



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION**

Citation: *Shoppes at Galway Limited Partnership v. St. John's (City)*,
2026 NLSC 111

Date: September 8, 2026

Docket: 202401G4420

2026 NLSC 111 (CanLII)

BETWEEN:

**SHOPPES AT GALWAY LIMITED
PARTNERSHIP**

APPELLANT

AND:

THE CITY OF ST. JOHN'S

RESPONDENT

Before: Justice Philip Osborne

Place of Hearing: St. John's, Newfoundland and Labrador

Date of Hearing: October 3, 2025

Appearances:

Michael J. Crosbie, K.C. Appearing on behalf of the Appellant

Amy M. Crosbie, K.C.
and Travis D. Payne Appearing on behalf of the Respondent

Authorities Cited:

CASES CONSIDERED: *Oleynik v. Law Society of Newfoundland and Labrador*, 2026 NLCA 15; *R. v. Rioux*, 2025 SCC 34; *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *R. v. H. (J.M.)*, 2011 SCC 45; *Johannson v. Saskatchewan Government Insurance*, 2019 SKCA 52; *Yatar v. TD Insurance Meloche Monnex*, 2021 ONSC 2507; *French v. Newfoundland and Labrador (Eastern Newfoundland Regional Appeal Board)*, 2019 NLCA 36; *Performance Industries Ltd. v. Sylvan Lake Golf and Tennis Club Ltd.*, 2002 SCC 19; *Essex Condominium Corp. No. 43 v. LaSalle (Town)*, [2009] O.J. No. 5745, 69 M.P.L.R. (4th) 44 (S. Ct. J.)

STATUTES CONSIDERED: *Urban and Rural Planning Act, 2000*, S.N.L. 2000, c. U-8; *City of St. John's Development Regulations*, N.L.R. 3/01, created under the authority of the *Urban and Rural Planning Act, 2000*, S.N.L. 2000, c. U-8; *City of St. John's Act*, R.S.N.L. 1990, c. C-17

REASONS FOR JUDGMENT**OSBORNE, J.:****INTRODUCTION**

[1] Shoppes at Galway Limited Partnership (“Shoppes”), submitted a development application with the City of St. John’s (the “City”) to develop land at 85 Danny Drive in Galway. As part of the application, Shoppes submitted a Traffic Impact Assessment (“TIA”). The TIA proposed a traffic signal phasing sequence consisting of a protected left turn movement (permitting traffic to turn left only when a flashing arrow is displayed) opposite a protected/permissive left turn movement (allowing vehicles to turn left both on a flashing arrow and when it is otherwise safe to do so). The City rejected the TIA and requested Shoppes provide technical references to support the proposed traffic signal phasing sequence or provide an alternative traffic control proposal for the intersection. Shoppes appealed the City’s decision to reject the TIA to the St. John’s Local Appeal Board (the “Board”).

[2] The Board dismissed Shoppes' appeal and confirmed the City's decision to reject the TIA. In doing so, it also addressed several additional issues raised by Shoppes. Shoppes now appeals the Board's decision.

[3] For the reasons that follow, I am dismissing Shoppes' appeal.

BACKGROUND AND CONTEXT

[4] The City described the development application procedure as an iterative process where an applicant makes a submission, and there is continued back and forth between City staff and the applicant with comments, requests or refinements until the application is ready to be submitted for approval.

The 2020 Development Application

[5] Shoppes applied to the City for permission to develop two parcels of land located at 85 Danny Drive near Costco ("2020 Application"). The property is located near the intersection of Danny Drive and Access Road B (which runs along the front of Starbucks and the Costco gas station).

[6] After some back and forth between the parties, in May 2020, the City wrote Shoppes and advised that the Application had been reviewed and there were no further comments. The email stated that there were three conditions required prior to final approval. However, Shoppes did not proceed further at that time.

The 2023 Development Application

[7] In April 2022, Shoppes wrote the City stating they would like to revisit this file and asked for an extension to the 2020 Application. The City wrote back the

same day asking what date they had in mind for the extension, but Shoppes did not reply until February 27, 2023. In the 2023 reply, Shoppes said that they were going to be moving forward with this development but noted that the building locations had been modified and a drive-through was added to a building. Shoppes asked if they could apply for an amendment to the 2020 application or if they needed to reapply for development approval.

