

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF the *Planning Act*,
R.S.N.W.T. 1988, c. P-7, as amended;

AND IN THE MATTER OF the Decision of the Fort Smith
Development Appeal Board dated June 15, 2005.

BETWEEN:

THE NORTH WEST COMPANY

Appellant

- and -

MUNICIPAL CORPORATION OF THE TOWN OF FORT SMITH,
MARIE SWANSON, GLEN FREUND, ROGER RAWLYK,
WILLIAM TORDIFF and JOHN MINUTE

Respondents

MEMORANDUM OF JUDGMENT

- [1] This is an appeal from a decision made on June 15, 2005 by the Development Appeal Board for the Town of Fort Smith (“the Board”). The appeal is brought pursuant to section 51 of the *Planning Act*, R.S.N.W.T. 1999, c. P-7 (“the Act”).

BACKGROUND

- [2] The Appellant operates the Northern Store in Fort Smith. The store is located at 79 Breynat Street. The *Fort Smith General Plan By-Law No. 672* (“the *General Plan*”) creates a number of zones within the municipality. The Northern Store is located in the Town Centre zone.

- [3] On April 8, 2005, the Appellant submitted an application for development to the Town of Fort Smith for approval to add a retail facility for the sale of petroleum products to the existing Northern Store. The Appellant was advised that an application would also have to be made to amend the zoning by-law because the proposed development was not one normally contemplated under the existing zoning by-law. The Appellant made application to amend the zoning by-law on April 8, 2006.
- [4] The Appellant was advised on May 18, 2005, that the application for development had been approved. On May 31, 2005, the Town of Fort Smith issued development permit DPA-004-05, which confirmed this approval.
- [5] A number of residents from Fort Smith sent correspondence expressing various concerns about the proposed development. These individuals are named Respondents in this case.
- [6] On June 3, 2005, the Appellant received correspondence from the Board advising that a public hearing was set to proceed on June 13, 2005 to consider appeals which had been received with respect to the application for development.
- [7] The hearing proceeded on June 13, 2005. All parties appeared and made submissions, with the exception of Respondent Roger Rawlyk.
- [8] On June 15, the Appellant received correspondence from the Board advising that the appeals had been allowed and that the application for development was denied. This correspondence stated:

It is the decision of the Development Appeal Board to uphold the appeals received and to deny the Development Application DPA-004-05 for the reasons stated below:

1. The intent of the General Plan for Town Center (TC) was not followed.
2. There were no similar in character developments in the Town Center.
3. Previous precedents have been set in regards to such applications.

4. The permitted use will be determined by the General Plan until such time as the General Plan has been reviewed.
5. Recommend that the General Plan be reviewed.

- [9] The Appellant seeks leave to appeal the Board's decision. It argues that the Board erred in law by failing to provide adequate reasons for its decision. It also argues that the Board committed a jurisdictional error by taking into account inappropriate factors in reaching its decision.
- [10] The Respondent's position is that leave to appeal ought not to be granted. On the merits, the Respondent argues that the reasons given by the Board, when examined in the full context of the case, are adequate. The Respondent also argues that the record does not support the Appellant's assertion that the Board considered inappropriate factors in arriving at its decision.

RELEVANT STATUTORY PROVISIONS

- [11] Section 51 of the *Act* gives this Court jurisdiction to entertain the issues raised by the Appellant. It reads, in part, as follows:

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 (...)

(...)

- [12] Section 23 of the *Act* provides the framework for the exercise of the Board's jurisdiction. Subsection 23(3) is particularly relevant, as it sets out the Board's powers in hearings such as the one held on June 13, 2005.

23.(...)

(3) An appeal board shall

- (a) hold a hearing within 30 days after the receipt by it of a notice of appeal
- (b) ensure that reasonable notice of the hearing is given to the appellant and all persons who, in the opinion of the appeal board, may be affected; and

(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.

[13] This provision makes it clear that general plans and zoning by-laws are important considerations for the Board. The Board's decision must therefore be examined in the context of the *General Plan* and the *Town of Fort Smith Zoning By-Law No.673* ("the *By-Law*").

[14] The *General Plan* creates various zones, including the Town Centre zone. Its description of that zone reads, in part, as follows:

The purpose of this land use as designated on Schedule "2" is to provide for a wide variety of commercial, institutional, and personal service uses with regard for safety, convenience and attractiveness.

Acceptable land uses in the Town Centre area include public buildings, offices, personal services and retail commercial. Non-commercial uses which may also be suitable include parks, churches, mixed commercial-residential development.

