

Appeal of Development Permit Application PL-2020-0335

Before the City of Yellowknife
Development Appeal Board

May 29, 2021

INTRODUCTION

This appeal is of two decisions:

1. Council's decision of February 8, 2021 to approve the building use of this development as a Special Care Facility; and
1. The Development Officer's decision of April 16, 2021 to approve Development Permit Application PL-2020-0335.

INTRODUCTION 2

This appeal is not about **WHAT** the decisions concluded, but **HOW** the decisions were reached. You will hear about how both Council and the Development Officer misapplied the Act and the Zoning By-Law.

You will hear about:

- How Council misapplied the Zoning By-Law; specifically its powers, duties and functions as a Development Authority;
- How the Development Officer misapplied the Zoning By-Law; specifically her powers, duties and functions as a Development Authority; and
- How both Council and the Development Officer failed to uphold their duty of fairness and the principles of procedural fairness.

INTRODUCTION 3

You will hear why the remedy for Council's and the Development Officer's misapplication of the Act and Zoning By-Law as well as the substantive procedural unfairness during the development permit application review process requires both the reversal of the decisions under appeal, and remitting of the matter back to Council for it to rehear the development permit application anew while being directed to comply with the principles of natural justice and procedural fairness.

INTRODUCTION 4

This appeal is made pursuant to paragraph 62(1)(a) of the Act and section 3.10(1)(b) of the Zoning By-Law. These sections are as follows:

The *Community Planning and Development Act S.N.W.T. 2013, c.9*

62. (1) A person other than an applicant for a development permit may only appeal to the appeal board in respect of an approval of an application for a development permit on the grounds that the person is adversely affected and

(a) there was a misapplication of a zoning bylaw in the approval of the application;

...

(c) the development permit relates to a use of land or a building that had been permitted at the discretion of a development authority;

And

City of Yellowknife Zoning By-Law 4404

3.10(1)(b) A person claiming to be affected by a decision of the Development Officer or Council made under this by-law may appeal to the Development Appeal Board pursuant to Section 62 of the *Community Planning and Development Act*, by serving written notice of appeal to the Secretary of the Board within 14 days after the day the application for the development permit is approved.

BACKGROUND

December 2, 2020 – Avens submits its Development Permit Application to the City.

December 27, 2020 – Only 2 of the Appellants receive notice of the Development Permit Application.

January 6, 2021 – The Appellants seek information about the application from the City. The City provides written notice of the application, and directs any “comments” be submitted by January 13, 2021.

January 25, 2021 - Council’s Governance and Priorities Committee held first public hearing.

February 1, 2021 - Council’s Governance and Priorities Committee held second public hearing.

February 8, 2021 – Council’s Meeting at which Council made decision to approve the “building use” by way of Motion #0025-21.

February 22, 2021 – Council’s Meeting at which Motion #0025-21 was ratified.

April 16, 2021 – Development Officer issued a Notice of Decision whereby Development Permit Application PL-2020-0335 was approved.

ISSUES

ISSUES

- A. Whether Council's decision-making and other powers as a Development Authority were properly exercised concerning Development Permit Application PL 2020-0335;

- A. Whether the Development Officer had any decision-making authority as a Development Authority concerning the approval of Development Permit Application PL-2020-0335; and

- A. Whether Council and / or the Development Officer breached the principles of natural justice and the duty of fairness in their decision-making role.

DEVELOPMENT AUTHORITY

The Act defines Development Authority as:

"development authority" means a development authority identified in a zoning bylaw in accordance with subsection 16(1);

Where **both** Council and a Development Officer are designated as a Development Authority concerning an individual development permit application, the zoning bylaw must identify what specific powers, such as decision-making authority concerning the application are the responsibility of Council, and which aspects fall to a Development Officer.

16. (1) A zoning bylaw must identify either council or a development officer appointed under section 52,

or both, as the development authority responsible for

- a) making decisions on applications for each type of development permit; and
- b) other powers and duties of a development authority under this Act, the regulations and the zoning bylaw that relate to the use and development of land and buildings.

(2) A zoning bylaw that identifies both council and a development officer as development authorities for a type of development permit, or in respect of other powers and duties, must include provisions respecting the circumstances under which each will act.

DEVELOPMENT AUTHORITY 2

Zoning By-Law

Development Officer's powers, duties and functions as a Development Authority include:

2.2(3)(d) Make decisions on all development permit applications for those uses listed as Permitted Uses;

and

2.2(3)(f) Refer all applications for Conditionally Permitted Uses, and all applications requesting a variance in accordance with Sections 3.5 to Council for decision;

Council's powers, duties and functions as a Development Authority include:

2.4(1) Council shall:

(a) Make decisions and state any terms and conditions for development permit applications for those uses listed as Conditionally Permitted Uses;

And

(f) Consider and state any terms and conditions on any other planning, subdivision or development matter referred to it by the Development Officer or Planning Administrator, or with respect to which it has jurisdiction under this by-law.

DEVELOPMENT AUTHORITY 3

Council has all decision-making authority concerning an

Application for a Development Permit for a Conditionally Permitted Use

Unless otherwise stated by the By-Law

The Development Officer has all decision-making authority concerning an

Application for a Development Permit for a Permitted Use

Unless otherwise stated by the By-Law

DEVELOPMENT AUTHORITY 4

Interpreting Legislation
Including Acts and municipal By-law

Must be read in its *entire context, in its grammatical and ordinary sense and in harmony with the legislative scheme, its object and the intention of the legislature: **Rizzo & Rizzo Shoes Ltd. (Re)**, [1998] 1 SCR 27*

Entire Context: The internal context of the Act or By-law as well external context such as other Acts and By-laws;

Grammatical and Ordinary Sense: the ordinary or every day meaning of words and terms;

In Harmony with;

- the **Legislative Scheme:** How the Act or By-law is structured, i.e. Parts, Divisions;
- the **Object:** the purpose of the Act or By-law; and
- the **Intention of the Legislature:** what the Legislative Assembly (Acts) or City Council (By-laws) intended

DEVELOPMENT AUTHORITY 5

Council is the Development Authority for all decisions concerning an *Application for a Development Permit for a Conditionally Permitted Use*.

The Development Officer

3.4(1) In making a decision on an Application for a Development Permit for a Permitted Use, the Development Officer:

- (a) Shall approve, with or without conditions, the application if the proposed development conforms with this by-law, or;
- (b) Shall refuse the application if the proposed development does not conform to this by-law, unless a variance has been authorized pursuant to Section 3.5.

City Council

3.4(2) In making a decision on an Application for a Development Permit for a Conditionally Permitted Use, Council:

- (a) May approve the application if the proposed development meets the requirements of this by-law, with or without conditions, based on the merits of the application, the Community Planning and Development Act, by-law or approved plan or policy affecting the site, or;
- (b) May refuse the application even though it meets the requirements of this by-law, or;

DEVELOPMENT AUTHORITY 6

Other examples of 'context' supporting this interpretation

Council's and the Development Officer's decision-making authority in how an application for a variance is to be determined.

Shared Development Authority

The Development Officer

3.5(1) Upon application by the property owner or agent, the Development Officer may allow a variance in regard to site coverage; building height; front, side and rear yard setbacks; landscaping; parking; lot depth and width; floor area; and site area.

City Council

3.5(3) Upon application by the property owner or agent, Council may consider allowing a variance in regard to site density provisions.

DEVELOPMENT AUTHORITY 7

Other examples of 'context' supporting this interpretation

Direction to both Council and the Development Officer as a Development Authority

7.1(1) In reviewing development permit and subdivision applications, the Development Officer and Council will apply the following development principles. The principles are not to be regarded as inflexible, but are intended to encourage a high standard and quality of development.

Includes:

- Site Planning
- Landscaping
- Reduced yard setbacks
- Vehicular access and on-site traffic

DELEGATION OF COUNCIL'S DECISION-MAKING AUTHORITY

Council may only delegate its powers, duties or functions to specific entities. The Act also prohibits Council from delegating specific powers and functions.

Cities, Towns, and Villages Act, S.N.W.T. 2018, c.13

13. (1) Council may perform its functions by either resolution or bylaw, unless required by this or any other enactment to act by bylaw.

(2) Subject to this Act, council may, by bylaw, delegate any of its powers, duties or functions under this or any other enactment to

- (a) a committee of council;
- (b) a board or commission established by the municipal corporation; or
- (c) the senior administrative officer.

(3) Council may not delegate

- (a) the power or duty to make bylaws or resolutions;
- (b) a function that may only be performed by bylaw;
- (c) a power, duty or function that may not be delegated by an enactment; and
- (d) the power to appoint the deputy or acting mayor, a youth member, the auditor, the senior administrative officer, officers or bylaw officers, or to suspend or revoke those appointments.

DELEGATION OF COUNCIL'S DECISION-MAKING AUTHORITY 2

On February 8, 2021 Council decided only the “Special Care Facility” element of the Development Permit Application and thereafter delegated its decision-making authority to the Development Officer. It was the Development Officer who, on April 16, 2021 approved the *Application for a Development Permit for a Conditionally Permitted Use*.

The *Cities, Towns, and Villages Act* prohibits Council from:

1. delegating its decision-making authority; and
2. delegating any of its powers, duties, or functions to the Development Officer

DEVELOPMENT PERMITS

The *Community Planning and Development Act* defines “development permit”:

"development permit" means a permit issued by a development authority for a development;

The *Community Planning and Development Act* - section 14(1)(c)

Mandatory types of uses

- The permitted use of land;
- The permitted use of buildings;
- The use of land permitted at the discretion of a development authority; and
- The use of buildings permitted at the discretion of a development authority.

At least one type of use must be identified in a zoning by-law for each zone.

DEVELOPMENT PERMITS 2

Section 14(1)(c) of the Act is as follows:

14. (1) A zoning bylaw must

- (a) divide the municipality into zones of the number and area that council considers appropriate;
- (b) include a map showing the zones;
- (c) specify one or more of the following for each zone:
 - (i) the permitted uses of land,
 - (ii) the permitted uses of buildings,
 - (iii) the uses of land that may be permitted at the discretion of a development authority,
 - (iv) the uses of buildings that may be permitted at the discretion of a development authority;
- (d) describe any conditions that may apply or be imposed with respect to any of the permitted uses under paragraph (c); and
- (e) prohibit or otherwise regulate uses of land and buildings that fail to conform with permitted uses.

Act - *“at the discretion of a development authority”*

Zoning By-Law - *“Conditionally Permitted Use”*

DEVELOPMENT PERMITS 3

Zoning By-Law

“conditionally permitted use” means a use listed in a conditionally permitted use table that may be permitted by Council after due consideration is given to the impact of that use upon neighboring land and other lands in the City, subject to section 3.4;

R3-Residential – Medium Density Zone

Permitted uses	Conditionally permitted use
Accessory Decks, Single detached dwelling, Duplex dwelling, Multi-family dwelling - subject to Section 7.3, Multi-attached dwelling - subject to Section 7.3, Parks and recreation, Planned development subject to Section 7.1(9), Public utility uses and structures, Home based business, Accessory structures and uses, Temporary activity subject to Section 7.1(6), Child care facility.	Apartment hotel, Convenience store, In-Home Secondary Suite for multi-attached dwelling <u>Special care facility,</u> Public and quasi-public use, and Similar use.

DEVELOPMENT PERMITS 3

Mandatory types of uses

- The permitted use of land;
- The permitted use of buildings;
- The use of land permitted at the discretion of a development authority; and
- The use of buildings permitted at the discretion of a development authority.

Zoning By-Law has grouped these it just two types:

- Permitted Use; and
- Conditionally Permitted Use

Zoning By-Law: No distinction between "land use" and "building use" as far as Development Authority is concerned.

Council is the sole Development Authority for both land use and building use for an *Application for a Development Permit for a Conditionally Permitted Use*

COUNCIL'S DISCRETION & RESPONSIBILITIES

Council's position has consistently been that its jurisdiction in deciding an *Application for a Development Permit for a Conditionally Permitted Use* is limited to only deciding a building's use, and thereafter all decisions concerning the development permit are made by the Development Officer.

"This is the way we've always done it" Is not a valid argument in defense of challenged process.

The delegation of Council's decision-making authority is:

1. a misapplication of the Zoning By-Law; and
2. a violation of the *Cities, Towns, and Villages Act*

COUNCIL'S DISCRETION & RESPONSIBILITIES 2

How should the Development Appeal Board consider Council's interpretation of its own jurisdiction?

