Before the Yellowknife Development Appeal Board

IN THE MATTER OF AN APPEAL
Under the *Community Planning and Development Act* S.N.W.T. 2013, c.9
And the City of Yellowknife Zoning By-Law 4404;
Regarding Development Permit Application PL-2020-0335

BETWEEN:

Colin Baile, Elizabeth Baile, Judy Murdock,
Marilyn Malakoe, Garth Malakoe, Justin Nelson,
Maribel Nelson, Jillian Letts, Daron Letts,
Jenny Tucker, Dave Hatto, Eva Paul
Darcy Milkowski, Gabrielle Decorby,

Appellants

AND

City of Yellowknife
(City Council & The Development Officer)

Respondent

Written Submissions of the Appellants

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Written Submissions of the Appellants

Introduction:

[1] This appeal is made pursuant to section 3.10(1)(b) of the City Zoning By-Law No. 4405 (“the Zoning By-Law”) and pursuant to paragraph 62(1)(a) of the *Community Planning and Development Act*, S.N.W.T 2013, c.9 (“the Act”). The Appellants are adjacent property owners who are each adversely affected by the proposed development.

[2] This is an appeal of two decisions. Firstly, City Council’s decision of February 8, 2021 in which Council approved only the building use of the Development Permit Application presently before you, and thereafter invalidly delegated its decision-making authority to the Development Officer.

[3] The second decision appealed is that of the Development Officer made April 16, 2021 in which Development Permit Application PL-2020-0335 was approved without the statutory authority to do so.

[4] Both decisions involve the misapplication of the Zoning By-Law by the City Council and the Development Officer.

[5] The Appellants will also demonstrate how both Council and the Development Officer breached several elements of the duty of fairness during the consideration of Development Permit Application PL-2020-0335. In doing so, both Council and the Development Officer denied the Appellants a fair process.

[6] In these written submissions, we present the background to the decision of City Council. We then outline the legislative authority that empowers City Council to act as a “Development Authority” and how it failed to follow this legislation. Simply put, City Council was required to make a decision about the entire development permit application. Instead, it dealt with a small portion of the decision, i.e., the “building use” only, and invalidly delegated the rest of the decision-making to the Development Officer.

[7] The second part of our written submissions deal with the failure of City Council and the Development Officer to follow the rules of natural justice, in particular, the duty of fairness including, the right to know the entirety of the developer’s application and to respond to it, the right to cross-examine, the right to an unbiased decision-maker, and the right to have the decision-maker who

heard the arguments regarding the application to decide the outcome of the developer's application. Finally, we comment on how the failure of Council to follow the legislation and the rules of natural justice has undermined the development permit process.

[8] The unlawful decision-making of both Council and the Development Officer, together with the numerous breaches of the duty of fairness amount to a process so flawed, as to require the Appeal Board to reverse both decisions and return the matter back to Council with direction to follow the legislation and the rules of natural justice in making its decision.

Background:

The Application for a Development Permit and Notice

[9] On or about December 2, 2020, the City of Yellowknife (the "City") received a Development Permit Application from *AVENS – A Community for Seniors*, a non-profit organization incorporated under the *Societies Act* of the Northwest Territories (the "developer").

[10] On or about December 27, 2020 one of the Appellants received written notice of the Development Permit Application (the "Notice"). Another Appellant contacted the City by telephone on January 6, 2021 and sought further information about the Development Permit Application. That Appellant was informed all of the adjacent Matonabee Street property owners were inadvertently missed in the notification process. Notices (Appendix 1) were hand delivered to all adjacent Matonabee Street residents that same day. The Notice stated that any written comments from impacted landowners were to be received by 4:30pm on January 13, 2021.

[11] The Appellants asked the Development Officer for copies of the developer's Development Permit Application but were refused. The Appellants were required to deal directly with the developer who provided access to certain documents via an Internet site. As will be discussed later, the Appellants were never provided with a copy of the entire Development Permit Application.

[12] Due to the delayed distribution of the Notice, and the lack of ability of the Appellants to access the documents, the Appellants requested a postponement. Council postponed addressing the matter for one week. The refusal to disclose the entire Development Permit Application and the improper notice were the beginning of a number of procedural and legal errors on the part of the City that tainted the whole process with respect to Development Permit Application PL-2020-0335.

Council's Hearing of the Application and Decision

[13] On January 25, 2021, Council's Governance and Priorities Committee (a committee of the whole) conducted a public meeting at which Council received a summary of the Development Permit Application from City Administration and received both oral and written submissions from two of the Appellants.

[14] On February 1, 2021 Council's Governance and Priorities Committee received additional written and oral presentations on the Development Permit Application from the developer, City Administration, and several of the Appellants. The Committee passed a motion to recommend Council approve the Conditionally Permitted Use (Special Care Facility) (Appendix 2 at page 8).

[15] At City Council's meeting on February 8, 2021, it received further oral and written submissions from the Appellants, which included submissions on its jurisdiction. Council unanimously passed Motion #0025-21 approving:

> *That Council approve the Conditionally Permitted Use (Special Care Facility) at Lots 43 and 44, Block 62, Plan 4252 (5710 50th Avenue)*

Council also passed motion #0026-21 adding an amendment to Motion #0025-21:

> *That the motion be amended to include the following condition:*
>
> *That Council direct Administration to ensure vehicular access/egress points to public roadways, as well as interior driveways, parking lots and circulation areas, are in accordance with accepted transportation standards.*

[16] On February 22, 2021 Council adopted the minutes of its February 8, 2021 meeting, thereby ratifying Motions #0025-21 and #0026-21.

[17] It is our position City Council should not have made the decision that is reflected in these motions. Council misused its decision-making authority as a Development Authority and it failed to follow the rules of natural justice. These two grounds are the focus of this appeal. Therefore, during this appeal, we do not address the flaws in the Application for a Development Permit and why the development permit should not have been granted on its merits. We will however address how Council improperly considered the impact of the proposed development on adjacent property owners and the neighbourhood, and how Council's actions led to procedural errors. This appeal addresses the decision-making authority exercised by Council as the appropriate development authority and the manner in which this decision-making authority was exercised in passing Motions #0025-21 and #0026-21.

[18] It is our position that if City Council had exercised its decision-making authority properly, it would have decided it did not have a complete and proper application before it and it would have rejected or delayed the Application for a Development Permit.

[19] On February 8, 2021, City Council approved the conditionally permitted use of the proposed Avens Pavilion as a "special care facility". We submit that this decision was flawed and we appeal the decision. There are two main grounds of appeal:

a) City Council only has the authority given to it under territorial legislation and the City Zoning By-law to approve developments. City Council did not follow the legislation and therefore acted outside of its authority.

b) When making decisions regarding developments, City Council is not acting as a political body. It is acting as a quasi-judicial body (See subsection B.1). It must follow the principles of natural justice. It ignored at least four fundamental principles of natural justice.

Approval of the Application for a Development Permit by the Development Officer

[20] This appeal also addresses how the Development Officer incorrectly exercised her decision-making authority.

[21] Following Council's February 8, 2021 decision and its subsequent delegation of its decision-making authority, the Development Officer took steps as though the *Development Permit Application for a Conditionally Permitted Use* was a *Development Permit Application for a Permitted Use*.

[22] The Development Officer entered into a development agreement with the developer, and seemingly negotiated all further conditions. This was completed without any further consultation with, or participation of, the Appellants.

[23] On April 16, 2021 the Development Officer issued a Notice of Decision (Appendix 9) by which Development Permit Application PL-2020-0335 was approved by the Development Officer. As will be presented, the Development Officer was without decision-making authority to approve the application.

[24] In the end, Development Permit Application PL-2020-0335 should be quashed, its approval reversed, and a new, complete development permit application should be submitted to City Council. Additionally, City Council should be directed to follow the legislation and the rules of natural justice in making its decision.

Issues:

[25] This appeal raises three issues; they being:

A. Whether Council's decision-making and other powers as a Development Authority were properly exercised concerning Development Permit Application PL 2020-0335;
B. Whether the Development Officer had any decision-making authority as a Development Authority concerning the approval of Development Permit Application PL-2020-0335; and
C. Whether Council and / or the Development Officer breached the principles of natural justice and the duty of fairness in their decision-making role.

Each issue shall be addressed individually.

A. Whether Council's Decision-making Authority and other Powers as a Development Authority Were Properly Exercised Concerning Development Permit Application Pl 2020-0335.

[26] There are three aspects to this issue. First, what is City Council's authority over development and from where does it receive that development authority? Second, how does Council exercise its decision-making authority, duties and functions when dealing with a *Development Permit for a Conditionally Permitted Use*; and third, what is Council's obligation to consider impact factors under section 3.4 of the Zoning By-Law?

A.1 Development Authority – Legal Framework

[27] As with all administrative decision-makers, Council's ability to make decisions about development within the City has it origin in legislation. The *Community Planning and Development Act*, S.N.W.T 2013, c.9 < https://canlii.ca/t/8s78> (the "Act") defines "Development Authority" as:

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

[28] Section 16 of the Act clearly states the Development Authority must be either Council or a Development Officer or both. 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. (Underline Added)

If a zoning by-law does not specify the decision-making authority as being shared, then all decision-making authority rests with the solely identified Development Authority.

[29] The powers, duties and functions of each Development Authority (Council and Development Officer) are specified in sections 2.2, and 2.4 of the Zoning By-Law. The powers, duties and functions of the Development Officer 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;

[30] Council's powers, duties and functions as a Development Authority are directed by section 2.4 of the Bylaw. It states, in part:

> 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.

