staff. Furthermore it was prepared only when the Community Council asked or directed staff to provide a further report containing clarification and additional information.

[175] In my view, *Williams Lake* 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. This is reflected in paras. 35 and 36 where Oland, J.A. referred to *Jones v. Delta, supra*, and said:

> 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.
>
> ...
>
> 36 The court held that the proponents' submissions did not vitiate the process because they did not relate to changes in the proposed golf course concept but only to changes to habitat to satisfy the concerns of farmers.

[176] The critical part of the *Williams Lake* decision is contained in para. 37 which, in my view, must be read with para. 50, upon which the applicants rely. The two paragraphs are as follows:

> 37 The supplemental report does not contain any new information in respect of the re-zoning application that had not been raised before the Community Council in the initial report, in written submissions from the public, or during the public information hearing. It did not present any new studies or set out any new facts. It did not include any new submissions from Kimberly-Lloyd or other proponents of the proposed development.
>
> ....

> 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.

[177] Interpreting this decision in this way, in my view, reflects what the decision actually dealt with. Each case must be looked at to determine if the general rule that the public hearing must be re-opened applies or if it is one where no procedural unfairness would result if it is not re-opened. In *Hubbard v. West Vancouver (District)*, [2005] B.C.J. No. 2769, 2005 BCCA 633, Hall, J.A. said at para. 16:

> 16 Determining whether new issues are raised in post-hearing submissions is a question of fact and will depend on the circumstances in each case.

One must consider what occurred at the public hearing to determine if there was a breach of procedural fairness.

[178] This public hearing went along as most public hearings do, although this one was lengthier than some. The Administrative Order procedure was considered in *Williams Lake* in the Chambers decision and specific provisions were found to be acceptable, such as the five minute limit for speakers. Oland, J.A. referred to these at para. 13:

> The Chambers judge decided that the five minute rule for addressing the Community Council at the hearing did not result in any procedural unfairness. Nor, in his view, did a change in the venue of the first meeting, the use of the sign up sheet, or the decision not to adjourn the second hearing night, amount to unfairness. His determination of these issues has not been appealed.

[179] Paragraph 16 of Appendix "A" to Administrative Order No. 1 provides for the applicant to have "an opportunity to briefly respond to points raised by speakers." It is not entirely clear from this paragraph whether the public hearing has been closed at this point. The paragraph refers to "the last speaker from the public" having been heard. The next paragraph (17) refers to "When the public hearing has been closed, staff will ... respond."

[180] I conclude that whether the public hearing has closed at that point is not critical because what is abundantly clear from these paragraphs is that, in normal circumstances, the developer gets to speak after all the speakers from the public. He or she gets the last word.

[181] Paragraph (16) refers to "a brief" response. What is brief, in my view, depends on the length of the public participation part of the public hearing. If five speakers from the public speak for a total of twenty-five minutes, a brief response would be quite a different length of time from the length permissible where a public hearing has gone on for many hours over two evenings as this one did. I do not consider the length of the response from the developers' representatives in this case to be of concern. The response to the speakers is contained at pp. 47-50 of the Minutes of the March 21, 2006 meeting (Tab 23, Volume 3) and was introduced by Mayor Kelly reminding Ms. Muecke "... it does say 'briefly respond'." The real concern is the content of what went before that response and, to a lesser extent, the timing of it.

[182] The Administrative Order deals with the role of members of Council. When staff presents its report and recommendations to Council, Council members are to ask questions of staff only for clarification (para. 6). When members of the public are speaking, Council members are not to debate with them but only ask for clarification of points the speakers have raised (para. 13). After all the speakers for the public have been heard, Council then hears from the developer and finally from its staff. Both have an opportunity to respond to points made by the speakers by the public (paras. 16 & 17). The Administrative Order also contemplates that Council members may, as a result of what they have heard, "require further information from staff" (para. 18).

[183] There is no specific provision in the Administrative Order for the developer to speak before members of the public but, at this public hearing, the architect for the developer and its vice-president spoke before any names were called from the speakers' list. Their names were not on the speakers' list. Paul Dunphy, the Director of Planning and Development Services, discussed this. He says (p. 58, Tab 20, Volume 2):

> **MR. DUNPHY**: Yes, Your Worship. There'll be a presentation by the developer on their project. The developer, as

> with any other group, may make multiple presentations but each speaker of a group may only speak once. There was some confusion when the developer came this evening as to whether or not they would be given priority to speak and given that confusion, they didn't sign up on the sign-up list. They were led to believe that they could speak immediately after the staff presentation. That's common practice and so we will give them an opportunity to speak. Any subsequent speakers as part of that group would need to go to the end of the list, in all fairness.

