

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

5142 NWT LTD., AFM HOLDINGS LTD., CARTER INDUSTRIES LTD.,
G&L WORKWEAR LTD., GODWIN STORES LTD., HAY RIVER DISPOSALS
(1985) LTD., JAMESON HOLDINGS LTD., operating as JAMESON'S TRUE
VALUE HARDWARE, SCOTT'S ELECTRICAL SERVICES LTD.,
STAN DEAN & SONS LTD. and TERRITORIAL QUICK PRINT INC.

Applicants

THE MUNICIPAL CORPORATION OF THE TOWN OF HAY RIVER,
GREG McMEEKIN and HAY RIVER LIQUOR RETAILERS (1991) LTD.

Respondents

Appeal of a decision of the Hay River Development Appeal Board.

Heard at Yellowknife, NT on December 13, 2007

Reasons filed: January 10, 2008

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER

Counsel for the Applicants: Steven Cooper and Keith J. Macey

Counsel for the Municipal Corporation of the Town of Hay River: Jonathan Rossall

Counsel for the Hay River Liquor Retailers (1991) Ltd.: Katherine Peterson Q.C.

Counsel for the Development Appeal Board: Cayley J. Thomas

5142 NWT Ltd. et al. v. Town of Hay River et al, 2008 NWT SC 02

2008 01 10

Docket: S-001-CV 2007000051

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

5142 NWT LTD., AFM HOLDINGS LTD., CARTER INDUSTRIES LTD.,
G&L WORKWEAR LTD., GODWIN STORES LTD., HAY RIVER DISPOSALS
(1985) LTD., JAMESON HOLDINGS LTD., operating as JAMESON'S TRUE
VALUE HARDWARE, SCOTT'S ELECTRICAL SERVICES LTD.,
STAN DEAN & SONS LTD. and TERRITORIAL QUICK PRINT INC.

Applicants

-and-

THE MUNICIPAL CORPORATION OF THE TOWN OF HAY RIVER,
GREG McMEEKIN and HAY RIVER LIQUOR RETAILERS (1991) LTD.

Respondents

REASONS FOR JUDGMENT

[1] For the reasons set out in *5142 NWT Ltd. et al v. Town of Hay River et al*, 2007 NWTSC 51, the Applicants Godwin Stores Ltd. and Jameson Holdings Ltd., operating as Jameson's True Value Hardware were granted standing and leave to appeal a decision of the Development Appeal Board for the Town of Hay River. I will refer to them as the Applicants as that is how they appear in the style of cause. The Board's decision upheld the issuance of a development permit to the Respondent Hay River Liquor Retailers (1991) Ltd. ("the developer"), allowing it to add a retail liquor store to its existing liquor warehouse and recycling depot located in an industrial area of Hay River.

[2] Leave to appeal was granted pursuant to s. 51 of the *Planning Act*, R.S.N.W.T. 1988, c. P-7 on the following two grounds:

1. Did the Development Appeal Board err in law or jurisdiction in failing to provide full or adequate reasons for its decision?
2. Did the Development Appeal Board err in law or in jurisdiction in failing to correctly interpret, apply or comply with the General Plan (Bylaw No. 1811) or the Zoning and Building Bylaw (Bylaw No. 1812)?

Background

[3] The Town's Development Officer issued a development permit to the developer for the addition of a retail liquor store to its existing liquor warehouse and recycling depot located in what was generally described as an industrial area of Hay River, zoned as C2 - Highway/Service Commercial. An appeal was taken to the Development Appeal Board on the following three grounds, which I have paraphrased somewhat:

(i) the proposed development was for a retail outlet and did not have any commercial or industrial applications;

(ii) the proposed location already housed a recycling depot, giving rise to concerns about health and safety issues such as the presence of mould, mildew, airborne contaminants and infectious diseases;

(iii) there were safety concerns arising from the absence of sidewalks and streetlights in the proposed location and the building did not have proper access or fencing to provide safe passage to and from the outlet as outlined in a Request for Proposals issued by the Territorial Government.

