

CITY OF YELLOWKNIFE DEVELOPMENT APPEAL BOARD

IN THE MATTER of a development appeal between:

Yellowknife Community Garden Collective, Back Bay Community Association, Cathy Cudmore, Barb Cameron, Alan & Miki Ehrlich, Pamela Dunbar & David Gilday, Ann Lynagh, and Gary Maund & Marjorie Matheson-Maund

Appellants

- and -

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

Respondent

Issued: November 27, 2020

File: 200-D1-H2-20

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").

Dates of Board Hearing: September 20 and October 3, 2020

Board Members in Attendance: Mr. Terry Testart, Chairperson
Mr. Justin Adams,
Mr. Bill Gault,
Mr. Andy Tereposky, and
Mr. Matthew Yap.

Ms. Debbie Gillard, Secretary

Appearances:

Ms. Libby MacPhail Development Officer, City of Yellowknife

Ms. Barb Cameron Appellant
Mr. Stephen Fancott Agent for Ms. Barb Cameron
Ms. Pamela Dunbar & Mr. David Gilday Appellant
Mr. Gary Maund & Marjorie Matheson-Maund Appellant

Ms. Pamela Dunbar & Mr. David Gilday	Appellant
Mr. Gary Maund & Marjorie Matheson-Maund	Appellant
Mr. Dave Jones	Back Bay Community Association
Ms. Caihla MacCuish & Ms. Amanda Johnson-Dunk	Yellowknife Community Garden Collective
Ms. Cathy Cudmore	Appellant
Ms. Stephanie Laurella	Legal Counsel for Ms. Cathy Cudmore
Ms. Ann Lynagh	Appellant
Mr. Alan Ehrlich & Ms. Miki Ehrlich	Appellant
Mr. Milan Mrdjenovich	Developer
Mr. James Murphy, Q.C.	Legal Counsel for the Developer

Decision:

After reviewing the submission of the Appellants, Developer and Development Officer, and hearing 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 General Plan and the Zoning By-law, determined that the decision of the Development Officer dated August 11, 2020 to approve Development Permit No. PL-2019-0168 be **varied by removal of the height variance.**

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

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 Officer 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. 994552 NWT Ltd. ("994552") submitted a development application to the Municipal Corporation of the City of Yellowknife's Development Officer ("Respondent") to construct a four-storey, 65-unit, Multi-Family Dwelling, ("proposed development") at Lot 17, Block 80, Plan 4462 YELLOWKNIFE ("lot"), within the municipal boundaries of the City of Yellowknife. This land is zoned as Old Town Mixed Use Zone ("OM") pursuant to City of Yellowknife Zoning By-law No. 4404, as amended ("By-law No. 4404").
3. Section 10.18 of By-law No. 4404 regulates OM development, and the purpose of the Zone is to provide areas for a mix of commercial and residential uses. A Multi-Family Dwelling is defined in By-law No. 4404 as a building or portion of a building containing three or more dwelling units with shared entrance facilities. A Multi-Family Dwelling is not listed in the By-law as a permitted use, conditionally permitted use, or as a prohibited use in the OM zone.
4. On May 11, 2020 the Mayor and City Council considered whether a Multi-Family Dwelling is a "Similar use" to other permitted uses of the land in OM pursuant to s. 22 of the *Act*. City Council concluded that the proposed development was a "Similar use" and approved it as a conditional use in this case.

5. On August 11, 2020 the Respondent granted 994552 a development permit for the proposed development for a four-storey Multi-Family Dwelling with a 45.8% height variance pursuant to s. 23 and 25 of the *Act*.
6. Between August 21-25, 2020 the Appellants filed notice of appeal of the Respondent's decision, pursuant to s. 62(1) of the *Act* to the Board.
7. The Appellants provided written submissions to the Board by September 10, 2020, in accordance with s. 3.10(4)(a) of By-law No. 4404. The hearing commenced on September 20, 2020 in accordance with s. 66(1) of the *Act*, recessed on that date and reconvened on October 3, 2020. The parties and the public were provided the opportunity to participate in proceedings, pursuant to s. 67(6) and s. 68(1) of the *Act* and all submissions were carefully considered.