[31] The powers, duties and functions of the Development Officer and Council noted above plainly and clearly invest Council with all decision-making authority concerning an *Application for a Development Permit for a Conditionally Permitted Use*. The Development Officer has no shared decision-making authority when deciding such an application; nor does the Zoning By-Law stipulate any decision-making authority rests with the Development Officer in consideration of a *Application for a Development Permit for a Conditionally Permitted Use*. In fact, the By-Law directs the Development Officer to refer all such applications to

Council. This interpretation is strongly supported by the scheme, purpose, and internal context of the Bylaw. In other words, other sections of the Bylaw reinforce that Council is the Development Authority for all decisions concerning an Application for a Development Permit for a Conditionally Permitted Use.

[32] This interpretation of Council's decision-making authority is further supported by section 3.4 of the By-Law. This section addresses the discretion of a Development Authority. Subsection 3.4(1) is about a Development Officer's decision-making authority.

> 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.

Subsection 3.4(2) is about Council's decision-making authority and includes:

> 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;

[33] Section 3.4(2) of the Zoning By-Law clearly directs that only Council is the Development Authority with the decision-making and other powers and duties to approve an *Application for a Development Permit for a Conditionally Permitted Use*. Yet the approved application before the Appeal Board was clearly approved by the Development Officer (Appendix 9).

[34] A further example of internal context of Council's and the Development Officer's decision-making authority is how an application for a variance is to be determined. Section 3.5 of the Zoning By-Law defines succinctly the decision-making authority of Council and the Development Officer.

[35] When a variance is required, approval of specific kinds of variances are assigned to the Development Officer as the Development Authority is outlined at section 3.5(1) of the By-Law:

> 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.

[36] At section 3.5(3) of the Zoning By-Law, a specific kind of variance is assigned to Council:

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

[37] This example demonstrates how section 16(2) of the Act (Noted at paragraph 28 above) anticipates a zoning by-law giving both Council and the Development Officer “shared” decision-making authority while defining the role of each.

[38] No such “shared” decision-making authority applies to the consideration of a *Application for a Development Permit for a Conditionally Permitted Use*.

[39] It is noteworthy that the Zoning By-Law gives a Development Officer only the discretion to approve or refuse an *Application for a Development Permit for a Permitted Use*. However, the By-Law gives Council far greater discretion when making a decision on an *Application for a Development Permit for a Conditionally Permitted Use*.

[40] Section 3.4(2) of the Zoning By-Law directs Council to approve or refuse the Application for a Development Permit for a Conditionally Permitted use, not just the building use aspect of the application.

[41] A third example of the internal context of the By-Law, which supports this interpretation, can be found at section 7.1 of the Zoning By-Law. This section is titled “Rules Applicable to All Zones” and addresses many aspects of a development regardless of the kind of zone is in question, e.g. R-1 Residential

(Single Detached Dwelling), or R-4 Residential (High Density). It addresses several considerations including landscaping, vehicular access, drainage, and outdoor lighting. This section directs both the Development Officer and Council to apply specific principles.

> 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.

[42] Section 7.1 of the Zoning By-Law clearly directs Council to apply these "development principles" in the same manner as a Development Officer. Were these "development principles" intended to be applied only by the Development Officer, this section would not have directed Council to also apply the "development principles".

[43] When an *Application for a Development Permit for a Conditionally Permitted Use* is being considered, the Zoning By-Law does not specify or direct that the Development Officer has any decision-making authority. Nor does the Zoning By-Law allow Council to delegate any of its decision-making authority. Therefore, Council, and only Council, must decide on all aspects of the *Application for a Development Permit for a Conditionally Permitted Use*.

A.1.1 Delegation of Council's Decision-making Authority

[44] Sections 12 and 13 of the *Cities, Towns, and Villages Act*, S.N.W.T. 2018, c.13 < https://canlii.ca/t/8hsq > directs that Council may only delegate its powers, duties or functions to specific entities. The Act also prohibits Council from delegating specific powers and functions.

> 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.

[45] Subsection 13(2) of the Act prohibits Council from delegating its decision-making authority as a Development Authority to the Development Officer. Further, subsection 13(3) prohibits Council from delegating "a power, duty or function" such as its decision-making authority as a Development Authority without a specific grant to do so by the *Community Planning and Development Act*. That Act gives no such authority.

[46] In consideration of Development Permit Application PL-2020-0355, Council, without statutory authority, decided only the "building use" and thereafter purposefully and invalidly delegated its decision-making authority to a Development Officer concerning this Development Permit Application.

[47] On April 16, 2021 the Development Officer approved the Application for a Development Permit subject to several conditions (Appendix 9). However as noted at paragraph 32 above, section 3.4(2) of the Zoning By-Law allows only Council to a) approve an *Application for a Development Permit for a Conditionally Permitted Use*, and b) only Council may make conditions to such an approval.

[48] Council was aware it was potentially making a legal mistake in delegating its decision-making authority to the Development Officer. On January 27, 2021 the Author made written submissions (Appendix 3) to Council regarding Council's jurisdiction. The submission was made in answer to, what we submit to be, misleading and incorrect comments made by the Mayor on January 25, 2021 at the Governance and Priorities Committee meeting about Council's role or jurisdiction in consideration of an *Application for a Development Permit for a Conditionally Permitted Use*. Council's reply to those submissions will be addressed later.

A.2 Types of Development Permits– Legal Framework

[49] In the consideration of whether Council's powers, duties and functions as a Development Authority, namely its decision-making authority were properly exercised, another element is the types of development permits defined in the Act and Zoning By-Law. There are several defined terms relevant to this element.

[50] The Act defines "development permit" as being:

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

[51] At paragraph 14(1)(c) of the Act, the mandatory types of uses are listed. At least one of the following uses must be identified in a zoning by-law for each zone:

- 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.

Section 14(1)(c) 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.

[52] The term "*at the discretion of a development authority*" in the Act is referred to in the Zoning By-Law as a "Conditionally Permitted Use". The Zoning By-Law defines "Conditionally Permitted Use" as:

> "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;

[53] Section 10.9 of the Zoning By-Law states the kinds of developments, which are defined as 'Permitted Uses' and 'Conditionally Permitted Use' for R3-Residential – Medium Density zones.

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 Special care facility, Public and quasi-public use, and Similar use.

[54] Of the four types of "Uses" listed in paragraph 14(1)(c) of the Act, the Zoning By-Law has grouped them into just two types; "Permitted Uses" and "Conditionally Permitted Use". Each of these two types includes both land and building uses. Such a scheme is in keeping with the Act. However, in doing so, the Zoning By-Law has eliminated the distinction between land use and building use as far as Development Authority is concerned. This means 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* concerning R3 zones. Council may not decide only building use or only land use, but rather Council is the Development Authority for all matters concerning an *Application for a Development Permit for a Conditionally Permitted Use*.

[55] When interpreting legislation, including municipal bylaws, the ‘specific’ always supersedes the ‘general’. Section 2.4(1) of the Zoning By-Law specifically directs Council to decide matters of a Development Permit Application for a Conditionally Permitted Use. Section 10.9 of the Zoning By-Law is a general list identifying what categories of development are “Permitted Uses” and which are “Conditionally Permitted Use” for Zone R-3. The section 10.9 list does not state which Development Authority is responsible for either type of use. That authority is assigned by section 3.4 of the Zoning By-Law.

[56] In consideration of Development Permit Application PL-2020-0335, Council, contrary to the statutory authority given to it as a Development Authority, decided only the “building use”. While making that decision rests with Council, it is not where Council’s decision-making powers as a Development Authority end. Thereafter Council purposefully and invalidly delegated its decision-making authority to the Development Officer concerning this Development Permit Application.

A.3 Council’s Discretion and Responsibilities

[57] 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 misinterpretation of Council’s powers, duties and functions as a Development Authority was repeated several times by the Mayor, the City Administrator, and other Council Members. These statements can be found in the recordings of Governance and Priorities Committee meetings (January 25 & February 1, 2021) and Council’s meetings (February 8, 2021).

> January 25,2021 - https://yellowknifent.new.swagit.com/videos/115480
> February 1, 2021 - https://yellowknifent.new.swagit.com/videos/115481
> February 8, 2021 - https://yellowknifent.new.swagit.com/videos/115213

Rather than addressing the Appellants’ submission on the issue of Council’s jurisdiction, which refuted that view, Council cited all of the previous *Applications for a Development Permit for a Conditionally Permitted Use* they had decided in the same manner.

[58] With respect, the Appellants submit Council's interpretation of its own jurisdiction as a Development Authority is clearly wrong. "*This is the way we've always done it.*" Is not a valid argument in defense of challenged process.

A.3.1 Standard of Review of Council's Decision

[59] We are asking the Development Appeal Board to decide that Council's interpretation of its own jurisdiction was not the proper legal interpretation. We understand this in not the type of decision the Development Appeal Board is normally asked to make and we wish to provide the Board with a solid legal basis for your decision.

[60] We recognize the Appeal Board is not a Court and this is not a process of judicial review in a Court of Law. However, the Appeal Board has the jurisdiction to determine that there has been a misapplication of the Zoning By-Law and the Act.

[61] It is our submission the Appeal Board must decide whether Council's interpretation of its authority was "correct". This is the standard to be applied according to existing case law. In our submission, based on this "correctness" standard, the Appeal Board should find the Zoning By-Law and the Act were misapplied.

