

The Clive Development Application to Oak Bay Council

(The following paper provides an overview of the Council Process from December 21012 – September 2013 and includes excerpts from Council and Committee minutes, staff reports, and additional information. Please note that references to “Council” mean a specific majority of Council members. Not all Councillors have supported the furtherance of this proposed development.)

Council Meeting - December 10th 2012

The Clive development application was presented by the Director of Building and Planning - The minutes report the proposal was for a rezoning and development permit. Most Council members had a very positive response to the project. However, the staff report strongly recommended rejection by explaining the project was an “intensive development” and listed the many ways the application failed to meet several of the municipality’s zoning, Parking and Official Community Plan (OCP) Bylaw requirements:

“The architect for the Proposal explained to Council that: With respect to density, Mr. Damant stated that a rezoning is requested in order to achieve the floor space ratio needed to meet the LEED requirements and make the project economically viable for the owner. He noted that neither the current zone nor the high-density zone in the Zoning Bylaw would allow a sufficient density on this site to meet these needs...”.

While the financial benefit aspect is most likely true, however regarding the LEED requirement - at the subsequent September 9th 2013 Council meeting the Director of Building and Planning explains,

“Mr. Thomassen responded to questions noting that there are a variety of conditions which a development can meet in order achieve LEED accreditation; a particular density, he said, is one of these conditions but is not a basic requirement”.

The architect further explained that although the intent is to keep blasting to a minimum, it is not clear at this point how much blasting will be required. He confirmed that the owner has committed to achieve (only) the first level of LEED certification, but that consideration will be given to achieving a higher level if feasible.

Referring to the limited setbacks he informed Council they are intended to provide a transition to Oak Bay avenue and the residential area and the higher floors have the least setbacks. He further explained that the existing ancillary building does not meet the setbacks of the present zone.

The architects explanation makes no sense because what he is saying is: the purpose of the limited setbacks - even though they are far less than what the zoning bylaw requires - are intended to

provide the required transition space for high density properties and that the small existing one-story parking building, is equal to a three story apartment "intensive development".

Mark Brennan, Municipal Administrator stated: *that the application would require the creation of a new zone specific to this site. He also notes that the current OCP renewal process makes this a challenging time to amend the existing OCP, which would also be required for the proposed development to proceed.*

Although Mr Brennan does provide his reasons for the requirement for an OCP amendment - if they were not the same as the Director of Building and Planning's reasons - it would be normal procedure to point this out. It is also normal procedure for a municipal administrator to approve all staff reports and I am sure he did in this case. Note the "special zoning" is the only reason indicated as the need to amend the OCP. Mark Brennan's employment was terminated shortly after this Council meeting.


The minutes indicate very little discussion of the Staff Reports many bylaw contraventions. In fact, they are played down as indicated by the following brief statement in the minutes. The Japanese maple tree loss is given more consideration than the many major variances and bylaw concessions that would be required.

"A discussion ensued, with some members of Council expressing concerns regarding the proposal, noting that the loss of the existing Japanese maple tree was disappointing and that this is a substantial variation from both the existing building and the current OCP".

The Director of Building and Planning makes the following recommendation:

Recommendation

That at this time Council decline the proposal as the principal objectives for multi-family development permit areas of the Official Community Plan would not be met.



Roy Thomassen, Director
Building and Planning

Council ignores staff recommendation and refers the Clive Proposal to the Committee of the Whole (COW) to hear from members of the public.

Committee of the Whole February 18th, 2013

A parking study was presented - paid for by the developer. The Parking Consultant recommended 12 Parking stalls for 19 units. This is far below Oak Bay's requirements and the 1.7 parking stalls per

unit average of the other CRD municipalities. The Consultant, in response to questions from Committee members, admits it is also important to provide sufficient space to meet the regular parking demands of a building. He also said the parking study was meant to address the project, not the issues in the surrounding area - on street parking is one of the main concerns of Oak Bay and Clive Drive residents that to date has not been recognized.

The Zoning Bylaw presently requires off street parking to be, "constructed below the elevation of the abutted roadway" and, "the surface of the land shall not be used for parking spaces". The parking is then exempted from the allowable total floor area. The Director of Building and Planning explained to Council that this concept is quite common in zoning by laws as the massing of the building is not effected when parking is below grade. This is a zoning method to control massing above ground

However, in the case of the Clive the implications of allowing such a radical variance that severely limits off street parking to well below the required amount and also builds it above ground - have not been discussed by Council. Compounding this variance request is the developer's proposal continues to overlook the fact this ground floor parking will not be included in the above ground floor area calculations.