GROUND OF APPEAL

8. The Appellants submitted that the grounds for their appeals include:
 - Multi-Family Dwelling is not a similar use to Multi-Attached Dwelling;
 - The proposed development is not in keeping with the character of the Old Town Mixed Use Zone;
 - The density / building form does not fit with the surroundings;
 - Concerns with the height of the building;
 - Anticipated increase in traffic;
 - Loss of property value;
 - Sunlight / shadowing impacts;
 - Contradicts Intensification Compatibility Points from the 2011 General Plan and does not align with the 2020 Community Plan.

To paraphrase the appeals, Appellants have claimed that they are adversely affected by the decision (s. 62(1)), and:

- There was a misapplication of a zoning bylaw in the approval of the application (s. 62(1)(a));
- the proposed development contravenes the zoning bylaw, the community plan or an area development plan (s. 62(1)(b));
- the development permit relates to a use of land or a building that had been permitted at the discretion of a development authority (s.62(1)(c));
- the application for the development permit had been approved on the basis that the specific use of land or the building was similar in character and purpose to another use that was included in a zoning bylaw for that zone (s. 62(1)(d));

- the application for the development permit had been approved under circumstances where the proposed development did not fully conform with a zoning bylaw (s. 62(1)(e)); and
 - the development permit relates to a non-conforming building or non-conforming use (s. 62(1)(f)).
9. Having reviewed all the information, in its deliberations the Board determined that it is required to consider whether there was a misapplication of the Community Plan, By-law No. 4404, City Council's approval of "Similar Use", and the Development Officer's decision granting a 45.8% Height Variance. Each of these issues will be addressed in turn, below.

SIMILAR USE

10. By-law No. 4404 provides for a number of uses in the OM Zone. The Board heard evidence that Multi-Family Dwellings are neither a Permitted Use nor a Conditionally Permitted Use, but are not prohibited in the OM Zone. In addition, By-law No. 4404 provides that "Similar Use" is a Conditionally Permitted Use in OM and such, Conditionally Permitted Uses requires City Council's approval, which was granted.
11. Section 22 of the Act provides flexibility for City Council to grant an application in circumstances when uses which are not specifically permitted in the By-law, but are similar to existing uses, as excerpted below:

A zoning bylaw may authorize a development authority, on an application for development permit, to

- (a) **determine whether or not a specific use of land or a building, that is not provided for in the bylaw with respect to a zone, is similar in character and purpose to another use of land or a building that is included**, in accordance with paragraph 14(1)(c), in the uses specified in the bylaw for that zone; and
- (b) treat an application involving a similar use in the same manner as an application for a development permit in respect of a use referred to in subparagraph 14(1)(c)(iii) or (iv).

(emphasis added)

12. The Board heard evidence that Council carefully considered the different uses in OM and concluded that a Multi-Family Dwelling is similar in character and purpose to other Permitted or Conditionally Permitted Uses, such as a Multi-Attached Dwelling, by way of Council Motion #0074-20.
13. In reviewing the City's decision, that the proposed development of a Multi-Family Dwelling is a similar use to other permitted uses, the Board heard evidence that within OM there is already a large variety of uses. As a result, the Board concludes that City Council's decision, that a Multi-

Family Dwelling is a similar use, was a reasonable outcome. The Board defers to City Council's decision and exercises the Board's discretion to not interfere with that outcome on the basis that it was within Council's authority and was within a reasonable realm of possibilities. The Board further noted that Council's decision to permit a Multi-Family Dwelling as a "Similar Use" is not contrary to the 2011 General Plan or 2020 Community Plan.

14. The majority of the Appellants' submission about "Similar Use" were in fact concerned with the size and scope of the building. While the Board does have concerns about the mass and scale of the proposed development, the Board does not consider this to be a factor in determining whether a Multi-Family Dwelling is a "Similar Use" to a Multi-Attached Dwelling.
15. As a result, this ground of appeal is dismissed.