[4] The first of the above grounds related to concerns about the effect of the proposed location of the retail liquor store on the downtown core of Hay River. Others who addressed the Development Appeal Board in favour of the appeal and against the development permit also focused on this issue. It ties in with a direction

in the General Plan that the downtown commercial core remain as the major retail focus of the community and that the Town protect the vitality of the downtown core for that and other purposes. Although not explicitly stated in the materials before me, it is a reasonable inference that it was understood that the result of the permit would be the relocation of the only liquor store in Hay River from downtown to the industrial area.

[5] The Board reserved its decision after the hearing. On February 1, 2007 it released its reasons for upholding the issuance of the permit, as follows:

After reviewing the submission of the Appellant and hearing the evidence of the other 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 merit of the Applicant's case and to the purpose, scope and intent of the General Plan and the Zoning and Building By-law, determined that the decision of Development Officer to approve Development Permit No. D06-144, to establish a Liquor Retail Store on Lots 1430, 1431 & 1432, Plan 1466, being #32, 34 & 36 Industrial Drive be upheld, and that the appeal be denied.

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

1. That the decision of the Development Officer to approve Development Permit No. D06-144, to establish a Liquor Retail Store on Lots 1430, 1431 & 1432, Plan 1466, being #32, 34 & 36 Industrial Drive in (*sic*) accordance with the existing policies, practices and Zoning and Building Bylaw of the Town of Hay River.
2. That Development Permit D06-144 has properly been issued under the C2-Highway Commercial Zone of the Town of Hay River Zoning and Building By-law and that the development may proceed, subject to the conformity to the requirements of the Development Regulations and the Development Permit.
3. The health issues are beyond the scope of the Development Appeal Board and are covered under section 4.3 of the Zoning and Building Bylaw, which state that: "All buildings proposed for public use, including apartments, religious assemblies, commercial and industrial buildings, must, pursuant to Section 1.4 of this bylaw, conform to the *National Building Code of Canada* and have the approval of the health authorities of the Northwest Territories and the NWT Fire Marshall."

4. The issue outlined in the RFP are beyond the scope of the Development Appeal board and is the responsibility of the Territorial Government when awarding the RFP.

[6] The bylaws in question contain the following relevant provisions:

General Plan (Bylaw No. 1811):

4.2 Commercial Land Use

Core Area

1. The Town shall ensure that the central commercial core, identified as *Core Area* on the *Land Use Concept*, remains as the major retail, service and office focus of the community. The *Core Area* also provides residential development opportunities.

2. The Town shall continue to protect the vitality of the *Core Area* lands for those purposes.

3. The Town shall continue to promote infilling of the *Core Area* before expansion.

Zoning and Building Bylaw (Bylaw No. 1812)

6.10 C2 - Highway/Service Commercial

1) General Purpose

To provide a zone for highway and service oriented commercial uses which are more appropriately located here than in any other commercial or industrial zone.

2) Permitted Uses

...

3) Discretionary Uses

...

b) Retail Stores

Adequacy of the Board's reasons

[7] The Applicants complain that the Board's decision is unreasonably brief and merely states that the Development Officer was right to issue the permit without explaining why he was right. They argue that the decision fails to explain why and how the Board permitted the proposed retail store as a discretionary use in the face of the arguments raised against it. The Respondents argue that the Board's reasons are sufficient and, read in context, are clear.

Analysis

[8] It is now recognized that in some circumstances an aspect of the duty of procedural fairness owed by a statutory tribunal is the provision of an explanation for its decision. This duty to provide reasons will arise in various circumstances, for example, where there is a statutory right of appeal: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

[9] The *Planning Act* does not require that a development appeal board give reasons, only, in s. 23(4)(b), that the board's decision be in writing. Development appeal boards make decisions that have an impact on the property rights and interests of individuals and communities. Their decisions are also subject to appeal, and therefore scrutiny, in this Court. I am satisfied that the importance of their decisions, together with the statutory right of appeal, is justification for a requirement that reasons be provided. Having decided that reasons are required, in my view the absence of a statutory requirement for them is not relevant to their content. In other words, the absence of a statutory requirement for reasons cannot justify reasons which are lacking in content in the sense of being inadequate.

[10] As to adequacy, where the duty to give reasons arises, at a minimum, the reasons must show why or how or on what evidence the tribunal reached the conclusion. The relevant inquiry is whether the individual affected can have any doubt as to the reasons for the tribunal's decision: *Omega2 Corp. v. Edmonton (City)*, [2005] A.J. No. 1756 (C.A.).