[62] **Canada (Minister of Citizenship and Immigration) v. Vavilov**, 2019 SCC 65 (CanLII), <https://canlii.ca/t/j46kb> is the leading case on the issue of standard of review. The Supreme Court of Canada addressed how a reviewing Court should consider an administrative decision-maker's decision on jurisdiction. There are two standards of review: reasonableness and correctness.

[63] One of the circumstances, which calls for the correctness standard, is to resolve questions about the jurisdictional boundaries between two or more administrative decision-makers. This analysis is relevant in light of the question of jurisdiction between Council and the Development Officer. At paragraphs 63 – 64 of *Vavilov*, the Court wrote:

> [63] Finally, the 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: *Dunsmuir*, para. 61. One such question arose

> in *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, [2000] 1 S.C.R. 360, in which the issue was the jurisdiction of a labour arbitrator to consider matters of police discipline and dismissal that were otherwise subject to a comprehensive legislative regime. Similarly, in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, 2004 SCC 39, [2004] 2 S.C.R. 185, the Court considered a jurisdictional dispute between a labour arbitrator and the Quebec Human Rights Tribunal.
>
> [64] Administrative decisions are rarely contested on this basis. Where they are, however, the 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. The rationale for this category of questions is simple: the rule of law cannot tolerate conflicting orders and proceedings where they result in a true operational conflict between two administrative bodies, pulling a party in two different and incompatible directions: see *British Columbia Telephone Co.*, at para. 80, per McLachlin J. (as she then was), concurring. Members of the public must know where to turn in order to resolve a dispute. As with general questions of law of central importance to the legal system as a whole, the application of the correctness standard in these cases safeguards predictability, finality and certainty in the law of administrative decision-making.

[64] The question then is whether Council's interpretation of the Zoning By-Law as to Council's jurisdiction to only decide the building use issue and thereafter delegate its decision-making authority as a Development Authority to the Development Officer was correct. The Appellants argue correctness is the standard the Appeal Board should apply to its consideration of this issue.

[65] In the alternative, the standard would be reasonableness. In *Vavilov*, the Court wrote at paragraph 68:

> [68] 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. Conversely, where the legislature has afforded a decision maker broad powers in general terms — and has provided no right of appeal to a court — the legislature's intention that the decision maker have greater leeway in

> interpreting its enabling statute should be given effect. Without seeking to import the U.S. jurisprudence on this issue wholesale, we find that the following comments of the Supreme Court of the United States in *Arlington*, at p. 307, are apt:
>
> > *The fox-in-the-henhouse syndrome is to be avoided not by establishing an arbitrary and undefinable category of agency decision-making that is accorded no deference, but by taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority. Where [the legislature] has established a clear line, the agency cannot go beyond it; and where [the legislature] has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow. But in rigorously applying the latter rule, a court need not pause to puzzle over whether the interpretive question presented is "jurisdictional" . . . .*

[66] Applying the reasonableness standard to this issue arrives at the same conclusion. The Zoning By-Law is specific and precise as to Council's decision-making authority as a Development Authority; that Council and not the Development Officer must approve or deny an *Application for a Development Permit for a Conditionally Permitted Use*.

A.3.2 Council's Consideration of Impact Factors

[67] In support of our submission, we respectfully request that you, the Development Appeal Board, review the oral statements of certain Council members. Unlike the majority of appellant tribunals, the Development Appeal Board has the benefit of being able to consider the underlying decision-makers' deliberations and the extent to which the issues before them were considered and how the evidence was weighted. Council's "deliberation" of the decision under appeal, which took place at Council's meeting on February 8, 2021, can be viewed at https://yellowknifent.swagit.com/play/02082021-1071 (Items 17 &18).

[68] The Mayor's comments, beginning at approximately the 24-minute mark, demonstrate Council's analysis of how the Zoning By-Law's section 3.4(3) impact factors were considered. The majority of impact factors raised by the Appellants as having a negative impact on them, were not considered at all. 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.

[69] An example of Council's reasoning, is how it considered the impact of sun shadow caused by the development would have on adjacent properties. 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.

[70] This reasoning is not in keeping with section 3.4(3) of the Zoning By-Law. The Zoning By-Law requires Council to consider "*the circumstances and merits of the application*". Council erred by simply applying a comparative test between a "Permitted Uses" and a "Conditionally Permitted Use" development.

[71] Council failed to consider the actual impact this development will have on adjacent property owners; rather it used the test of '*If this were a permitted use apartment building…*'. However, the proposed development is not a permitted use apartment building. Section 3.4 directs Council to consider any impact factors a proposed conditionally permitted use development will have on adjacent properties. The Zoning By-Law requires Council to consider the actual impact factors a specific development will have on adjacent properties. Such an analysis should properly be undertaken on its own merits having regard to "*the circumstances and merits of the application*" and not one of "*what if this were an apartment building*".

[72] The Author made written submissions to Council on February 8, 2021 on Delay & Conditions (Appendix 4). In that submission, at paragraph 8, some of the differences between a Special Care Facility and a permitted use apartment building were identified:

> [8] Council members heard from Mayor Alty on February 1st, when she said that if this development was an apartment building, Council would not be involved. That statement is true, however it is important for Council members to understand why this development must be a 'conditionally permitted use – Special Care Facility'. These reasons include:
>
> • This Special Care Facility requires one quarter the number of parking spaces vs. an R3 apartment building (26 vs 102).
>
> • This Special Care Facility allows for a commercial kitchen, which will prepare meals for the 'assisted care' residents of the development as well as the 57

additional residents of the dementia facility and the long term care facility. It also allows for a commercial laundry. A R3 apartment building would not be allowed to operate such a commercial kitchen or laundry.

• This Special Care Facility proposes 38 staff parking stalls. A R3 apartment building would not require such parking at all.

• This Special Care Facility allows for almost half (46) of the units to be 'supportive care'. This designation allows for there to be limited or no ability to cook in the unit. A R3 apartment building would not be approved with such restrictions.

• One third of the total floor space of the development is for rooms such as commercial kitchen, commercial laundry, activity rooms, dining room, community wellness rooms, social rooms, common bathing rooms. All this additional floor space would not be required in a R3 apartment building. This means the footprint of a 'Special Care Facility' is far greater than a R3 apartment building. No apartment building with 102 units would ever have such a large footprint.

• This Special Care Facility is intended for a specific use: seniors' housing and care. An R3 apartment building cannot be intended for one specific demographic without dealing with human rights issues.

[73] Council did not acknowledge any of the Appellants' written submissions on any issues except for the Matonabee Street alley. Based upon Council's discussions and questions to City Administration and the developer, it is unclear if our written submissions (Appendix 5) were even read by Council.

[74] Apparently, Council failed to meaningfully consider the Appellant's submissions on all but one of the impact factors raised by the Appellants. The one impact factor considered to any degree by Council was the intended use of the Matonabee Street alley as the main access and parking location for the development. However Council's consideration of even this traffic issue was not in keeping with the requirements of the Zoning By-Law.

[75] At the time of the development permit application being filed with the City in December 2020, a "draft" Transportation Impact Assessment formed part of the application. The Appellant's raised with Council, numerous and substantive concerns about the draft Assessment, concerning the methodology used, the data collection process, and the study's conclusions. City Administration also had concerns regarding the draft study as expressed by them at Council's Governance and Priorities Committee meeting on February 1, 2021. At no time

were City Administration's specific concerns with the draft traffic study ever shared with the Appellants.

[76] There is no evidence that City Administration's concerns with the draft traffic study were ever shared with Council. It was understood as late as February 8, 2021 (see Council's February 8, 2021 meeting minutes) that the developer was in the process of preparing a revised traffic study at the direction of City Administration. No revised traffic impact study was available to Council as of its February 8, 2021 decision to approve the "building use" of the development permit application. As noted at paragraph 15 above, Council added a condition that the development permit should "*ensure vehicular access/egress points to public roadways, as well as interior driveways, parking lots and circulation areas, are in accordance with accepted transportation standards.*" In doing so, Council erred by: a) prematurely making a decision without having the awaited final traffic study; b) fettering its discretion by unlawfully delegating its decision-making powers and duties to the Development Officer, c) failing to fully consider the Appellants' submissions on the traffic issue, and d) failing to give the Appellants an opportunity to receive the final traffic study and make submissions on the final study. The Appellants became aware of the final traffic study after the April 16, 2021 approval decision and did not receive a copy until April 29, 2021.

[77] If Council had properly acted within its decision-making authority, it would have had before it a complete *Application for a Development Permit for a Conditionally Permitted Use*, which had been properly reviewed by the Development Officer. Council should then have taken into account the factors contained in section 3.4 of the Zoning By-Law, heard from the Appellants, and made a decision on the application. Instead, it had before it a flawed and incomplete *Application for a Development Permit for a Conditionally Permitted Use*. Council made a decision on building use without properly considering the section 3.4 factors and then invalidly delegated decision-making for the rest of the application to the Development Officer.

[78] In consideration of Development Permit Application PL-2020-0355, Council erred by applying an incorrect test in its determination of the development's impact factors. Further, Council erred by prematurely deciding conditions to affix to the development permit without waiting for further evidence it was aware would be forthcoming. Council also erred by failing to give due consideration to the submissions of the Appellants.

B. Whether the Development Officer had any Decision-Making Authority as a Development Authority Concerning the Approval of Development Permit Application PL-2020-0335.