The Courts have settled on two standards of review:

1. Correctness; and
2. Reasonableness

COUNCIL'S DISCRETION & RESPONSIBILITIES 3

On Correctness

“[T]he rule of law requires that the correctness standard be applied in order to resolve questions regarding the jurisdictional boundaries between two or more administrative bodies.” [para. 63]

“[T]he rule of law requires courts to intervene where one administrative body has interpreted the scope of its authority in a manner that is incompatible with the jurisdiction of another.” [para. 64]

On Reasonableness

“Reasonableness review does not give administrative decision makers free rein in interpreting their enabling statutes, and therefore does not give them licence to enlarge their powers beyond what the legislature intended. Instead, it confirms that the governing statutory scheme will always operate as a constraint on administrative decision makers and as a limit on their authority. Even where the reasonableness standard is applied in reviewing a decision maker’s interpretation of its authority, precise or narrow statutory language will necessarily limit the number of reasonable interpretations open to the decision maker — perhaps limiting it one.” [para. 68]

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65
Supreme Court of Canada

COUNCIL'S DISCRETION & RESPONSIBILITIES 4

Council's Consideration of Impact Factors

3.4(3) In reviewing an Application for a Development Permit for a Conditionally Permitted Use, Council shall have regard to:

(a) The circumstances and merits of the application, including, but not limited to:

- i) The impact on properties in the vicinity of such factors as airborne emissions, odors, smoke, traffic and noise, sun shadow and wind effects;
- ii) The design, character and appearance of the proposed development, and in particular whether it is compatible with and complementary to the surrounding properties, and;
- iii) The treatment provided to site considerations including landscaping, screening, parking and loading, open spaces, lighting and signs.

COUNCIL'S DISCRETION & RESPONSIBILITIES 5

Council's Consideration of Impact Factors

For the impact factors which were considered by Council, an inappropriate standard was used in their consideration. Council used a comparison between the technical elements of the proposed development and what would be allowed were the development a permitted use building such as an apartment building.

Example – Sun Shadow

The Mayor stated because the proposed development would be 12m in height and a “permitted use” apartment building in the same location could be 15m in height, based on the Zoning By-Law, no condition was required.

COUNCIL'S DISCRETION & RESPONSIBILITIES 6

Council's Consideration of Impact Factors – Sun Shadow For December 21st



12:30 PM



1:00 PM



1:30 PM



1:00 PM

SHADOW STUDY APPROPRIATE

DESIGN VILLAGE/PROJECT: WATER STREET DEVELOPMENT BY
 CME DEVELOPMENT
 2008 12/21/11
 SHEET: SH01
 PROJECT: WATER STREET DEVELOPMENT

DATA SOURCE: CITY OF YELLOWHEAD (OPEN DATA)

- CITY OF YELLOWHEAD BUILDINGS
- CITY OF YELLOWHEAD CONTOUR LINES
- CITY OF YELLOWHEAD PROPERTY PARCELS

City of Yellowknife

Development Permit # 154-2020-033

Approved 2021.06.2022

Development Officer Libby Macphail



2700-1 AVENUE, SUITE 200
 CALGARY, ALBERTA T2C 1Y1



1000-10 AVENUE, SUITE 100
 CALGARY, ALBERTA T2C 1Y1

December 21

10:50 AM

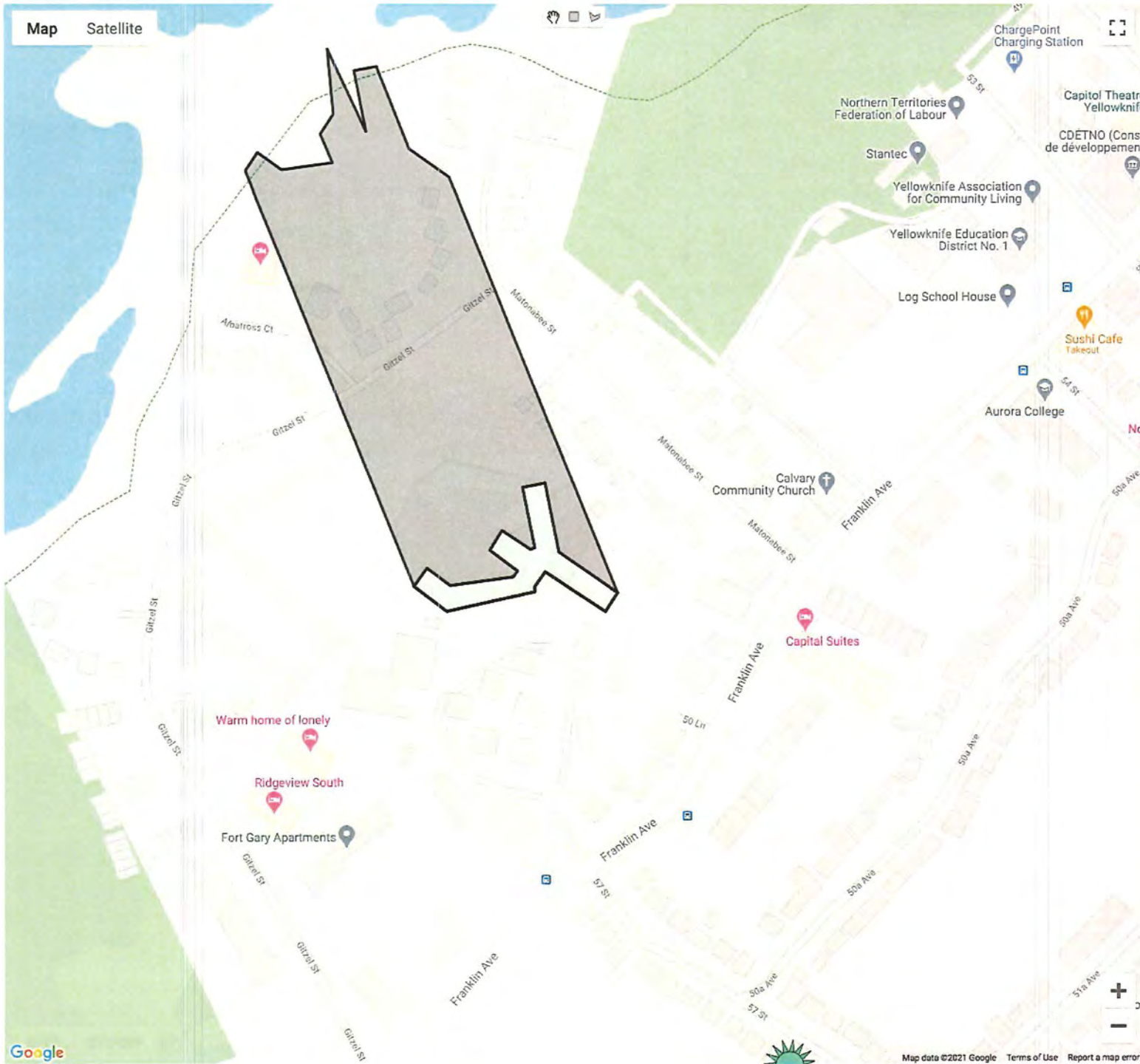
Avens Shadow Impact

Prepared using Shadowcalculator.eu



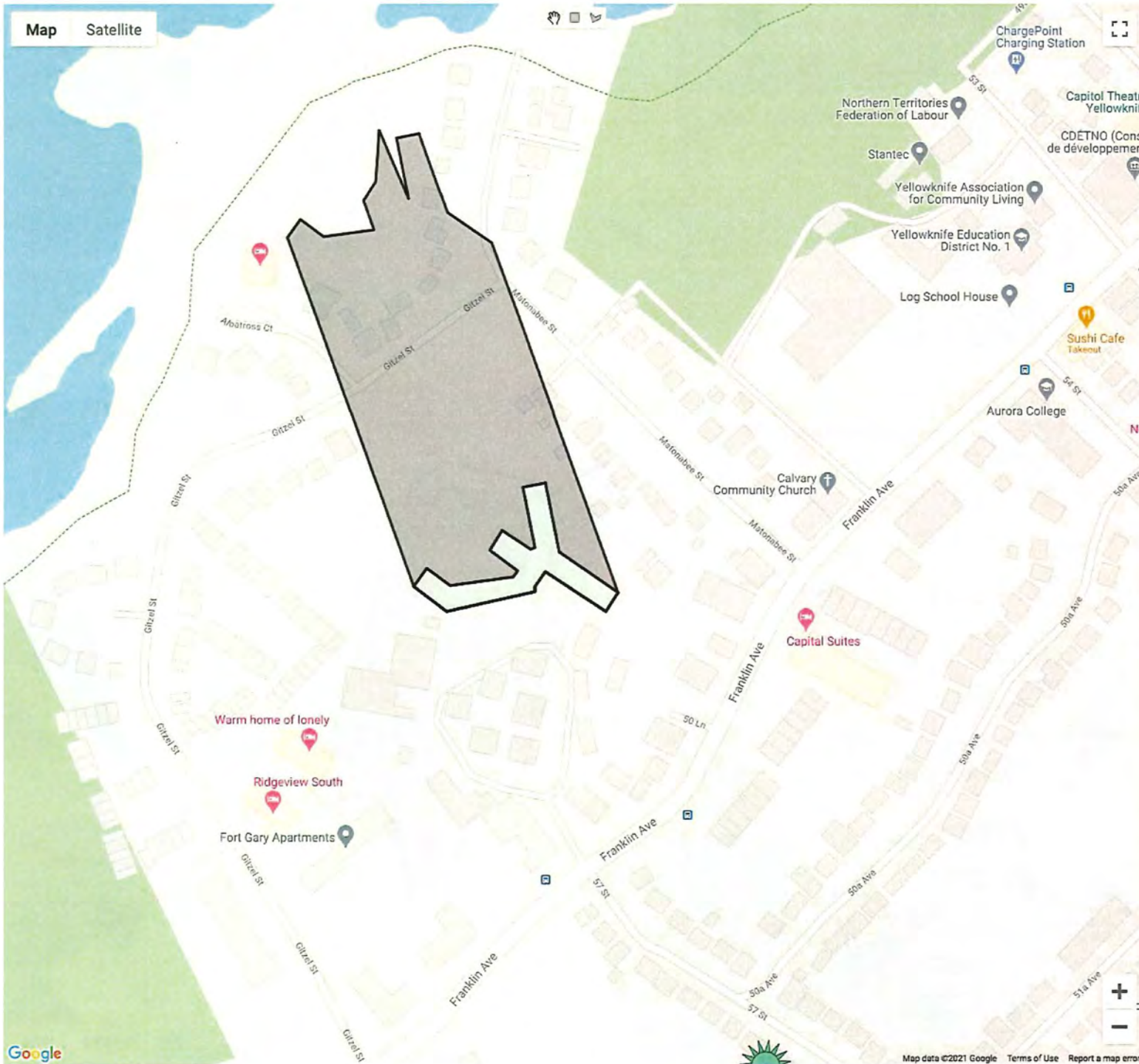
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December 21

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December 21

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December 21

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December 21

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December 21

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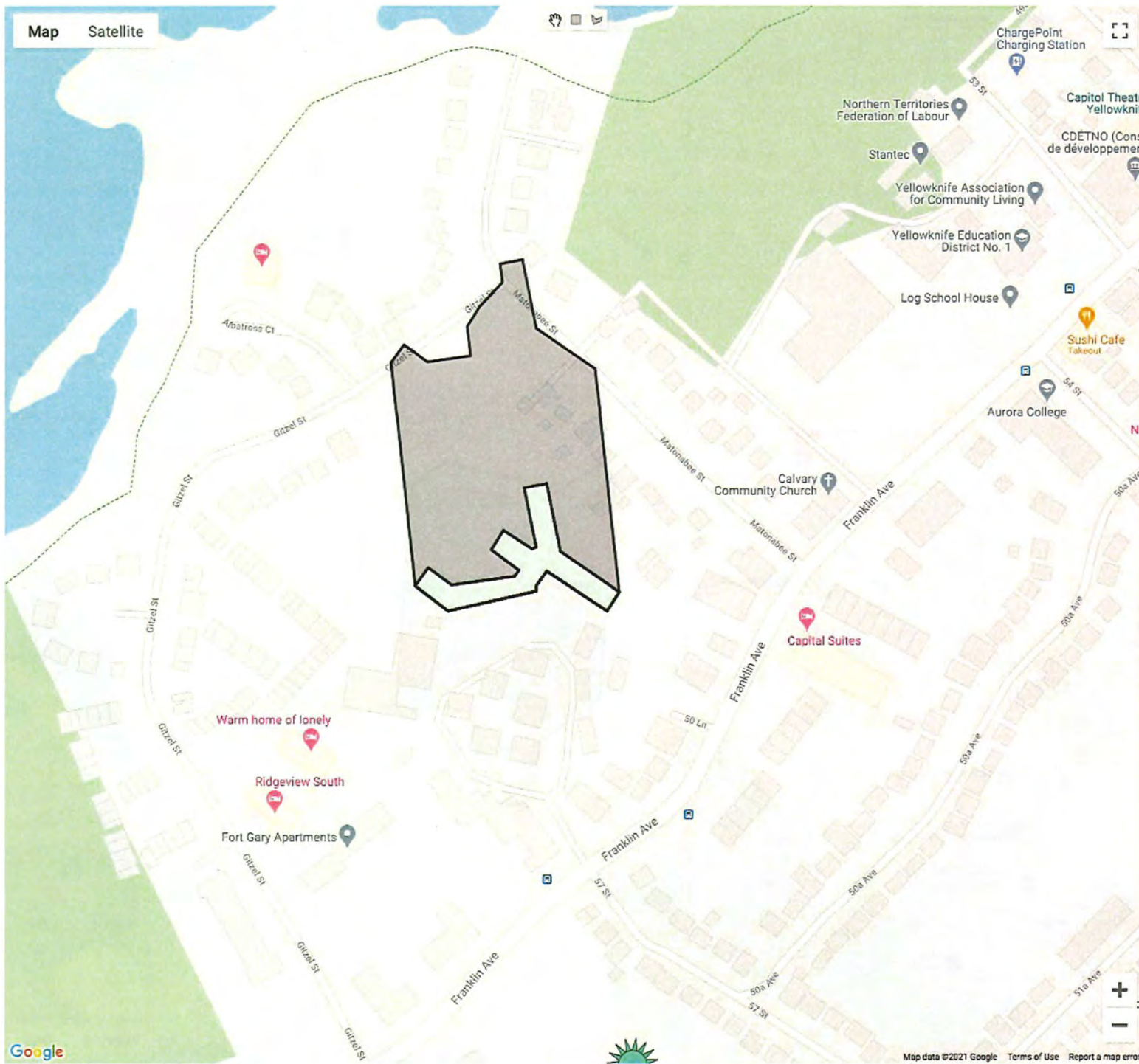
December 21

