



**EDMONTON
TRIBUNALS**

*Subdivision &
Development
Appeal Board*

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Project Number: 185396289-002
File Number: SDAB-D-16-102

Notice of Decision

- [1] On April 21, 2016, the Subdivision and Development Appeal Board heard an appeal that was filed on **March 23, 2016**. The appeal concerned the decision of the Development Authority, issued on March 17, 2016, to refuse the following development:

**To change the Use from General Retail Stores to Specialty Food Services
(ECLIPSE - 97.36 square metres Public Space)**

- [2] The subject property is on Plan 760BW Lots 5-6, located at 9319 - 111 Avenue NW, within the CB1 Low Intensity Business Zone. The Pedestrian Commercial Shopping Street Overlay and Boyle Street McCauley Area Redevelopment Plan apply to the subject property.
- [3] The following documents, which were received prior to the hearing and are on file, were read into the record:
- A Development Permit Application, including the plans of the proposed Development;
 - The refused Development Permit;
 - A response from Transportation Services;
 - The Development Officer's written submissions; and
 - A letter in opposition to the proposed development.
- [4] The following exhibits were presented during the hearing and form part of the record:
- Exhibit A – Community Consultation letter from the City of Edmonton to residents within the 60 metres notification radius

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

[7] The Presiding Officer asked the parties to address the application of the recent Court of Appeal decision, *Thomas v. Edmonton (City)*, 2015 ABCA 30 (the “*Thomas*” decision), to Section 819.3(15) of the *Pedestrian Commercial Shopping Street Overlay* from the *Edmonton Zoning Bylaw*, which states:

Where an application for a Development Permit does not comply with the regulations contained in this Pedestrian Commercial Shopping Street Overlay:

- a. the applicant shall contact the affected parties, being each assessed owner of land wholly or partly located within a distance of 60.0 metres of the Site of the proposed development and the President of each affected Community League and the President of each Business Revitalization Zone Association operating within the distance described above, at least 21 days prior to submission of a Development Application;
- b. the applicant shall outline to the affected parties, any requested variances to the Overlay and solicit their comments on the application;
- c. the applicant shall document any opinions or concerns, expressed by the affected parties, and what modifications were made to address their concerns; and
- d. the applicant shall submit this documentation as part of the Development Application.

[8] Specifically, the Presiding Officer asked the parties to address whether the SDAB has the authority to waive the Applicant’s obligation to perform community consultation.

Summary of Hearing on Preliminary Issues

i) *Position of the Appellant, Mohammed Nur, assisted by Wayne Roberts*

[9] Earlier in the fall of 2015, the Appellant submitted a Development Permit application for a Restaurant Use at the subject Site. As part of the Development Permit application, the Applicant sent the City community consultation feedback. This application was refused and this refusal was not appealed. However, the Appellant assumed that the City would consider that community consultation from the application for a Restaurant Use for his new Development Permit application for a Specialty Food Services.

[10] The Appellant submitted verbal evidence of limited community consultation performed for this application for a Specialty Food Services Use, which had been performed after this appeal had been filed. He believed his partner, who was not in attendance at the hearing, surveyed approximately 5-6 commercial properties located on the subject street.

He reviewed the parking variance required and indicated those he spoke to supported the variance. The adjacent neighbours had not been contacted, nor had any of the occupants or owners of residential properties across the lane and within the 60 metres notification area. The Appellant did not provide written evidence of this consultation, nor could he confirm which properties were consulted on the community consultation map, but he did point out three properties (appearing in photographs contained in the file) further along the blockface which he believed had been contacted.

[11] He had not submitted any information about community consultation of any sort to the City.

ii) Position of the Development Officers, Cindy Li and Harry Luke

[12] The Development Officer, Cindy Li, referenced her Written Submission dated April 11, 2016. In the fall of 2015, a Development Permit application to change the use of the Site from a General Retail Store to a Restaurant on the subject site was submitted. Twenty six (26) consultation letters had been sent out on September 24, 2015, including McCauley Community League and Alberta Avenue Community League. Six (6) letters/consultation forms were received by October 15, 2015, three comments were objecting to the proposed parking variance and three consultation forms has no comments/issues with the parking deficiency. The application was refused on November 23, 2015 and, according to City records, that refusal has not been appealed.

[13] In January 2016, the Appellant submitted a new application to change the Use from General Retail to Specialty Food Services. The floor plan was the same one used for the previous application.

