



**EDMONTON
TRIBUNALS**

*Subdivision &
Development
Appeal Board*

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Date: August 16, 2019
Project Number: 297464379-001
297464643-001
File Number: SDAB-D-19-115
SDAB-D-19-116

Notice of Decision

- [1] On August 1, 2019, the Subdivision and Development Appeal Board (the “Board”) heard appeals that were filed on July 3, 2019 and July 8, 2019. The appeals concerned the decisions of the Development Authority, issued on June 24, 2019, to refuse the following developments:

SDAB-D-19-115: 9809 - 92 Avenue NW (Plan 1822787 Blk 128 Lot 21B)

To construct a Single Detached House with fireplace, uncovered deck and walkout Basement development.

SDAB-D-19-116: 9811 - 92 Avenue NW (Plan 1822787 Blk 128 Lot 21A)

To construct a Single Detached House with fireplace, uncovered deck and walkout Basement development.

- [2] The subject properties are within the (RF2) Low Density Infill Zone. The Mature Neighbourhood Overlay and the Strathcona Area Redevelopment Plan apply to the subject property.
- [3] The following documents were received prior to the hearing and form part of the record:
- From the Development Authority, copies of:
 - Development Application, Refused Permit and Plans;
 - Lot Grading Plan, Geotechnical Map, and Correspondence between the Development Authority and Integrated Infrastructure Services;
 - Correspondence from Subdivision Planning;
 - Abandoned Wells Map; and
 - Written Submissions
 - From the Appellant:
 - Written Submissions and Supporting Materials
 - From the Public:
 - One email, and three online comments submitted in opposition to the development for both Files 115 and 116.

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

- Exhibit “A” – Email in opposition from an affected party.
- Exhibit “B” – Photographs submitted by an adjacent property owner.

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. The Presiding Officer explained that evidence for SDAB-D-19-115 and SDAB-D-19-116 will be heard together but will be considered as two separate appeals.

[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 Appellant, Franken Homes, represented by Mr. S. Franken and Mr. U. Franken

[8] Millcreek/Strathcona is one of the many mature neighbourhoods within the City that offer a unique combination of nature, culture and access to important infrastructure such as trails, bike lanes and public transportation, all in proximity to both Whyte Avenue and downtown. The unique homes and high quality of life for residents attract people to this neighbourhood.

[9] They have been working closely with the Development Officer to eliminate all non-essential variances. However, their clients specifically requested a flat roof and a walk out basement because of the unique characteristics of the lot, elevation and scenic views. The flat roof will enable their clients to utilize the third storey (as opposed to a pitched roof that only offers two and a half storeys). The walkout will enable them to easily access and store the bikes that they depend on for their primary mode of transportation.

[10] The proposed development will enhance the neighbourhood and encourage more urban density (as opposed to urban sprawl).

[11] The subject development previously proposed an attached Garage via a breezeway, which would have required more variances. However, due to discussions with the Development Officer, the Appellant decided to proceed with a detached Garage, therefore, those variances were no longer needed.