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December 21

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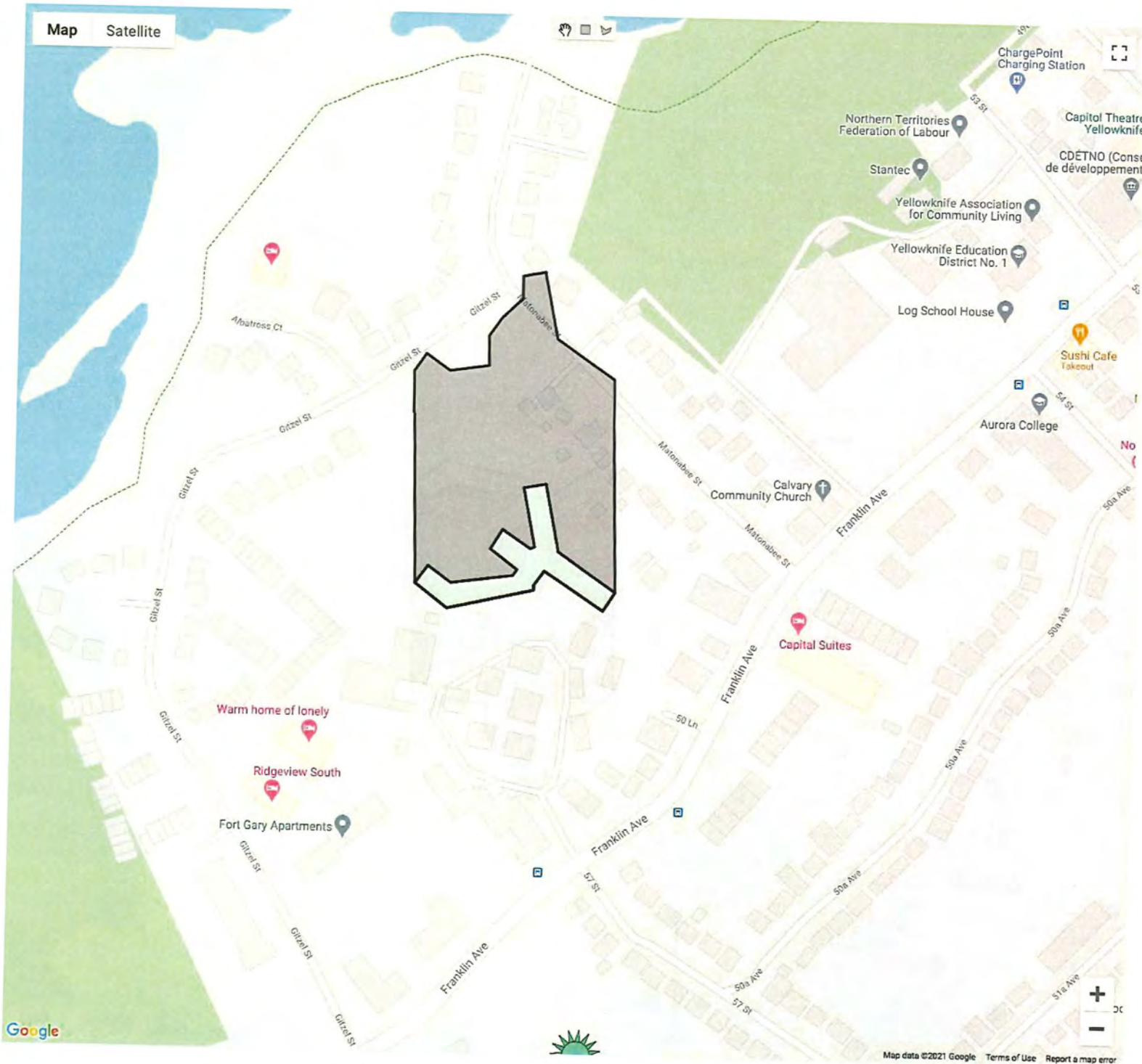
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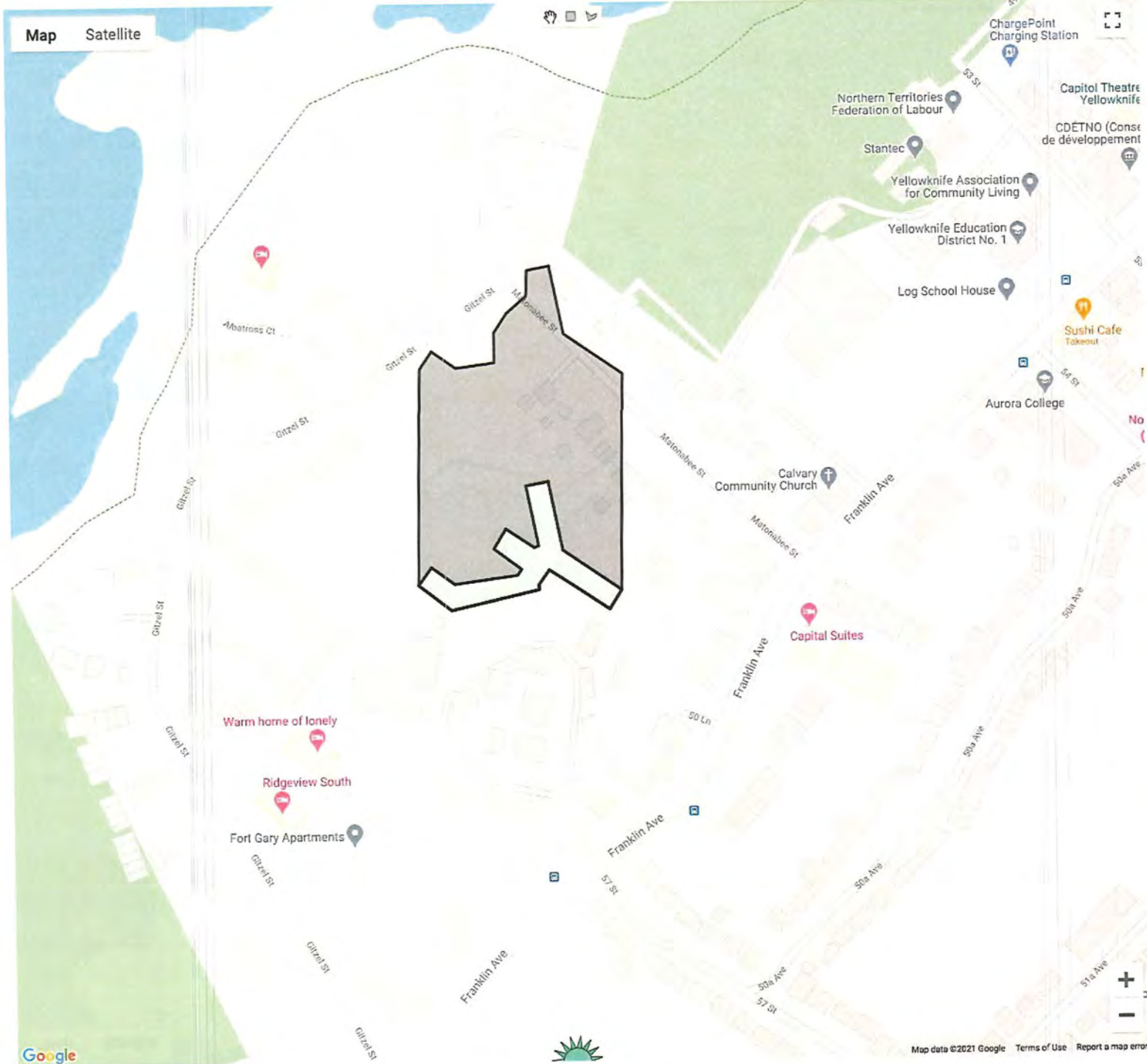
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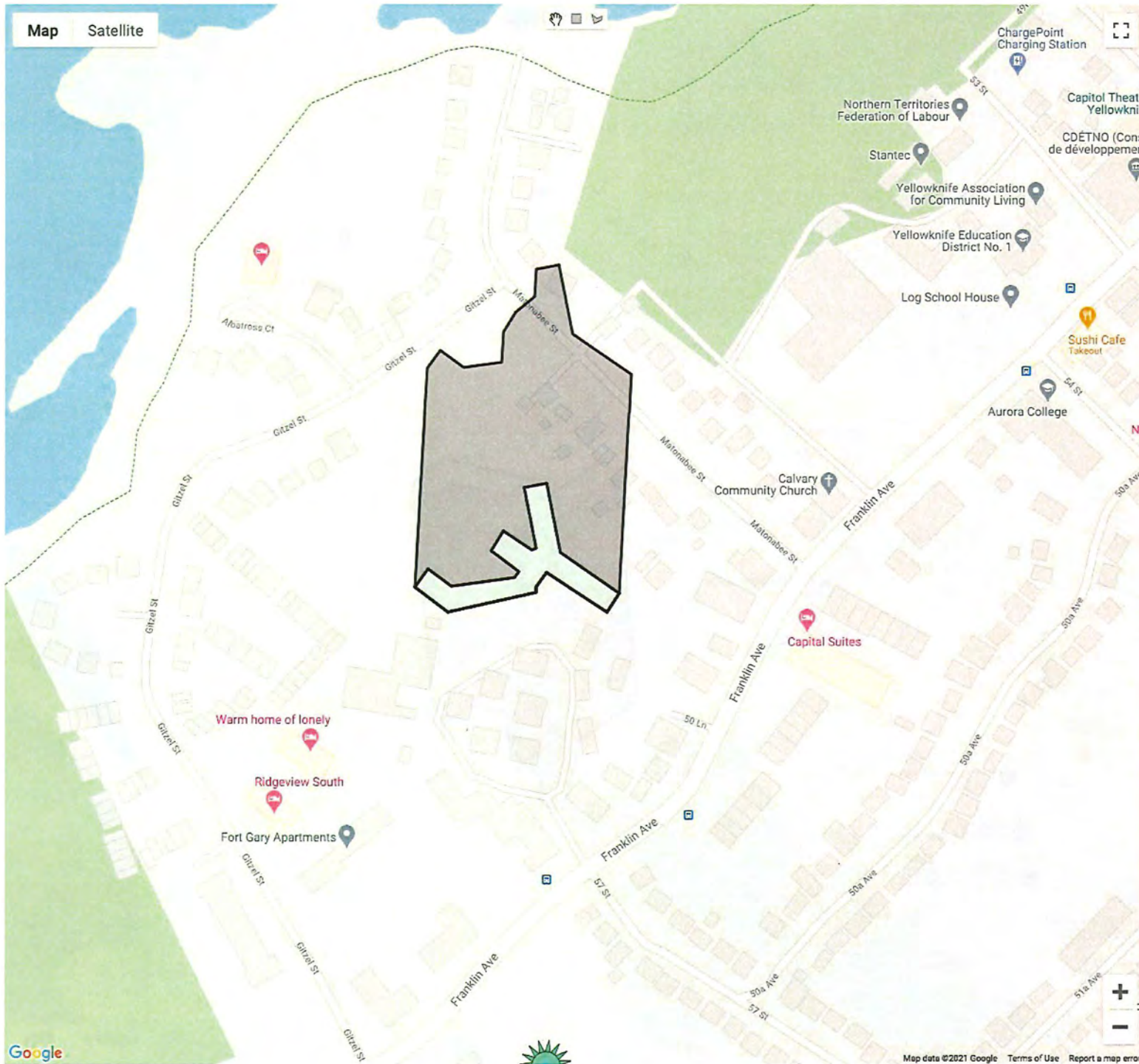
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December 21

