



**EDMONTON
TRIBUNALS**

*Subdivision &
Development
Appeal Board*

*10019 - 103 Avenue NW
Edmonton, AB T5J 0G9
P: 780-496-6079 F: 780-577-
3537
sdab@edmonton.ca
edmontonsdab.ca*

Date: September 7, 2017
Project Number: 254175082-001
File Number: SDAB-D-17-148

Notice of Decision

- [1] On August 23, 2017, the Subdivision and Development Appeal Board (the “Board”) heard an appeal that was filed on **July 28, 2017**. The appeal concerned the decision of the Development Authority, issued on July 28, 2017, to refuse the following development:

To construct an Accessory building (detached Garage, 8.53 metres by 9.75 metres) and to demolish an existing Garage

- [2] The subject property is on Plan 6450KS Blk 36 Lot 19, located at 6727 - 94 Avenue NW, within the RF1 Single Detached Residential Zone. The Mature Neighbourhood Overlay applies 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; and
 - The Development Officer’s written submissions.
- [4] The following exhibits were presented during the hearing and form part of the record:
- Exhibit A – Email from the Community League
 - Exhibit B – Copy of the community consultation submitted by the Appellant
 - Exhibit C – Aerial photo submitted by the Development Officer
 - Exhibit D – Copy of a plan with notations by the Development Officer

Preliminary Matters

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

- [6] The Chairman 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*, R.S.A 2000, c. M-26 (the “*Municipal Government Act*”).

Summary of Hearing

i) Position of the Appellant, Mr. J. Halayko:

- [8] The existing detached Garage was built in the 1960s. The floor is separating from the slab and the corners of the garage are sinking.
- [9] The proposed new Garage will be insulated and will have roof racks to provide additional storage. Nine foot overhead doors are proposed so that vehicles can be parked inside without having to remove roof racks and ski boxes.
- [10] The existing garage has settled over the years. The lot will be graded to address drainage problems and the driveway to the proposed Garage will be sloped into the rear lane to prevent water from backing up into the Garage. This will result in an increase in the height of the garage.
- [11] The proposed storage attic will provide much needed storage space.
- [12] The proposed gable roof will maximize the number of solar panels that can be installed on the south face of the proposed Garage.
- [13] The decision was made to build a new garage rather than move because the Appellant likes the neighbourhood and neighbours.
- [14] Mr. Halayko discussed and reviewed the proposed plans with all of the affected neighbours and the Community League. An email of support from the President of the Community League, marked Exhibit A, as well as a list of the addresses that were contacted, marked Exhibit B, were submitted. Everyone that he spoke to, including his neighbour who resides to the east, supported the proposed development.
- [15] He specifically discussed the proposed height of the garage with his neighbour who resides to the east because he will be impacted the most from the proposed height of the garage.
- [16] Mr. Halayko provided the following information in response to questions:
- a) His neighbour to the east lives alone and very rarely uses the amenity space in the rear yard.

- b) There is a temporary shed located beside the detached garage in his neighbour's rear yard.
- c) The existing detached garage is four feet shorter and six feet narrower than the proposed three-car Garage.
- d) The lot should not impact drainage onto adjacent lots.
- e) A window has been included in the attic in order to provide some natural light to the space.
- f) The Garage has been sited in order to retain an existing mature tree and as much of the rear yard amenity space as possible.
- g) A gable style roof was chosen because it is optimal for the installation of solar panels.

ii) *Position of the Development Officer, Mr. B. Liang:*

- [17] Mr. Liang reviewed his method of calculating the height of the proposed detached Garage. The average Grade was determined by using the four corners of the lot, pursuant to Section 52.4(b) of the *Edmonton Zoning Bylaw*. However, during his initial review the height was calculated from the concrete slab to the roof ridge instead of from Grade to roof ridge. This correction results in a variance for the maximum ridge line of the roof of 1.3 metres instead of 0.8 metres as noted on the refused Development Permit application.
- [18] He referenced an aerial photograph, marked Exhibit C, to illustrate that the proposed detached Garage will be located similarly to the existing detached Garage.
- [19] The proposed development complies with the minimum setback requirements.
- [20] The proposed Garage is noticeably over height. He could not confirm the height of the existing single detached house.
- [21] A Garage with a Garage Suite could be developed at this location. The Garage Suite could be higher than the proposed Garage but the Side Setback would have to be 1.2 metres rather than the 0.9 metres required for the Garage.
- [22] The increased height of the detached Garage will be highly visible and noticeable, particularly from the immediately adjacent property to the east.
- [23] The lots on this part of the block are oriented in a north-northwest direction. Since afternoon shadows will be cast in a north to east direction, the shadows from this detached Garage would be cast onto the amenity area of the east abutting neighbour. It was his opinion that the height variance will materially interfere with the use, enjoyment and value of this property.

[24] Mr. Liang provided the following information in response to questions from the Board:

- a) The proposed detached Garage complies with all of the development regulations contained in the Mature Neighbourhood Overlay.
- b) There are no windows proposed on the east elevation of the Garage.
- c) Mr. Liang used an elevation drawing, marked Exhibit D, to illustrate how reducing the height of the Garage to comply would change the massing impact. Even if the proposed height complied with the maximum allowable, there would still be a substantial shadowing impact on the neighbouring property to the east.
- d) The proposed development complies with all of the setback requirements.

iii) Rebuttal of the Appellant

[25] Mr. Halayko confirmed that there are no windows in the elevation that abuts the neighbouring property to the east.

[26] They originally considered developing a Garage/Garden Suite but the cost was prohibitive. The proposed development is a compromise in order to provide storage space in the attic of the Garage.

[27] He had discussions with his neighbour to the east about the proposed height of the garage on many different occasions and he never expressed any concern or objection to the proposed development.

[28] He referenced an aerial photograph of the subject site to illustrate that the proposed Garage will be the same width as the existing driveway.

Decision

[29] 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. This Development Permit authorizes the development of an Accessory Building (rear detached Garage, 8.53 metres by 9.75 metres) and the demolition of the existing Accessory Building (rear detached Garage). The development shall be constructed in accordance with the stamped and approved drawings.
2. The Accessory Building shall not be used as a Dwelling (Section 50.3.1).
3. Eave projections shall not exceed 0.46 metres into the required Yard or Separation Space less than 1.2 metres (Section 44.1.b).

