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DATE: July 28, 2011

TO:

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K. Scott McLean	Fax 613-783-9690

FROM: Debbie O'Neil ***for*** Regional Senior Justice C.T. Hackland

MESSAGE: Justice Hackland has directed me to advise that his Reasons for Decision in Friends of Lansdowne v. City of Ottawa et al, are released herewith by fax. Hard copies are available for pick up at our reception area (5th Floor, Judges' Chambers). In addition, an electronic copy of the Reasons for Decision will follow immediately.

Number of pages following, including transmittal form: 33

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Friends of Lansdowne Inc. v. Ottawa (City), 2011 ONSC 4402
COURT FILE NO.: 10-49352
DATE: 20110728

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
FRIENDS OF LANSDOWNE INC., Applicant	Steven Shrybman, Fay K. Brunning and Colleen Bauman, for the Applicant
– and –	
CITY OF OTTAWA Respondents	Peter K. Doody and Katherine Sangster, for the Respondent
– and –	
OTTAWA SPORTS AND ENTERTAINMENT GROUP Intervener	K. Scott McLean, for the Intervener
HACKLAND R.S.J.	**HEARD:** June 21-23 and 27-30, 2011 (Ottawa)

REASONS FOR DECISION

Overview:

[1] The applicant seeks to quash for illegality the by-laws and resolutions of Ottawa City Council made on June 28, 2010 and on November 19-22, 2010 in so far as these relate to the redevelopment of Lansdowne Park in the City of Ottawa.

[2] Specifically, the applicant submits that:

(a) The City of Ottawa (the City) has acted in bad faith;

(b) The City has illegally bonused Ottawa Sports and Entertainment Group ("OSEG"), the intervener in this application, contrary to s. 106 of the *Municipal Act*, 2001, S.O. 2001, c.25; and

(c) The City has violated its procurement by-laws and rules, and in so doing has acted illegally and in disregard of the requirements of s. 270 of the *Municipal Act.*

[3] This Application is brought under s. 273 (1) of the *Municipal Act,* which reads as follows:

> 273. (1) Upon the application of any person, the Superior Court of Justice may quash a by-law of a municipality in whole or in part for illegality. 2001, c. 25, s. 273 (1).

[4] The applicant, Friends of Lansdowne Inc. (the applicant), describe themselves as "a volunteer group founded in early 2009 in response to the City's decision to abandon the Lansdowne Design Competition and proceed with one redevelopment plan proposed by OSEG". OSEG is a consortium of Ottawa developers who have agreed to enter into what is properly described as a complex public private partnership with the City for the redevelopment of Lansdowne Park. The project, known as the Lansdowne Partnership Plan ("LPP"), contemplates the renovation and refurbishment of the football stadium and hockey arena presently on site, together with housing and a commercial development (office and retail) and related parking facilities.

[5] Lansdowne Park is an important City landmark located within Ottawa's central Glebe neighbourhood. Frank Clair Stadium, an open air 20,172-seat stadium, and the 9,261-seat Civic Centre Arena dominate existing development on the site. Both were constructed in 1967 as an integrated complex. Frank Clair Stadium was the home field of the Ottawa Rough Riders, who played in the Canadian Football League ("CFL") from 1876 until their cessation of operations in 1996. The stadium was also the home field of the Ottawa Renegades, who played in the CFL from 2002 until the franchise was suspended by the CFL in 2006. The Civic Centre is the home ice of the Ottawa 67's, who have played in the Ontario Hockey League since 1967. Several other buildings are located on the site, including the Horticulture Building, the Aberdeen Pavilion and

the Coliseum. At the present time, the balance of the park is generally open, covered in asphalt, and used for parking.

[6] The evidence establishes that the football stadium and arena area, now 43 years old, are in a serious state of disrepair. The Horticulture and Aberdeen buildings are designated heritage buildings. The site is bounded on two sides by the Rideau Canal, which is a UNESCO (United Nations Educational, Scientific and Cultural Organization) World Heritage site.

[7] Redevelopment of Lansdowne Park has been, and remains a priority for the City. Approval of Ottawa City Council by-law 2010-225 in June 2010, authorized the City to proceed to "phase two" of the LPP, to redevelop the park. This followed a two and a half year process which was reviewed in considerable detail in oral argument and in the voluminous materials which constitute the record before this court.

[8] The parties have also addressed the issue of the appropriate standard of review of City Council's decision encompassed in by-law 2010-225 as well as the question of how the court should exercise its discretion as to whether or not to quash the by-law in the event the applicant's argument of bad faith against the City is accepted.

[9] It is to be noted that the LPP will be brought back before City Council for final review and authorization and for further review of certain incorrect data originally circulated concerning the revenue distribution for the project (the "waterfall"). City Council's pending further review and consideration of the LPP arguably raises issues of prematurity and mootness. Further, I expressed to counsel my view that the applicant's bad faith argument may raise credibility and factual issues requiring a trial of all or part of this application. However, on both issues, I am persuaded by the parties, including the intervener, that a timely disposition of this application on its merits is urgently required in the public interest and that the issues are unlikely to become moot. On that basis, I agree that it is appropriate to render judgment on the current record.

Issues

[10] In my view, the issues to be decided are the following:

(a) What is the proper standard of review of the decision of City Council to enact by-law 2010-225 approving the LPP project in reference to the applicant's three arguments of illegality?

(b) Has the City acted in bad faith in the course of negotiating and approving the LPP?

(c) Has the respondent illegally bonused OSEG, contrary to s. 106 of the *Municipal Act*? and

(d) Has the City violated its procurement by-laws and rules, and in so doing has acted illegally and in disregard of the requirements of s. 270 of the *Municipal Act*?

Analysis:

Standard of Review

[11] As noted, the applicant argues that the City's decision in enacting the by-law approving the LPP project was illegal due to bad faith, breach of the City's procurement by-law and as constituting a bonus contrary to s. 106 of the *Municipal Act*. The latter two arguments, as will be discussed, involve a substantial factual component and on the record in this case are properly viewed as mixed questions of fact and law. As such, a deferential standard of review is called for, namely reasonableness, see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. Moreover, the controlling authorities as discussed below have been very clear in stating that the decisions of democratically elected municipal councils are to be accorded substantial deference.

[12] Section 272 of the *Municipal Act* and the case law both provide that municipal by-laws are not subject to review for "unreasonableness" that falls short of bad faith. The *Act* states:

> Quashing By-laws
>
> Restriction on quashing by-law
>
> 272. A by-law passed in good faith under any Act shall not be quashed or open to review in whole or in part by any court because of the unreasonableness or supposed unreasonableness of the by-law. 2001, c. 25, s.272.

[13] The case law recognizes that Municipal councils are elected representatives of their community and, as such, are accountable to their constituents. In *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342 at para. 36, the Supreme Court of Canada adopted the

dissenting opinion of McLachlin J. in *Shell Canada Products Limited v. Vancouver (City)*, [1994] 1 S.C.R. 231 at 244, as follows:

> Recent commentary suggests an emerging consensus that courts must respect the responsibility of elected municipal bodies to serve the people who elected them and exercise caution to avoid substituting their views of what is best for the citizens of those municipal councils. Barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold.