- [12] Regarding the required Height variance, the Appellant explained that the allowable Height is 8.9 metres and they are requesting 9.75 metres, equating to a variance of 0.85 metres. The Appellant expressed confusion about how the Development Authority determines its Height measurements. A rendering of a slanted roof requiring no variances was juxtaposed next to a flat roof requiring a variance, yet the two roof types appear visually to be of the same Height.
- [13] They previously built houses with the slanted roof and it reduces the functionality of the third Storey space. Flat roofs allow for a third Storey that provides a greater functional space to meet the demands of how people live in today's world, while providing a low maintenance outdoor living space.
- [14] The Appellant referred to photographs of other comparable three Storey, over-height developments, including existing precedents in the Belgravia and Millcreek/Strathcona areas.
- [15] They spoke to neighbouring property owners who indicated that they did not have a concern with the proposed development. However, one neighbour indicated he would prefer to see a duplex built on the subject Site.
- [16] Regarding the privacy screening, the proposed development has a front balcony that is set back from the street and will not impact privacy on the neighbours' rear yard. Adding the required screening to the upper floor balcony would negatively impact the view of downtown and the ravine.
- [17] Regarding the Height of the unenclosed step, they stated that the proposed project includes a steel open riser from street level to front door. Due to the elevation of the lot, a 1.0 metre allowance would not work for such a steep access. In their view, the incline of this lot is unique and provides an opportunity to open up the basement with natural light. The walkout basement would also provide their clients with direct access to bike lanes and trails.
- [18] The Appellant referenced the City's Municipal Development Plan, and provided an overview of how the subject development aligns with the City's vision and policies for increasing livability.
- [19] The Appellant provided the following information in response to questions from the Board:
- a. Referencing Picture 1.1 from their materials, the Appellant stated that the Development Officer had explained that the mid-point is calculated from the sloped roof, which is approximately 1/3 the Height of the taller cantilevered roof. Upon further questioning from the Board, the Appellant acknowledged that if Height is calculated from the mid-point of this cantilevered roof, a minor variance may be required. The Appellant also acknowledged that the Picture 1.1 rendering would

- require a separate variance for the dormer that protrudes extensively beyond the sloped roof.
- b. The City did not outline the landscaping that is required, but the front yard will have some concrete with grass and planters. The Board noted that section 55 sets out the landscaping regulations that will govern the subject development.
 - c. The Board noted that none of the pictures of similar houses show a rear walkout with front yard dugout that result in the impression of a four Storey Single Detached House from the street. The Board questioned whether any of the houses in the pictures required Height variances. The Appellant stated that the subject property is located on a sloped lot and the elevation presents a design challenge. However, if needed, they are prepared to alter the elevation.
 - d. The Appellant did not speak to the most affected adjacent neighbor to the west; however, that property owner submitted an online response in opposition to the development.
 - e. The proposed third Storey balcony will project further than the adjacent neighbour's upper floor balcony. As such, in lieu of traditional privacy screening that would hamper the client's view of the ravine, the fireplace wall directly adjacent to the neighbour's property will serve as a form of privacy screening.
 - f. The Appellant is willing to add additional privacy screening if required. They are agreeable to the suggested conditions of the Development Officer and any imposed conditions by the Board.

ii) Position of Affected Property Owners in Opposition of the Appellant

Mr. B. Murphy

- [20] Mr. Murphy lives across the street from the subject Site. He previously sent an email in opposition to the proposed development to the Development Officer. He did not receive any direct consultation from the Appellant. The Notice of Hearing from this Board was the only correspondence he received regarding the proposed development.
- [21] The Board noted that due to recent amendments to the Mature Neighbourhood Overlay regulations, community consultation is now coordinated by the Development Authority, although developers/applicants may still elect to do their own form of consultation. To ensure that Mr. Murphy's email to the Development Officer would be included in the appeal file, the Board recessed to provide Mr. Murphy an opportunity to submit the email he sent to the Development Officer (Exhibit "A").

- [22] Upon reconvening, Mr. Murphy questioned the number of storeys for the proposed development.
- [23] Mr. Murphy disagreed with the Appellant's submission that there are several front attached garages in the area. He is aware of only one.
- [24] Mr. Murphy also sought clarification regarding privacy screening. The Presiding Officer explained that based on the Appellant's submissions, the intent is for the fireplace wall to screen the adjacent properties, though there will be no such screening between the two proposed subject developments.
- [25] Mr. Murphy expressed concern that the rooftop amenity space will overlook his property across the street. In his view, it is unclear as to whether all required variances have been addressed and he was not confident that the proposed development will be built according to the plans.