[15] The *By-Law* sets out more specifically permitted uses and conditional uses for each of the zones created by the *General Plan*. The permitted uses and conditional uses applicable to the Town Centre zone are set out at page 56 of the *By-Law*:

(1) Permitted Uses

- (a) Banks;
- (b) Coffee shops and restaurants;
- (c) Barber shops and beauty shops;
- (d) Retail stores;
- (e) Convenience stores;
- (f) Medical and dental clinics;
- (g) Funeral parlor;
- (h) Hotel and motel;
- (i) Laundry and dry cleaning facilities;
- (j) Offices;
- (k) Post office;
- (l) Public and quasi-public buildings;

- (m) Theatre;
- (n) Community halls;
- (o) Private clubs and lodges; and
- (p) A workshop accessory to a retail store.

(2) Conditional Uses

- (a) Apartments combined with permitted and conditional uses;
- (b) Public utilities and installations;
- (c) Parks and playgrounds;
- (d) Day use recreational vehicle park;
- (e) Day cares;
- (f) Churches and related residences;
- (g) Accessory buildings and uses;
- (h) Extensions to existing dwellings;
- (i) Suites in existing dwellings;
- (j) Boarding and lodging houses in existing dwellings;
- (k) Bed and breakfast establishments in existing dwellings;
- (l) Veterinary clinics; and
- (m) Other uses which are considered by resolution of Council to be similar in character and purpose to the uses listed above as part of the [Town Centre] zone.

ANALYSIS

A) Application for leave to appeal

[16] The parties agree that to be granted leave to appeal, the Appellant must demonstrate that the appeal raises a serious arguable point. The analysis of whether this threshold is met turns on the examination of five elements: whether the point on appeal is of significance to the practice, whether the point raised is of significance to the action, whether the appeal is *prima facie* meritorious, whether the appeal will unduly hinder the progress of the case, and what standard of review will apply if leave is granted.

BP Canada Energy Co V. Alberta (Energy and Utilities Board) [2004] A.J. No.47, at para.37.

[17] The Appellant argues that it has met this threshold. The Respondent disagrees, primarily because it claims that the Appellant has not demonstrated that this is *prima facie* a meritorious appeal. The parties also disagree about the applicable

standard of review. My understanding is that the Respondent's position is that a standard of reasonableness applies on all issues; the Appellant's position is that a standard of correctness applies to the issue raised about the sufficiency of the reasons given by the Board, and a standard of reasonableness applies to the jurisdictional issue.

- [18] The applicable standard of review is not determinative on the leave application, but of course, identifying the standard that applies is helpful in ascertaining whether a proposed ground of appeal has a reasonable chance of success.
- [19] In my view, the sufficiency of the reasons given by the Board must be examined on a standard of correctness. *Lor-al Springs Ltd. v. Ponoka (County) Subdivision and Development Appeal Board* [2000] A.J. No.1286, at para.8.
- [20] The determination of the standard of review on the jurisdictional issue requires the examination of a number of factors. Section 51 of the *Act* provides a statutory right of appeal from the Board's decision. This, in my view, means that the analysis to determine the standard of review is different from what it generally is in judicial reviews. A right of appeal means that the legislature intends that the Board's decisions be subject to review. It is the opposite of a situation where the legislature has specifically included a privative clause in the statute, shielding the administrative tribunal's decisions from review. It suggests a standard of review that is less deferential to the Board's decision. *Lor-al Springs Ltd. v. Ponoka (County) Subdivision and Development Appeal Board, supra*, at para.7.
- [21] Another factor to consider is the expertise of the decision-maker. The Board is composed of members of the community. They are familiar with the community and bring useful knowledge and insights to decisions that the Board has to make. However, they do not have any particularly specialized training.
- [22] The purpose of the provision and of the statute must also be considered. I have already referred to section 23(3)(b) of the *Act*, which sets out the criteria that the Board must consider on an appeal. That provision requires the Board to examine the purpose, scope and intent of general plans and by-laws, as well as the circumstances of the case. This may, in some cases, require the exercise of considerable discretion, which often suggests that a deferential standard of review should be used on appeal.