[14] Writing for the court in *Nanaimo*, Major J. stated at paragraph 35:

> ... Municipal councillors are elected by the constituents they represent and as such are more conversant with the exigencies of their community than are the courts. The fact that municipal councils are elected representatives of their community, and accountable to their constituents, is relevant in scrutinizing intra vires decisions. The reality that municipalities often balance complex and divergent interests in arriving at decisions in the public interest is of similar importance. In short, these considerations warrant that the intra vires decisions of municipalities be reviewed upon a deferential standard.

[15] The Ontario Court of Appeal has also stated that courts are to extend substantial deference to decisions of municipal councils, particularly if the issues relate to broad based considerations of community interest, see *Equity Waste Management of Canada v. Halton Hills (Town)* (1997), 35 O.R. (3d) 321, [1997] O.J. No. 3921 (C.A.). See also *Grosvenor v. East Luther Grand Valley (Township)*, [2006] O.J. No. 5562 (S.C.J.), aff'd [2007] O.J. No. 241 (C.A.).

[16] In my opinion these statements of the governing law are highly relevant to the issues raised by the applicant in this proceeding. After a lengthy process involving numerous studies, public consultations, experts' reports including legal opinions, presentations and debates at City Council, and a review of the LPP by the City's Auditor General, assisted by his own consultants, City Council voted to approve the initial stages of this public private partnership. Inherent in this process and in the approval of the by-law (by-law 2010-225), were a number of policy decisions. These included the decisions that the LPP was to be a sole source negotiation with OSEG rather than a competitive process, that a significant aspect of the redevelopment of the park was to be carried out through a public private partnership, that refurbishing the football stadium and

returning a CFL franchise to Ottawa Frank Clair Stadium at Lansdowne Park was to be a key objective of the LPP and that the economic structure of the LPP, as discussed below, was to be in its present form. This court has no jurisdiction to pass on the wisdom or the reasonableness of these policy decisions and to the limited extent that the court may legitimately intervene, a generous deferential standard of review is required.

Has the City acted in bad faith in the course of negotiating and approving the LPP?

[17] After a careful review of the extensive record, the court is of the opinion that the applicant has failed to prove bad faith, either on the part of City Council or any member of Council or on the part of the City Manager and his staff. The applicant's arguments, which are discussed below, even if correct factually or as matters of reasonable opinion, do not individually or taken together, amount to bad faith. Notwithstanding Mr. Shrybman's capable submissions, the applicant's bad faith arguments are largely an attempt to reargue the applicant's position that the LPP is a poor deal for the City from a financial perspective, and these arguments have been expressed publicly and debated extensively at meetings of City Council or its sub-committees, prior to the approval of the LPP.

[18] The burden of proving bad faith is as stated by Blair J.A. in *Grosvenor v. East Luther Grand Valley (Township)*, [2006] O.J. No. 5562 (S.C.J.), aff'd [2007] O.J. No. 241 (C.A.):

> There is no dispute that the onus of establishing bad faith rests on the person attacking the by-law.

I would also adopt the observation of Aston J. in *Municipal Parking Corp. V. Toronto (City)* (2009), 314 D.L.R. (4th) 642, [2009] O.J. No. 5017 (S.C.J.) that the standard to be met in establishing bad faith is high and necessitates evidence to demonstrate the City acted other than in the public interest.

[19] This authoritative definition of bad faith was provided by Laskin J.A. in *Equity Waste Management*, at paragraph 61:

> Bad faith by a municipality connotes a lack of candour, frankness and impartiality. It includes arbitrary or unfair conduct and the exercise of power to serve private purposes at the expense of the public interest...

[20] It has also been held that in order for a by-law to be set aside on the ground of bad faith, it must be proven that a majority of members of Council acted in bad faith, see *Langille* (c.o.b. *Rickshaw Runners of Toronto) v. Toronto (City)*, [2007] O.J. No. 1756 (S.C.J.), and also see *Equity Waste* paragraph 17 and *Rogers, The Law of Municipal Corporations* at 1019. In *Langille*, Belobaba J. struck down one discrete provision of a municipal by-law governing pedicabs in Toronto for bad faith because it was enacted in a manner that was imposed in an arbitrary and unfair manner, "lacking in any notice to or input from the pedicab business; and the lack of any investigation or analysis or "due diligence" on the part of City Council".

[21] In my opinion the extensive consultation which occurred in relation to the LPP, including public hearings and expert studies, contrasts significantly on a factual basis with the bad faith cases cited to the Court in argument. Bad faith in the cases cited included lack of notice of the by-law, which was enacted for a collateral purpose (*Grosvenor*), by-laws enacted arbitrarily without notice, industry input, proper analysis or evidentiary basis (*Langille*), by-laws enacted without any studies on the causal connection between the by-law and public safety or allowing any public input from those affected (*Xentel DM Inc. v. Windsor (City)* (2004), 243 D.L.R. (4th) 451, [2004] O.J. No. 3656 (S.C.J.)), by-laws passed only to appease a certain group and unsupported by any legitimate planning concerns (*Equity Waste Management*), and by-laws enacted after a failure to keep the public fully informed, including a lack of proper notice of council meetings regarding the by-law. Other examples are a refusal to adjourn a meeting of Council, (*Albert Bloom Ltd. v. Bentinck (Township) Chief Building Official* (1996), 29 O.R. (3d) 681, [1996] O.J. No. 1393 (Gen. Div.)), serious unjustified delays in processing certain applications by the Chief Building Officer (*Pedwell v. Pelham (Town)*, [1998] O.J. No. 3461 (Gen. Div.)), and the by-law singling out one property to the owner's detriment, no planning purpose justifying the by-law, and the by-law being pushed through with inordinate speed, and lack of notice to the affected parties (*H.G. Winton Ltd. v. Borough of North York* (1978), 20 O.R. (2d) 737 (Div. Ct.)).

[22] The applicant in the present case disclaims any allegation of improper motives against specific members of City Council or against the City Manager and his staff. Rather, it is argued that in the totality of circumstances in the process leading to the approval of the by-law adopting

the LPP, there was a lack of openness, frankness and impartiality resulting in what was characterized in argument as a "one sided deal favouring one private interest". It is argued that the City exhibited a pattern of conduct that failed to distinguish between public and private interests with the result that the LPP was not presented to City Council and to the public in a candid transparent matter. It is also argued that there was no adequate discussion of the pro's and con's of the deal, rather the information provided to council by the City Manager and various consultants was "salesmanship". Most importantly, the LPP was said to be a disguised subsidization of professional football.

[23] The City's ongoing involvement in the Lansdowne re-development project from September 2007 to the approval of phase 2 of the LPP in June 2010, is described in detail in the affidavit of Kent Kirkpatrick, City Manager, which is 61 pages in length, supported by 91 exhibits occupying 6 volumes of record. He was cross-examined extensively by applicant's counsel prior to the hearing of the application.

