SUPREME COURT OF NOVA SCOTIA

Citation: *Barney v. Halifax (Regional Municipality)*, 2023 NSSC 138

Date: 20230501
Docket: *Hfx*, No. 479016
Registry: Halifax

Between:

Lance Barney, Wendy Brookhouse, Trevor Brumwell, Manuel Cierra, Glen Ginther, Sue Goyette, Scott Hodgson, Kelsey Macaulay, Gary MacLellan, Peter Munro, Nancy Murphy, Geraldine O'Shea, Kim Plaxton, Donna Rammo, Janet Stevenson, Jolyn Swain, Michael Teehan, Pat Thompson, Ross Thompson, and Kristin Tweel

Applicants

v.

Halifax Regional Municipality

Respondent

Judge:	The Honourable Justice Diane Rowe
Heard:	October 13, 2022, in Halifax, Nova Scotia
Counsel:	Jason Cooke, for the Applicants Randolph Kinghorn, for the Respondent

By the Court:

[1] This is an Application in Chambers seeking to quash a municipal resolution that the Applicants submit authorizes substantive changes to the traffic profile of their Halifax neighbourhood.

[2] The disputed resolution was made by Halifax Regional Council ("Council") on May 8, 2018. It is entitled "14.4.1 Implementation of Local Street Bikeways on Vernon-Seymour and Allan-Oak Corridors", ("Resolution"). The Applicants seek to quash the Resolution on the grounds of illegality pursuant to s.207(1) of the *Halifax Regional Municipality Charter*, SNS 2008, c. 39 ("HRM Charter").

[3] Council passed the *Local Street Bikeway Implementation Administrative Order*, 2016-002-OP ("Administrative Order") to allow the development of bikeways in the Halifax Regional Municipality ("HRM"). The Resolution was made, further to the Administration Order, to direct and authorize the creation of a bikeway on the Allan and Oak Street Corridor (the "Bikeway"). It also allows the construction of a permanent diagonal cement diverter to block traffic at the intersection of Harvard and Allan Streets, with street renaming.

[4] The Applicants plead that Council and HRM staff failed to follow the processes mandated by the Administrative Order for the Bikeway Resolution. Further, the Applicants state they were not notified and properly consulted with in respect of the Bikeway in accordance with their legitimate expectations in keeping with HRM's duty of procedural fairness. The Applicants allege the diagonal diverter is an inappropriately intrusive method for street calming, with a substantially negative impact upon their interests. All of these factors, it is submitted, render the Resolution illegal as HRM failed to meet the requirements of the enabling legislation, policy, and the duty of procedural fairness.

[5] HRM acknowledges that there is a duty of procedural fairness owed to the Applicants, but disputes that the Resolution is illegal. HRM states that the consultation process was conducted appropriately, in accordance with law, policy, and with the requisite standard for procedural fairness met for the Applicants.

Issue

[6] Should the Resolution be quashed for illegality, pursuant to s. 207 of the *HRM Charter*?

Procedural Background

[7] The Applicants chose to proceed by Application in Chambers pursuant to *Nova Scotia Civil Procedure Rule* 5 ("CPR 5"), rather than a judicial review pursuant to *Nova Scotia Civil Procedure Rule* 7.

[8] In July 2020, HRM moved to convert the Application to a Judicial Review. Justice Brothers dismissed the motion to convert in *Barney et al. v. Halifax Regional Municipality,* 2021 NSSC 264. In rendering this decision, Justice Brothers held that *CPR* 5 was an appropriate procedural route for the purposes of quashing a municipal bylaw or resolution pursuant to s. 207 with the *HRM Charter*. At issue was the legality of a law or regulation passed by Council pursuant to its Charter, rather than a review of an administrative decision for deficiencies in the decision-making process (with reliance by Brothers, J, on *Geophysical Services Inc. v. Canada – Nova Scotia Offshore Petroleum Board*, 2013 NSSC 220 at paragraph 38). It was held that the application was properly before the Court pursuant to *CPR* 5.

[9] As a result of that motion, the evidence before the Court in the Application extended beyond just the administrative decision maker's record of the decision, as would have been the case in a judicial review. In this matter, the Applicants' affidavits each set out their individual concerns, the overall context, and their

experience of public consultation and notice by HRM concerning the proposed Bikeway, with later information on the subsequent Resolution.

Municipal Law and Application to quash a Resolution for Illegality

[10] Halifax Regional Municipality is an incorporated municipality, with Council deriving its authority in accordance with the *HRM Charter*.

