

*Edmonton Subdivision and
Development Appeal Board*

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PROJECT NO.: 162665810-001
FILE NO.: SDAB-D-15-036

Canadian Western Bank Place, Suite 1400
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NOTICE OF DECISION OF THE SUBDIVISION AND DEVELOPMENT APPEAL BOARD

This appeal dated January 27, 2015, from the decision of the Development Authority for permission to:

Change the Use from Convenience Retail Store to a Restaurant (79.15 square metres of Public Space) and construct interior alterations

on Plan 1021575, Block 19, Lot 24, located at 11949 - Jasper Avenue NW, was heard by the Subdivision and Development Appeal Board at its hearing held on February 26, 2015, and March 19, 2015. The decision of the Board was as follows:

February 26, 2015 Hearing:

SUMMARY OF HEARING:

At the outset of the appeal hearing, the Chair confirmed with the parties in attendance that there was no opposition to the composition of the panel.

The appeal was filed on time, in accordance with Section 686 of the *Municipal Government Act*, R.S.A. 2000, c. M-26 (the “MGA”).

The Board heard an appeal from the decision of the Development Authority Change the Use from Convenience Retail Store to a Restaurant (79.15 square metres of Public Space) and construct interior alterations, located at 11949 – Jasper Avenue NW. The subject Site is zoned DC2.825 Site Specific Development Control Provision. The development permit application was refused because of a deficiency in the minimum required number of parking spaces pursuant to the requirements of DC2.825.4(2)(a) of the *Edmonton Zoning Bylaw*.

Prior to the hearing the Board was provided with the following information, copies of which are on file:

- Memorandum from City of Edmonton, Transportation Services, dated January 15, 2015;
- Submission from the Development Authority received on February 17, 2015;
- Further submission from the Development Authority received on February 19, 2015;
- Letter of opposition from a condominium owner received on February 24, 2015; and
- Letter of support from the Oliver Community League received on February 25, 2015.

At the outset of the hearing the Chair referenced Section 641(4) of the *MGA* which states that despite section 685, if a decision with respect to a development permit application in respect of a direct control district is made by a council, there is no appeal to the subdivision and development appeal board, or is made by a development authority, the appeal is limited to whether the development authority followed the directions of council, and if the subdivision and development appeal board finds that the development authority did not follow the directions it may, in accordance with the directions, substitute its decision for the development authority's decision.

The Board heard from Mr. J. Murphy, Legal Counsel for the Appellant, who provided a written submission, marked Exhibit "A". Mr. Murphy referenced his written submission and provided the following information in support of the appeal:

1. He referenced a copy of Section 641(4)(b) of the *MGA* contained in Tab 1 of his submission and indicated that the subject site was zoned as a Site Specific Development Control Provision by City Council to accommodate a specific use.
2. The Development Officer can exercise discretion and grant variances if that authority is delegated by City Council.
3. The Development Officer erred because discretion was not used while reviewing this development permit application.
4. The proposed development was refused because the Development Officer determined that a variance of 27 parking spaces was required, which exceeds the maximum parking variance of 5 spaces that was granted for a previous development permit approval on the subject site.
5. The Development Officer erred by not considering parking for the entire development when reviewing this application.

6. The Development Officer relied on Section 11.3(3) of the *Edmonton Zoning Bylaw* as grounds to deny the required variance.
7. The General Purpose of the DC2.825 is “to accommodate a 36 storey mixed use, high rise, high density development with commercial uses on the main and second floor of a three storey podium that provides for an active and inviting pedestrian oriented streetscape fronting onto Jasper Avenue and a publicly accessible garden linking Jasper Avenue and the Victoria Trail Promenade, with site specific design controls to reduce the mass, sun shadow and view impacts of the tower on adjacent developments”.
8. With regard to the General Purpose, development means the entire project, not the individual components of a development.
9. The Development Officer limited his variance powers by only considering the proposed change in use and not the total parking requirement for this multiple use Site.
10. During the rezoning application for this Site, City Council understood that the uses in this building would change and that is Section DC2.825.4.1(a) states “The development shall be generally in accordance with the following regulations and the attached appendices, to the satisfaction of the Development Officer.”
11. Section 720.3(3) of the *Edmonton Zoning Bylaw* allows the Development Officer to apply all regulations contained in the *Edmonton Zoning Bylaw* to developments in a Direct Control Provision.
12. Section 11.2(5) of the *Edmonton Zoning Bylaw* states that the Development Officer “may relax a regulation in a Zone or other Section of this Bylaw in accordance with the regulations contained in that Zone or Section, or may relax regulations in accordance with Sections 11.3 and 11.4, and in such case, the development applied for shall be a Discretionary Development”. Section 11.3 is the test used by the Development Authority and Section 11.4 allows variances in the case of unnecessary hardship.
13. A variance was not required because the Development Officer could have exercised discretion on the basis that the development was in general accordance with the regulations for the zone. This would result in the exercise of discretion rather than granting a variance.
14. In this case, the Development Officer only analyzed the application in the context of whether or not a variance should be granted.
15. DC2.825 applies to the entire development and not to the individual uses of the building.
16. City Council approved this Site Specific Development Control Provision with the knowledge that it was a 7 year project and that changes in use would occur during that time.
17. Transportation Services asked that the originally proposed 285 parking spaces be reduced in an attempt to encourage the use of public transit and reduce the number of vehicles in the downtown core.

