

From: O'Connor, M. Rick

Sent: Thursday, July 23, 2015 1:39 PM

To: Watson, Jim (Mayor/Maire); 'City Council'

Cc: Kirkpatrick, Kent; Arpin, Serge; Jones, Susan (A/DCM - City Ops); Simulik, Marian; Moser, John; Mizzi, Michael; Allaire, Lisa; Kennery, Ryan; Box, Steve; White, David; Huxley, Stuart; Dunn, Jenn

Subject: RE: Urban Tree Conservation By-law - Charges - March Road

Mayor and Members of Council,

This is to advise that earlier today, the City Prosecutor withdrew two charges under the *Urban Tree Conservation By-law* in relation to alleged violations of destruction/injury to trees occurring in May 2014 at 936 March Road. A By-law charge had been issued against the property owner, Metcalfe Realty Company Limited, and also against a tree company, Ottawa Valley Tree Experts. The rationale for the withdrawal of these charges is set out below for your information. That said, it is important to note that today's withdrawal of charges is limited to the particulars of this case and does not impact the enforceability of the *Urban Tree Conservation By-law* which furthers the protection of the urban forest through a permit system and through by-law enforcement of violations.

The City had a prosecutorial obligation to withdraw the two charges after it was determined by the Prosecutor that a reasonable prospect of conviction did not exist in relation to the case. The prosecution process is held to a more onerous standard of review than the standard applicable to enforcement. For prosecution purposes, a reasonable prospect of conviction requires that the Prosecutor be satisfied that there exists sufficient evidence admissible in accordance with the rules of court that could prove the elements of the offence "beyond a reasonable doubt". Following two separate pre-trials on these charges, the Prosecutor concluded that there was not sufficient evidence that could properly prove the charges beyond a reasonable doubt and, as a result, the prosecution was discontinued. The Prosecutor's decision is consistent with judicial guidance provided through two judicial pre-trial conferences in this case. This decision is also grounded in the duties entrenched by the *Rules of Professional Conduct* along with both the *Memorandum of Understanding* between the City of Ottawa and the Ministry of the Attorney General, as well as the *Crown Policy Manual*, along with information relating to the lands as in this case.

The Prosecutor was guided by the *Rules of Conduct* established by the Law Society of Upper Canada for lawyers engaged as prosecutors. The commentary on the duty of prosecutors includes:

"When engaged as a prosecutor, the lawyer's prime duty is not to seek to convict but to see that justice is done through a fair trial on the merits. The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately..."

In addition, the decision to withdraw the charges was also founded in the guidance provided by the *Memorandum of Understanding* or “MOU” that was entered into in 2001 for the provision of court administration and prosecution functions of Provincial Offences. The MOU recognizes the separation of the prosecution function from enforcement, the independence of the prosecutorial process is free from any political influence, and that the prosecution will be held to a standard of fairness and impartiality. As a result, therefore, careful consideration was given to the Ministry of the Attorney General’s *Crown Policy Manual on Charge Screening*. The Manual includes the following extract on the standard of review:

“When considering whether or not to continue the prosecution of a charge the first step is to determine if there is a reasonable prospect of conviction. This test must be applied to all cases. If the Crown determines there is no reasonable prospect of conviction, at any stage of the proceeding, then the prosecution of that charge must be discontinued.

The threshold test of “reasonable prospect of conviction” is objective. This standard is higher than a “prima facie” case that merely requires that there is evidence whereby a reasonable jury, properly instructed, could convict. On the other hand, the standard does not require “a probability of conviction,” that is, a conclusion that a conviction is more likely than not.”

In light of the foregoing, the Prosecutor was duty-bound to withdraw the charges upon the determination that there was no reasonable prospect of conviction in this particular matter.

In addition, information was relayed to the Prosecutor that in May 2015, a determination was made that lands in question did not meet criteria for the designation of significant woodlands. The Prosecutor was advised that the Planning and Growth Management Department did not consider the lands to be a natural heritage system feature under City Official Plan Policy 3.11(7b). That said, the alleged tree cutting did not have a bearing upon these determinations, nor did these determinations have any bearing on the charges being laid or the subsequent decision to withdraw the charges.

I trust that this information is of assistance in understanding the decision to withdraw the charges in this instance.

M. Rick O’Connor, CMO

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