[8] The City stated that the same application number could be used, but it considered the application a new proposal for development (“2023 Application”). During the iterative review process, the City included 38 comments to be addressed by Shoppes, including the requirement of a traffic study to determine suitable traffic control at the adjacent intersection. Shoppes responded to the comments, including providing a TIA.

Proposed traffic signal phasing sequence

[9] Included as part of Shoppes’ Application was a TIA report from Harbourside Transportation Consultants dated March 12, 2024 (the “Report”). The Report confirmed that a higher form of traffic control was required at the subject intersection. The Report recommended traffic lights that had a protected left turn signal for vehicles turning left off Danny Drive towards the Marshall’s parking lot and a protected and permissive turn signal for vehicles turning left off Danny Drive onto Access Road B. The Report provided six examples of this signal phasing arrangement existing in Ontario and British Columbia.

[10] Shoppes also provided a peer review of the Report from an engineer that supported the recommendations of the Report. Shoppes submits the peer review provided adequate technical references. The City submits the technical references in the peer review were not for the same signal phasing arrangement. The City expressed concern that traffic turning left onto Access Road B could create long queues that might back up at nearby intersections.

City's decision

[11] In April 2024, the City wrote Shoppes to advise that City staff rejected the Report and that the Development Application would not be reviewed until an acceptable technical reference for the proposed traffic phasing signal sequencing combination is provided or an alternative traffic control is proposed. Specifically, the City noted in the decision that the Report did not address the request for Shoppes to provide technical references from the Transportation Association of Canada, or an acceptable alternative, for the proposed traffic phasing sequence combination that was presented in the Report.

Shoppes' appeal to the St. John's local appeal Board

[12] Shoppes appealed the City's decision to reject the Report to the Board.

[13] Shoppes' appeal submission to the Board listed three grounds of appeal:

- i) The City has no statutory authority to require that Shoppes build a roundabout;
- ii) That in the within circumstances, the professional evidence provided indicates that it is not justified for the City to require a roundabout; and
- iii) That the City's refusal is an unlawful decision by the City because the City is considering irrelevant factors; is failing to consider relevant factors; is making an unreasonable decision; and is requiring a minor permit alteration on the renewal of a permit to involve excessive and very expensive new and additional permit conditions.

Board's Decision:

[14] The Board denied Shoppes' appeal and confirmed the City's decision to reject the Report. It found that the City had the authority to require Shoppes to undertake a TIA pursuant to s.4.4.1(2) of the City of St. John's Development Regulations ("Regulations") which provides that an application "shall include such plans, specifications and drawings as necessary to evaluate the application." The Board found that this section can be interpreted by the City to include an assessment of traffic matters.

[15] The Board rejected Shoppes argument that the City was requiring a roundabout. The Board found that decisions about vehicle access, traffic infrastructure and safety as it relates to traffic are valid municipal planning concerns and that S. 4.4.1(2) authorizes the City to request the information it feels it requires to adequately review and make a decision on a development application. The regulation provides that "at a minimum, an application for Development shall include. . ." and the attached chart lists vehicular access as one of 17 considerations.

[16] The Board agreed with the City that s. 4.4 gives it the discretionary authority to accept or reject the findings or recommendations of a traffic impact assessment that it has required an applicant to undertake.

[17] The Board rejected Shoppes' argument that it should allow the appeal on the basis that the City's position is contrary to Shoppes professional evidence. The Board found that this was a discretionary decision of the City and Shoppes arguments did not raise issues that would give the Board authority to substitute its discretion for the City's.

[18] The Board found that the City's decision was lawful. It found that the permit was a new permit and rejected Shoppes' arguments that the permit was rekindled and the added conditions were disproportionate use of discretion. The Board found no evidence that the City misinterpreted, misapplied or abused its discretionary authority when making its decision to reject the Report.

APPEAL TO THIS COURT AND STANDARD OF REVIEW

[19] Shoppes has not sought judicial review of the City's decision or of the Board's decision. Rather, it seeks to appeal the Board's decision pursuant to section 3.2.5 of the Regulations and s. 46 of the *Urban and Rural Planning Act, 2000*, S.N.L. 2000, c. U-8 ("URPA").

[20] This is an important distinction as appeals under the Regulations and *URPA* are restricted to questions of law or jurisdiction. The Court's role on a statutory appeal is different from its role on a judicial review. On this statutory appeal, the Court determines if questions of law or jurisdiction were decided correctly. On a judicial review, the Court exercises its supervisory jurisdiction over administrative decision makers.