4. The design and use of exterior finishing materials used on the Accessory Building shall be similar to, or better than, the standard of surrounding development (Section 57.2.1).
5. Immediately upon demolition of the building, the site shall be cleared of all debris.

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

1. The maximum allowable building Height (from Grade to roof midpoint) of 4.3 metres as per Section 50.3(2) and Section 52.1.a is varied to allow an excess of 1.3 metres, thereby increasing the maximum allowed Height to midpoint to 5.6 metres.
2. The maximum allowable building Height of 5.8 metres (from Grade to the ridgeline of roof) as per Section 52.2.c is varied to allow an excess of 1.3 metres, thereby increasing the maximum allowed building Height to the ridgeline of roof to 7.1 metres.

Reasons for Decision

[31] The proposed detached Garage is Accessory to Single Detached Housing which is a Permitted Use in the RF1 Single Detached Residential Zone.

[32] The proposed detached Garage complies with all of the development regulations with the exception of the maximum allowable Height.

[33] The Board has granted two variances to the maximum allowable Height requirements for the proposed detached Garage for the following reasons:

- a) The proposed detached Garage will be located close to the rear lot line. Because of this the majority of any sun shadowing impacts will occur at the rear of the neighbouring lot to the east and not in the largest part of the amenity area in the rear yard.
- b) Based on the evidence provided, there is a storage shed located in the rear yard of the adjacent lot to the east which will further mitigate the impact of the proposed detached Garage.
- c) The proposed detached Garage is located in the rear yard and is not visible from the front street. The Garage will not impact the property located west of the subject site because it is located on the east side of the rear yard and will be screened by large, mature deciduous trees. The proposed Garage will not impact properties located across the rear lane to the south because of the existing garages and driveways along the rear lane.

- d) The proposed development has the support of all of the affected property owners, including the most affected property owner to the east. The Board also notes the written support of the Community League.
- [34] For all of these reasons, the Board finds that granting 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. I. Wachowicz, Chairman
Subdivision and Development Appeal Board

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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*10019 – 103 Avenue NW
Edmonton, AB T5J 0G9
P: 780-496-6079 F: 780-577-
3537
sdab@edmonton.ca
edmontonsdab.ca*

Date: September 7, 2017
Project Numbers: 245380263-001 &
245489756-001
File Number: SDAB-D-17-149 & SDAB-D-
17-150

Notice of Decision

- [1] On August 23, 2017, the Subdivision and Development Appeal Board (the “Board”) heard appeals that were filed on **July 26, 2017**. The appeals concerned the decisions of the Development Authority, issued on July 21, 2017, to refuse the following developments:

Change the Use from a Restaurant to a Bar and Neighbourhood Pub (NYALA LOUNGE)

Develop an Outdoor Patio to an existing Restaurant (NYALA Ethiopian Restaurant)

- [2] The subject property is on Plan NA Blk 17 Lots 23-24, located at 10875 - 98 Street NW, within the DC1 Direct Development Control Zone. The Boyle Street/McCauley Area Redevelopment Plan applies 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, including videos;
- A written submission from Legal Counsel for the Appellant; and
- Online responses.

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

- Exhibit A – Public Safety Compliance Report dated March 17, 2017 submitted by the Appellant
- Exhibit B – Photographs submitted by Edmonton Police Service
- Exhibit C – Photographs submitted by City of Edmonton
- Exhibit D – Menu submitted by the Appellant
- Exhibit E – Photographs submitted by the Appellant

Preliminary Matters

- [5] At the outset of the appeal hearing, the Chairman confirmed with the parties in attendance that there was no opposition to the composition of the panel.
- [6] The Chairman 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*, R.S.A 2000, c. M-26 (the "*Municipal Government Act*").
- [8] The Board notes that evidence and exhibits were applicable to both SDAB-D-17-149 and SDAB-D-17-150, but separate decisions and reasons were issued in this notice.
- [9] The Chairman referenced Section 641(4) of the *Municipal Government Act*, which states that despite section 685, if a decision with respect to a Development Permit application in respect of a direct control district is made by a council, there is no appeal to the subdivision and development appeal board, or 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.
- [10] The Chairman asked Legal Counsel for the Appellant to describe how the Development Officer failed to follow the directions of Council in refusing these Development Permit applications.

Summary of Hearing

- i) Position of the Appellant, Mr. M. Tesfay, who was represented by Legal Counsel, Mr. P. Alwis, Hladun & Company. Mr. Alwis referenced a detailed written submission, a copy of which is on file, and provided the following information:*
- [11] The Development Officer failed to follow the directions of Council because they exceeded their discretionary powers by deeming the proposed development to be a "Nightclub Use". It was his opinion that the proposed development does not conform to Council's definition of a Nightclub Use.
- [12] The Development Officer failed to consider whether any activity or purpose of the development which was deemed to be consistent with a "Nightclub Use", could be considered an "Accessory Use".
- [13] The Development Officer failed to consider their discretion to grant a Development Permit for a prescribed and/or deemed Discretionary Use in a Direct Control Zone, with conditions, to ensure compliance with the *Edmonton Zoning Bylaw* and Statutory Plans.

- [14] The Development Officer failed to comply with Council's direction to encourage long term redevelopment of the "Chinatown North Special Commercial Sub-Area" along 98 Street for commercial uses, in circumstances where they made erroneous factual conclusions with respect to the intensity of the proposed use, and the effects of the proposed developments on neighbouring properties.
- [15] The Board should exercise discretion and approve the proposed development application because it conforms to Council's definition of a Minor Eating and Drinking Establishment which is a prescribed Use in the DC1 Direct Development Control Provision (Area 5), it is consistent with Council's goals for this area, it does not interfere with the amenities, use and enjoyment of neighbouring properties and has received unanimous support from neighbouring residents and businesses.
- [16] It was not Council's intent for a Development Officer to exercise discretion arbitrarily, on the basis of patently unreasonable conclusions. A Development Officer cannot ascertain a Use Class for a development independent of the prescribed definitions for Use Classes, nor can they conclude that a development is inconsistent with Council's direction for redevelopment without a purposive understanding of Council's intent or a factual foundation for their conclusions.
- [17] The Development Officer characterized the proposed development as a "Major Eating and Drinking Establishment (Nightclub), rather than a "Minor Eating and Drinking Establishment". These Use Classes were provided by the *Land Use Bylaw 5996* effective at the date that Council issued the Boyle McCauley Direct Control Provision (Area 5). Minor Eating and Drinking Establishments are a prescribed Use in the DC1 Direct Development Control Provision.
- [18] In Section 3 of the *Edmonton Zoning Bylaw*, Council directed that the modern Use Class provisions apply to development in DC1 Zones, pursuant to Section 3.2(1)(e) through (f).
- [19] Section 7.4(39) of the *Edmonton Zoning Bylaw* specifically defines a Nightclub (in part) as a development where the primary purpose of the facility is the sale of alcoholic beverages to the public, for consumption within the premises or off the Site, **in a facility where entertainment facilities take up more than 10 percent of the Floor Area** (emphasis added).
- [20] Section 7.4(6) of the *Edmonton Zoning Bylaw* defines a Bar and Neighbourhood Pub (in part) as a development where the primary purpose of the facility is the sale of alcoholic beverages to the public, for consumption within the premises or off Site.
- [21] Council has provided clear direction for ascertaining whether a development oriented around the sale of alcoholic beverages is a Nightclub by introducing an objective and measureable standard by which to distinguish between two Uses with a generally similar purpose.