- [23] A final factor to be considered is the nature of the problem at issue, and whether it relates to the determination of law or facts. If the issue is one of law, a less deferential standard of review applies. If the issue relates to the interpretation and assessment of facts, a more deferential standard is appropriate.
- [24] The Appellant has not framed the second issue on this appeal as a challenge of the Board's interpretation of the evidence presented at the hearing, or its interpretation of the *General Plan* and *By-Law*. Rather, the issue is focused on the factors considered in reaching the decision.
- [25] Had the issue raised been the Board's interpretation of the *By-Law* or *General Plan*, a more deferential standard of review might be appropriate. However, that is not how the Appellant has framed its challenge. Having weighed the factors I have referred to, I conclude that the standard of review on the second issue is one of correctness, as the issue really is whether the Board complied with Paragraph 23(3)(b) and applied the proper criteria in reaching its decision.
- [26] Applying the standard of correctness on the first issue, the reasons provided by the Board in support of its decision are very brief. They do not refer to the submissions made and do not include an analysis of the *General Plan* or of the *By-law*. Aspects of the reasons are more in the nature of recommendation than decision.
- [27] On the second issue, it is clear from the record that some of the appellants raised concerns that were outside the scope of the criteria that were relevant to the Board's decision. The appeals themselves, attached as Exhibits "F", "G", "H", and "I" to the affidavit of Anne Sebert sworn September 14, 2005, as well as the Minutes of hearing, attached as Exhibit "K" to the same affidavit, make it clear that issues related to economics and competition were at the heart of some of the appeals presented. The reasons are silent as to what the Board made of those irrelevant considerations.

[28] Having regard to the standard of review which I find to be applicable on both grounds of appeal, I cannot say that the issues raised by the Appellant are *prima facie* frivolous. I find that both grounds of appeal raise serious arguable points. I find, therefore, that the Appellant has met the threshold to be granted leave to appeal.

B) Sufficiency of reasons

[29] The *Act* does not specifically require the Board to give reasons for its decisions. There is a significant body of jurisprudence that recognizes that procedural fairness more often than not requires administrative tribunals to give reasons for their decisions. There is a growing recognition that those who appear before administrative tribunals and have a stake in the outcome of the proceedings have a right to understand why the tribunal decides one way or another. Moreover, where there is a statutory right of appeal, as there is in this case, it is essential for the reviewing court to be able to decipher why the administrative tribunal reached the decision it did. *Baker v. Canada (Minister of Citizenship & Immigration)* [1999] 2 S.C.R. 817.

[30] In this case, the Board did provide reasons for its decision. The issue is whether those reasons were adequate.

[31] The Appellant argues that it is not possible to know, on the basis of the reasons given, why the Board allowed the appeal and reversed the decision to grant the development permit. The Appellant points out that the reasons do not include any analysis of the submissions made, or any reference to the statutory criteria the Board was required to apply pursuant to Subsection 23(3) of the *Act*. The Respondent argues, on the contrary, that the reasons given, when examined in the context of the record, leave no doubt as to why the Board reached the conclusion it did.

[32] The determination of whether reasons are adequate requires consideration of the context within which the decision was made. *Lor-al Springs Ltd. v. Ponoka (County) Subdivision and Development Appeal Board, supra*, at para. 15. *Rogers v. Development Appeal Board of Strathcona (County No.20)* [1979] A.J. No.370, at para.10.

[33] I agree with the Appellant that neither this Court nor the parties should have to guess why the Board reached the conclusions it did. However, the Board's reasons must be examined in the context of the specific issues that were before the Board and the submissions made at the hearing. The *General Plan* and the *By-law* are also very important to place the Board's reasons in context.

a) nature of the appeals

[34] A number of individuals appealed the decision of the Town of Fort Smith to approve the development permit. Although there were some overlaps in the issues raised, each appeal was framed in slightly different ways and raised different issues.

i) appeal by Bill Tordiff

Mr. Tordiff's appeal made reference to the *By-Law* and stated that a gas distribution center was not listed as one of the "permitted uses" for the Town Centre zone. He referred to the potential reduction in property values in the area if this development was permitted. He also referred to the number of existing gas outlets in the community and said it was bad planning to allow for another one to be allowed to open. He stated that "someone was bound to lose" if this was allowed, presumably referring to possible economic consequences for the other gas outlets. He raised concerns about the Appellant's management of its existing business, referring to various problems with the upkeep of the property, in particular with respect to garbage. He also referred to the fact that another individual had applied to open a gas station in the same area and had been denied that request.

