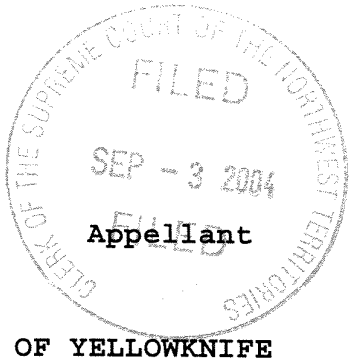
Boyd vs. City of YK et al, 2004 NWTSC 55 S-1-CV-2004000247

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER of the Planning Act, R.S.N.W.T. 1988, Chapter P-7:

AND IN THE MATTER OF the decision of the Development Appeal Board of the City of Yellowknife dated June 17, 2004;



B E T W E E N:

ADRIAN BOYD

Appellant

- and -

THE MUNICIPAL CORPORATION OF THE CITY OF YELLOWKNIFE

and HOMES NORTH LTD.

Respondents

AMENDED

Transcript of the Oral Reasons for Judgment by The Honourable Justice A. Lutz, at Yellowknife, in the Northwest Territories, on August 20th, A.D. 2004.

APPEARANCES:

Mr. C.F. McGee:	Counsel for the Appellant
Ms. S.M. MacPherson:	Counsel for the Respondent City of Yellowknife
Mr. A. Denroche:	Counsel for the Respondent Homes North Ltd.
Mr. G.D. Tait:	Counsel for the Development Appeal Board of the City of Yellowknife

THE COURT: By way of an elaborate Originating Notice of Motion filed July 15, '04, the Appellant appeals the Development Appeal Board's June 17, '04 confirmation of the May 14, '04 Development Officer's approval of a development permit, application No. 04-153 respecting development of "undeveloped raw lands" located within what is termed Niven Lake Phase 6 residential development which lies within the City of Yellowknife.

Some 11 grounds are set forth in the Notice of Motion, and they are follows:

> 1. The Development Appeal Board for the City of Yellowknife (the "Board") erred in law in confirming the decision of the Development Officer dated May 14, 2004, to issue Development Permit No. 04-153 (the "Development Permit") with regard to the development of the Niven Lake Phase 6 residential subdivision (the "development").
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> 2. The Board erred in law in accepting that the location of the playground/playing field area as provided for on Schedule No. 1 to By-law No. 4269 and Schedule No. 1 to By-law No. 4270 could be "adjusted within the development" and in confirming the issuance of the Development Permit given the evidence before it that the development would involve the construction of Road #1, a portion of Road #2, and approximately 17 residential lots or portions thereof in the area designated for the playground/playing field area.
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> 3. The board misapprehended the evidence before it in finding that

Road 6 lies within the area zoned PR - Parks and Recreation as outlined on Schedule 1 of the Niven Lake Development Scheme and erred in law in confirming the issuance of the Development Permit given the evidence before it that Road 6, a cul-de-sac, is not provided for on Schedule No. 1 to By-law No. 4269 or Schedule No. 1 to By-law No. 4270.

4. The board erred in law in finding that a Development Scheme, and in particular the Niven Lake Development Scheme adopted by the City of Yellowknife pursuant to By-law No. 4269, is a general instrument which indicates what characteristics a development will have, but that specific locations are determined within the development permitting stage.

5. The Board erred in law in ruling that, as a playground/playing field is provided for elsewhere within the Niven Lake Subdivision, the development meets the intent of the Niven Lake Development Scheme Bylaw No. 4269 and meets the intent and direction of the General Plan By-law approved by the Council of the City of Yellowknife in 1996.

6. The Board erred in law in failing to distinguish the legal effects of a Development Scheme and a Zoning By-law and thereby failing to give due consideration and effect to the specific zoning designations applicable to the subject lands pursuant to Zoning By-law No. 4024 as amended by By-law No. 4270.

7. The board erred in law in failing to distinguish the legal authorities and responsibilities of the Council and the Development Officer and thereby erred in law in holding that adequate public

consultation regarding the issues pertaining to the Development Permit had taken place.