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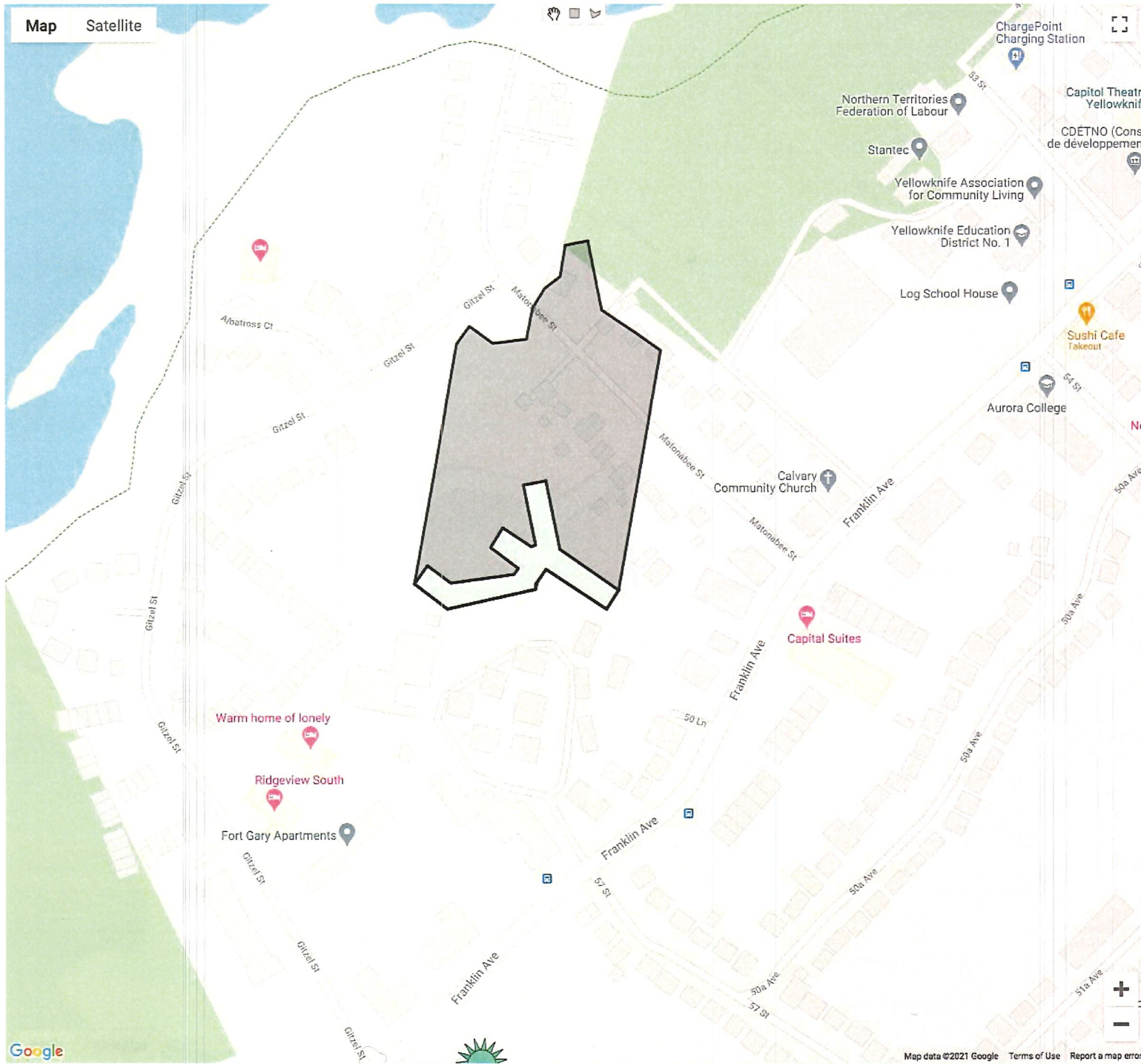
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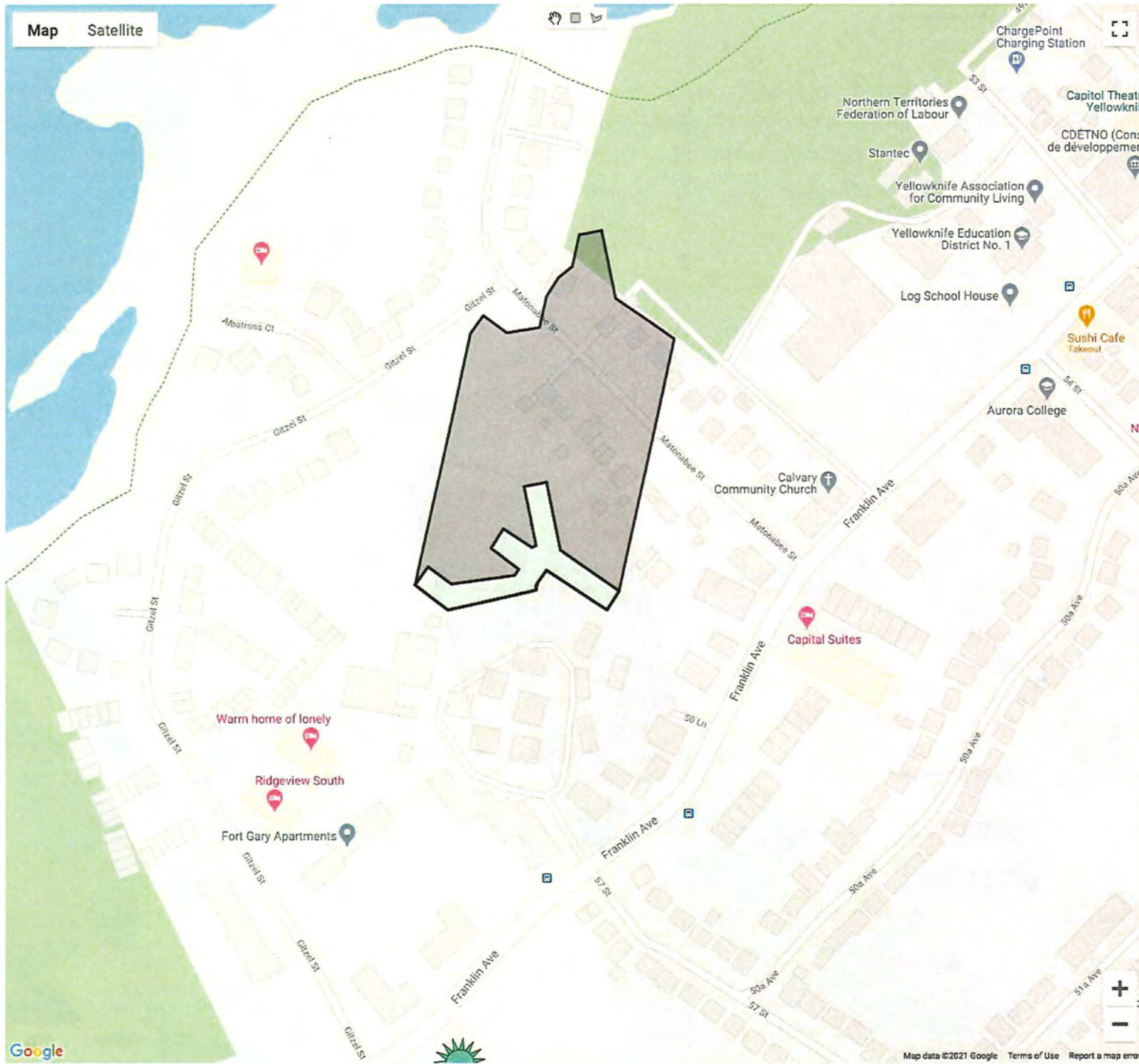
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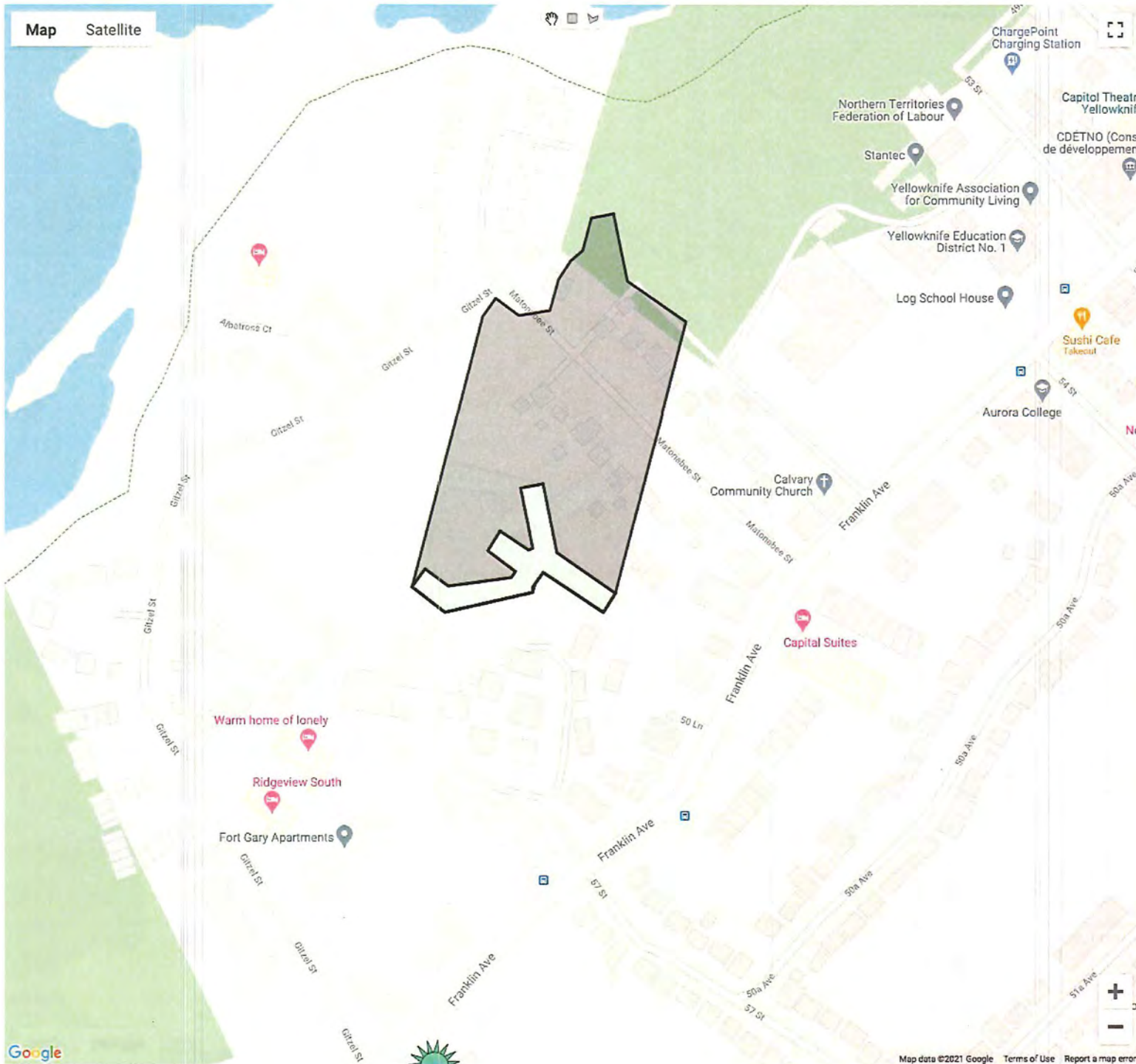
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December 21

