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Community Consultation Is "Not Mere Window Dressing" in Development Permit Applications

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Case Commented On: *Thomas v Edmonton (City)*, 2016 ABCA 57 (CanLII)

Disputes between developers of new residential properties and landowners, especially in the context of mature neighborhoods, are common when variances are sought from local land-use bylaw standards. In *Thomas v Edmonton (City)*, the Court of Appeal tipped the scales slightly in favor of landowners where the bylaw mandates community consultation. The Court held that where a development standard variance is required, and the applicable zoning bylaw mandates community consultation, that consultation is a condition precedent to obtaining a valid development permit. Moreover, the Subdivision and Development Appeal Board (SDAB) has no authority to waive the requirement.

Facts

This was an appeal from the issuance of a development permit to the developer of a condominium complex known as "Sylvancroft" in Groat Estates, Edmonton. The respondent on the appeal was the developer The House Company Ltd. (House Co.), and the appellants were five residents of the Groat Estates neighborhood whose properties back on to Sylvancroft.

After Sylvancroft was subdivided, House Co. sought and obtained a series of development permits from the City for single family dwellings within Sylvancroft, which is zoned as RF3 (Small Scale Infill Development) under the City of Edmonton's *Zoning Bylaw 12800*. However, Groat Estates falls within the geographical area to which the Mature Neighborhood Overlay ("Overlay") in the Zoning Bylaw applies. Generally, the Overlay imposes specific requirements for new low density residential housing in mature neighborhoods. House Co. had already applied for variances for three developments in Sylvancroft, and in each case, the variance and development permit was granted.

This appeal relates to House Co.'s fourth proposed variance in Sylvancroft. The proposed development, a single detached house, did not comply with the Overlay regulations in the Zoning Bylaw in regard to setback requirements, and House Co. applied for a variance. The express purposes of the Overlay are to ensure that new low density development in Edmonton's mature residential neighborhoods is sensitive in scale to existing development, and ensures privacy and sunlight penetration for adjacent properties.

Section 814.3(24) of the Zoning Bylaw required House Co. to conduct a community consultation. As summarized by the Court:

> In short, where a proposed development does not comply with the Overlay regulations, the applicant must consult with all assessed owners of land within 60 metres of the

development, discuss requested variances, document any concerns of affected parties and what modifications were made to address these concerns and submit this documentation to the Development Officer. (at para 7)

House Co. decided not to conduct a community consultation for its fourth variance application. It had spoken to the appellants in regard to the three prior applications, and decided that to do so again would be "a waste of time" (at para 8). The Development Officer denied House Co.'s application on the basis that the development failed to comply with the specified setback requirements in the Overlay, but did not order community consultation to be undertaken. House Co. appealed the decision to the SDAB. The SDAB allowed the appeal and granted the development permit by exercising its discretion to grant variances to setback requirements under section 687(3)(d) of the *Municipal Government Act*, RSA 2000, c M-26 (MGA). It did not, however, require community consultation prior to doing so. The question on appeal was whether the SDAB had the authority to waive the requirement for community consultation in the Zoning Bylaw.

The answer turned on the proper interpretation of section 687(3)(d) of the MGA. This section empowers the SDAB to grant development permits even when a proposed development does not meet the requirements of a land use bylaw. It reads as follows:

> (3) In determining an appeal, the subdivision and development appeal board (…)
>
> (d) may make an order or decision or issue or confirm the issue of a development permit even though the proposed development does not comply with the land use bylaw if, in its opinion,
>
> (i) the proposed development would not
>
> (A) unduly interfere with the amenities of the neighborhood, or
> (B) materially interfere with or affect the use, enjoyment or value of neighboring parcels of land
>
> and
>
> (ii) the proposed development conforms with the use prescribed for that land or building in the land use bylaw.

Does the phrase "even though the proposed development does not comply with the land use bylaw" in this section encompass *both* substantive (*i.e.*, physical development standards like setbacks) *and* procedural requirements (*e.g.*, community consultation), or just substantive physical standards? The SDAB took the view that it included both. In other words, it had the authority to waive both procedural and substantive requirements under the Zoning Bylaw. In its view, House Co.'s failure to comply with the mandated community consultation (a procedural requirement) "did not, in of itself, materially interfere with the amenities of the neighborhood or materially interfere with or affect the use, enjoyment and value of neighboring parcels of land" (at para 11). It thus waived the requirement, allowed the setback variance, and issued the development permit.

A majority of the Court of Appeal disagreed. Writing for the majority, Fraser C.J. concluded that section 687(3)(d) does not empower the SDAB to waive the requirement for community consultation in the Zoning Bylaw. Rather, such consultation is a critical procedural requirement that must be fulfilled prior to the issuance of any development permit to which the Overlay applies.

