

CITY OF YELLOWKNIFE DEVELOPMENT APPEAL BOARD

IN THE MATTER of a development appeal between:

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

Appellants

- and -

The Municipal Corporation of the City of Yellowknife (Development Officer)

Respondent

Issued: June 25, 2021

File: 200-D1-H2-21

This is the decision of the City of Yellowknife Development Appeal Board ("Board") with respect to an appeal submitted pursuant to s. 62 of the *Community Planning and Development Act* ("Act").

Date of Board Hearing: May 29, 2021

Board Members in Attendance: Mr. W.R. (Bill) Gault, Chairperson
Ms. Ann Peters,
Ms. Georgina Rolt, and
Mr. Matthew Yap.

Ms. Debbie Gillard, Secretary

Appearances:

Mr. Colin Baile Representative for the Appellants

Ms. Libby Macphail Development Officer, City of Yellowknife
Ms. Kerry Thistle Legal Counsel for the City of Yellowknife

Mr. Thomas Milan Developer
Mr. Toby Kruger Legal Counsel for the Developer



Decision:

After reviewing the submission of the Appellants, Developer and Development Officer, and the evidence of the parties present at the hearing, and after reviewing the written submissions filed with the Board; the Board, having due regard to the facts and circumstances, the merits of the Appellant's case and to the purpose, scope, and intent of the Community Plan and the Zoning By-law, determined that the decision of the Development Officer dated April 16, 2021 to approve Development Permit No. PL-2020-0335 be **confirmed**.

The Board's reasons for this decision are as follows:

BACKGROUND

1. The role of the City of Yellowknife Development Appeal Board ("Board"), as set out in the *Act*, is to review development decisions of the Development Authority made under a Zoning By-law. The Board has the power to confirm, reverse or vary the decision appealed from and may impose conditions or limitations that it considers appropriate in the circumstances.
2. AVENS and Nahanni Construction submitted a Development Permit application to the Municipal Corporation of the City of Yellowknife's Development Officer ("Respondent") to construct a Special Care Facility composed of 102 Units of Independent/Supportive Living ("proposed development") at Lots 43 and 44, Block 62, Plan 4252 YELLOWKNIFE ("lots") within the municipal boundaries of the City of Yellowknife. This land is zoned as R3 – Residential Medium Density ("R3") pursuant to City of Yellowknife Zoning By-law No. 4404, as amended ("By-law No. 4404").
3. Section 10.9 of By-law No. 4404 regulates R3 – Residential Medium Density Zone development, and the purpose of the Zone is to provide areas for medium density residential development with a mixture of residential buildings.

GROUND OF APPEAL

4. The Appellants submitted that the grounds for their appeal include:
 - a. City Council ("Council") failed to follow its procedures set out in section 3.4(2) of the Zoning By-law and misapplied the Zoning By-law when it approved only the Conditionally Permitted Use (building use) aspect of the Development Permit application;
 - b. Council did not exercise its development authority in keeping with the *Community Planning and Development Act* and By-law No. 4404;
 - c. Council breached the principles of natural justice and procedural fairness; The Development Officer incorrectly, and without proper authority, approved Development Permit application PL-2020-0335;



- d. The Development Officer breached the principles of natural justice and procedural fairness; and
 - e. Council and the Development Officer did not follow the procedures set out in By-law No. 4404 and the design of the AVENS Pavilion contravenes the by-law.
5. Subsequently, the appellants alleged bias by one member of Council.
 6. Having reviewed all the information, in its deliberations the Board determined that it is required to consider whether there was a misapplication of By-law No. 4404 and whether:
 - a. The decision-making process by the Respondent was flawed;
 - b. There was a denial of natural justice and/or procedural fairness in the process used to reach the decision to issue the Development Permit and for the Appellants to make their case, including the allegation of bias against the Appellants; and
 - c. The City failed to appropriately consider the Development's impact on the Appellants.

Each of these issues will be addressed in turn, below.

DECISION-MAKING PROCESS

7. The Board heard uncontested evidence that Council considered the proposed development and approved the Conditionally Permitted Use for a Special Care Facility on lots. The City considered the application for a Conditionally Permitted Use at two Governance and Priorities Committee meetings, held on January 25, 2021 and February 1, 2021, and at a Council meeting held on February 8, 2021. These meetings were open to the public where Council heard presentations from interested parties, including from Appellants. Council stated a term to the development, requiring amendments for vehicle access in accordance with accepted transportation standards, as follows:

Council Motion #0025/26-21

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

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.

8. The Development Officer then considered and approved all remaining aspects of the Development Permit application. This meant the approval process within the City involved both Council and the Development Officer. The Appellants submit the Development Officer approving a development application which complied with the Conditionally Permitted Use and its conditions issued by Council was a misapplication of By-law No. 4404. The Respondents described this was an appropriate, normal, delegation where the Development Officer was determining if the application complied with the City's requirements or not.