[11] The question whether a tribunal has given full or adequate reasons for its decision is a question of law and must be reviewed on a standard of correctness: *Lor-al Springs Ltd. v. Ponoka (County) Subdivision and Development Appeal Board*, [2000] A.J. No. 1286 (C.A.); *North West Co. v. Fort Smith (Town)*, [2007] N.W.T.J. No. 6 (S.C.). Effectively, that means that a court sitting on appeal from the decision of a tribunal does not defer to the tribunal by assuming that it must have had good reasons for coming to its decision. Instead, the court on appeal must examine the tribunal's reasons in the context within which the decision was made. The court must attempt to determine why the tribunal reached the decision it did and if it cannot make that determination, there is likely merit in the lack of reasons as a ground of appeal.

[12] The tribunal's reasons should not be examined in isolation, but in the context in which the tribunal made the decision, including the representations made at the hearing, the nature of the issues under appeal, the record of the proceedings and any applicable statutes or statutory plans: *Lor-al Springs, supra*.

[13] Since the Board did give reasons in this case, the question is whether they were adequate. Can one determine from the reasons, taking them in context, why the Board ruled as it did?

[14] As noted above, the appeal before the Board was based on three grounds. The first of these was that the proposed development was for a retail store and did not have any commercial or industrial applications. In his oral presentation, the appellant before the Board, and several others who addressed the Board, submitted that allowing a major retail business such as the liquor store to operate in the industrial area would be detrimental to the vitality of the downtown core and inconsistent with the General Plan, which contains the direction that the downtown core be the major retail focus of the community. It should be emphasized that this is a direction in the Plan, it is not an absolute requirement. Concerns were raised about the deterioration of the downtown area, as perceived by some business owners.

[15] In the first paragraph of its reasons, the Board simply says that the decision to approve the permit is in accordance with the existing policies, practices and Zoning and Building Bylaw of the Town of Hay River. One can conclude from this that the Board had regard to the Zoning and Building Bylaw, which says that retail stores are a discretionary use in the C2 zone. Although the Board makes no reference to the General Plan or its direction, one can conclude that it considered the Plan since it refers to it in the preamble to the reasons. One can also conclude that it considered the submissions that were placed before it. Yet nowhere does the Board analyse the issues or engage in any reasoning.

[16] The Board also refers to existing policies or practices, yet no policies or practices were referred to at the hearing before the Board, none are in the record and the Board does not say in its decision what they are.

[17] The second paragraph in the reasons says only that the Development Officer acted correctly in issuing the development permit. It does not say why the Board found that he acted correctly. Part of the context to be considered is the Development Officer's evidence given at the hearing before the Board. His evidence does not, however, assist. He merely stated that the lot in question is zoned C2, highway service commercial, where retail stores are a discretionary use. He also noted that the development was to be in an existing building in the zone. He referred to a letter from a town planner to the effect that there was no reason not to grant the permit.

[18] In my view, the first two paragraphs in the Board's reasons do nothing more than state that the development permit was properly issued because retail stores are a discretionary use in the zone. They do not explain why the Board found that the proposed use should be permitted notwithstanding the directions in the General Plan or the perceived effect on the downtown core; indeed, they do not comment on those issues at all. Although the preamble refers to consideration of the merits of the appeal, the reasons do not disclose whether the arguments against the permit were found to have no merit at all, or simply insufficient merit or whether they were rejected due to some policy or practice.

[19] The developer argues that the issue before the Board was a very simple one. The developer says that pursuant to a Request for Proposals issued by the Liquor Commission, which document is not in the materials before me or the record, it

proposed to downsize its existing liquor warehouse and add a retail liquor store to it. In the Development Officer's letter to the developer advising that the permit had been approved, he describes the permit as "Renovate Liquor Warehouse to include Liquor Retail Store". The Zoning and Building Bylaw does not permit warehouses in the downtown core. The developer argues that the Board properly focused on the development as a whole; a combined warehouse and retail liquor store could only be located in the C2 zone, not the downtown core.