[79] Part A of our submission addressed Council's powers, duties, and functions as a Development Authority. Also addressed was Council's invalidly delegated decision-making authority. As noted, it is our position the Development Officer is without decision-making authority to approve Development Permit Application PL-2020-0355. It is however appropriate to examine the unlawful April 16, 2021 approval of Development Permit Application PL-2020-0355.

[80] The April 16, 2021 decision to approve Development Permit Application PL-2020-0355 was made by the Development Officer (Appendix 9). The wording of the decision begins with:

> 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:

[81] Development Permit Application PL-2020-0355 is an *Application for a Development Permit for a Conditionally Permitted Use*. Accordingly, under section 3.4(2) of the Zoning By-Law, Council is the sole Development Authority which has the decision-making authority to approve, with or without conditions, or deny Development Permit Application PL-2020-0335.

[82] The decision to approve the Development Permit Application included 12 conditions. These conditions are a collage of issues which fall under the decision-making authorities of Council and the Development Officer. Also there are issues which have been decided by the Development Officer that adjacent

property owners should have had an opportunity to address before Council. Additional, there are conditions about which, the Appellants have been denied information as a result of being refused a copy of the Development Agreement (See section C.3.1).

[83] The conditions are as follows:

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.

[84] Provided are a few examples of the statutory authority of the conditions and the source of decision-making authority.

Condition 1 – Under subsection 3.5(1) of the Zoning By-Law, a Development Officer may approve a variance to a front yard setback.

Condition 2 – This condition was made by Council as part of the Council's decision now under appeal.

Conditions 3&4 – These conditions are prescribed by rule under paragraphs 7.1(2)(i)&(g) of the Zoning By-Law and are applicable to all developments. Council is the Development Authority which should have considered these conditions.

Condition 5 – Without full disclosure of the Development Agreement, the Appellants can not know what additional conditions apply to the approved development permit. We do know however from the released Stamped Plans (Appendix 11, page 3) this *Application for a Development Permit for a Conditionally Permitted Use* was approved with a condition that a new access road be built from the Avens Pavilion to Gitzel Street through Lot 1 Block 119 which is zoned as Parks and Recreation. Construction of such a road would be a conditionally permitted use, thereby requiring Council's approval under section 10.5(2)(b) of the Zoning By-Law. No such approval has been requested or granted and no adjacent property owners have been notified as required by section 3.7(2) of the Zoning By-Law. The Development Officer was without decision-making authority to allow for the construction of the proposed road works.
Condition 8 – This condition is a general regulation under section 9.1(j) of the Zoning By-Law.

Conditions 3,4,8,9, and 10 – All of these conditions fall under Council's decision-making authority – Zoning By-Law section 3.4(3)(a)(iii). As such, the Development Officer has no decision-making authority to make these conditions.

[85] The Development Officer's decision to approve Development Permit Application PL-2020-0335 is flawed in several ways.

- Council does not have the authority to delegate its decision-making authority, powers, and duties to the Development Officer. As such the Development Officer was 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?

C. Whether Council And / Or The Development Officer Breached The Principles Of Natural Justice And Procedural Fairness In Its Decision-Making Role.

[86] This issue speaks to how Council and the Development Officer exercise their powers, duties and functions, including decision-making authority, and the standards which apply to reviewing such actions. Procedural fairness is about the process that leads to a decision, not the conclusion reached that results in a decision. In addressing this issue, several elements of procedural fairness will be discussed. These include: the kind of authority exercised by Council and the Development Officer in making their decisions now under appeal, the key principles of procedural fairness, and the factors to be considered in determining whether a procedure followed by a decision-maker meets the requirements of procedural fairness.

[87] In Section D of these submissions, we will address the Appeal Board's duties and jurisdiction for addressing procedural unfairness.

C.1 Council's Quasi-judicial Role

[88] The first consideration of this issue is characterizing Council's role in deciding a Development Permit Application. Any city council wears 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. The first two can be thought of as being political in nature, while the third is adjudicative.

[89] The Courts, in reviewing various city council decisions have considered these separate and succinct powers.

[90] The Prince Edward Island Court of Appeal in **Charlottetown (City) v. Island Reg. & Appeals Com. 2013 PECA 10** (CanLII), <https://canlii.ca/t/fzw4c> at paragraph 46 notes the different 'hats' a city council may wear in this way:

> [46] Council decisions are subject to appeal under the Planning Act. Any suggestion that Council's decisions are insulated from review because Council is elected and the Commission is not has to be considered in context and appropriately moderated. The constraints on Council's discretion depend on the role being performed by Council. 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. When it is called upon to exercise its discretion in such a matter that affects the rights of persons to have the matter decided in accordance with particular rules, such as the CDA Bylaw, the Official Plan, and the Planning Act, then Council must exercise its discretion in accordance with the enactment containing those rules (**Wiswell v. Winnipeg (Greater),** [1965] SCR 512, at paras.32-36, applied in **Welbridge Holdings Ltd. v. Winnipeg (Greater)**, [1971] SCR 957, at pp.968-969; **St. Peters Estates Ltd. v. Prince Edward Island (Land Use Commission)**, [1990] P.E.I.J. No. 121 (PESCTD), at pp.34-35; David G. Boghoslan, LL.M., and J. Murray Davison, Q.C.: **The Law of Municipal Liability in Canada** (LexisNexis, 1999), pp.1.15-1.17. See also: **Catalyst Paper Corp. v. North Cowichan (District)**, 2012 SCC 2, at para.10-12, which in the course of considering the validity of legislative power by a municipality, described the

> source and limits of delegated authority, and advised that all kinds of municipal decisions may be reviewed for compliance with the governing legislative scheme and applicable procedural fairness.) (Underline Added)

The PEI Court of Appeal in **Charlottetown** at para. 47, also relied of the Supreme Court of Canada's decision in **Shell Canada Products Ltd. v. Vancouver (City), [1994] 1 S.C.R. 231** <https://canlii.ca/t/1frts>. At paragraph 92 of **Shell**, the Supreme Court of Canada stated:

> [92] The powers of a municipality are classified for some purposes. The classifications include legislative functions, quasi-judicial functions and business functions. The nature of the function may affect the duties and liabilities of the municipality. Accordingly, it may be liable in contract or tort in respect of its business function but civil liability in respect of its legislative or quasi-judicial function is problematic. 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. See Welbridge Holdings Ltd. v. Metropolitan Corporation of Greater Winnipeg , [1971] S.C.R. 957, andWiswell v. Metropolitan Corporation of Greater Winnipeg , [1965] S.C.R. 512. As creatures of statute, however, municipalities must stay within the powers conferred on them by the provincial legislature. In R. v. Greenbaum , [1993] 1 S.C.R. 674, Iacobucci J., speaking for the Court, stated, at p. 687:
>
> > *Municipalities are entirely the creatures of provincial statutes. Accordingly, they can exercise only those powers which are explicitly conferred upon them by a provincial statute.*

[91] The Courts have found a city council's determination of a development permit is a quasi-judicial function and therefore has a duty of fairness. *"[W]hen Council is deciding whether to approve an application for development, it is acting as a tribunal performing a quasi-judicial function".*

C.2 Duty of Fairness

[92] The duty of fairness is the most basic requirement of administrative tribunals. It is flexible and applied according to the context and the case. The Supreme Court of Canada, in **Moreau-Bérubé *v*. New Brunswick (Judicial Council**), [2002] 1 S.C.R. 249, 2002 SCC11 <https://canlii.ca/t/5221> at paragraph 75 stated:

> "*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*".

[93] As noted at paragraph 87 above, the Supreme Court in **Shell** spoke of a city council's duty of fairness when exercising a quasi-judicial function.

[94] 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;
2. The right to an unbiased decision maker;
3. The right to have the person who heard the case decide it; and
4. The right to know the reasons for the decision.

[95] The standard to be used when considering if a quasi-judicial decision-maker failed to provide a fair process is "correctness". In other words, deference need not be given to the decision-maker; either the process was fair, or it was not. The Appellant shall show how Council and City Administration together have breached several of the key principles of fairness. Each key principle will be addressed individually.

[96] The Court of Appeal for British Columbia in **Murray Purcha & Son Ltd. v. Barriere (District)**, 2019 BCCA 4 <https://canlii.ca/t/hwrrn> stated very clearly that the duty of fairness is either complied with, or it is not.

> *[23] 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.* (Underline Added)

[97] In addition to knowing what principles are reflected by the duty of fairness, it is also important to know how each element of duty of fairness is to considered. In ***Baker v. Canada (Minister of Citizenship and Immigration***), 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817 at paragraphs 21 to 27, the Supreme Court of Canada addressed the factors to be considered in determining whether a procedure meets the requirements of procedural fairness.

> i) the nature of the decision being made and the process followed in making it;
>
> ii) the nature of the statutory scheme and the terms of the statute pursuant to which the tribunal operates;

iii) the importance of the decision to the individual or individuals affected;

iv) the legitimate expectations of the person challenging the decision;

v) the choice of the procedure made by the tribunal, particularly where the statute leaves that choice to the tribunal

[98] Each of the relevant key principles will be addressed individually below and it will be shown how these principles were violated in the context of the decisions and actions of Council and the Development Officer.

C.3 The Right to Know the Case and Reply to it

[99] 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; 2) that party must receive the notice with enough time and in enough detail to adequately prepare and respond; and 3) the affected party must have a reasonable opportunity to present evidence and make an argument.

C.3.1 The Right to Know the Case

[100] The first element relevant to this appeal is that parties 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.