- [22] Although “entertainment facilities” are not defined elsewhere in the Bylaw, the Development Officer stated in his reasons for refusal that a compliance inquiry identified an “area shown on the floor plan with planters that was being used as a dance floor”, which is “consistent with the definition of a Nightclub”.
- [23] The Development Officer reviewed the Appellant’s application and floor plans. The Floor Area of the two floor business is 3253.86 square feet in size, with a basement Floor Area of 1572.43 square feet.
- [24] He referred to photographs of the basement to illustrate the area referenced by the Development Officer as being used as an entertainment facility. This area is less than 157 square feet in size. Ten percent of the total Floor Area of the development is 325 square feet. However, the Development Officer’s written reasons do not indicate that any measurements were taken in the course of any compliance inquires and Floor Area was not referenced in the reasons for refusal.
- [25] The area in the basement referenced by the Development Officer is an aisle way that is used by customers to access the washrooms. It is not the intent of the owner to provide an entertainment area for dancing.
- [26] Therefore the Development Officer failed to follow the directions of Council when the Applicant was required to apply for a “Nightclub Use”.
- [27] The Development Officer did not recognize that the application to change the Use to a Bar and Neighbourhood Pub is for the entire building.
- [28] Bars and Neighbourhood Pubs are commonly Permitted Uses in many mixed residential/commercial zones, including CB1, CB2 and CB3.
- [29] Section 3.2 of the *Edmonton Zoning Bylaw* states that for the purpose of any existing Development Permit or Direct Control Provision, a Major Eating and Drinking Establishment is deemed to be a Specialty Food Service, Restaurant or Bar and Neighbourhood Pub. A Minor Eating and Drinking Establishment is deemed to be a Specialty Food Service, Restaurant or Bar and Neighbourhood Pub for less than 100 occupants.
- [30] The Development Officer had discretion to approve this application and impose conditions to ensure that the development would function as a Bar and Neighbourhood Pub for less than 100 occupants. It was Mr. Alwis’s opinion that even if it was deemed to be a Nightclub Use, the Development Officer could have approved the Use and imposed conditions to address any concerns regarding the use of the property.
- [31] For the majority of time, this business is not operating as a Nightclub.
- [32] Mr. Alwis and Mr. Tesfay provided the following information in response to questions from the Board:

- a) It was Mr. Alwis's opinion that the Board should be referencing the Use Class definitions contained in the *Edmonton Zoning Bylaw* and not those contained in *Land Use Bylaw 5996*.
- b) The parking criteria contained in Section 66 of the *Land Use Bylaw* apply to this site because they are specifically cross-referenced in the DC Bylaw.
- c) Mr. Tesfay explained that the videos referenced by the Development Officer were taken on a day when there was a special event being held at the Restaurant. This was an unusual situation and it is not his intent to use the premises in this manner.
- d) It was Mr. Alwis's opinion that the submission of community support would be relevant if the Board finds that the Development Officer did not follow the direction of Council by refusing the proposed Development Permit application. The support of neighbouring property owners and businesses may be valuable if variances are required.
- e) This application is for a Bar and Neighbourhood Pub. Mr. Tesfay has no intention of operating a Nightclub. He applied to operate a Bar and Neighbourhood Pub which is a listed use in the DC1 Zone.
- f) The Development Officer who reviewed the application determined that the proposed Use was a Nightclub and not a Bar and Neighbourhood Pub.
- g) Mr. Tesfay's business has been operating as a Bar and Lounge for the past five years and he simply wants to continue with this use.
- h) Mr. Tesfay advised that a Development Permit to operate a Restaurant was approved in 2012. He was advised by the City to apply for a Development Permit to operate a Bar and Neighbourhood Pub because of the hookah smoking that was occurring on the premises.
- i) The upper floor of the building is used as an office space and customers do not have access. The main floor is used as a Restaurant with 44 seats. Alcohol and food are served and hookah smoking is permitted. A full food menu is offered between 4:00 p.m. and 2:00 a.m. Minors are permitted even though it would be his preference not to have children on the premises because of the hookah smoking. The Restaurant is busiest on the weekends.
- j) The basement has a maximum occupancy of 60 people and is only open from Thursday to Sunday, between 5:00 p.m. or 6:00 p.m. and 2:00 a.m. A bar and seating is available. The Restaurant menu is offered, hookah smoking is permitted and minors are not allowed.

- k) There is music on the main floor and the basement level. The same activities occur on both the main floor and the basement level but it is typically younger people that attend the basement level.
- l) There is no designated dance floor on the basement level, customers dance anywhere, including the aisles and at their tables.
- m) Security guards are employed to provide a safe environment for his customers.
- n) Special events are held on the premises occasionally.
- o) The business has transitioned from a Restaurant and the primary use is now alcohol sales and hookah smoking. The Development Permit application is for the entire building, not just the basement level.

[33] At this point the Chairman asked the Board Officer to play the video evidence provided by the Development Officer. The Chairman asked the Appellant and his Legal Counsel to comment on the video evidence.