[24] The Kirkpatrick affidavit provides a chronological commentary on events from the initial design competition (September 2007), to receipt of the OSEG initial proposal for re-development of Lansdowne Park (October 2008) to the evaluation of the OSEG proposal, which formed the subject of a report which was presented to the relevant Council Committees on April 6, 2009. An evaluation team, including outside consultants and a Fairness Commissioner carried out this exercise. The first public consultation took place at a joint meeting of the relevant Council Committees on April 20, 2009. On April 22, 2009 Council approved the report which recommended pursuit of the OSEG proposal and required staff to complete negotiations with OSEG and report back to Council on September 2, 2009. Notably it was at this same meeting that City Council voted against further pursuit of the original design competition.

[25] Mr. Kirkpatrick points out that by letter dated April 24, 2009, the Fairness Commissioner commended the City for their unbiased and impartial approach to the assessment process which was conducted with "both professionalism and high ethical standards".

[26] As noted, on April 22, 2009, Council directed City staff to enter into partnership negotiations with OSEG subject to a considerable list of stipulations or objectives, including the

"principle of not increasing the overall cost to the taxpayer" and that revenues from the project "not be used to subsidize any professional sports team".

[27] The City assembled a series of teams of senior staff and including outside consultants to carry out the negotiations with OSEG. An outside consultant, Graham Bird and Associates were retained to lead the overall project negotiations, under the City Manager's direction.

[28] The City Manager deposed that in negotiating the partnership plan, his staff were guided by Council's directions of April 22, 2009 and a series of other municipal policies. These included:

> ... (f) the stadium revitalization, the "centre court" for sports, is a key element of the Lansdowne transformation; the new stadium should be integrated into its surroundings and enhance the functionality to permit at last football, soccer, and hockey; similarly, the architecture of the facility should be inspiring, innovative, and consistent with the overall vision for Lansdowne; ...

[29] These negotiations resulted in a Memorandum of Understanding and draft partnership plan which were presented to City Council on September 2, 2009. These documents represented OSEG's formal redevelopment plan for Lansdowne Park (the LPP). The LPP provided, among other features, that:

(a) OSEG would bring a CFL football team to a revitalized Frank Clair Stadium and would acquire the Ottawa 67's OHL franchise from its current owners and the Project Agreement shall be conditional on both of those things occurring; and

(b) Frank Clair Stadium and the Civic Centre would be entirely renovated and refurbished so that Frank Clair Stadium would accommodate the CFL team and the Civic Centre would continue to be the "home ice" location of the Ottawa 67's and provide a 10,000-seat venue for sporting and other events.

[30] The Memorandum of Understanding and the LPP also described in detail the financial transactions forming part of the project. This included:

(a) the cost of the stadium and arena improvements would be borne by the City at a maximum cost to be established, anticipated to be not more than $110 million;

...

(c) OSEG would be solely responsible for any and all amounts above the maximum established cost for the stadium improvements other than costs for pre-existing environmental conditions.

[31] The Memorandum of Understanding and the LPP presented to Council on September 2, 2009 also provided that the fundamental concept for the financial arrangements between the City and OSEG was that there would be a "closed system" pooling revenues and expenses, with the following essential elements (which were later varied in certain material respects by further negotiations):

(a) a minimum equity contribution by OSEG in the amount of $30 million (the "Minimum Equity") with any equity contributions in excess of that figure described as "Additional Equity";

(b) OSEG would not be entitled to a return of the Minimum Equity for five years, and would then be entitled to have the amount of the Minimum Equity repaid on an "amortized" basis over a period of 27 years;

(c) OSEG would be entitled to a return on Equity (only cash equity) actually contributed and outstanding from time to time at 8% per annum;

(d) the repayment of OSEG's Equity and return on Equity would be payable only in accordance with a set of priority payments in the Waterfall as described below;

(e) the City would receive a credit for "Deemed Equity" calculated to include

(i) the fair market value of the Retail Component lands;

(ii) the present value of the Office Head Lease ... rentals based on fair market value rentals during the initial 30 years of the operating term commencing as at the commencement of the operating term and adjusted at ten-year intervals thereafter; and

(iii) the "soft costs" of the stadium improvement prior to Council approval;

(f) the City would receive a deemed rate of return on its Deemed Equity at 8% per annum, payable in accordance with the priority of distributions under the Waterfall;

(g) net cash from all aspects of the Project (the "Closed System") would be distributed in the following "Waterfall" of payments; that is, in accordance with the following priorities in the order set out below:

(i) payments to a reserve to fund lifecycle replacements and major capital repairs for the Stadium, the Parking Component and the Aberdeen Pavilion;

(ii) a return on Equity contributed and outstanding by OSEG at 8% per annum, on a cumulative, but not compounded, basis;

(iii) a return of Additional Equity to OSEG;

(iv) a return of the Minimum Equity of OSEG in accordance with the formula described in sub-paragraph 60(b) above;

(v) a return to the City on its Deemed Equity at the rate of 8% per annum, on a cumulative but not compounded basis; and

(vi) the balance of the net cash flow distributed to OSEG and the City in equal shares; and

(h) after 30 years, the Waterfall System would be terminated, the City receiving the reversion of the property rights to the stadium, assuming the Head Office Lease ... and applicable Parking Leases, and receiving fair market value for the Retail Lease.

[32] The City commissioned PricewaterhouseCoopers (PWC) to deliver a report analyzing the proposed redevelopment plan. This was made publicly available on September 1, 2009 and it provided:

- compared with historical operations of Lansdowne, the Project is expected to generate positive cash flow to the City over the first term of the proposed agreement with OSEG;
- under the proposed Waterfall System, the City would begin to receive its accumulated return on Deemed Equity in 2029, and would have received all accumulated deficits on its return on Deemed Equity by 2040 (if the Office and Hotel are not built), when cash sharing between the City and OSEG would begin; if excess cash is held in reserve, the reserve will be sufficient to retire all debt in 2033.

[33] The City Manager deposed that he advised Council that OSEG was the only party that had a conditional CFL franchise that would be an anchor tenant for a revitalized Frank Clair Stadium. On the evidence, this would appear to be the principal rationale for the sole sourcing of this project.

[34] On November 12, 13, and 16, 2009, Council met for the purpose of receiving public delegations, and to ask questions of staff and to further consider the LPP Implementation Report as voted on at the September 2, 2009 Council meeting.

[35] Mr. Kirkpatrick deposes that in the course of these meetings Council heard close to 100 presentations from various delegates including businesses, interest groups and the general public and including a number of representatives of the applicant. Also at that time a report of the Auditor General was tabled, pursuant to Council's prior request. This report specifically noted for the information of Council that the proposal did not fully comply with Council's earlier direction in April in that it proposed the use of revenues to reimburse franchise fees and start up costs related to the proposed CFL and existing OHL teams. At this meeting the City Manager and the Auditor General also provided assurances that the procurement by-laws were not contravened by sole sourcing the project and advised Council that this position was confirmed in a legal opinion received from the City's lawyers.