[184] Mr. Dunphy referred to the common practice and then said each would still only have five minutes to speak. The two concepts are somewhat inconsistent and no opinion was sought on this point from the municipal solicitor who was present. Although Mr. Dunphy referred to any other speakers going "to the end of the list", that did not occur and, in fact, is inconsistent with para. 16 of the Administrative Order to which I have referred above.

[185] I conclude that the developer is not, for the purposes of the public hearing, considered to be a member of the public for whom notice of the hearing has been

given and who must sign up on the list to speak. I therefore find as a fact that the developer did not speak as part of the public hearing *per se*. In my view, this is consistent with the requirement for public participation mandated in the planning legislation to which I have referred above. Without that legislation, the developer would, in any event, have the opportunity to deal with the municipality about a re-zoning or development agreement for its lands. It is the public for whom the process exists.

[186] I have quoted above the relevant portions of the public hearing procedure from Administrative Order One. The municipal solicitor, Mary Ellen Donovan, was called upon on several occasions to explain the public hearing process. At the March 21, 2006 Council meeting, she said (p. 7, Tab 23, Vol. 3):

> ... the general public participation segment of the public hearing did close and was concluded and all speakers who wanted to be heard were, in fact, heard. At this stage, what we are doing is continuing with the hearing process and continuing with the interrupted wind study presentation that Council had sought on the last day.

[187] In answer to a question about whether Council was now in debate, she replied (p. 7):

> That's not our view. Our view is that the public hearing, as a public hearing, will close at the point when the debate portion starts.

[188] At pp. 8-9, an unidentified male spoke. I conclude from other parts of the transcript that this was the Acting Chief Administrative Officer and former municipal solicitor, Wayne Anstey. He said at p. 9:

> So we're treating it as if it is a public hearing but, technically, the public part of the hearing is over and they're now either responding or responding to questions.

Councillor Sloane then comments (p. 9):

> I don't remember in any other case where we had a rebuttal from the actual ... proponent. So I'm just wondering, Your Worship, if anything, this would be clarification or an addition of information.

[189] Ms. Donovan replied (p. 9):

> In the administrative procedural ordinance [Administrative Order] number one, Appendix "A" provides specific provisions with respect to public hearings and it addresses this particular situation. And it says, when the last speaker from the public has been heard, the presiding officer shall provide the applicant with an opportunity to briefly respond to points raised by speakers.

[190] Councillor Sloane then said (p. 10):

> ... basically this is not a rebuttal. What they are doing is they are actually giving us information we asked for. And I would like that stated in the record because that's a little bit different than a rebuttal.

[191] Mayor Kelly then said (p. 10):

> There will be a rebuttal coming forward after.

[192] Councillor Sloane (p. 10) then said "... it seems a little odd that we would have this information after the public part when the public should have been ... privy to this so they could actually respond to it in their actual remarks, which they weren't."

[193] Ms. Donovan was asked by Mayor Kelly for clarification and said at pp. 10-11:

> Councillor, this public hearing process ... is not intended as being adversarial or a debate. So what you're looking for, typically, at this stage of the proceeding is either clarification to items spoken to previously or looking for a response from the applicant with respect to points raised by other speakers.

[194] Councillor Sloane concluded her comments on this point (p. 11):

> ... many people brought up wind, many people brought up shadows and now, all of a sudden we're seeing it. And I'm not saying that's a bad thing. I'm just stating the point that here we are looking at something

> that was not privy to all of us before we actually ended the public hearing.

[195] From the Administrative Order and from the explanation given by the municipal solicitor quoted above, I conclude the public hearing has several parts:

1) introduction of the matter by planning staff;
2) opening remarks by the proponent/developer or its representative;
3) opening of the public participation part of the public hearing and submissions by members of the public;
4) close of the public hearing;
5) provision of additional information and clarification but no new material or substantive changes to the proposal by staff and/or the proponent/developer (without re-opening the public hearing);
6) response by the proponent/developer;
7) brief response by staff;
8) debate by Council with no further input, from the public or the developer. In the debate stage, the only additional information which can be provided is from staff, as set out in para 18 of Appendix "A" to Administrative Order Number One.

[196] An additional feature of the Administrative Order, in my view, is relevant. Paragraph 4 provides that written material may be submitted at any time, prior to Council making its decision, and these submissions are provided to Council. Although the apparent intent of the Administrative Order is that the developer speaks after all members of public have given their oral presentations, members of the public are invited to continue to make written submissions after the public hearing has closed.

