



**EDMONTON
TRIBUNALS**

*Subdivision &
Development
Appeal Board*

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Project Number: 222903792-001
File Number: SDAB-D-16-193

Notice of Decision

- [1] On August 10, 2016, the Subdivision and Development Appeal Board heard an appeal that was filed on July 14, 2016. The appeal concerned the decision of the Development Authority, issued on July 13, 2016, to refuse the following development:

Change the Use from General Retail Store to Indoor Participant Recreation Services and construct interior alterations (SNAP FITNESS)

- [2] The subject property is on Condo Common Area (Plan 1025554), located at 2804C - Calgary Trail NW and Plan 1025554 Unit 2, located at 2812 - Calgary Trail NW and Plan 1025554 Unit 3, located at 2814 - Calgary Trail NW, within the DC2.332 Site Specific Development Control Provision. The Major Commercial Corridors Overlay applies to the subject property.
- [3] The following documents, which were received prior to the hearing and are on file, were read into the record:
- Copy of the Development Permit application with attachments, proposed plans, and the refused Development Permit;
 - Appellant's written submission, with attached documents and photographs; and
 - Development Officer's written submissions, dated July 22, 2016.

Preliminary Matter

- [4] 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.
- [5] The Presiding Officer outlined how the hearing would be conducted, including the order of appearance of parties, and no opposition was noted.
- [6] 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 Appellant, Snap Fitness*

- [7] The Appellant was represented by Mr. C. Dalton, who reiterated the information contained in the grounds for appeal which he submitted with his Notice of Appeal.
- [8] Upon questioning by the Board with respect to how the Development Authority failed to follow the directions of council as required pursuant to Section 641(4)(b) of the *Municipal Government Act*, Mr. Dalton noted two points.
- [9] First, prior to submitting his development application, Mr. Dalton spoke twice with staff from Sustainable Development. During one of those times, he spoke with Mr. P. Belzile, the Development Officer who issued the refusal decision. Mr. Dalton stated that Mr. Belzile assisted him with drawing up the proposed plans, and at no time was there any indication that the proposed fitness centre would need to be developed in conjunction with a hotel or motel. This requirement was disclosed at the last moment, after the application had been submitted and after he had already committed to various contracts and deposit payments.
- [10] Second, the map attached to DC2.332 is no longer accurate. The area between 23 Avenue and 34 Avenue has changed significantly since DC2.332 was passed. There is now an overpass, and the Site is now served by a service road.

ii) Position of Affected Property Owners in Support of the Appellant, Mr. V. Malhotra

- [11] Mr. Malhotra owns the property at 2812 and 2814 Calgary Trail NW, which he acquired in 2011.
- [12] Mr. Malhotra noted that Indoor Participant Services is one of the listed uses in the DC2.332 Site Specific Development Control Provision. It is possible that when DC2.332 was passed in 1993, a hotel or motel was being considered for the Site, but since then, the area has developed in such a way that it would no longer be possible for a hotel or motel to be built.
- [13] Upon questioning by the Board, Mr. Malhotra stated he was unaware as to whether a hotel or motel was ever proposed for the Site. However, the building located on the subject property is the original building.
- [14] Both Mr. Malhotra and Mr. Dalton clarified that there is a fence and some trees separating the subject Site from the residential homes to the west. People do cut across this area, but there is no dedicated or formal pathway. They also confirmed that the residential properties are situated higher than the subject Site.

iii) Position of the Development Officer, Mr. P. Belzile

- [15] The Board drew attention to Section DC2.332.4(l), which states, in part: “the Development Officer may grant relaxations to the regulations contained in Sections 50 through 79, and the provisions of this District, with the exception of Clauses 4(b) and 4(h)”.
- [16] In response to questioning from the Board, Mr. Belzile clarified that the reason he refused the development was not due to the parking deficiency. The existing Site currently has surplus parking, and there is no history of parking variances being previously granted. Upon questioning by the Board, Mr. Belzile stated that it would be acceptable to grant a parking variance to Sections 66.1(1) and 66.2(1) of the *Land Use Bylaw 5996* (“LUB 5996”) pursuant to the discretionary powers granted under DC2.332.4(l).
- [17] Mr. Belzile’s main concern with respect to the proposed development is that Section DC2.332.5(f) states that “Indoor Participant Recreation Services and Convenience Vehicle Rentals shall be developed only in conjunction with Hotel or Motel uses.” In his view, he has no authority to vary a development regulation within this DC2 Site Specific Development Control Provision. Upon questioning by the Board, Mr. Belzile stated that he had no information with respect to why Section DC2.332.5(f) was drafted with the requirement that Indoor Participant Recreation Services be developed “in conjunction with Hotel or Motel uses.”
- [18] After further review and discussion of the wording of Section DC2.332.4(l), Mr. Belzile acknowledged that the phrase, “the Development Officer may grant relaxations to the regulations contained in Sections 50 through 70, *and the provisions of this District*” [emphasis added], does appear to grant the Development Officer with the authority to relax development regulations contained within DC2.332, including the requirement under Section DC2.332.5(f) to develop Indoor Participant Recreation Services in conjunction with Hotel or Motel uses.

