



**EDMONTON
TRIBUNALS**

*Subdivision &
Development
Appeal Board*

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Date: September 7, 2018
Project Number: 285518626-001
File Number: SDAB-D-18-126

Notice of Decision

- [1] On August 23, 2018, the Subdivision and Development Appeal Board (the “Board”) heard an appeal that was filed on **July 25, 2018**. The appeal concerned the decision of the Development Authority, issued on July 13, 2018 to refuse the following development:

**To construct exterior alterations to a Single Detached House
(Driveway extension, 1.81 metres by 6.82 metres).**

- [2] The subject property is on Plan 0820126 Blk 3 Lot 29, located at 16904 - 57 Street NW, within the (RSL) Residential Small Lot Zone. The McConachie Neighbourhood Structure Plan and the Pilot Sound Area Structure Plan apply to the subject property.
- [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, the proposed plan, and the refused Development Permit;
 - The Development Officer’s written submission;
 - The Appellant’s written submissions;
 - One letter in opposition to the proposed development; and
 - One e-mail and one on-line response in support of the proposed development.

Preliminary Matters

- [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, Mr. & Mrs. D. Fortier

[7] They extended the width of their driveway to provide enough space for their son to park his vehicle and still allow access for vehicles into the attached two car garage. The driveway with the extension is not wide enough to park three vehicles.

[8] They were not aware that a development permit was required before the concrete was poured. However, they applied for a development permit as soon as they were notified by the City.

[9] A petition of support signed by the majority of surrounding neighbours was submitted with the appeal. The only neighbour who did not support the development resides immediately to the north.

[10] A photograph was shown of another similar driveway extension that is located approximately three blocks away.

[11] The front yard of the subject site has been landscaped to preserve the curb appeal.

[12] The existing driveway was not poured to the full width of the garage and therefore, the extension only exceeds the width of the garage by 1.2 metres.

[13] The concrete has been setback 12 inches from the property line to ensure drainage is not impacted on their property or the property to the north.

[14] Mr. and Mrs. Fortier provided the following information in response to questions from the Board:

a) The extension was poured separately from the existing driveway.

b) The north side of the garage does not have a man door, but they have future plans to develop a sidewalk along that side of the garage to provide access to the rear yard.

ii) Position of the Development Officer, Mr. J. Folkman:

[15] The Development Authority provided a written submission and did not attend the hearing.

Decision

[16] 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 condition:

1. Lot grades must match the Engineered approved lot grading plans for the area. Contact Lot Grading at 780-496-5500 for lot grading inspection.

[17] In granting the development, the following variances to the *Edmonton Zoning Bylaw* are allowed:

1. The maximum allowable width of the Driveway per section 54.1(4)(c) is varied to allow an excess of 1.8 metres.
2. The requirement that the Driveway leads directly from the roadway to the Garage per section 54.1(4)(a) is waived.
3. The requirement of section 54.2(2)(e)(i) is waived to allow a parking space within the Front Yard.

Reasons for Decision

[18] The proposed development is Accessory to a Permitted Use (Single Detached Housing) in the (RSL) Residential Small Lot Zone.

[19] The Board has granted the required variances for the following reasons:

- a) Based on the evidence provided, the Appellant has future plans to construct a sidewalk to provide access from the Driveway extension to the Rear Yard along the north side of the Garage. The added portion of the Driveway may become the access point to the Rear Yard and therefore may at that time be deemed a Walkway.
- b) Based on a review of the photographic evidence provided, there is no direct overlook onto the immediately adjacent property to the north.
- c) The Front Yard has been landscaped to preserve the curb appeal from the front roadway.
- d) The northern edge of the Driveway extension is setback 12 inches (30 centimetres) from the (north) property line to ensure adequate grading and drainage on the subject Site, which will mitigate the concerns of the property owner to the north. This does not preclude the Appellant from ensuring all Drainage Bylaws are met as required.
- e) There was no evidence provided to persuade the Board to support the Development Officer's reason for refusal that the proposed development will generate undesirable

impacts on surrounding Sites such as poor appearance, excessive noise, light and odours.