- p) They acknowledged the laser lighting but reiterated that there is no designated dance floor.
- q) If the change in use is allowed, the primary purpose of the establishment will be a hookah bar, not a Nightclub.
- r) There are normally never more than 100 occupants on the premises between the main floor and the basement. If the Development Permit is approved, a condition could be imposed that there be a maximum of 50 occupants in the basement.
- s) The lights, music and dancing are subordinate to the purpose of this business to serve alcohol and hookah. This use conforms with the definition of a Bar and Neighbourhood Pub and is consistent with the intent of the Area Redevelopment Plan.
- t) One of the reasons for refusal was that the application for a Bar and Neighbourhood Pub Use is not in keeping with Objective 4 of Section 7.2.3 of the Boyle McCauley Area Redevelopment Plan to “protect residential areas from conflicts with commercial uses”. However, the only conclusion drawn by the Development Officer was a vague reference to “late night activities” and dance floors. The Development Officer failed to consider if the goals and provisions of the Statutory Plan could be controlled with conditions.
- u) He questioned how Objective 1 of the Area Redevelopment Plan “to provide a primary area for a commercial development which will take advantage of the area’s proximity to Downtown and the existing multicultural elements can be achieved without some prejudice to residents.

- v) Any apprehension of conflict should not outweigh the submission of signatures of support from neighbouring residents and businesses. In addition, two affected neighbours took time to attend the hearing to provide information to the Board regarding their support for the proposed development.
- [34] With respect to the Outdoor Patio application, the Development Officer failed to follow the directions of Council because he failed to consider his discretion to grant a variance to the parking requirements for an Outdoor Patio to an existing Restaurant. As well, the Development Officer misinterpreted Section 90(1) of the *Edmonton Zoning Bylaw* with respect to outdoor seating abutting residential developments.
- [35] The Development Officer failed to consider any discretion to grant a Development Permit with conditions to ensure compliance with the Bylaw.
- [36] The proposed outdoor patio at the front of the property would require one additional parking space.
- [37] Parking was addressed by the Board when the Development Permit for the Restaurant Use was approved in 2012. It was the finding of the Board that the parking problems cannot be attributed to one business but are rather a result of the close proximity of a major hospital and medical facilities.
- [38] The seasonal patio furniture has been removed from the rear patio to comply with the original conditions.
- [39] The parking requirements of Section 66 of the *Land Use Bylaw* apply to this application.
- [40] Section 8.4.16.4.4 of the Boyle McCauley Area Redevelopment Plan states that “Parking and loading shall, wherever possible, be located in the rear areas. Required off-street parking shall be in accordance with Section 66 of the *Land Use Bylaw*”. It was his opinion that this section provides discretion which the Development Officer chose not to exercise.
- [41] Section 90.1 of the *Edmonton Zoning Bylaw* states that “if any Specialty Food Service, Restaurant, Bar and Neighbourhood Pub or Nightclub abuts or is across a Lane from a Site zoned residential or a Site with a residential development, the Development Officer shall draw a line parallel to the boundary or Lane separating each such residential development or Zone and bisecting the Site containing the Specialty Food Service, Restaurant, Bar and Neighbourhood Pub or Nightclub Uses and shall not allow any outdoor seating on the side of any such line that is closest to the Residential Zone or development”.
- [42] Drawings were referenced to illustrate that the proposed outdoor seating is located on the south side of the site, furthest away from the residential property to the north which complies with Section 90.1 of the *Edmonton Zoning Bylaw*.

- [43] He referenced a photograph of the front façade to illustrate the exterior renovations that have been completed.
- [44] Although Mr. Tesfay would like to have a patio with more seating, he only applied for four seats because of the additional parking that would be required.
- [45] On-street parking in front of the building and on the other side streets is readily available after regular business hours.
- [46] A variance of 17 parking spaces was granted with the original Development Permit approval in 2012.
- [47] On-site parking will be restored at the rear of the building that can accommodate six vehicles.
- [48] Mr. Tesfay submitted a copy of a Public Safety Compliance Team report dated March 17, 2017, marked Exhibit A. The Hookah Bar is run responsibly, the majority of his customers are mature adults and he has no intention of operating a Nightclub from this location.

ii) Position of Affected Property Owners in Support of the Appellant:

Mr. Pang:

- [49] Mr. Pang has resided immediately north of the subject site for the past 10 years.
- [50] He supports the proposed development and has no concerns regarding excessive noise.
- [51] He and his family have frequented the Restaurant on several occasions.

Mr. Currie:

- [52] He resides in close proximity to the subject site.
- [53] It was his opinion that the outdoor patio improves the neighbourhood.
- [54] Hospital parking is a problem until 3:00 p.m. but after that there is ample street parking available.
- [55] Mr. Tesfay is a respectful business owner. Most of the customers come to the Restaurant regularly.
- [56] He has never experienced any problems because of loud music or excessive noise.
- [57] He has frequented the Restaurant on occasion and has attended activities organized by Mr. Tesfay. There have never been more than 10 or 12 people in the Restaurant when he

has been there. He has also been in the basement of the establishment on several occasions and observed customers having fun. There is no designated dance floor but people were dancing.

iii) Position of the Development Officers, Mr. Paul Belzile, Mr. Paul Adams and Mr. Michael Gunther, Legal Counsel:

- [58] Mr. Gunther advised that Mr. Belzile asked him to attend the hearing because of some of the unusual legal issues relevant to this Development Permit application.
- [59] He acknowledged that the past development compliance and enforcement issues associated with this business are not relevant before the Board. However, it does provide some explanation as to what is actually occurring on the premises. Some of the City staff and a member of the Edmonton Police Service (EPS) who have inspected the site over the past few months are in attendance to provide information to the Board.
- [60] Based on the evidence provided by the Appellant, the proposed change in Use is already occurring on the premises.
- [61] This is an application for a Bar and Neighbourhood Pub. A Bar and Neighbourhood Pub is classified as a Minor Eating and Drinking Establishment. A Nightclub Use would be classified as a Major Eating and Drinking Establishment which is not a listed use in the DC Zone and would not be allowed at this location.
- [62] It is the role of the Board to establish the intended direction of Council and to determine whether or not the Development Officer followed that direction. It is the position of the City that the proposed change in Use is for a Nightclub and not a Bar and Neighbourhood Pub and the Nightclub Use is already occurring at this location.
- [63] The *Edmonton Zoning Bylaw* provides a transitional provision. A Bar and Neighbourhood Pub for less than 100 occupants was classified as a Minor Eating and Drinking Establishment in the *Land Use Bylaw 5996* and a Nightclub was classified as a Major Eating and Drinking Establishment.
- [64] Mr. Gunther clarified that he and the other City representatives are in attendance to provide evidence regarding what they have observed occurring on site.
- [65] Mr. Belzile explained that serving hookah is not regulated by the *Edmonton Zoning Bylaw* and can be included in any Use class. It is usually associated with a Bar and Neighbourhood Pub or a Specialty Food Service. He did not classify the proposed development as a Nightclub because of the hookah bar.
- [66] The Development Permit application was made as a result of a development compliance inspection in the basement of this business. It was not clear whether or not the development application was for the entire building or just the basement level.