8. The Board erred in law in ruling that the development is consistent with the objectives and intent of the General Plan By-law No. 3898, Niven Lake Development Scheme By-law No. 4269, and Zoning By-law No. 4024 as amended by By-law 4270.

9. The development proposed by the Respondent Homes North Ltd., as approved by the decision of the Development Officer to issue the Development Permit and the confirmation of that decision by the Board, includes the clearing of trees and brush within proposed road rights-of-way; the alteration of contours within proposed road rights-of-way to facilitate the installation of underground piped water/sewer/power service; the alteration of contours within proposed road rights-of-way to facilitate the construction of roads and sidewalks; and the alteration of contours by infilling selected areas of the Phase 6 area to create suitable building sites with positive drainage.

10. Irreparable harm will result if the Development Permit remains in effect and work on the development is permitted to proceed pending a determination with respect to the lawfulness of the issuance of the Development Permit, as the subject lands will be irretrievably altered and an ultimate determination in the Applicant's favour would be rendered of no practical effect.

11. Such further and other grounds as counsel may advise.

Adrian Boyd, the Appellant, a Yellowknife

resident, swore an affidavit July 15, '04 in support of the Originating Notice of Motion which raised the following in argument:

> 1. What is the applicable standard of review by the Court of the decision of the Development Appeal Board for the City of Yellowknife?
>
> 2. Did the Development Appeal Board for the City of Yellowknife err in law in confirming the decision of the Development Officer dated May 14, 2004, to issue Development Permit No. 04-153 with regard to the development of the Niven Lake Phase 6 residential subdivision?
>
> 3. Did the Development Appeal Board for the City of Yellowknife err in law in accepting that the location of the playground/playing field area as provided for on Schedule No. 1 to By-law No. 4269 and Schedule No. 1 to By-law No. 4270 could be "adjusted within the development" and in confirming the issuance of the Development Permit given the evidence before it that the development would involve the construction of Road #1, a portion of Road #2, and approximately 17 residential lots or portions thereof in the area designated for the playground/playing field area?
>
> 4. Did the Development Appeal Board for the City of Yellowknife misapprehend the evidence before it in finding that Road 6 lies within the area zoned PR - Parks and Recreation as outlined on Schedule 1 of the Niven Lake Development Scheme and err in law in confirming the issuance of the Development Permit given the evidence before it that Road 6, a cul-de-sac, is not provided for on Schedule No. 1 to By-law No. 4269

or Schedule No. 1 to By-law No. 4270?

5. Did the Development Appeal Board for the City of Yellowknife err in law in finding that a Development Scheme, and in particular the Niven Lake Development Scheme adopted by the City of Yellowknife pursuant to By-law No. 4269, is a general instrument which indicates what characteristics a development will have, but that specific locations are determined within the development permitting stage?

6. Did the Development Appeal Board for the City of Yellowknife err in law in ruling that, as a playground/playing field is provided for elsewhere within the Niven Lake Subdivision, the development meets the intent of the Niven Lake Development Scheme Bylaw No. 4269 and meets the intent and direction of the General Plan By-law approved by the Council of the City of Yellowknife in 1996?

7. Did the Development Appeal Board for the City of Yellowknife err in law in failing to distinguish the legal effects of a Development Scheme and a Zoning By-law and thereby failing to give due consideration and effect to the specific zoning designations applicable to the subject lands pursuant to Zoning By-law No. 4024 as amended by By-law No. 4270?

8. Did the Development Appeal Board for the City of Yellowknife err in law in failing to distinguish the legal authorities and responsibilities of the Council and the Development Officer and thereby err in law in holding that adequate public consultation regarding the issues pertaining to the Development Permit had taken place?

> 9. Did the Development Appeal Board for the City of Yellowknife err in law in ruling that the development is consistent with the objectives and intent of the General Plan By-law No. 3898, Niven Lake Development Scheme By-law No. 4269, and Zoning By-law No. 4024 as amended by By-law 4270?