[11] Section 58 of the HRM Charter provides that:

> 58 (1) The Council shall make decisions in the exercise of its powers and duties by resolution, by policy or by by-law.
>
> (2) The Council may exercise any of its powers and duties by resolution unless a policy or a by-law is required by an enactment.
>
> (3) The Council may exercise by by-law any of the duties and powers that it may exercise by resolution or policy.
>
> (4) The Council may exercise by policy any of the duties and powers that it may exercise by resolution.
>
> (5) The Council may make and carry out a contract, perform an act, do anything or provide a service for which the Municipality or the Council is authorized by an Act of the Legislature to spend or borrow money.

[12] Justice MacAdam, in *North End Community Health Association v. Halifax (Regional Municipality)*, 2012 NSSC 330 (reversed on other grounds, 2014 NSCA 92), upon reviewing the *HRM Charter* remarked that:

> 64 The HRM Charter contains no privative clause respecting Council's decisions. Section 207 provides, under the heading "procedure for quashing by-law":
>
> > 207 (1) A person may, by notice of motion that is 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, 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) An application pursuant to this Section to quash a by-law, order, policy or resolution, in whole or in part, must be 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.
>
> 65 The applicants describe s. 207 as creating a statutory right of appeal. Clearly, however, the section actually contemplates judicial review. The introduction to the applicants' own brief indicates that this proceeding is a judicial review, and this is clear as well in the other parties' submissions.
>
> **66 This application is to quash Council's resolution for illegality. I note that ss. 207(2) provides that a by-law may not be quashed "for a matter of form only or for a procedural irregularity." The other subsections refer to by-laws, orders, policies and resolutions. This suggests that an order, policy or resolution may be quashed on grounds broader than those on which a by-law may be quashed, that is, on the grounds of form or procedural irregularity.**
>
> (emphasis added)

[13] As Justice Brothers noted at paragraph 50 of the prior *Barney, supra* decision, Justice MacAdam's comments were not disturbed on a later appeal of his decision.

[14] Justice Chipman, in *Dawgfather PHD v. Halifax (Regional Municipality)*, 2016 NSSC 104, upon considering the legality of a resolution disputed in accordance with s. 207 of the *HRM Charter*, wrote that:

> 74 The Applicant's attack on the legality of the resolution is confined to attacks on Council's failure to follow procedure and to afford sufficient participatory rights. Non-observance of obligatory, i.e. statutorily mandated, procedures can amount to

> illegality, but failure to observe internal procedure cannot: Rogers, supra at §193-194.1.

[15] I will also note here, Justice Chipman's comments at paragraph 87, relied upon by the Respondent HRM as follows:

> [87] Notwithstanding that Justice Roscoe was considering the former *Halifax City Charter* (repealed and replaced with the *HRM Charter*), it is my determination that the case is of guidance here. The establishment of a bicycle lane is a form of traffic regulation within the function of the HRM Traffic Authority and not Council. Council is empowered, under s. 325(1) of the *HRM Charter*, to close streets. This must be done by policy. But s. 325(1) has no application here because establishing a bicycle lane is not a street closure. The Applicant has therefore failed to establish that Council failed to follow a statutory procedure. The rest of his attacks on the legality of the resolution amount to criticisms of Council's failure to follow internal procedure, which cannot constitute illegality. Accordingly, the Applicant's application to quash the resolution under s. 207 is dismissed.

[16] More recently, in *Colchester Containers Limited v. Colchester County (Municipality)*, 2020 NSSC 203, reversed on other grounds, 2021 NSCA 53, the Applicant brought an Application in Court to quash a by-law and policy, and also filed a judicial review challenging a decision made by the Municipality under the impugned by-law. Section 189 of the *Municipal Government Act* was the subject of the Court's consideration, with that section mirroring in content the provisions of s. 207 of the *HRM Charter*. Justice Campbell noted that:

> 23 Section 189 of the *Municipal Government Act* sets out the procedure for quashing a by-law or policy. **A person may, by notice of motion, apply to a judge of the Supreme Court to quash a by-law, order, policy or resolution of council, in whole or in part, "for illegality". There is one ground set out and that is "illegality". The legislation does not provide further guidance or any definition of illegality. Illegality may involve bad faith, discrimination, failure to follow a statutory requirement, or the creation of a by-law that is beyond**

> **the jurisdiction of the municipality**. *Dawgfather PHD v. Halifax (Regional Municipality*), 2016 NSSC 104 (N.S. S.C.). There is no onus on the party seeking to quash a by-law to prove bad faith on the part of the municipality. A municipality cannot expand the authority delegated to it by the *Municipal Government Act* by showing that it did so in the absence of bad faith. **[emphasis added]**

[17] Further, s. 189 was again the subject of judicial consideration in *Annapolis (County) v. E.A. Farren Limited*, 2021 NSSC 327. At paragraph 33 of *Annapolis*, *supra*, Justice Norton referenced the Supreme Court of Canada's observation in *London (City) v. RSJ Holdings Inc*., 2007 SCC 29, that indicates illegality is a broad generic term encompassing any non-compliance with the law. Justice Norton also cited *Fortin v. Sudbury (City)*, 2020 ONSC 5300 with approval, as that Court rendered the basis to quash for illegality may include these factors:

> (i) Statutory procedural non- compliance;
> (ii) Procedural unfairness;
> (iii) A party's reasonable expectation to be heard has not been met;
> (iv) A by-law has been passed for improper purpose;
> (v) Council has disqualifying bias; or that;
> (vi) A by-law was passed in "bad faith".