Hiring a planning consultant to, "provide planning advice" is discussed. The Director of Building and Planning notes he was, "not sure how much assistance a planning consultant would be able to give to the process and, noted that hiring consultants on a project by project basis could be problematic".

The developer stated she could not make any more modifications as this would make the project uneconomical - although this was not recorded in the minutes - the developer has repeated this position in several meetings and this is confirmed by the massing and setback and parking variance requests showing little change.

The Committee recommends that neighbours continue to meet with the Developer.

The Clive Proposal is referred to a future COW Meeting.

Committee of the Whole May 21st, 2013 (three months later)

A temporary planner had been hired to assist with the Clive application and a joint report with the Director of Building and Planning was presented. It recommended 4 options as follows:

OPTIONS:

One of the purposes of this report is to outline some possible options for Council consideration with respect to dealing with this application.

Option 1.

If the present proposal in its present form is considered acceptable to Council, a new multi-family residential zoning category would be drafted to accommodate this proposal as now presented and these bylaw amendments could be considered through the usual bylaw process by Council with subsequently holding a public hearing. This should also include Preparation of a draft Housing Agreement Bylaw to ensure the units are maintained as rental units in perpetuity and not to be legally stratified, and a restrictive covenant drafted to guarantee the form and character of the project as presented in the Development Permit including architecture, landscape and infrastructure improvements details to the satisfaction of Council.

Option 2

Prior to proceeding with preparation of draft bylaws, the applicant be requested to either modify or further address issues raised in this report and agreed to by Council such as: reorganizing the massing and increasing the setbacks of the building; consider on-site amenities, provision of additional parking on-site; and, reviewing the concerns with streetscape, sidewalk design and tree planting to the satisfaction of the Engineering and Parks' Departments.

Option 3.

Defer further consideration of this application until a draft OCP has been prepared to address future density and development criteria for projects of this nature with enhanced Development Permit Area guidelines for multi-family residential projects.

Option 4

Decline to consider the application further.

Option two is recommended in the Staff Report

The Developer acknowledges that, *"the residents have understandable concerns with respect to traffic in the area, but that these traffic issues are outside the scope of the proposal."*

The Committee of the Whole passes the following motion:

Moved by Councillor Murdoch, Seconded by Councillor Green, That, prior to proceeding with the preparation of draft bylaws, the applicant be requested to either modify or further address issues raised in the May 9, 2013 report of the Director of Building and Planning and Hope Burns, Planner, and agreed to by the Committee, including: reorganizing the massing and increasing the setbacks of the building; considering on-site amenities and provision of parking on-site; and reviewing the concerns with streetscape, sidewalk design and tree planting to the satisfaction of the Engineering and Parks'

Following approval of the motion and after discussion staff were directed to proceed as follows"

".....with respect to the timing of the consultation between Oak Bay staff and the proponents. It was noted that, though the Committee wished the application to proceed in a timely fashion, members were concerned that the discussions not be further limited in scope. Ms. Burns (Planner) commented that she has not yet had an opportunity to discuss the

application directly with the proponents. In concluding the discussion, the Municipal Administrator stated that Oak Bay staff would bring forward the Committee's concerns with respect to the application and inform the Committee where no further resolution could be reached with the proponents, or where modification would be considered".

Committee of the whole July 15th, 2013 (2 months later)

Staff Report

The Director of Building and Planning and the Temporary planner provided a report that explained briefly that the Committee of the Whole's main concerns about massing and setbacks had not been recognized and there had been no change to the Clive proposal. Regarding the COW request that staff meet with the development team - the Staff Report had this to say:

In a meeting held with municipal staff after the last Committee meeting, the applicant and her architects were asked to review the massing, setbacks and parking to determine if any revisions could occur. The specific areas of concern to be reviewed involved: the higher density (massing), the blankness of the rear elevation (north), the view corridors of neighbouring properties (setbacks), the amount of on site parking, and the concerns raised previously about the south elevation of the building fronting onto Oak Bay Avenue. The architecture has not been revised to address these concerns; however, the landscape designer has both addressed the Engineering Department's comments about use of the public right-of-way and the visual look of the three units' entranceways directly onto Oak Bay Avenue. An additional parking stall is now shown to be designated as "visitor" at the entrance to the project from Clive Avenue with a reduced garbage holding area.

A separate meeting was also held with staff and approximately a dozen of the neighbouring property owners to personally hear their concerns and comments. These concerns although not different from previously raised issues were provided to the architect for consideration.

The Staff report then goes on to state:

If Committee concurs, at this juncture, it is suggested that the ADP be requested to review this project. Elevation plans for all elevations should be reviewed and it is still recommended that a massing model be prepared for review by the ADP and in time for the public hearing.