[14] The Development Officers explained the current community consultation practice. The Sustainable Development Department has initiated a new process to assist applicants to ensure they have a clear understanding of the requirements for community consultation. The Development Officer fully explains the process to the Applicant and provides both the documentation which identifies the scope of application and the required variances, and the 60 metres map indicating exactly whom the Applicant needs to contact. The City also sends out letters to the owners of all properties within the 60 metres radius notifying owners of an impending application and that an applicant will be contacting them to solicit feedback. The property owners are also given the opportunity to contact the Development Officer directly if they feel more comfortable. However, the onus is still on the Applicant to complete the process set out in the Overlay to satisfy the community consultation requirement.

[15] This practice was followed for this Development Permit application. The process was explained and documents were provided to the Appellant, including variances required and the 60 metres notification map. The City sent out 26 letters to notify neighbours to expect a community consultation and provided to the Board an example ("Exhibit A"). By virtue of Section 819.3(15), the Appellant was given 21 days to complete the process,

which ran from January 27, 2016 – February 17, 2016. After this time period expired, the Development Officer herself contacted the Appellant for a summary. She granted a ten-day extension of the deadline for community consultation. No documentation was provided. After the initial deadline expired, the Development Officer also contacted the two Community Leagues to solicit feedback. Four (4) letters/consultation forms were received directly by the Development Officer, all objecting to the proposed parking variance. These forms were received as a result of the pre-consultation letter sent by the City and the Development Officer's efforts to call the Community League, not from any efforts on the part of the Appellant. To date, the Development Officer has not received any community consultation from the Appellant.

- [16] Upon questioning from the Board, the Development Officers acknowledged that lack of community consultation should have been listed a reason for refusal.
- [17] In their opinion, contacting only 5-6 neighbours was insufficient to satisfy Section 819.3(15). Further, no written confirmation was provided.
- [18] The City's efforts in community consultation do not satisfy Section 819.3(15); the onus is still on the Appellant.
- [19] In their opinion, the *Thomas* decision, which came after the Development Officer's decision, just reinforced the importance of community consultation and it was always required under the Overlay.
- [20] The Development Officers acknowledged that it is difficult for the Appellant to fully meet the requirements of Section 819.3(15), that is contacting neighbours at least 21 days prior to submission of a Development Application, because most applicants are unaware of the process or the variances required. This is why they assist applicants and ask them to provide community consultation 21 days prior to the Development Officer rendering a decision. In their view, this practice meets the "spirit of the legislation".
- [21] In their opinion, the City has the authority to send out the pre-consultation letter. Under the *Zoning Bylaw*, once an application does not meet the bylaw, it is determined to be Discretionary Use. A Development Officer is entitled to use several means to render the decision, if she requires more information, she is allowed to get it.

iii) Rebuttal of the Appellant

- [22] The Appellant did not understand the importance of the community consultation, notwithstanding the *Thomas* decision. It has been a long, time-consuming and frustrating process for him. He would have put in more significant effort, rather than focusing on the parking variance. He asked to Board to use the community consultation from Restaurant Use application. He then asked the Board for an adjournment to complete further community consultation.

iv) Development Officer Position on the Adjournment Request

[23] In light of the *Thomas* decision, Section 819.3(15) was not satisfied and will never be satisfied, even with the requested adjournment. As discussed previously, the Appellant was given ample assistance and opportunity to conduct the community consultation, including a 10-day extension after the initial deadline date of February 17, 2016. To date, nothing has ever been received. The City does not support the Adjournment request.

v) Rebuttal of the Appellant on the Adjournment Request

[24] The Appellant asked for an additional 10-day extension to perform the community consultation because at that time his business was completely shut down by City Officials.

Decision

[25] The appeal is DENIED and the decision of the Development Authority is CONFIRMED. The Development is REFUSED.

Reasons for Decision

[26] The proposed development, Specialty Food Services, for less than 100 occupants and 120 square metres of Public Space, is a Permitted Use in the CB1 Low Intensity Business Zone. The proposed development does not comply with all regulations of the *Pedestrian Commercial Shopping Street Overlay*. Specifically, a variance to Section 819.3(8)(b) is necessary to reduce the required number of off street parking spaces from 24 spaces to 2 spaces.

