



**EDMONTON
TRIBUNALS**

*Subdivision &
Development
Appeal Board*

**10019 – 103 Avenue NW
Edmonton, AB T5J 0G9
P: 780-496-6079
F: 780-577-3537
sdab@edmonton.ca
edmontonsdab.ca**

Date: April 21, 2017
Project Number: 240549147-001
File Number: SDAB-D-17-063

Notice of Decision

- [1] On April 6, 2017, the Subdivision and Development Appeal Board heard an appeal that was filed on March 8, 2017. The appeal concerned the decision of the Development Authority, issued on March 1, 2017, to refuse the following development:

To change the Use from General Retail Store to Child Care Service (69 children) and to construct interior and exterior alterations

- [2] The subject property is on Plan 8922019 Blk 9 Lot 5, located at 11250 - 82 Street NW, within the CB1 Low Intensity Business Zone. The Stadium Station Area Redevelopment Plan applies to the subject property.

- [3] The following documents were received prior to the hearing and form part of the record:

- Copies of the development application, Development Permit decision and plans;
- Memorandum from City of Edmonton Transportation Planning and Engineering;
- Development Officer's Technical Review and written submissions dated March 30, 2017; and
- Appellant's supporting materials, including photographs and a letter of support.

- [4] The following exhibits were presented during the hearing and form part of the record:

- Exhibit A – Copy of a Commercial Purchase Contract for the immediately adjacent site to the south submitted by the Appellant.
- Exhibit B – A sketch of the subject site to show the location of the proposed 6 foot wooden fence and 3 foot landscaped buffer submitted by the Appellant.

Preliminary Matters

- [5] At the outset of the appeal hearing, the Presiding Officer confirmed with the parties in attendance that there was no opposition to the composition of the panel.

- [6] The Presiding Officer outlined how the hearing would be conducted, including the order of appearance of parties, and no opposition was noted.
- [7] The appeal was filed on time, in accordance with section 686 of the *Municipal Government Act*, RSA 2000, c M-26.

Summary of Hearing

- i) *Position of the Appellants, Ms. N. Sidhu, Ms. S. Judge and their Architect, Mr. M. Lomasnkiewicz*
- [8] Mr. Lomasnkiewicz advised the Board that a six foot high wooden fence will be constructed inside the existing chain link fence along the south and west property lines to address the concerns of the Development Officer as identified in the second reason for refusal.
- [9] A three foot wide landscape buffer with small shrubs, trees and planters will also be installed to the inside of the proposed six foot high wooden fence.
- [10] He addressed the Development Officer's first reason of refusal and stated that the proposed outdoor play space will be located in the southwest corner of the site. The play space will be adjacent to a storage building and vehicle storage located on the immediately adjacent property to the south. The play space is not adjacent to a building bay, therefore, the Development Officer's first reason for refusal is not a valid concern. The other building located further east on the site to the south is used for vehicle repairs.
- [11] The developer of the subject site plans to purchase the adjacent property to the south to develop additional retail uses which should mitigate the concerns of the Development Officer regarding the proposed development. He submitted Exhibit "A", a copy of a Commercial Purchase Contract with a closing date of May 15, 2017.
- [12] It was his opinion that the proposed Child Care Service has been designed according to the Bylaw requirements for fencing, security and the safety of the children. The proposed wooden fence and landscape buffer will address the concerns of the Development Officer regarding the industrial land that abuts the site to the south.
- [13] Upon questioning by the Board, the Appellant confirmed that the landscape buffer would help reduce noise pollution from the Light Rail Transit ("LRT") line, but was unable to confirm whether the fence would reduce possible odours or pollution from the neighbouring automotive repair shop.
- [14] The Appellant stated that at a meeting with the City Development office in August 2016, the landlord had been assured that a Child Care Service would be allowed at this location. Ms. Sidhu also personally visited the City Development office and was advised similarly. She did not obtain written confirmation. Based on these discussions, plans were

submitted to Sustainable Development. The Appellant was therefore surprised to learn that the application had been refused. At no point was the LRT line, nor the industrial land to the south, identified as a problem.

- [15] Mr. Lomasnkiewicz referenced a sketch of the subject site, marked as Exhibit “B”, to show the location of a new six foot high wooden fence and three foot wide landscaped buffer. He advised the Board that a formal landscaping plan had not yet been prepared. He clarified that if the chain link fence has to be retained because of the LRT line, the new six foot high wooden fence would be constructed approximately one foot inside that chain link fence.
- [16] Information could not be provided regarding the storage of toxic materials on the site to the south. However, it was the Appellant’s position that safety regulations have to be followed regarding the storage and disposal of toxic materials. For example, used tires stored on the site are picked up by a recycling company. Accordingly, any such materials should not pose a danger to the children in the play space.
- [17] The Appellant expressed no opposition to the recommended conditions provided by the Development Officer, and stated that they would accept the imposition of a condition that a six foot high wooden fence and a three foot wide landscape buffer be installed along the south and west property lines to encompass the proposed outdoor play area.