[18] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at paragraph 23, the Court confirmed that correctness continues to be the standard of review when the Court is asked to review and overturn an administrative decision on the grounds there has been a breach of natural justice and/or the duty of procedural fairness.

[19] The Nova Scotia Court of Appeal, in *Colchester County (Municipality), supra*, considered the standard of review for a disputed by-law in the context of an application to quash pursuant to s. 189 of the *Municipal Government Act*. The comments of Justice Scanlanare broadly informative concerning standards of review for a Court post–*Vavilov, supra,* as follows:

> [30] In order for this Court to consider whether the hearing judge applied the correct standard of review, it is helpful to identify what standard the matter before the hearing judge required.
>
> [31] There is no doubt that in *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 the Supreme Court of Canada pushed a reset button on the judicial review of administrative decisions. Prior to the Court adopting a revised framework for determining the standard of review for administrative decisions, the judicial review of municipal by-laws attracted a two-stage analysis that often resulted in two differing standards of review being applied. Determining whether a municipality possessed the legislative authority to pass a by-law was assessed through the lens of correctness. However, challenges to how a municipality exercised its power was afforded deference. (See *Nanaimo (City) v. Rascal Trucking Ltd*., 2000 SCC 13; *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19; *Halifax (Regional Municipality) v. Ed DeWolfe Trucking Ltd*., 2007 NSCA 89.)
>
> [32] *Vavilov* served to compress the former two-stage analysis into one for the vast majority of municipal decisions. The single inquiry is now whether a challenged decision is unreasonable (at para. 83). The Court also provided assistance in the application of the reasonableness standard:
>
> > [68] Reasonableness review does not give administrative decision makers free rein in interpreting their enabling statutes, and therefore does not give them licence to enlarge their powers beyond what the legislature intended. Instead, it confirms that the governing statutory scheme will always operate as a constraint on administrative decision makers and as a limit on their authority. **Even where the reasonableness standard is applied in reviewing a decision maker's interpretation of its authority, precise or narrow statutory language will necessarily limit the number of *reasonable* interpretations open to the decision maker — perhaps limiting it to one. Conversely, where the legislature has afforded a decision maker broad powers in general terms — and has provided no right of appeal to a court — the legislature's intention that the decision**

> **maker have greater leeway in interpreting its enabling statute should be given effect. …**
>
> (Italics in original; bolding added by Scanlan J.A.)
>
> [Underlining added]

[33] Earlier in *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 the Supreme Court specifically addressed the application of the reasonableness standard to the review of municipal by-laws. It is clear that assessing a by-law for reasonableness is a contextual exercise, and one in which the decision-maker is owed significant deference. Writing for the Court, Chief Justice McLachlin said:

> [19] The case law suggests that review of municipal bylaws must reflect the broad discretion provincial legislators have traditionally accorded to municipalities engaged in delegated legislation. Municipal councillors passing bylaws fulfill a task that affects their community as a whole and is legislative rather than adjudicative in nature. Bylaws are not quasi-judicial decisions. **Rather, they involve an array of social, economic, political and other non-legal considerations**. "Municipal governments are democratic institutions", per LeBel J. for the majority in *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64, [2000] 2 S.C.R. 919, at para. 33. In this context, reasonableness means courts must respect the responsibility of elected representatives to serve the people who elected them and to whom they are ultimately accountable.
>
> [20] The decided cases support the view of the trial judge that, historically, courts have refused to overturn municipal bylaws unless they were found to be "aberrant", "overwhelming", or if "no reasonable body" could have adopted them (para. 80, per Voith J.). See *Kruse v. Johnson*, [1898] 2 Q.B. 91 (Div. Ct.); *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corp.*, [1948] 1 K.B. 223 (C.A.); *Lehndorff United Properties (Canada) Ltd. v. Edmonton (City)* (1993), 1993 CanLII 7201 (AB KB), 146 A.R. 37 (Q.B.), aff'd (1994), 1994 ABCA 276 (CanLII), 157 A.R. 169 (C.A.).
>
> [21] This deferential approach to judicial review of municipal bylaws has been in place for over a century. As Lord Russell C.J. stated in *Kruse v. Johnson*:
>
> > … courts of justice ought to be slow to condemn as invalid any by-law, so made under such conditions, on the ground of supposed unreasonableness. Notwithstanding what Cockburn C.J. said in *Bailey v. Williamson* [(1873), L.R. 8 Q.B. 118, at p. 124], an analogous case, I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn by-laws, made under such authority as these were made, as invalid because unreasonable. <u>But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between</u>

> different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires." But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there.