[21] The parties agree that as a statutory appeal, the appellate standards of review apply in this case. To determine whether there were errors in law, the standard is correctness (*Oleynik v. Law Society of Newfoundland and Labrador*, 2026 NLCA 15, at para.9).

[22] Shoppes identified two pages of issues in the appeal to this Court. While Shoppes describes each ground of appeal as an error of law, the City argues some of the issues appear to be challenging findings of fact, or findings of mixed fact and law, and some are new grounds of appeal that were not before the Board. Shoppes submits that in the circumstances of this case, the errors relating to factual findings give rise to errors of law.

[23] Whether an issue constitutes a question of law depends on the nature of the alleged error rather than its severity (*R. v. Rioux*, 2025 SCC 34, at para. 43). In *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, at paragraph 43, the Supreme Court discussed the process for characterizing a question as either legal, factual or mixed fact and law. The court summarized that questions of law concern a legal test, questions of fact concern what took place, and questions of mixed fact and law involve the application of legal tests to facts. If the legal test is altered

in the application of a legal test to a set of facts, then the question becomes a question of law. At paragraph 45 of *Teal*, the Court stressed that reviewing courts must:

...exercise caution in identifying extricable questions of law because mixed questions, by definition, involve aspects of law. The motivations for counsel to strategically frame a mixed question as a legal question - for example, to gain jurisdiction in appeals from arbitration awards or a favourable standard of review in appeals from civil litigation judgments - are transparent. ...

[24] On a statutory appeal limited to questions of law, the Court's task is to determine whether the decision-maker correctly identified and applied the governing law or standard relevant to the facts determined by the decision maker.

[25] There are limited circumstances where a factual determination by a decision maker may give rise to an error of law. Those limited circumstances may include if the Board ignored items of evidence that the law required the Board to consider (*Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 41). Challenges to the weighing of evidence supporting a finding of fact do not give rise to a question of law in this context.

[26] An error in legal principle made during the fact-finding process can give rise to an error in law (*R. v. H. (J.M.)*, 2011 SCC 45, at paras. 25-29). It can also be an error of law to make a finding of fact on a material issue where the factual finding is based solely on (a) no evidence, (b) irrelevant evidence, or (c) an irrational inference (*Johannson v. Saskatchewan Government Insurance*, 2019 SKCA 52 at paras. 24-25; *Yatar v. TD Insurance Meloche Monnex*, 2021 ONSC 2507 (overturned on different grounds), at paras. 28-29).

[27] Shoppes asks that if the Court finds error, that the Court “reverse the City’s Refusal Decision; set aside the City’s requiring of a roundabout, thereby permitting the development of the property involving traffic signal phasing as recommended by the TIA; and order that the City accept the TIA and continue processing DEV 200009 to the issuance of the permit.”

[28] On this appeal the only remedy available if an error is found is to remit the issue to the Board. This Court can not substitute its decision for that of the Board (*French v. Newfoundland and Labrador (Eastern Newfoundland Regional Appeal Board)*, 2019 NLCA 36, at para. 24). The legislation provides that on appeal, the Court shall either confirm or vacate the order of the Board and where vacated the Court shall refer the matter back to the Board with the opinion of the Court as to the error in law or jurisdiction and the Board shall deal with the matter in accordance with that opinion.

[29] With these principles in mind, I will review the grounds of appeal.

ISSUES

1. Did the Board err in finding that the 2023 Application was a new development application?
2. Does City staff have the authority to make the refusal decision?
3. Is section 4.4.1(2) of the Regulations valid?
4. Is the City's requirement that Shoppes provide technical references or an alternative form of traffic control, in fact a requirement for a roundabout?
5. Does the City have authority to rely on the Standard Terms of Reference?
6. Does the City have authority to reject Shoppes' signalization references?
7. Does the City have authority to reject the Report?

1. Did the Board err in finding that the 2023 Application was a new development application?

[30] Shoppes argues that the Board erred in law by finding that the 2023 Application was a new application. Its position is that:

1. The 2020 Application had already undergone review and received approval in principle, with only three outstanding requirements before final approval could be granted;
2. The changes proposed in 2023 were not substantial departures from the 2020 Application;
3. It sought to continue, or “rekindle,” the 2020 Application within two years and before any approval would have expired; and
4. Even if the City had discretion to treat the 2023 Application as a new application, exercising that discretion in the circumstances was unlawful and disproportionate.