[101] On January 6, 2021 most of the Appellants were served with notice of the Development Permit Application. Three documents which formed part of the Development Permit Application were attached to the notice. These included a portion of the ‘Avens Pavilion Elevations’, the ‘Avens Pavilion Site Plan’, and the ‘Aven Pavilion Shadow Study’.

[102] The following day on January 7, 2021, the author emailed the City's Development Officer. That email included the following request:

> *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. Specifically, I require all additional information which accompanied the Application form as required by section 3.3(2) of the Bylaw 4404. (*Appendix 6, page 4)

[103] The Development Officer replied the same day. That reply included:

> *As mentioned in earlier correspondence where you were cc'd, the 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.*
> *(*Appendix 6, page 3)

[104] The email exchange continued with the author replying to the Development Officer, which included:

> *While "proprietary" knowledge is a term which simply identifies ownership, it is not the same as "secret". In fact Avens has made some of the withheld information public already. 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. There are inherent limits on how proprietary information may be used by third parties, but those limits do not extend to access, by involved parties, to the information in an administrative justice process.*
> (Appendix 6, page 2)

[105] The Development Officer replied, in part:

> *Please note however that site 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. It is not my intent to conceal information or to make you feel like there are secrets, and 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. (*Appendix 6, page 1)

[106] The following day on January 8, 2021, the City's Manager of Planning & Lands Division emailed the author with the following:

> *Through this email, 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. As such, I will give Kenny and the Aven's team an opportunity to provide you with the documentation and we can pick this up again if you are not satisfied with the information that you receive. Please see Kenny's contact information below.*
>
> *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. Please let me know if you have any questions or concerns going forwards. (*Appendix 7)

[107] These strings of emails clearly demonstrate the City's two procedural errors. **Firstly**, 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 is conducted in a public forum. In fact, the City later made the application documents in question public as part of the Governance and Priorities Committee's February 1, 2021 agenda documents. They can be found at: (https://calendar.yellowknife.ca/Document/View/f9b7d499-9bf1-43fe-ba43-acbf00cff612).

[108] On January 12, 2021, the developer provided the Appellants with access to the documents forming part of the Application for a Development Permit. The developer's email of January 12, 2021 to the author required the Appellants to keep the information confidential.

> *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.*
>
> *AVENS will make documents available to neighbours along Matonabee street, under the same Confidential Information agreement.*

> *The attached word document outlines how to access, comment on, and download the documents from the website once you have created a free account.*
>
> *By clicking on this link, you will agree to the terms above:* (Appendix 8)

[109] This access was "granted" by the developer under confidentiality conditions that are not in keeping with this key principle of procedural fairness. Because Council was acting as an administrative tribunal and bound by procedural fairness, it should have a) provided the application information to the Appellants directly, or b) directed the developer to disclose the information to the Appellants. Instead, the City left the matter to be resolved between the developer and the Appellants. There were no assurances all information was provided by the developer in the absence of direction from the City.

[110] The Development Officer should have exercised a "supervisory authority" to ensure procedural fairness: See **Thomas v Edmonton (City)**, 2016 ABCA 57 (CanLII), <https://canlii.ca/t/gnxs6> at paragraph 51.

[111] **Secondly**, it is clear from the City's correspondence that it failed to understand its own role or that of the Appellants in the development permit application process. The email exchanges between the City and the author demonstrate the City's view that the Appellants are only entitled to enough information in order for the Appellants to "comment" on the application.

> *As mentioned in earlier correspondence where you were cc'd, the 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. (*Appendix 6, page 3)
>
> *…..*
>
> *[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.*
> *(*Appendix 6, page 1)
>
> …..

> *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. (*Appendix 7)

[112] The Zoning By-Law at section 3.7(2) provides for notice to be given to adjacent property owners of an *Application for a Development Permit for a Conditionally Permitted Use*. That notice is to include directions about submitting comments. However 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 an administrative decision-maker.

[113] The City's invitation for the Appellant's to make "comments" to Council about the Development Permit Application, without providing the information which it knew would be before Council strongly suggests the City viewed this process as one of 'public consultation' rather than a quasi-judicial adjudication. When Council acts in its legislator role, it must undertake public consultation; such as when considering a By-Law amendment. That is a very different process compared to when Council carries out its role as a decision-maker. When Council carries out its quasi-judicial function, it must provide parties with standing, a more robust and meaningful opportunity to participate in the process.

[114] The developer's decision to provide the information does not cure City's procedural error. It was the City's responsibility to ensure the Appellant's were provided disclosure; the City did not do so. The Appellants had to rely on the developer to provide disclose. Without Council "overseeing" the disclosure of information, the Appellants had no way of knowing the completeness of the disclosure.

[115] Despite being asked by the Appellants, City Administration failed to provide a copy of the actual Development Permit Application form, nor has the City confirmed it provided all of the Application's supporting documents to Council.

[116] 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 same information was later made public by the City in its posting of the Council's Governance and Priorities

Committee January 25, 2021 agenda materials. (https://calendar.yellowknife.ca/Document/View/b3619caf-6090-4df9-b600-acb800f28919)

[117] **Thirdly**, On April 16, 2021, the Development Officer approved Development Permit Application PL-2020-0335 (Appendix 9). Three of the twelve conditions of the approved development permit require the developer to comply with elements of a Development Agreement entered into between the City and the developer.

[118] The three "conditions" requiring compliance with the Development Agreement are:

> *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.*

[119] The Development Officer directed compliance with the terms and conditions of the Development Agreement as a condition of the development permit. In doing so, the terms and conditions of the Development Agreement *became* conditions of the development permit.

[120] On April 22, 2021, the author emailed the Development Officer requesting information about the development permit including a copy of the Development Agreement. This request was made in order to know the full extent of the conditions which are part of the development permit. The request for a copy of the Development Agreement was denied (Appendix 10).

The author wrote:

> Is it possible for you to provide me with a copy of the development agreement between the City and Avens as well as information regarding the variance

> granted (what is considered the front yard, etc) and any other decisions reached in approving the development permit application. *(*Appendix 10, page 3)

In reply the Development Officer replied:

> I am not able to provide you with a copy of the development agreement, but I can confirm to you that the City entered into a Development Agreement to ensure onsite improvements, such as sidewalks & landscaping; and off-site improvements, such as the creation of a new roadway access; are properly implemented. *(*Appendix 10, page 1)

[121] No reason was given for denying the Appellants a copy of the Development Agreement. In doing so, the Appellants were denied the right to know the conditions of the development permit presently under appeal. This denial of the right to know the case has a greater impact than procedural unfairness. The denial of information disallows the Appellants from knowing all the conditions of the development permit. What “off-site improvements” did the developer and the City agreed to? Do these “off-site improvements” impact the adjacent property owners? Did the City and the developer agree to change features or elements of the development itself?

[122] Subsection 20(1) of the Act directs what obligations and responsibilities may be required of a developer as part of a Development Agreement. The Act also directs such a Development Agreement is ‘a condition of the approval of an application for a development permit’.

[123] Not only were the Appellants denied information required to make submissions to Council at the commencement of this application process, the City has refused to provide the Appellants with information about the approved development permit, thereby denying the Appellants the ability to know the full extent of the decision now under appeal. The Development Officer’s denial to provide the Appellants access to the Development Agreement goes beyond the denial to information used in making a decision which impacts us, it is a denial to know the decision itself. Further, the Development Officer in reaching the decision to approve the Development Permit Application used the requested information. 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.

[124] In consideration of Development Permit Application PL-2020-0355, Council and the Development Officer erred in failing to provide the Appellants (parties with standing) with the information which Council, and without development authority, the Development Officer, was to use in making their decisions about the Development Permit Application. In so doing, Council and City Administration breached a key principle of procedural fairness, namely denying the Appellants' the right to know the case and reply.

C.3.2 The Right to Participate – Cross Examination

[125] Another element of the principle of *The right to know the case and reply to it*, is that of participation. The Appellant's were given three opportunities to give oral and written submissions to Council. These being before Council's Governance and Priorities Committee on January 25, 2021 and February 1, 2021 and before Council on February 8, 2021. Each Appellant was afforded 5 minutes to make oral submissions, with a possible 2 additional minutes at Council's pleasure.

[126] On February 1, 2021, during Council's Governance and Priorities Committee meeting, the Author sought an opportunity to make further submissions and ask questions of the developer in attendance. The Committee Chair (the Mayor) advised the Author that Council would not allow any further comments or questions, "as per procedure".

[127] It is appropriate to consider Council's procedures. Council Procedures By-Law 4975 directs how Council conducts its business. Section 114 of By-Law 4975 establishes the Governance and Priorities Committee as a Standing Committee of Council. The duties of standing committees are as follows:

> 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.

[128] Section 118 of By-Law 4975 outlines the rules of procedure for standing committees. That section includes the following rules:

> 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;
> (Underline Added)

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

[129] On February 1, 2021 the Governance and Priorities Committee heard from three of the Appellants in addition to the City Administrator, other City Staff, and the developer. The author, after hearing from the other parties and several Council Members, sought to further "participate in the discussion" by requesting to make rebuttal submissions and direct questions to City Staff and the developer regarding their oral and written submissions. This request was denied.

[130] At approximately time stamp 1:19:00 of the recorded Committee meeting, (https://yellowknifent.new.swagit.com/videos/115481 [Item 3]) the exchange between the Mayor and the Author may be reviewed. You will note the Mayor states "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 principle of the right to know the case and reply to it. The Appellants were denied the opportunity to cross-examine City staff or the developer, each of whom gave testimonial evidence to Council. While the offer was made for the Appellants to make further written submissions, the opportunity was lost to cross-examine the developer and City Administrator who gave oral testimony.