[197] No mention is made in the Administrative Order of the developer being provided with copies of these written submissions. The affidavit of the HRM clerk, Jan Gibson, sworn on July 18, 2006, states that the written submissions were "... forwarded to the Mayor and to Municipal Councillors".

[198] She also included copies of written submissions which were provided to Council at the meetings on February 8, March 7 and 21. There is no indication that these were available to the developer either. That being the case, unilateral communications are made to members of Council to which the developer has no

opportunity to respond and, in fact, of which the developer does not even have notice or copies.

[199] In my view, there is nothing wrong with this practice. It is fully consistent with the legislative role of Council referred to above. Members of Council are politicians and their constituents have every right to communicate with them. If the public hearing process were truly a judicial proceeding, such communications would be prohibited. Accordingly, since members of the public may communicate with members of Council outside the public hearing process without harming the process, the developer may do so too to a limited extent as long as what is done does not result in procedural unfairness to the public.

[200] It would be procedurally unfair if the developer changed its proposal after the close of the public hearing; that would subvert the public hearing process. The public has a right to address its comments with respect to the very proposal of which notice has been given and which is addressed in the staff reports. It would be unfair to the public to have a new issue addressed after the closing of the public hearing. In *Heritage Trust v. Nova Scotia (P.P.A.B.)*, *supra*, changes were made to the design of the building after the close of the public hearing. In para. 210,

Cowan, C.J. commented on those changes and the effect on the fairness of the public hearing:

> 210 ... The change made in the design of the building was comparatively minor and resulted in meeting, to some extent at least, the wishes of those who urged that the mass of the building, that is, its western face, should be reduced. In my opinion, it was entirely within the power of the council to decide whether a further public hearing should be held and that the decision of council not to have a new public hearing was made by the council without any breach of its duty of fairness to the public and, in particular, to the plaintiffs or any of them.

That was also what was alleged in *Jones v. Delta, supra*, where, after the close of the public hearing, Council received a representation with respect to environmental and agricultural concerns. Southin, J.A. said in paras. 75 and 76:

> 75 ... The changes in the development consequent upon the concerns expressed did not change the substance of the matter nor were any new facts relating to the issue of birds versus golf put before Council. ...
>
> 76 As to the grounds put forth in the petition quoted at the outset of these reasons, it is my opinion that while 'submissions' were received

> from proponents of the bylaw after the public hearing, the receiving of those submissions does not vitiate this process because they related to changes not in the substance of the proposed development, i.e., a golf course of a certain size with certain ancillary buildings and so forth, but to changes thought to improve the course as habitat, or, to put it another way, to lessen the damage to habitat and to satisfy the concerns expressed at the earlier public hearing by Mr. Weaver on behalf of the farmers. ...

[201] Southin, J.A. concluded in para. 77:

> 77 To give effect to the argument which was made to us would mean that municipal councils could never address concerns expressed at a public hearing, or a series of public hearings essentially on the same point, without having a further public hearing.

[202] The question in this case is whether the information received by Halifax Regional Council was new information that required the re-opening of the public hearing so the public could comment on it or whether it was clarification or provision of additional information on matters already raised. If it was the latter,

re-opening the public hearing would only have allowed the opponents to the development an opportunity to repeat their earlier concerns. As Oland, J. said in *Williams Lake* at para. 48:

> 48 ... It appears that were a further public hearing held or another opportunity for response given, the opponents to the re-zoning application would only emphasize or elaborate upon their reasons for disagreeing with the staff interpretation of Policy 7.3 which they had already advanced orally and in writing.

[203] It is clear that members of Council did not have the wind and shadow studies at the start of the public hearing. They received them only after the close of the public hearing. The studies were reviewed with them by representatives of the developer. There is nothing wrong with this as long as there was no new information provided upon which the public had no opportunity to comment.

[204] I have quoted above portions of the staff report of December 16, 2005 which was attached to the February 24 report presented by staff before the opening of the public hearing. That report indicates that wind and shadow studies had been done

and that the Municipal Planning Strategy required wind and shadows to be addressed.

[205] It is evident from the number of members of the public who addressed these issues in oral presentations, during the public hearing and in written submissions before, during and after the public hearing, that these issues were of concern to many. For example, Philip Pacey had not only addressed both in his oral presentation to Council but he submitted written comments as well along with a copy of the wind study on which he had made annotations.

[206] I therefore conclude that the issues of wind and shadow are 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 these things would have required the public hearing to be re-opened. Was there anything in the wind and shadow studies such that the public hearing had to be re-opened so the public could be heard? The courts have considered this issue in a number of decisions.