[31] Shoppes further submits that the Board’s findings were inconsistent with the evidence before it. According to Shoppes, the 2020 Application was not pursued to construction solely because of the effects of the COVID-19 pandemic. It characterizes the changes proposed in 2023, including reduced building sizes and the addition of a drive-through, as minor modifications to an already approved project. It notes that the site already had approved vehicle access and permission for the construction of two buildings and argues that any traffic concerns were largely attributable to increased traffic generated by Costco rather than the proposed drive-through. According to Shoppes, these changes are not substantial. Shoppes contends that the Board’s finding that it had requested a substantial amendment to the approved development was unsupported by the evidence.

[32] Shoppes also argues that the Board erred in finding that it sought to revive the project on February 27, 2023. It maintains that it first sought to rekindle the 2020 Application in April 2022. On this basis, Shoppes submits that, by operation of law, the earlier approval had not expired and the City lacked authority to treat the proposal as a new development application. It further argues that the additional requirements imposed by the City in connection with the 2023 Application represented a disproportionate exercise of discretionary authority.

[33] Shoppes points to s. 4.5.4(2) of the Regulations, which provides that final approval remains valid for two years and may be extended for an additional year at the written request of the applicant. It argues that this provision did not permit the City to treat the 2023 proposal as a new application. Shoppes makes a similar argument with respect to approvals in principle under s. 4.5.3 of the Regulations.

[34] Shoppes therefore submits that, since it sought to continue the 2020 Application before any approval had expired, the City lacked authority under the Regulations to require a new development application. It argues that the Board erred in concluding otherwise.

Analysis

[35] For the following reasons, I dismiss this ground of appeal.

[36] The Board's Decision states as follows:

Shoppes in support of its assertion that it has a *prima facie* right to a permit argues this was simply a minor permit alteration of an existing Development Approval. The Board does not agree. The prior approval Shoppes refers to came in May 20, 2020 with three conditions to be satisfied prior to final approval. Because of COVID, the project did not go to construction. On February 27, 2023 Shoppes requested an amendment to that approval (because of changes in the site plan and buildings, including the addition of a drive thru). Three days later, on March 2, 2023 the City advised Shoppes that while it would proceed under the old application number, this was a new proposal and the new Development Regulation would apply. On April 13, 2023 the City requested that Shoppes provide information relating to the new proposal. The email contained a numbered list of 38 items. Shoppes began to provide the requested information (see July 10, 2023 letter from Robin Summers to City employee Andrea Roberts) and participated in meetings with the City relating to further information requests and eventually tendered the TIA. Based on the record in front of the Board, the Board concludes that this was not a minor permit alteration but rather a new proposal.

[37] The Board's factual findings included the following:

- The May 2020 approval was subject to three outstanding conditions;
- The project did not proceed in 2020;
- On February 27, 2023, Shoppes requested amendments to the approved proposal;
- The City advised that it regarded the revised proposal as a new development application;
- The City identified 38 matters requiring further information; and
- Shoppes responded to those requests and continued discussions regarding the revised proposal.

[38] Those findings were supported by evidence in the record. Shoppes' disagreement with the Board's assessment of that evidence does not, without more, establish an error of law.

[39] At the hearing, counsel for Shoppes acknowledged that final approval had never been issued in relation to the 2020 Application. As a result, s. 4.5.4 of the Regulations, which governs the duration of final approvals, has no application to the present case.

[40] With respect to approvals in principle under s. 4.5.3, the record supports the Board's conclusion that the changes proposed in 2023 were not merely minor modifications to the earlier proposal. The Board had evidence before it of the passage of time, changes to the building footprint, and the addition of a drive-through. These were considerations available to the Board in determining whether the proposal constituted a new application. Further, there was no evidence presented that Council extended any approval for one year, as is required under that provision.

[41] Whether the changes were sufficiently significant to constitute a new development application was a question of fact, or at most a question of mixed fact and law. The Board's conclusion was supported by evidence in the record. There is no indication it applied an incorrect legal principle, ignored relevant evidence, or

otherwise committed a reviewable error in its fact-finding process. On an appeal limited to questions of law, this Court may not reweigh the evidence considered by the Board. The Board's factual findings support its conclusion that the 2023 Application was a new development proposal. No error of law has been established.

[42] Accordingly, this ground of appeal is dismissed.