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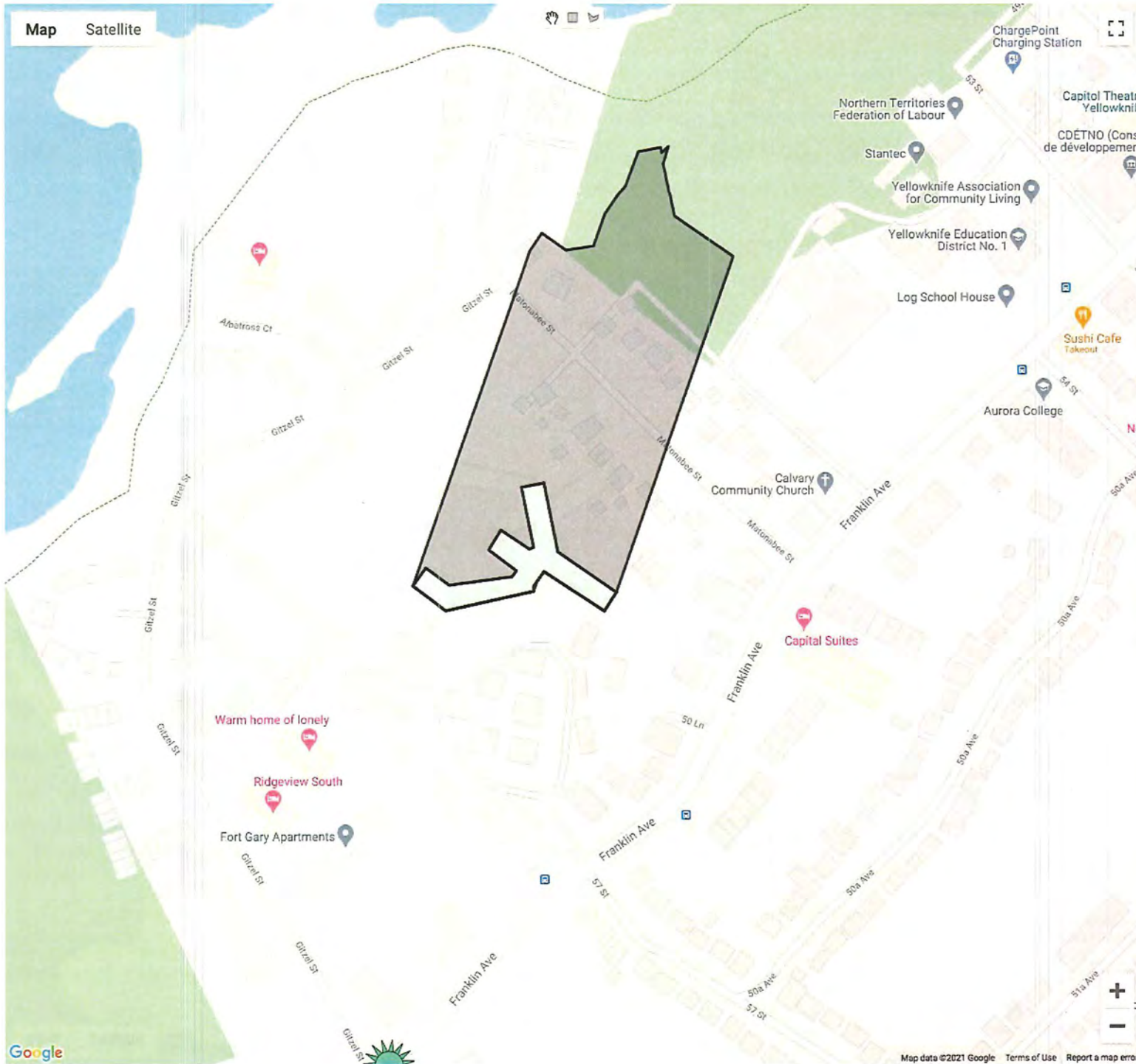
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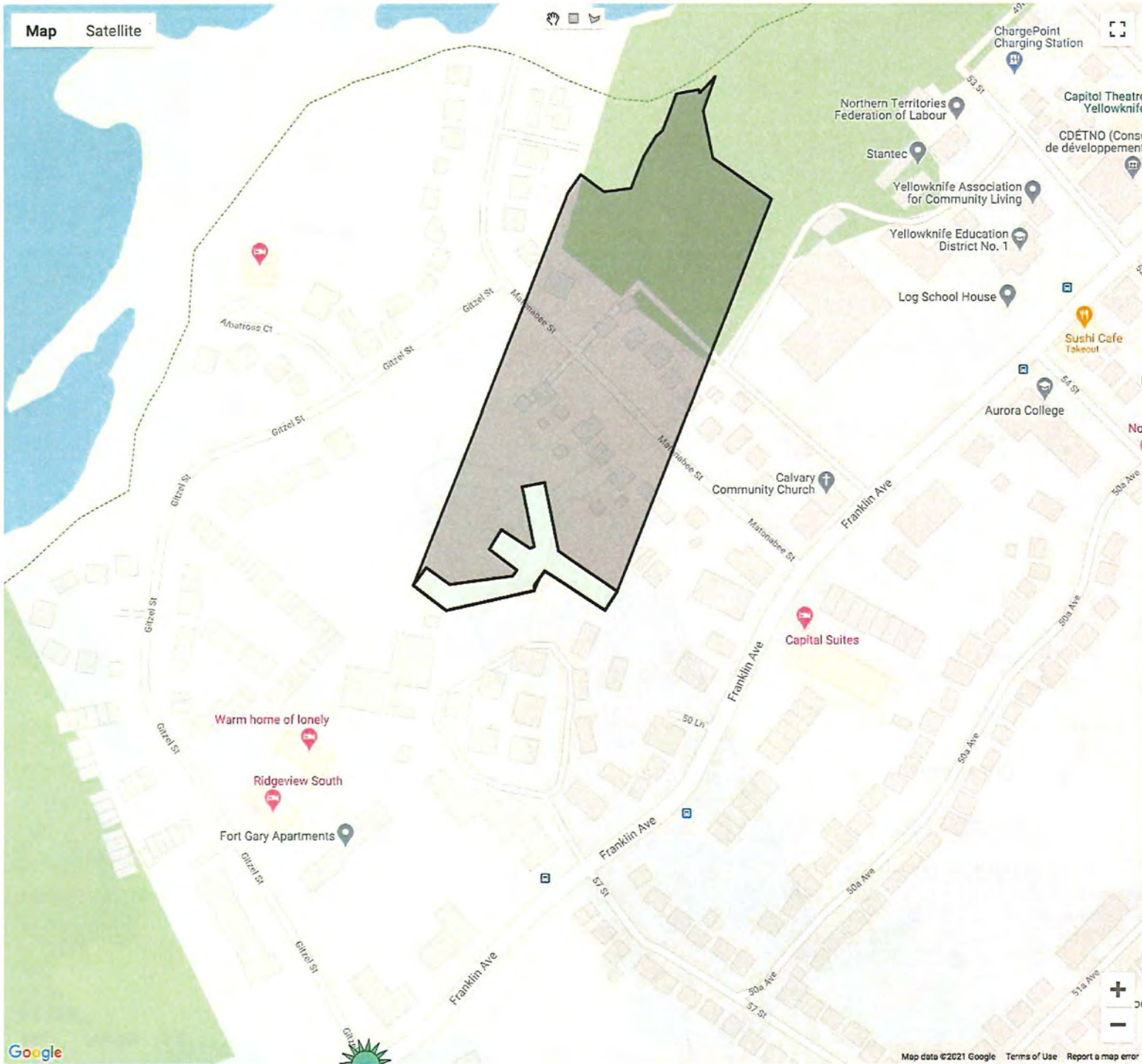
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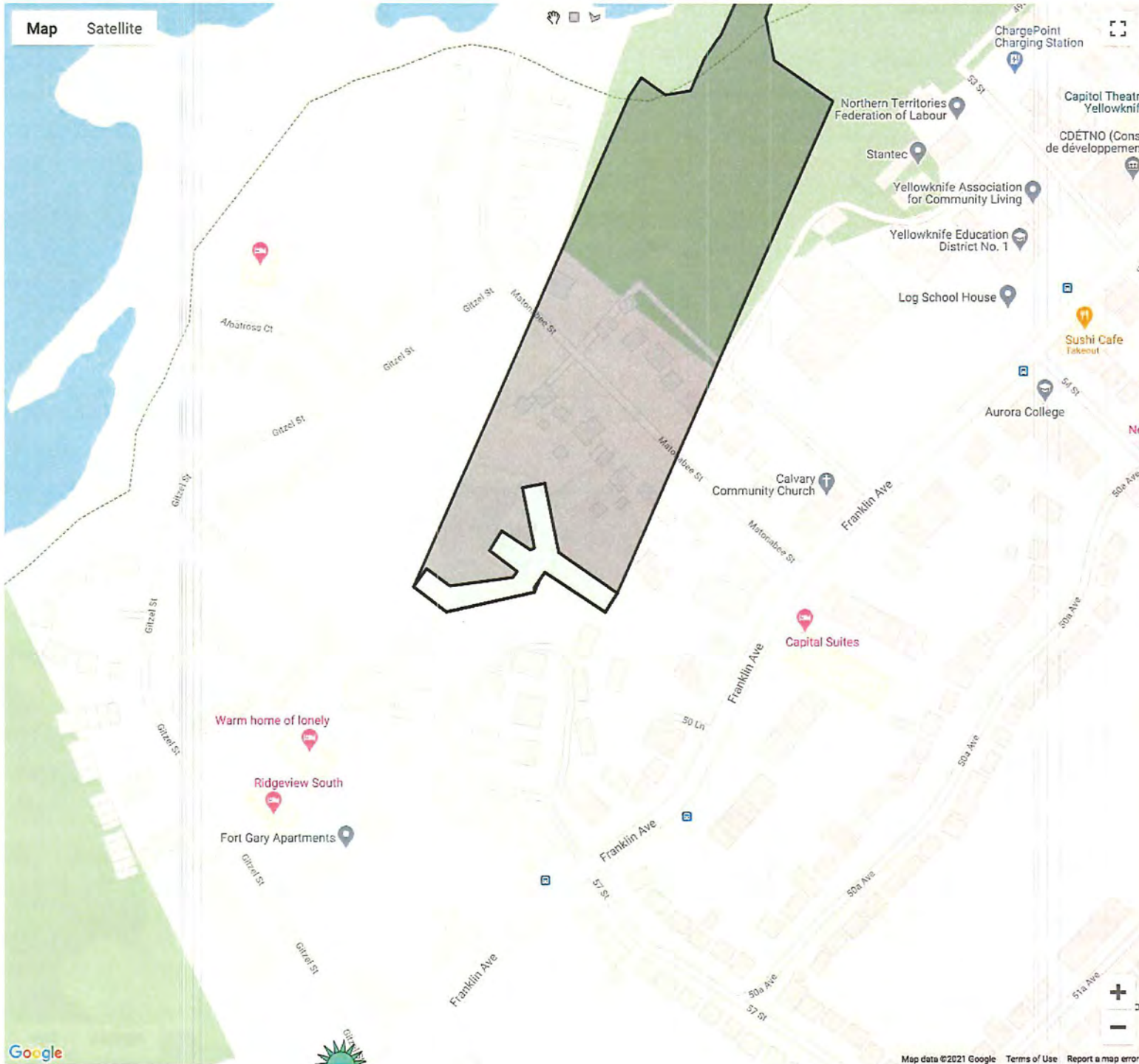
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December 21

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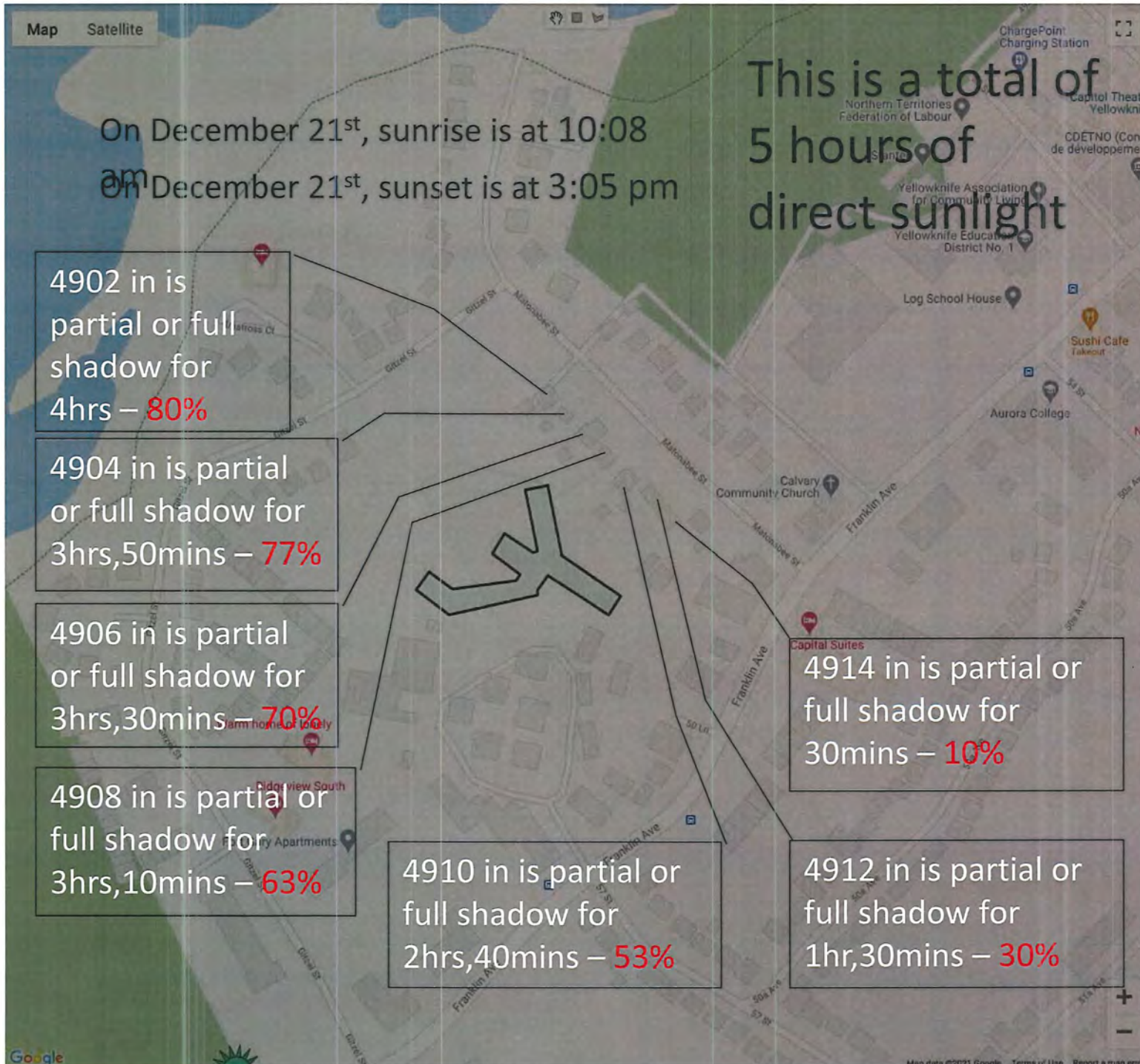
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December 21

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COUNCIL'S DISCRETION & RESPONSIBILITIES 7

Council's Consideration of Impact Factors – Traffic Study

A “draft” Transportation Impact Assessment formed part of the Application for a Development Permit. City Administration did not accept this study. The developer was instructed to provide an amended study.