The Development Permit can include details such as form and character, landscape design, screening of roof top mechanical equipment and details of all exterior lighting, including all site lighting, at grade and surface parking lighting, and exterior building lighting. The applicant has agreed that all fixtures should be 'down cast' arched with a restricted light spread.

The staff report doesn't deal with the fact the developer has refused to change the intensive densification and address the neighbourhood traffic and parking problems - even though these have been outlined in all staff reports to date and recognized by some Council members. These issues are also recognized by Committee of the Whole at the May 21, 2013 meeting in their motion requiring significant density modifications. No detail is provided as to why these COW requirements were rejected by the developer.

These considerable modifications specifically included: *“reorganizing the massing and increasing the setbacks of the building; considering on-site amenities and provision of parking on-site; and reviewing the concerns with streetscape .* The report does not point out these major issues have not been addressed instead the staff report jumps straight to, *“its up to the COW Committee’s discretion on how to proceed”* and, *“if it is agreed that the Clive Proposal is to move forward “in its present state” then the next step should be it should be referred to the Design Advisory Panel for review and make a recommendation to the COW Committee”*. The staff report then concludes with this recommendation:

RECOMMENDATION:

If Committee is satisfied with the application in its present form, then staff recommends that the application proceed to the Advisory Design Panel for recommendation to Committee of the Whole. Upon receipt of the recommendation from ADP then further direction on the next steps will be provided, such as Bylaw preparation (Zoning and Housing Agreement as well as DP with variances) and consideration of a public hearing date to be set for in the fall.

The staff report is disturbing because it:

- A. It does not address the fact virtually none of the strong staff objections raised in all earlier reports or major issues raised by the community about the projects over-development - have been recognized and,
- B. The staff report provides lots of miscellaneous minor changes and items in detail but skips over the major requested modifications. For example regarding the massing, and setbacks *“The architecture has not been revised to address these concerns”*. It appears from how the report is crafted and its general tone - it is designed to pretend something was accomplished besides *“a staff meeting with the development team”* and then moves hastily on to advise *“moving forward”* with the project.
- C. The 4 Staff Report appendices:

Attachment “A” --revised design plans

Attachment “B” –Cascadia Architects’ letter March 28th, 2013

Attachment “C”-Clive Drive Residents’ submitted concerns dated May 9th, 2013

Attachment “D”-Transportation and Parking Study, Boulevard Transportation Group

Are not provided to the public or provided online (until much later).

Committee of the Whole meeting July 15th , 2013

The meeting opens with the architect for the development explaining the changes that have been made since the previous COW meeting mid May. The changes he referred to were extremely minor. The public was then allowed to speak - of the 13 people who spoke 11 were strongly opposed to the proposal. One of those in favor said he represented the business community.

"In response to questions from the Committee with respect to the massing and setbacks of the building, Mr. Damant (the Architect) stated that the massing has not been altered since the previous Committee of the Whole meeting."

"Concerns were also expressed by some Committee members including that the issues with the proposed massing and setbacks have not been sufficiently addressed and that there is significant opposition among residents to the proposal. It was noted that the density and lot coverage for the proposal are very significant and that previously other proposals have not been approved because of these issues."

This led to a motion to deny the proposal and this was defeated 3-2 (the council member who did not vote was not identified).

A motion was then made to move the Clive application to the Design Advisory Panel however, the discussion of the motion and the motion was not recorded in the minutes. The motion regarding the Design Advisory Panel involvement was defeated in a tie vote (3-3). It was suggested that when Councillor Ney who was on holiday at the time returned - she could cast the deciding vote. A motion was then passed to defer to a future meeting when a full Council would be in attendance.

It is interesting to note that what the minutes of the meeting does record is there were many comments about the "supportable elements" of the proposal but the fact the excessive massing and limited setbacks, limited parking and potential on-street parking problems had not been dealt with was covered up with the defeated motion to move the proposal forward to the Design Advisory Panel.

Mark Brennan was providing ethical, accurate information on some of the over-developments Council was trying to push through and this why he was in conflict and was let go. I strongly suspect the Planner and Chief Administrator (CAO) were brought in to carry out Council's densification agenda. This seems to be reflected in the various reports and minutes since they appeared on the scene. The Director of Building and Planning has far more experience with development permits than either of them. His strong objections however, have been whittled down or forgotten in this long drawn out process. The developer's strategy of a series of small minor adjustments is designed to make it appear that a lot of changes are being made - when the reality is the present proposal is basically the same density as the original proposal. There is a strong possibility the Director of Building and Planning had little input to the Staff report submitted to the July 15, 2013 Committee of the Whole meeting. This reasoning is based on the content and

wording of the report - it sounds more like the temporary CAO and Planner than Mr.Thomassen who has continually recommended scaling back the project. The CAO and Planner unfortunately will not be around long enough to be accountable for their advice to Council.