Mr. R. Kostek

- [26] Mr. Kostek lives adjacent to the subject Site. The neighbourhood is populated with a variety of different sized lots, and he is not opposed to infill developments if they follow the regulations of the *Edmonton Zoning Bylaw* ("Zoning Bylaw").
- [27] He submitted a series of photographs (Exhibit "B") that show an abundance of vegetation on the subject property. He would like the vegetation to remain, but there is no provision regarding landscaping for the subject property.
- [28] He has received no information as to how the variances will not impact the neighbours, and noted that the two most affected neighbours have not had any consultation with the Appellant.
- [29] He expressed concern regarding overgrown weeds on the subject site, as well as maintenance of the lot and sidewalk.
- [30] Much of the information presented to the Board during the hearing was new to him. Based on what he has heard and seen, the proposed development has the appearance of a four storey house. The required variances should not be granted, as in his view, the proposed development will not enhance the neighbourhood.
- [31] Mr. Kostek provided the following information in response to questions from the Board:
- a. He confirmed that his house is immediately east of the subject Site. He is concerned that his property will be shadowed by the proposed development and that the proposed upper floor balcony will overlook his rear deck and his front porch.
 - b. He understood that there will be no privacy screening between the two houses being developed.

iii) Position of the Development Officer, Mr. Joselito

[32] The Development Authority did not appear at the hearing and the Board relied on Mr. Joselito's written submission.

iv) Rebuttal of the Appellant

[33] In response to the privacy screening concerns, the Appellant submitted that the City has strict guidelines for ensuring that privacy issues are addressed. On the outer walls adjacent to the neighbouring properties, there are piano windows so that occupants of the subject property cannot see inside their neighbours' properties. Referring to the plans, the Appellant noted that drawings of the left side elevation demonstrate how these windows have been placed much higher to avoid impact upon neighbouring properties.

[34] On the west side, the deck will be set back 1.0 metres.

[35] The Board referred to section 55.2(g), which states: "all Yards visible from a public roadway, other than a Lane, shall be seeded or sodded". The Appellant confirmed that they are agreeable to comply with this regulation. Although the proposed plans appear to show the front yard finished with concrete, they would be agreeable to a condition requiring that the front yard be seeded or sodded and to the concrete notation being removed from the stamped plan.

Decision

[36] 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. All yards visible from a public roadway, other than a Lane, shall be seeded or sodded (Section 55.2(g)).
2. Detached Garage requires a separate permit.
3. Geotechnical conditions and advisement:

The developer and owner should be aware that geotechnical information on slope stability and recommendations concerning related development restrictions are intended to preserve the integrity of the slopes and to improve the long term viability of the properties. Such information would be expected to reduce uncertainty and better-define the risk of slope instability for their properties and the proposed developments.

Proper management of water at the site will be of high importance in order to reduce the risk of erosion and instability. Discharge water from roof leaders, downspouts, and sump pump discharge spouts should be connected to the storm sewer system, where possible. It is recommended that restrictions on water features be adhered should development at this site be allowed, as follows:

1. No 'Swimming Pool' shall be constructed or installed, where 'Swimming Pool' refers to a swimming pool, ornamental pond, or other water retention structure.
2. No permanent sprinkler or irrigation systems shall be constructed or installed. Water must also not be allowed to accumulate or pond on the property.
3. Where the construction or installation of a swimming pool or other water retention structure is proposed, supporting geotechnical information should be provided to the City for review and approval as part of a development application.
4. The developers and owners should be aware that site-specific geotechnical engineering investigation and inspections by qualified geotechnical personnel would reduce uncertainty and risk relative to the proposed development and the design and construction of the foundations for the proposed structures. In general, good local construction techniques and practices must be employed in accordance with proper engineering design.
5. Importantly, should development be approved to proceed, the applicants must be aware that they are fully responsible to mitigate all geotechnical risks to surrounding properties and structures. Notably, all design and construction measures, including retaining structures and temporary shoring to support the basement excavation must suitably protect neighbouring properties, structures and infrastructure from any adverse impacts during construction.