No revised traffic impact study was available to Council as of its February 8, 2021 decision to approve the “building use”.

The Appellants' were denied the opportunity to receive the final traffic study and make submissions on the final study.

COUNCIL'S DISCRETION & RESPONSIBILITIES 8

Council's Consideration of Impact Factors

Council erred by:

- a) prematurely making a decision without having the awaited final traffic study;
- a) fettering its discretion by unlawfully delegating its decision-making powers and duties to the Development Officer – a misapplication of the Zoning By-Law;
- a) failing to fully consider the Appellants' submissions on the traffic issue; and
- a) failing to give the Appellants an opportunity to receive the final traffic study and make submissions on the final study.

COUNCIL'S DISCRETION & RESPONSIBILITIES 9

Council's Consideration of Impact Factors

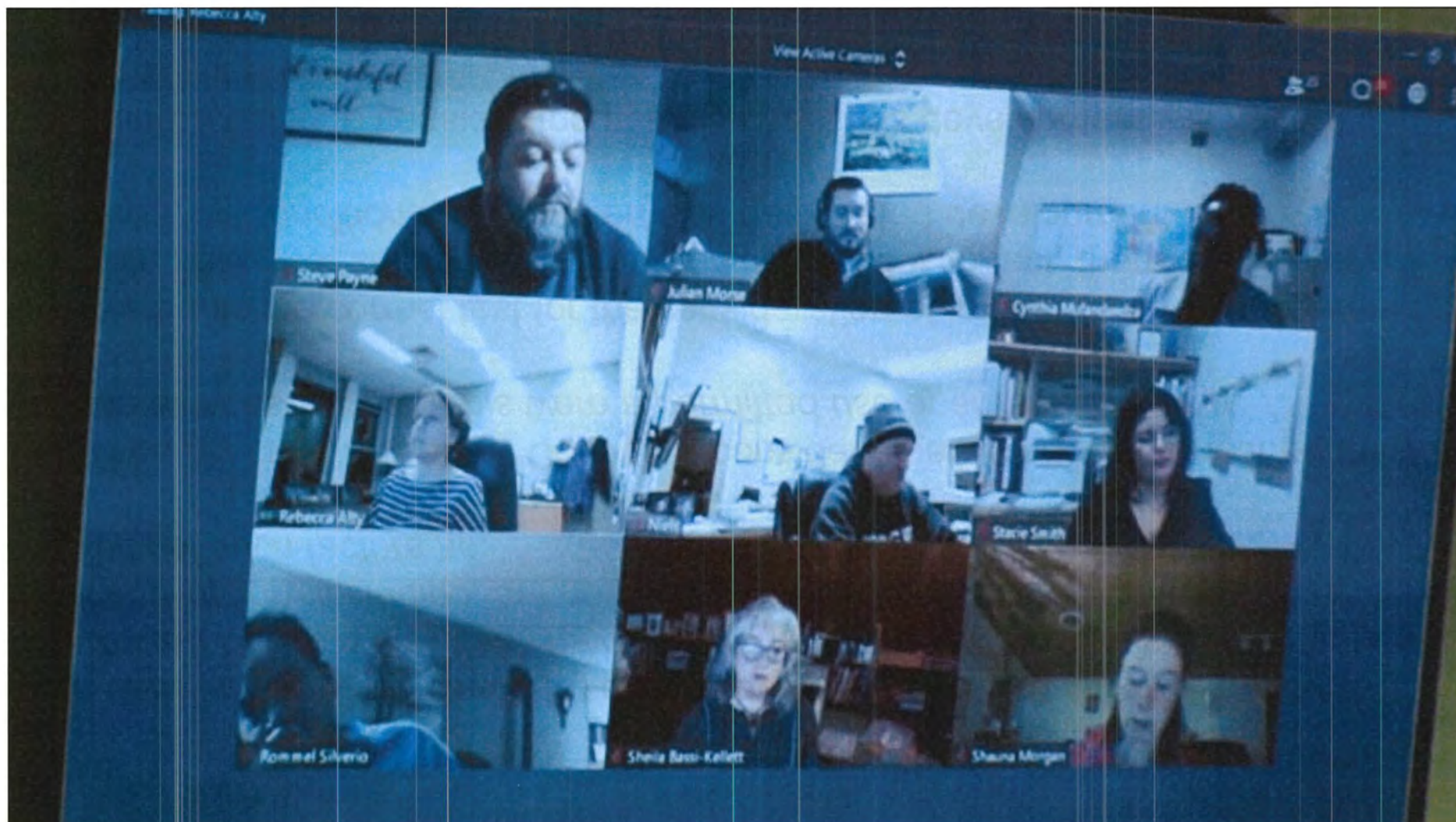
Section 3.4(3) of the Zoning By-Law directs Council that:

“In reviewing an Application for a Development Permit for a Conditionally Permitted Use, Council shall have regard to: ... The circumstances and merits of the application, including, but not limited to: the impact on properties in the vicinity of such factors as...”

- The only criteria used by Council in considering all impact factors other than the alley use was; *‘If this were a permitted use apartment building...’*.
-
- Were this the correct test for the consideration of impact factors, there would be no need for section 3.4 of the Zoning By-Law. In fact, there would be no need for *Conditionally Permitted Use* designated development.
-
- Council failed to consider the actual impact this development will have on adjacent properties.
-
- It is unclear if Council even reviewed the submissions of the parties on the question of impact factors.

COUNCIL'S DISCRETION & RESPONSIBILITIES 10

Council's Consideration of Impact Factors



Development Authority – Development Officer

- Council may not delegate its decision-making authority to the Development Officer.
- The Development Officer is without decision-making authority to approve an *Application for a Development Permit for a Conditionally Permitted Use*.
- Development Permit Application PL-2020-0355 is an *Application for a Development Permit for a Conditionally Permitted Use*.
- The Development Officer, is without legal authority to approve Development Permit Application PL-2020-0355.

Development Authority – Development Officer 2

APPENDIX - 9

PUBLIC NOTICE

CITY OF YELLOWKNIFE – ZONING BY-LAW NO. 4404

NOTICE OF DECISION

Development Permit Application No. PL-2020-0335, dated the 02 day of March, 2021, for a development taking place at the following location: 5710 50 AVE.

Lot 43 & 44 Block 62 Plan # 4252

Intended Development: Special Care Facility

Has been APPROVED subject to following conditions:

1. The minimum front yard setback has been decreased from 6.0 m to 3.59 m (40.17% variance);
2. Council Motion #0025-21 approved a Conditionally Permitted Use for the establishment of a Special Care Facility located at Lots 43 and 44, Block 62, Plan 4252;
3. Landscaping shall be completed by September 30, 2023 and maintained for the life of the development, as indicated in the stamped approved plans and Development Agreement;
4. Plants used for landscaping shall be of capable healthy growth in Yellowknife, grown from northern stock, with the certification that the plants are grown North of 54 degrees latitude;
5. On-site and Off-site Improvements shall be completed as indicated in the stamped approved plans and Development Agreement;
6. A surveyor's Real Property Report shall be submitted to the City prior to occupancy. The Real Property Report must indicate i) all permanent features on the site and ii) finished grades at all corners of the lot and buildings and periodic grades every 20 m;
7. The property owner is responsible for freeze protection of water lines during construction;
8. Lighting specifications in terms of the Intensity of light are to be the minimum required for safety and security, and so that no direct rays of light are projected to adjacent properties;
9. The owner shall delineate all parking spaces on the property;
10. The owner shall delineate and identify with visual indicators a minimum of three (3) accessible parking spaces on the property.
11. A Water Connect Permit will be required for the water and sewer services to the building. Permit application must include Plan and Profile drawings for the servicing that are signed and stamped by an Engineer registered with NAPEG. For information on the permit contact construction@yellowknife.ca;
12. The Development shall comply with all stamped approved plans and with the executed development agreement.

DATE of Issue of this Notice of Decision: April 16, 2021
EFFECTIVE DATE: May 1, 2021


Development Officer

NOTICE:
Any persons claiming to be adversely affected by the development may, in accordance with the *Community Planning and Development Act*, appeal to the Development Appeal Board, c/o City Clerk's Office, tel. 920-5646, City of Yellowknife, P.O. Box 380, Yellowknife, NT X1A 2N4. Please note that your notice of appeal must be in writing, comply with the *Community Planning and Development Act*, include your contact information and include the payment of the \$25 appeal fee (the appeal fee will be reimbursed if the decision of the Development Officer is reversed). The appeal must be received on or before 4:30 p.m. on the _____ day of _____, A.D., 20____.

AFTER THE EFFECTIVE DATE OF THIS PERMIT, THE OWNER OF THE SUBJECT PROPERTY IS AUTHORIZED TO REMOVE THIS NOTICE. ALL OTHER PERSONS FOUND REMOVING THIS NOTICE WILL BE PROSECUTED.

Development Authority – Development Officer 3

The Development Officer's decision to approve Development Permit Application PL-2020-0335 is flawed in several ways and is a misapplication of the Zoning By-Law.

- Council does not have the authority to delegate its decision-making authority, powers, and duties to the Development Officer.
- The Development Officer was without jurisdiction to approve an *Application for a Development Permit for a Conditionally Permitted Use* and therefore is without jurisdiction to approve Development Permit Application PL-2020-0335.
- Several of the conditions, which form part of the approval are also not within the Development Officer's decision-making authority.
- As a condition of the approval, the Development Officer allow for construction of road works on an adjacent lot zoned as Parks and Recreation. This condition is outside the Development Officer's decision-making authority.
- The Development Officer's denial of the Appellants' request for access to the Development Agreement means we are unable to know all of the conditions of the approval. It is clear from the Notice of Decision, some number of conditions include off-site improvements. What if any impacts will the unknown conditions have on adjacent property owners?

Duty of Fairness & Procedural Fairness

- How Council and the Development Officer exercise their powers, duties and functions, including decision-making authority;
- The standards which apply when reviewing such actions;

Procedural fairness is about the process that leads to a decision, not the conclusion reached that results in a decision.

Council's Quasi-judicial Role

All city councils wear at least three hats;

1. **Legislators** – in this role, Council passes By-Laws,
2. **Administrators** – in this role Council exercises its business functions including policy making and financial decisions, and
3. **Quasi-judicial decision-makers** – in this role Council makes decisions that affects the rights of individuals.

Council's Quasi-judicial Role 2

“The legal constraints will be different depending on the nature of the function being performed. Council’s decisions must always be based on relevant criteria and a decision based upon extraneous considerations is susceptible to being invalidated. Beyond that, when Council is exercising political decision-making authority, making policies, enacting legislation, and carrying out operations, it may be that Council is not expected to adhere to standards of fairness or that such standards may be circumscribed. On the other hand, when Council is deciding whether to approve an application for development, it is acting as a tribunal performing a quasi-judicial function”.

Charlottetown (City) v. Island Reg. & Appeals Com. 2013 PECA 10
PEI Court of Appeal
At para 46

Council's Quasi-judicial Role 3

“The powers of a municipality are classified for some purposes. The classifications include legislative functions, quasi-judicial functions and business functions.”