- f) The Board also notes that this extended portion of Driveway has not eliminated any existing off-street parking spaces.

[20] Based on the above, it is the opinion of the Board, that the proposed development, with the required variances, 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.

Mr. V. Laberge, Presiding Officer
Subdivision and Development Appeal Board

Board members in attendance: Mr. B. Gibson, Mr. C. Buyze, Mr. J. Kindrake, Ms. M. McCallum

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.



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Date: September 7, 2018
Project Number: 265793500-001
File Number: SDAB-D-18-115

Notice of Decision

August 2, 2018 Hearing:

Motion:

“That SDAB-D-18-115 be **TABLED** to August 23, 2018, at the written request of the Appellant and with the consent of the Development Officer.”

Reasons for Decision:

1. This is the first postponement request received from the Appellant.
2. Postponing the appeal hearing will allow a representative for the Appellant to attend the hearing.

August 23, 2018 Hearing:

Motion:

“That SDAB-D-18-115 be raised from the table”

- [1] On August 23, 2018, the Subdivision and Development Appeal Board (the “Board”) heard an appeal that was filed on **July 6, 2018**. The appeal concerned the decision of the Development Authority, issued on June 27, 2018, to refuse the following development:

To change the Use from General Retail Stores to a Restaurant (50 Seats, 36.2 square metres of Public Space) and construct interior alterations (Fleisch).

- [2] The subject property is on Plan 1522508 Blk 51 Lot 29, located at 10610 - 82 Street NW, within the DC2.863 Site Specific Development Control Provision (the “DC2”).

[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;
- The Appellant's written submissions, including a Parking Assessment, and two Subdivision Planning memorandums; and
- Letters in opposition to the proposed development from three adjacent properties.

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

- Exhibit A – A PowerPoint presentation used by an agent for the Appellant; and
- Exhibit B – Photographs submitted by Mr. D. Jaster, an affected property owner who appeared in opposition to the proposed development.

Preliminary Matters

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

[6] The Chair 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.

[8] The Chair referenced section 685(4)(b) of the *Municipal Government Act* which states:

despite subsections (1), (2) and (3), if a decision with respect to a development permit application in respect of a direct control district is made by a development authority, the appeal is limited to whether the development authority 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.

Therefore, the Board must determine whether or not the Development Authority followed the directions of Council in refusing this development permit application.

Summary of Hearing*i) Position of the Appellant, Ms. K. Ingraham and her agent, Mr. C. Dulaba, representing Bel Jan Development:*

- [9] The proposed development is within a newer mixed use four-storey apartment building and it is surrounded by a mix of low to medium density housing. The apartment contains 27 dwellings and commercial space on the main floor.
- [10] There is a small cluster of (CNC) Neighbourhood Convenience Commercial zoned sites surrounding the proposed development which creates a small commercial node in a very walkable neighbourhood.
- [11] Parking is restricted during peak hours along 106 Avenue, a four lane arterial roadway, that is located south of the subject site.
- [12] There are four parking spaces located on the west side of the building that are used for both residential and commercial uses.
- [13] During the development permit review process, the Development Officer requested that a Parking Impact Assessment be completed to justify the required parking variance.
- [14] Bunt and Associates conducted a Parking Impact Assessment when the development permit was issued for Cartago (a Bar and Neighbourhood Pub) in 2014 and were hired to complete the study for this proposed development. The study concluded that there was sufficient on-street parking to accommodate the anticipated parking demands generated by the proposed coffee shop and deli.
- [15] In a memorandum dated June 4, 2018, Subdivision Planning accepted the findings of the Parking Impact Assessment that there were a total of 63 on-street parking spaces available within a one block radius of the subject site, which justified the required increase in the on-site parking variance.
- [16] However, a revised response from Subdivision Planning dated June 13, 2018, indicated that Parking Management now had concerns based on a review of the area parking following several complaints received from residents along 82 Street after the first commercial development on the ground floor of this building was completed. Therefore, it was their conclusion that the proposed increased parking deficiency would exacerbate the on-street parking demand and result in further residential concerns and complaints.
- [17] Mr. Dulaba questioned the completeness of the review completed by Parking Management given the short period of time between June 4, 2018 and June 13, 2018. It took several months for Bunt and Associates to gather information and analyze their findings to prepare the Parking Impact Assessment. It was his opinion that the City was

aware of the neighbourhood concerns prior to providing support for the development on June 4, 2018.