TRANSPORTATION ADVISEMENTS:

1. Access for future development must be to the adjacent alley in conformance with the Mature Neighbourhood Overlay Section 814.3(17) of *Zoning Bylaw 12800*.
2. There are existing boulevard trees adjacent to the site that must be protected during construction, as shown on the Enclosure. For information about tree protection please refer to the City of Edmonton's web site (Trees and Construction).
3. There are existing stairs, walkway and retaining wall adjacent to 92 Avenue that encroach on road right-of-way. Upon redevelopment of proposed Lots 20 and 21, the existing stairs, walkway and retaining wall must be removed, as shown on Enclosure I. The owner/applicant will be required to obtain a Permit, available from Development & Zoning Services, 2nd Floor, 10111 - 104 Avenue.

4. The Strathcona neighbourhood is on the Neighbourhood Renewal program . This particular location is scheduled for reconstruction between 2019 and 2022 . Subdivision Planning recommends that the owner/applicant email BuildingGreatNeighbourhoods@edmonton.ca to coordinate any work on road right-of-way. Should you require any additional information please contact Roberta Bennett at 780-496-2612.

In granting the development the following variances to the *Zoning Bylaw* are allowed:

1. The maximum allowable Height of 8.9 metres as per section 814.3(5) is varied to allow an excess of 0.85 metres, thereby increasing the maximum allowed Height to 9.75 metres.
2. Section 814.3(8)(c) is varied to allow privacy screening as shown in the stamped approved plans for the uppermost deck.
3. The Height of the unenclosed steps that project into the Setback (Front) as per section 44(1)(b)(ii) is varied to allow an excess of 1.4 metres.

Reasons for Decision

- [37] The Development Officer refused two applications for permission to construct a Single Detached House with fireplace, uncovered deck and walkout basement on abutting lots at 9809 - 92 Avenue NW (Plan 1822787 Blk 128 Lot 21B) and 9811 - 92 Avenue NW (Plan 1822787 Blk 128 Lot 21A). The two proposed developments both require three identical variances to the *Zoning Bylaw*.
- [38] The Board considered the two appeals simultaneously and these reasons apply to both proposed developments unless otherwise indicated.
- [39] Single Detached House is a Permitted Use in the RF2 - Low Density Infill Zone.
- [40] Based on the written submissions by the Development Officer, the Appellants and the affected neighbours, as well as oral clarifications provided at the in-person hearing, the Board finds that the Development Officer completed the Community Consultation as required pursuant to section 814.5(1)(a) prior to rendering his decisions.
- [41] The Development Officer refused the two development permit applications for three reasons: excess in the maximum Height (which the Development Officer cannot vary per section 11.4(1)(b) of the *Zoning Bylaw*); failure to provide the uppermost decks with Privacy Screening; and excess in the Height of the unenclosed steps that project into the Front Setback.

- [42] The Subdivision and Development Appeal Board has the authority to vary development regulations in the *Zoning Bylaw* pursuant to section 687(3)(d) of the *Municipal Government Act* if it is determined that the proposed development will not unduly interfere with the amenities of the neighbourhood or materially affect the use, enjoyment or value of neighbouring properties.
- [43] In this case there is not a great deal of evidence before the Board one way or the other with respect to potential impacts attributable to the three requested variances.
- [44] The Board considered the Development Officer's written report as he did not attend the hearing. The three variances were identified and it was noted that he did not have authority to vary the Height. He did not provide any additional comments or rationale with respect to the refusal or the impacts, if any, of granting the three requested variances.
- [45] The Board considered the Appellants' submissions.
- [46] First, many of the Appellants' arguments dealt with their buyers' preferences and the marketability of their developments. The Board has not given weight to these arguments as the matter before it is determined by the impacts of the variances on neighbouring properties and neighbourhood amenities, not the preferences of the Appellants or their clients.
- [47] Second, the Appellants argued that the proposed development is consistent with several redevelopment policies concerning revitalization, intensification and infrastructure optimization in mature neighbourhoods found in several applicable Municipal Development Plans, including for example those enunciated in policies 3.5.1.1, 3.5.2.1, 4.2.1.1, 4.2.1.5 and 4.2.1.6. from the Plan, The Way We Grow.
- [48] These policies support the following types of objectives:
- a) increasing the portion of new growth, to accommodate residential infill ranging from small lot single family houses to high-rise towers in selected locations;
 - b) redevelopment and residential infill that contributes to the livability and adaptability of established neighbourhoods;
 - c) supporting neighbourhood revitalization and contributing to the livability and adaptability of mature neighbourhoods;
 - d) supporting the City of Edmonton's long-term intensification efforts in established communities vis a vis schools; and
 - e) optimizing the use of existing infrastructure in established neighbourhoods.