“In its quasi-judicial function, Council may have a duty of fairness which does not apply in respect of the exercise of its legislative powers.”

Shell Canada Products Ltd. v. Vancouver (City), [1994] 1 S.C.R. 231
Supreme Court of Canada
At para 92

Duty of Fairness

The duty of fairness is the most basic requirement of administrative tribunals and quasi-judicial decision-makers.

“The duty to comply with the rules of nature justice and follow rules of procedural fairness extends to all administrative bodies acting under statutory authority”.

Moreau-Bérubé v. New Brunswick (Judicial Council), [2002] 1 S.C.R. 249
Supreme Court of Canada
At para 75

Duty of Fairness 2

The Courts at all levels have defined what are the elements of a fair process. Duty of fairness consists of four key principles.

People affected by a decision have:

- 1) The right to know the case and reply to it;
- 1) The right to an unbiased decision maker;
- 1) The right to have the person who heard the case decide it; and
- 1) The right to know the reasons for the decision.

Duty of Fairness 3

The standard to be used when considering if a quasi-judicial decision-maker failed to provide a fair process is “correctness”.

“By contrast, compliance with the duty of procedural fairness is not assessed on a standard of reasonableness. The process undertaken by the decision-maker either complies with the duty of fairness or it does not. No deference is given by the reviewing court to the views of the decision-maker on this issue.”

Murray Purcha & Son Ltd. v. Barriere (District), 2019 BCCA 4
Court of Appeal for British Columbia
At para 23

The Right to Know the Case and Reply to it

The principle of *The right to know the case and reply to it* has several elements such as:

- 1) an affected party must be given notice that a decision will be made;
- 1) and that party must receive the notice with enough time and in enough detail to adequately prepare and respond; and
- 2) the affected party must have a reasonable opportunity to present evidence and make an argument.

The Right to Know the Case

- Parties appearing before a quasi-judicial decision-maker must receive all the information that is available to the decision-maker so they are fully aware of the case to be met.
- This information must be made available with sufficient time to prepare.

On January 6, 2021 the Appellants were served with the notice of the Development Permit Application PL-2020-0335.

3 documents were attached to the notice:

- 'Avens Pavilion Elevations',
- the 'Avens Pavilion Site Plan', and
- the 'Aven Pavilion Shadow Study'

The Right to Know the Case 2

On January 7, 2021 I had an email exchange with the Development. That exchange included:

Appellant

"I require a complete copy of the Avens' Application for a Development Permit in order to make meaningful submissions as the notice provided does not include the information required to do so."

Development Officer

"[T]he drawings and studies that make up the development permit application are proprietary knowledge. The drawings that were selected were done so carefully to balance intellectual property interests while still ensuring the property owners and lessees within the notification boundary understood the development. It would be inappropriate for the City to further divulge drawings and studies with property owners while the development permitting process is underway."

Appellant

"The process used by the City to consider an Application for a Development Permit is bound by the principles of nature justice; in particular, procedural fairness. As a party with standing before the Council, I am entitled to any evidence to be considered by the Council."

Development Officer

" [S]ite plans, elevations, studies that make up development permit applications are the intellectual property of the architects, engineers, and other design professionals that create them, and the City does not have the intellectual property rights for those items, and therefore cannot share without the creator's consent."

The Right to Know the Case 3

On January 8, 2021 an email from the City's Manger of Planning & Lands Division was received that included:

"I would like to introduce you to Kenny Ruptash, one of the project managers for the Avens project. I discussed your request for access to the development permit package with Kenny and it is the Avens project team request that they be given the opportunity to provide this documentation directly to the neighbourhood residents, rather than the city immediately having to play the role of mediator."

On January 12, 2021 an email from the developer was received that included:

"The AVENS Pavilion Development Permit documents form a portion of the overall AVENS Pavilion design and shall be considered Confidential Information. Except as otherwise provided in writing by AVENS, you are to keep the Confidential Information confidential. Documents may be downloaded and printed by yourself, however distribution of these documents is not permissible."

The Right to Know the Case 4

These strings of emails clearly demonstrate the City's first two procedural fairness errors.

- The City refused to provide the Appellants with the information, which Council would have in order to make its decision presently under appeal. Council's hearing of this matter was conducted in a public forum.
- The Development Officer should have exercised a "supervisory authority" to ensure procedural fairness: See **Thomas v Edmonton (City)**, 2016 ABCA 57, para 51

The Appellant's request of City Administration for the Development Permit Application information was denied based upon that information being "*proprietary knowledge*" of the developer. Yet the City later made the application documents in question public as part of the Governance and Priorities Committee's February 1, 2021 agenda documents.

Despite being asked by the Appellants, City Administration failed to provide a copy of the actual Development Permit Application form.

The Right to Know the Case 5

The City's emails demonstrates it failed to understand its own role and that of the Appellants in the development permit application process. It is clear the City believed it only needed to give the Appellants enough information to "make comments" to Council about the application.

Development Officer

"The drawings that were selected were done so carefully to balance intellectual property interests while still ensuring the property owners and lessees within the notification boundary understood the development"

"[I] am hopeful that we can instead forge a relationship where you feel informed about the proposed development and prepared to share your comments with Council."

Manger of Planning & Lands Division

The City wants to ensure that the Matonabee neighbours are fully informed about the proposed development at Avens, and that residents are given the opportunity to provide comment."

A distinction must be drawn between the general public and an adjacent property owner. The former may be entitled to make comments about issues before Council. The latter however has legal standing and must be afforded the rights of a party before a quasi-judicial decision-maker.

The Right to Know the Case 6

The decision to approve Development Permit Application PL-2020-0335 included 12 conditions.

There are three “conditions” requiring compliance with the Development Agreement:

3. Landscaping shall be completed by September 30, 2023 and maintained for the life of the development, as indicated in the stamped approved plans and Development Agreement;

5. On-site and Off-site Improvements shall be completed as indicated in the stamped approved plans and Development Agreement;

12. The Development shall comply with all stamped approved plans and with the executed development agreement.

The terms and conditions of the Development Agreement *became* conditions of the development permit.

The Right to Know the Case 7

The Appellants requested a copy of the Development Agreement on April 22, 2021. The request was denied resulting in:

1. The Appellants being denied the right to know the conditions of the approved development permit presently under appeal. We are not allowed to know the decision.
1. The denial of the City to provide this information hobbles the Appellants ability to fully understand the Development Officer's decision and to reply to it.

The Right to Participate – Cross Examination

The right to participate and to cross examination are parts of the principle of *the right to know the case and reply to it*.

There were three opportunities to give oral and written submissions:

- January 25, 2021 - Governance and Priorities Committee
- February 1, 2021 - Governance and Priorities Committee
- February 8, 2021 – Council Meeting

The Right to Participate – Cross Examination 2

February 1, 2021 - An Appellant was denied the opportunity to give rebuttal submissions or to cross examine other parties who gave oral testimony to the Committee.

The Committee Chair (the Mayor) stated that Council would not allow any further comments or questions, *“as per procedure”*.

The Right to Participate – Cross Examination 3

Council's Procedures

Council Procedures By-Law 4975

117. (1) All committees of Council are advisory in nature.

(2) Committees have the responsibility to analyze all matters referred to them by Council or the City Administrator and submit recommendations to Council on ways and means of addressing these matters.

118. Meetings of standing committees shall be conducted in accordance with the following provisions:

....

(3) informal discussion of any matter is permitted when no motion has been made;

(4) members of the public shall be permitted to participate in the discussion of any matter before a standing committee;

“Discussion” implies two-way communication. This section does not say “the public shall be permitted to make a presentation”.

The Right to Participate – Cross Examination 4

Council's Procedures

February 1, 2021 - Governance and Priorities Committee

The Mayor:

“We don't do the back and forward between Council and previous presenters as per our procedures...”.

- This denial breaches both section 118 of By-Law 4975; and
- The opportunity to cross-examine

An offer was made for the Appellants to make further written submissions, however the opportunity was lost to cross-examine the developer and City Administrator who each gave oral testimony.

The Right to Participate – Cross Examination 5

“Procedural unfairness, which I conclude resulted from the manner in which the hearing was conducted, might have been avoided in different ways:

.....

c) Allowing the Applicant to cross-examine witnesses who were making very general allegations, or who were providing information which the Applicant felt was inaccurate or unsupported, or who were offering personal opinions based on what the Applicant felt were faulty assumptions, would also have alleviated much of the unfairness.”

“What is clear is that the only consideration given by the Committed [SP] to any deviation from what it considered to be its standard procedure was to permit some five minute extensions of speaking time. In the circumstances of this particular case, where there were so many conflicting viewpoints expressed, contradictory, vague and unsupported evidence, evidence given by witnesses based on false assumptions and little or no ability for the Applicant to either challenge or respond to new evidence, further deviation from the normal process was warranted.”

Society for Promotion of Alternative Arts and Music v. Edmonton (City), 2008 ABQB 629
Alberta Court of Queens Bench
at paragraph 40:

The Right to Participate – Cross Examination 6

A quasi-judicial decision-maker cannot use its “procedure” to deny the right to participate.

“I agree with the Applicant that, given the nature of the material contained in the written disclosure package, as well as the generalized assertions made by witnesses at the hearing, the Applicant’s inability to cross-examine significantly hampered its ability to defend against the allegations and, not having been addressed in some other manner, resulted in unfairness to the Applicant.”

Society for Promotion of Alternative Arts and Music v. Edmonton (City), 2008 ABQB 629
Alberta Court of Queens Bench
at paragraph 42

The Right to Participate – Reply

The Appellants sought additional time and the ability to question other parties concerning statements made to Council.

This breach of this key principle of procedural fairness resulted in the Appellants' inability to:

- a) properly present its case, and
- b) challenge the developer's statements and submissions, and
- c) determine why the City required a second traffic study, finding the first study inadequate.

The Right to an Unbiased Decision-Maker

The principle of *The Right to an Unbiased Decision-maker* is, at its core, the right to a fair and impartial hearing by an impartial decision maker. Impartiality means the same as neutral, and that a decision maker must come to a case with an open mind.

Council has unfortunately failed to apply both its own By-Laws concerning impartiality, and has also failed to comply with the common law requirements concerning impartiality.

The Right to an Unbiased Decision-Maker 2

By-Law 4976 – Council Code of Ethics

“Pecuniary Interest”

means a direct or indirect pecuniary interest as defined in the *Conflict of Interest Act*.

And

“Conflict of Interest”

includes a Pecuniary Interest or circumstances where an individual is, or could be, influenced, or appear to be influenced, by a personal interest when carrying out their public duty including anything that gives rise to bias, prejudice, close mindedness, or undue influence;

The Right to an Unbiased Decision-Maker 3

By-Law 4975 – *Council Procedures By-law*

19. A Member shall have the following duties at meetings of Council:

...

(3) to disclose a Conflict of Interest in any matter before Council in accordance with this by-law the *Conflict of Interest Act*, and the common law and remove him or herself from the meeting when this item is under consideration.

Definition of “conflict of interest” includes “...*anything that gives rise to bias, prejudice, [or] close mindedness*”.

The Right to an Unbiased Decision-Maker 4

Bias is the opposite of impartiality. Bias exists when a reasonably informed observer would perceive that a decision maker is not neutral about the issue to be decided.

The test for perceived bias includes four elements:

- There must be a likelihood of bias,
- perceived by an informed, reasonable, and right-minded person,
- viewing the matter realistically and practically, and having thought the matter through.

Committee for Justice and Liberty et al. v. National Energy Board et al.,
1976 (SCC), [1978] 1 SCR 369
Supreme Court of Canada

R. v. S. (R.D.), 1997 CanLII 324 (SCC), [1997] 3 SCR 484
Supreme Court of Canada

The Right to an Unbiased Decision-Maker 5

A perceived bias is assessed not from the view of the decision-maker or the party alleging bias, but rather from the perspective of a well informed and reasonable outside observer who views the matter realistically and practically.

The Right to an Unbiased Decision-Maker 6

Relationship Bias

- Everyone has relationships.
- Can be challenging for decision-makers in a small community.
- Decision-makers must assess and disclose if a relationship could be perceived as creating a bias.
- Relationships, which may be perceived as creating an apprehension of bias include relationships with: family members, friends, and business associates.

The Right to an Unbiased Decision-Maker 7

Relationship Bias

Despite this statutory and common law requirement, Council Member Konge failed to disclose his close friendship with the developer's Chief Executive Officer, Daryl Dolynny.

It is the Appellants' understanding that Mr. Konge and Mr. Dolynny:

1. Are past business associates and present friends.
2. Mr. Konge and Mr. Dolynny have gone on holiday travel together, and
3. They socialize together.

Council Member Konge failed to declare a potential conflict of interest or perceived bias.