These are the general indicators of unreasonableness in the context of municipal bylaws. It must be remembered, though, that what is unreasonable will depend on the applicable legislative framework. …

(Underlining of Chief Justice; bolding added)

[34] The Chief Justice added:

> [24] It is thus clear that courts reviewing bylaws for reasonableness must approach the task against the backdrop of the wide variety of factors that elected municipal councillors may legitimately consider in enacting bylaws. **The applicable test is this: only if the bylaw is one no reasonable body informed by these factors could have taken will the bylaw be set aside.** The fact that wide deference is owed to municipal councils does not mean that they have *carte blanche*.
>
> [25] **Reasonableness limits municipal councils in the sense that the substance of their bylaws must conform to the rationale of the statutory regime set up by the legislature**. The range of reasonable outcomes is thus circumscribed by the purview of the legislative scheme that empowers a municipality to pass a bylaw.
>
> (Emphasis added)

[35] The fact municipal decisions often do not result in written reasons was noted by the Chief Justice, and guidance given as to how a reviewing court should assess for reasonableness in those instances:

> **[29] It is important to remember that requirements of process, like the range of reasonable outcomes, vary with the context and nature of the decision-making process at issue. Formal reasons may be required for decisions that involve quasi-judicial adjudication by a municipality. But that does not apply to the process of passing municipal bylaws.** To demand that councillors who have just emerged from a heated debate on the merits of a bylaw get together to produce a coherent set of reasons is to

> misconceive the nature of the democratic process that prevails in the council chamber. The reasons for a municipal bylaw are traditionally deduced from the debate, deliberations and the statements of policy that give rise to the bylaw.
>
> [30] Nor, contrary to Catalyst's contention, is the municipality required to formally explain the basis of a bylaw. **As discussed above, municipal councils have extensive latitude in what factors they may consider in passing a bylaw. They may consider objective factors directly relating to consumption of services. But they may also consider broader social, economic and political factors that are relevant to the electorate.**
>
> (Emphasis added in bold in originating decision; the bolded underline is added in context of the application before this Court)

The Applicants' Submission

[20] The articulated reason for the proposed bike route is to promote commuting by bicycle, which is a component of the HRM's long term active transportation plan (HRM 2006 AT Plan). Appendix A to the HRM 2006 AT Plan sets out what are described as the numerous public benefits of converting motor vehicle traffic to bicycle traffic, including the public safety benefit of enhanced safety for existing bicycle commuters to have use of a dedicated bicycle lane.

[21] The Applicants all live on Harvard Street or near the intersection of Harvard and Allan Streets (defined as the "Project Area"). The Applicants say they are not opposed to the Administrative Order, or to having a local street bikeway on Allan Street. They do, however, say they oppose the following:

> • The flawed process by which the Resolution, as it relates to the Bikeway, was written, presented for Council's approval, and approved by Council at the May 8, 2018, meeting, without notice or discussion with the affected parties;

- The construction of a diagonal diverter at the intersection of Harvard and Allan Streets; and
- The imposed name change to the portion of Harvard Street affected by the diagonal diverter.

[22] The Applicants are all residents of Harvard Street or Lawrence Street.

[23] On or around May 14, 2018, some of the Applicants received a letter from an administrator of HRM informing them that Council had approved the Resolution approving a Bikeway for the Allan-Oak Street Corridor on May 8, 2018, with a cement diverter to be installed, and a portion of Harvard Street to be renamed.

[24] The Applicants submit that the Administrative Order required that they were to receive notice of the Bikeway and of related community engagement initiatives prior to Council passing the Resolution. This is provided in the Administrative Order as:

> 3. The purposes of this Administrative Order are to establish the processes to designate Local Street Bikeways, which include:
>
> a. public notification and community engagement;
> b. route analysis and design of features;
> c. the decision- making framework; and
> d. processes to monitor existing Local Street Bikeways. (emphasis added)

[25] Further, the Applicants submit the Schedule 3 to the Administrative Order creates a tier-approached method to notify Abutters (which is defined below) and

conduct community engagement, with those most affected attracting a greater entitlement to notice and engagement by HRM.