CHARACTER AND FORM OF THE PROPOSED DEVELOPMENT

16. Section 4.2 of the 2011 General Plan and By-law No. 4656 provides for Character Areas within the City of Yellowknife. The Character Area of Old Town is provided for at s. 4.2.1 of the 2011 General Plan, which states:

Old Town is recognized as an integral part of Yellowknife's history and a major part of the unique character and personality of the community. The redevelopment vision for this area responds with the careful and incremental redevelopment of key sites and waterfront areas to add additional activity, increase public waterfront access, while at the same time respecting the organic and authentic character of the area. Old Town is characterized by eclectic building forms, human scale streets, modern and rustic materials, an active and natural waterfront, prominent rock outcroppings, and a diversity of people and activities that reflect the independent, industrious and artistic culture of Yellowknife. The design guidelines and statements of this section are intended to reinforce the established character of Old Town.

A new Harbour Plan is being prepared and may contain a further definition of the character of Old Town. Amendments to the guidelines below may result from the adoption of the Harbour Plan.

Policies:

1. Intensification proposals in Old Town, as described on Map 3, should conform to the following design guidelines and statements:
 - a. **Design of buildings should celebrate the eclectic character of built form in Old Town by sensitively contrasting building massing, materials, and colour.**
 - b. **Massing and scale of buildings should respect the human-scale of Old Town streets,** respond to any adjacent public gathering spaces, and emphasize priority of pedestrian activity.
 - c. Redevelopment of lots that include waterfront must incorporate public access to the waterfront into the site design.
 - d. Development in proximity to Pilot's Monument Rock and McAvoy Rock shall not detract or obscure the Rocks' distinctiveness. Development should have a form that fits with the contours and does not dominate the terrain. Finishing materials should fit in with the natural terrain.

- e. Prominent views to the lake from public gathering spaces are to be maintained, wherever possible.
- f. **No building should exceed 3 storeys in height. Exceptions to this height limit will be considered for sites along Franklin Avenue** (west of Weaver Drive), subject to conformity with compatibility criteria in Section 4.1 and to the design guidelines of this section.

(emphasis added)

17. The Appellants argued that the proposed development contravenes many of the provisions of the 2011 General Plan, particularly with design, massing, scale and height; specifically policies a, b, and f, and contended that it is not in keeping with the character of Old Town or the OM zone. However, the Board found that the Appellants' submissions did not convincingly persuade the Board that form alone was contrary to the General Plan.
18. The Board heard evidence that the Developer took reasonable steps to integrate the proposed development into the character of the OM zone. The Developer selected materials such as wood siding, galvanized metal, stone and colours of blue, grey, browns and orange to respect the local and natural colours and to blend into the Old Town eclectic style.
19. After reviewing these perspectives, the Board noted that "character" is not a defined term and determined that "character" or what should be "reinforced" is a subjective concept, as it could mean different things to different people. Further, "policy" is not mandatory, prescriptive rules. Furthermore, there are many different building forms in the OM zone, including single-family dwellings, Multi-Attached Dwellings, warehouses, log cabins, commercial buildings, etc. that reflect a great diversity of uses and building forms in the OM Zone.
20. As a result, the Board concluded that the Developer has taken reasonable efforts to blend into the character of Old Town and the OM Zone. While the Board recognized that there is not another building character or form that completely compares exactly to the proposed development, the Board concludes that the Developer has taken adequate steps to integrate the building's form and design and that the development will contribute to the diverse character of Old Town to comply with the 2011 General Plan and By-law No. 4404.
21. As a result, this ground of appeal is dismissed.

SUNLIGHT / SHADOWING IMPACTS, NOISE, TRAFFIC AND PARKING

22. The Appellants further expressed concerns with the amount of traffic that this proposed development will create, in addition to light and noise, and parking problems.
23. The Board heard evidence from the Appellants indicating that the shadowing study submitted by the Developer was flawed. The Board agreed that the study was flawed.

24. The Board concludes that parking and traffic is not within their authority and is covered by other by-laws.
25. As a result, these grounds of appeal are dismissed.

LOSS OF PROPERTY VALUE

26. The Board considered the evidence provided and determined that the Appellant's arguments were inadequate to prove loss of property value.
27. As a result, this ground of appeal is dismissed.