9. The Board considered the Appellant's written and oral submissions. The submissions of the Appellant did not persuade the Board on a balance of probabilities that there was an error in the application of the By-law. In the alternative the Board determined that any alleged misapplication did not rise to a level to merit a reversal or amendment to the outcome. As a result, the Board dismisses this ground of appeal.

DENIAL OF NATURAL JUSTICE

10. The Appellants have alleged that Council and / or the Development Officer have breached the principles of natural justice and the duty to fairness in their decision-making role on grounds of procedural fairness by misapplying By-law No. 4404. Council's and / or the Development Officer's misapplication of By-law No. 4404 was alleged to have deprived the Appellants of their right to be heard with respect to a development that profoundly affects their property and neighbourhood.
11. The Board heard evidence that, following notice of the development to adjacent property owners, the Respondent denied the Appellants' request for copies of relevant materials and documents relating to the proposed development. The Respondent admitted that there were concerns and these issues were subsequently reversed; the materials were provided to the Appellants and the deadline for submissions was extended as a result. The Board heard further evidence that the Appellants were still able to make three submissions and express their views to the Respondent.
12. The level of procedural fairness is contextual and in this instance, the Board found there was an adequate level of procedural fairness granted to the Appellants. Therefore, the Board dismisses this ground of appeal as the Appellants did not prove a denial of natural justice or procedural fairness.

FAILURE TO CONSIDER IMPACT ON THE APPELLANTS

13. The Appellants expressed concerns with sun shadow; traffic; privacy; lighting; and property value. Each of these issues will be addressed in turn, below.

Sun Shadow

14. The Board considered the shadow studies presented by both the Appellants and the Respondent / Developer. The shadow study presented by the Appellants did not consider topography, vegetation or existing buildings and appeared flawed in the projection of the shadow cast. The Board concluded that the shadow study presented by the Respondent and Developer to be more accurate and shading to adjacent property would not be so unreasonable for the City to have reached its decision.

Privacy

15. The Appellants allege that the proximity of the proposed development will have an undue impact on the privacy of surrounding properties due to its proximity. The Board heard evidence that the proposed development meets the requirements of By-law No. 4404 with respect to height, and

rear and side yard setback requirements, for the R3 Zone. The Board considered the distances between the development and the existing residences provided by the Appellants and concludes that there is sufficient separation between the proposed development and the surrounding properties.

Lighting

16. The Board heard evidence that the exterior lighting on the proposed development and the placement of windows were adjusted by the Developer to reduce the impact on neighbouring properties.

Loss of Property Value

17. The Board considered the evidence provided and determined that the Appellants did not prove loss of property value.

Traffic Impact

18. The Board heard evidence that the proposed vehicle access from the laneway satisfies the requirements of By-law No. 4404, and the Yellowknife Fire Division. The Board considered the evidence provided and determined the Appellants did not prove the traffic impacts would be unreasonable.

Summary

19. The Board concludes that, while not to the satisfaction of the Appellants, the Respondent and Developer have considered their concerns and taken reasonable measures to mitigate the impact on neighbouring properties.

THE RIGHT TO AN UNBIASED DECISION-MAKER

20. The Appellants alleged that Council has failed to apply both its by-laws concerning impartiality, has also failed to comply with the common law requirements concerning impartiality and that Council Member Konge failed to disclose a close friendship with the Developer's Chief Executive Officer, Daryl Dolynny.
21. The Board heard evidence that Councillor Konge posted images of himself and Mr. Dolynny at social gatherings on his Facebook page. Councillor Konge also spoke wholeheartedly in favour of the development at Committee and Council meetings and stated that he welcomes this development within the community. While the evidence suggests a relationship between one Council Member and a representative of the Developer, the evidence presented does not rise to the level of bias, or that it would be fatal to the approval of the development. The Board accepts that members of Council, as political officials, are expected to voice their view on matters as part of the decision making process. Councillor Konge is but one member of Council and Council as a whole was the decision maker.

22. The Board concludes that the decision to approve the Conditionally Permitted Use was passed unanimously by Council and the allegation of bias on the part of Councillor Konge was not proven on a balance of probabilities. In any event, Councillor Konge's vote would not have affected the outcome. As a result, this ground of appeal is dismissed.

DISPOSITION

23. In conclusion, it is the determination of the Board that the evidence presented is insufficient to declare that the Respondent erred in issuing the Development Permit. The Development Appeal Board confirms the Decision of the Development Officer to approve the issuance of Development Permit No. PL-2020-0335.
24. Pursuant to s. 70 of the *Community Planning and Development Act*, this decision of the Board is final and binding on all parties and is not subject to appeal.

Dated this 25TH day of June, 2021.



W.R. Gault, Vice-Chairperson



for Debbie Gillard, Secretary