[131] The Courts have considered the right to cross-examine during a quasi-judicial proceeding. In the matter of **Society for Promotion of Alternative Arts and Music v. Edmonton (City)**, 2008 ABQB 629, <https://canlii.ca/t/21797>, the Alberta Court of Queen's Bench dealt with a judicial review application concerning two decisions. The first decision was that of the Director of Permitting and Licensing for the City of Edmonton, and the second decision was that of the City of Edmonton Quasi-Judicial Standing Committee.

[132] There were several issues before the Court in this case. The issues included whether the Committee erred in providing the Applicant the time required to adequately present its case and also denied the Applicant's right to cross examine witnesses.

[133] In consideration of the allegations of procedural unfairness the Court stated:

> [40] Procedural unfairness, which I conclude resulted from the manner in which the hearing was conducted, might have been avoided in different ways:
>
> > a) A process of pre-hearing disclosure, which could have disclosed not only the documentary evidence but also the substance of the testimony expected from witnesses, would have enabled the Applicant to better prepare for the appeal hearing.
> >
> > b) When the Applicant indicated that new evidence had been brought forward at the hearing, an adjournment of the hearing to allow the Applicant to prepare a response to the new information would also have remedied this type of unfairness. I do note, however, that, although the Applicant indicated the information was new, it did not request an adjournment to prepare a response to the new information.
> >
> > 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. (Underline Added)

[134] The Court expanded on the issue of the right to cross examine witnesses. At paragraph 42 the Court stated:

> [42] The Applicant argues that a denial of the right to cross-examine may constitute a breach of the rules of natural justice in certain cases. The Applicant refers to **Syncrude Canada Ltd. v. Michetti,** (1994) 162 A.R. 16, as well as Brown & Evans in their textbook, *Judicial Review of Administrative Action in*

> *Canada* (Toronto: Canvasback, 1998), **Murray v. Rockyview No. 44**, (1980) 12 Alta. L.R. (2d) 342, and **Paterson v. Skate Canada**, (2004) 47 Alta. L.R. (4th) 112, as support for its submission that in this case denial of its request to cross-examine constituted a breach of the rules of natural justice. The Applicant argues that this is the type of case, referred to in the authorities, where cross-examination was the only effective means of defending against the allegations since the Respondent refused or was unable to provide the detailed supporting information underlying the generalized and summarized allegations and opinions which were offered as support for the imposition of the conditions. 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. (Underline Added)

[135] As with **Society for Promotion of Alternative Arts and Music**, the appeal now before you deals with a municipality's standing committee, undertaking a quasi-judicial role, which failed to afford the parties more than 5 minute blocks of time to present their case and failed to provide the parties an opportunity cross examine witnesses.

C.3.3 The Right to Participate – Reply

[136] It is clear from the record that the Appellants contested both the method and conclusions of studies submitted by the developer as part of it development permit application. The Appellants sought additional time and the ability to question other parties concerning statements made to Council. The requests were denied despite Council's own procedural rules. The consequence of Council's breach of this key principle of procedural fairness was 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.

[137] Council Members' words and actions confirm its misunderstanding of its quasi-judicial role. The entire process undertaken by Council in the review and deliberation of the decision now under appeal is reflective of Council's legislative role during public consultations. Referring to the Appellants as "presenters", limiting Appellants to 5 minutes, failing to allow cross-examination of other parties' on their evidence, are all a denial of the Appellants' right to participate.

[138] In consideration of Development Permit Application PL-2020-0355, Council erred in failing to provide the Appellants (parties with standing) with adequate time to present their case and cross examine other parties (City Administration and the developer) on their oral and written submissions. In so doing, the Council breached a key principle of procedural fairness, namely denying the Appellants' the right to know the case and reply.

C.4 The Right to an Unbiased Decision-Maker

[139] 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.

[140] 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.

[141] Often the term "conflict of interest" is used in reference to impartiality based on a direct financial interest. Bias or a reasonable apprehension of bias, however refers to broader circumstances whereby a decision-maker could be seen as not being impartial. By-Law 4976 – *Council Code of Ethics*`, includes two definitions relevant to this topic; they being:

"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, prejudgment, close mindedness, or undue influence;

[142] The two definitions are duplicated in By-Law 4975 – *Council Procedures By-law*. At section 19 of the By-Law, Council Members are to recuse from any matter for which a "conflict of interest" applies.

> 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.

[143] The By-Laws' requirements for impartiality are based upon the common law requirements for impartiality. In fact the By-Laws' definition of "conflict of interest" includes "*…anything that gives rise to bias, prejudgment,* [or] *close mindedness*".

[144] 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. Bias in this context can be either 'actual bias' or 'perceived bias' (reasonable apprehension of bias). Actual bias involves a discernable connection between a decision maker and the issue to be decided. The test for perceived bias has been thoroughly considered by the Courts. In Supreme Court of Canada decisions such as **Committee for Justice and Liberty et al. v. National Energy Board et al**., 1976 CanLII 2 (SCC), [1978] 1 SCR 369,<https://canlii.ca/t/1mk9k>, **R. v. S. (R.D.)**, 1997 CanLII 324 (SCC), [1997] 3 SCR 484, <https://canlii.ca/t/1fr05>, and by the Federal Court of Canada in **Boucher v. Canada (Attorney General)**, 2006 FC 1342 (CanLII), <https://canlii.ca/t/1q265>

[145] The test for perceived bias includes four elements:

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

[146] There are five common situations in which decision-makers are perceived to be biased. For the purposes of this appeal, two forms of bias will be discussed; they being relationship bias and attitudinal bias.

[147] It is important to remember that 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.

C. 4.1 Relationship Bias

[148] When considering relationship bias, one must be aware that everyone has relationships. This can be very challenging for decision-makers in small communities such as Yellowknife. However, decision-makers must assess and disclose their relationships should there be a possibility that any such 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.

[149] At the beginning of each Committee and Council meeting attended by one or more of the Appellants, the Mayor asked Council Members if they had a ‘pecuniary interest’. In other words, they were asked if they had a financial interest in the matter before them. Council Members were not asked if they had a conflict of interest which, under their own By-Law would include not only other forms of bias, but also close mindedness. No Council Member raised such concerns.

[150] 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.

[151] It is the Appellants’ understanding that Mr. Konge and Mr. Dolynny are past business associates and present friends. Further, it is our understanding Mr. Konge and Mr. Dolynny have gone on holiday travel together and they socialize together.

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

[153] By way of example, consider a scenario in which your neighbour took you to court over a dispute about the fence separating your properties. You later

found out that your neighbour and the judge have been friends for some time and have even gone on golfing trips to Las Vegas together.

[154] The following two page-captures are from Mr. Konge's publicly accessible Facebook page. The two photographs were posted in 2012 and 2014. Together, these photographs are demonstrative of Mr. Konge's close friendship with Mr. Dolynny, the developer's Chief Executive Officer.