- [49] The Board acknowledges these objectives are part of the applicable Plans, and may be advanced by the addition of two new Single Detached Houses, but it finds that the three requested variances are not particularly relevant to the specified general objectives in the Way We Grow or the other cited Plans.
- [50] Third, the Appellants supplied evidence to show that there are precedents with similar Heights in the broader Millcreek area. There is a four Storey building at the end of the block face and there are other homes with front attached garages which have a similar effect. These examples were not significantly persuasive for the Board. The Appellants did not provide details with respect to applicable *Zoning Bylaw* regulations at the time of approval, details of approval or actual measurements. Further, the Board is not bound by precedent and has considered these two cases on their own merit.
- [51] Fourth, the proposed developments are located on sloped lots with a significant increase in elevation from the front to the rear lot lines which creates some practical issues, opportunities and impacts that differ from flatter lots.
- [52] Finally, the Board considered the mixed evidence it received about the views of neighbouring property owners concerning the variances:
- a. According to the Appellants, they canvassed the majority of the adjacent neighbours and reported the following: some had no concerns; some supported and even welcomed the developments; others were not in support, but the Appellants believed that the opposition stemmed largely from concerns with design choices as one neighbour would have preferred a duplex.
 - b. In his written report, the Development Officer notes “There is a concern from the neighbor/s regarding Height potential overlook into the adjacent properties.”
 - c. Three emails were received from neighbouring property owners in opposition to the proposed developments. Two neighbours attended the hearing. They believe that developments should be fully compliant with the *Zoning Bylaw*. Their main concerns related to the Height of the buildings and privacy impacts. The neighbours expressed the following additional concerns: the developments would increase density; create a precedent for higher buildings; result in a design inconsistent with the historic design and vernacular of Old Strathcona; and create privacy concerns and slope stability issues. The Board notes that none of requested variances deal with density, design or slope stability.
- [53] The Board notes that none of the requested variances deal with density or slope stability, and there is no regulation requiring the design of new developments in the RF2 zone to be consistent with the historical architecture of Old Strathcona. The Board allows the variances for the following reasons.

i. Privacy Screening

1. Section 814.3(8)(c) of the *Zoning Bylaw* requires privacy screening shall be incorporated to reduce direct line of sight into the windows of the Dwelling on the Abutting Dwellings.
2. The adjacent neighbour immediately west of the subject Sites was concerned about privacy for his front veranda and overlook of his windows and rear yard from the uppermost decks. The neighbour immediately east of the subject Sites has a second floor balcony facing the proposed developments and did not make any submissions.
3. The two proposed third floor decks are located on the front of the Dwellings and are visible to one another. Each deck is set back 1.0 metres from the side elevations facing one another. Each deck incorporates partial privacy screening in the form of an eight-foot, solid wall along the majority of the elevations facing out toward the side lot lines shared with adjacent existing properties immediately to the east and west.
4. Given the step back location of the front decks and the privacy screening indicated on the plans, the Board finds there will be no sightlines into the adjacent rear yards or windows of abutting dwellings. Any impact on privacy of the front yard for the neighbour to the west will be ameliorated by the existing trees and the fact that their front veranda is covered by a solid roof.
5. The privacy concerns with respect to the neighbouring property across the road is mitigated as the two properties are separated by the street, the front setbacks for the proposed dwellings are set at 8.05 metres from the front lot lines according to the plot plans, and the deck is stepped back an additional 1.0 metres from the front elevations of the dwellings. Further, the Board notes that sight lines in this case will exist regardless of the privacy screening facing the roadway due to the overall slope of this portion of the neighbourhood and will probably be greater from the compliant first and second Storey windows on the proposed Single Detached Houses than from the decks.