[36] At the special City Council meeting of November 12, 13, and 16, 2009 Council approved the LPP in principle, subject to further stipulations. Council also approved a recommendation that a final review of the financial projections of the LPP be completed and that the Office of the Auditor General provide Council with a supplementary report on the accuracy of the forecasts as well as the reasonableness of the assumptions used. At the same time an extensive public consultation program was approved and subsequently carried out.

[37] Finally, in June of 2010, City Council convened a number of meetings designed to consider approval of the LPP.

[38] On June 8, 2010 the City and OSEG committed to an LPP Project Agreement Framework which provided a description of the required legal agreements and the material business arrangements in the project. The Closed System of "Waterfall" payments were revised in a number of respects. Council also had available a series of reports including a financial analysis by PWC as well as a "Sensitivity Analysis and Worst Case Scenario Report". The Auditor General also provided an audit of the LPP financial model in response to the November 2009 request from Council that he provide a "supplementary report on the accuracy of these forecasts as well as the reasonableness of the assumptions used...". The Auditor General's report was prepared in part with the assistance of outside consultants (Hunden Strategic Partners).

[39] On June 9, 2010 the City Manager submitted a report to Council on the redevelopment of Lansdowne and the status of the conditions set by Council at their November 2009 meeting. On

June 17, 23, 24, and 25, 2010, Council sitting as Committee of the Whole, deliberated over the many reports and presentations prepared for them. Over 100 presentations from private and public delegations were received during those meetings including from representatives of the applicant.

[40] Council, following this extensive process described in detail in the City Manager's affidavit, voted to approve the LPP.

[41] In the context of their argument as to a lack of transparency and due diligence amounting to bad faith, the applicant raises the following specific instances of alleged bad faith on the part of City Council and staff.

1. Failure to consult 2 heritage bodies concerning the horticulture building and the Aberdeen pavilion.
2. Failure to maintain minutes of meetings between City officials and OSEG in the March to October 2008 time period.
3. Failure to make a report by Deloitte available to City Council.
4. Council's treatment of the "no subsidization of sports facilities" criteria.
5. Misleading discussion of the LPP being "revenue neutral".
6. Accepting an unsubstantiated valuation of the OHL franchise.
7. The erroneous information presented to City Council concerning the City's "Deemed Equity", in the revenue "Waterfall" arrangement.
8. Sole sourcing the public private partnership to OSEG.

[42] Concerning the heritage buildings, there is no evidence before the court from heritage officials or otherwise that there will be any breach of law or of appropriate practices in relation to these buildings. On-going discussions are taking place between City officials dealing with the two heritage buildings. Some early shortcomings in communications with heritage officials do not support an allegation of bad faith. Included in the resolutions approving the LPP passed was the following concerning heritage approvals:

... (f) Recommendation 19, to "Direct City staff to initiate the processes necessary to consult with the Ontario Heritage Trust (OHT) and obtain any required heritage approvals, as outlined in this report and described in Document 8, including the following:

...

c. Approval pursuant to the provisions of the *Ontario Heritage Act* for the relocation, alteration and adaptive reuse of the Horticulture Building and any alterations that may be required to accommodate a new use in the Aberdeen Pavilion.

[43] The City has been unable to produce, in answer to requested undertakings, minutes of communications which took place between City officials and OSEG during the period of March to October of 2008. This issue was addressed by the City's chief information officer in affidavit form and he was cross-examined. I am satisfied on the evidence that the failure to retain this documentation, while unfortunate, was inadvertent and not bad faith conduct.

[44] The City obtained over 21 experts' reports relating to the LPP. All of these were made available to City Council before the LPP was approved. The one exception was a report prepared by Deloitte who were retained by the City in November of 2008 to review the initial version of the proposal for the public private partnership presented by OSEG. The Deloitte report contained a number of recommendations that were negotiated into the current LPP. One recommendation however was to require that the retail development pay land rent at market rates rather than the nominal one dollar per year (for 30 years) component of the current partnership. It is conceivable that this report could have contributed to public discussion of the financial aspects of the LPP but this topic has been debated in great detail and I do not accept that the failure to release this report dealing with a preliminary proposal was a matter that was likely to have been material to any informed assessment of the LPP. I find that the non-circulation of the Deloitte report was not an act of bad faith on the City's part.

[45] It is argued that an important instance of bad faith was the City's failure to follow City Council's direction that there be no subsidization of professional sports teams and that the LPP does exactly that in a manner not made transparently clear to City Council when the LPP was approved. At its meeting of April 22, 2009, Council passed the following resolution for the purpose of authorizing the City Manager to commence negotiations with OSEG:

> THEREFORE BE IT RESOLVED that staff be directed to negotiate a partnership with The Ottawa Sports and Entertainment Group (OSEG) to redevelop Lansdowne Park, including revitalizing the Civic Centre and Frank Clair stadium, enhancing Trade and Consumer Show space and protecting the Ottawa Farmers' Market, based on a revenue and value neutral basis, subject to Committee and Council approval and based on the following conditions:
>
> 1. That the City continue to support the Central Canada Exhibition's move to the Albion Road site;
>
> 2. That the City of Ottawa's contribution to the revitalization of Lansdowne Park be limited to a dollar amount to be established during the negotiations based on the principle of not increasing the overall cost to the taxpayer; and
>
> 3. That any revenues generated from the revitalized Lansdowne Park not be used to subsidize any professional sports teams.
>
> (underlining added)

[46] Pursuant to this authorization from City Council, the City manager and his team commenced negotiations with OSEG. As mentioned previously, the end result, ultimately approved on June 20, 2010 in the by-law being challenged in this application, was a "closed system and waterfall scheme" that intertwined or pooled all revenues and losses from the sports teams and athletic facilities as well as the commercial and retail components of the LPP. Arguably, the resulting scheme does, among other things, result in the subsidization of the proposed professional football team. The football team will be the anchor tenant for the refurbished stadium and will be a significant component of the overall LPP project. Council is entitled to depart from its initial negotiating objectives and, subject to the bonusing argument discussed below, is entitled to enter into a public private partnership which has a component that is a professional sports team. As long as the operational and financial proposals are fully and accurately disclosed to City Council, its acceptability and wisdom are matters for council to decide. These are issues of policy, not legality.

[47] Council has been concerned with what has been termed the "revenue neutrality" of the LPP. This connotes the general concept that tax revenues from the project including "avoided costs" will cover the City's costs of financing their capital costs in the LPP. It is of course a policy decision as to whether and to what extent council may choose to base its approval of the LPP on any concept of revenue neutrality. However, the applicant argues that the relevant financial information presented to council has been misrepresented.

[48] City Council, in a meeting dated September 2, 2009, passed a resolution "that staff be directed to include in the implementation report to the Committee of the Whole and Council, what those initial costs might be and how this would be balanced by the revenue streams". In addition, one of the negotiating conditions imposed by City Council, quoted previously, was that the City's contribution to the project be limited to a dollar amount to be established during the negotiations, "based on the principle of not increasing the overall costs to the taxpayer".