The remedy sought by the Appellant is:

> a. Vacating the Decision of the Development Appeal Board for the City of Yellowknife dated June 17, 2004, confirming the decision of the Development Officer for the City of Yellowknife dated May 14, 2004, to issue Development Permit No. 04-153.
>
> b. Awarding costs of the within appeal to the Appellant against the Respondent City of Yellowknife, on a solicitor and client basis.
>
> c. Granting such further and other relief as this Honourable Court may deem just.

In short, the Appellant complains that the Development Permit is inconsistent with the objectives and intent of the Niven Lake Development Scheme By-law No. 4269 and the Zoning By-law No. 4024, as he abandoned the argument that it contravened the General Plan By-law No. 3898 during argument.

The Development Appeal Board ruled that:

> The development is consistent with the objectives of the General Plan, Zoning By-law and Niven Lake Development Scheme No. 4269.

The argument was that this is a site preparation development and that that was advanced on the June 16 meeting with the public where everyone who wished had an opportunity to praise or condemn the proposed development. It is my distinct impression that some were placated by the impression that was left with them, and I will develop that further as I move along.

The Appellant contended that the Development Officer exceeded his authority by initiating changes to the Development Scheme which included an additional cul-de-sac and removal of a playground, or PR zone, as it is colloquially termed. The board disagreed.

At the June 16, '04 meeting presentations were made by the Appellant, the Development Officer, Homes North Limited and anyone else who wished to speak. The Appellant, disagreeing with the result, sought and secured leave from Justice Wachowich on the 4th of August pursuant to section 51(2) of the statute. The appeal is pursuant to section 51 of the Planning Act R.S.N.W.T. 1988, c.P-7.

The standard of review is said to be this: Section 51(1) of the Act sets out the basis for an appeal from the decision of the Board:

> 51.(1) Subject to subsection (2), an appeal on a question of jurisdiction or on a question of law lies to the Supreme Court from a decision of an appeal board made under section 23 or an order of

> the Minister made under section 40.

Subsection 23(3)(c) of the Act sets out the wide parameters that are given to the board in making its decision, and it says:

> An appeal board shall
>
> (c) consider each appeal having due regard to the circumstances and merits of the case and to the purpose, scope and intent of a general plan that is under preparation or is adopted and to the zoning by-law that is in force.

Subsection 23(5) of the Act sets out the broad powers that the Board has when determining an appeal:

> In determining an appeal, an appeal board
>
> (a) may confirm, reverse or vary the decision appealed from and may impose conditions or limitations that it considers proper and desirable in the circumstances; and
>
> (b) shall render its decision in writing to the appellant within 60 days after the date on which the hearing is held.

The purpose behind the establishment of the Development Appeal Board is, as I understand it, to review development decisions of the development officer at the request of "any person claiming to be affected" by that decision. That is pursuant to section 23(1) of the Act. The Appellant is one of those persons.

The Board has very far reaching powers in making its decision on appeal, and it is argued that the only restriction on the Board's decision making power is set forth in section 23(8) which requires the Board's decision to be compatible with the City of Yellowknife's General Plan.

On this appeal the Board itself limited its submissions to two matters:

> a. the evidence which was before the Board at the time the Board's decision was made, and which should be before this Court; and
>
> b. the standard of review that this Court should apply to the Board's decision.

The Board made no submission on the grounds of appeal advanced by the Appellant.

Section 52 of the Act specifies the procedure in an appeal from the Board decision:

> On the hearing of an appeal by the Supreme Court,
>
> (a) the party who made the order or decision appealed from and any other party affected is entitled to be represented by counsel or otherwise and to be heard on the argument;
>
> (b) no evidence other than the evidence that was submitted to the Minister or the appeal board shall be admitted, but the Supreme Court may draw all inferences that are not inconsistent with the facts expressly found by the Minister or appeal board and as are necessary for determining the question of jurisdiction or of law; and

> (c) the Supreme Court shall proceed either to confirm or vacate the order and if it vacates the order, it shall refer the matter back to the Minister or appeal board that in its opinion erred as to a question of law or of jurisdiction, and the Minister or appeal board shall deal with the matter in accordance with that opinion.