- [67] He determined that the proposed Use was a Nightclub based on a review of the inspection notes and the videos that were provided by the EPS. However, he did note that there was no specific entertainment area identified on the submitted floor plan for the basement.
- [68] He acknowledged that the definition of a Nightclub Use is different from the definition of a Bar and Neighbourhood Pub Use because it states that entertainment facilities take up more than 10 percent of the Floor Area. In this review, it was difficult to determine what part of the basement was being used as an entertainment facility and “entertainment” is not defined in the *Edmonton Zoning Bylaw*.
- [69] Mr. Belzile and Mr. Gunther provided the following information in response to questions from the Board:
- a) A Nightclub would have to provide an entertainment facility in addition to seats and tables.
 - b) The video evidence provided shows that people are dancing in almost the entire basement level.
 - c) An entertainment facility is not defined in the Bylaw which makes it difficult to determine what constitutes an entertainment facility.
 - d) Simply drawing a line on the floor to identify a dance floor that would constitute an entertainment facility is not reflective of what is happening on the premises.
 - e) In this situation the Board needs to consider the holistic definition of an entertainment facility. In this situation the whole intent is to engage people in activities that are associated with a Nightclub Use. A Nightclub Use means more than just sitting and sharing a drink or hookah.
 - f) It was acknowledged that many developments can fit more than one Use Class definition and this is one of them. In this case the Development Officer had to decide and the Board has to decide on the Use Class definition that most accurately captures what is occurring at this site.
 - g) In this case, even though 10 percent of the Floor Area was not identified on the Floor Plan as an entertainment facility, it was determined that the Use occurring on the site most appropriately fit the Nightclub Use based on the evidence provided by the inspectors that there was a DJ booth, menus were not available and people were dancing on the majority of the basement level.
 - h) When the site was inspected, the main floor of the business was closed. Therefore, the Development Officer only used the basement level to consider the size of the entertainment facilities.

- i) It was their opinion that it is difficult to craft conditions that would ensure that this establishment operated as a Bar and Neighbourhood Pub and not a Nightclub.
- j) The definitions contained in *Land Use Bylaw 5996* have been superseded by the definitions contained in the *Edmonton Zoning Bylaw*.
- k) Mr. Gunther conceded that the definitions are drafted poorly. However, when the two definitions are read together, the only real conclusion is that it was the intent of City Council that a proposed development with more than 100 persons is a Major Eating and Drinking Establishment. In order to comply with the definition of a Minor Eating and Drinking Establishment, this appeal would have to be refused or a condition would have to be imposed to limit the number of occupants.
- l) A copy of Development Permit application was referenced. It was noted that the scope of the application read “To change the Use from a Restaurant to a Bar and Neighbourhood Pub (Nyala Lounge)”.
- m) However, during his review Mr. Belzile reviewed the history of the site. He noted that several violations only referenced the basement level because the main floor was closed and not accessible during the inspections. Therefore, he made the assumption that the Development Permit application was for the basement level and did not include the main floor of the building in his review.
- n) The evidence provided is that the main floor of this building operates differently than the basement level.
- o) The lighting, loud music played by a DJ and people milling around encourages people to dance wherever they want in the basement. Even though there is no designated dance floor, the facility encourages that activity and creates an expectation that this is a Nightclub.
- p) The videos provided clearly demonstrate that use as an entertainment facility even though a designated dance floor has not been identified.
- q) It was acknowledged that there is a huge subjective element to this development. However, it was the Development Officer’s job and it is the Board’s responsibility to determine if the proposed Use is a Bar and Neighbourhood Pub or a Nightclub. The Development Officer determined that the proposed Use is a Nightclub.
- r) It was the opinion of Legal Counsel for the Appellant that dancing could be found to be accessory to the business. The Nightclub component could be considered accessory to the Bar and Neighbourhood Pub. It was Mr. Gunther’s opinion that accessory is defined as something subordinate and second in nature to the primary use, such as accessory parking for a commercial business. Labelling a use as accessory should be done sparingly and only if it is secondary to the primary use.

- s) Section 7.4(39) defines a Nightclub (in part) as a development where the primary purpose of the facility is the sale of alcoholic beverages to the public, for consumption within the premises or off the Site, in a facility where entertainment facilities take up more than 10 percent of the Floor Area. However, the Board can substitute their definition if it is determined that an entertainment facility should be defined differently.
- t) The fact that “entertainment facility” is not defined in the *Edmonton Zoning Bylaw* provides discretion for the Development Officer to determine what constitutes an entertainment facility.
- u) It was determined that the proposed development is a Major Eating and Drinking Establishment (Nightclub) which is neither listed as a Permitted or Discretionary Use under the Boyle Street McCauley Area Redevelopment Plan.

[70] Acting Sargent John Allan of the EPS provided photographs, marked Exhibit B, and provided the following information:

- a) This business has been inspected on several occasions over the last year and a half following several shootings that occurred in close proximity to this site.
- b) On six different occasions it was noted that there were over 100 patrons on the basement level of this business.
- c) Based on his experience, when a business looks like a Nightclub and sounds like a Nightclub, it is probably a Nightclub.
- d) A Security Guard was stationed at the basement door and the main floor has been closed. They have not seen a menu or food being served in the basement. The music is very loud and there is strobe lighting.
- e) Although it can be difficult to distinguish a Nightclub from a Bar and Neighbourhood Pub, a determining factor is food service.
- f) There is more of a restaurant setting on the main floor.
- g) There is a conflict between the Alberta Gaming and Liquor Commission Licence and the Business Licence for this establishment.

[71] Michael Doyle, City of Edmonton Development Compliance Branch submitted photographs, marked Exhibit C, and provided the following information:

- a) He attended the site at approximately 1:00 a.m. on April 29, 2017. He met with the operational manager on site, provided a Notice of Entry and explained the reasons for the inspection.