- [18] The Development Officer calculated the required number of parking spaces for the proposed Use using the parking regulations that were in effect in May 2014. Since then, the *Edmonton Zoning Bylaw* (the *Bylaw*) has been amended and the required number of parking spaces for this type of Use has been reduced. It was his opinion, that the Development Officer had discretion to apply the requirements of the current *Bylaw* when reviewing the parking requirements because it was Council's intention to reduce the requirements for Restaurants and Specialty Food Service Uses on sites that have a high level of walkability, cycling and are close to public transit.
- [19] Section DC2.863.4(j) states that parking requirements shall be in accordance with section 54 of the *Bylaw*, except that a minimum of 1.0 parking stalls per Dwelling shall be provided. There are 27 residential dwelling units in the building and 28 parking spaces have been provided. The residential units are fully occupied and three of the residents do not use parking.
- [20] The current General Retail Store Use requires four parking spaces and would be approved without a variance.
- [21] It was his opinion that the required variance for the change in Use is reasonable given the location of the building. Potential customers of the proposed development are residents in the subject building and customers of Cartago use other modes of access including walking, cycling and transit.
- [22] A map was referenced to illustrate the location of Cartago customers who have provided support for the proposed development. These customers were asked to provide their address or postal code and this information was plotted on the map. The results indicated that eight supporters reside within 60 metres of the subject site and six reside in the residential units in the building.
- [23] Ms. Ingraham advised that as a small business owner she finds it very difficult to navigate the political red tape and bureaucracy involved in operating a business in Edmonton.
- [24] The proposed coffee shop and deli is a targeted business move, located in the same building as the Bar and Neighbourhood Pub that she currently owns and operates. The Bar and Neighbourhood Pub has only been open for one year and is thriving primarily because of community acceptance.
- [25] An open house was held after the development permit application was refused to address neighbourhood concerns. Unfortunately many of the residents who objected did not attend, which in her opinion speaks to the animosity that currently exists in this neighbourhood. It was her opinion that this has been fostered by City administration because they have avoided their responsibility of dealing with the safety concerns

identified by neighbourhood residents. The safety concerns will exist even if a General Retail Use was approved at this location.

- [26] No one from the City has ever discussed the concerns of the neighbourhood residents with her in an attempt to find a solution. The development permit application for the Restaurant was submitted in October 2017 and she was not advised of the neighbourhood concerns until May 2018.
- [27] It was Ms. Ingraham's opinion that there are other solutions available to the City to address neighbourhood concerns, including the use of residential parking permits along 82 Street as well as reviewing the parking requirements on 106 Avenue to alleviate parking on 82 Street.
- [28] The Forest Heights Community League did not provide support or opposition for the proposed development. However, two Community League Directors attended the open house and provided their personal support.
- [29] Mr. Dulaba referenced photographs that he and Ms. Ingraham took on several different days at different times along 82 Street, 83 Street and 106 Avenue to support their contention that there are a significant number of on-street parking spaces available in the immediate vicinity and the Parking Impact Assessment supports their findings.
- [30] The proposed Restaurant will operate during early morning and early evening hours and not during the late evening, which is the peak operating time for the Bar and Neighbourhood Pub.
- [31] Mr. Dulaba and Ms. Ingraham provided the following information in response to questions from the Board:
- a) It was Mr. Dulaba's opinion that the Development Officer should have used the parking requirements contained in the current *Bylaw* because they were recently amended by Council in an attempt to reduce the onerous parking requirements placed on Restaurants and Specialty Food Services.
 - b) A General Retail Store Use on the ground floor of this building was approved by Council and a parking variance was granted for the Bar and Neighbourhood Pub that was approved in the first commercial space. The result is that any Use in the remaining commercial space will require a parking variance.
 - c) The DC2 requires that commercial parking be shared with the residential component of the building. There are four parking spaces on the west side of the building designated for a commercial use and the Bar and Neighbourhood Pub uses two of those spaces.
 - d) The proposed public area is 36.2 square metres and one parking space is required for every 9.6 square metres of public space for a total of four parking spaces.