ii) appeal by Glen Freund and Marie Swanson

Mr. Freund and Ms. Swanson's appeal referred to provisions of the *General Plan* and the *By-Law*. They referred specifically to clause (m) in the list of Conditional Uses for the Town Center zone, and argued that the proposed development was not similar in character to other uses permitted in this zone. They suggested that a public meeting be held to determine whether it would be appropriate to

determine whether the *General Plan* or *By-Law* should be changed. They stated that this development permit, if granted, would lead to similar applications by other businesses operating in the area. They also referred to the number of gas outlets already operating in the community.

iii) appeal by John Minute

Mr. Minute's appeal referred to an application made by another individual, several years ago, to operate as gas bar in the area in question, which request had been denied. He stated that his concerns were that having a gas station in the center of town raised safety issues. He expressed concern about potential contamination of the environment arising from spills and fumes. He expressed the view that service stations should be located on the outskirts of the community.

iv) appeal by Roger Rawlyk

Mr. Rawlyk's appeal was focused on issues of economics and viability of small businesses. He referred to the size of the community, the number of existing gas outlets, and stated that there was not enough business to support another one. He expressed concern that the smaller businesses would not be able to compete with the Appellant if it was allowed to operate a gas bar.

[35] All appellants except Mr. Rawlyk appeared before the Board and made submissions. The minutes of hearing indicate that the submissions made were consistent with the correspondence the appellants had sent to the Board. Exhibit "J" to Ian Burrows' affidavit sworn July 25, 2005, filed on behalf of the Appellant, summarizes the presentations made at the hearing. The notes are not extremely detailed but nothing in those notes contradicts the other evidence about the nature and content of the presentations made at the hearing.

b) Provisions of the *General Plan* and *By-Law*

[36] I have already referred to provisions of the *General Plan* and of the *By-Law* that apply to the Town Center zone. Gas stations and service stations are not listed as permitted uses or conditional uses for that zone. Conditional uses, as set out at Paragraph (m) of the conditional uses list, include “uses which are considered by resolution of Council to be similar in character and purpose to the uses listed above”. For the Appellant to demonstrate that the proposed development was permissible in the Town Center zone, it had to persuade the Board that the development was similar in character and purpose to other permissible uses listed in the *By-Law* for the Town Center zone.

[37] I also note that the sale of gas, gas stations and service stations are specifically referred to and listed as permissible or conditional uses in some of the other zones set out in the *General Plan* and the *By-Law*.

c) Sufficiency of reasons in context of the nature of the appeals, the *General Plan*, and the *By-Law*

[38] Taking the full context of the hearing into account, in my view, the reasons given by the Board are quite clear despite their brevity.

[39] Although the proposed development was for a gas outlet and an attached convenience store, the gas outlet was an essential component of the project, and was the aspect that attracted the opposition of the individuals who filed appeals. It was therefore appropriate for the Board to focus on that aspect of the project.

[40] The Respondents Tordiff, Freund and Swanson raised the fact that gas stations were not the type of activities that were contemplated, in the *General Plan* and the *By-law*, to be permitted in the Town Center zone. The first statement made in the Board’s decision (“ The intent of the General Plan for Town Center (TC) was not followed”) shows that the Board accepted that submission.

[41] The second statement made by the Board, “There were no similar in character developments in the Town Center”, can only refer to Paragraph (m) of the Conditional Uses listed in the *By-Law* for the Town Center zone. Respondents Freund and Swanson made submissions specifically on that point, and on the fact the proposed development was not similar in character and nature to the

other listed uses for that zone. They referred to the fact there was no other gas bar in the Town Center zone. The second statement in the Board's reasons demonstrates that it agreed with that submission.

- [42] The third statement, "Previous precedents have been set in regards to such applications", may appear somewhat of an obscure statement when one is not aware of the full context of the hearing, but it is completely understandable when one considers that Respondents Tordiff and Minute referred to other individuals who attempted to undertake similar activities in the Town Centre zone and were not permitted to do so.
- [43] The fourth statement, "The permitted use will be determined by the General Plan until such time as the General Plan has been reviewed" is a statement that accurately reflects the provisions of sections 23(3)(c) and 23(8) of the *Act* and section 1(3) of the *General Plan*; these provisions all refer to the importance of taking the *General Plan* in consideration when deciding whether a proposed development should be permitted.
- [44] The final statement, "Recommend that the General Plan be reviewed", does nothing more than state the Board's view that the *General Plan* should be reviewed. The statement does not constitute reasons for the decision. I note, however, that Respondents Freund and Swanson specifically recommended, in their appeal, that public meetings be held to determine whether it was time to review the *General Plan* and related by-laws. I understand the Board's final statement to simply be an expression of the Board's view that it would be appropriate to review of the *General Plan*, and revisit the question of what activities and developments should be allowed in the Town Center zone.
- [45] This recommendation does not render the reasons deficient. On the contrary, when examined in the context of the Board's previous statement, it shows an awareness of the Board's obligation to base its decision on the existing *General Plan* and *By-Law*, irrespective of the Board's views about the need for those statutory instruments to be reviewed. It confirms that the Board was aware of the criteria that Paragraph 23(3)(c) and that its discretion had to be exercised within those parameters.
- [46] The record shows that at this hearing, the issue before the Board was whether the proposed development, in particular its gas sales component, fell within the