ii) Position of the Development Officer, Mr. P. Adams

- [18] Mr. Adams explained that Ms. Sidhu likely originally met with a staff member at the front counter of the Sustainable Development Department, whereupon she was likely advised that the proposed development was a Discretionary Use in the Zone. It is typical to review the general development regulations with an Applicant at that type of meeting. However, a detailed review is not completed by a Development Officer at that time and no promises are made as to whether an application will be approved or refused.
- [19] The proposed Child Care Service directly abuts a site that has been approved for General Industrial Use which allows for body shop work and painting of motor vehicles. The type of repair work that would be occurring on the adjacent site would therefore not be engine work.
- [20] He clarified that the second recommended condition in his written report is indeed a development regulation. Section 51 of the *Edmonton Zoning Bylaw* requires outdoor lighting to be located and arranged so that direct rays of light are not directed at any adjoining properties or interfere with the effectiveness of traffic control devices.
- [21] Based on a quick review of the sketch provided by the Appellant, it was his opinion that the proposed three foot wide landscape buffer would comply with the landscaping requirements of section 55 of the *Edmonton Zoning Bylaw*. However, while the provision of a new six foot high wooden fence and three foot wide landscape buffer might provide

some protection for children using the outdoor play space, it does not change the fact that the subject site abuts a General Industrial Use, a Vehicle and Equipment Sales/Rentals Use and the LRT line. The development therefore does not comply with section 80(2). The safety of the children would be compromised should an accident or emergency situation occur, or if a child wandered onto the LRT line.

- [22] Upon questioning by the Board, Mr. Adams clarified that the noise generated by the LRT line is a lesser consideration. Of primary concern is the access to, and egress of, the proposed outdoor play area, which in his opinion is not safe. He acknowledged that safety considerations are more heavily considered at later stages of the licensing process by other officials. However, safety remains a factor to consider when reviewing development applications.
- [23] In this case, the west property line abuts a fiber optics easement and the LRT line can be accessed from this easement. There is also no access or egress available on the south side of the proposed outdoor play area. In the event of an emergency, the only exit from the outdoor play area requires access through the building, or along a narrow walkway of approximately 0.9 metres wide bordering the rear of the building.
- [24] Mr. Adams was unable to confirm whether the existing chain link fence along the property line is owned by the City or by the developer. Referencing a photograph submitted by the Appellant, he identified what he believed was a temporary construction fence located between the LRT line and the building.
- [25] Mr. Adams confirmed that the building was approved on January 29, 2016, and that relocating the outdoor play area on the site would impact other development regulations. A new development permit application would therefore be required. As it stands, the outdoor play space is located in the setback requirement. However, a variance is not required because the Child Care Service does not abut a residential zone.

iii) Rebuttal of the Appellants

- [26] There is an existing chain link fence on the west property line between the subject site and the LRT line. A new six foot high wooden fence will be constructed approximately one foot inside that fence.
- [27] The building was approved and constructed to provide access and egress that complies with all safety requirements.
- [28] A gate that complies with all development regulations will be installed to provide access and egress to the outdoor play area.
- [29] Ms. Sidhu asked if the Board could delay rendering a decision pending the sale of the General Industrial Use site to the south.

- [30] At this point the Presiding Officer clarified that pursuant to the provisions and scheme of the *Municipal Government Act*, the Board must render a decision based on the existing uses of the land and information provided at the hearing. However, the Appellant/Applicant would have the option to withdraw the appeal and reapply for a new development permit at a later date.
- [31] Ms. Judge advised the Board that her husband owns and operates an automotive repair shop from another location in the city. Based on her personal experience, strict safety precautions are taken and there is nothing kept on the site that would be dangerous to children.

Decision

- [32] The appeal is **DENIED** and the decision of the Development Authority is **CONFIRMED**. The development is **REFUSED**.

Reasons for Decision

- [33] Child Care Service is a Discretionary Use in the CB1 Low Intensity Business Zone.
- [34] If approved, the proposed Child Care Service Use would require a waiver of two locational requirements enacted to address safety concerns for children.
- [35] The proposed Child Care Services Use is to be located in the southern portion of the commercial building which has been constructed right up to the southern Side Lot Line. The outdoor play area is located in the southwest corner of the triangular lot immediately abutting an existing General Industrial Use and a Vehicle and Equipment Sales/Rentals Use contrary to the locational requirements in sections 80(2)(a)(iv) and (vi) of the *Edmonton Zoning Bylaw* which provides that no portion of a Child Care Service Use, including the building bay and on-site outdoor play space, where provided, shall be located adjacent to a building bay with an approved development permit for General Industrial Uses or Vehicle and Equipment Sales/Rentals..
- [36] The photographic evidence shows these two neighbouring developments are in use and that the northwest portion of the abutting site along the shared Side Lot Line contains an accessory storage building (built with no setback), several parked vehicles and other random materials including several vehicle tires.
- [37] There is no separation or setback between the building which is to house the Child Care Services Use, or between the outdoor play area and the General Industrial Use and Vehicle and Equipment Sales/Rentals use occurring on the immediately adjacent property to the south, which increases the potential planning concerns related to safety and the proposed Child Care Service Use.