[49] The City Manager subsequently reported to Council:

> The debt to be issued was modeled as a 40-year term at 5.35 per cent (the current posted 40 year rate at which the City could borrow from Infrastructure Ontario) and would require yearly debt servicing of $7.142M per year. The debt servicing can be funded from:
>
> - The cost savings of $3.8M already included in the City's budget for both capital and operating expenses;
> - 75 per cent of the forecast tax revenue generated from the retail space being proposed as part of Phase 1 ($2.874M); and,
> - Contributions totalling $1.370M from the parking reserve over the first 6 years (average of $228,333) and repaid in years 7 to 11.
>
> The debt-servicing model also assumes that the taxation on these properties will increase by 2.5 per cent per year, reflecting inflationary tax increases.

[50] A vigorous debate has developed as to whether the City Manager's data is correct and as to whether it meets the concept of revenue neutrality. The debate centers around whether there will be sufficient tax revenues from the retail component of the project to cover the City's debt servicing requirements on an annual basis. The evidence indicates that these issues have been thoroughly debated before City Council and the applicant's witness, Professor Lee, has addressed Council on the very issues raised in his report.

[51] The City argues that the City Manager, Mr. Kirkpatrick, explained to Council and to the public viewing or attending Council meetings that the concept of revenue neutrality depended upon a determination by Council that a certain portion of the property taxes to be paid by businesses which would be established at the project were incremental in the sense that they

would not have located in Ottawa if the project was not created. Mr. Kirkpatrick explained that it was up to Councillors to review the information provided by staff and to determine whether they were prepared to consider the taxes as incremental, and if so, at what percentage.

[52] Mr. Kirkpatrick advised Council at the November 16, 2009 meeting that if they were not prepared to consider any taxes as incremental, Council should understand that the LPP would create a budget pressure for the City. In response to a question from Councillor Bédard, Mr. Kirkpatrick stated the following:

> Kirkpatrick - ... If you did not wish to consider that any of these taxes might be incremental, in other words, wouldn't be generated if these redevelopments didn't go forward, then what you should be focused on is that, in my opinion, that $3.3 million differential between what will be your budget requirement for Lansdowne Park and the debt service charges.

[53] At the Council meeting of June 9, 2010, prior to the approval of the LPP, the City Manager described the consequences of Council considering the concept of incremental taxation. He explained in what I consider a candid and forthright manner:

> And then you get into the discussion about whether you are prepared to accept any property taxes. If you were not prepared to accept any property taxes as incremental or any of the 85 million of distributions to the city as being a relevant offset to the debt service charge in the end you are left with about 3.2 million as would be the budget impact. That's 0.3% of a tax increase.

[54] The analysis provided by PwC dated June 9, 2010, entitled "Lansdowne Park: Business Plan for Transformation", opined that the LPP would in fact be revenue positive. As that report indicates, that analysis was based on the assumption that 75% of retail, office and related parking taxes have been included in the analysis for the purposes of determining revenue neutrality as they are considered "incremental" – that is, dependent on the LPP being developed.

[55] What of course has been under discussion before Council, and in particular at its meetings of June 9 and June 17, 2010 is the appropriateness of the assumptions made and of the revenue forecasts which will be dependent on the retail tenants attracted to this project and the extent to which the LPP succeeds in its objective of attracting tenants who would come

specifically to the LPP so as to be considered "incremental". In my opinion, and as I find, the financial issues sought to be raised before this court were understood and debated before City Council. Transcriptions of the relevant Council meetings forming part of the record in this application support this observation. These are issues of policy and political choices not subject to review by the court. The competing arguments as to what assumptions and projections are to be used and as to whether revenue neutrality will be achieved have been fairly placed before City Council for their collective business judgment. On the evidence I do not accept the allegation that this information was put to Council in a misleading fashion so as to inappropriately favour OSEG's interest.

[56] The applicant relies as an instance of lack of transparency or due diligence on an admitted serious error contained in the Project Agreement Framework, a document dated June 8, 2010 which was presented by the City Manager to Council at the June 2010 meetings when the relevant by-law was approved. The error was only identified later in the course of the pre-hearing cross-examination of the City Manager in this proceeding and in response to which the City has undertaken to bring the issue back before City Council for discussion and such further action as City Council deems appropriate.

[57] As part of the waterfall structure for net revenue distribution in the LPP the City is entitled to receive a return on "funding equity" beginning in 2020. City Council and the public were advised that the value of the City Funding Equity was estimated to be $13.469 million in a PwC Report dated June 2010. Presumably this was Council's understanding on the point when the by-law was approved and it appears to be the case that this sum or possibly somewhat less remains the realistic projected amount. In the Project Agreement Framework, a briefing document outlining the financial and legal structure of the LPP presented to Council in June 2010, it is stated:

- The City will receive a credit for "Funding Equity", being:
    - the lesser of the maximum hard and soft costs to the City of the stadium component and parking structure and the actual costs to the City of the stadium component and parking structure (in each case excluding certain costs described above)

    less

- the maximum amount of debenture financing available to the City for the project, based on the amount of debt that could be supported by seventy-five percent of the anticipated tax revenue to be generated by the project components other than the residential component, as determined on a predetermined date prior to closing

- net proceeds received by the City for the sale of residential air rights

[58] The evidence establishes that the agreement between the City and OSEG which was reached in negotiations provided for the City to receive a credit for "Funding Equity", and then to receive, at the second level of the waterfall, a return on that amount of money at 8% per annum, and, at the fourth level of the waterfall, to receive a return of the Funding Equity. This provision was inserted into the agreement after a motion brought by Councillor Wilkinson in November 2009, which provided, in part, as follows:

> That in the waterfall the City's deemed equity include any funds paid out from reserves or as cash payments in addition to items stipulated in section 10 of the Memorandum of Understanding (MOU) of the Lansdowne Park Project and that payment under the steps following provision of the reserve fund as detailed in the waterfall in section 12 of the Lansdowne Partnership Plan be revised so that at each payment step, commencing with the 8% return on equity payment, amounts be paid to the City and OSEG at the same time, proportional to the cash contribution from each at the time of payment, with the final step, once the equity positions are paid out, remaining at a 50/50 split.

[59] The formula actually used to arrive at the value of the funding equity, expressed as $13.469 million in the PwC report presented at City Council, was as follows:

> Total City project costs [$129,300,000] less proceeds from the sale of air rights [$10,247,833], less the amount that can be debentured from 75% of the realty taxes estimated from the project other than the residential component [$42,952,034], less the amount that can be debentured from the avoided costs of $3.8 million per year [$62,631,403], to equal $13,468,730.

[60] This calculation was the basis of agreement between the City and OSEG in the negotiations leading up to the agreement on the Project Agreement Framework, and was intended to put into place the motion moved by Councillor Wilkinson, referred to above.

[61] The definition of the City's Funding Equity found in the Project Agreement Framework, however, and in the June 9, 2010 PwC report to Council, does not include any deduction from the total City project costs of the **"amount that could be debentured from the avoided costs of $3.8 million per year [$62,631,403]"**. If the erroneous description of the calculation contained in the Project Agreement Framework document was followed, the City's Funding Equity would be $76,100,133 and not $13,468,730, (or $62,631,403 greater than Council was advised in the June 2010 PwC report).