- e) The Restaurant will have approximately 30 seats, not 50 seats as indicated in the scope of application.
- f) The overlap hours of operation for the existing business and the proposed business would be from 3:00 p.m. to 7:00 p.m.

[32] Ms. Ingraham read two letters of support received from neighbourhood residents who stated that the proposed development will be a positive addition and amenity in this neighbourhood. Many customers walk and cycle to Cartago. It was their opinion that the parking issues have been overstated and that not all of the parking and traffic concerns in the neighbourhood can be attributed to Cartago. Based on their observations, the street parking situation does not change on Mondays when Cartago is closed.

[33] Ms. N. Farn, representing Bunt and Associates, provided the following information in response to questions from the Board:

- a) Visits were made to the site and surrounding area on different days of the week at different times to observe the availability of parking within 200 metres of the subject site.
- b) There were many vacant on street parking spaces during the morning and afternoon hours along 106 Avenue and underused on street parking spaces located immediately adjacent to the subject site.
- c) The *Bylaw* was amended to reduce parking requirements for Restaurants and Specialty Food Services located in close proximity to transit avenues.
- d) The Parking Impact Assessment was conducted between February and April 2018, which is a busy time for the Bar and Neighbourhood Pub.
- e) Street parking is restricted on 106 Avenue between 7:30 a.m. to 9:00 a.m. for westbound traffic.
- f) The proposed Restaurant requires a parking variance of four spaces which would be the same for a General Retail Use at the same location.
- g) The Parking Impact Assessment was conducted as it would be for any other location in the City according to the methodology approved by the City.

ii) Position of the Development Officer, Mr. I. Welch:

- [34] The Direct Control regulation, section DC2.863.4(j), states that parking shall be provided, with certain specific caveats per section 54 of the *Bylaw*. It was the interpretation of their Legal Counsel that because the DC2 was passed prior to the current minimum parking regulations adopted in September 2017 under Bylaw 18171, any parking calculation should be based on regulations that were in effect in section 54 at the time that the DC2 was passed in May 2014. Therefore, the proposed development could not benefit from the relaxed parking requirements.
- [35] If the existing *Bylaw* parking regulations are applied to this development, the parking requirement for the existing and proposed commercial uses would be reduced from 42.6 spaces to 17.2 spaces. However, the variance would still be refused due to the concerns raised by Subdivision Planning (Transportation). The Appellant's parking calculation based on the current *Bylaw* is accurate.
- [36] The Appellant prepared and submitted a Parking Impact Assessment by Bunt & Associates that was reviewed and initially accepted by Subdivision Planning. However, based on additional information, specifically concerns received from neighbourhood residents, Subdivision Planning reassessed the situation and indicated non-support for the required parking variance. This additional information was not available prior to the initial decision.
- [37] The traffic safety concerns identified by neighbourhood residents should be addressed by a Transportation Planner.
- [38] He could not comment on the intent of Council regarding parking when this DC2 was passed.
- [39] Old versions of the *Land Use Bylaw 5996* and the *Bylaw* are available to research the exact wording of those regulations of the exact date a Direct Control District is passed.

*iii) Position of Affected Property Owners in Opposition to the Appellant:***Mr. K. Hanasyk:**

- [40] Mr. Hanasyk has no animosity towards the owner of the business but it was his opinion that Council created the problem when the DC2 was approved. He attended the public hearing along with the Community League to oppose the rezoning. He expressed concern that the developer did not attend the public hearing and made no commitment to address neighbourhood concerns.
- [41] After the DC2 was approved, he wrote several letters to the Mayor but did not receive a response.