[20] The developer interprets the Board's statement that the Development Officer's decision is "in accordance with the existing policies, practices and Zoning and Building Bylaw of the Town of Hay River" as meaning that the Board is saying the permit complies with the General Plan and the Zoning and Building Bylaw.

[21] On the face of it, this argument appears to have some merit. However, the Board's decision does not refer to a permit to renovate a warehouse to include a liquor store; it refers to a permit to establish a retail liquor store. Even if one assumes that the Board did view the development as a whole, the reasons given do not explain why the discretionary use is approved notwithstanding the direction in the General Plan and why it is considered to be more appropriately located in the C2 zone than elsewhere.

[22] I accept that a tribunal such as the Development Appeal Board should not be held to the same standard as a judge in the reasons it gives. However, the General Plan's direction about preserving the downtown core and the submissions made to the Board about that amount to a major issue that is not addressed at all in the Board's reasons. The argument made by the developer explains why the Board could confirm the permit but it does not explain why it did confirm it in the face of the General Plan's preference for keeping retail business in the downtown core and the concerns expressed about deterioration of that core. Furthermore, the Board's decision may have been affected by other policies and practices as referred to in the reasons; yet there is no indication at all as to what those policies and practices are.

[23] It seems unlikely, in light of the submissions, both oral and written, that were before it, that the Board had no regard at all to the issue of preservation of the downtown core or the direction in the General Plan. However, even if one concludes from the preamble to the reasons that the Board must have considered those issues, there is no indication in the reasons why the developer's plans were

held to outweigh the direction of the General Plan and concerns about the downtown core.

[24] In relation to the third paragraph of the Board's reasons, the Applicants argue that the statement that "the health issues are beyond the scope of the Development Appeal Board" means that the Board failed to consider those issues and failed to explain why it would not consider those issues. However, the Board went on to say that the health issues are covered under the Zoning and Building Bylaw. The Development Officer in his presentation to the Board addressed the permits and approvals that the developer would need. It can be inferred that the Board felt that the health issues raised would be addressed by those other processes and the conditions placed on the permit by the Development Officer, one of which was compliance with the Zoning and Building Bylaw, which in turn requires compliance with federal, territorial and municipal legislation. No evidence was offered to the Board in support of the concerns raised about contaminants and disease and, in the context of the information before it, it is unlikely that the Board could have decided whether those concerns were valid or sufficient to refuse to confirm the permit. In my view the Board's reasons are adequate on this particular point.

[25] The fourth paragraph in the Board's reasons states, "The issue outlined in the RFP are beyond the scope of the Development Appeal board and is the responsibility of the Territorial Government when awarding the RFP". "RFP" appears to be a reference to the Request for Proposals which the appellant before the Board spoke of in his presentation, but which is not in the record.

[26] The Applicants argue that the Board's reasons are inadequate in that they fail to address the safety concerns that were raised. The Respondents argue that the foregoing paragraph does adequately address those concerns.

[27] The written notice of appeal that was before the Board referred to two areas of concern about safety: first, the lack of sidewalks or streetlights and second, lack of proper access or fencing to provide safe passage to and from the outlet as required in the Request for Proposals. In his oral presentation to the Board, the appellant elaborated on these. He compared the lighting and sidewalks in the downtown area with the lack of same in the industrial area. He compared the absence of heavy equipment traffic in the downtown area with the presence of same in the industrial area. He expressed concern about the cost of putting sidewalks and

proper lighting in the industrial area. The sidewalk, lighting and traffic concerns were echoed by several others who spoke at the hearing before the Board.

[28] The second area of concern explained by the appellant was the presence of heavy equipment around the existing recycling depot operated by the developer on the lot where it proposed to put the liquor store. The appellant before the Board submitted that if the area used by the equipment was to be fenced off for safety reasons, there would be little room for parking for the store which would not meet the requirements under the Request for Proposals.

[29] Since the Request for Proposals was not, according to the record, before the Board, it is not clear what the Board meant, in paragraph number 4, by the “issues outlined in the RFP”. One could interpret it as a reference to the parking requirements that the appellant had referred to in his submission. If that is the reference, however, the Board failed to go on to deal in its reasons with the sidewalk, lighting and traffic concerns. There is no indication in the record that those particular issues were included in any manner in the Request for Proposals.