[26] Schedule 3 provides the following:

> 4(1) Abutters, including residents and property owners, **in the project area** shall be notified that their street is being assessed for implementation as a Local Street Bikeway.
>
> (2) The notification in subsection (1) may include:
>
> a. a description of the proposed Local Street Bikeway and any anticipated impacts;
>
> b. background on Local Street Bikeways and overall active anticipated impacts;
>
> c. a description of the Municipality's decision making processes prior to designation of a Local Street Bikeway;
>
> d. information on any community engagement opportunities;
>
> e. links to any additional information available online; and
>
> f. staff to contact for further information. (emphasis added)

[27] Further, at s. 5(2) of the Schedule it is provided that "Staff shall undertake community engagement for any proposed Local Street Bikeway where traffic calming or diversion measures are being proposed."

[28] Section 5(3) of the Schedule then further provides that community engagement "may include any of the following" with a brief list of public meeting and an online public engagement tool as options.

[29] Section 5(3(sic)) then indicates that notifications "may be" made by way of: mailings to residents and property owners within the Project Area; public service

announcements; advertisements in community and regional newspapers; social media; and advisories to local community organizations.

[30] "Project Area" is defined in the Administrative Order at s. 4(r) as: "…the street proposed or designated as a Local Street Bikeway; and may include cross streets one block in either direction; the next parallel street; and streets for which the project street is the sole link as determined by staff." (emphasis added)

[31] The Applicants plead that in contravention of the terms of the Administrative Order, none of the Applicants, who they believe should have been considered by HRM as residents in the Project Area, were notified in the requisite manner of the Bikeway before Council approved it by Resolution. HRM Council owed them a duty of procedural fairness which was not met, as the outcome of the Resolution changed the "character" of the roadway and Project Area neighbourhood.

[32] As a result, it is submitted that they were neither properly consulted nor given an opportunity to be heard before the Resolution was passed. The notice that HRM indicates was sent, a postcard, was not within their legitimate expectations of the process. A more substantive notice is required, it's submitted, as the process undertaken by HRM staff was not adequate in proportion to the interests affected.

[33] The Applicants continue by saying the breach of procedural fairness caused by a failure to follow the procedures in the Administrative Order resulted in illegality that can only be remedied through the Court quashing the Resolution.

[34] Their submission is that there are less intrusive street calming measures than a diagonal cement diverter that would serve the purpose of implementing the Bikeway without incurring negative repercussions on the neighbourhood, however, they were precluded from submitting this to Council before the Resolution was considered.

[35] HRM prepared a "Staff Report", dated April 17, 2018 ("Staff Report") on the proposed Bikeway, with an implementation plan for Council. The Staff Report outlines multiple community engagement efforts, which included meetings to obtain public feedback on the design held on October 24, 2017, November 8, 2017, and November 16, 2017.

[36] The Staff Report referenced the notice to be provided at page 9 as follows:

> To ensure that all abutting residents and property owners on Vernon, Seymour, Allan and Oak Streets were aware of the online survey and public open house sessions, each dwelling was notified with a postcard-style invitation in their mail box. In addition, a notification boundary including the surrounding side streets was created to distribute further post cards (e.g. Henry St., Lawrence St., one block into all perpendicular streets abutting bikeway corridor.) As there is a high proportion of rentals along these streets, property owners were mailed a letter explaining the purpose of Local Street Bikeways and directing them to the website for more information. The letters also contained invitation details of the open house and online survey. Survey results were similarly positive (75-81% support for Vernon-

> Seymour and 64-69% support for Allan-Oak), however, some specific concerns were raised which factored into the final preferred design….

[37] The Applicants highlight that Lawrence Street was identified as a street where residents would receive notice, by way of postcards. Harvard Street, it is submitted, should be implicitly included in this catchment as the cement diverter will be located on it and is directly impacted, although the Court notes that there is no explicit reference to Harvard Street in the Staff Report.

[38] The Applicants' evidence is that none of them received notice, written or otherwise, concerning the Bikeway or of the Council vote on the Resolution until after the Resolution was passed.

[39] The Applicants submit that the process in which the Bikeway was considered and then passed by Resolution goes beyond mere "procedural irregularity", as the Applicants are materially impacted in a negative fashion by the Resolution.

[40] The decision *By-Law No. 8078, Winnipeg (City), Re (1914),* 17 DRL 582, upheld on appeal (*By-Law No. 8078, Winnipeg (City), Re (1914)* 20 DLR 226), was cited as authority for the principle that the distinction between "illegality" and "procedural irregularity" turns on the impact of the relevant municipal action, with the Court to consider whether such action detrimentally impacted the rights of

individuals. If so, it is likely to amount to more than a procedural irregularity and would be beyond “mere internal regulation”, particularly where additional time and consideration may have created a different result. This issue in that case concerned the legality of a bylaw with a material negative impact upon the property rights of a landowner, which would prohibit the lands further development for the purpose of an apartment building.