18. Schedule 1 of Section 54.2 of the *Edmonton Zoning Bylaw*, which provides vehicular parking requirements, is not static.
19. The most recent technical brief on the parking considerations has not yet been reviewed by Transportation Services.
20. On street parking spaces are available in front of the proposed development during the morning hours but not as many are available in the afternoon.
21. It is anticipated that the proposed development will attract walk by customers.
22. A Transportation Study was not undertaken during the original construction phase because it was not required by the Development Authority.
23. The Oliver Community League has provided an unsolicited letter of support for the proposed development because they support the concept of a mixed use building.

The Board then heard from Mr. I. Welch, representing the City of Edmonton Sustainable Development Department and Ms. V. Ferenc-Berry, representing the City of Edmonton Law Branch, who provided the following information:

1. This application was refused in accordance with a review of the regulations contained in the DC2.825 Site Specific Development Control Provision.
2. DC2.825.4.2(a) states “The development shall provide parking in accordance with Schedule 1 of Section 54.2 of the Edmonton Zoning Bylaw with the variance of five stalls to the satisfaction of the Development Officer.” This clause limits the maximum allowable parking variance to 5 parking spaces.
3. A variance equaling 5 parking spaces was granted for the site in January, 2013, for an approved development permit application.
4. The Development Officer would not be following Council’s direction by granting a further parking variance.
5. The definition of a “development” in the DC2 regulations was taken from the *MGA*, where it is broadly defined.
6. The application was reviewed based on the proposed use and not the parking requirements for the entire building.
7. The DC2 regulations do not contain minimum or maximum parking requirements and the Appellant has not provided a recent Traffic Study.
8. The Applicant was advised that there were other options available but the provision of a Traffic Study was not specifically addressed.
9. When assessing available parking for the proposed use, Mr. Welch only considered the availability of the parking designated as commercial parking rather than considering the total parking available on the subject site.

10. He confirmed that the *Edmonton Zoning Bylaw* does not distinguish between commercial and residential parking when calculating parking requirements for a site. However, he advised that calculating commercial and residential parking requirements separately was an established planning practice.

Mr. Murphy made the following points in rebuttal:

1. He submitted a draft memorandum from Transportation Services dated July 27, 2009 that contained proposed amendments to the Oliver Area Redevelopment Plan, marked Exhibit "B". A recommendation was made to delete Section 4.2(b) to encourage developers to reduce the number of onsite parking spaces because of the close proximity of the building to the downtown core and public transit.
2. Based on this recommendation the required parking was reduced from 197 to 170 spaces. This included residential, visitor and commercial parking for the entire site.
3. The Development Officer did not review the shared use of any parking spaces on the site.
4. The variance of 5 parking spaces applies to the entire site, not just to individual specific uses.
5. He reiterated that the Development Officer failed to use discretion in refusing this development permit application and therefore did not follow the direction of Council.
6. The most recent Traffic Study has not yet been reviewed by Transportation Services but will be submitted to the Board and available for all interested parties.

Mr. Welch made the following comments:

1. He used the provisions of DC2.825.4.2(a) when calculating the parking variance for the proposed development.
2. It was his opinion that a "draft" Memorandum from Transportation Services cannot be considered direction from City Council.

Mr. Murphy had nothing further to add in rebuttal.

DECISION:

that the Development Authority did not follow the direction of Council.

REASONS FOR DECISION:

The Board finds the following:

1. The Development Authority failed to follow the direction of Council in determining whether or not the proposed development required a parking variance, pursuant to Section 54.1(2)(h) of the *Edmonton Zoning Bylaw*.
2. There are no provisions in the *Edmonton Zoning Bylaw* which enable a Development Officer to separate commercial and residential parking when determining whether or not a parking variance is required for a proposed development.

SUMMARY OF HEARING (CONTINUED):

The Board reconvened and the Chairman advised that it was the decision of the Board that the Development Authority did not follow the direction of Council in refusing the proposed development and that the Board would continue to hear the merits of the appeal.

