



**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](mailto:sdab@edmonton.ca)  
[edmontonsdab.ca](http://edmontonsdab.ca)**

August 1, 2018

Permit Masters

Care of: Stephanie Zitkus  
208, 8657 – 51 Avenue NW  
Edmonton, AB T6E 6A8

RE: SDAB-D-18-113 / Project No. 282871006-001, to construct a side uncovered deck (4.97m x 4.18m @ 0.81m Height.) with pergola and hot tub (2.06m x 1.84m) to a Single Detached House; existing without permits; 8707 – 140 Street NW

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The Subdivision and Development Appeal Board made and passed the following motion on August 1, 2018:

“That SDAB-D-18-113 be TABLED to September 19, 2018, at the written request of the Appellant and with the written consent of the Respondent.”

Reasons For Decision:

1. The Appellant is unable to contact the owner of the subject property to discuss the appeal as he is out of the country until September 7, 2018.
2. This is the first postponement request made by the Appellant and the Respondent's representative, Permit Masters, has provided their written consent to this request.

The time and location of the hearing will be provided in future correspondence.

Should you require further information in this regard, please contact the Subdivision & Development Appeal Board Office at 780-496-6079.

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

cc: City of Edmonton, Development & Zoning Services, Attn: Ms. S. Watts / Mr. A. Wen



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1031118 Alberta Ltd  
2, 6010 - 104 St NW  
Edmonton AB T6H2K3

Date: August 15, 2018  
Project Number: 064420917-005  
File Number: SDAB-D-18-114

**Notice of Decision**

[1] On August 1, 2018, the Subdivision and Development Appeal Board (the “Board”) heard an appeal that was filed on **July 4, 2018**. The appeal concerned the decision of the Development Authority, issued on June 8, 2018 to refuse the following development:

Increase the occupancy and public space of a Restaurants Use (67 m2 public space) and to change the Use of the second floor to (2) Dwellings of Apartment Housing, existing without permits

[2] The subject property is on Plan 3553P Blk 41 Lot 6, located at 6010 - 104 Street NW, within the (CB2) General Business Zone.

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

- Copy of the Development Permit application with attachments, proposed plans, and the refused Development Permit;
- The Development Officer’s written submission; and
- The Appellant’s written submissions.

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

- Exhibit A – E-mail from Appellant to the Development Officer
- Exhibit B – Google aerial map of the subject site and surrounding area

**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 Presiding Officer advised the Appellant that the Board must first determine a jurisdictional issue: whether or not the appeal had been filed on time in accordance with Section 686 of the *Municipal Government Act*, RSA 2000, c M-26 (the “*Municipal Government Act*” or “*Act*”).

### **Summary of Preliminary Item**

- [8] The Presiding Officer reviewed Sections 686(1) and 642(3) of the *Municipal Government Act* with the parties.

- [9] The Presiding Officer asked for the parties’ submissions about the timeliness of the appeal given that the record before the Board showed that the written decision from the Development Officer regarding this application was issued on June 8<sup>th</sup>, 2018, and the appeal to this Board was filed on July 4<sup>th</sup>, 2018. The 21<sup>st</sup> day after June 8<sup>th</sup> is June 29<sup>th</sup>. The appeal date of July 4<sup>th</sup> appears to fall outside this 21 day window set by section 686(1) of the *Act*.

#### *i) Position of the Appellant, Mr. T. Khatib*

- [10] Mr. Khatib was away in Toronto for three weeks and received notice of the registered mail when he returned on June 25<sup>th</sup>, 2018. He picked up the registered mail the next day – June 26<sup>th</sup>, 2018.
- [11] He did not receive any e-mails or phone calls from the Development Officer, Mr. Robinson, while he was away and did not have any indication that the application was refused until he picked up the registered mail.
- [12] He went to the City Planning Department and spoke with a planning officer on Friday, June 29<sup>th</sup>, 2018. The officer outlined the appeal procedures and advised him to contact Mr. G. Robinson. The Appellant filed an appeal within the next few days and also followed up with an e-mail to Mr. Robinson.
- [13] He attempted to file his appeal online during the long weekend. After the weekend, he contacted the Board administration, who informed him that the appeal had not been received; therefore, he re-filed it on July 4<sup>th</sup>, 2018.