ii. Height

1. The Development Officer provided no opinion regarding Height.
2. The Board considered that the proposed design involves the removal of significant portions of the Front Yards to make them level and expose the basements for walk out access.
3. The Board also considered that the adjacent neighbour to the east has also removed a significant portion of their sloped Front Yard to accommodate a double front attached garage with a level Driveway.

4. The Board notes that removing a significant portion of the Front Yard to accommodate a walk out basement or front garage may add to the appearance of Height when viewed from the front of the lot. However, this design feature does not require a variance for overall Height of the proposed developments.
5. In these two cases, the variance for overall Height is required only to accommodate the third floor loft areas.
6. According to the stamped plans, these loft areas are 438 square feet (approximately half the floor area of the other floors). The roofs for these lofts are recessed approximately four feet from the rear elevations and more than 14 feet from the front elevations of the Single Detached Houses.
7. The Board finds that the visual massing and impacts of the variance to Height is lessened by the size of the loft areas, as well as the fact that the higher roof areas are significantly recessed from the front elevations. The recessed upper lofts will also be less visible to passersby from street level due to the slope of the lots.
8. Given these circumstances, the Board finds that the variance to Height will not add materially to the overall impact and appearance of the proposed developments from the street.

iii. Unenclosed Steps

1. The plans show stairs to access the front entries of homes on the subject Sites. The variance for the stairs is required due to the relative elevations of the front entries for the dwellings and the hollowed out portions of their respective Front Yards.
2. Given the sloped topography of the immediate area, the Board notes that front stairs in some form with a similar number of risers to access the Dwellings will be required. Stairs are characteristic given the sloped neighbourhood and the proposed developments will not detract from neighbouring properties.
3. However, the Board also considered that the drawings and renderings appear to indicate that almost the entire Front Yards are to be level concrete, which may amplify the impact of the proposed stairs. The Board therefore clarifies that the Appellants are not being granted any variance to the requirement for landscaping in these yards. The Board imposes a condition to require compliance with section 55.2(g) of the *Zoning Bylaw*, which states that “all Yards visible from a public roadway, other than a Lane, shall be seeded or sodded”. In short, to ameliorate the impact in Height, the Board is adding the condition that the Appellants must landscape the front of the property. During the hearing, the Appellants indicated that despite the notation on the Plan, they did not intend that the entire Front Yard areas be concrete and that they were willing to consent to this condition.

[54] For the above reasons, it is the opinion of the Board that the proposed development 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.

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

Board Members in Attendance:

Mr. B. Gibson; Ms. M. McCallum; Ms. E. Solez; Mr. C. Buyze

Important Information for the Applicant/Appellant

1. This is not a Building Permit. A Building Permit must be obtained separately from Development & Zoning Services, 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 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 Development & Zoning Services, 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**

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Appeal Board*

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Date: August 16, 2019
Project Number: 312131072-001
File Number: SDAB-D-19-117

Notice of Decision

- [1] On August 1, 2019, the Subdivision and Development Appeal Board (the “Board”) heard an appeal that was filed on **July 3, 2019**. The appeal concerned the decision of the Development Authority, issued on June 27, 2019, to refuse the following development:

Construct an ancillary administrative office building to an existing Senior's Apartment Housing facility.

- [2] The subject property is on Plan 9724004 Blk 10 Lot 6, located at 12603 - 135 Avenue NW and Plan 9724010 Unit 1, located at 12511 - 135 Avenue NW, within the DC2.897 Site Specific Development Control Provision.
- [3] The following documents were received prior to the hearing and form part of the record:
- A 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 including photographs.
- [4] The following exhibit was presented during the hearing and forms part of the record:
- Exhibit A – Google Aerial Map.