The question of the standard of review in cases where there is a statutory right of appeal from a tribunal decision has been canvassed, as it has been argued by counsel -- and I compliment all three counsel on the excellent briefs that they filed -- has been canvassed in several decisions, the main decision being Q. v. College of Physicians and Surgeons (British Columbia). The Chief Justice, writing for the court, noted that in statutory appeals from decisions of administrative tribunals, a pragmatic and functional analysis must be applied to determine the appropriate standard of review. I would also, in that light, reference Ryan v. The Law Society of New Brunswick and Pushpanathan v. Canada (Minister of Citizenship and Immigration). These decisions are well-known to counsel and have been provided by counsel, and I make no further reference to them, because counsel know what they mean; so do I.

There is no privative clause for the Development Appeal Board and considering its makeup and as the

Board was required to balance the interests of the City, the Developer and those who speak for and against the development, and with the deference it is to be accorded, I say that the standard of review is reasonableness simpliciter.

The Board here endeavoured to resolve and balance the interests of various constituencies, to use the words of Mr. McGee in his brief, and did so within the parameters of the development of raw land. The Appellant's real complaint is that he disagrees with the "permitted uses", and particularly with the parks and recreation aspect, but also with the proposed cul-de-sac.

It is to be noted that adjustments, as we use that term in this context, is said to be for houses and playgrounds, et cetera and are permitted within this development. I note that the permit speaks of site preparation development and not roads, the latter of which is one that was of concern to the Appellant.

Development Permit 04-153 authorized, "the modification of contours and natural features," for Phase 6. Zoning By-law section 2.5 permits the making of any change in the use or in the intensity of use of land. Section 7 of the Planning Act sets forth what a development scheme may contain. It is not necessary that the by-law, "specify for each zone the uses of land and buildings that are permitted or conditionally

permitted".

The argument advanced by the City is that the Development Appeal Board's decision that the development permit was in conformity with the overall objectives of the Niven Lake Development Scheme was a planning decision based on both the expertise of the Board in deciding development issues and on the evidence that the Board heard and that this Court should be loathe to substitute its view of fact and policy except in the most exceptional circumstances, and I adopt that. This is not a de novo appeal.

It is then said that the Board heard evidence from the Development Officer that the Niven Lake Development Scheme was viewed as a planning for a conceptual framework for development in the subject area. The Board also heard evidence that the land in question was "raw" property which had not been legally surveyed and it is a reasonable interpretation that the development scheme is a planning instrument, without set legal boundaries, and, as such, minor deviations from the conceptual scheme are to be expected as part of the development process.

That was the impression that the public was left with and enabled the praise or renunciation, as the case might be, to the individual site users later. But, unfortunately, the proper interpretation or feeling of the board was, in my view, never left with

the people at the meeting, and now the City candidly admits that an amendment to the zoning by-law is required to deal with the parks/recreation modification. That above is sufficient to allow the appeal here. I need not grant it on the issue of the cul-de-sac or, indeed, be concerned with the cul-de-sac.

On the question posed by Ms. MacPherson:

> Does the decision of the Development Officer, as upheld by the Development Appeal Board, to allow site preparation development in an area partially designated as park land, by adjusting the boundaries of the park area within the larger development, contravene the objectives of the Niven Lake Development Scheme,

that I will answer.

Then:

> In the granting of the permit, the development officer adhered to the general nature of the lands being residential, notwithstanding the move of the proposed park.

It is said that:

> The park is not eliminated from the development; it is simply relocated within the development. Given that the original development scheme is based on unsurveyed land, it is submitted it is reasonable to accept that there would be modifications of boundaries at the development stage.