[27] Section 819.3(15) of the *Pedestrian Commercial Shopping Street Overlay* provides:

Where an application for a Development Permit does not comply with the regulations contained in this Overlay:

- a the applicant shall contact the affected parties, being each assessed owner of land wholly or partly located within a distance of 60.0 metres of the Site of the proposed development and the President of each affected Community League and the President of each Business Revitalization Zone Association operating within the distance described above, at least 21 days prior to submission of a Development Application;
- b the applicant shall outline to the affected parties, any requested variances to the Overlay and solicit their comments on the application;
- c the applicant shall document any opinions or concerns, expressed by the

affected parties, and what modifications were made to address their concerns; and

- d the applicant shall submit this documentation as part of the Development Application.

[28] The Board accepts the Development Officer's statements that she had ongoing contact with the Applicant concerning community consultation during the application process during which she:

- fully explained the community consultation process and the Applicant's obligation to contact specific affected parties and to solicit their comments within a set timeline;
- identified the required variance to the *Pedestrian Commercial Shopping Street Overlay* and provided the applicable documents, including a list of the 26 property owners within the notification area to assist in this process;
- pre-notified the affected owners of an impending community consultation by the Applicant (Exhibit A);
- having received no feedback from the Applicant, contacted the Applicant after the community consultation deadline to solicit any community consultation or feedback documentation; and,
- granted the Applicant's request for a ten-day extension of the deadline to submit community consultation.

[29] The Appellant and Development Officer agree that despite ongoing communications and the 10-day extension, no community consultation was ever provided to the Development Officer for this application.

[30] At the hearing, the Appellant submitted that his partner spoke with five or six occupants of property along the blockface, but not with anyone connected with the immediately adjacent properties. He identified only three of those properties at the hearing and admitted none of the occupants or owners of properties across the back lane had been contacted. He, or his partner, had experienced difficulty getting people to even answer their doors.

[31] Earlier in the fall of 2015, the Appellant sent the City community consultation feedback as part of a different Development Permit application for a Restaurant Use at the subject Site. The earlier Restaurant Development Permit Application was refused November 23, 2015 and that refusal was not appealed. This material was not provided to the Board. The Appellant asked the Board to consider the material provided for that earlier Restaurant Development Application as sufficient feedback to satisfy the requirements in Section 819.3(15) for this Development Application under appeal for a Specialty Food Services Use.

- [32] The Board finds that the two applications were entirely separate and therefore, the materials submitted earlier for the other refused Restaurant Development Application cannot satisfy the requirement for community consultation required for the Development Application for a Specialty Food Services Use under appeal before the Board.
- [33] Based on the submissions of the City and Appellant, the Board finds that the Appellant failed to provide any evidence of community consultation as required by the *Bylaw* to either the Development Officer (prior to her Refusal or thereafter) or to the Board (at the appeal hearing). Therefore, the Board finds that requirements for community consultation under Section 819.3(15) have not been met which constitutes a breach of procedural fairness.
- [34] The Board further finds that it has no authority to waive this breach of procedural fairness.
- [35] The Board is bound on this issue by *Thomas v. Edmonton (City)*, 2016 ABCA 57, a recent decision issued by the Alberta Court of Appeal, which 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 and the Board has no jurisdiction to waive it.
- [36] The *Thomas* case dealt with community consultation requirements under the *Mature Neighbourhood Overlay* of the *Bylaw* and the current appeal deals with requirements under the *Pedestrian Commercial Shopping Street Overlay*. However, the Board finds that the principles cited by the Alberta Court of Appeal apply with equal force to the case at hand.
- [37] During the oral hearing, the Appellant requested an adjournment to perform a community consultation. The Board declines to grant the adjournment based on the submissions outlined in the reasons above. In particular, the Board accepts the submission of the Development Officer regarding her discussions with the Applicant concerning community consultation. The Board finds that Applicant was in ongoing contact with the Development Officer at all material times, was fully aware of the details of the requirement for community consultation prior to the Development Officer's decision and was granted a request for an extension specifically to meet that requirement. The parties agree no consultation was provided prior to hearing and the Appellant attended the hearing with inadequate information or documentation of community consultation, despite admitting he was aware of the requirement.
- [38] In sum, the Applicant has already been afforded more than ample opportunity and assistance to perform the required community consultation.

[39] Accordingly, the appeal is dismissed.

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

Board Members:

Mr. V. Laberge

Ms. P. Jones

Mr. R. Hachigian

Ms. K. Oviatt

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

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.