Decision

The Court agreed that the applicable standard of review in this case was correctness. In its view, whether the SDAB has the authority under section 687(3)(d) to waive the required community consultation is a question of "pure statutory interpretation" (at para 17) that does not engage the expertise of the SDAB. The Board's decision was therefore not owed any deference by the Court.

Fraser C.J., for the majority, conducted a careful and thorough review of the purposes of both the SDAB's variance powers under the MGA and the requirement for community consultation in the Zoning Bylaw. She concluded that in the absence of apparent inconsistency, the MGA and the Zoning Bylaw should be interpreted in a manner that ensures harmony, coherence and consistency between them.

As every first-year law student knows, the starting point for statutory interpretation is the contextual or purposive approach. Ultimately, the goal is to uncover the intention of the legislator. Fraser C.J. noted that this search requires a consideration of the specific words in question, the scheme, purpose and structure of the part of the MGA in which the words are found, along with other legislation (including delegated legislation like the *Zoning Bylaw*) touching a similar or related matter. In that way, the overall objective of the specific enactment can be identified and fulfilled. (at paras 19-22)

Applying the contextual approach here, Fraser C.J. concluded that section 687(3)(d) does not grant the SDAB authority to waive compliance with the community consultation requirement for three key reasons. First, she held that a purposive and contextual interpretation of the relevant provisions in the MGA reveal that it is the "proposed development" itself that must not be in compliance with the land use bylaw for purposes of section 687(3)(d) (at para 31). She reviewed the relevant parts of the definition of "development" in the Act (*i.e.*, "a building or an addition to or replacement or repair of a building and the construction or placing of any of them on, in, or under land") and concluded that "…to engage the SDAB's variance authority, it is the *physical* structure that must not comply with the relevant land use bylaw, not the failure to fulfill the procedural requirements for community consultation." (at para 33; emphasis added) This interpretation was supported, in her view, by a review of the whole of section 687(3)(d), as well as other relevant sections in the MGA (in particular, section 640(6) which grants a nearly identical variance power to development officers) (at para 34).

Further, as she noted, "[a]llowing the SDAB (and by extension, a Development Officer) to waive the community consultation requirement would effectively render s. 814.3(24) of the *Zoning Bylaw* meaningless." (at para 36) Under this approach, non-compliance with a community consultation could never, in itself "unduly interfere with the amenities of the neighborhood or materially interfere with or affect the use, enjoyment and value of neighboring parcels of land" (at para 36). Thus, there would never be a valid reason under section 687(3)(d) to not waive the

community consultation requirement. This would effectively abolish the consultation requirement in the Zoning Bylaw, and such an interpretation must be rejected (at para 37).

Second, Fraser C.J. stated that her interpretation of section 687(3)(d) is supported by "compelling public policy justifications" for community consultation. She noted that community consultation exists for a reason and that a fair process is the "basis for public confidence in the legitimacy of all democratic processes, including those relating to planning and development of land" (at para 41). In her view, it would make little sense to waive a step in the development process that is intended to help determine whether a proposed development's non-compliance with development standards should be waived in the first place. Having an applicant consult with the community provides necessary information to determine whether non-compliance with a bylaw development standard would in fact interfere with the "neighboring parcels of land" or the "amenities of the neighborhood". This is especially so, she said, "where, as here, the requirement for community consultation is held out to members of mature neighborhoods as being a valid method of ensuring a proper balance between existing and new development." (at para 42)

Fraser C.J. stated that the requirement is "not mere window dressing or a false promise to taxpayers in mature neighborhoods" (at para 42). Rather, all landowners to whom the requirement applies should have confidence that the rules will be applied fairly and equally. If the SDAB could waive the community consultation requirement, some landowners would receive the benefits of it, while others would not. This could not have been the intention of the City in passing the consultation requirement in the Zoning Bylaw.

Lastly, the majority of the Court held that the failure to conduct the required consultation constituted a breach of procedural fairness. An administrative decision that affects "the rights, privileges or interests of an individual" (see *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817) triggers a duty of procedural fairness on the decision-maker. While the content of the duty is highly contextual and varies depending on a number of factors, Fraser C.J. concluded that the existence of legitimate expectations was a critical factor in this case. She noted that where a claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness. (at para 50)

Here, the affected neighbors expected to be consulted and should have been. Since the Zoning Bylaw mandates community consultation in every instance where the Development Officer determines that the proposed development does not comply with the Overlay regulations, such landowners had a legitimate expectation that they would be consulted. The language in the Zoning Bylaw with respect to the community consultation requirement is "clear, unambiguous and unqualified" (at para 50). Evoking the seminal work of legal theorist Hohfeld, Fraser C.J. concluded that "[t]he corollary of a mandatory obligation on an applicant to consult affected landowners is a right, on the part of the affected landowners, to be consulted" (at para 50).