- [42] The provision of underground parking could have addressed the problems that are currently being experienced. It was his opinion that the developer was not held accountable.
- [43] There is no on-street parking available on the north side of 106 Avenue because of two bus stops and another business.
- [44] It was his opinion that there is a conflict of interest because the business owner hired the consultant who prepared the parking study.
- [45] His neighbour just sold their house at a loss because the neighbourhood has become too urban.
- [46] This used to be a nice quiet street but it has changed and it has impacted their quality of life.
- [47] The provision of residential parking permits may help alleviate the situation. Even though he would like to support the business it is difficult because of the effect it has had on the neighbourhood.
- [48] Mr. Hanasyk provided the following information in response to questions from the Board:
- a) Cartago has been successful from day one. On-street parking is worse during the peak times of operation which is during the evening hours.
 - b) Safety concerns may be separate from parking but it was his opinion that they are related because motorists are accessing the street in an attempt to find parking spaces. He and his wife have tried to address problems with drivers on their street but it is never well received.
 - c) His neighbour advised him that the value of his property had decreased but he did not have an opinion from a professional real estate agent.
 - d) His visitors have to park quite a distance away because the on-street parking in front of their house is occupied by customers of Cartago.
 - e) The commercial space on the main floor of this building was approved for General Retail Use, not a Restaurant. In his opinion, a Restaurant requires more parking.

Ms. S. Hiron:

- [49] Residents arrive home from work between 3:30 p.m. and 7:30 p.m. during the proposed overlap hours of the two businesses when the demand for on-street parking is the greatest.
- [50] The on-street parking spaces on 82 Street, north of the building, are the first to fill up. When motorists cannot find parking there they become frustrated and rip a U-turn at the far end of the street and come back down 82 Street. None of the cars go south on 106 Avenue.
- [51] Ms. Hiron conceded that some of the parking issues are a result of the residents of the apartment building.
- [52] None of the houses on 82 Street have front drive access and residents park on the street.
- [53] It is her assumption that the restaurant staff will use the designated parking spaces.
- [54] There are no on street parking spaces available on 106 Avenue east of the site because of the existing bus stop. Customers of Cartago do not park south of 106 Avenue.

Mr. D. Jaster:

- [55] Mr. Jaster has resided in a house located north of 106 Avenue on 82 Street since 2016, prior to the construction of the subject building. Cars never lined both sides of Rowland Road before the building opened.
- [56] His children were able to play street hockey because the street was so quiet. After the building opened, traffic and the demand for on-street parking increased significantly.
- [57] Photographs marked *Exhibit B* were referenced to illustrate the state of parking in the area, specifically along 82 Street, between Rowland Road and 106 Avenue on different days and at different times, which is much different than what was reflected in the photographs submitted by the Appellant.
- [58] The proposed Restaurant would be a great addition to the neighbourhood but he is concerned about increased traffic and a lack of parking which will result in a significant safety issue.
- [59] Rowland Road is a narrow shared-use roadway with no sidewalks that becomes very unsafe at times when it is congested with cars parked on both sides of the road. Many people walk, run or bike on Rowland Road while constant traffic is eagerly trying to find parking to access Cartago, the apartment and the river valley.