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 Development Officer, Mr. J. Angeles*

[8] Mr. Angeles provided the following information in response to questions by the Board:

- a) When reviewing the application he looked at the similarity of the proposed development and Appendix I.
- b) The proposed administration building is not in general conformance with Appendix I because it is a stand-alone structure. This additional structure is not included in the site plan of Appendix I.
- c) He consulted with the City Law Branch to ensure that they were reviewing the proposed development correctly.
- d) He confirmed that the only way a Direct Control District can be modified is through City Council.
- e) The Development Authority included all reasons for refusal as part of the decision to ensure the building is designed as outlined in the DC2.
- f) With respect to the other reasons for refusal, the Development Officer made the following responses:
 - a. This Direct Control District also states that design techniques, inclusive of the use of sloped roofs, stepped building design and the use of variations in setbacks and articulation of building facades, shall be employed to minimize the perception of massing when viewed from the low density residential areas to the north, east and west. (Reference Section DC2.897.4.k).
 - b. In his opinion, in addition to not being in general conformance with Appendix I, the proposed development does not have sloped roofs, stepped building design and the use of variations in setbacks and articulation of building facades with regard to design techniques as required by DC2.897.4.k.
 - c. There is a commercial building directly across the street and there are residential properties across the street to the north of the location of the proposed building on subject site.
 - d. A new landscaping plan would also be required to show compliance with the applicable landscaping regulations.
- g) Mr. Angeles is not aware of any rezoning application pertaining to the subject site.

ii) *Position of Mr. E. Gooch, representing the Appellant, MPM Project Management, who was accompanied by Mr. S. Terlson, representing Shepherd's Care Foundation and Ms. M. Gerard, representing Interscape Interior Design.*

- [9] The proposed development complies in all ways possible with the regulations in the DC2.897 Site Specific Development Control Provision, except that it is not outlined in Appendix I. They agree with the Development Officer on this point. They have run out of space for staff, who are currently working in crowded conditions and inappropriate places, such as tables in the cafeteria.
- [10] The Board should consider other factors. The proposed development will be characteristic with the existing buildings on the subject site. It will be a hardship if they have to appear before City Council to amend the DC2. The parking, floor area ratio, and height, all comply with the regulations of the Bylaw. Accordingly, they ask the Board to help them to go forward.
- [11] The Presiding Officer indicated that the Board is bound by section 685(4) of the *Municipal Government Act* that states:
- 685(4) Despite subsections (1), (2) and (3), if a decision with respect to a development permit application in respect of a direct control district
- (a) ...
- (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.
- [12] Mr. Terlson stated that they appeared before City Council to amend the DC2 for the existing cottage which did not appear on Appendix I at the time it was built and Council had added it to Appendix I in 2015.
- [13] The proposed building does not appear on Appendix I because it was impossible to contemplate when they rezoned. They are frustrated that anytime they have a development on the subject site they have to appear before City Council to have it approved. This process places a restriction on developments for seniors in their facility which is not in their best interest.
- [14] They have put a lot of work into the plan and now that work is going by the way side. The Development Officer indicated to them that the proposed development was going to be approved until his supervisor reviewed the proposed application and indicated that the proposed development should be refused.