2. City staff has authority to make the refusal decision.

[43] Shoppes argues that the Board erred in determining that the City had authority to reject the Report as the decision was *ultra vires* because the legislation only permits City Council to issue a refusal decision related to infrastructure. The City states that this is a new issue that was not before the Board, and accordingly, there is no jurisdiction for this Court to consider this argument as the legislative scheme provides that it is the Board who should hear the matters at first instance, and then only errors by the Board can be reviewed on appeal. Regardless, the City argues that Shoppes has incorrectly described the City's decision and its relationship to section 4.5.1(2) of the Regulations.

[44] Generally, a party should not raise a new issue on appeal that was not considered at first instance. However, the Court has the discretion to consider a new issue of law on appeal where it is able to do so without prejudice to the other party and where the refusal may amount to an injustice (*Performance Industries Ltd. v. Sylvan Lake Golf and Tennis Club Ltd.*, 2002 SCC 19, at para. 33). In this instance, Shoppes' argument is one of statutory interpretation that I can determine based on the information before me. For the reasons that follow, I am dismissing this ground of appeal.

[45] The City decision provides that:

This is to advise that Staff have rejected the report entitled "The Shoppes at Galway – Parcel C2 Transportation Impact Assessment" (the "Report") dated March 12, 2024. Pursuant to Section 4.4 of the St. John's Development Regulations, 2021, a

development application shall include such plans, specifications, and drawings necessary to evaluate the Applications including matters related to Vehicle Access. Staff have reviewed the Report and determined that insufficient information has been provided as it relates to Vehicle Access.

[46] The City decision goes on to state that:

Until the Applicant provides a technical reference in support of the signal phasing, the subject Development cannot be reviewed. For clarity, the Report has been rejected however the Development Application has not been rejected or accepted at this time. . .

[47] Section 4.4.1(2) states:

An application shall include such plans, specifications and drawings as necessary to evaluate the application, together with the applicable fee. At minimum, an application for Development shall include:

[the chart provided includes that such information is provided in respect of “Vehicular Access”].

[48] Section 4.5.1 of the Regulations provides that City staff may approve applications that comply with the legislative scheme, and that all other applications “may be approved by council.”

[49] The Board’s decision found that the City:

. . . was within its authority under section 4.4 of the [Regulations], and used this authority appropriately, when it issued correspondence on April 18, 2024, to The Shoppes at Galway Limited Partnership to reject the report ...

[50] The Board then confirmed the City’s decision to reject the Report.

[51] The Report was rejected because the City considered the information regarding vehicle access to be insufficient. The Development Application itself was neither approved or refused.

[52] The application procedure relies on an iterative process in which City staff work with applicants to identify deficiencies and obtain additional information necessary to evaluate an application. I agree with the City's submission that the legislation cannot be interpreted to mean that Council must review the adequacy of every piece of information submitted during the review of a development application.

[53] The Board did not err in law or jurisdiction in this regard. This ground of appeal is dismissed.

3. Validity of section 4.4.1(2)

[54] Although Shoppes did not advance this argument before the Board, it now submits that the Board erred in law by concluding that s. 4.4.1(2) of the Regulations authorized the City to reject the Report. Shoppes argues that the references in the Regulation to "Vehicular Access" and to the plans, specifications, and drawings required "as necessary to evaluate the application" are too vague and general and it does not state the discretion and variance powers available to Council as required by s. 35(1) of *URPA*.

[55] Shoppes submits that the City's authority to control development is derived from s. 35(1) of *URPA*, which authorizes the enactment of development regulations. Section 4.4.1(2) of the Regulations provides that an application must include such plans, specifications, and drawings as are necessary to evaluate the application, together with the applicable fee. The section further provides that, at a minimum, an application must include the information set out in the accompanying table, which includes a category entitled "vehicular access."

[56] Shoppes argues that the provision of the Regulations provide no particulars as to what the vehicular access requirement entails. It submits that the subject property already has vehicular access. It submits that the Regulations do not expressly authorize the City to require a traffic assessment, prescribe terms of reference for such an assessment, dictate its contents, or require technical studies or references. According to Shoppes, the absence of such guidance permits the City to regulate development on an *ad hoc* basis through arbitrary decision-making, contrary to established principles of municipal law. Shoppes makes the same argument in Issue 4 regarding the City's authority to request a TIA or technical references; in Issue 5 regarding its position that the Standard Terms of Reference must be enacted by regulation; and in Issue 7 regarding the City's authority to reject the Report.