This, of course, is what will require an amendment to

the zoning by-law, and this is one of the points being made by the Appellant.

The argument proceeds, then, thusly:

> The development Appeal Board found, as a fact, that the relocation of the park (was) will provide better access to all residents of Niven Lake Subdivision and will contribute to the characteristics of the neighbourhood. In doing so, it is submitted that they gave due regard to the Development Scheme.

But the difficulty is that the City cannot relocate without an amendment, and the City left the distinct impression with the public that nothing more and certainly no public input was required to adjust the current plan to accommodate full development as submitted to the public at the June 16, '04 meeting.

The City was not being forthright, and, had they been, the Appellant here could have waited it out. However, the Development Appeal Board's error in law and the lack of forthrightness respecting the Public Reserve forced the Appellant to move now, and it does not now lie in the mouth of the City to say there will be another day, having left the impression that it did.

It was argued by the City that the development authorized by the Development Officer, and upheld by the Development Appeal Board, did not have the effect of authorizing road development within the area, only

the modification of contours and natural features preparatory to further site development.

That may well be the case, and that is one way of interpreting it, one way of putting it, but I do not have to deal with that particular issue and I decline to do so.

On this issue whether the Board misapprehended the evidence in relation to Road 6 being located within an area designated by the Development Scheme as a park, it is submitted by counsel that if this occurred, the error is not material to the decision reached by the board; nor can it be said that the Board was unaware of the effect or consequences of its decision. The totality of the evidence before the Board, and the detail of its reasoning, illustrates that it was aware that by approving the development permit, the effect was to have site preparation development occur in the area previously designated as a park.

The Appellant demands that the Board comply with its own process. It is not contrary to the nature and function of a Board of this type to expect that. I recognize that these members are local citizens, not trained experts, and so long as they perform within the parameters of a board of this nature and comply with their own processes with reasonableness, they cannot be held to a higher standard, but they did not.

Counsel for the city said this:

> The Respondent Municipality submits that By-law 4270, amending the Zoning By-law by attaching Schedule 1 is not inconsistent with the position taken by the Development Officer and Development Appeal Board that there is a certain degree of latitude extended with respect to the adjustment of boundaries within the overall subdivision.

I pause here to say that that would be a quantum leap with this history of this matter. Carrying on:

> The Schedule is clearly conceptual in nature and refers to the proposed rezoning of the particular area in question. Unlike the detail contained within the area referred to as Blk 302 on that same map, the lands which are the subject of this appeal are described only in the most conceptual of fashion, without reference to lots or precise boundaries.

Now, that, according to a map that has been produced, is not the case. I carry on:

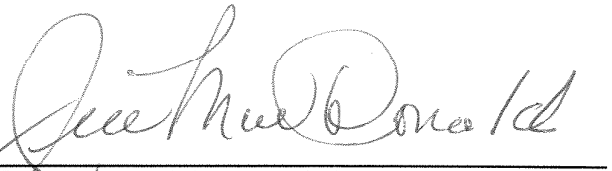
> It is to be expected that development of a property at this early stage would be based on conceptual drawings, which are unlikely to always reflect the precise course of development and that, as the development project proceeds, further amendments to the zoning by-law will be required and will the subject (of) debate and consultation at the time. At the present time, the work approved by the Development Appeal Board is not inconsistent with the approximate zoning of the property as found in By-law 4270.

In there there are inconsistent statements. The

impression clearly left with the public for which this Board is answerable was that this was it, do your thing now or forever hold your peace, and that caused, in my view, the Appellant to move as he has done.

The public can only expect forthrightness. I do not say there was bad faith or obfuscation by the City. The Board erred in law, though I expect it was a misunderstanding. Accordingly, the appeal is allowed and the matter is referred back to the Development Appeal Board.

Certified to be a true and accurate transcript pursuant to Rules 723 and 724 of the Supreme Court Rules.



Jill MacDonald, CSR(A), RPR
Court Reporter