[30] The Board has a duty to consider safety issues. Section 2.2, subparagraph 2 of the General Plan (Bylaw No. 1811) says that one of the development objectives is to base land use and development decisions on criteria that include the health, safety and quality of life of residents. The lack of sidewalks and lighting and the presence of heavy equipment traffic in the proposed location for the liquor store was squarely raised with the Board. The Board’s reasons do not, however, indicate that any consideration was given to these issues beyond what the Board may have believed was contained in the Request for Proposals. On this issue, the Board did have factual information from several individuals who spoke at the hearing about traffic and safety problems in the proposed location.

[31] On this point, the Board’s reasons are inadequate. If the Board believed that all of these issues were addressed in the Request for Proposals, it may have been wrong; we cannot know for sure because the Request for Proposals is not in the record. If the Board found that the safety issues were non-existent, or minor or could be addressed in some manner, it should have explained that. There is nothing in the conditions attached to the permit issued by the Development Officer that would address these issues so it cannot be inferred that the Board felt they had already been addressed.

[32] However, if the Board did not consider the safety issues at all, then arguably it did not follow the General Plan and thus breached s. 23(8) of the *Planning Act*. Since the Board did not give adequate reasons, it is not possible to determine what the Board's thinking was on this issue.

[33] It is not enough for the Board to simply recite in the preamble to its reasons that it has had regard to the merits of the case and other factors. What is required is some analysis, some reasoning to indicate that the Board has understood and made a logical and considered decision about the issues before it.

[34] Although it was not raised by counsel, I will comment on another aspect of the submissions that were made to the Board. The appellant before the Board questioned whether the Board was ignoring some of the issues just to accommodate the developer (page 5 of the transcript). He also suggested that development permits were not generally scrutinized because of "the buddy system" (page 7). In a general sense, these types of allegations are probably more likely to arise where a tribunal does not give sufficiently detailed reasons that address the substantive issues before it. In other words, a perception of favour or bias, even if completely without merit, may be strengthened if the tribunal does not clearly set out the reasons why it has come to the decision it takes. This contributes to the need for clear and thorough reasons.

[35] In summary, I find that the Board did not adequately address in its reasons the two main points that were raised in the appeal against the development permit: the direction in the General Plan that the downtown core be the major focus of retail business and the safety issues. The issues were not so clear cut that one can determine with any certainty why the Board decided the way it did. This amounts to an error of law and the appeal from the Board's decision must be allowed. Counsel submitted that if I were to allow the appeal, this matter should be remitted to the Board for a new hearing on the appeal to it. I agree and I make that order.

[36] In the circumstances, I need not deal with the second ground of appeal.

[37] Costs may be spoken to, if required, by counsel providing their available dates to the registry so that an appearance may be scheduled. Should counsel agree to address costs by way of written submissions, they may jointly direct to my

attention a written schedule for the filing of those submissions. Counsel are requested to communicate with the registry for these purposes within 30 days of the filing of this decision.

V.A. Schuler,
J.S.C.

Dated at Yellowknife, NT
this 10th day of January, 2008.

Counsel for the Applicants: Steven Cooper and Keith J. Macey
Counsel for the Municipal Corporation of the
Town of Hay River: Jonathan Rossall
Counsel for Hay River Liquor Retailers (1991) Ltd.: Katherine Peterson Q.C.
Counsel for the Development Appeal Board: Cayley J. Thomas

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

5142 NWT LTD., AFM HOLDINGS LTD., CARTER
INDUSTRIES LTD.,
G&L WORKWEAR LTD., GODWIN STORES
LTD., HAY RIVER DISPOSALS (1985) LTD.,
JAMESON HOLDINGS LTD., operating as
JAMESON'S TRUE VALUE HARDWARE,
SCOTT'S ELECTRICAL SERVICES LTD.,
STAN DEAN & SONS LTD. and TERRITORIAL
QUICK PRINT INC.

Applicants

-and-

THE MUNICIPAL CORPORATION OF THE
TOWN OF HAY RIVER,
GREG McMEEKIN and HAY RIVER LIQUOR
RETAILERS (1991) LTD.

Respondents

REASONS FOR JUDGMENT
THE HONOURABLE JUSTICE V.A. SCHULER