If the Staff report is read carefully it is easy to see that it is crafted to move the proposal forward to the Design Advisory Panel. The strong recommendations of both the COW May 21, 2013 motion above and the Staff Report are played down and forgotten. This paves the way to continue the Projects approval process.

At the July 15th COW meeting the Planner mislead Council as recorded in the minutes:

"With respect to the OCP, Ms. Burns (Planner) noted that this property was designated as multi-family, but that the current design guidelines lack detail and that it is up to Council to determine if a permit can be issued".

The Planner indicates the OCP does not contain design guidelines. This is misleading because a Community Plan contains policy guidelines and objectives not design guidelines. This is stated in the Local Government Act, Part 26, 875 Purposes of official community plans:

"An official community plan is a statement of objectives and policies to guide decisions on planning and land use management"

Design guidelines and specifications are incorporated in the relevant bylaws.

However, what Ms Burns fails to inform Council of is that it is quite clear that in the present Community Plan there are plenty of policy guideline details regarding multi-residential zones. These were provided in the original Staff Report to Council on December 9, 2013 and this was the rationale provided to recommended rejecting the Project - They are as follows:

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MULTI-DWELLINGS USE and FAMILY-USE ZONES:

(i) The objectives of the designation include ensuring that multifamily development complements and enhances the architectural and natural landscape features of the Municipality; that it minimizes externalities for adjacent lower density properties; that it provides for containment of all associated parking on-site; that it preserves view corridors ;that where applicable, it respects the natural landscape including mature trees; that it maintains the sense of openness which has been characteristic of residential development in the Municipality; and that it provides a quality living environment.

It was announced the next meeting for discussion of the Clive development was to be held on September 23, 2013. Clive Drive residents, who had not had any of their concerns addressed

satisfactorily by Council or the Developer, organized a petition opposing the project based on the fact the development far exceeds the Zoning, Parking and Community Plan bylaws. Council, with only two days notice informed residents the meeting was not to be held at the September 23rd COW meeting but at the next Council meeting on September 9th, 2013. Residents were told if they wanted to present their petition it would have to be submitted the next day with signatures as well as addresses or it would not be accepted.

The community protested the short notice but responded and provided over 500 signatures against approving the development.

Council Meeting September 9, 2013

Staff Report

The staff report was the same submitted on July 15, 2013.

The Oak Bay resident petition with over 50 signatures had been submitted.

During the public participation period eight (8) residents spoke strongly against the proposal. A request was made that Council obtain a legal opinion on whether approval of the project would result in a precedent. It was explained given the implications of approving a proposal so far in excess of the requirements of three keynote Oak Bay bylaws (Zoning Parking and Official Community Plan).

The Municipal Administrator then responded to questions from Council noting that a legal precedent would not be set by this application, as zoning is at the discretion of Council and each application must be evaluated on an individual basis. While this might technically be true in practice the reality it is a different story. The present Administrator, along with previous Oak Bay administrators has confirmed that, " Council would be hard pressed to turn down a similar application". A legal opinion would confirm this principle and a Council Member's statement that approval would definitely set a political precedent.

With respect to the issue of amending the Official Community Plan (OCP) to accommodate the application, Mr. Nason (CAO) drew Council's attention to the May 9, 2013 report of the Director of Building and Planning and the Consulting Planner. He commented that, notwithstanding advice by staff, it is Council's prerogative to determine if an amendment to the OCP would be required for the application to proceed. It would be premature, he said to alter the signage on the subject property and remove mention of amending the OCP. He indicated this could be done prior to Council providing direction to staff to draft the requisite bylaws for consideration at a public hearing.

Ms. Burns clarified that the existing OCP is written so that an amendment would be required if a change in land use designation is proposed. The original application, she noted, contemplated a commercial element, which is not the case with the current application.

There are several problems with the above statements by the CAO and Planner. For example - the original staff report December 6, 2012 by the Director of building and Planning states:

“With the proposed intensive development not meeting the objectives of the Official Community Plan an amendment to the OCP would be required” and “That at this time Council decline the proposal as the principal objectives for the multi family development permit areas of the Official Community Plan would not be met”.