[57] The City submits that s. 4.4.1(2) is supported by statutory authority, including s. 35(1) of *URPA* and s. 352 of the *City of St. John's Act*, R.S.N.L. 1990, c. C-17, which grants the City authority to prohibit development on traffic-related grounds. The City argues that, applying a broad and purposive approach to the interpretation of municipal legislation, the authority to regulate development necessarily includes the authority to require information needed to assess the traffic impacts of a proposed development.

[58] However, the City submits that this ground of appeal must be dismissed because neither the Board nor this Court on this statutory appeal, have the jurisdiction to determine whether s.4.4.1(2) is *ultra vires*, overly broad or impermissibly vague. The City submits that judicial review is the proper method to challenge the validity of the provision.

[59] Section 41(2) of *URPA* provides:

A decision of council . . . to adopt, approve or proceed with a plan, a scheme, development regulations and amendments and revisions of them is final and not subject to appeal.

[60] The City argues that this provision precludes the Board from determining whether provisions of the Regulations are invalid. It submits that if the Board cannot determine validity, then this Court cannot consider the issue on this statutory appeal.

[61] As noted earlier, the prohibition against raising new arguments on appeal is not absolute. Whether to entertain a new argument is a discretionary decision that requires a balancing of the interests of justice. In the circumstances of this case, I am not satisfied that it is in the interests of justice to permit Shoppes to raise this issue for the first time on appeal.

[62] First, it is not clear why Shoppes failed to advance this argument before the Board. Had the issue been raised, the Board would have had the opportunity to determine the effect of s. 41(2) on its jurisdiction to consider the validity of s. 4.4.1(2).

[63] Second, I am not satisfied that the evidentiary record is sufficiently developed to permit fair and effective consideration of the issue. While the Record contains portions of the Transportation Report's terms of reference, the evidence is not sufficiently developed to support a determination that the provision is impermissibly vague or that the discretion it confers has been exercised arbitrarily. In the absence of findings by the Board, a more complete record would be required, including, for example, evidence of *ad hoc* decision-making, or evidence of comparative application records demonstrating inconsistent application of the provision in similar circumstances, or evidence of internal guidelines, policies, or thresholds governing the exercise of the discretion.

[64] Accordingly, I decline to exercise my discretion to consider this new issue on appeal and I dismiss this ground of appeal.

4. Requirement for a technical reference or alternative traffic control

[65] Before the Board, Shoppes' first ground of appeal concerned its contention that the City's decision to reject the Report was effectively requiring it to construct a roundabout. The Board disagreed with Shoppes' characterization of the City's decision to reject the Report. On appeal to this Court, Shoppes argues the Board erred in law in reaching this conclusion.

[66] The City's decision stated:

Until the Applicant provides a technical reference in support of the signal phasing, the subject development cannot be reviewed. For clarity, the Report has been rejected however the Development Application has not been rejected or accepted at this time. The City looks forward to reviewing an amended Report which provides the requested technical reference. If HTC cannot provide the technical reference supporting the proposed signal phasing combination sequence, then alternative traffic control, e.g., a roundabout, should be considered at this location.
...

[67] The Board rejected Shoppes' characterization of the City's decision as requiring a roundabout. It found:

The Board does not agree with the characterization of the decision made as being one to mandate a roundabout. The Decision Letter references rejection pursuant to section 4.4 of the Development Regulations for failure to provide adequate information about vehicle access. ...

[68] The Board concluded that the City had rejected the traffic impact report because it considered the information regarding vehicle access insufficient, not because it had required construction of a roundabout.

Shoppes' arguments

[69] Shoppes submits that the Board erred in reaching this conclusion for five reasons.

[70] First, Shoppes argues that the City's request for additional information amounted to a failure to decide the development application.

[71] Second, Shoppes argues that the City identified no alternative traffic control other than a roundabout. According to Shoppes, the requirement for technical references supporting the proposed signal-phasing arrangement therefore operated, in practice, as a requirement to construct a roundabout.

[72] Third, Shoppes argues that the City lacked authority to require either a TIA or a technical reference concerning vehicle access. It submits that s. 4.4.1(2) of the Regulations contains no criteria relating to vehicle access and that such requirements are imposed on a case-by-case basis rather than pursuant to any enacted regulation. Accordingly, Shoppes contends that the City's request for further technical information was unauthorized and that the Board erred in upholding it.

[73] Fourth, Shoppes relies on the Development Design Manual which provides s. 4.2.5 that:

The following criteria apply to street intersections:

(a) Intersections shall be of a "T" type configuration; ...