- [60] When vehicles cannot find parking on 82 Street they proceed to the T-intersection at 82 Street and Rowland Road, make a U-turn and then travel south to 106 Avenue.
- [61] The speed limit on Rowland Road is 20 kph but the majority of vehicles exceed this. Some motorists completely ignore the stop sign, turn left and then back up into a shared path, into the middle of an intersection that is often busy with pedestrians of all ages, which is very unsafe.
- [62] It is human nature that people try to find parking as close to their destination as possible, especially during the winter months.
- [63] There is a power pole in one of the designated parking spaces on the subject site which makes it virtually unusable except for a motorcycle or a smart car.
- [64] It is wonderful to have amenities within walking distance and the proposed development is a fabulous concept that would benefit the community. However, parking and safety need to be addressed.
- [65] Hopefully some creative solutions can be found to allow the business to proceed while addressing the concerns of residents.
- [66] Mr. Jaster provided the following information in response to questions from the Board:
- a) It is his opinion that a busy coffee shop and deli at this location will have many more customers than a General Retail Store.
 - b) Parking restrictions may help alleviate some of the problems but they also have an impact on residents.

iv) Rebuttal of the Appellant, Mr. C. Dulaba and Ms. K. Ingraham:

- [67] Mr. Dulaba confirmed that he was in attendance at the Public Hearing for the proposed rezoning held by Council.
- [68] Numerous meetings were held with the Community League during the rezoning process to discuss the development and address neighbourhood concerns.
- [69] Under the DC2, a Pharmacy with operating hours between 8:00 a.m. and 9:00 p.m. could be approved as a Permitted Use.
- [70] The proposed Use is reasonable given the context of the neighbourhood adjacent to a busy four lane arterial roadway. The subject site borders several commercially zoned sites and density will increase in the surrounding residential zones given the recent *Bylaw* amendments regarding secondary suites. Therefore, it is reasonable to expect that street parking demands in the neighbourhood will increase.

- [71] Customers use various modes of transportation to access the existing business, including cycling. Further, an 18 space bicycle parking room is located in the building.
- [72] Ms. Ingraham clarified that five of the 13 employees reside in Forest Heights and walk to work. The other employees have been instructed to park south of 106 Avenue on 82 Street and walk to the site. This practice will continue to be enforced with any new employees. She does not anticipate an increase in staffing because of the overlapping hours of the two businesses.
- [73] Now that she is aware of the concerns of some of the residents, every effort will be made to address and resolve the issues.

Decision

- [74] 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 **CONDITONS**:
1. Exterior lighting shall be developed to provide a safe lit environment in accordance with sections 51 and 58 and to the satisfaction of the Development Officer;
 2. Any outdoor lighting for any development shall be located and arranged so that no direct rays of light are directed at any adjoining properties, or interfere with the effectiveness of any traffic control devices. (Reference section 51 of the *Edmonton Zoning Bylaw*);
 3. Any modification to the existing site access(es) shall require the review and approval of Subdivision Planning.
- [75] In granting the development, the following variance to the *Edmonton Zoning Bylaw* is allowed:
1. The parking requirements per section 54.1(2)(h) are waived to allow the proposed development with the existing Apartment House and the existing Bar and Neighbourhood Pub at the subject Site.

Reasons for Decision

[76] Section 685(4)(b) of the *Municipal Government Act* (the *Act*) states:

despite subsections (1), (2) and (3), if a decision with respect to a development permit application in respect of a direct control district is made by a development authority, the appeal is limited to whether the development authority 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.

[77] The proposed development is located on a Site zoned DC2.863 Site Specific Development Control Provision (the "DC2"), Bylaw 16811, passed by Council on April 14, 2014.

[78] Section DC2.863.1 states:

The General Purpose of the DC2.863 Site Specific Development Control Provision is to allow for the development of a four-storey mixed use residential apartment building with commercial uses on the ground floor.

[79] The proposed development is to change the Use from General Retail Stores to a Restaurant (50 seats, 36.2 square metres of Public Space) and construct interior alterations.

[80] Restaurants, for less than 100 occupants and 120 square metres of Public Space, is a Listed Use, pursuant to section DC2.863.3(p). The proposed development for at most 50 occupants and 36.2 square metres of Public Space is therefore a Listed Use in the DC2.

[81] Section DC2.863.4(j) states:

Parking requirements shall be in accordance with section 54 of the Zoning Bylaw, except that:

- i. Access to parking shall be provided from the Lane;
- ii. A minimum of 1.0 parking stalls per Dwelling shall be provided;
- iii. Visitor parking shall be accommodated off-site; and
- iv. A Parking Management Plan to allow shared-use parking between residential and commercial uses shall be submitted to the satisfaction of the Development Officer, in consultation with Transportation Services, as a part of the Development Permit application.