[62] Whether or not the erroneous information in the Project Agreement Framework provided to Council affected the decision of any member of Council to support the LPP is unknown, although it may be thought to be unlikely since the only figure for Funding Equity actually provided to Council was, as noted, $13.5 million dollars. In any event, the City makes this statement in paragraph 55 of its factum:

> Before the Project Agreement can be executed or closed, the wording of the Project Agreement Framework, or the actual Project Agreement, when finalized, will have to be changed, and those changes approved by Council (should it so decide), to reflect the intention of the parties at the negotiation table, and to show how the expected funding equity, estimated in June 2010 to be $13.469M, was and is to be calculated.

[63] I find that this error was made in the context of explaining to City Council a very complex financial arrangement. It was an innocent albeit potentially significant error that warrants further review by City Council, as is the City's intention as represented to this court. I am of the opinion that this informational error does not support an inference of bad faith on the part of the City management and certainly not on the part of members of the City Council who were unaware of the misinformation.

[64] As to the valuation of the OHL franchise as a component of the LPP, I understand the applicant's point to be that the City failed to exercise due diligence by not requiring any independent valuation of the franchise. I am simply not prepared to view this as an instance of bad faith through lack of diligence when there is no evidence before the court that the valuation of the OHL franchise is unreasonable.

[65] The applicant has served experts reports from Professor John Loxley and Professor Harry Kitchen directed to the bad faith issue. The City objects to their admission into evidence based on lack of relevance.

[66] I have considered the principles governing the admission of expert opinion evidence as recently set out in *R. v. Abbey*, [2009] O.J. No. 3534 (C.A.). Professor Loxley is an economist who has studied Public Private Partnerships. He advises in his report that he was not able to conduct a value money assessment of the LPP but he offers a critique of the procurement approach followed by the City concerning the LPP based on what he outlines as best practices. He argues for the use of a competitive process in Public Private Partnerships. While the court found this report to be informative background reading, it is directed to the general policy issue of whether sole sourcing in this type of project is wise or appropriate. This issue is not before the court and accordingly the report is not relevant to the legal issues in this case and will not be admitted into evidence.

[67] Professor Kitchen is an expert in municipal finance. His report criticizes the manner in which tax neutrality and incremental financing will be utilized and has been discussed or represented by the City in the LPP. He offers the opinion that tax incremental financing is not appropriate for funding the redevelopment of a sports stadium that caters, in his view, to primarily private sector interests. He expresses the opinion that the City's proposal, as it relates to incremental taxation, surplus revenue and dedicated tax revenue, is "not supported by any principle of sound municipal finance or best practise". While useful background information, these are policy arguments that do not assist the court in dealing with the issue of bad faith and are, in my view, irrelevant to the issues in this application. As such this report will not be admitted into evidence.

[68] In summary, for the reasons expressed previously in paragraph 17, I find that the applicant has failed to prove bad faith on the part of City Council or staff.

Has the respondent illegally bonused OSEG, contrary to s. 106 of the *Municipal Act*?

[69] The applicant argues that certain aspects of the LPP are illegal because they involve the granting of bonuses to a commercial enterprise, contrary to s. 106 of the *Municipal Act*, 2001 which states:

> 106(1) Despite any act, a municipality shall not assist directly or indirectly any manufacturing business or other industrial or commercial enterprise through the granting of bonuses for that purpose.
>
> (2) Without limiting subsection (1), the municipality shall not grant assistance by
>
> (a) giving or lending any property of the municipality, including money;
> (b) guaranteeing borrowing;
> (c) leasing or selling any property of the municipality at below fair market value; or
> (d) giving a total or partial exemption from any levy, charge or fee.

[70] The applicants argue that the alleged bonusing consists of providing preferential terms with respect to OSEG's return on their equity within the so called waterfall distribution of revenues within the LPP.

[71] There would appear to be no appellate jurisprudence interpreting s. 106 of the *Municipal Act*. I am aware of only two relevant trial level decisions, one from British Columbia, *Nelson Citizen's Coalition v. Nelson (City)*, [1997] B.C.J. No. 138 and a recent decision of this court in *1085459 Ontario Ltd. v. Prince Edward County (Municipality)*, [2005] O.J. No. 3471.

[72] In the *Nelson* decision, the British Columbia Supreme Court refused to declare illegal an agreement between the City of Nelson and a land developer to develop a hotel/motel/marina complex along the City's waterfront on the basis that it breached s. 292 of the British Columbia's *Municipal Act*. That statute forbids a city to "assist an industrial or commercial undertaking". Notably, the agreement included a requirement that the City transfer a parcel of land for $1. McEwan J. held:

> I think "assistance" within s. 292 of the *Municipal Act* implies the conferring of an obvious advantage. Where, as here, a municipality exercises its power to contract under s. 19 to effect purposes that are clearly within the realm of public policy, I do not think s. 292 is an available mechanism to obtain a review of the contract, weighing the tangible and inchoate benefits, to determine if the municipality has made a good deal or not.

[73] As the court in *Nelson* put it, the question to be addressed by the court is whether the agreement's complicated matrix of covenants, viewed as a whole, clearly confer a benefit on the developer unsupported by any concomitant obligation benefiting the City.

[74] In the *Prince Edward County* decision this court found an unlawful bonus to have been granted by a municipality to a contractor for the purpose of establishing a broadband network to facilitate communications in the area. This took the form of a payout of $115,000 to the contractor for "seed money" to be recovered over a 5 year period in the form of discounted service billings to the municipality. The court found:

> **17** In my opinion, the evidence before the court establishes that the parties intended the payments totalling $115,000 in the first two and one half months of the contract to be a general contribution to W3's costs in establishing and operating the network over the 5-year term of the contract. As noted, the purpose of the contract was to establish a telecommunications infrastructure in the community, but the payment itself could be used by W3 for any contract related purpose it might choose. I see no "complicated matrix of covenants" as existed in Kendrick v. Nelson (City), supra, which prevented the court from assessing the concomitant obligations of each party to determine if the municipality conferred "an obvious advantage" on the developer. In my view, the $115,000 payment in this case is an obvious advantage (and therefore a bonus within section 106 of the Municipal Act) in that it is a simple unqualified payment supported only by the developers' reciprocal obligation to reduce its charges to the municipality for its use of the network, in an approximately equal monetary amount, over the 5-year contract term.

[75] In the Prince Edward County decision, I made the following observations (at paragraph 13) dealing with the policy reasons supporting a restrictive interpretation of the *Municipal Act's* anti-bonusing provision (s. 106) in the context of public private partnerships. In my opinion these observations are properly applied to the case at bar.

