

Notice of Appeal
Regarding the Approval of an Application for a Conditionally Permitted Use
Development Permit – #PL 2020-0335, including
Council’s Motions #0025-21 & #0026-21

TO: Secretary to the Development Appeal Board
Development Appeal Board
c/o City of Yellowknife Office of the City Clerk
Attn: Debbie Gillard
By Email

A. Notice of Appeal

[1] We, the undersigned, (the “Appellants”) hereby appeal the approval of Development Permit Application PL-2020-0335. The developer – *Avens – A Community for Seniors*, a non-profit organization incorporated under the *Societies Act* of the Northwest Territories refers to the proposed development as “the Aven Pavilion”.

[2] Specifically, we are appealing two decisions:

- a) Council’s decision of February 8, 2021 granting the building use as a Special Care Facility (“Conditionally Permitted Use Decision”); and
- b) The Development Officer’s decision to approve the development permit application (“Application Approval Decision”) on April 16, 2021.

[3] This appeal is made pursuant to section 3.10(1)(b) of the City Zoning By-Law No. 4404 (the “Zoning By-Law”) and pursuant to paragraphs 62(1)(a) & (c) of the *Community Planning and Development Act*, S.N.W.T. 2013. C.9 (the “Act”). We are adjacent property owners who are each adversely affected by the proposed development.

[4] City Council made the Conditionally Permitted Use Decision in the following manner. At City Council's meeting on February 8, 2021, it had received oral and written submissions from the Appellants. Council unanimously passed Motion #0025-21 approving:

“That Council approved the Conditionally Permitted Use (Special Care Facility) at Lots 43 and 44, Block 62, Plan 4252 (5710 50th Avenue)”.

[5] 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.

[6] On Monday, February 22, 2021, Council ratified that motion with the adoption of minutes from Council's February 8, 2021 meeting.

[7] For the purposes of the Zoning By-Law and the Act, the Conditionally Permitted Use Decision is a “decision of Council” made under the Zoning By-Law and therefore subject to appeal to the Development Appeal Board.

[8] The Development Officer's April 16, 2021 Application Approval Decision regarding development permit application PL-2020-0335 is a “decision of the Development Officer” made under the Zoning By-Law and therefore subject to appeal to the Development Appeal Board.

B. Reasons for Appeal

[9] The Appellants appeal the Conditionally Permitted Use Decision for the following reasons:

- i) City Council failed to follow its own procedure set out in section 3.4(2) of the Zoning By-Law. To use the words of the Act, City Council misapplied the Zoning By-Law when it approved only the conditionally permitted use (building use) aspect of the development permit application;
- ii) City Council did not exercise its development authority in keeping with the Act and Zoning By-Law;
- iii) City Council breached the principles of natural justice and procedural fairness in its decision-making role.

[10] The Appellants appeal the approval of Development Permit Application PL-2020-0335 by the Development Officer for the following reasons:

- i) The Development Officer incorrectly and without statutory authority, approved development permit application PL-2020-0335;
- ii) The Development Officer breached the principles of natural justice and procedural fairness in her decision-making making role; and
- iii) Since City Council and the Development Officer did not follow the procedures set out in the Zoning By-Law, the design of the Avens Pavilion contravenes the Zoning By-Law. Some of these design flaws are known to the Appellants; however, other flaws are not known because the proper public process was not followed before City Council.

C. Explanation of Reasons for Appeal

[11] Section 3.4(2) of the Zoning By-Law is clear in its meaning. When considering an Application for a Development Permit for a Conditionally Permitted Use, City Council cannot decide only on the “building use”. It must make a decision to either approve or refuse the Application for a Development Permit.

[12] By deciding the use of the Aven Pavilion as a conditionally permitted use (Special Care Facility) and leaving the decision to approve the Development Permit Application to the Development Officer, City Council invalidly delegated its authority.

[13] In making its decision to approve the use of Aven Pavilion as a special care facility, City Council failed to properly consider the impact factors Council was required to consider under section 3.4 of the Zoning By-Law. Council applied an incorrect test in its consideration of the impact factors. Further, it left the consideration and decision of some of these factors to the Development Officer.

[14] In making its decision to approve the use of Aven Pavilion as a special care facility, City Council based its decision on an incomplete and flawed application for a development permit.

[15] The Development Officer did not have the authority to approve the development permit application. Only City Council had this authority. City Council could not delegate this authority to the Development Officer.

[16] Both City Council and the Development Officer violated the Appellants’ right to procedural fairness. Both City Council and the Development Officer breached several key principles of the duty of fairness.