permitted uses in the Town Center zone under the existing *General Plan* and the *By-Law*. Unlike many cases referred to by the Appellant, the evidence before the Board was straightforward and the issue under consideration was very narrow. This must be taken into account in assessing the sufficiency of the reasons provided.

[47] I have also taken into account the fact that the Board is composed of community members who have no specialized or legal training. Reasons it issues, while they must be sufficient, should not be held to the same standard as reasons issued by a judge or a specialized tribunal. *Treeshin v. Yellowknife (City)* [1996] N.W.T.J. No.16, at para.14.

[48] As stated at the outset, the standard of review that applies to this ground of appeal is a standard of correctness. That is not the same thing as a standard of perfection. There is no question the Board's reasons could have been more detailed. Ideally, reasons for decision should set out the facts, the issues raised, the applicable criteria, an analysis of those criteria against the facts of the case, and the decision reached. However, in my view, the reasons, while brief, leave no doubt that the Board agreed with the submission that the proposed development was simply not one authorized under the *General Plan* and the *By-Law*. Taken in the full context of the case, the reasons are clear and do not warrant this Court's intervention.

C) CONSIDERATION OF IRRELEVANT OR INAPPROPRIATE FACTORS

[49] The Appellant argues that the Board considered irrelevant or inappropriate factors in reaching its decision, thereby committing a jurisdictional error.

[50] I do not agree with the Appellant's assertion that the Board ought not to have taken into account decisions made on similar applications that had been made in the past. The Board was not bound by these earlier decisions but was entitled to take them into consideration.

[51] I also disagree with the assertion that the Board failed to assess the criteria that it was statutorily mandated to consider. On the contrary, I find the reasons show that the *General Plan* and the *By-Law* were duly taken into account by the Board. I find that the lack of detailed analysis is easily explained when one considers that the issue at hand was straightforward and did not require

weighing evidence or a complex analysis of the relevant provisions of the *By-Law*.

- [52] As for irrelevant considerations, I accept the Appellant's submission that some of the Respondents raised issues that were outside the scope of what the Board was permitted to consider. Issues related to the market, economics or competition clearly fall outside the parameters of Paragraph 23(3)(b) of the *Act*. However, the Board does not control the contents of correspondence it receives or the submissions that interested parties choose to present at hearings.
- [53] Having carefully reviewed the record, I find no evidence that the Board invited or encouraged representations on irrelevant or inappropriate considerations. I also find no evidence that the Board attached any weight to irrelevant or inappropriate considerations in making its decision. The reasons given by the Board do not refer to any of the inappropriate or irrelevant considerations the Appellant has raised. There is no reference to issues of competition between businesses, to the number of gas outlets the Fort Smith market can support, to concerns about spills, fumes, or risks to the environment.
- [54] On the contrary, the Board's reasons refer to proper considerations. The reasons refer to the *General Plan*. They refer, without naming it, to Paragraph (m) of the conditional uses for the Town Center set out in the *By-Law*. They refer to past decisions on similar applications made by other citizens. All these factors were proper factors for the Board to consider.
- [55] While the record shows that irrelevant matters were raised before the Board, there is nothing on the record that shows that the Board's decision was based on any of those considerations. This Court should not presume that the Board acted on improper considerations. Similarly, this Court should not infer that the Board was swayed by submissions on improper considerations where the decision itself makes no reference to those improper considerations.
- [56] I am not satisfied that the Board committed any jurisdictional error in this case.

CONCLUSION

- [57] For these reasons,

- a) the application for leave to appeal is granted; and
- b) the appeal is dismissed.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
24th day of January 2007

Counsel for the Appellant:
Counsel for the Respondents:

Paul N.K. Smith
Thomas D. Marriott

S-0001-CV 2005000187

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MEMORANDUM OF JUDGMENT OF THE
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