#### *ii) Position of the Development Officer, Mr. G. Robinson*

- [14] Mr. Robinson noted that this application has been on-going for several years and he is the second Development Officer to handle the file. Additional information was required from the Appellant which delayed the process.
- [15] Mr. Robinson forwarded a copy of Mr. Khatib’s July 3<sup>rd</sup>, 2018 e-mail, confirming that he had received the refusal letter on the previous Thursday (marked Exhibit A). Prior to this July 3<sup>rd</sup> e-mail, the last contact Mr. Robinson had with Mr. Khatib was April 20<sup>th</sup>, 2018.

- [16] The decision of refusal was made on June 8<sup>th</sup>, 2018, and Mr. Robinson confirmed it is his Department's standard practice to send out decisions via registered mail the same day they are issued. This procedure provides a receipt from Canada Post to confirm the date of delivery.
- [17] He referred the Board to Section 6 of his written submission which states: "The decision to refuse this application was made on June 8<sup>th</sup>, 2018. The written decision was sent to the applicant via registered mail. According to the delivery confirmation provided by Canada Post, the decision was delivered and signed for on June 26<sup>th</sup>".
- [18] He confirmed that the City is not taking a position regarding the potential late filing of this appeal, but it is his personal opinion that the decision document came out in written format, was delivered through Canada Post and the written decision was *given* when Mr. Khatib picked it up from Canada Post on June 26<sup>th</sup>, 2018; therefore, he personally is of the opinion that the appeal was filed in time.

### **Decision**

- [19] The Appeal was filed in time and the Board assumes jurisdiction.

### **Reasons for Decision**

- [20] As the Board's jurisdiction is limited to appeals which are filed within the 21 day limit set in section 686(1) of the *Act*, it first considered the timing of this appeal.
- [21] The evidence before the Board establishes:
- a. On June 8<sup>th</sup>, 2018, the decision of refusal was issued by the Development Officer. A copy of the written decision and a notice of decision were sent out to the Appellant by registered mail on the same day.
  - b. On June 25<sup>th</sup>, 2018, the Appellant returned from an out of town trip to find a notice of registered mail.
  - c. On June 26<sup>th</sup>, 2018, the Appellant attended at the post office to pick up the mail which consisted of a notice of decision and the written decision as confirmed by the Receipt of Registered Mail form provided by the Development Officer. This was the first time that the Appellant became aware that the decision had been issued for his 2015 application for a Development Permit. The Board finds that this is the date on which the decision was given to the Appellant.
  - d. On June 29<sup>th</sup>, 2018, the Appellant attended at City offices and spoke to a planning officer who suggested he speak with the Development Officer who made the decision.

- e. On July 3<sup>rd</sup>, 2018, the Appellant sent the Development Officer an email confirming that he received the refusal and seeking further information.
- f. On July 4<sup>th</sup>, 2018, the Appeal was filed with the Board.
- g. On July 5<sup>th</sup>, 2018, the Development Officer responded inviting the Appellant to follow the instructions on the letter should he wish to appeal and to ask any questions.

[22] The relevant sections of the *Act* are sections 686(1) and 642(3). They were recently amended and currently state:

686(1) A development appeal to a subdivision and development appeal board is commenced by filing a notice of the appeal, containing reasons, with the board

(a) in the case of an appeal made by a person referred to in section 685(1)

(i) with respect to an application for a development permit,

A. **within 21 days after the date on which the written decision is given under section 642, or**

B. if no decision is made with respect to the application within the 40-day period, or within any extension of that period under section 684, within 21 days after the date the period or extension expires,

or

(ii) with respect to an order under section 645, within 21 days after the date on which the order is made,

or

(b) in the case of an appeal made by a person referred to in section 685(2), within 21 days after the date on which the notice of the issuance of the permit was given in accordance with the land use bylaw. [Emphasis added]

642(3) A decision of a development authority on an application for a development permit must be in writing, and a copy of the decision, together with a written notice specifying the date on which the written decision was given and containing any other information required by the regulations, must be given or sent to the applicant on the same day the written decision is given.

[23] In the Board's opinion, the commencement of the appeal period in section 686 (1)(a)(i)(A) is somewhat ambiguous due in part to the use of the word "given" in both sections 686 and 642 and leaves two possible interpretations:

1. The 21 days runs from the date the decision was given by the Development Officer, in other words from June 6<sup>th</sup>, 2018, the date the decision was issued.
2. The 21 days runs from June 25<sup>th</sup>, 2018, the date that the decision was given to the Appellant, the date he received the written decision.