[207] In *Pitt Polder*, *supra*, the British Columbia Court of Appeal made it clear that the applicants did not need to prove what they might have done had these studies been included in the information package provided to members of Council and the public before the public hearing. In *Pitt Polder*, Rowles, J.A. said in para. 67:

> 67 In my respectful view, the appellant was not required to marshal evidence of what its members or other members of the public might have done had the impact reports and other relevant documents been made available in advance of the public hearing.

[208] In *Jones v. Delta*, *supra*, which was decided before *Pitt Polder*, *supra*, Southin, J.A. concluded that the "submissions" from the proponent did not change the substance of the proposed development but were to address concerns raised by the public during the public hearing. It is arguable, based upon this conclusion, that even if the studies presented after the close of the public hearing were new but addressed concerns raised at the public hearing, that would not "vitiate this process" (quoting from Southin, J.A. at para. 76). That, however, is not the situation here. These studies were not created after the public hearing as appears was the case with material provided in *Jones v. Delta*.

[209] Part of Southin, J.A.'s decision was quoted by Oland, J.A. in *Williams Lake*, *supra*, at para. 35. Subsequently, in *Hubbard*, *supra*, the British Columbia Court of Appeal dealt with a similar issue. Hall, J.A. referred to *Re McMartin et al and City of Vancouver* (1968), 70 D.L.R. (2d) 38 (B.C.C.A.) in para. 13:

> 13 What is of significance and interest in the present case arising from Re McMartin, supra, is the following comment by Davey C.J.B.C., who observed at p. 41:
>
>> ... I do not doubt that the council may obtain such advice as it sees fit, at least from its staff, or experts whom it may retain, on questions raised at the public hearing; even from those officials who have initiated the rezoning scheme.

He then reiterated Southin, J.A.'s point saying in para. 15:

> 15 However, a municipal council will not necessarily be required to call an additional hearing if it simply wishes to clarify issues raised at the public hearing, Re McMartin, supra, and Jones v. Delta (1992), 92 D.L.R. (4th) 714, 11 M.P.L.R. (2d) 1 (B.C.C.A.).

[210] He continued in para. 16:

> 16 As Saunders J. (as she then was) observed in Hall v. Maple Ridge (District) (1993), 15 M.P.L.R. (2d) 165 at para. 64, [1993] B.C.J. No. 1006 (S.C.): '[a]fter a public hearing, any subsequent hearing must be regarded as a new hearing ... [But] this does not prevent municipal officials from seeking to address the concerns of the citizens between third reading and adoption of a by-law.' A similar issue was before Mr. Justice Donald in Royal Oak College v. Burnaby (District) (1993), 14 M.P.L.R. (2d) 137, [1993] B.C.J. No. 469 (S.C.). Although the bylaw was quashed in that case for defective notice, Donald J. (as he then was) concluded, at para. 53, in regard to submissions received after the conclusion of public hearings:
>
> > Bay Village, supra, and Re Bourque, [supra], stand for the proposition that it is improper for a council to hear submissions from a proponent after a public hearing without giving the opponents an opportunity to be heard. However, since the decision in Jones v. Delta, [supra], the law has been refined to take into account differences in the nature of communications between the proponent

> and council after the hearing. If what passed between them was nothing more than a resolution of problems raised at the public hearing, then the integrity of the process has not been harmed, and the validity of the by-law will not be affected. ...

[211] He concluded in para. 25

> 25 ... all of the other <u>matters</u> commented on by Mr. Nicholls related to <u>issues or concerns</u> that had been raised and commented upon at the public hearing. (my emphasis)

[212] In the circumstances of this case, I conclude that the additional information provided by the developer was in the nature of clarification and "resolution of problems raised at the public hearing." I therefore conclude it did not harm the integrity of the public hearing process.

[213] I have considered the following in making this finding. The applicants provided an analysis of the shadow study to show the "new" information provided after the close of the public hearing compared to the information contained in the November 16, 2005 staff report. I attach that analysis as Appendix "A" to this

decision. I find as a fact that the information provided is not new but only a clarification of what was already summarized in the staff report.

[214] Similarly, the applicants provided a five page comparison of the information in the staff report of December 16, 2005 with the information provided after the close of the public hearing. I attach it as Appendix “B” to this decision. I find as a fact that it too was clarification or to deal with issues raised at the public hearing. Furthermore, as quoted earlier in this decision, the mitigation measures to be undertaken were to be defined in detail at the design stage as is provided in the development agreement.

[215] The public speakers had already commented on wind and shadow in their oral presentations. These topics were also dealt with by a number of those who emailed or wrote to counsel before, during and after the public hearing. One letter even pre-dates the setting of the date for the public hearing on February 7, 2006. I have reviewed the written submissions and the transcript of the remarks of the speakers at the public hearing. Many were concerned about wind tunnel effects caused by tall buildings and the casting of shadows on such places as Sackville

Landing. Along with views and viewplanes, heritage and design issues including height, these were the most common themes of those opposed to the development.