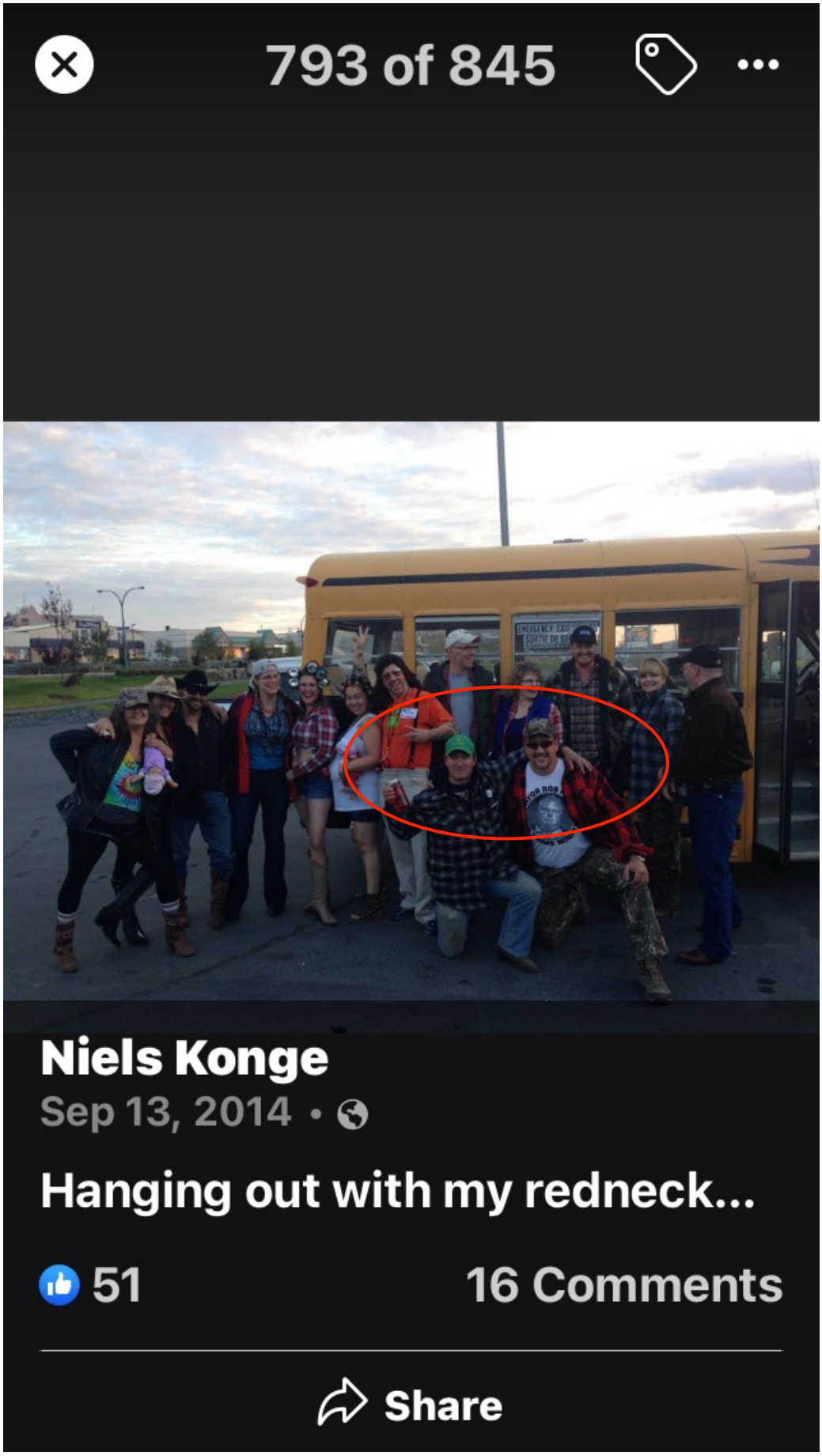
833 of 873

Niels Konge
Feb 15, 2012 •

With Mark Feldberg and 4 ot...

6 3 Comments

Share


793 of 845
Niels Konge
Sep 13, 2014 •
Hanging out with my redneck...
51
16 Comments
Share

[155] A decision-maker has an obligation to bring forward any circumstances which could lead to a 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.

[156] In the Supreme Court of Canada decision **Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)**, 1990 CanLII 31 (SCC), [1990] 3 SCR 1170, <https://canlii.ca/t/1fspc>, the Court considered municipal council members' responsibilities in terms of bias and apprehension of bias. Sopinka J. writing for the majority at page 1196, drew a distinction between different kinds of personal interest on the part of a council member, which could raise issues of bias or apprehension of bias:

> I would distinguish between a case of partiality by reason of pre-judgment on the one hand and by reason of personal interest on the other. It is apparent from the facts of this case, for example, that some degree of pre-judgment is inherent in the role of a councillor. That is not the case in respect of interest. There is nothing inherent in the hybrid functions, political, legislative or otherwise, of municipal councillors that would make it mandatory or desirable to excuse them from the requirement that they refrain from dealing with matters in respect of which they have a personal or other interest. 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. See *Re Blustein and Borough of North York*, 1967 CanLII 350 (ON SC), [1967] 1 O.R. 604 (H.C.); *Re Moll and Fisher* (1979), 1979 CanLII 2020 (ON SC), 23 O.R. (2d) 609 (Div. Ct.); *Committee for Justice and Liberty v. National Energy Board*, *supra*; and*Valente v. The Queen*, 1985 CanLII 25 (SCC), [1985] 2 S.C.R. 673. [Underline Added]

[157] The Court affirmed at page 1198 that the test for the reasonable apprehension of bias applies to a council member where relationship bias is alleged:

> Schwartz J. did refer to the fact that Councillor Savoie acted as an advocate for the development but in light of the above finding this reference must be taken to mean nothing more than that he argued in favour of it. 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. As I have stated above, there is nothing arising from the political and legislative nature of a councillor's duties that requires a relaxation of this test. The situation is quite distinct from a prejudgment case. In this case no personal interest exists or was found and it is purely a prejudgment case. Councillor Savoie had not prejudged the case to the extent that he was disqualified on the basis of the principles outlined above. The Court of Appeal was right, therefore, in reversing the judge of first instance on this point. The appeal on this ground must therefore fail.

[158] The Supreme Court has clearly stated that where a municipal councilor has a personal interest in a development, by way of a friendship with the developer, the reasonable apprehension of bias test should apply. This Appeal Board should apply this same test as to whether Council Member Konge's relationship with Mr. Dolynny amounts to an apprehension of bias. For relationship bias, actual bias need not be proven.

[159] In this case, Council Members were asked before each meeting if they had a financial interest in the development under consideration, however that is only one of several circumstances under which bias or conflict of interest may exist.

[160] Based upon the information above, there is far more than a threshold level of apprehension, which should have triggered Mr. Konge's disclosure in order to undertake a critical consideration of his continuing participation in deciding this development permit application. This was not done.

[161] The remedy for such an error will be addressed late in this submission.

[162] Should Council Member Konge disagree with our understanding of his friendship with Mr. Dolynny, he is able to offer further information to the Appeal Board at the hearing of this appeal.

C. 4.2 Attitudinal Bias

[163] Administrative decision-makers, as with judges, must keep an open mind. Such decision-makers must not say anything, or by action demonstrate that they

could have, or did prejudge a matter. To do so would breach the procedural fairness principle of the right to an unbiased decision-maker. Decision-makers should not make up their minds so strongly ahead of a case that they can't decide another way at the hearing. To do so transcends a reasonable apprehension of bias to become actual bias.

[164] In the normal course, the test for reasonable apprehension of bias as noted by the Supreme Court in **Committee for Justice and Liberty** would apply. However the Supreme Court of Canada noted that a municipal council member wears several hats including a political one. The Court 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.

[165] 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 in 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.

[166] The Supreme Court of Canada, stated at page 1197 in **Old St. Boniface Residents Assn.**:

> In my opinion, the test that is consistent with the functions of a municipal councillor and enables him or her to carry out the political and legislative duties entrusted to the councillor is one which requires that the objectors or supporters be heard by members of Council who are capable of being persuaded. The Legislature could not have intended to have a hearing before a body who has already made a decision which is irreversible. 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. In this regard it is important to keep in mind that support in favour of a measure before a committee and a vote in favour will not constitute disqualifying bias in the absence of some indication that the position taken is incapable of change. The contrary conclusion would result in the disqualification of a majority of Council in respect of all matters that are decided at public meetings at which objectors are entitled to be heard.

[167] It is the position of the Appellants that 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.

[168] During the Governance and Priorities Committee hearing on January 25, 2021, Council Member Konge made several comments about the development permit application, which is the subject of this appeal.

[169] These comments can be viewed at https://yellowknifent.new.swagit.com/videos/115480 (Item 3).

[170] Council Member Konge's comments include:

Time	Comment
36:45	*"For me as a Councilor, this is super easy, absolutely yes to the conditionally permitted use"*
37:40	"*So absolutely yes, and I look forward to this coming to Council so I can officially say yes"*
1:18:55	*"…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."*

[171] These comments confirm: 1) Council Member Konge strongly supports this development permit application; 2) prior to hearing all submissions, he confirms that he will emphatically decide this matter in favour of the developer, and 3) 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.

[172] The question to be considered by the Appeal Board is whether Council Member Konge has demonstrated a “closed mind” and is not open to be persuaded otherwise. The Appellants argue Council Member Konge’s comments unquestioningly demonstrate a closed mind resulting in bias.

[173] The Appeal Board is free to consider both Council Member Konge’s perceived relationship bias and attitudinal bias as self-supporting. His friendship with the developer’s Chief Executive Officer and his “closed mind” in defense of his friend’s development permit application each support confirmation of the other.

[174] From the Appeal Board’s perspective, little weight need be given to the reason why Council Member Konge failed to announce any potential apprehension of bias. Whether by ignorance or intention, the consequence is the same.

C.5 The Right to Have the Person Who Heard the Case Decide It

[175] The two duty to fairness core principles addressed previously are the right to know the case and reply, and the right to an unbiased decision maker. The third core principle of the duty of fairness to be addressed is the right to have the person who heard the case decide it.

[176] In section A of these submissions we addressed how Council incorrectly exercised its powers and duties as a Development Authority. Council’s delegation of its decision-making powers and duties to the Development Officer was done in contravention of the Zoning By-Law and the Act.

[177] 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.

[178] During the hearing of this matter, 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.

[179] Such an argument to avoid decision-making authority is without merit or reason. There are several administrative tribunal decision makers who rely on staff to assist in the evaluation of technical information. In the Northwest Territories, tribunals such as Land and Water Boards consistently have staff evaluate, summarize, and opine on information / evidence which comes before them.

[180] The vast majority of administrative tribunals have the ability to seek legal and technical advice. In this case, Council has consistently chosen to inappropriately delegate its decision-making authority as the Development Authority to the Development Officer.

[181] Council's actions have denied the Appellant's the right to a decision made by the decision maker that heard the case. Council heard submissions from the Appellants, City administration, the developer, and other community members. Yet Council did not make the decision to accept or reject the *Application for a Development Permit for a Conditionally Permitted Use*.

D. Remedy for Breach of Procedural Fairness

[182] The Development Appeal Board should quash the decisions of Council and the Development Officer and send the *Application for a Development Permit for a Conditionally Permitted Use* back to Council. This is the proper remedy for breaches of the duty of fairness.

[183] 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 CanLII 18 (SCC), [1979] 2 S.C.R. 561 and ***Taiga Works Wilderness Equipment Ltd. v British Columbia (Director of Employment Standards)***, 2010 BCCA 97 316 DLR (4th) 719, have been read to mean breaches of procedural fairness can be remedied by hearing the matter *de novo* (anew) by an appeal 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 appeal tribunal.

