



**EDMONTON
TRIBUNALS**

*Subdivision &
Development
Appeal Board*

*10019 – 103 Avenue NW
Edmonton, AB T5J 0G9
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SDAB-D-17-156

Application No. 155374557-002

An appeal by _____ to convert an existing Semi-Detached House to 4 Dwellings of Apartment Housing, existing without permits was **TABLED TO SEPTEMBER 14, 2017.**



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Date: September 14, 2017
Project Number: 244872025-001
File Number: SDAB-D-17-157

Notice of Decision

- [1] On August 30, 2017, the Subdivision and Development Appeal Board (the “Board”) heard an appeal that was filed on **August 8, 2017**. The appeal concerned the decision of the Development Authority, issued on July 24, 2017 to approve the following development:

Operate a Major Home Based Business (General contractor for landscaping company - Sunrise Lawn & Garden Renovation)

- [2] The subject property is on Plan 0024535 Blk 8 Lot 17, located at 18941 - 122 Avenue NW, within the DC2 Site Specific Development Control Provision. The Kinokamau Plains Area Structure 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 approved Development Permit;
 - The Development Officer’s written submissions;
 - The Appellant’s written submissions; and
 - Three letters from neighbouring property owners in opposition.

Preliminary Matters

- [4] At the outset of the appeal hearing, the Presiding Officer confirmed with the parties in attendance that there was no opposition to the composition of the panel.
- [5] The Presiding Officer outlined how the hearing would be conducted, including the order of appearance of parties, and no opposition was noted.
- [6] The appeal was filed on time, in accordance with Section 686 of the *Municipal Government Act*, R.S.A 2000, c. M-26 (the “*Municipal Government Act*”).

- [7] The Presiding Officer noted that the subject site was located in a direct control district and per Section 641(4) of the *Municipal Government Act* despite section 685, if a decision with respect to a Development Permit application in respect of a direct control district is made by a development authority, the appeal is limited to whether the development authority followed the directions of council, and if the subdivision and development appeal board finds that the development authority did not follow the directions it may, in accordance with the directions, substitute its decision for the development authority's decision.
- [8] Accordingly the Presiding Officer asked the Appellants to describe how the Development Officer failed to follow the directions of Council in approving the Development Permit application.
- [9] The Presiding Officer also gave the parties an opportunity to review the Court of Appeal decision, *Edmonton (City) v Edmonton (Subdivision and Development Appeal Board)*, 2017 ABCA 140 and asked them to also address any applicable issues regarding this appeal.

Summary of Hearing

i) Position of the Appellants, Mr. and Mrs. Pederson

- [10] Mr. and Mrs. Pederson have lived across the street from the subject Site for over 20 years. They are concerned that the Major Home Based Business will decrease their property value.
- [11] This area was annexed from another municipality years ago and businesses that were operating at that time were grandfathered in as commercial type businesses.
- [12] When they purchased the property in 1997, they believed it was zoned DC5 and it is now a DC2.
- [13] They reiterated their written reasons for the appeal. In their opinion, the conditions and variance as stated on the approved permit are not being followed by the Respondent who has been carrying on the landscaping business on the subject Site since April without a permit.
- [14] There is only one way in and out of the cul-de-sac. Trucks come and go during the day and noise can be heard coming from the subject Site at many hours of the day and night. They have complained to the City about the development.
- [15] There is business activity at the subject Site on a daily basis. It is clearly a commercial operation. There are 3 to 5 trucks and several trailers being used on the site. The business has been operating without a license. Trucks with trailers back into maintained groomed ditches in the area to turn around.

- [16] Trailers associated with the business bring tree branches and scraps from work sites. Parts of the loads on these trailers often fall off in the cul-de-sac when they are going to the subject Site. This debris is often stored without cover on the subject Site and subsequently burned in a fire pit.
- [17] Mooncrest Park is a residential community and residents have been working with their Councilor and Bylaw Enforcement in relation to business activities on seven properties occurring in violation of development permits or without permits or licenses.
- [18] They spoke to their neighbours and gathered a petition from neighbouring property owners in opposition to the proposed development.
- [19] They believe there are errors in the Development Permit application and also in the Development Officer's written submission.
- [20] For instance, several people live in the house and several vehicles are associated with the subject Site contrary to the application which specifies that zero persons involved in the business live on site. Further, while the application states two vehicles are registered to the property, on any given day, there are three trucks and several cars on site.
- [21] The submitted photographs also show materials are stored outdoors that they can see from their front window. Up to four trailers park regularly on the site. The bobcat which is to be stored in the garage pursuant to the granted variance has remained outside. The Appellant is not complying with the terms of the permit even before it has been issued.
- [22] Property owners like to enjoy the larger lots in this area and a Major Home Based Business such as this will negatively impact their privacy.
- [23] In response to questions by the Board, they stated that the Respondent moved to the subject Site around November 2016.
- [24] They confirmed that the trucks associated with the business do not have signage nor is there business signage on the subject Site.
- [25] They do not believe the Development Officer followed the directions of City Council and the directions outlined in the DC2 Site Specific Development Control Provision.
- [26] In their opinion, the Respondent has more equipment than is associated with a typical Major Home Based Business. The Respondent's business does not fit in to the definition of a major home based business, nor with the residential character of the area. The amount of equipment shown in the photos belongs on a commercial site not a residential one.
- [27] They confirmed that all activity associated with the business is performed outside, including loading and unloading of trucks and trailers, and storage of material.