- [38] During the hearing, the Appellants provided evidence to the Board that the adjacent property to the south may be sold and rezoned to accommodate different Uses. However, this is speculative and the Board has based its decision on the existing circumstances and currently approved Uses and zoning.
- [39] The subject Site (and the outdoor play area in particular) also abuts the existing Light Rail Transit line located to the west.
- [40] Given these circumstances, the Board finds that the location of the Child Care Services Use and the outdoor play area (directly abutting a Light Rail Transit line, a General Industrial Use and a Vehicle Equipment Sales/Rentals Use) also creates a dangerous and negative impact on the Child Care Service, contrary to section 80(2)(d) which states:
- Where Site conditions exist which may negatively impact the Child Care Services Use, including but not limited to trash collection areas, large parking lots, loading docks, rail lines, or arterial public roadways, the Applicant shall design the building, entrances, play spaces, landscaping and Fencing, or similar, to mitigate these conditions to the satisfaction of the Development Officer.
- [41] The Appellant proposed construction of a second six foot high wooden fence inside an existing chain link perimeter fence and a three foot wide landscape buffer along the south and west property lines to mitigate these concerns. However, the Board finds that a wooden fence and three foot wide landscape buffer would not adequately address the potential safety concerns raised by the approved abutting and adjacent uses.
- [42] Furthermore, while the Board recognizes the jurisdiction of other authorities regarding building and safety codes, the proposed development is a Discretionary Use and the Board finds that the siting of the principal building on the lot further exacerbates the planning concerns about the suitability of this Discretionary Use at this location.
- [43] The previously approved commercial building in which the proposed Child Care Service is located extends up to the southern Side Lot Line and is setback approximately 0.9 metres from the Rear Lot line. Furthermore, the only outdoor egress from the proposed outdoor play area is along a narrow walkway bordering the entire length of the rear of the building. Access to means of egress along the rear of the building may be further lessened by the addition of the wood fence proposed by the Appellant to address the other safety concerns.
- [44] Both the Appellant and the landlord indicated that during various conversations with Sustainable Development in the summer of 2016, they received assurances that the Child Care Service would be approved and therefore the Appellant submitted the refused development permit application and began the interior alterations. The Development Officer submitted that these types of representations would be inconsistent with typical City practice at a cursory front counter review and opined that the landlord and the Appellants were more likely to have been informed that Child Care Services was a

Discretionary Use in the CB1 Zone. However, the Development Officer also acknowledged that he was not present at any of these interactions.

- [45] The determination as to whether a Discretionary Use such as Child Care Services should be approved is governed by statute and case law and determined based on the development's compatibility with the surrounding uses and particular planning concerns. Representations that may or may not have been made by the Development Authority with respect to the issuance of a development permit is a matter separate from this determination and therefore outside the purview of this Board.
- [46] For the reasons outlined above, based on the Site conditions (including the proximity of the proposed outdoor play area to a General Industrial Use, a Vehicle and Equipment Sales/Rentals Use and the LRT line, and the configuration of the principal building with no setback from the south Lot Line), the Board has determined that the proposed Child Care Service Use is not reasonably compatible with the surrounding land uses. It is not an appropriate Discretionary Use at this location and the Board declines to approve the Use with the required variances. The appeal is therefore denied.

Ms. K. Cherniawsky, Presiding Officer
Subdivision and Development Appeal Board

Board members in attendance: Ms. P. Jones, Mr. A. Peterson, Ms. E. Solez, Mr. J. Wall

Important Information for the Applicant/Appellant

1. This decision may be appealed to the Alberta Court of Appeal on a question of law or jurisdiction under Section 688 of the *Municipal Government Act*, RSA 2000, c M-26. If the Subdivision and Development Appeal Board is served with notice of an application for leave to appeal its decision, such notice shall operate to suspend the Development Permit.

2. When a decision on a Development Permit application has been rendered by the Subdivision and Development Appeal Board, the enforcement of that decision is carried out by the Sustainable Development Department, located on the 2nd Floor, Edmonton Tower, 10111 – 104 Avenue NW, Edmonton, AB T5J 0J4.

NOTE: The City of Edmonton does not conduct independent environmental checks of land within the City. If you are concerned about the stability of this property for any purpose, you should conduct your own tests and reviews. The City of Edmonton, when issuing a development permit, makes no representations and offers no warranties as to the suitability of the property for any purpose or as to the presence or absence of any environmental contaminants on the property.



**EDMONTON
TRIBUNALS**

*Subdivision &
Development
Appeal Board*

*10019 – 103 Avenue NW
Edmonton, AB T5J 0G9
P: 780-496-6079
F: 780-577-3537
sdab@edmonton.ca
edmontonsdab.ca*

SDAB-D-17-064

Project No. 180068603-001

An appeal to construct a Single Detached House with front attached Garage, rear covered deck (6.10 metres by 3.05 metres), second floor rear balcony, and Basement development (NOT to be used as an additional Dwelling was **TABLED** to a date to be determined.