[184] The Court of Appeal of Alberta in **Thomas v Edmonton (City)**, 2016 ABCA 57 (CanLII), <https://canlii.ca/t/gnxs6> considered an appeal from a City of Edmonton Subdivision and Development Appeal Board decision. The Court addressed whether a hearing of an appeal before the Appeal Board could "cure" the procedural unfairness of uncompleted mandated processes; that being community consultation. The Court stated:

> [49] The doctrine of procedural fairness has been a fundamental component of Canadian administrative law for decades. The Supreme Court of Canada set out the law on when procedural fairness is triggered in ***Baker v Canada (Minister of Citizenship and Immigration)***, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 [***Baker***] at para 20: "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". It has subsequently reiterated this test on a number of occasions: see, for example, ***Dunsmuir v New Brunswick***, 2008 SCC 9 at para 79, [2008] 1 SCR 190; ***Canada (Attorney General) v Mavi***, 2011 SCC 30 at para 38, [2011] 2 SCR 504; ***Agraira v Canada (Public Safety and Emergency Preparedness)***, 2013 SCC 36 at para 93, [2013] 2 SCR 559. (Underline added)

[185] The Court went on to address whether a *de novo* hearing before the Appeal Board could "cure" the procedural unfairness.

> [54] 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: ***Taiga Works Wilderness Equipment Ltd. v British Columbia (Director of Employment Standards)***, 2010 BCCA 97 at para 37, 316 DLR (4th) 719 [***Taiga***]. However, sometimes a cure will not be possible as this Court found in ***Stewart v Lac Ste. Anne (County) Subdivision and Development Appeal Board***, 2006 ABCA 264, 397 AR 185 [***Stewart***]. A number of factors must be considered, including the gravity of the error, the seriousness of the consequences for the individual and the width of the powers of the appellate body: ***Taiga***, *supra* at paras 28-32,38; ***Stewart***, *supra* at paras 24, 27.

[186] The Court concluded a *de novo* hearing before the Appeal Board could not "cure" the procedural unfairness of appellants being denied a mandated notice requirements (paragraphs 53, 58, 64).

[187] That Court subsequently addressed another form of procedural unfairness, specifically, bias or apprehension of bias. The Alberta Court of Appeal in **Stewart v. Lac Ste. Anne (County) Subdivision and Development**

Appeal Board, 2006 ABCA 264 (CanLII), <https://canlii.ca/t/1pgt8> 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.

[188] To draw an analogy to the present appeal before you, 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.

[189] At paragraphs 17 to 29, the Appeal Court's analysis is instructive. As noted at paragraphs 27 to 29, the Appeals Court considered the SDAB's two options; conducting a hearing *de novo* (hearing the matter anew) or quashing the Development Authority's decision and returning the matter back to them for rehearing. The Court wrote:

> [27] The SDAB was required to, and did, consider the allegation of bias. In doing so, however, the Board misapprehended and erroneously concluded that there was no evidence of bias. In this case, the disposition of the SDAB cannot stand. 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. Section 687(3)(c) of the *Municipal Government Act* confers upon the SDAB the authority to substitute a decision of its own. However, in my opinion, a consideration of the five factors recited by de Smith favours a direction by this Court that should 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. I would also direct the SDAB, when considering the allegation of bias, to take into account the affidavit of Duncan A. Stewart, Q.C., sworn on November 22, 2004, in support of the application for leave to appeal to this Court and such other evidence as the SDAB may consider appropriate.
>
> [28] The gravity of the alleged error is sufficiently serious to warrant that result. The nature of the issue in dispute carries with it consequences of a serious nature for the Appellant should the ruling be adverse.
>
> [29] 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. (Underline Added)

[190] The Appeals Court found the proper method of addressing the allegation of bias against a member of the Development Authority was for the SDAB to firstly determine whether the allegations of bias were substantiated. If the allegations are confirmed by the SDAB, it should quash the Development Authority's decision to issue the development permit, and send the matter back to the Development Authority to rehear the matter.

[191] This case gives clear direction that the Appeal Board has both the jurisdiction and responsibility to remit a matter back to the Development Authority where bias or apprehension of bias is confirmed. This jurisdiction transcends section 69(1) of the Act.

[192] Due to the jurisdictional error made by Council as addressed in part A of these submissions, the Appeal Board is unable to hear this matter as though for the first time. This is because Council did not have the authority to make the decision in isolation which is the subject of this appeal. In doing so, the Appeal Board would only repeat Council's error if it were to rehear the matter. Therefore the Appeal Board must decide whether to quash Council's decision.

[193] In consideration of Development Permit Application PL-2020-0355, Council erred by a Council Member failing to recuse himself from hearing this development permit application. In so doing, the Council breached a key principle of procedural fairness, namely denying the Appellants' the right to an unbiased decision-maker.

E. The Detrimental Effect of Council's Failure

[194] The failure of Council to follow the legislation 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.

[195] What should have happened is this. City Council should have received a completed *Application for a Development Permit for a Conditionally Permitted Use*. The entire completed application should have been disclosed to the affected neighbours. The Development Officer should have ensured that the application was complete and presented his or her analysis of the application to City Council. City Council should then have listened to the submissions of the developer and the affected neighbours with respect to the development.

[196] The Zoning By-law directs Council as follows:

> 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.
>
> (b) The purpose and intent of the General Plan and the applicable Area Development Plan adopted by the City.
>
> (c) The purpose and intent of any non-statutory plan or policy adopted by the City.

[197] After listening to the submissions, Council should have approved or refused the application (section 3.4(2) of the Zoning By-Law).

[198] Instead, Council dealt with an incomplete and flawed application. The developer had been told by administration that its design for lane access was unsafe and it had to be redesigned. There was no final design before Council. The affected residents were never allowed to see the entire application. Submissions were made by the Matonabee Street residents about all of the impact factors including those set out above in section 3.4(3) based on the

information that they had been provided. These submissions were met by the response, "*If this was an R3 development, City Council would not have to make a decision. Therefore, the development officer can make these decisions.*" City Council then decided that Avens Pavilion was a special care facility and left everything else to the Development Officer.

[199] The reason that the Zoning By-Law requires City Council to look at the factors in section 3.4(3) and to make a decision on the application is because the development permit is for a conditionally permitted use. It is NOT an R3 – permitted use development. It affects the neighbourhood in ways that are unique and not contemplated by the R3 zoning. That is why these factors have to be considered by City Council in a public forum with submissions from the people affected and not negotiated between the developer and the Development Officer.

[200] Because the Appellants were denied the ability to see the Development Agreement, we remain uninformed as to all the conditions of the April 16, 2021 approved application. These unknown conditions were not before Council, but rather were negotiated behind closed doors between the developer and City Staff.

F. Conclusion

[201] It is appropriate to summarize the many errors in the misapplication of the Zoning By-Law and breaches of procedural fairness addressed in this appeal.

1. Council failed to properly exercise its powers, duties and functions as a Development Authority, namely its decision-making authority by:
    a. deciding only the building use issue;
    b. invalidly delegating its decision-making authority to a Development Officer;
    c. applying an inappropriate and incorrect test in weighing the impact factors under section 3.4 of the Zoning By-Law;

2. Council breached its duty of fairness and the principles of procedural fairness by:
    a. failing to allow the Appellants to cross examine the other parties who gave oral and written evidence to Council;
    b. failing to provide the Appellants with adequate time to present their oral submissions and argument;
    c. Council Member Konge failing to identify potential bias and apprehension of bias; and by failing to recuse himself from Council's decision-making in this matter; and
    d. failing to apply a process in consideration of the Application for a Development Permit, which reflected its decision-making role rather than its legislative or governance roles.

3. The Development Officer failed to properly exercise her decision-making authority, thereby misapplying the Zoning By-Law by:

    a. approving Development Permit Application PL-2020-0335 without statutory authority to do so;
    b. attaching conditions to the approval decision which were outside the Development Officer's decision-making authority.

4. The Development Officer breached the duty of fairness and the principles of procedural fairness by:

    a. failing to provide the Appellants with the requested Development Permit Application and supporting documents, or supervising the distribution of relevant information, and
    b. failing to provide the Appellants a copy of the Development Agreement entered into by the developer and City.

[202] This appeal raises significant concerns about how both Council and the Development Officer exercised their jurisdiction and misapplied the Zoning By-Law. Additionally, several breaches of procedural fairness are raised about how Council and the Development Officer failed to ensure procedural fairness.

[203] Any one of the noted errors in exercising the powers, duties or functions of a Development Authority or the breaches of duty of fairness issues would be sufficient grounds to overturn the approval of Development Permit Application PL-2020-0335. Collectively, these errors and breaches are demonstrative of a process so fraught with substantively prejudicial procedural and adjudicative mistakes as to demand redress.

[204] The Appellants respectfully seek the following relief:

a) Council's Conditionally Permitted Use Decision of February 22, 2021 be reversed;

b) Council's decision to have the Development Officer decide whether to grant Development Permit Application PL-2020-0335 be reversed;

c) The Development Officer's Application Approval Decision of April 16, 2021 be reversed;

d) 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

e) 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;

[205] 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;

2. Not delegate its powers and duties, namely its decision-making authority, to the Development Officer;

3. Ensure compliance with the principles of procedural fairness; and

4. 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.

[206] 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 make written and oral submissions on the merits.

All of which is respectfully submitted this 19th day of May 2021.

Colin Baile, Author
On behalf of and with the full concurrence of the other Appellants