The test is not whether the decision-maker thinks there is a reasonable apprehension of bias, but rather whether a well informed and reasonable outside observer, who viewing the matter realistically and practically, would perceive bias.

The Right to an Unbiased Decision-Maker 8

Relationship Bias



Source:
Mr. Konge's publicly accessible Facebook page

The Right to an Unbiased Decision-Maker 8

Relationship Bias



Source:
Mr. Konge's publicly accessible Facebook page

The Right to an Unbiased Decision-Maker 9

Relationship Bias

“It is not part of the job description that municipal councillors be personally interested in matters that come before them beyond the interest that they have in common with the other citizens in the municipality. Where such an interest is found, both at common law and by statute, a member of Council is disqualified if the interest is so related to the exercise of public duty that a reasonably well-informed person would conclude that the interest might influence the exercise of that duty. This is commonly referred to as a conflict of interest.”

“It was error, therefore, for the learned judge to apply the reasonable apprehension of bias test. This test would have been appropriate if it had been found that the Councillor had a personal interest in the development, either pecuniary or by reason of a relationship with the developer. In such circumstances, the test is that which applies to all public officials: Would a reasonably well-informed person consider that the interest might have an influence on the exercise of the official's public duty? If that duty is to hear and decide, the test is expressed in terms of a reasonable apprehension of bias.”

Old St. Boniface Residents Assn. Inc. v. Winnipeg (City), 1990,31 (SCC), [1990] 3 SCR 1170

At page 1196

Supreme Court of Canada

The Right to an Unbiased Decision-Maker 10

Attitudinal Bias

- Administrative decision-makers, as with judges, must keep an open mind.
- Decision-makers must not say anything, or by action demonstrate that they could have, or did prejudge a matter.
- Decision-makers should not make up their minds so strongly ahead of a case that they can't decide another way at the hearing.
- Courts acknowledged politicians are not always decision-makers and must be free to give their opinion on matters that may later come before them for determination.
- The Supreme Court of Canada directed a different test in the consideration of an allegation that a municipal council member prejudged a matter to the point of bias. The test is known as the 'open mind test'.
- This test is met when it can be shown a council member makes a statement(s), to such a degree in support of a position being advocated by a party, that it is clear the council member is not open to be persuaded otherwise.

The Right to an Unbiased Decision-Maker 11

Attitudinal Bias

“The party alleging disqualifying bias must establish that there is a prejudgment of the matter, in fact, to the extent that any representations at variance with the view, which has been adopted, would be futile. Statements by individual members of Council while they may very well give rise to an appearance of bias will not satisfy the test unless the court concludes that they are the expression of a final opinion on the matter, which cannot be dislodged.”

“[A] vote in favour will not constitute disqualifying bias in the absence of some indication that the position taken is incapable of change.”

Old St. Boniface Residents Assn. Inc. v. Winnipeg (City), 1990,31 (SCC), [1990] 3 SCR 1170

At page 1197

Supreme Court of Canada

The Right to an Unbiased Decision-Maker 12

Attitudinal Bias

Council Member Konge made public comments prior to hearing all of the Appellants' submissions, which demonstrate he was not open to persuasion, did not have an "open mind", and had prejudged the matter in a conclusive and final way.

January 25, 2021 - Governance and Priorities Committee hearing



"For me as a Councilor, this is super easy, absolutely yes to the conditionally permitted use"

The Right to an Unbiased Decision-Maker 13

Attitudinal Bias

Council Member Konge made public comments prior to hearing all of the Appellants' submissions, which demonstrate he was not open to persuasion, did not have an "open mind", and had prejudged the matter in a conclusive and final way.

January 25, 2021 - Governance and Priorities Committee hearing



"For me as a Councilor, this is super easy, absolutely yes to the conditionally permitted use"

"So absolutely yes, and I look forward to this coming to Council so I can officially say yes"

The Right to an Unbiased Decision-Maker 14

Attitudinal Bias

Council Member Konge made public comments prior to hearing all of the Appellants' submissions, which demonstrate he was not open to persuasion, did not have an "open mind", and had prejudged the matter in a conclusive and final way.

January 25, 2021 - Governance and Priorities Committee hearing



"For me as a Councilor, this is super easy, absolutely yes to the conditionally permitted use"

"So absolutely yes, and I look forward to this coming to Council so I can officially say yes"

"...then the community even gets to throw a wrench into it if they so chose if they look at it and don't like it they can go to the Appeal Board which I certainly hope doesn't happen because it adds 30 to 90 days on the whole process."

The Right to an Unbiased Decision-Maker 15

Attitudinal Bias

Council Member Konge's comments confirms:

1. He strongly supports this development permit application;
1. Prior to hearing all submissions, he confirms that he will emphatically decide this matter in favour of the developer, and
2. Any community member who exercises their right of appeal is "*throw[ing] a wrench into it*". This last comment can only be interpreted as meaning any public opposition to the development is a destructive and counter-productive undertaking.

The Right to an Unbiased Decision-Maker 16

Attitudinal Bias

The test to be used when considering **Relationship Bias** is the apprehension of bias test:

Would an informed, reasonable, and right-minded person, viewing the matter realistically and practically, and having thought the matter through, perceive bias.

The test to be used when considering **Attitudinal Bias** is the “open mind” test:

Did Council Member Konge’s statements demonstrate he had made his mind up and was not open to be persuaded otherwise?

The Right To Have The Person Who Heard The Case Decide It

Council delegated its decision-making authority to the Development Officer after hearing from the parties.

In addition to such delegation of authority being a breach of the Zoning By-Law and the Act, it is also a breach of the duty of fairness.

This is a breach of the duty of fairness principle of the *right to have the person who heard the case to decide it*.

Council Members repeatedly stated Council Members have no expertise in evaluating the technical elements of a development permit application; that such decisions must therefore be made by the Development Officer who has such expertise.

Such an argument to avoid decision-making authority is without merit or reason.

Remedy for Breach of Procedural Fairness

You have heard how the principles of procedural fairness have been violated.

The Right to Know the Case and Reply

- City refused to provide disclosure of the Development Permit Application;
- City refused to disclose the Development Agreement;
- Council refused to allow cross examination of other parties;
- Council refused to allow Applicants to “participate in the discussion” during the hearing.

The Right to an Unbiased Decision-Maker

- Council Member Konge’s relationship with the developer’s Chief Executive Officer, Daryl Dolynny amounts to an apprehension of bias – Relationship Bias
- Council Member Konge’s public statements before hearing from all the parties, demonstrates he did not have an “open mind” and was not open to persuasion – Attitudinal Bias

The Right To Have The Person Who Heard The Case Decide It

- Council’s delegation of its decision-making authority resulted in someone other than those who heard the case to decide it.

Remedy for Breach of Procedural Fairness 2

The Courts have considered how an appellant tribunal should “remedy” such breaches of the duty of fairness, including procedural unfairness. Several Court cases such as *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561 and *Taiga Works Wilderness Equipment Ltd. v British Columbia (Director of Employment Standards)*, 316 DLR (4th) 719, have been read to mean breaches of procedural fairness can be remedied by hearing the matter *de novo* (anew) by an appellant tribunal.

In part, this analysis is correct; however subsequent Court decisions have concluded not all breaches of procedural fairness may be “cured” by a fresh hearing of the case by an appellant tribunal.

Remedy for Breach of Procedural Fairness 3

“The fact that a decision is administrative and affects ‘the rights, privileges or interests of an individual’ is sufficient to trigger the application of the duty of fairness”.

Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817, para 20
Supreme Court of Canada

“The doctrine of procedural fairness has been a fundamental component of Canadian administrative law for decades.”

...

“Nor is there merit to the argument that the procedural unfairness was “cured” by the SDAB’s hearing the appellants’ concerns. It is correct that, in certain circumstances, appellate tribunals can cure breaches of procedural fairness:”

...

*“However, sometimes a cure will not be possible as this Court found in *Stewart v Lac Ste. Anne (County) Subdivision and Development Appeal Board*, 397 AR 185”*

Thomas v Edmonton (City), 2016 ABCA 57, para 49, 54
Court of Appeal of Alberta

Remedy for Breach of Procedural Fairness 4

The Alberta Court of Appeal in **Stewart v. Lac Ste. Anne (County Subdivision and Development Appeal Board)**, 2006 ABCA 264 addressed how an appellant tribunal should remedy procedural unfairness from a decision-maker below.

In that case, the Subdivision and Development Appeal Board (SDAB) considered an appeal of a Lac Ste. Anne County (Development Authority) decision regarding the issuance of a development permit. The SDAB upheld the Development Authority's issuance of a development permit, despite allegations of bias.

The SDAB serves the same statutory role as this Appeal Board and the Development Authority in that case serves the same statutory role as City Council in this appeal.

Remedy for Breach of Procedural Fairness 5

The Alberta Court of Appeal considered the SDAB's (Development Appeal Board) two options;

1. conducting a hearing *de novo* (hearing the matter anew) or
2. quashing the Development Authority's decision and returning the matter back to them for rehearing.

The Court wrote:

"The SDAB was required to, and did, consider the allegation of bias."

*"There must be a new hearing before the SDAB. The relevant inquiry is whether in the circumstances of this case a direction that the SDAB conduct a hearing *de novo* is an adequate remedy."*

"[S]hould the SDAB conclude that the proceedings before the Development Authority were tainted by bias or apprehension of bias, the matter be returned to the Development Authority, differently constituted, for a fresh hearing."

"Where the allegation is one of bias (or apprehension of bias), a duty to have acted fairly should not, in my opinion, be easily brushed aside by simply remitting the matter to the SDAB for a fresh hearing without more. A direction that the allegation of bias be considered and that, if made out, the matter be remitted to the Development Authority for a fresh hearing, is essential. Otherwise, the effect would be to relieve the Development Authority of its duty to conduct its affairs in a procedurally proper fashion."

Remedy for Breach of Procedural Fairness 6

The **Stewart** case gives clear direction:

1. The Appeal Board has both the jurisdiction and responsibility to determine whether the process used by Council and the Development Officer breached the principles of the duty of fairness including bias and the apprehension of bias.
1. The Appeal Board has both the jurisdiction and responsibility to remit a matter back to Council where bias or apprehension of bias is confirmed. This jurisdiction transcends section 69(1) of the Act.
2. To NOT remit the development permit application to Council would unjustly, “*relieve [Council] of its duty to conduct its affairs in a procedurally proper fashion*”.

Detrimental Effect of Council's Failure

- The failure of Council to follow the legislation (misapply the By-Law) and the rules of natural justice is not a simple procedural error with no effect.
- The failure has deprived the Appellants of their right to be heard with respect to a development that profoundly affects their homes, their property and their neighbourhood.
- The failure has denied the Appellants a fair and impartial hearing of the application.

The Statutorily Appropriate Process

1. Council should have received a complete *Application for a Development Permit for a Conditionally Permitted Use*.
1. The entire completed application should have been disclosed to the affected neighbours.
1. The Development Officer should have ensured that the application was complete and presented his or her analysis of the application to City Council.
1. City Council should then have listened to the submissions of the developer, City Administration, and the affected neighbours with respect to the development.
 - a) Including the Appellants' submissions about the actual impacts the development would have on adjacent properties.
 - b) Providing the opportunity for the parties to ask questions of the individuals who provided oral or written submissions.
2. City Council then should have denied the application for a conditionally permitted use development permit; or accepted the application with or without conditions.

Relief Sought

The Appellants respectfully seek the following relief:

1. Council's Conditionally Permitted Use Decision of February 22, 2021 be reversed;
1. Council's decision to have the Development Officer decide whether to grant Development Permit Application PL-2020-0335 be reversed;
1. The Development Officer's Application Approval Decision of April 16, 2021 be reversed;
1. The developer should be allowed to resubmit Development Permit Application PL-2020-0335 so that it can be properly considered by City Council in compliance with the Zoning By-Law and the Act; and
1. The Appeal Board direct Council to comply with the Zoning By-Law in the exercise of its decision-making powers and other duties and functions; and to do so with observance of the principles of natural justice and procedural fairness;

Relief Sought 2

Additionally, the Appellants respectfully request Council be directed to:

1. Apply the appropriate test when considering conditions under section 3.4 of the Zoning By-Law;
1. Not delegate its powers, functions, and duties, namely its decision-making authority, to the Development Officer;
1. Ensure compliance with the principles of procedural fairness; and
1. Ensure Council Members confirm any conflicts of interest and that Council Member Konge not participate in any way during the hearing and decision-making of any subsequent development permit application from the developer.

In the alternative, should the Appeal Board decline to reverse the decisions under appeal, and determine a *de novo* hearing of this matter would “cure” all alleged breaches of the duty of fairness, and jurisdictional errors of Council and the Development Officer, the Appellants request an adjournment in order to prepare and make, written and oral submissions on the merits.

“The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.”

Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR
817, para 28
Supreme Court of Canada