[41] The Bikeway Resolution’s legality is being challenged for a breach of the duty of procedural fairness owed to the Applicants concerning notice of the proposed Resolution and the opportunity to be heard, with the review of HRM’s actions to meet the notice requirements as set out in the Administrative Order subject to a correctness review.

[42] The Applicants submit that the fact they did not receive a written notice is not a failure of HRM Staff to implement an internal procedure, but it is rather a substantive breach of their right to procedural fairness.

HRM Submission

[43] HRM submitted that despite its efforts to inform, which included two in-person open house sessions regarding this Bikeway and an online survey through HRM’s Shape Your City web portal, with a specific opportunity to comment on

the diagonal diverter. HRM submits that it received input from hundreds of people, including some persons who identified as residents of the Project Area online.

[44] The feedback from the engagement, in conjunction with a design of the Bikeway including a diverter, was incorporated in the Staff Report. The Staff Report was compiled and submitted to Council to review when considering the Resolution.

[45] Ms. Siobhan Witherby is employed as an Active Transportation Planner with HRM. She was Project Manager of the Local Street Bikeway for the Vernon-Seymour and Allan-Oak Corridors referenced in the Resolution, and her affidavit of October 3, 2022 ("Witherby Affidavit") was submitted to the Court.

[46] The Witherby Affidavit outlines the public strategy undertaken. HRM draws the Court's attention to the evidence the public engagement was inclusive of all HRM residents with access to media, including newspapers and the internet. Input could be received via internet, or sent by email, at all times and was not constrained to just Project Area residents. HRM submits that the opportunity to participate was very broad, and continuous.

[47] A formal letter of notice was sent to “Abutters, deemed abutting residents, and property owners on Allan and Oak Streets”, on October 26, 2017, concerning the proposed Bikeway.

[48] HRM did not include residents of either Harvard or Lawrence Street as falling within the definition of “Abutters” in accordance with s. 4(1) and Schedule 1 of the Administrative Order. It was determined that while Harvard and Lawrence Streets fell within the Project Area, this portion of the area would receive a post card.

[49] HRM staff created an informational postcard concerning the Bikeway with a printing of 1000. The city also ran ads concerning the public engagement and proposal in both the Metro and Coast newspapers.

[50] In regard to steps taken to mail the postcard, HRM relied upon an email, dated June 5, 2018, from a staff member copying Ms. Witherby (Witherby Affidavit at Exhibit “Q”). This email canvassed the steps taken internally by HRM to mail the postcard to all postal addresses within the Project Area, that would include the Applicants. The email referred to using the services of a person to prepare the postcards who was then to deliver them to Canada Post for mailing to the Project Area based on postal code. This would have included Harvard Street

and Lawrence Street. This email indicated there were two invoices for HRM for mail preparation and postal charges in the amount of $255.53 plus tax.

[51] An invoice from Canada Post was attached to the Witherby Affidavit at Exhibit “N”, with a handwritten note that a line item in that amount was for the “Public engagement- Bikeways Mailout”, for an amount of $253.31 plus tax. While the amounts vary slightly, it would corroborate HRM had retained a person to perform mailing in the month of October 2017, and related postal delivery charges.

[52] The Court considered the admissibility of the email, and its attendant weight, and with the corroboration of the invoice, the Court accepts that HRM did mail materials via Canada Post in keeping with the engagement strategy. Ms. Witherby was not cross examined on her affidavit, in which she stated that the postal charges were for postcard mailings.

[53] Taken in context with the Staff Report that referenced postcard mailing to the Project Area at page 9, despite the slight variation in amounts concerning the postal charges, the Court finds that it is more likely than not that HRM mailed the postcards concerning public engagement concerning this Bikeway. It is difficult to know with absolute certainty whether the postcard mailing was to the Project Area

impacted for both Bikeway Corridors or mailed in relation to one Bikeway Corridor. While a mailing occurred, it is not possible to determine whether it was delivered to the Applicants.

[54] HRM submits that the Applicants are arguing that the municipality has an obligation to ensure with certainty that every individual resident of an area be made personally aware of a pending municipal decision that might affect them, and aware of the opportunities available for input in advance of a resolution. HRM submits that the Applicants have an unreasonably high expectation concerning the standard of the procedural right to notice in this matter.

[55] The Respondent submits that the level of procedural fairness concerning notice and participation for the Applicants was correctly determined, and met, and in accordance with the Administrative Order, with associated legislation.

[56] However, HRM also pleads that mailing a written notice was just one option provided in the Administrative Order for providing notice to the residents in the Project Area, with other alternatives including public service announcements, advertisements in newspapers, and social media all undertaken in the public engagement that informed the Staff Report.

[57] HRM notes that the *HRM Charter* requires that the actions of Council be conducted in a meeting open to the public, except for a small number of matters that may be dealt with in-camera, and then with the in-camera decision confirmed at the public meeting. *HRM Charter* s. 16(1) provides that: "Notice of regular Council meeting is not required," only notice of special meetings. Section 16(7)(a) provides that: "A meeting of the Council is not an illegal or invalid meeting by reason only of (a) a failure to give notice."