iii) Rebuttal of the Appellant, Snap Fitness

- [19] With respect to parking, Mr. Dalton stated that most gym members use the facilities during the peak hours of 5:00 p.m. to 9:00 p.m. Most of the neighbouring businesses will be closed by 5:00 p.m. The service road abutting the Site also has on-street parking for up to two hours.

Decision

- [20] The appeal is ALLOWED and the decision of the Development Authority is REVOKED. The development is GRANTED as applied for to the Development Authority, subject to the following CONDITIONS:

- 1) 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 62, *Land Use Bylaw 5996*)
- 2) No parking, loading, storage, trash collection, outdoor service or display area shall be permitted within a required yard. Loading, storage and trash collection areas shall be located to the rear or sides of the principal building and shall be screened from view from any adjacent sites or public roadways in accordance with the provisions of Section 69.3. If the rear or sides of a site are used for parking, an outdoor service or display area, or both, and abut a Residential District or a lane serving a Residential District, they shall be screened in accordance with the provision of Section 69.3 of the Land Use Bylaw. Trash Collection facilities shall make provisions for recycling initiatives. (Reference Section DC2.332.4.g)

[21] In granting this development, the following variances are allowed:

- 1) Section DC2.332.5(f) is waived to permit the development of an Indoor Participant Recreation Service Use on the subject Site without requiring that it be in conjunction with a Hotel or Motel Use.
- 2) Section DC2.332.4(k), and Sections 66.1(1), 66.2(1) and Schedule 66A(14) of *Land Use Bylaw 5996* are varied to permit a deficiency of 150 off-street parking spaces from the required 162 off-street parking spaces, for a total of 12 off-street parking spaces to be provided by the subject Indoor Participant Recreation Service.

Reasons for Decision

[22] Indoor Participant Recreation Services is a listed use in this DC2.332 Site Specific Development Control Provision, which was passed by Council on November 15, 1993, under Bylaw 10550.

[23] Because the proposed development is in a direct control district, the discretion of the Board is constrained by the provisions of Section 641(4)(b) of the *Municipal Government Act*, which reads:

641(4) Despite section 685, if a decision with respect to a development permit application in respect of a direct control district

...

(b) 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.

- [24] The Board must first determine if the Development Officer followed the directions of Council when he refused to grant a development permit for the proposed development. In this case, the Development Officer considered Section DC2.332.4(k), which governs development in this direct control district. Section DC2.332.4(k) provides as follows:

Developments in this district shall be evaluated with respect to compliance with the General Development Regulations of Sections 50 to 79 inclusive, of the Land Use Bylaw;

- [25] The Development Officer confirmed to this Board through his presentation and through questioning that he did not consider varying or relaxing any regulations because it was his opinion that he did not have the authority to grant those variances.
- [26] However, the Board notes that Section DC2.332.4(l) states: "the Development Officer may grant relaxations to the regulations contained in Sections 50 through 79, and the provisions of this District, with the exception of Clauses 4(b) and 4(h)". Upon further review of this provision, the Development Officer acknowledged that DC2.332 did, in fact, grant him the discretionary power to consider variances to both the regulations contained in Sections 50 to 79 of LUB 5996, as well as regulations within DC2.332 itself.
- [27] Since the Development Officer did not consider his variance powers when reviewing this development application, the Board finds that the development authority did not follow the directions of council pursuant to Section 641(4)(b) of the *Municipal Government Act*. As such, the Board has the authority to substitute its own decision for that of the Development Officer's, in accordance with the directions of Council.
- [28] Two variances are required for this development: Section DC2.332.5(f) with respect to the requirement to develop Indoor Participant Recreation Services in conjunction with a Hotel or Motel, and Section 66 of LUB 5996 with respect to off-street parking requirements.
- [29] When determining whether to grant the required variances, the Board considers various factors, such as whether the proposed development will unduly interfere with the amenities of the neighbourhood, or with the use, enjoyment or value of neighbouring properties.
- [30] The Board has determined that the change in Use from General Retail Store to Indoor Participant Recreation Services will not negatively impact the neighbourhood or surrounding properties for the following reasons:

- 1) DC2.332 has not been updated or amended since it was passed on November 15, 1993. The existing structure on the subject Site is also the original building that was constructed on this Site.
- 2) The Board accepts that much has changed in this location since DC2.332 was passed, and that the area has developed in such a way that a Hotel or Motel would no longer be feasible on this Site. The Development Officer's Written Submissions indicate that no Hotel or Motel Uses have been approved on this Site.
- 3) Although no Hotel or Motel is located in the prescribed DC2.332 direct control district, the Board notes that there is an existing Hotel within close proximity of the subject Site.
- 4) The proposed Indoor Participant Recreation Services already exists in a location directly north of the subject Site. Commercial zones are located directly north and south of the Site. The Board finds that the proposed development is compatible with the existing surrounding uses.
- 5) The Board received no letter of opposition, nor did anyone appear for the appeal hearing in opposition to the development, whereas one letter in support of the proposed development was submitted by the condominium corporation, with an accompanying five signatures of support from the condominium's business tenants.

[31] With respect to the required parking variance under Sections 66.1(1), 66.2(1) and Schedule 66A(14) of LUB 5996, the Board accepts that the Development Officer would have granted the parking variance as it was both his and the Appellant's view that the peak parking periods of the proposed development, that being 5:00 p.m. to 8:00 p.m., will be outside the peak periods for the existing neighbouring tenants. Further, part of the application package provided to the Development Officer included a parking analysis that clearly indicates there are vacant stalls throughout the day.

[32] The Board accepts the Development Officer's calculation of the parking requirements, based on LUB 5996 which was in effect at the time that DC2.332 was passed. However, the Board notes that Section 720.3(3) of the current *Edmonton Zoning Bylaw 12800* states: "All Regulations in the Zoning Bylaw shall apply to development in the Direct Control Provision, unless such Regulations are specifically excluded or modified in a Direct Control Provision." Should it be more appropriate to apply the parking regulations under Section 54 of the current *Edmonton Zoning Bylaw 12800*, the Board notes that the off-street parking requirements governing Indoor Participant Recreation Services are less stringent than those under LUB 5996, which further weighs in favour of granting the required variance for off-street parking.

[33] Finally, the Board accepts that there is available two hour on-street parking along the service road that abuts the Site, which should alleviate the concerns, if any, with respect to granting a variance to the off-street parking requirements.

[34] The Board also considered that the location of this proposed Use is located on the east end of the Site zoned DC2.332. This portion of the Site is located further away from the residential area to the west, and the Site itself is separated from the residential area by

fencing and trees. The Board also notes that the current location of Snap Fitness is at the property directly north of this DC2 direct control district, and is currently operating on a site with a parking variance without any reported difficulties.

- [35] Based on the above, the Board can find no sufficient planning reasons for why the required variances should not be granted. Having determined that the development authority did not follow the directions of council pursuant to Section 641(4)(b) of the *Municipal Government Act*, and having determined that the proposed development will not unduly interfere with the amenities of the neighbourhood, or with the use and enjoyment of neighbouring properties, this Board exercises its authority under Section 641(4)(b) and substitutes its decision for that of the development authority's. The development is granted.

Vincent Laberge, Presiding Officer
Subdivision and Development Appeal Board

Board Members in Attendance

N. Somerville; A. Nagy; R. Hachigian; R. Handa

Important Information for the 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. Obtaining a Development Permit does not relieve you from complying with:
 - a) the requirements of the *Edmonton Zoning Bylaw*, insofar as those requirements have not been relaxed or varied by a decision of the Subdivision and Development Appeal Board;
 - b) the requirements of the *Alberta Safety Codes Act*, RSA 2000, c S-1;
 - c) the requirements of the *Permit Regulation*, Alta Reg 204/2007;
 - d) the requirements of any other appropriate federal, provincial or municipal legislation; and
 - e) the conditions of any caveat, covenant, easement or other instrument affecting a building or land.
3. 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.
4. A Development Permit will expire in accordance to the provisions of Section 22 of the *Edmonton Zoning Bylaw 12800*, as amended.
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*, 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.
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.

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.