[216] I have quoted above the portions of the December 16, 2005 staff report dealing with wind. It refers to wind tunnel testing and wind mitigation measures. It also says the latter will be determined at the design stage and that these are required in the development agreement itself. (That provision of the development agreement was also quoted above.) The staff report also refers to the shadow study and the modelling done for the solstices (December 21 and June 21) and the equinoxes (March 21 and December 21). The results were summarized and reference made to shadowing on “public open spaces”. I note that no suggestion has been made that the staff report misrepresents the results of the two studies. I have also mentioned the references to the wind and shadow studies at the HAC and PAC meetings.

[217] Questions were asked of staff after its presentation about shadows (pp. 17-18 and 39-41, Tab 20, Volume 2) and about wind (p. 23, pp. 31-33 and p. 35 at Tab 20).

[218] After the close of the public hearing, members of Council had questions for staff about wind and shadow. Ms. Muecke showed the shadow study on DVD. She said she had prepared the written report (p. 129, Tab 21, Volume 3). Peter Connor, the architect who prepared the study, spoke (pp. 130-131). At that meeting, Ted Mitchell, the design manager with United Gulf explained the process involved in doing the wind study (p. 132). Councillor Hendsbee commented on Philip Pacey's presentation and his references to pass and fail in safety categories (p. 133). Councillor Sloane said (pp. 135-136):

> Your Worship, it seems to me that there's a lot of questions that are still not answered and that I think that what we should be doing is getting some clarification on some of the questions that we have.

[219] The meeting adjourned shortly thereafter and the subject was again on the agenda at the March 21, 2006 Meeting of Halifax Regional Council. At that meeting, Mayor Kelly said (Tab 23, p. 5, Volume 3):

> And, council, we commenced, at the time of discussion, the wind study portion, so that's where we'll pick up after last time. After the wind study, area has been reviewed and clarified for any questions you have.

> The proponent will then be able to respond to issues raised at the public hearing as is our normal process.

[220] Thereafter, Anne Muecke went through the study using a model of downtown Halifax (pp. 12-22). She answered questions from members of Council (pp. 22-47) and, as well, some questions were directed to or answered by Paul Sampson or Ted Mitchell. Then Anne Muecke responded on behalf of the developer. Before she spoke, as noted above, Mayor Kelly reminded her that her response was to be brief. As noted above, it was actually quite brief, running only from pp. 47 to 50 of the transcript, which is consistent with the length on the transcript of the comments made by speakers from the public. Council then began its debate and, as is required by the Administrative Order, heard no further representations by the public or the developer.

[221] I therefore conclude that, had the public hearing been re-opened, it would only have provided an opportunity for members of the public to reiterate their concerns about wind and shadow. Members of Council were aware from the comments of the public, both oral and written, that these were important issues. They sought further information from the developer and from staff.

[222] In the context of a moderate to fairly high duty of procedural fairness, HRC did not have to re-open the public hearing to allow the public to respond to the information provided by the developer.

[223] Although the clarification provided was in greater detail than the original information provided and the length of time taken in presenting it greater than one would normally expect to be the case, I cannot conclude that members of the public did not have sufficient information to allow them to participate meaningfully in the hearing(paraphrasing *CPR*, *supra)*. The result of the public's oral and written submissions was that Council sought further information about wind and shadow before making its decision. If it made a decision which is not reasonably consistent with the intent of the Municipal Planning Strategy, that is a matter, not for this court, but for the appeal pursuant to the *Municipal Government Act* to the Nova Scotia Utility and Review Board.

[224] As I stated above, I conclude that the Record does not indicate any substantial prejudice to the applicants and the public. I would, therefore, in any event, exercise my discretion not to grant the application on this ground.

ISSUE NO. 3 - FETTERING OF HALIFAX REGIONAL COUNCIL'S DISCRETION

[225] In reviewing the decision of Halifax Regional Council on this issue, the standard of review is correctness. It was addressed in the brief and in submissions of the applicant; no one disputed it. I conclude that is the appropriate test. The standard of review of a municipal government decision on matters of jurisdiction is correctness (*United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485.

[226] The applicants say 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 refer to the wording of both and say that this meant that HRM expected a tower to be constructed on the lands. In doing so, they say Council pre-judged the development agreement application.