[74] Shoppes argues that, in the circumstances, there was no alternative form of traffic control available other than a roundabout. It therefore submits that the City was effectively mandating a roundabout despite having no statutory or regulatory authority to require one, particularly where a roundabout is not a "T" type intersection.

[75] Fifth, Shoppes argues that because the Regulations require "T" type intersections, the City is prohibited from requiring a roundabout. It submits that permitting the City to do so indirectly would permit it to circumvent its own Regulations.

Analysis

[76] It is not clear that this ground of appeal raises a question of law or jurisdiction separate from the issues already addressed above in these reasons.

[77] The Board found that the City's rejection of the Report was not a requirement to construct a roundabout. Rather, it was a determination that the Report failed to provide sufficient technical references to support the proposed traffic signal phasing.

[78] In substance, Shoppes disagrees with the Board's conclusion that the City's decision constituted a request for further information rather than a mandate to construct a roundabout. However, disagreement with the Board's characterization of the City's decision does not, by itself, identify an extricable error of law. Nor does Shoppes identify any legal principle that the Board misapplied in determining that the City was seeking additional information.

[79] Similarly, Shoppes' argument that the rejection of the Report was, in effect, a requirement to construct a roundabout depends upon its assertion that no other traffic-control options were available. Even if that were accepted, it does not establish that the Board committed an error of law in interpreting the City's decision as a request for further information.

[80] The issue of if s. 4.4.1(2) is too vague to allow the City to request technical information has been addressed above as part of the decision of Issue 3 - validity of section 4.4.1(2).

[81] Because the Board did not find that the City's decision mandated the construction of a roundabout, it is unnecessary on this appeal to determine whether the Development Design Manual's requirement for "T" type intersections prohibits the use of roundabouts for traffic control, or whether the City would have authority to require one in a future decision.

[82] Accordingly, this ground of appeal is dismissed.

5. Standard Terms of Reference

[83] The City incorporated the Standard Terms of Reference into the Transportation Assessment Scope that it provided to Shoppes. The Standard Terms of Reference set out the requirements for a TIA, including the expectation that the assessment be prepared in accordance with industry best practices. The Standard Terms of Reference for Transportation Assessments are standard terms that are consistent across any traffic study the City requires and is used by City staff to evaluate whether a TIA meets the necessary requirements.

[84] Shoppes argues that the Standard Terms of Reference were never enacted as a City Regulation and that it was never provided with a copy of the document. As a result, Shoppes submits that the Board erred in law by upholding the City's reliance on the Standard Terms of Reference when requiring the Report and the supporting technical references.

[85] In support of this argument, Shoppes points to correspondence found at Volume 1, Tabs 3 and 4 of the Record. In that correspondence, the City advised Shoppes by email that the Standard Terms of Reference were attached. Shoppes argues that the document was not in fact attached to the email and were not provided to Shoppes.

[86] As the City noted during oral submissions, there are at least two references in the Record indicating that Shoppes had the Standard Terms of Reference: Record

Volume 1, Tab 3, Sub-tab 3, and page 246 of the Record, where the executive summary of the Report states that the study was completed in accordance with the City's Standard Terms of Reference. I therefore reject Shoppes' argument that it did not receive the document.

[87] The City submits that it provides the Standard Terms of Reference pursuant to its statutory authority under the Regulations. In particular, the City relies on s. 4.4.1(2), which requires development applications to be supported by such plans, specifications, drawings, and other information as are necessary to evaluate the application.

[88] According to the City, the Standard Terms of Reference communicate to prospective developers the information that will be required to assess a development application. The City submits that this promotes transparency and ensures that its discretion is exercised in a consistent, rather than arbitrary, manner.

[89] Applying a broad and purposive approach to the interpretation of municipal legislation, I agree with the City that the Standard Terms of Reference fall within the authority conferred by s. 4.4.1(2), which authorizes the City to require the plans, specifications, drawings, and other information necessary to evaluate an application.

[90] Shoppes has not satisfied me that the Board erred in law on this issue. Accordingly, this ground of appeal is dismissed.

6. The signalization references were not unlawfully refused by the City

[91] Under this ground of appeal, Shoppes argues that the Board erred in law in concluding that the City was justified in finding that Shoppes had failed to provide the required technical references.

[92] Shoppes submits that the Report included six examples of intersections in Ontario and British Columbia that use the same signal phasing arrangement, namely a protected-only left turn with an opposing protected-permitted left turn.