[24] Reading the words of the sections 686(1) and 642(3) purposively, in context, in their grammatical and ordinary sense, in consideration of potential harm or prejudice and in a manner which avoids an absurd result, the Board determined that the appeal period runs from the date that the written decision of refusal was given to the Appellant for the following reasons:

- a) The Board considered the potential consequences of the two interpretations.
- b) If the Board were to find that the appeal period runs from the date of issuance, then the Appellant's right of appeal could be extinguished before he is even aware of the refusal and his accompanying statutory appeal rights. The Appellant would then be required to wait the applicable reapplication period before making a new application at additional expense.
- c) By contrast, if the Board were to find that the appeal period did not run until the Appellant was given the written decision of refusal, there would be a more reasonable result – his exercisable, right of appeal would be preserved, but only for a limited number of days.
- d) Considering these results, the Board finds that the principles of fairness support the second possible interpretation and that Counsel would not intend that an appellant would lose his right of appeal without meaningful notice. The Board also notes that communications between the applicants and Development Officers can be prolonged and irregular and in this case occurred sporadically over three years.
- e) The Board finds further support for the second interpretation in that the appeal period for stop orders runs from the date they are "made", not "given", per section 686(1)(a)(ii). The Board also notes that the word "made" was also replaced by the word "given" in the most recent amendment to section 642(3). The Board assumes the choice of the word "given", which can imply delivery, rather than "made", which does not imply delivery, is deliberate.

- f) Similarly, the Board notes that subsection 686(1)(b) also sets a different appeal period for appeals initiated by persons other than the applicant who are affected by decisions of the development authority. It states:

686(1)(b) [I]n the case of an appeal made by a person referred to in section 685(2), within 21 days after the date on which the notice of the issuance of the permit was given in accordance with the land use bylaw.

1. This provision requires the appeal to be made “within 21 days after the date on which the notice of the issuance of the permit was given in accordance with the land use bylaw.”
2. The limited appeal period begins in these cases when the development authority sends out notices or publishes them in local papers as required by the *Bylaw*.
3. This rule deliberately furthers the planning objectives of certainty and timeliness in a manner that balances the competing interest of the developer to proceed with certainty at a set date after a development has been approved against the interest of an affected party to challenge an approved development.
4. There is no comparable need to limit the appeal period to prevent prejudice to the interest of affected parties in the case of an Applicant who appeals a refusal.

- g) The Board also considered the oral submissions of the Development Officer. He indicated:

1. It is the City’s practice to send out notices of refusals to Applicant’s by registered mail in order to provide evidence to affirm the date on which the written decision is given to any applicant; and,
2. In his personal opinion, in this case the appeal was filed in time based on the date that the decision was actually given to the Applicant at the post office.

[25] For the above reasons, the Board finds that the appeal was filed within 21 days of the date on which the written decision of the Development Officer was given to the Applicant and was therefore filed within the time allowed under section 686 of the *Act*.

### **Summary of Hearing**

#### *iii) Position of the Appellant, Mr. T. Khatib*

[26] Mr. Khatib purchased the building in 2003 with the intent of running a business (17 seat restaurant) on the main floor while residing on the second floor. He has completed over \$350,000 in renovations since he purchased the property and was quite surprised when he

received the decision of refusal from the Development Authority regarding the completed application.

[27] Inspections were carried out when he made the application to increase the seating from 17 to 32 and the only issue that arose was parking. The restaurant has been operating successfully for 15 years and there have been no complaints from neighbours or customers. The letter he submitted to the Board confirms a parking agreement he has with the property to the North named Dell EMC.

[28] Since residing in this property, Mr. Khatib has maintained good relations with his north and south neighbours and they have expressed no objections to the proposed development.