D. Summary of Supporting Facts and Law

D.1 Development Authority

[17] Section 16 of the Act provides for a municipal zoning by-law to identify Council or a Development Officer or both as development authorities for specific types of development permits. Section 16(2) of the Act directs where both Council and a Development Officer are identified as development authorities for a type of development permit, that specific circumstances must be identified as being the authority of either Council or a Development Officer.

[18] The Zoning By-Law at section 2.4(1)(a) directs Council to be the development authority for Conditionally Permitted Use Development Permit Applications. The Zoning By-Law does not grant authority of any kind to a Development Officer in consideration of a Conditionally Permitted Use Development Permit Application.

[19] 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.

D.2 Failure to Consider Mandatory Impact Factors

[20] Section 3.4(3) of the Zoning By-Law directs that Council “shall” consider the impact of numerous factors the proposed development will have on adjacent property owners.

[21] Not only did Council not properly consider these factors, Council could not consider the factors since the application for a development permit did not adequately

address some of these impact factors. By the City's own admission, the application was incomplete.

[22] At the direction of City Administration, the developer provided as part of its Development Permit Application, a "draft" Transportation Impact Study. City Administration deemed this study inadequate and the developer was directed to provide a more comprehensive study.

[23] At the time of Council rendered its Conditionally Permitted Use Decision, it only had the developer's draft study. Rather than delaying its decision regarding impact the development would have on the surrounding neighbourhood, Council delegated its authority to the Development Officer with the broad and inappropriate condition that vehicle traffic both in and around the development site comply with "accepted transportation standards".

[24] In doing so, Council made its decision based on incomplete and contested information. Further, Council then "passed off" to the Development Officer all further decision-making authority and responsibility.

[25] In leaving this decision-making to the Development Officer prior to the developer submitting all required evidence, Council deprived the Appellants of the opportunity to make submissions with respect to the mandatory impact factors as required by the Zoning By-Law.

[26] Of the impact factors considered by City Council, it inappropriately applied an incorrect test. Council simply used a comparison between 'permitted use' criteria and that of 'conditionally permitted use', rather than an analysis on the merits.

D.3 Council's Analysis and Decision

[27] During Council's meeting on February 8, 2021, the Mayor stated the motion before it "*...is not to approve development number xxxx, it's a motion to approve the building use.*" The Mayor noted that in the past five years Council has addressed twenty-five conditionally permitted use applications in the same manner.

[28] This interpretation of the Zoning By-Law is erroneous. Section 2.4(1) of the Zoning By-Law gives sole development authority to Council for development permit applications listed as conditionally permitted uses.

D.4 Procedural Fairness and the Duty of Fairness

[29] 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.

[30] Both City Council and the Development Officer breached the Appellants' right to know the case and reply to it. The Development Officer refused to provide the Appellants with information necessary to know the case. City Council denied the Appellants the right to fully participate.

[31] Additionally, City Council, by action and inaction breached the Appellants' right to, 1) an unbiased decision-maker, and 2) to have the person who heard the case decide it. Council Member Konge failed to declare a conflict of interest in deciding this matter. The conflict of interest in centered on relationship bias and attitudinal bias. Additionally, while Council "heard" the case, it was the Development Officer who approved the application.

E. Adversely Affected

[32] The Appellants have been adversely affected.

[33] Both the Development Officer's and City Council's breaches of procedural fairness and misapplication of the Zoning By-Law and Act, have resulted in a denial of a fair process and breached the Appellants' entitlement to a duty of fairness.

[34] Further, City Council's misapplication of the Zoning By-Law has resulted in the approval of the development permit application, which if allowed would significantly impact, and materially interfere with our use, enjoyment and value of our properties.

F. Relief Sought

[35] The Appellants seek the following relief:

- a) Council's Conditionally Permitted Use Decision of February 22, 2021 be reversed and the Aven Pavilion Development Permit Application be rejected;
- b) The Development Officer's Application Approval Decision of April 16, 2021 be reversed;
- c) 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
- d) The Appeal Board direct Council to comply with the Zoning By-Law in the exercise of its development authority and with observance of the principles of natural justice and procedural fairness;

All of which is respectfully submitted April 29, 2021

Colin Baile, Author

Matonabee St.

And Signed By:

Name	Address
Judy Murdock	Matonabee Street
Marilyn Malakoe	Matonabee Street
Jenny Tucker	Matonabee Street
Liz Baile	Matonabee Street
Maribel Nelson	Matonabee Street
*Gabrielle Decorby	Matonabee Street
Eva Paul	50 Avenue
*Darcy Milkowski	Matonabee Street
Garth Malakoe	Matonabee Street
Justin Nelson	Matonabee Street
Daron Letts	Matonabee Street
Jillian Letts	Matonabee Street
Dave Hatto	Matonabee Street

* Ms. Decorby and Mr. Milkowski are Matonabee Street residents and are in support of this appeal, but are not adjacent property owners.