



**EDMONTON
TRIBUNALS**

*Subdivision &
Development
Appeal Board*

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Date: August 22, 2019
Project Number: 227514182-023
File Number: SDAB-D-19-119

Notice of Decision

- [1] On August 7, 2019, the Subdivision and Development Appeal Board (the “Board”) heard an appeal that was filed on July 1, 2019. The appeal concerned the decision of the Development Authority, issued on June 10, 2019, to refuse the following development:

To change the Use from a Bar & Neighbourhood Pub to a Nightclub (Entendre)

- [2] The subject property is on Plan B2 Blk 5 Lot 166, located at 10344 - 105 Street NW, within the (UW) Urban Warehouse Zone. The Special Area Downtown Overlay and the Capital City Downtown Plan apply to the subject property.
- [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 submissions;
 - The Appellant’s written submissions;
 - A written submission from Mr. R. Noce, Legal Counsel for an affected property owner; and
 - Online responses.

Preliminary Matters

- [4] 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.
- [5] The Chair 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 (the “*Municipal Government Act*”).

[7] The Chair advised that the hearing would proceed in the absence of the Appellants based on the written reasons that were provided when the appeal was filed.

Summary of Hearing

i) Position of the Appellant, 1966318 Alberta Ltd. based on their written reasons for appeal:

[8] The City has provided us with a permit to operate a Bar and Neighbourhood Pub and as of recent, issued our business with a cease order to stop operations immediately. The calculation provided in the reasoning for the cease order is inaccurate and not consistent with the initial calculation performed when first obtaining this permit. With this, we are compliant with Bar and Neighbourhood Pub Zoning – We operate under the permitted (allowed) use of “Bar & Neighbourhood Pub”. Zoning and Development will not give us the opportunity to rectify any of their calculation issues (ex. To make changes according to what they expect) and therefore left us with only one choice – apply for a “Nightclub” development permit. The city would like for this to happen so that we are forced to be a discretionary use and no longer a permitted use development permit. Noise is not exclusive to the Nightclub use. Operations of a bar and neighbourhood pub and even a restaurant these days will include a DJ, louder music levels, dancing, etc.

ii) Position of the Development Officer, Mr. I. Welch and Mr. M. Gunther, representing the Law Branch:

[9] This is an unusual situation because this establishment was recently issued a Stop Order to cease the Nightclub Use immediately as well as the Bar and Neighbourhood Pub Use until the site was in compliance.

[10] The issuance of the Stop Order was appealed and subsequently upheld by the Board. In their decision, SDAB-D-19-101, the Board determined that the subject site was operating as a Nightclub and not in compliance with a previous approved development permit that was issued for a Bar and Neighbourhood Pub.

[11] The development permit application was refused because the scale and scope of the proposed Nightclub will have an undue and negative impact on adjacent and surrounding residential uses with respect to noise and general disruption based on numerous complaints that were received from adjacent residences regarding the operation of the subject development over the past 18 months.

[12] This reason is supported by the previous decision of the Board, SDAB-D-19-101, specifically paragraph [38] which states that “Since Entendre opened there have been 34 Bylaw complaints regarding noise. The first complaint was received on December 1, 2017 and the most recent complaint was received on March 26, 2019”.

- [13] Numerous letters and emails were received from residents of neighbouring residential buildings for the previous appeal of the Stop Order as well as this appeal. It was noted that complaints were received from residents of all of the major residential towers located within a one block radius of the subject site which provides valid grounds for concern.
- [14] The second reason for refusal was that the proposed development does not comply with Policy 7.10 of the Capital City Downtown Plan which states that “in order to protect downtown residential areas from the impacts of bars, neighbourhood pubs and nightclubs, these uses will be controlled through zoning regulations that stipulate location and maximum size”. Policy 7.8, a Collaborative Approach to a Vital Entertainment Environment, requires the adoption of a mix of strategies around responsible hospitality to ensure the night time entertainment environment in Downtown is safe and conducive to enjoyment and positive social interaction and does not cause undue discomfort to neighbouring residents. In the Urban Services Zone, a Bar and Neighbourhood Pub for less than 100 occupants and 120 square metres of Public Space is a Permitted Use. Bars and Neighbourhood Pubs for more than 100 occupants and 120 square metres of Public Space and Nightclubs, are Discretionary Uses.
- [15] Even though the proposed development complies with all of the development regulations pursuant to section 910.11, the development permit application was refused in order to protect the surrounding residential developments to comply with Policy 7.10 of the Capital City Downtown Plan.
- [16] Section 687(3)(a.2) of the *Municipal Government Act* states that “in determining an appeal, the subdivision and development appeal board, subject to section 638, must comply with any applicable statutory plans.” Using the similar standards of review required by the Board provides consistency in the review process.
- [17] Based on the history of the site, the history of the development and the overwhelming opposition of residents that was evident at the hearing of the Stop Order appeal, it was his opinion that the proposed Nightclub, a Discretionary Use, is not appropriate at this location.
- [18] Mr. Welch and Mr. Gunther provided the following information in response to questions from the Board:
- a) Even though the proposed development complies with the development regulations for this Zone and is listed as a Discretionary Use, it is not in keeping with Policy 7.10 of the Capital City Downtown Plan to protect downtown residential areas from the negative impacts of Bars, Neighbourhood Pubs and Nightclubs.
 - b) Mr. Gunther agreed that the definition for a Bar and Neighbourhood Pub and a Nightclub are very similar. However, a Nightclub Use includes dance clubs, cabarets, nightclubs, lounges, neighbourhood pubs and bars, beverage rooms and cocktail lounges. The definition of a Bar and Neighbourhood Pub includes neighbourhood