- [15] Ms. Gerard stated that they conducted community consultation with 150 individuals and received signatures from one third of them in support of the proposed development.
- [16] The Presiding Officer acknowledged the Appellant's statements and asked the Appellants to indicate how the Development Officer did not follow the directions of City Council when he refused the development.
- [17] Mr. Gooch indicated that if the proposed development was not approved by the Board then they would have no choice but to appear before City Council.
- [18] Ms. Gerard referred to a drawing of the area showing that the proposed development is complementary with the other buildings on the subject site.
- [19] The Board recessed for a short time to deliberate the matter.
- [20] Upon reconvening, the Presiding Officer reiterated that the Board is bound by the Court of Appeal and section 685(4) of the *Municipal Government Act*.
- [21] Mr. Terlson and Mr. Gooch reiterated how the proposed development came to this point and how they feel the Board should hear the merits of the appeal. They feel this decision by the Development Officer is inconsistent with previous decisions, particularly the earlier instance where a building was approved and then later added to Appendix I by Council. They argue that the same process should apply in this case.
- [22] The Board recessed for a short time to allow the parties to discuss any further points to present to the Board.
- [23] Upon reconvening, Mr. Terlson indicated that their earlier concession about inconsistency with the Appendix I is not correct and asked to make further submissions. In their view, there should be consistency in the decisions rendered by the City regarding new developments on the subject site. Some buildings were developed and added to Appendix I after a development permit was issued. The Development Officer failed to follow the directions of City Council, as in the past, buildings on the subject site were approved prior to being added to Appendix I in 2015. In his opinion, the Development Officer did not follow the correct process.
- [24] He reiterated that the Development Officer was going to approve the proposed development until his Supervisor advised him to refuse the development permit application.
- [25] With regard to the other two reasons for refusal, Ms. Gerard stated that the proposed landscaping plan complies with section 55.3 of the *Edmonton Zoning Bylaw*.
- [26] In their opinion, the landscaping was dealt with prior to the permit being refused in other plans so it should not be a reason for refusal.

Decision

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

Reasons for Decision

[28] The proposed development is to construct an ancillary administrative office building to an existing Senior's Apartment Housing facility. According to the Appellants' application the proposed accessory building is comprised of three floors with a gross floor area of 1266 square metres.

[29] The proposed development is within the DC2.897 Site Specific Development Control Provision; therefore, section 685(4) of the *Municipal Government Act* (the *Act*) applies. It states:

685(4) Despite subsections (1), (2) and (3), if a decision with respect to a development permit application in respect of a direct control district

(a) ...

(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.

[30] DC2.897 provides regulations specific to the subject Site. It states in part at DC2.897.4.a "Development shall be in general conformance with Appendix I."

[31] Appendix I is a Site Layout showing the property line and accesses to surrounding roadways, parking areas, a courtyard and the outlines of several buildings including: Shepherd's Inn, Health & Wellness Centre, Shepherd's Manor, Addition and Shepherd's Place.

[32] According to his written report and oral submissions, the Development Officer's primary reason for refusal was that the proposed building is not in general conformance with Appendix I because it does not appear on Appendix I.

[33] All of the parties were in agreement that the proposed three-storey administrative building does not appear on Appendix I. The Board notes that the proposed location for the building on Appendix I is partially designated as a parking area and partially undesignated.

- [34] The Appellants initially agreed that the proposed building was not in general conformance with Appendix I, but subsequently argued that it was in general compliance. In their view, future development cannot be anticipated and the Development Officer failed to follow the directions of City Council because in the past a previously approved building did not appear on Appendix I and was added after the fact by City Council in a subsequent amendment to the DC2 Bylaw. In their view, the same process should be followed in this case for consistency.
- [35] The Board prefers the position of the Development Officer that because the proposed development, a three-storey building, does not appear on Appendix I it is contrary to DC2.897.4.a, a mandatory regulation within the Site Specific Direct Control District.
- [36] Therefore, the Board finds that the Development Officer followed the directions of City Council in denying the application.
- [37] The Board's authority to hear this appeal is governed by the *Act*. Given the Board's finding that the Development Officer followed the directions of City Council, per section 685(4) of the *Act* it has no authority to consider the merits of this appeal or substitute its decision for the Development Officer's decision.

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

Board Members in Attendance:

Mr. B. Gibson; Ms. M. McCallum; Ms. E. Solez; Mr. C. Buyze

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.
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 Development & Zoning Services, located on the 2nd Floor, Edmonton Tower, 10111 – 104 Avenue NW, Edmonton, AB T5J 0J4.