> In my opinion, the prohibition against the granting of bonuses in s. 106 of the Ontario *Municipal Act* is the precise equivalent of the prohibition against assisting a commercial undertaking in the British Columbia legislation. I respectfully agree with the approach taken by McEwan J. of the British Columbia Supreme Court in concluding that "assistance" within the prohibition in s. 292 of the British Columbia *Municipal Act* is to be interpreted restrictively in the sense of "conferring an obvious advantage". The prohibition against granting bonuses should be similarly restricted. To do otherwise would be to unduly restrict the public/private joint ventures that are of increasing importance in the establishment

> of municipal facilities and which often depend upon a complex exchange of benefits, assets and services to facilitate development.

[76] The applicant submits that unlike the B.C. municipal legislation, s. 106 (2) (c) of the *Municipal Act* specifically prohibits leasing municipal property at below fair market value. Under the LPP, the stadium, the arena and the portion of Lansdowne Park to be leased for commercial development are municipally owned property to be leased for a period of 30 years to limited partnerships owned equally by the City and OSEG, for a nominal rent of $1.00 per year. It is argued that this is per se an illegal bonus or, in the alternative, is a transaction which provides obvious advantages to OSEG without any concomitant obligation to the private developer (OSEG) and this amounts to illegal bonusing. Also, in the obvious advantage category of bonusing, the applicant argues is the indirect reimbursing OSEG for the costs of acquiring the CFL and OHL franchises through the cash payments to OSEG under the waterfall as well as the $35 million dollars the City will invest in the construction of an urban park, which arguably will indirectly benefit the commercial development that is a key part of the LPP.

[77] First of all, I do not accept the submission that leasing land at a nominal rental as part of a public private partnership is per se an illegal bonus to the extent it benefits the privately held interest. The commercial arrangement must be viewed as a whole and the question asked as to whether the City has conferred an obvious advantage on the private developer (OSEG) which is not balanced by a concomitant benefit to the City. Moreover, this is primarily a question for the City Council to answer as a matter of policy and business judgment and such answer, if arrived at in good faith, is entitled to a very high degree of defence by the court.

[78] The applicant has filed two reports from an accountant, Alan Mak, which are essentially argument, focusing on the perceived financial shortcomings of the LPP. I regard this as a helpful discussion on several of the financial issues but in the final analysis it is a partisan argument that does not purport to be a value for money analysis comparing the relative risks and benefits of the LPP between the City and OSEG. Mr. Mak did create a table in his report which purports to compare the benefits or receipts of both the City and OSEG in the LPP. The City points out that in cross-examination this witness admitted to not valuing in his table a number of benefits to the City that should legitimately be recognized such as the fact that at the end of the 30 year stadium

lease, the City would receive its reversionary interest in a fully maintained stadium. In addition the City would receive the market value rent in the commercial complex and the reversionary interest in the retail development itself, again after the first 30 years. A number of other criticisms were presented concerning Mr. Mak's analysis which I do not propose to recite.

[79] The position of the City concerning Mr. Mak's reports is that they are admissible but ought to be given limited weight due to a lack of independence. Evidence was presented that Mr. Mak's report was a joint effort involving the ideas and input of counsel and various members of the applicant. As noted, it is framed as an argument. Having said that, the court found Mr. Mak's discussion to be thoughtful and informative and of assistance in understanding the applicant's perspective on some of the financial aspects of this complex partnership. The report is aimed largely at the financial wisdom of the LPP, a policy matter for City Council to decide. I exercise my discretion to admit these reports while according them limited weight.

[80] I am of the opinion that the most helpful and objective analysis of the reasonableness and the accuracy of the financial forecasts for the LPP is contained in the Auditor General's report of June 2010 which was commissioned by City Council and was available to them before the impugned by-law was approved. In my view, the Auditor General carefully considered the financial issues being debated including the points raised by the applicant before this court.

[81] It was the Auditor General's conclusion that the financial model for the LPP could achieve its projected results. He was of the view that the financial assumptions were reasonable and presented a realistic expectation for the future. He warned that a key assumption related to the accuracy of projected vacancy rates for the retail development which could impact the retail revenues essential to make the project viable.

[82] The Auditor General addressed the revenue neutral debate in relation to the avoided costs issue and the challenges of including public sports facilities in a project such as this. He stated:

> The financial and cash flow structure of the project responds to the difficult financial realities associated with public sports facilities. In general, large sports and public assembly facilities do not create net operating revenue, which means they must be supported by ongoing public or other revenue streams. The City has been providing a public revenue stream to support operating activities at the Park for many years. The City can therefore rightly conclude that there are avoided

costs associated with the redevelopment and that these costs can be committed to the project.

The current model assumes annual contributions by the City based upon savings from no longer maintaining the existing facilities. This contribution is set at $3.8 million per year. Over the 30-year period of 2010-2041, this amounts to a total contribution from savings of $114 million. In September 2009 we received maintenance figures which, as indicated in our 12 November 2009 report, were $23 million less than the required total savings contribution to 2031. At that time, it was recommended that management develop a more accurate life-cycle estimate for the existing site. In April 2010 we received these revised figures. Using these, as well as 2% per year inflation-adjusted figures for operating and minor capital expenses, results in a potential total savings of $112 million over 30 years or a revised shortfall of $2 million ($62,500 per year). Funding this contribution will require an increased commitment for Lansdowne Park on the current annual contribution to capital reserves. This will result in less funding being available for any other capital work in the future.

[83] On the specific issue of bonusing as an "obvious advantage" conferred by the municipality in a complex public private partnership, I respectfully adopt the observations of the Auditor General:

When considering any real estate partnership, such as that being proposed here, there should be a clear balance and alignment of risk and potential reward/potential loss. One party should not put more investment at risk than another party. In this case, one would expect the City and OSEG to balance and align their investments and risks so that the public not only has a strong chance of repayment of invested capital, but a reasonable chance of a positive return on that investment. One would expect that OSEG would be able to generate a reasonable return on investment, but on its own investment, and not from the investment of public sector funds.

We have reviewed the flow of funds in the proposed model and believe that there is an appropriate amount of risk for each party. We examined all of the assumptions for the various structures and believe these to be reasonable and fair to both parties. In a scenario where the project succeeds, the public is protected and rewarded and the private sector is rewarded as well. In a scenario where the project fails (i.e. rental revenues on the retail development are substantially lower than expected), the public, while not guaranteed of protection, has a relatively high rate of protection. Even if this occurs, there is no likely scenario where the real estate taxes would go to zero; there is only a risk that the real estate taxes will be lower than expected. While not ideal, the City would not lose its entire investment. In fact, the model is structured such that OSEG would lose its entire

> investment if the project fails prior to 2018 and would lose a significant portion of it in later years in a failure scenario.
>
> Based on the proposed model, the repayment risk to the City is minimal in our opinion.

[84] I am of the opinion that the Auditor General's opinion that the LPP represents an appropriate balance of risk and potential reward or potential loss is a reasonable conclusion and is an opinion obviously adopted by a majority of City Council in approving the LPP. With due respect to the applicant's financial arguments, relating as they do to future projections of costs and revenues and the validity of assumptions in the financial model, I am not persuaded that OSEG has received any obvious advantage in the LPP and I am not prepared, nor do I have the jurisdiction, to interfere with City Council's determination on the reasonableness of the financial model. I find that viewed as a whole, the LPP does not involve bonusing in contravention of s. 106 of the *Municipal Act*.