[29] Mr. Khatib provided the following responses to questions from the Board:

- a) He was unaware that no development permits were in place for the two second floor apartments at the time of purchasing this property. The appraisal he provided to the bank to obtain financing showed these two apartments.
- b) A loading stall is not required for the small restaurant operated by his tenants. Supplies are purchased by staff members from Superstore, Costco, etc. and are brought to the site in their personal vehicles. He is of the opinion that no large commercial delivery vehicles are required for the restaurant.
- c) He acknowledged that there are five official parking stalls on site although there is room for a sixth car to park. He has access to an additional 12 stalls in the adjacent parking lot to the north after regular business hours. The lunch hour is typically not busy and customers come and go at staggered times between the hours of 11:30 a.m. to 1:30 p.m. Parking has never been a problem during these hours.
- d) There are no other apartments in the immediately surrounding area. A four storey building with underground parking to the north houses a programming company (Dell). A strip mall is located to the south containing a restaurant and several other businesses. Across the alley to the west is an area of single family residential homes.
- e) The apartments do not have any balconies and there is no patio on the roof.
- f) Mr. Khatib confirmed he had reviewed the Development Officer's recommended conditions if the Board were to approve this application and has no objections to them.

*iv) Position of the Development Officer, Mr. G. Robinson*

[30] Mr. Robinson did not have a presentation and provided responses to questions from the Board.



- [31] The current development permit application came about as a result of a complaint and subsequent inspections conducted in 2014. To his knowledge, this is the only complaint that has been received regarding this application.
- [32] Section 54.2 (2)(ii) of the *Edmonton Zoning Bylaw* (the “*Zoning Bylaw*”) allows for non-accessory parking but in this case neither of the two abutting properties have permits for non-accessory parking. An adjacent property owner could authorize the applicant to apply for such a permit, but this has not been done.
- [33] Mr. Robinson confirmed that there are cases where the requirement for a loading zone is waived if the size of the business and its operations indicates one is not required.
- [34] He confirmed that the current Development Permit Application includes both increasing the restaurant space on the main floor as well as allowing the second floor apartments. If a Development Permit is approved, a separate building permit would have to be applied for.
- [35] A typical amenity area for a small apartment such as this would be provided by way of a balcony or a rooftop terrace; in this case, no amenity space has been provided. He agreed that this impacts the residents of the subject property more than the neighbouring properties.
- [36] He could not find justification to grant the required variances as there was no unnecessary hardship or practical difficulty peculiar to the site and because the number of variances required were many.
- [37] Mr. Robinson reviewed the properties surrounding the subject site using a Google aerial map (marked Exhibit B):
- a) Professional, financial and office buildings are located to the north.
  - b) A strip mall is located to the south containing different types of businesses.
  - c) Industrial properties are located to the east.
  - d) Several blocks of single detached housing are located to the west.
  - e) Mount Pleasant School and the associated park are located in close proximity to the southwest.
- [38] As indicated in Section 2 of his written submission inadequate parking, both on and off-street, was identified as a concern in this area in the applicable Plan, but he acknowledged that the Plan is older. A total of nine parking spaces are required for the restaurant plus the apartments. The site plan confirms that the subject site only has 5 parking spaces and there is no street parking available at this location.

v) *Rebuttal of the Appellant*

[39] Mr. Khatib confirmed that the Architectural drawing only shows five parking spaces that meet the required dimensions, but noted that there are six spaces available as a practical reality of the site.

**Decision**

[40] 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** as suggested by the Development Officer:

1. Fences, Walls, Gates, and Privacy Screening shall be constructed in accordance with Section 49 of the *Edmonton Zoning Bylaw*.
2. The area hard surfaced for driveways and/or parking areas approved on the site plan for this application shall comply with Section 54.6 of the *Edmonton Zoning Bylaw*.
3. 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).

Advisements:

- i) 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.
  - ii) This Development Permit is not a Business License. A separate application must be made for a Business License.
  - iii) An approved Development Permit means that the proposed development has been reviewed against the provisions of this bylaw. It does not remove obligations to conform with other legislation, bylaws or land title instruments including, but not limited to, the *Municipal Government Act*, the *Safety Codes Act* or any caveats, restrictive covenants or easements that might be attached to the Site.
  - iv) Signs require separate Development Applications.
- [41] In granting the development, the following variances to the *Edmonton Zoning Bylaw* are allowed:

1. The required minimum of 9 parking spaces as per Section 54.2 Schedule 1(A) is varied to allow a deficiency of 4 parking spaces, thereby decreasing the minimum required to 5 parking spaces.
2. The required minimum of 1 Loading Space as per Section 54.4 Schedule 3 is varied to allow a deficiency of 1 Loading Space, thereby decreasing the minimum required to 0.
3. The minimum Amenity Area requirements in Section 46 and Section 340.5(3)(c) are waived.