[82] Section 54.2, Schedule 1(A)(23) of the *Edmonton Zoning Bylaw* (the *Bylaw*) requires that a Restaurant or Specialty Food Service provide a minimum of one parking space per 9.6 square metres of Public Space.

- [83] All parties agreed that the existing residential Apartment Building, as mandated by the DC2 Bylaw, requires 27 on-site parking spaces and that there are only 28 parking spaces available on the Site. Therefore, any commercial use on the ground floor of the four storey mixed use residential building approved by Council in the DC2 will require a parking variance.
- [84] Pursuant to section 685(4)(b) of the *Act*, the issue before the Board is to determine whether or not the Development Authority followed the directions of Council by not granting a variance in the minimum required number of parking spaces.
- [85] Section DC2.863.4.j states that parking requirements shall be in accordance with section 54 of the *Bylaw*.

Section 54.1.2(g) states:

The Development Officer may use their variance power to relax the vehicular parking requirements in Schedule 1, the Bicycle Parking requirements in Schedule 2 and the loading requirements in Schedule 3, however such a variance shall only be considered in cases where the nature of the Use, the size of the Site, or other physical constraints result in a situation where the requirements cannot be met on-site without unnecessary hardship or practical difficulties.

Section 54.2.1(b) states:

Where the applicant for a Development Permit can demonstrate through a parking impact assessment completed in accordance with section 14.11 that the parking requirement for the proposed development is less than any minimum or more than any maximum set out in Section 54.2, Schedule 1, the Development Officer may allow a reduction from the minimum or an increase from the maximum in the number of parking spaces.

- [86] The Alberta Court of Appeal decision, *Garneau Community League v Edmonton (City)*, 2017 ABCA 374 determined that, when dealing with direct control provisions, the Board is limited to the variance power provided to the Development Authority and cannot use the general variance power provided in section 687 of the *Act*. Therefore in this appeal the Board is limited to the variance power provided to the Development Authority in section 54 as stated above.
- [87] The Board finds that the Development Authority did not follow the direction of Council by failing to exercise, or even consider, the variance power provided in section 54.1.2(g) and section 54.2.1(b) of the *Bylaw*.

[88] The Appellant completed a Parking Impact Assessment in accordance with section 14.11 of the *Bylaw*. The Parking Impact Assessment was prepared by Ms. N. Farn, P. Eng., at Bunt and Associates, Traffic Engineering Specialists. The Parking Impact Assessment determined that the proposed development would not be overly impactful upon the nearby residences and street given the current usage of available on-street parking spaces and concluded that “It is anticipated that on-street parking opportunities can appropriately accommodate the anticipated parking demands generated by the proposed coffee shop/deli land use.”

The Board was not provided with a contrary professional opinion from either Subdivision Planning or those opposed to the appeal and therefore accepts the findings of the Parking Impact Assessment. As such, the Board finds that the Appellant complied with the requirements of section 54.2.1(b) of the *Bylaw* and in order to follow the direction of Council, the Development Authority should have used the variance powers provided to grant the required variance.

[89] Given the nature of the Use, the size of the Site and the physical constraints, it is clear that no matter what type of commercial application is made for this Site, a variance in the parking requirements will be required. The residential portion of this development occupies 27 of the 28 on-site parking spaces provided and there is an existing Bar and Neighbourhood Pub operating in the other commercial space on the ground floor of the building. Therefore, it is impossible for any commercial development to satisfy the vehicular parking requirements in section 54. City Council, in approving the General Purpose of the DC2 Bylaw (which is to allow commercial uses on the ground floor) effectively mandates a variance, if the requirements of section 54.1.2(g) are met. As such, the Board finds that the Development Authority did not follow the direction of Council because the variance power provided in Section 54.1.2(g) was not used.