The Procurement Issue

[85] The applicant argues that the sole sourcing of the Lansdowne re-development to OSEG was carried out in bad faith and in contravention of the City's procurement by-law.

[86] Before approving the LPP, City Council had requested and received a report from the Auditor General on the subject of whether the OSEG bid should be subject to the City's Purchasing By-Law for Request for Proposals which generally requires a competitive bidding process, subject to specific exceptions. This report ultimately expressed the view that there was no contravention of municipal procurement by-laws in the City's treatment of the OSEG proposal which the Auditor General described as "a sole source response to an unsolicited bid". To the same effect was a legal opinion from the Borden Ladner Gervais firm which the City Manager summarized to City Council. In view of Council's request for and consideration of these reports, this court cannot view the lack of a competitive procurement process as evidence of bad faith.

[87] The City Manager's Report to City Council on September 2, 2009, which outlined the proposed LPP, also addressed the question of whether the City's Purchasing By-law required that

there be a competitive bid process for this project. He advised Council that, pursuant to paragraph 22 of the City of Ottawa's Purchasing By-law, it was permissible for the City to waive the requirement for competitive bid solicitation for goods, services, and construction, and replace it with negotiations where there is an absence of competition for technical and other reasons and the goods, services, or construction can only be supplied by a particular supplier and no alternative exists.

[88] I accept the City's evidence that it was the understanding of City staff that the Ottawa Option Policy, which is a component of the Purchasing By-law and applies to unsolicited proposals received by the City, did not apply to the LPP, because it was a land development project. In any event, the City did in fact assemble an evaluation team and performed a detailed evaluation of the LPP, including an assessment of the merits and risks, the technical, commercial, managerial and financial capability and the benefits to the City. Based on the outcome of the detailed evaluation, it was determined that the LPP met the sole source criteria and did not require further competition. This is essentially the process required under the Ottawa Option Policy.

[89] City Council has decided that it wanted a project that would both revitalize Lansdowne Park and bring CFL football back to Ottawa. The proponents of the LPP argued that this proposal was the only one that could do both. The project includes, as an integral part thereof, the entry by the City into limited partnerships with OSEG to which OSEG will bring CFL and OHL franchises, both of which are said to be essential to the proposed agreement. These franchises will be owned by limited partnerships to which the City will be a party, and are said to be necessary to the business model which lies at the heart of the proposed project. City Council was entitled to accept this approach.

[90] As noted previously, the City relied on paragraph 22 (1) (d) of its Purchasing By-Law on the basis that, as the City Manager explained, OSEG was the only party that has a conditional CFL franchise that would be an anchor tenant for a revitalized Frank Clair Stadium.

[91] The Purchasing By-Law provides as follows:

> 22(1) The requirement for competitive bids solicitation for goods, services and construction may be waived under joint authority of the appropriate Director and

Supply Management and replaced with negotiations by the Director and Supply Management under the following circumstances:

> [...]
> (d) Where there is an absence of competition for technical or other reason and the goods, services or a construction can only be supplied by a particular supplier and no alternative exists,
> [...]
>
> (8) Any non-competitive contract that does not satisfy the provisions of subsection 22(1) is subject to the City Manager's approval.
> [...]
> 25(2) Any procurement activity resulting from the receipt of an unsolicited proposal shall comply with the provisions of this by-law and the separate Ottawa Option Policy for unsolicited proposals as approved by City Council on October 23, 2002.
>
> (3) A contract resulting from an unsolicited proposal shall be awarded on a non-competitive basis only when the procurement complies with the requirements of a non-competitive procurement.

[92] On February 9, 2009, the City Treasurer presented a report to a committee of Council recommending replacing the original Ottawa Option Policy with a new policy. I accept that the minutes of that committee meeting do indicate, as the City argues, that Councillors contemplated that the policy applied to the purchasing of goods and services only, and did not apply to the Lansdowne project.

[93] The revised Ottawa Option Policy was adopted by Council on February 25, 2009. Thereafter, I accept that it was the relevant Ottawa Option Policy, the policy which was in place in April 2009 when Council considered the OSEG proposal, and was still in place in June of 2010 when the ultimate by-law approval occurred.

[94] In summary on the evidence I accept the City's position that the Ottawa Option Policy was not believed by Council and City staff to apply to the LPP, but that assuming they were in error on that point, such policy was substantially complied with. I also accept that the exception to the competitive bid requirement (paragraph 22 (1) (d)) of the purchasing by-law is applicable.

[95] I am of the view that the Auditor General's opinion that there was no breach of City Procurement By-Laws was reasonable. I adopt his reasoning as stated in his first report of November 2009.

> In response to the first Council motion to the Auditor General, it is our opinion that this represents a sole source response to an unsolicited bid. However, no contravention of the Purchasing By-Law has occurred and furthermore Council effectively approved this action at its meeting on 12 November 2008 when a motion to re-start the design competition was tabled pending the results of the City Manager's evaluation of the OSEG proposal. This decision was reinforced on 11 March 2009 when Council approved the Assessment Framework and was further reinforced at the Council meeting of 22 April 2009 when the City Manager was given direction to negotiate an agreement with OSEG. As such, the process being followed is legitimate and is neither inappropriate nor illegal.

[96] In any event, City Council, after due consideration, decided not to re-start the design competition to sole source the OSEG unsolicited bid. The City argues failure by a city to follow its own policy set out in a by-law, even a policy which it is required to put in place by statute, such as a procedural by-law, does not render a by-law illegal, so long as the elements of the policy are not mandated by statute: see *Blyth v. Northumberland (County)* (1990), 75 O.R. (2d) 576, [1990] O.J. No. 2166 at para. 19 (S.C.J.). I accept this submission and am of the opinion that the City was lawfully entitled, when acting in good faith to make the decision to depart from the procedures in its procurement By-Law, notwithstanding s. 270 of the *Municipal Act* which requires municipalities to "adopt and maintain" policies with respect to the procurement of goods and services.

Disposition

[97] As I have determined that the respondent City of Ottawa and, in particular, City Council, was acting in good faith in June of 2010 when it approved the LPP pursuant to by-law 2010-225 and that the terms of the LPP do not involve unlawful bonusing in contravention of s. 106 of the

Municipal Act and the relevant procurement by-laws have not been contravened, this application is accordingly dismissed.

Hackland R.S.J.

Mr. Justice Charles T. Hackland

Released: July 28, 2011

CITATION: Friends of Lansdowne Inc. v. Ottawa (City), 2011 ONSC 4402
COURT FILE NO.: 10-49352
DATE: 20110728

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

FRIENDS OF LANSDOWNE INC

Applicant

– and –

CITY OF OTTAWA

Respondents

– and –

OTTAWA SPORTS AND ENTERTAINMENT GROUP

Intervener

REASONS FOR DECISION

Mr. Justice Charles T. Hackland

Released: July 28, 2011