- b) There was a closed sign on the front door of the restaurant on the main floor. There was some strobe lighting on the main floor but there was no one on the main floor.
- c) There were people standing or dancing at tables near the bar area in the basement. The Bartender was asked for a food menu but a menu was never provided.
- d) The inspection was done in an attempt to determine what use was occurring on the site. At the time of the inspection, there was an approved Development Permit to operate a Restaurant at this location.
- e) He acknowledged that the Use Class definitions for a Bar and Neighbourhood Pub are very similar. However, it has been his experience that the sale of food is more indicative of a Bar and Neighbourhood Pub than a Nightclub.
- f) Mr. Gunther reiterated his opinion that the role of the Board is to characterize which definition best matches the activities that are occurring on this site. It was his opinion that because there is no food service available, the characterization is pushed towards a Nightclub in this situation.

[72] Mr. Doyle and Mr. Gunther provided the following information in response to questions from the Board:

- a) This is a unique situation for two reasons. Firstly, the use is already occurring and a sense of how that looks has been provided. Secondly, the proposed change in Use and what is being proposed is reflective of what has been occurring at this location. The Applicant has applied for a Development Permit for an existing use.
- b) In this case the pre-permit application activities are relevant because there is ample evidence of what the post-permit activities will be.

[73] Mr. Paul Adams reviewed his written submission and explained the reasons for refusing the development application to develop an Outdoor Patio.

[74] It was his assumption from conversations with Mr. Tesfay that the proposed patio would be used for the Restaurant even in light of the Development Permit application to change the Use.

[75] The proposed development would require one additional parking space. A 17 parking space variance was approved by the Board when a Development Permit for a Restaurant was approved in 2012.

[76] An 18 parking space variance would be required without any patio development at the rear of the building.

[77] There is a single detached house located immediately north of the subject site. Although the main floor of the property located immediately to the south is a Professional,

Financial and Office Support Service on the main floor, there is a residential dwelling in the basement.

[78] Section 90.1 of the *Edmonton Zoning Bylaw* states that if any Restaurant abuts or is across a Lane from a Site zoned residential or a Site with a residential development, the Restaurant shall not allow any outdoor seating on the side of the Residential Zone or development. Therefore, the proposed outdoor patio does not comply with this Section of the Bylaw.

[79] Mr. Adams and Mr. Gunther provided the following responses to questions:

- a) The parking variance is calculated based on the number of seats. One parking space is required for every 4 seats.
- b) A parking variance of 17 spaces was granted when the Development Permit for a Restaurant was approved in 2012.
- c) Section 66 of *Land Use Bylaw 5996* has to be used because it is specifically cross-referenced in the DC1 Direct Development Control Provision (Area 5).
- d) Granting the additional variance could be a problem because of the limited availability of on street parking.
- e) When the Restaurant was approved in 2012, it was noted that most of the street parking was taken up during the day by hospital workers and visitors and that on street parking was more available during the evening hours.
- f) The Community League did not provide any feedback regarding the proposed development.
- g) Fred Laux in his book, *Planning Law in Alberta*, is of the opinion that where Direct Control Provisions provide discretion to the Development Officer, this means that Council has provided incomplete direction and the Board can, therefore, substitute its own discretion for that of the Development Authority.
- h) Mr. Gunther indicated that the Court of Appeal currently has an appeal before it with regards to this issue.
- i) This Direct Control Provision provides a degree of discretion to the Development Officer.
- j) Section 641 of the *Municipal Government Act* states that if the Subdivision and Development Appeal Board finds that the Development Authority did not follow the directions of Council, it may, in accordance with the directions, substitute its decision for the Development Authority's decision.

- k) The best interpretation is that, in this case, the Board does not have the authority to substitute its discretion for the Development Officer's because the Development Officer followed Council's direction.
- l) The rationale of the Boyle Street McCauley Area Redevelopment Plan is to provide for a District which will promote the conservation and rehabilitation of the existing housing stock until this area is redeveloped for low intensity business uses in order to achieve the intent of Section 7.2.3 of this Plan which is to protect residential areas from conflicts with commercial uses.
- m) It was acknowledged that this neighbourhood is moving towards a more commercial zone.
- n) In this situation, the test for the Development Officer was Section 90 which addressed the intensity of the use.

*iv) **Rebuttal of the Appellant, Mr. Tesfay and Mr. Alwis, Legal Counsel:***

- [80] The proposed change in Use has always been intended for the entire building, not just the basement level.
- [81] The Development Officer had already refused his application before he had an opportunity to submit additional information that was requested.
- [82] Mr. Tesfay was not on site when the inspection was conducted on April 29, 2017 because of a family emergency and that is why food was not available. He provided a copy of the menu, marked Exhibit D.
- [83] The strobe and laser lighting has been removed from the basement. Music cannot be heard outside the building.
- [84] The photographs referenced by Development Compliance to illustrate overcrowding were taken on a day when a special celebration was occurring on site.
- [85] Mr. Tesfay submitted some photographs of the main floor and the basement level, marked Exhibit E to illustrate the normal occupancy.
- [86] He has made numerous changes based on the inspections conducted in an attempt to correct some of the problems identified.
- [87] Mr. Tesfay and Mr. Alwis provided the following responses to questions:
 - a) The photographs taken by the Development Compliance Inspector that showed people dancing were taken close to the bar area where people tend to congregate. However, the entire basement level is not used for dancing.

- b) This was a one off situation and it will never happen again.
- c) The photographs submitted represent a compliance issue. Officers have been visiting the establishment for well over a year. Mr. Tesfay has been learning the scope and regulatory nature of managing a business that straddles two potential uses.
- d) He understands that the approved use and the operation of the business have to be consistent. Mr. Tesfay is willing to work with the EPS and City officials to ensure that this happens.
- e) Mr. Alwiss questioned the significance of the lack of food service when the inspection occurred between 1:00 and 1:30 a.m. This is not reflective of the operation of the business at other times of the day.
- f) It was his opinion that the Development Officer refused this Development Permit application based on a broad interpretation of an “entertainment facility”.
- g) He acknowledged that allowing 100 occupants in the basement of the building is a compliance issue.
- h) The primary purpose of the proposed Bar and Neighbourhood Pub is to sell alcohol with the consumption of hookah.
- i) The Board has the ability to impose conditions to ensure that the proposed Bar and Neighbourhood Pub cannot be used as a Nightclub.
- j) The photographs submitted by Mr. Tesfay confirm that the establishment is much different now than when the photographs were taken by the Development Compliance team in April, 2017.