### **Reasons for Decision**

- [42] The proposed development involves two Uses: an increase to a previously approved Restaurant Use, which is a Permitted Use in the (CB2) General Business Zone, and an Apartment Housing Use, which is a Discretionary Use in the (CB2) General Business Zone. The proposed development requires variances for Amenity areas, Parking and a Loading space.
- [43] The Board finds that the Apartment Housing Use is an appropriate Discretionary Use at this location for the following reasons:
- a) The proposed Apartment Housing consists of two one-bedroom dwelling units which have been in existence since before 2003.
  - b) There is only one known complaint about this property. It occurred in 2013. The details of this complaint are unknown, but it prompted a compliance investigation which ultimately led to the discovery of the unauthorized dwelling units and the application under appeal.
  - c) Owners of the adjacent commercial properties support the development and no other neighbouring owners submitted any indication of support or opposition.
  - d) The aerial photograph (Exhibit B) and submissions of the parties confirm that areas to the east of proposed development are industrial, the areas immediately to the North and South are purely commercial, and the area to the west is residential. There are a significant number of Single Detached Houses immediately to the west across the alley.
  - e) Given that the subject site is in a transitional location at the intersection of residential and non-residential uses, the Board finds that the proposed two dwelling Apartment Housing Use is reasonably compatible with the surrounding Uses.
- [44] The Board finds the overall impact of lack of amenity space for the two dwellings will be negligible and waives the requirement for Amenity space for the following reasons:

- a) Because the proposed Second-floor Apartments have only two one-bedroom apartment units, it is unlikely that the number of occupants associated with this development add appreciably to the aggregate number of residents in the immediate area. Accordingly, the lack of Amenity area will be of a more significant impact to the residents rather than to neighbouring property owners.
- b) Based on the aerial photo (Exhibit B), a large green space and park area connected with Mount Pleasant school is located in close proximity to the property, which will fully absorb any Use attributable to the residents of the two dwellings.

[45] The Board waives the requirement for one loading space for following reasons:

- a) As noted by the Development Officer, it is consistent with City practices to waive this requirement where warranted by site conditions and scale of proposed Use. In this case, the proposed restaurant is for 32 spaces and 67 square metres of public space, which is a relatively small restaurant.
- b) Based on the submissions of the Appellant, the Board accepts that deliveries are facilitated through smaller commercial vehicles which can utilize the regular on-site parking area during off hours for the restaurant.
- c) There were no known complaints associated with restaurant-related deliveries from any of the commercial and residential properties which share the rear Lane with the proposed development.

[46] The Board allows the parking variance for following reasons:

- a) Only one complaint was received regarding this property since 2003 and no evidence has been submitted that this sole complaint was specific to parking.
- b) The Board accepts the evidence of the Appellant, who has lived on site for many years and who previously operated the restaurant, that there have been no parking issues with regard to this development to date amongst neighbouring businesses or nearby residential owners.
- c) The Appellant has provided documentation of an informal arrangement between the restaurant and Dell EMC (neighbours to the north) that the patrons of the restaurant Use may occupy parking spaces of the abutting property after 5:00 p.m., encompassing the typical peak hours for the restaurant. The Appellant confirmed that this arrangement provides 12 potential additional off street parking spaces, exceeding the minimum number of required parking spaces.
- d) The Appellant provided oral submissions that he enjoys good ongoing relationships with the adjacent neighbours and that they were specifically in favour of the proposed development that includes the expansion of the restaurant and the upstairs apartments.

[47] For the above reasons, the Board finds that the proposed development, with the variances granted, will not unduly interfere with the amenities of the neighbourhood nor materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land.

A handwritten signature in blue ink, appearing to read "K. Cherniawsky".

Kathy Cherniawsky, Presiding Officer  
Subdivision and Development Appeal Board

**Board Members in Attendance**

Mr. B. Gibson; Mr. J. Jones; Ms. D. Kronewitt Martin; Mr. A. Nagy

cc: Development & Zoning Services – G. Robinson / H. Luke

**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 2nd Floor, Edmonton Tower, 10111 – 104 Avenue NW, Edmonton, AB T5J 0J4.
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*,
  - c) the *Alberta Regulation 204/207 – Safety Codes Act – Permit Regulation*,
  - d) the requirements of any other appropriate federal, provincial or municipal legislation,
  - 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, 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 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.*