[227] The provisions of those two documents to which the applicants refer are found at Tabs G and H of the Supplemental Record and have been quoted above. There is reference to a "tower component" and a "tower" at pp. 15 and 16 of Tab

G. The design guidelines attached to the tender also refer to a tower under the heading "design requirements".

[228] The staff report dated May 19, 2004 (Tab H, Supplemental Record) recommends acceptance of United Gulf's tender. Attachment B refers to the building proposed as being twenty-six stories high. The agreement of purchase and sale executed between HRM and United Gulf (Tab J, Supplemental Record) incorporates as Schedule "B" the design guidelines referred to above. The Site Development Proposal attached to it as Schedule "C", in item 5 on p. 2 "Type of Development Being Proposed" states in part as follows:

> The main portion of the project rises above these terraces to an imposing tower accommodating offices and condominiums.

[229] HRM says it cannot legally fetter its discretion and, furthermore, there is no evidence it did so.

[230] *In Pacific National Developments Ltd. v. Victoria (City)*, [2002] S.C.R. 919,]2000] S.C.J. No. 64, LeBel, J., writing for the majority, said at paras. 55-56:

55 As the authorities make clear, a limitation on a municipality's legislative power is a very serious matter. As Rogers, The Law of Canadian Municipal Corporations, supra, puts it at para. 199.4, 'Unless expressly authorized to do so local authorities have no power to enter into an agreement the effect of which will be to restrict or divest the legislative powers of succeeding councils in respect of any matter affecting the public at large.' Rogers goes on to note that this does not mean that a council acting in its proprietary or business capacity cannot make contracts. But it does mean that a council cannot somehow give up its legislative powers: cf. Birkdale District Electric Supply Co. v. Corporation of Southport, [1926] A.C. 355 (H.L.), at pp. 364 and 371-72.

56 Eloquent echoes of this principle have rung out through Canadian case law:

Our municipal councils are just as truly legislative bodies within the ambit of their jurisdiction as Parliament or the Legislature; and any contract which would interfere with the due exercise of the discretion and judgment of a member of such a council must equally be void as against public policy.

(Town of Eastview v. Roman Catholic Episcopal Corporation of Ottawa (1918), 44 O.L.R. 284 (S.C., App. Div.), at pp. 297-98)

[M]unicipalities must be free to amend or alter their by-laws as circumstances dictate. They cannot bind themselves or their successors by contract with a third party to the status quo.

(Capital Regional District v. District of Saanich (1980), 115 D.L.R. (3d) 596 (B.C.S.C.), at p. 605)

[A] municipality cannot bargain away its legislative powers in advance.

(Re Galt-Canadian Woodworking Machinery Ltd. and City of Cambridge (1982), 135 D.L.R. (3d) 58 (Ont. Div. Ct.), at p. 63, aff'd (1983), 146 D.L.R. (3d) 768 (Ont. C.A.))

Municipal legislative powers are an integral part of governance that municipalities cannot give up. Municipal councils cannot fetter the discretion of successor councils to engage in the legislative process without undue influences.

[231] The question then is whether HRM "gave up its legislative powers" in issuing the call for tenders and subsequently entering into the contract with United

Gulf. Clearly, HRM can enter contracts. Was this one that caused it to fetter its discretion dealing with the subsequent development agreement application?

[232] In my view, HRM could have done little more to ensure it did not fetter its discretion. The tender documents and subsequent agreement clearly stated that the risk of obtaining development agreement approval was to be borne by the developer. The tender provision, previously quoted, referred to the need for development agreement approval pursuant to municipal planning strategy policies for any building over 40 feet in height. The agreement of purchase and sale (Tab J, Supplemental Record) provided in clause 16 on p. 5:

> 16 ... The Purchaser and the Municipality further agree and acknowledge that the development is subject to final Development Agreement approval.

[233] The buy-back provision in that agreement (p. 6, part H, Supplemental Record) is entirely in favour of the municipality. It did not obligate HRM to buy the land back from United Gulf if a development agreement were not approved.

[234] It was also made clear to Council that it had no obligation to approve the development agreement. The report to Council recommending approval of the tender from United Gulf also recommended rejecting tenders which were conditional. This included one which was more financially favourable but that provided for the agreement to become null and void if the development agreement were not approved (p. 4, Tab H, Supplemental Record).

[235] The staff report dated December 16, 2005 (Tab 11, Volume 2) provided on pp. 10-11 three alternatives for Council: 1) that it may approve the development agreement; 2) that it may refuse it; or 3) that it may approve it with modifications. The staff report to Council dated February 24, 2006 (Tab 18, Volume 2) repeats the alternatives referred to above in substantially the same wording.