pubs, bars, and cocktail lounges. It does not include a Nightclub because it is a more intensive and impactful use.

- c) The development permit application indicates that the proposed business activities that will be inside the building are liquor service and dancing. This constitutes a dance club which appears to have been operating at this location for some time without a development permit.

[19] The more intense Nightclub Use is not appropriate at this location.

iii) Position of Affected Property Owners

Ms. J. Cairo and her Legal Counsel, Mr. R. Noce:

[20] Photographs were referenced to illustrate the location of the condominium unit that is owned by Ms. Cairo in the building located immediately north of the subject site. The building is comprised of a two storey podium and residential tower. The main floor is comprised of commercial uses and the second floor is residential. The entrance to the Nightclub is located immediately below the balcony of Ms. Cairo's unit.

[21] Mr. Noce noted that the development permit was refused on June 10, 2019 and the appeal was filed on July 1, 2019. However, an email was sent from the Subdivision and Development Appeal Board office to the Appellant on July 2, 2019 because reasons for the appeal had not been provided. Technically this would mean that the appeal was filed late. In addition, the non-appearance of the Appellants at this hearing sends the message that they do not care about the costs and inconvenience that they have caused their neighbours.

[22] Ms. Cairo purchased her unit in 2014 and resided there until October, 2018 when she was forced to move out because of the impacts of this business. She is unable to sell or rent her unit. She did finally find someone that was willing to rent her unit but they only lasted one night. All attempts to sell the unit have been unsuccessful. The unit is currently on the market and Ms. Cairo is hopeful that it will be sold even if the sale results in a loss of \$100,000.

[23] After she learned about the proposed development, she expressed her concerns about the potential impact on property values but was assured that it was not going to be a Nightclub. On opening night, the noise was horrific and her son moved out the following day. She continued to make continuous complaints to her Councillor and Bylaw Enforcement.

[24] She would regularly drive across the city to sleep at her daughter's house because she was not able to sleep in her unit. She would often go to bed in her unit and be able to

sleep until 10:00 or 11:00 pm. After she was awakened, she would drive to her daughter's house to sleep for the rest of the night. She was still working at the time and was required to use her sick time and vacation time in order to cope with the situation.

- [25] She is currently renting a house because she cannot live in her condo. The proceeds from the sale of her unit that may or may not be finalized at a loss will not be enough to allow her to purchase another house. The operation of a Nightclub from this location has impacted every aspect of her life.
- [26] Ms. Cairo and all of the other residents know what the impacts of this development will be. There is absolutely no speculation about what the impacts of approving a Nightclub as a Discretionary Use at this location in a densely populated residential area will be.
- [27] The Appellants do not have any intention of addressing the problems. She moved downtown when Rogers Place was under construction and after it opened it did not impact the use or enjoyment of her condominium. However, the operation of this business has resulted in her decision not to reside in her condo unit because her quality of life means more than the money that she will lose.
- [28] Mr. Noce acknowledged that there will be competing opinions when dealing with a Discretionary Use and it is then up to the Board to consider those opinions and make a decision. In this case, it is evident that the Appellants have been bad neighbours by ignoring the development permit that was issued for a Bar and Neighbourhood Pub and, in fact, operating a Nightclub.
- [29] The impact of this on the residents in this area has been real. There is no speculation regarding the impact of this establishment on the neighbours. Ms. Cairo has not lived in her condominium since October 2017, is unable to sell it or rent it and she has suffered a significant financial loss.
- [30] The Court of Appeal decision, *Rossdale Community League (1974) v. Edmonton (Subdivision and Development Appeal Board)*, 2009 ABCA 261 was referenced. This decision provides direction to the Board when dealing with an appeal for a Discretionary Use. Specifically paragraph [14] which states:
- The object and purpose of a discretionary use is to allow the development authority to assess the particular type and character of the use involved, including its intensity and its compatibility with adjacent uses.
- [31] The Development Authority and the Board are both required to exercise appropriate discretion to assess the use with respect to adjacent uses.
- [32] Ms. Cairo is the most affected of all the neighbouring residents. The Appellants filed their appeal late and did not attend the hearing. The evidence provided is that they broke the law by operating a Nightclub without a valid development permit. They also did not comply with the Class A permit that was issued for a Bar and Neighbourhood Pub

because the establishment had more Public Space than was allowed for this Permitted Use.