- Note there is no reference in the report to live \ work units as being the requirement for an OCP amendment.
- The Oak Bay OCP is written to include only **two** multi-family residential development permit areas - they are mapped in Appendix B (and do not include the Clive location). The Provincial Local Government Act is quite clear under section 919 (1) (2a) that these multi-family development areas **MUST** describe the special conditions or objectives that justify the designation.

In the case of the Clive it is Council’s intention to create a new multi-residential special zone specific to the site. If the zone is just added it must meet the requirements of the OCP objectives of the present zones - it does not. These objectives are explained in detail in the December 2012 staff report. If a new zone is created - then according to the Local Government Act the OCP **MUST** describe the special conditions or objectives to justify the designation. In both cases the OCP is being changed and an amendment would be required.

- The Local Government Act is also makes it quite clear that municipal Zoning Bylaws must be consistent with the Official Community Plans.
- The Planner has misled Council and provided incorrect information on several occasions regarding an OCP amendment not being required for the Clive. Her information is recorded in the Council minutes (attached).

Quote from July 15, 2013 COW minutes).

“Concerns were also expressed by some Committee members including that the issues with the proposed massing and setbacks have not been sufficiently addressed and that there is significant opposition among residents to the proposal. It was noted that the density and lot coverage for the proposal are very significant and that previously other proposals have not been approved because of these issues” and, a Council member explained that if this project is approved it would be the

densest tin Oak Bay. The committee however again fails to recognize that there have been no modifications as they requested and moves the Clive application ahead to the Design Advisory Panel.

MOVED by Councillor Green

Seconded by Councillor Ney, That the rezoning and development permit application for the property at 1510 Clive Drive and 2280 Oak Bay Avenue be referred to the Advisory Design Panel for review and a subsequent recommendation to Committee of the Whole including consideration of building massing, setbacks and parking.

Design Advisory Panel October 2, 2013

The meeting was a one-hour presentation by the development team with much of the same misinformation presented to Council and then a question period followed by comments from panel members.

The Design Panel then decided that they would inform Oak Bay Council that they liked the design of the Clive proposal but, they would like to see the massing and setbacks at the north side scaled back.

The Design Panel did not give any specifics as to which of the architectural features of the rectangular box design they were keen on. They also did not explain how reducing the massing and setbacks on only the north side would impact the whole "design" or, if the "scaling back" should make the Clive project comply with the current zoning bylaw for this type of development. The architect had indicated to them any scaling back would be only a few feet.

The problem with this recommendation to Council is, if the scaling back is not defined and could be a few feet, as indicated by the architect, Council could simply allow minimal reductions and take it to a public meeting. Councillors Green and Copley have pointed out several times now in discussion on over-development proposals that Council needs to "test the waters" of the community's reaction to over-development.

Council has spent a lot of taxpayer dollars and considerable staff time, including hiring extra staff and incurring legal expenses to consider this project for more than 10 months. It has ignored the developer's refusal to make significant changes and both Staff and the Community's advice to decline further consideration.

Conclusion

Precedent setting

This project, if approved, would definitely set a densification precedent. It is being pushed ahead by Council and the developer on the premise it supplies much needed rental and affordable accommodation in Oak Bay. Overlooking the fact Council says they want to encourage age diversity and that the developer's market may mostly be seniors, the developer has stated that rents will be whatever the market will bear (which may be in the \$1400/month range). This rate does not meet any publicly agreed definition of "affordable". The Director of Building and Planning says there are many more such small multi-residential sites that could result in applications for similar major variances. This has occurred with other over-developments in Oak Bay and other jurisdictions resulting in many demolitions and over building. The building of additional similarly intensive projects and increased rents would clearly decrease our stock of currently affordable rental accommodation. For example, this development if approved, would result in the demolition and displacement of the eight existing tenants whose rents are currently affordable.

Over-building and the related loss of streetscapes are currently a major community concern and something that those running for Council said they were committed to prevent. Many residents have informed Council of their objections by appearing at meetings and in written complaints. These complaints have also been brought to Council's attention by senior staff. However, virtually all complaints are simply acknowledged and filed. To date, two years after their election, no remedial action has been taken.

A final note: Council has indicated they have no intention of amending the Official Community Plan that they are in fact required to do by the BC Local Government Act. If Council decides, as recommended in the September 9th, 2013 staff report to Council, *"to consider the Design Advisory Panel's recommendation, direct staff to take the next steps of bylaw preparation, drafting a zoning and housing agreement in addition to a development permit with variances"*, ahead of holding a public meeting - this will strongly indicate a public meeting is purely a formality. No matter what Council says about their open mindedness - it will not be credible. Once again, public consultation will be deemed as an "opportunity" to submit oral and/or written concerns prior to their being filed. True "engagement" will not be countenanced.