[58] With a few exceptions, which the Bikeway Resolution does not fall within, there was no legal requirement under the *HRM Charter* for Council to conduct a public hearing to enact a by-law, order, policy or resolution. Council may choose the manner in which it obtains public input, and this process was outlined in the Administrative Order.

[59] HRM submits that the *Motor Vehicle Act*, RSNS 1989, c. 293 ("MVA") provides legislative authority for the regulation of bikeways in accordance with provisions concerning regulation of traffic and parking by the municipality as a "traffic authority", pursuant to s. 86 of the *MVA*.

[60] Further, sections 89(1) and 90(3) provide that the traffic authority may regulate traffic by parking and signage, and may mark lanes for traffic to "control the use of lanes for traffic."

[61] HRM submits that the exercise of municipal jurisdiction to pass the resolution is not at issue, nor is there an allegation that the city failed to follow a statutory procedural requirement. The Respondent relies upon Justice Chipman's observation in *Dawgfather, supra* at para 74, dismissing an application to quash under s. 207, that "failure to observe an internal procedure cannot" amount to illegality.

[62] In addition, HRM draws the Court's attention to section 373 of the *HRM Charter* which provides:

> 373(1) Any notice, decision or other document required to be served pursuant to this Act may be served personally, by mailing it to the person at the latest address shown on the assessment roll, by electronic mail or by facsimile.
>
> (2) a notice, decision or other document is deemed to have been served on the third day after it was sent.

[63] To begin, HRM conceded it owed a duty of procedural fairness to the respondents affected by a Bikeway (*Jono Developments Ltd. V. North End Community Health Association,* 2014 NSCA 92 at para 48, and *Dawgfather, supra*). The nature and scope of the duty to procedural fairness should be

considered in context and with a consideration of the principles set out in *Jono*, *supra* at paras 52 and 53.

[64] In *Jono*, *supra* at para 53, the Court wrote:

> [53] In **Baker, supra**, Justice L'Heureux-Dubé set out what have become the guiding principles to define the content of the duty:
>
> > 21 The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As I wrote in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case". ...
> >
> > 22 ... I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker. [Emphasis added]
>
> She then goes on to describe five non-exhaustive factors to consider, which can be summarized as follows:
>
> 1. the nature of the decision being made and the process followed in making it;
>
> 2. the nature of the statutory scheme and the "terms of the statute pursuant to which the body operates;"
>
> 3. the importance of the decision to the individual or individuals affected;
>
> 4. the legitimate expectations of the person challenging the decision; and
>
> 5. 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.

> See **Baker, supra**, at 23-28. In **Canada (Attorney General) v. Mavi**, [2011] 2 S.C.R. 504, Justice Binnie reiterated that this list is non-exhaustive (42).

[65] HRM submits that on application of the *Baker, supra* factors to the evidence that a low level of procedural fairness is appropriate, as the nature of the decision is not adjudicative, and the statutory scheme for the authorization of a Bikeway route by a municipal traffic authority does not require public input. It is submitted that the Administration Order contains a policy decision for public engagement measures to obtain public input but not public hearings prior to a resolution. Further, the HRM Traffic Authority must also approve the Bikeway to ensure compliance with the *MVA.*

[66] In addition, HRM submits that the importance of the decision to the Applicants appears focussed upon their view that the impact of the diagonal cement traffic diverter to calm the neighbourhood is negative but that this concern is speculative, rather than substantive.

[67] In regard to the “legitimate expectations” of the Applicants, HRM pleads that the municipality has met the required expectations set out in the Administrative Order through the notifications and public engagement process that was undertaken.

[68] In regard to the fifth *Baker, supra* factor, HRM states that it chose its own procedures, as it was permitted to do, and acted in accordance with the provisions of the Administrative Order, with staff interpreting the policy and exercising their discretion in accordance with it.

Analysis

[69] At the outset of the hearing, counsel advised that the issue of renaming the street had been resolved, as HRM Staff decided not to proceed with this aspect of the Resolution as it was not mandatory.

[70] The question for the Court is whether HRM breached the duty of procedural fairness owed to the Applicants upon an application of a standard of correctness, or did HRM use a fair and open procedure, appropriate to the decision being made and within its statutory, institutional and social context, with an opportunity for those affected to be heard (paraphrasing L'Heureux-Dubé in *Baker*, *supra*, at para 22).

[71] Schedule 3 provides the following:

> 4(1) Abutters, including residents and property owners, **in the project area** shall be notified that their street is being assessed for implementation as a Local Street Bikeway.