[33] When the Class A Permit was issued there was no right of appeal because the threshold for Public Space was not exceeded. However, at the previous hearing for SDAB-D-19-101 the Board determined that they did not comply with the development permit that was issued for a Bar and Neighbourhood Pub Use and were, in fact, operating a Nightclub.

[34] Mr. Noce adopted the reasons for refusal outlined in SDAB-D-19-101 as part of his submission.

[35] Mr. Noce and Ms. Cairo provided the following information in response to questions from the Board:

- a) The subject site was vacant for many years and she did not experience any problems in the first three years that she lived in her condominium.
- b) It was acknowledged that condominium prices have fallen throughout the city and no definitive evidence could be provided that the \$100,000 loss to Ms. Cairo is solely the result of the Nightclub. However, the existence of the Nightclub does impact her ability to market her unit and Ms. Cairo confirmed that the stated reason provided to her real estate agent by prospective buyers is the operation of the adjacent Nightclub.

Mr. Panesar:

[36] He summarized his letter of opposition and provided the following information:

- a) His condominium is located directly across the street from the Nightclub at street level. The noise, music disruption and loitering from the front doors of this establishment has had a very negative impact since it opened.
- b) He made the choice to move downtown in 2001, being fully aware that increased noise was part of that choice. He moved into this building in August and has witnessed the complete transformation of the downtown core, including the construction of Rogers Place. While Rogers Place events have changed the neighbourhood, the majority of events are over by 10:00 or 11:00 p.m. and people are not drunk or disorderly and do not loiter for hours into the early morning when leaving the building.
- c) The noise disruptions caused by the Nightclub impact neighbouring residents between midnight and 4:00 a.m. on the weeknights when the establishment is open. The business typically opens between 10:00 and 11:00 p.m. and the single, concentrated source of noise and disruptions continues until past 3:00 a.m., including weeknights.

- d) He and his wife have regularly been forced to sleep elsewhere on weekends for over a year. It has been his observation that this establishment has never operated as a Bar and Neighbourhood Pub but rather it has always been operated as a Nightclub.
- e) There is noise that you can hear and noise that you can feel. Noise generated from the operation of this business includes people screaming and talking loudly as well as noise from loud music, specifically the bass.
- f) He and his neighbours have filed many complaints with 311 when their sleep has been interrupted because of loud music or large assemblies of people outside the front entrance fighting and shouting. It is not uncommon to have a disruption every few minutes for several hours. The business has been mysteriously closed for the past week and he has been able to experience the first uninterrupted sleep in years.
- g) It is difficult to understand how it might be reasonable to allow the desires of one entity downtown to have more rights than the impact they are causing hundreds of residents in all of the buildings surrounding the site. If the City wishes to have residents live and work downtown, this development permit should be refused.

Ms. Wanke:

- [37] She indicated that she was speaking in her role as Board President for the Fifth Street Lofts condominium Corporation Board as well a resident of the building.
- [38] Fifth Street Lofts is located across the street from the subject site.
- [39] The residents were excited when they were initially informed by the owners and developers that a Bar and Neighbourhood Pub would be opening at this location. However, it soon became clear from the marketing for the business that this was never the intent and that a Nightclub was planned for this location.
- [40] The Nightclub has operated on Thursday, Friday and Saturday evenings since it opened. The business typically opens around 8:00 p.m. and does not close until 3:00 a.m. Residents experience the most disruption when patrons are leaving the Nightclub in the early morning hours and loiter outside the building and in the parking lots.
- [41] Complaints were lodged with 311 but they were advised by Bylaw Enforcement Officers that their power was limited because the business had a valid development permit for a Bar and Neighbourhood Pub. Therefore, they required proof that the business was not operating as a Bar and Neighbourhood Pub. They have been dealing with this issue for the past two years and the first positive result they have experienced is when the Board upheld the Stop Order that was issued.