Mr. Murphy submitted a Technical Memorandum from Bunt & Associates, Transportation Planners and Engineers dated February 25, 2015, marked Exhibit "C". The memorandum contained a technical brief that summarized the parking characteristics associated with the operation of the proposed development.

DECISION:

that SDAB-D-15-036 be TABLED to March 19, 2015 in order to provide the Board the opportunity to review the Technical Brief regarding the parking considerations and to allow a copy of the Technical Brief to be circulated to Transportation Services for review.

REASONS FOR DECISION:

1. The Appellant introduced a Technical Brief on the date of the hearing. The appeal is tabled to give all parties and the Board the opportunity to review the Technical Brief before proceeding with the appeal hearing.

March 19, 2015 Hearing:

MOTION:

that SDAB-D-15-036 be raised from the table.

SUMMARY OF HEARING:

The Board notes that a Memorandum was received from City of Edmonton Transportation Services on March 18, 2015, relative to their review of the Parking Impact Assessment that was introduced at the hearing of February 26, 2015, a copy of which is on file.

The Board also notes, included in the SDAB online system are two responses from adjacent property owners:

- Letter of opposition from an adjacent condominium owner
- Response indicating a neutral position from an adjacent property owner

The Board heard from Mr. J Murphy, Legal Counsel for the Appellant, who referenced the Memorandum from City of Edmonton Transportation Services and provided the following information:

1. Transportation Services has reviewed parking for the entire site and has concluded that there is ample on-site and off-site parking.
2. The proposed Use is a café that will not require long term parking.
3. The proposed development will target local residents and walk-in customers.
4. Parking, when required, will use the reciprocal parking spaces that are available.
5. He agrees with the findings of Transportation Services that adequate parking is available for the proposed Use.

Mr. Murphy provided the following responses to questions:

1. The Technical Brief determined that there is an excess of parking spaces at the site.
2. The proposed Public Space is 60 square metres, not 79 square metres as indicated on the refused development permit application.
3. The Site Plan shows 9 on-site parking spaces located at the rear of the building. The remaining parking spaces are located in the underground parkade.
4. The Technical Brief references the request from Transportation Services to reduce the number of on-site parking spaces for this development because of its close proximity to the downtown core and public transit.
5. The submitted plans do not include drawings for the underground parkade.
6. There are a total of 197 on-site parking spaces available and all of the multi-use parking spaces are easily accessible.

The Board then heard from Mr. Welch, representing the City of Edmonton Sustainable Development Department who provided the following information:

1. This is a unique situation in that it was difficult to determine the wishes of Council in regard to the parking provisions for the site.

2. He reiterated that Sustainable Development would not support a variance in the minimum required parking requirements for this site.
3. He suggested that the requirements of Section 54.2 of the *Edmonton Zoning Bylaw* and the DC2 are contradictory and that clarification was required from City Council regarding their intent.
4. Section 641 of the *MGA* limits the appeal to the determination of whether or not the Development Authority followed the direction of Council. In this case he was not able to determine the direction of Council regarding the required variances.

Mr. Welch provided the following responses to questions:

1. It was his opinion that the parking spaces that would be either titled or sold should be removed from the equation which results in a deficiency in the parking requirements.
2. Section 54.1 of the *Edmonton Zoning Bylaw* requires all parking to be provided on the subject site.
3. He was not sure if the recommendations of Transportation Services were reflective of the direction of City Council.
4. The provision of off-site parking should only be considered at the direction of Council.

The Board then heard from Ms. Gelinas, representing City of Edmonton Transportation Services, who provided the following information:

1. She clarified that on-street parking cannot be assigned because it is considered public parking.
2. The use of on-street parking would be controlled by metered and timed parking.

Mr. Murphy provided the following information in rebuttal:

1. The parking requirements should not be broken down according to individual use classes because the DC2 Bylaw refers to “the” development which means that the parking requirements should be calculated based on the entire site.
2. Section 54.2(1)(e) of the *Edmonton Zoning Bylaw* allows the Development Officer to reduce the parking requirement for a proposed development based on a review of a parking demand study by Transportation Services.
3. In this case the proposed reduction should be approved on the advice of Transportation Services.
4. The Technical Brief has determined that there is adequate parking available.
5. Transportation Services agrees that adequate on-street parking is available.

6. The proposed business is a café that will be targeting walk-in customers and residents of the area. The proposed business will not survive with customers who are driving to the location as a destination.

DECISION:

that the appeal be ALLOWED and the Development GRANTED subject to the following amendment and conditions:

The Board has amended the scope of the Development Permit application to read:

Change the Use from Convenience Retail Stores to a Restaurant (60.0 square metres of Public Space), and construct interior alterations.