Decision SDAB-D-17-149

[88] 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**:

- a) At no time shall there be more than 44 patrons (as applied for) on subject site including the main floor and the basement.
- b) The Applicant must develop the main floor and basement in accordance with the floor plans submitted by the Applicant to the Development Officer, including but not limited to, all specified sitting areas, tables, chairs, benches, sofas and planters.
- c) All required parking and loading facilities shall only be used for the purpose of accommodating the vehicles of clients, customers, employees, members, residents

or visitors in connection with the building or Use for which the parking and loading facilities are provided, and the parking and loading facilities shall not be used for driveways, access or egress, commercial repair work, display, sale or storage of goods of any kind. (Reference Section 54.1.1.c)

- d) 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)

Reasons for Decision SDAB-D-17-149

[89] As the subject property is located in a Direct Control District, Section 641 of the *Municipal Government Act* sets out the scope of appeal as follows:

Designation of direct control districts

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

...

(b) is made by a development authority, the appeal is limited to whether the development authority followed the directions of council, and if the subdivision and development appeal board finds that the development authority did not follow the directions it may, in accordance with the directions, substitute its decision for the development authority's decision.

[90] The Board must determine whether the Development Authority followed the directions of Council set out in the Direct Control provisions.

[91] **Eating and Drinking Establishment, Minor**, is an allowed use that is listed in the DC1 Direct Development Control Provision (Area 5) that pertain to the subject site and is set out in the Boyle Street / McCauley Area Redevelopment Plan. That Use Class definition originates from the City of Edmonton *Land Use Bylaw 5996*. The Board notes that the current *Edmonton Zoning Bylaw 12800* describes how the **Eating and Drinking Establishment, Minor** use is to be interpreted since the coming into force of *Edmonton Zoning Bylaw*. Section 3.2(1) of the *Edmonton Zoning Bylaw*, states the following:

For the purpose of any Development Permit or Direct Control Provision:

e. Major Eating and Drinking Establishments is deemed to be Specialty Food Services, Restaurants, Bars and Neighbourhood Pubs and Nightclubs;

f. Minor Eating and Drinking Establishments is deemed to be:

- i. Specialty Food Services;
- ii. Restaurants; and
- iii. Bars and Neighbourhood Pubs for less than 100 Occupants.

- [92] This shows that under current use classification system, **Nightclub** is to be deemed a **Major Eating and Drinking Establishments** and **Bars and Neighbourhood Pubs for less than 100 Occupants** is deemed to be a **Minor Eating and Drinking Establishment** for purpose of any Development Permit in a Direct Control provision.
- [93] The main issue before the Board was whether or not the proposed development is a **Nightclub** or a **Bar and Neighbourhood Pub** for less than 100 occupants. It was accepted by the City that if the proposed development is deemed to be a **Bar and Neighbourhood Pub**, that it would be an allowable use in the Direct Control Provision.
- [94] This requires the Board to look carefully at the definitions of **Bars and Neighbourhood Pubs** and **Nightclubs**.
- [95] Section 7.4(6) of the *Edmonton Zoning Bylaw* states: “**Bars and Neighbourhood Pubs** means development where the primary purpose of the facility is the sale of alcoholic beverages to the public, for consumption within the premises or off the Site. This Use typically has a limited menu and minors are prohibited from patronizing the establishment during at least some portion of the hours of operation. Typical Uses include neighbourhood pubs, bars, beverage rooms, and cocktail lounges. This Use does not include Cannabis Lounges.”
- [96] Section 7.4(39) of the *Edmonton Zoning Bylaw* states: “**Nightclubs** means development where the primary purpose of the facility is the sale of alcoholic beverages to the public, for consumption within the premises or off the Site, in a facility where entertainment facilities take up more than 10 percent of the Floor Area. This Use typically has a limited menu from a partially equipped kitchen/preparation area and prohibits minors from lawfully utilizing the facility. Typical Uses include dance clubs, cabarets, nightclubs, lounges, neighbourhood pubs and bars, beverage rooms, and cocktail lounges. This Use does not include Cannabis Lounges.”
- [97] The opening sentences in both definitions are very similar. Both Uses have limited menus and their primary purpose is the sale of alcoholic beverages to the public. A typical use for a **Nightclub** includes neighbourhood pubs and bars. A key difference in the definitions is that the following phrase is added to the definition of **Nightclub**: “in a facility where entertainment facilities take up more than 10 percent of the Floor Area.” This is the primary distinguishing feature between **Bars and Neighbourhood Pubs** and **Nightclubs**.

- [98] The term “entertainment facility” is not defined. However, the use of the word “facility” and the fact that a specific percentage of Floor Area is referenced indicates that the plans for a Nightclub should show a space that is dedicated to entertainment activities such as a band stand, DJ booth, dance floor, stage or the like.
- [99] The plans submitted by the Appellant do not reveal any such entertainment facilities. In fact, both the main floor and basement floor plans show service counter areas, hallways to washrooms and sitting areas with tables and chairs.
- [100] In his reasons for refusal of the Development Permit, the Development Officer noted that a site inspection had shown that the area on the floor plan with planters was being used as a dance floor. However, the evidence presented to the Board is that this area is considerably less than 10 percent of the Floor Area of the proposed development.
- [101] At the hearing, the City presented evidence based upon past incidences at the subject site (which currently has Development Permit for a **Restaurant**) where numerous people have been dancing or standing between seating areas. The Development Officer felt that this showed the entire basement level was being used as an entertainment facility.
- [102] The Board finds that this characterization is incorrect. As was noted above, the use of the phrase “entertainment facility” in the definition of **Nightclub** indicates that a space must be dedicated to entertainment, not just used incidentally for this purpose. The spaces between the tables and the area where the planters are cannot be characterized as an “entertainment facility” simply because patrons occasionally dance there.
- [103] The Development Officer appears to believe that, because there will be dancing on the premises, this indicates that the proposed Use is a **Nightclub**. If the definition of **Bars and Neighbourhood Pubs** and **Nightclubs** made it clear that dancing is allowed in one but not the other, perhaps the decision of the Development Officer would have been correct. But given that there are no entertainment facilities on the plans, much less any that take up more than 10 percent of Floor Area, the subject development as set out in the subject plan cannot be defined as a **Nightclub**. The appropriate Use is **Bar and Neighbourhood Pub**. Once the Board finds the proposed development is a **Bar and Neighbourhood Pubs** it is therefore **Eating and Drinking Establishment, Minor** and an allowed Use listed in the DC1 provision.
- [104] For those reasons, the Board finds the Development Authority failed to follow the directions of Council by incorrectly characterizing the Use of the proposed development. Council’s direction is to allow an **Eating and Drinking Establishment, Minor**, and Council included **Eating and Drinking Establishment, Minor** to include **Bar and Neighbourhood Pub**.