[236] At the February 28, 2006 Council meeting, the night of the public hearing, Paul Dunphy, the Director of Planning and Development Services, began by first telling Council it had no obligation to approve the development agreement. He said (p. 3, Tab 20, Volume 2):

> **MR. DUNPHY:**
>
> ...

> The first is the land which is subject to this development was sold by the Municipality to the developer. And I just want to point out and clarify for anybody who is concerned about this that it's an arms' length transaction. The transaction is closed. The outcome of that transaction is not dependent upon Council's decision or the public hearing tonight. There is no buy-back clause. It's entirely at the developer's risk. The only buy-back option is a discretionary one by the Municipality. There is no trigger that the developer can cause if they're unhappy with the decision.

[237] There then followed questions by two councillors and Mr. Dunphy reiterated (p. 5):

> **MR. DUNPHY**
>
> ... It was entirely at the risk of the developer and subject to the outcome of a normal public hearing process.

[238] Halifax Regional Council cannot legally fetter its discretion and I conclude it did not do so in calling for tenders which referred to a tower. The same document

made it clear a development agreement would be required to be approved. It was abundantly clear that the project was entirely at the risk of the developer.

ISSUE NO. 4 - DID HALIFAX REGIONAL COUNCIL ERR IN ITS DECISION BY CONSIDERING IRRELEVANT MATTERS?

[239] As with the previous issue, the standard for review is one of correctness. If Council considers irrelevant factors, it makes an error of law for which the standard of review is correctness.

[240] The applicants say Halifax Regional Council considered irrelevant matters in making its decision. They refer in particular to comments by Councillors Streatch and Uteck in this regard. The comments of Councillor Streatch to which they refer are contained at pp. 77-78 of Tab 23, Volume 3 as follows:

COUNCILLOR STREATCH:

...

We sold this property, Your Worship, a few years back in good faith with no indication that this type of application would be not allowed, so the proponents are here in good faith and I think we owe it to them and the community to deal with it as such.

[241] They also refer to the remarks of Councillor Uteck at pp. 90-91:

COUNCILLOR UTECK:

...

but I want to point out to Council two things. This is a request for proposals, March 17th, 2004, that Council approved for this site. One says, 'Tower Component.' We knew that there was possibly a tower there.

The next I want to refer Council to is May 25th, 2004:

The following in-camera recommendation was approved.

Regional Council award tender number to United Gulf Developments Limited for the tender price as outlined in the

> report authorized the Mayor and Clerk that contents of the report not to be released.
>
> There was nobody objecting. Not one member of this Council said I object and I disapprove of the sale of this.

[242] The applicants say that these comments prejudiced the rest of Council when they were said in debate. They say that when Council considers irrelevant factors it exceeds its jurisdiction and this is an error of law which provides grounds for quashing the decision of Council. I disagree for two reasons.

[243] First, on a review of the entirety of the two councillors' comments, it is evident they considered relevant planning matters. Councillor Streatch said immediately following the words quoted above (at p. 78):

> In my opinion, Your Worship, the Municipal Planning Strategy does allow what's in front of Council as it relates to this development tonight.

[244] He also said on that page:

> But, you know, I have been betwixt and between on this issue ...

[245] Councillor Uteck referred to the viewplanes at p. 91. She quoted from the report to Halifax City Council in 1974 establishing the viewplanes. She quoted from the *UARB* decision with respect to Cambridge Suites about viewplanes and views. She referred to the wind study. She concluded with a reference to criticism of the Eiffel Tower in 1889.

[246] In my view, both councillors considered appropriate planning principles. As Pickford, L.J. said in *R. v. London County Council*, [1915] 2 K.B. 466 at pp. 490-91 quoted in *Valdun*, *supra*, at para. 28:

> 28 [T]here are probably few debates in which someone does not suggest as a ground for decision something that is not a proper ground, and to say that, because somebody in debate has put forward an improper ground, the decision ought to be set aside as being founded on that particular ground is wrong.

[247] Even if those councillors had in fact taken a stand in favour of the development, they are not disqualified unless it is shown that their minds could not be changed. As Sopinka, J. said at para. 57 of *Old St. Boniface*, *supra*:

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 hard 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 indiction 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.

[248] In my view, the comments made by the two councillors at issue are not such as to disqualify them. I have not been provided with any evidence that they were not capable of being persuaded; that is, that they believed they were bound by the tender and by the agreement of purchase and sale to approve the development agreement. As I have said, when dealing with the previous issue, it was made clear to Council that they did not have to approve the development agreement.

[249] My second reason for disagreeing with the applicants is that it is clear there were planning considerations before Council. As Morse, J. said in *Canada et al v. Winnipeg (City)*, [1984], 28 Man. R. (2d) 211 (Q.B.), [1984] M.J. No. 385 in para. 15:

> 15 In my judgment, the minimum degree of proof required of the plaintiffs is that they establish that a majority of councillors voting for the bylaw were acting in bad faith.