- [42] As the building located directly across the street from the Nightclub, with ground level units, their operations significantly impact the quality of life and to a certain degree the safety of their residents.
- [43] She moved into this building over 10 years ago when the site of Rogers Place was a parking lot and was aware of the impacts of living downtown. The development and operation of Rogers Place has barely had any impact because patrons attend events and then leave the area. The opposite is true for Entendre which has more impact on the residents of this area than Rogers Place.
- [44] This business has operated in bad faith from the time that it opened and has had a significant impact on residents of the surrounding buildings. Residents have been encouraged to contact 311 to register their complaints. However, after over a year of no change to the operation of the business, many residents have resigned themselves to regularly being woken up on the weekends.
- [45] Meetings have been held with residents of other buildings in the area and the city in an attempt to remedy this situation with limited success. Therefore, the Board was asked to refuse the development permit to change the Use from Bar and Neighbourhood Pub to a Nightclub.

Ms. Mann:

- [46] She lives next door to Ms. Cairo and has experienced many of the same impacts.
- [47] She purchased her unit in May 2017 and subsequently was notified that a Bar and Neighbourhood Pub was planned for the subject site. She realized that experiencing a certain amount of noise came along with living downtown.
- [48] However, opening night for the Nightclub was horrifying. She could hear and feel the bass from the loud music until 3:00 a.m. Since the Stop Order was issued and the business has shut down, she has been able to sleep through the night without be awakened at 3:00 or 4:00 a.m. However, in some ways her life will never be back to normal because of the ways this business has severely impacted her life both emotionally and financially.
- [49] In response to a question, Ms. Mann advised the Board that the operation of the adjacent Restaurant has never been part of the noise problem.

Decision

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

Reasons for Decision

- [51] A Nightclub, that does not exceed 200 occupants and 240 square metres of Public Space if the Site is adjacent to or across a Lane from a Residential zoned Site, is a Discretionary Use in the (UW) Urban Warehouse Zone, pursuant to section 910.11(3)(r) of the *Edmonton Zoning Bylaw*.
- [52] The Board notes that the proposed development complies with all of the development regulations pursuant to section 910.11 of the *Edmonton Zoning Bylaw*.
- [53] The issue before the Board is to determine whether or not the proposed Discretionary Use is reasonably compatible with surrounding land uses. The Court of Appeal set out the test for assessing the suitability of Discretionary Uses in *Rossdale Community League (1974) v Edmonton (Subdivision and Development Appeal Board)*, 2009 ABCA 261. Specifically paragraph [14], which states:
- The object and purpose of a discretionary use is to allow the development authority to assess the particular type and character of the use involved, including its intensity and its compatibility with adjacent uses.
- [54] This appeal of a development permit refusal is subsequent to a previous decision of the Subdivision and Development Appeal Board, SDAB-D-19-101, issued on July 12, 2019 which upheld the issuance of a Stop Order that had been issued to cease the Nightclub Use. In rendering the decision, the Board found that a Nightclub had been operating from this location for some years without a valid development permit. The evidence provided in the appeal hearing for SDAB-D-19-101 was submitted by Legal Counsel for one of the affected parties in the written submission provided for this hearing. As a result, the Board has the ability to assess very directly both the intensity of the Nightclub Use and its impact on existing adjacent uses.
- [55] The existing adjacent Uses include a residential Use in an abutting building located immediately north of the subject site as well as a residential Use including ground floor residential Uses located immediately east of 105 Street from the subject site.
- [56] The Board heard similar evidence from residents of both buildings, including the President of the Condo Board for the building located across the street. Their evidence was that the Nightclub Use involves very loud and intense music that starts at 10:00 p.m. and continues to be impactful through to 3:00 a.m., every week from Thursday to Sunday. The residents have lodged complaints because of the noise caused by the loud music emanating from the Nightclub but more particularly the noise that accompanies line ups, and the constant egress to and from the Nightclub that occurs late at night.

- [57] Residents describe the frequency, intensity and duration of the noise impacts associated with this business to be far greater than those associated with Rogers Place which is located immediately north of the residential towers. The impacts on one resident were so severe that she had to move out of her condominium unit.
- [58] The Board finds that having a Nightclub Use, which is an intense Use, with significant noise and disruption occurring four nights per week from the hours of 10:00 p.m. to 3:00 a.m. is not a compatible Use with the residential Uses that abut and surround the subject site.
- [59] For all of these reasons, the Board agrees with the decision made by the Development Authority and finds that the proposed Nightclub is a Use that is not compatible with the existing adjacent land uses and the Board declines to exercise its discretion to allow this Use. The development is refused.

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

Board members in attendance: Mr. M. Young, Mr. L. Pratt, Mr. A. Peterson, Ms. L. Delfs

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. If the Subdivision and Development Appeal Board is served with notice of an application for leave to appeal its decision, such notice shall operate to suspend the Development Permit.

2. When a decision on a Development Permit application has been rendered by the Subdivision and Development Appeal Board, the enforcement of that decision is carried out by the Sustainable Development Department, located on the 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.