- [105] It is important to note that what is before the Board is an application that explicit on its face is for a **Bar and Neighbourhood Pub** and contains plans that meet the definition of **Bar and Neighbourhood Pub**. What has or has not occurred at the subject site prior to this hearing has not changed what has been applied for and what this Board is granting.
- [106] The conditions the Board placed on the permit will ensure that no entertainment facilities exceeding 10 percent of the Floor Area will be developed as the Board has required that floor plans as submitted not be altered.
- [107] This Board granted a permit for a Restaurant to operate on the subject site in SDAB-D-12-137. At that time, the Board granted a parking variance of 17 Parking Spaces. The Development Officer confirmed that changing the use from a **Restaurant** to **Bar and Neighbourhood Pub** will not alter the required parking needs under section 66 of the *Land Use Bylaw*, which is specially referenced in section 4 (Section 8.4.16.4) of the Direct Control. As a result, the Board finds that this variance is appropriate for the same reasons set out in that decision.
- [108] Another reason the Development Officer gave for refusing the Development Permit was that it would not achieve the policy objective set out in Section 7.2.3 of the Boyle Street McCauley Area Redevelopment Plan (the “ARP”) “to protect residential areas from conflict with commercial uses.” The Board finds that the Development Officer did not follow the directions of Council because he took this one provision in the ARP out of context with other provisions.
- [109] Section 7.2.3 of the ARP deals with Sub-Area 1, the Chinatown North Special Commercial Sub-Area, where the proposed development is located.
- [110] The ARP states at page 62: “The land use concept for Chinatown North envisions eventual redevelopment of the entire area for general business uses and low intensity business uses, the latter along the east side of 97 Street where commercial uses are adjacent to residential development. In the interim period, the existing housing north of 107A Avenue would be conserved for housing or allowed to be converted for commercial or mixed commercial residential uses.”
- [111] The first four Objectives for Chinatown North are as follows:
1. To provide a primary area for a commercial development that will take advantage of the area’s proximity to the Downtown and the existing multicultural elements.
 2. To maintain commercial development in the area at a much smaller scale than that found in the adjacent Downtown and to develop a strong pedestrian shopping experience.

3. To provide an area for future commercial expansion while permitting the conservation of existing, viable housing stock for residential uses or conversion to commercial or mixed uses.
4. To protect residential areas from conflict with commercial uses.

[112] By focusing only on Objective 4, the Development Officer ignored the fact that Chinatown North is ultimately intended to be an area for commercial development, such as the proposed **Bar and Neighbourhood Pub**. Further, no evidence was presented to the Board that the past use of the facility, which the Appellant acknowledged was the type of use that would continue to be made if a Development Permit is issued, has conflicted with nearby residential uses. To the contrary, the Appellant presented evidence that his neighbours support the continuation of the past use. Accordingly, the Development Officer did not follow the directions of Council.

[113] For the above reasons, this appeal is allowed and the Development is granted.

Decision SDAB-D-17-150

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

Reasons for Decision SDAB-D-17-150

[115] This was an application to develop an outdoor patio to Restaurant now approved as Bar and Neighbourhood Pub.

[116] As the subject property is located in a Direct Control District, Section 641 of the *Municipal Government Act* sets out the scope of appeal as follows:

Designation of direct control districts

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

...

(b) is made by a development authority, the appeal is limited to whether the development authority followed the directions of council, and if the subdivision and development appeal board finds that the development authority did not follow the directions it may, in accordance with the directions, substitute its decision for the development authority's decision.

- [117] The Board must determine whether the Development Authority followed the directions of Council set out in the Direct Control provisions.
- [118] Section 710.4(5) of the *Edmonton Zoning Bylaw* states that “all regulations in this Bylaw shall apply to development in the Direct Development Control Provision, unless such regulations are specifically excluded or modified in a Direct Development Control Provision.”
- [119] Accordingly this application must be assessed pursuant to terms of section 90 of the *Edmonton Zoning Bylaw* which are as follows:

Section 90 states the following:

Outdoor Seating Associated With Specialty Food Services, Restaurants, Bars and Neighbourhood Pubs, and Nightclubs

1. If any Specialty Food Service, Restaurant, Bar and Neighbourhood Pub or Nightclub abuts or is across a Lane from a Site zoned residential or a Site with a residential development, the Development Officer shall draw a line parallel to the boundary or Lane separating each such residential development or Zone and bisecting the Site containing the Specialty Food Service, Restaurant, Bar and Neighbourhood Pub or Nightclub Uses and shall not allow any outdoor seating on the side of any such line that is closest to the Residential Zone or development.
- [120] The evidence before the Board was that there are residential developments abutting the subject site on both the north and south boundaries of the subject properties. As a result section 90 forbids the construction of outdoor seating area on either north or south of the subject site. Accordingly the proposed outdoor seating area does not comply with section 90. As a result, the Development Officer followed the directions of Council by denying the application for the Outdoor Patio.

[121] Therefore pursuant to Section 641, this appeal is denied.

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

Board members in attendance: Mr. M. Young, Mr. A. Nagy, Mr. A. Bolstad, Mr. J. Kindrake

Important Information for the Applicant/Appellant

7. This is not a Building Permit/Business License. A Building Permit/Business License must be obtained separately from the Sustainable Development Department, located on the 2nd Floor, Edmonton Tower, 10111 – 104 Avenue NW, Edmonton, AB T5J 0J4.
8. Obtaining a Development Permit does not relieve you from complying with:
 - f) 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,
 - g) the requirements of the *Alberta Safety Codes Act*,
 - h) the *Alberta Regulation 204/207 – Safety Codes Act – Permit Regulation*,
 - i) the requirements of any other appropriate federal, provincial or municipal legislation,
 - j) the conditions of any caveat, covenant, easement or other instrument affecting a building or land.
9. 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.
10. A Development Permit will expire in accordance to the provisions of Section 22 of the *Edmonton Zoning Bylaw, Bylaw 12800*, as amended.
11. 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.
12. 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.