Fraser C.J. also rejected the argument that the breach of procedural fairness was "cured" by the appellants having participated in the hearing before the SDAB. (at para 54) Were this the case, developers would be encouraged, indeed entitled, to treat the community consultation as an unnecessary and time-consuming step. And affected persons may consciously choose to not attend the hearing at all. Neither result, to her mind, accords with the spirit, intent, and the language of the Zoning Bylaw. (at para 55)

Nonetheless, Fraser C.J. conceded that procedural or informational defects of an "insubstantial" or "minor" kind should not be allowed to thwart the development process. She noted that an

efficient land development process is in the collective self-interest of a community, and that mechanisms exist under both the Zoning Bylaw and the MGA to ensure that "insubstantial procedural errors" and "technical irregularities" do not vitiate decisions made by a Development Officer and the SDAB. She noted also that the SDAB has "implicit authority regarding procedural defects" (at para 63) in the exercise of its discretion under the MGA. But none of these, in her view, empowered the SDAB to "waive" or "cure" the procedural unfairness inherent in the developer's failure to comply with the mandatory community consultation in this case.

In his dissent, Slatter J.A. focused on the majority's remarks about the SDAB's procedural jurisdiction. In his view, once it is conceded that the SDAB is authorized to overlook procedural errors and irregularities, its jurisdiction to waive even a mandatory consultation requirement must be accepted. Either the SDAB has procedural jurisdiction under section 687(3)(d) or it does not. To his mind, there is no legal distinction between a community consultation procedure and any other procedure; either they all fall within the wording of section 687(3)(d) or none do. As he concluded, "[o]nce it is conceded that the SDAB has such a procedural jurisdiction, whether any particular procedural shortcoming is "insubstantial", "minor", or within the "margin of appreciation" is within the mandate of the SDAB." (at para 81) And that decision is, presumably, subject to deference by the Court.

Commentary

While Slatter J.A.'s approach is attractive for its simplicity, with respect, it fails to give effect to the clear and unambiguous mandatory language of the community consultation requirement in the Zoning Bylaw. The majority is correct to conclude that section 687(3)(d) must, except in the case of apparent inconsistency, be reconciled with the intent, purpose and language of the Zoning Bylaw. Were it otherwise, the SDAB could simply ignore any and all procedural dictates on the part of the delegated legislator. Surely the failure to comply with a mandatory direction in regard to community consultation is not a "minor" or "insubstantial" procedural breach in the development permitting process.

Moreover, as noted by the majority, the community consultation requirement in the Zoning Bylaw is intended to bring forth relevant information needed to assist development officers and the SDAB to determine whether the proposed variance will "unduly interfere with the amenities of the neighbourhood" or "materially interfere with or affect the use, enjoyment or value of neighboring parcels of land". Mandating community consultation in one variance application but not in another would have the effect of negating the importance of information from affected landowners about the *cumulative* effects of separate variance applications. Because the SDAB typically evaluates each variance request on the basis of the community as it exists at the time of the hearing, this could have the effect of minimizing the cumulative impact of a series of variances on a mature neighborhood. As noted by the majority, community consultation is one way to mitigate this risk. It also encourages developers to make accommodations where possible to try to reduce opposition to a variance application.

That said, how far do the Court's views on the importance of community consultation in this case extend? Certainly there is broad language here about the importance of consultation and the legitimacy of democratic processes. But it is unlikely these comments extend more generally, outside of situations where there is a clear mandated requirement for community consultation in a land use bylaw. And the comments clearly apply only to those landowners actually identified in the land use bylaw as being entitled to the consultation, not to the public at large.

So the Court of Appeal has slightly tipped the scales in favor of landowners in the development permit application process through this decision. But why only "slightly"? The result of this case was that the development permit was quashed and the matter remitted back to the SDAB, with a direction to ensure that House Co. completes the necessary community consultation. The consultation had to occur, but is there any requirement that the developer *must* accommodate the concerns brought forth? Probably not. While section 814.3(24) of the Zoning Bylaw requires developers to "document any opinions or concerns, expressed by the affected parties, and what modifications were made to address their concerns", this language likely does not have the effect of requiring developers to actually accommodate the concerns in all cases. Such an interpretation would be hard to reconcile with the broad discretion given to development officers and the SDAB under the MGA to grant variances. Even the majority of the Court talked about consultation being an incentive for developers to make "reasonable" accommodations in response to affected landowner concerns. Ultimately, even if landowners are consulted, they may still get a decision they do not like – and that decision, unlike the one in this case, would be subject to a reasonableness standard of review that would attract considerable judicial deference.