[90] The Board grants the required variance to allow the proposed development to proceed for the following reasons:

- a) The proposed Restaurant requires four on-site parking spaces.
- b) The Development Authority provided evidence that the required number of on-site parking spaces was calculated based on the regulations contained in the *Bylaw* that was in effect in 2014 when the DC2 was passed in May 2014.

The Board disagrees with the method that was used to calculate the required parking for this development and finds that the parking calculation should have been completed using the regulations contained in *Edmonton Zoning Bylaw 12800* that were in effect on the date that the development permit application was submitted on October 30, 2017. It is the practice of the Board to consider and apply the *Bylaw* regulations and other forms of legislation that are in effect at the time of the appeal hearing.

- c) The Development Authority conceded that the proposed development requires four parking spaces based on the requirements of section 54.2, Schedule 1(A)(23) which states that a Restaurant/Specialty Food Services Use requires one parking space per 9.6 square metres of Public Space. The proposed development has 32.6 square metres of Public Space, which equates to four parking spaces.
- d) Although the Development Authority could not provide details of the City's interpretation of section DC2.863.4(j), the requirements of section 2.7 of the *Bylaw* were reviewed and discussed.

Section 2.7 states:

Unless there is an explicit statement to the contrary in a Direct Control District or Provision, any specific reference in a Direct Control District or Direct Control Provision to a land use bylaw shall be deemed to be a reference to the land use bylaw that was in effect at the time of the creation of the Direct Control District or Provision

The Board finds that section 2.7 is a transitional provision between *Land Use Bylaw 5996* and the *Edmonton Zoning Bylaw 12800*. This finding is supported by the Alberta Court of Appeal decision, *Parkdale-Cromdale Community League Association v. Edmonton (City)*, 2007 ABCA 309. Paragraph 4 of the Alberta Court of Appeal decision states:

On its correct interpretation, section 2.7 does not override section 2.4. Section 2.7 is **ONLY** intended to deal with a situation where a Direct Control bylaw passed before 2001 contained an express cross-reference to a provision of the old Land Use Bylaw [...] [**Emphasis Added**]

- e) The Board finds that section 2.7 does not apply in this instance because DC2.863 Site Specific Development Control Provision was passed in 2014 and does not contain an express cross-reference to a provision of the old *Land Use Bylaw 5996*. Therefore, there is no reason to depart from the general rule that the law must be applied as it is in force on the date on which a tribunal renders its decision.
- f) It was conceded by the Development Authority that under the regulations currently in effect in *Edmonton Zoning Bylaw 12800*, the existing General Retail Store Use requires four parking spaces and that the proposed change in Use to a Restaurant also requires four parking spaces. Therefore, the proposed change in Use does not result in any increase in the number of parking spaces required.

g) The Board notes that the Parking Impact Assessment provides a very simple, but in the Board's opinion, an effective Parking Management Plan. The proposed Restaurant and the existing Bar and Neighbourhood Pub will not have significant overlapping business hours, most notably during peak hours of operation. The Parking Impact Assessment concluded that the peak hours of operation for the Bar and Neighbourhood Pub is after 8:00 p.m. when the proposed Restaurant, a Coffee Shop and Deli will be closed.

[91] The Board concludes that the Development Authority did not follow the directions of Council because the variance power provided in section 54.1.2(g) and section 54.2.1(b) of the *Bylaw* was not exercised. The Board grants the required variance because the initial residential component of this building has monopolized all of the on-site parking spaces and has resulted in a situation where the parking requirements cannot be met on-site without unnecessary hardship and practical difficulties. In addition, the Parking Impact Assessment concluded that on-street parking opportunities exist in the immediate area and can appropriately accommodate the parking demands generated by the proposed Restaurant and will not have a negative impact on the neighbourhood.

Mr. I. Wachowicz, Chair
Subdivision and Development Appeal Board

Board members in attendance: Mr. B. Gibson, Mr. C. Buyze, Mr. J. Kindrake, Ms. M. McCallum

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.