MASS AND SCALE OF THE PROPOSED DEVELOPMENT AND HEIGHT VARIANCE

28. The Board heard submissions from the Appellants that the mass and scale of the proposed development is not appropriate for this neighbourhood as the largest residential building in the OM zone is an 8-unit Multi-Attached Dwelling, while the proposed development will have 65 units. In support of this submission, the Appellants outlined that this mass and scale is contradictory to the provisions of the By-law which states that buildings should respect the human-scale of Old Town streets, respond to any adjacent public gathering spaces, and emphasize priority of pedestrian activity.
29. In response to the Appellant's concerns regarding mass and scale, the Development Officer submitted that the use of balconies respects the human-scale of Old Town by increasing visual permeability and increases the chances of person-to-person interactions. The Development Officer further submitted that the structure responds to adjacent public gathering spaces by including pedestrian connections to the Twin Pine Hill Trail System, Rotary Park and that pedestrian activity is prioritized through the inclusion of landscaped sidewalk bump-outs in the parking lot.
30. In support of the Development Officer, the Developer submitted that the lot is 2.01 hectares in size and the 2011 General Plan contemplates for the potential to up to 75 units on this lot, while the proposed development is only 65 units. The Developer further submitted that there are geotechnical challenges with the lot, and as such they have concentrated the development and situated the structure on the lot where development can most easily occur. To this end, the Developer had requested a height variance of 4.58 meters that will allow the inclusion of a fourth floor to make the project financially viable.
31. Considering this matter, the Board did have concerns with the mass and scale of the proposed development, and particularly with the additional mass and scale that was created by allowing the height variance.

32. In granting the development permit the Development Officer granted a height variance of 4.58 meters for the purpose of allowing a fourth floor to be constructed on this Multi-Family Dwelling. The Development Officer submitted that when considering the height variance she took into account the 2011 General Plan which states:

“No building should exceed 3 storeys in height. Exceptions to this height limit will be considered for sites along Franklin Avenue (west of Weaver Drive), subject to conformity and compatibility criteria in Section 4.1 and to the design guidelines of this section.”

The Development Officer submitted that since the By-law utilizes the word “should”, it indicates that the policy is recommended, but not mandatory, and as such she has authority to grant the variance for a fourth story at this lot which is not on Franklin Avenue. The Development Officer further submitted that transition areas are encouraged between lands designated Mixed-Use and Residential Community and, given that this site is on the edges of both Downtown and Old Town, and in the proximity of the Downtown Zone, an increase in the permitted height of the proposed development would be a reasonable exception for this development.

33. After considering the submissions, the Board concluded that while the 2011 General Plan’s use of the word “should” is indeed permissive, the Board is not convinced by the reasons put forward. Having reviewed the submissions, the Board also noted that the By-law does not provide for transitional development within the Downtown Zone and OM, as relied upon by the Development Officer in granting the height variance.
34. The 2011 General Plan expressly contemplated the circumstances where exceptions for four storeys would exclusively occur. The Board’s interpretation of the 2011 General Plan suggests that no height variance is permitted outside of Franklin Avenue. If a variance was permitted outside of Franklin Avenue, there is nevertheless still no basis to grant one in this circumstance. While the community plan provides for such policy statements, By-law No. 4404 is precise in its height restriction and this proposed height variance is significant.
35. Furthermore, while there may be limitations to the buildable area of the lot, there is no requirement to see intensification or to bend rules to attempt to reach a ‘potential’ target that makes the developer more financially feasible to pursue the site as opposed to spreading out the development in other forms, masses or uses. The Board finds that the addition of a fourth storey does not adequately respect the provisions of the By-law and the 2011 General Plan and only exasperates the Board’s concerns with the mass and scale of the proposed development.

DISPOSITION

As a result, it is the Board’s determination that the mass and scale of the proposed development is not in keeping with that of Old Town as there are no other four-storey buildings within this Zone. The Board further determines that the proposed development is not along Franklin Avenue and would therefore not qualify for the exception provided for in the 2011 General Plan for the height variance.

- 36. The Development Appeal Board hereby **varies** the Decision of the Development Officer by removing the height variance from Development Permit No. PL-2019-0182.
- 37. Pursuant to s. 70 of the *Act*, this decision of the Board is final and binding on all parties and is not subject to appeal.

Dated this 27 day of November, 2020.



Terry Testart, Chairperson



Debbie Gillard, Secretary