Conditions:

1. Exterior lighting shall be developed to provide a safe lit environment in accordance with Sections 51 and 58 and to the satisfaction of the Development Officer;
2. Any outdoor lighting for any development shall be located and arranged so that no direct rays of light are directed at any adjoining properties, or interfere with the effectiveness of any traffic control devices. (Reference Section 51 of the Edmonton Zoning Bylaw 12800).

NOTES:

1) An approved Development Permit means that the proposed development has been reviewed only against the provisions of the Edmonton Zoning Bylaw. It does not remove obligations to conform with other legislation, bylaws or land title instruments such as the *Municipal Government Act*, the ERCB Directive 079, the Edmonton Safety Codes Permit Bylaw or any caveats, covenants or easements that might be attached to the Site.

2) The Development Permit shall not be valid unless and until the conditions of approval, save those of a continuing nature, have been fulfilled; and no notice of appeal from such approval has been served on the Subdivision and Development Appeal Board within the time period specified in subsection 21.1 (Ref. Section 17.1).

3) Signs require separate Development Applications.

4) The City of Edmonton does not conduct independent environmental checks of land within the City. If you are concerned about the suitability of this property for any purpose, you should conduct your

own tests and reviews. The City of Edmonton, in issuing this 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.

5) A Building Permit is required for any construction or change in use of a building. For a building permit, and prior to the Plans Examination review, you require construction drawings and the payment of fees. Please contact the 311 Call Centre for further information.

6) This Development Permit is not a Business Licence. A separate application must be made for a Business Licence.

REASONS FOR DECISION:

1. A Restaurant, 200 occupants or less and 240 square metres of Public Space, is a listed Use in the DC2.825 Site Specific Development Control Provision.
2. Section 641(4)(b) of the *MGA* states despite section 685, if a decision with respect to a development permit application in respect of a direct control district is made by a development authority, the appeal is limited to whether the development authority following the directions of council, and if the subdivision and development appeal board finds that the development authority did not follow the directions it may, in accordance with the directions, substitute its decision for the development authority's decision.
3. Based on the evidence provided by the Appellant that the proposed Restaurant is 60.0 square metres and not 79.15 square metres in size, as included on the original Development Permit application, the Board has amended the scope of the Development Permit application.
4. It is the direction of Council that the parking requirements for the proposed development be assessed pursuant to Schedule 1 of Section 54.2 of the *Edmonton Zoning Bylaw*.
5. Based on the information contained in the Bunt & Associates Technical Brief there are 197 on-site parking spaces available, 8 parking spaces are located at ground level, not including one disabled parking space, and 189 spaces are located in the underground parkade.
6. The current Uses on the subject site require a total of 170 on-site parking spaces.
7. None of the affected parties who appeared at the hearing disputed these calculations or refuted the evidence provided that there are 197 on-site parking spaces available on the subject site.

8. While the Board recognizes the possibility that the residential parking spaces located in the underground parkade could be segregated from the visitor and commercial spaces at some point in the future, Section 54.2, Schedule 1 of the *Edmonton Zoning Bylaw* does not require the Board to consider this possibility in determining the parking requirements for the proposed development.
9. Based on the evidence provided that there are 197 on-site parking spaces and that only 170 on-site parking spaces are required pursuant to the requirements of Section 54.2, Schedule 1 of the *Edmonton Zoning Bylaw*, the Board finds that a parking variance is not required.
10. The proposed development complies with all of the other development requirements pursuant to DC2.825 Site Specific Development Control Provision and therefore must be approved by the Board.

IMPORTANT INFORMATION FOR APPLICANT/APPELLANT

1. **THIS IS NOT A BUILDING PERMIT.** A Building Permit must be obtained separately from the Sustainable Development Department, located on the 5th Floor, 10250 – 101 Street, Edmonton.
2. When an application for a Development Permit has been approved by the Subdivision and Development Appeal Board, it shall not be valid unless and until any conditions of approval, save those of a continuing nature, have been fulfilled.
3. A Development Permit shall expire and shall no longer be valid after one year from the date of approval of the Permit, if no construction has been initiated. However, if the permit holder is unable to proceed pending a court decision involving the proposed development, time shall not run until such proceedings are finally completed. For further information, refer to Section 22 of the Edmonton Zoning Bylaw, 12800.
4. Notwithstanding clause (3) above, if a Building Permit is issued for the development within the twelve month period, the Development Permit issued therefore shall not lapse unless and until the Building Permit so issued is cancelled or allowed to lapse by virtue of work not having commenced within the statutory minimum period.
5. 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, R.S.A. 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.

6. 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 5th Floor, 10250 – 101 Street, Edmonton.

Mr. R. Colistro, Chairman
SUBDIVISION AND DEVELOPMENT
APPEAL BOARD