[250] In *Valdun*, *supra*, Winnipeg City Council voted, after a public hearing, to reject a proposal to re-zone lands to permit a casino. The unsuccessful proponent

sought to have the decision struck down because it was based on irrelevant considerations. The court said at para. 10:

> 10 During the course of the hearing some members of Council and of the public made adverse submissions or comments concerning potential parking problems, the proliferation of casinos in the City, security concerns and the economic impact of casinos on surrounding businesses. Some were probably irrelevant as they did not relate to planning considerations.

[251] At paras. 30 and 31, the court said:

> 30 There is no foundation for the finding by the Chambers Judge that the members of Council who voted to reject the amendment based their decisions on irrelevant or improper considerations or acted in bad faith to achieve an unauthorized purpose. If there was evidence of relevant planning concerns before Council, it must be assumed that the majority decision was based on it.
>
> 3. Evidence of Planning Considerations
>
> 31 Council was compelled by s. 617 of the Act to base its decision on legitimate planning considerations relevant to the proposed

> development and use of the property. In this case, if Council's resolution was made in the absence of any evidence of relevant planning considerations, it was beyond the power of Council. On the other hand, if there was some evidence of relevant planning considerations upon which Council could reasonably have based its decision, the resolution cannot be successfully attacked: 507089 Alberta Ltd. v. The City of Calgary (Alta.C.A. 0116624, November 8, 1996).

[252] The court continued in para. 32:

> 32 ... There was evidence relating specifically to the Respondent's property and its proposed use which raised planning concerns and upon which Council could properly and reasonably have based its decision. ...

[253] The court concluded in para. 45:

> 45 ... Contrary to the finding of the Chambers Judge, there was some evidence of planning matters on the basis of which Council could properly and reasonably have rejected the proposed amendment. The weight of that evidence was for Council to determine. In the absence of reasons it cannot be inferred that the Council members in the majority

> acted on the basis of irrelevant evidence or were motivated by unauthorized purposes. It must be assumed that they acted on the basis of the planning concerns raised at the hearing.

[254] On a review of the transcript of the debate at Council, it is clear that planning considerations were the basis for the decision of Council. The following is a summary and paraphrasing of some of the comments mentioning planning issues from the other eighteen Councillors who voted:

Councillor Hendsbee referred to "... the rules and regulations of the downtown business area, the viewplane legislation, everything else. (p. 59)

Councillor Harvey mentioned viewplanes (p. 61)

Councillor Rankin referred to the "heritage" provisions of the Municipal Planning Strategy (p. 62) and "views" (p. 64)

Councillor Karsten quoted portions of the Municipal Planning Strategy (p. 66) and referred to heritage buildings (p. 67)

Councillor Snow mentioned views (p. 68) and heritage properties (p. 69)

Councillor McInroy referred to policies of the Municipal Planning Strategy (p. 70)

Councillor Goucher referred to the Municipal Planning Strategy and "issues of height, bulk and scale." (p. 72)

Councillor McCluskey referred to municipal planning policies (p. 74) and quoted policies (p. 75)

Councillor Kent mentioned heritage and business district (p. 82)

Councillor Smith mentioned heritage and new development, viewplanes (p. 84)

Councillor Fougere commented on views and viewplanes (p. 86), height restrictions (p. 88)

Councillor Murphy read a section of the Municipal Planning Strategy (p. 94)

Councillor Wile referred to cultural plan, view, studies on wind and shade (p. 97)

Councillor Hum commented on the Municipal Planning Strategy (p. 98), historical aspect of the city (p. 99)

Councillor Younger mentioned Municipal Planning Strategy, viewplane legislation (p. 102)

Councillor Johns referred to heritage and Municipal Planning Strategy (p. 105)

Mayor Kelly referred to municipal planning policies (p. 108)

Councillor Sloane referred to wind (p. 109), tall buildings (p. 110)

[255] Planning concerns were mentioned by all speakers. I therefore conclude that the decision was appropriately based on planning considerations and not on irrelevant ones.

COSTS

[256] HRM is entitled to its costs from the applicants, having been successful on this application. An intervenor is normally required to bear its own costs. In this case, the intervenor was unsuccessful on its argument about standing. It was indirectly successful on the substantive issues, but they were mainly the respondent’s issues. I therefore conclude the intervenor should bear its own costs.

[257] If the applicant and respondent cannot agree on costs I will accept written submissions.

Editor's Note: Appendices available on request.