[93] Shoppes states that it also provided a peer review that cited two technical references. The City maintains that the peer review did not provide a technical reference supporting the proposed signal phasing sequence itself. Rather, the peer review cited technical references supporting the use of a protected left-turn phase where sightline issues exist.

[94] The City responds that it requested technical references consisting of recognized guidelines or best-practice standards demonstrating the safety of the proposed signal sequencing.

[95] Shoppes submits that, despite the examples contained in the Report and the references cited in the peer review, the City continued to reject the Report and insist upon additional technical references and that the Board erred in finding the City was justified in this regard.

The Board's decision

Shoppes submits that valid technical references have been given. The Board has accepted the City's position that references to other intersections using the proposed phasing is not a technical reference and relies on the City's reference to both versions of the Standard Terms of Reference for Transportation Assessments citing the need for the consultant to follow industry best practices in reaching this conclusion. ...

[96] In the appeal to this Court, Shoppes advances four arguments on this issue:

1. The Board erred in law by treating the Standard Terms of Reference as if they were binding Regulations.

2. The Board's decision implies that Shoppes' engineers failed to follow industry best practices, even though the Terms of Reference do not expressly require signal phasing recommendations to be supported by technical references.
3. Neither the City nor the Board identified any Regulation defining or requiring "technical references."
4. The City and the Board failed to give proper weight to the fact that the Report was stamped and sealed by a professional engineer.

Analysis

[97] The question of whether the Standard Terms of Reference must be incorporated into a regulation is the same argument and analysis that has been addressed under Issue 4 and Issue 5. I make the same findings for the same reasons stated earlier in this argument on this issue.

[98] The Board's acceptance of the City's position that examples from other jurisdictions do not constitute technical references is a finding of fact, or at most a question of mixed fact and law. As such, it is not subject to appellate review on this appeal.

[99] Shoppes' argument concerning the engineer's seal arguably raises an extricable question of law. Shoppes submits that, because the Report was stamped and sealed by a professional engineer, the City was not entitled to reject it.

[100] In support of that proposition, Shoppes relies on *Essex Condominium Corp. No. 43 v. LaSalle (Town)*, [2009] O.J. No. 5745, 69 M.P.L.R. (4th) 44 (S. Ct. J.), where the Court stated at paragraph 20:

A municipality is reasonably entitled to assume that, when plans and specifications have been prepared, stamped and sealed by a professional engineer, those plans are

compliant with the governing standards. The stamp and seal of an engineer communicates to the supervising building official and to the public that the contents of the documents reflect professional knowledge and care; and that applicable statutes, standards, codes and regulations have been followed. When dealing with applications for building permits, a municipality is not at liberty to disregard plans and specifications prepared and sealed by a professional engineer.

[101] The factual context of *Essex* is materially different from the present case. In *Essex*, the court held that the municipality, a town with an approximate population of 17,000 people, made a *bona fide* policy decision to rely on an engineer's seal and stamp to achieve the legislative purpose of achieving health and safety of the public. As a result of the policy decision, the town was not civilly liable for a structural defect in the condominium complex.

[102] Unlike the facts in *Essex*, the City submits that it employs professionals in traffic design. Further, there is no evidence that the City made a policy decision allowing it to accept traffic studies or plans solely on the basis that they were stamped and sealed by a professional engineer.

[103] The *Essex* decision was an application of government immunity for policy decisions. I find that the *Essex* decision does not stand for the proposition that a municipality lacks authority to question, reject, or require further support for a proposal simply because it has been stamped and sealed by an engineer.

[104] Accordingly, I am not persuaded that the Board erred in law in upholding the City's request for technical references. This ground of appeal is dismissed.

7. City's authority to reject the Report

[105] Shoppes submits that this ground of appeal raises three sub issues, first, is that there are no regulations stating the conditions and criteria concerning vehicle access, and therefore the City has no authority in this regard as there is no regulation that

authorizes the City to exercise a general discretion and arbitrary authority about vehicle access. Second, that the City is mandating a roundabout. And third, it again argues that *Essex* strips the City of the ability to disregard plans and specifications prepared and sealed by a professional engineer.

[106] Shoppes argues the Board erred in law in finding that the City had discretion to reject the Report.

[107] I agree with the City that this issue does not raise any ground of appeal that has not been addressed in other issues. This ground of appeal is dismissed.

DISPOSITION

[108] For the reasons outlined above, Shoppes' appeal is dismissed. The City is awarded costs of this appeal on a Column III basis.

PHILIP OSBORNE

Justice