[72] On a plain and ordinary reading of this section, in totality, residents and property owners of properties that abutted were to be notified that their street was being assessed for a Bikeway, in accordance with the Administrative Order.

[73] "Project Area" is defined in the Administrative Order at s. 4 (r) as: "… the street proposed or designated as a Local Street Bikeway; and may include cross streets one block in either direction; the next parallel street; and streets for which the project street is the sole link as determined by staff." (emphasis added)

[74] The Court notes that section 3 of the Administrative Order is drafted to be open ended, with the phrase "which include:" then followed by a non-exhaustive list of items, one of which is "public notification and community engagement…".

[75] Further, with all sections read in harmony, it appears that HRM staff decided that the Applicants did reside in the "Project Area", as defined, but, on the exercise of Staff discretion as provided in the Administrative Order, the Applicants were also to receive the additional level of written notice of a postcard, to be sent in conjunction with broader social media, advertisement and online engagement efforts, and public meetings.

[76] A higher degree of procedural fairness is proportional to the interests affected. In this case, the primary issue is a slower roadway – it is the potential

negative impact of the cement divider as a traffic calming measure. There is no evidence before the Court that there is another impact on the Applicants, however, the resultant impact is both speculative and subjective.

[77] It is apparent that, upon reviewing the post-*Vavilov, supra* decisions of the Court concerning section 207 of the *HRM Charter*, or analogous legislation, in which a municipal bylaw, resolution or policy is challenged that a Court is to consider that procedural requirements will **vary with the context and nature of the decision-making process at issue.** (C*olchester County (Municipality), supra a*t para 35).

[78] Certain statutes and regulations do mandate proof of service for notice, often in a judicial or quasi-judicial proceeding, which will require a high level of procedural fairness. This is proportionate with the level of impact that these proceedings have on the interests of participants. That is not the case here.

[79] If postcards concerning the potential Bikeway, or any other form of notice, was sent by the municipality there is no statutory duty imposed to ensure the notice is received (as established in *Delport Realty Limited v Halifax (Regional Municipality)*, 2010 NSSC 290; and *Hill v. Halifax (Regional Municipality)*, 2007 NSSC 348).

[80] The Court can only speculate as to reasons why these Applicants did not receive the postcards. They were likely to have been sent by HRM Staff further to the Administrative Order and public engagement plan created by staff, however, it is not established to a certainty. However, the Court considers that if there was a procedural irregularity, such as a failure to mail the postcards to the Applicants (which is not proven), that this was a failure of staff to meet an internal procedure.

[81] Justice Chipman's observation in *Dawgfather, supra* at para 74, dismissing an application to quash under s. 207, that "failure to observe an internal procedure cannot" amount to illegality.

[82] The Applicants submit that if they had the chance to participate in the public engagement that they could have provided input on the method of traffic calming, that could have resulted in a different result. They submit the lack of written notice of the proposed Bikeway placed them at a disadvantage as they were not given an opportunity to provide input, although the Court notes there were other modes of notice of public engagement undertaken by HRM, including online, continuous access to comment.

[83] However, accepting the Applicants' submission on lack of notice would place the level of procedural fairness for participation notice during the preliminary

public engagement stage intended to inform a Staff Report at an equivalent level typically seen for quasi judicial or judicial proceedings.

[84] While it's possible that the HRM staff may have received information during the public consultation concerning calming measures, they also could have received this input, included it in the Staff Report, and still proceeded to make a recommendation for the use of cement diverters.

[85] This Application seeks to apply the standard of correctness to the public engagement, as if the contents of the Staff Report were itself the decision, and merely fed into the Council for its *pro forma* approval of the resulting Resolution. The Resolution is not being challenged in a judicial review (which would have made the Resolution itself subject to review on the basis of reasonableness, with deference). This Application challenges the integrity of the Staff Report. However, the evidence also establishes it was open to anyone in the Project Area, as well as HRM broadly, to engage in the public engagement process. The applicants did not do so.

[86] The evidence of an alleged negative impact before the Court did not support the higher standard for notice. The Applicants are requesting that the Court accept that slower traffic is an adverse impact on their interests, that changes the character

of the roadway, in a substantive and negative manner. However, HRM's own policy is undertaken for a public policy goal which even the applicants concede is laudable – the reduction of vehicular traffic, with attendant pollution and climate impacts, and the encouragement of human powered vehicular traffic. It appears the impact, positive or negative, is subjective.

Conclusion

[87] For the reasons set out in the preceding paragraphs, the Court dismisses the application seeking to quash the Resolution.

[88] There was no submission by either the Applicants or the Respondent in regard to costs. I will leave the issue of costs to the parties to try to resolve by agreement, failing which I ask for their written submissions within 45 calendar days of the date of release of this decision.

Diane Rowe, J.