ii) *Position of the Development Officer, Ms. Lai*

- [28] Ms. Lai has the authority to grant a variance for the Major Home Based Business based on the information provided by the Respondent, the *Land Use Bylaw*, and the *Edmonton Zoning Bylaw*.
- [29] With regard to the Use class, in her opinion, the business is a General Contractor type business but all activity takes place on the job site. In her opinion, outdoor storage of materials associated with the business is not considered “business activity” as per the Court of Appeal in *Edmonton (City) v Edmonton (Subdivision and Development Appeal Board)*, 2017 ABCA 140.
- [30] A Major Home Based Business is a Listed Use and also a Discretionary Use in the DC2.369, per Section 12 of the *Edmonton Zoning Bylaw*.
- [31] She considered Section 85 of the *Land Use Bylaw* when reviewing the application. The permit included a variance to Section 75 of the *Edmonton Zoning Bylaw* and also listed standard conditions from Section 75 of the *Edmonton Zoning Bylaw* as that is the department’s standard procedure for all major home based businesses.
- [32] The activity currently taking place on the subject Site is not part of the scope of application which she approved. She cannot control what property owners do on the subject Site, nor activities that were not part of the approved Development Permit application.
- [33] She confirmed that the Respondent applied for a Major Home Based Business with one trailer for the business to be stored outdoors. If there is an excess of trailers and materials used at the subject Site, she would recommend a commercial site be used for the business.
- [34] In her opinion, she followed the directions of City Council even with the variances granted. The proposed development is for a General Contractor business with a truck that is not over the gross vehicle weight and the variance she granted is reasonable. She granted the variance pursuant to Section 11 of the *Edmonton Zoning Bylaw*. She was of the opinion that there was a practical difficulty with this lot given the size and that larger equipment would be needed to maintain it. Also, the Applicant faced undue hardship because he is a sole proprietor and it would be expensive for him to rent commercial space.

iii) *Position of the Respondent, Mr. Tran, who was accompanied by Mr. Ho*

- [35] Mr. Tran has run his landscaping business since 1993.
- [36] He purchased the property in November, 2016 before he made the application for the Major Home Based Business. He purchased the bobcat last year and had no place for it.

- His prior property was small for a trailer and a bobcat so he moved to get a bigger yard. He will use the bobcat to redo his own landscaping, but intends it mainly for his business.
- [37] His property does not yet have a fence so the neighbours are able to see the material that is stored on the subject Site.
- [38] In the spring, a road crew was working in the area and trucks were moved in the evening so he believes that they caused the noise that the Appellants are complaining about.
- [39] They do not work at the subject Site late into the evening; they do not work after 9:00 p.m.
- [40] They do not believe the trucks and trailers negatively impact the neighbourhood as they leave the subject Site at approximately 7:30 a.m. They load the trailers and leave the subject site and then come back later.
- [41] In their opinion, the picture of the bobcat was taken before it was parked in the garage. It is worth \$40,000.00 and so they always store it in the main garage.
- [42] The business has four family employees that live at the subject Site along with resident children and their parents.
- [43] Only one site is worked on at a time. One trailer is needed to remove dirt and another one is needed to deliver materials to the work site.
- [44] They confirmed that there are currently three trucks and three trailers associated with the Major Home Based Business. The fourth trailer shown in the pictures is not used for the business; it is used to bring water to their property.
- [45] The business was moved to the subject Site from a previous residential neighbourhood because the prior site did not have enough room and they felt this larger site would be more suitable for their business. They did not review the requirements of the *Edmonton Zoning Bylaw* before moving to the subject Site.
- [46] The business has been in operation since 1993. At that time, all the work was done manually and only recently the bobcat has been used for the business.
- [47] They confirmed that they have four trailers and three vehicles that are not all used for the business. There is no other big equipment. The trailers and vehicles are stored on the driveway and on the lawn. The trucks cannot be parked in the garage.
- [48] The debris and building material in the yard shown in the photos are present because the previous owners did not finish the landscaping. They will be using the patio blocks to finish the landscaping and the posts are for their own future fence.

- [49] They cut trees on job sites and store them outside on their property until they have a full load to take to the dump. On occasion, they will cut the stumps and then burn firewood from these work sites in their fire pit for personal recreational use
- [50] They only told the Development Officer about one of the trailers.
- [51] The Respondents confirmed that they are using more equipment and vehicles than they listed in the approved Development Permit and that they are storing materials outdoors in excess of what was indicated on the approved Development Permit application.
- [52] They would like to store all equipment associated with the business that they have mentioned during the hearing at the subject Site. The three trailers used for the business will be stored in the back yard. The fourth trailer will be used for personal use. They could possibly park the trailers in the garage while they are loaded but they cannot park all three of them in the garage.
- [53] The trucks are also used for personal use so they need to park them on-site, but the trailers can be stored off site if the proposed development is refused.
- [54] The Development Permit application was filled out based on what they had at the time, but the business has since expanded.
- [55] They would like the business to operate as it now even though that is not what they applied for on the approved Development Permit application.

iv) Rebuttal of the Appellant, Mr. and Mrs. Pederson

- [56] Mr. and Mrs. Pederson did not have anything to add in rebuttal.

Decision

- [57] The appeal is ALLOWED and the decision of the Development Authority is REVOKED. The development is REFUSED.

Reasons for Decision

- [58] The Appellants are adjacent property owners who appealed the issuance of this Development Permit for a Major Home Based Business primarily because of concerns about the ongoing business activities, specifically that the business was under way without a valid permit and that the actual activities on the Site to date were excessively commercial and did not comply with the conditions or the variance set out in the Development Permit approved on July 24, 2017.

- [59] The Board notes that the parties are in substantial agreement about the ongoing on-site business activities. Based on the submissions from both the Appellants and the Respondents, it became clear during the proceeding that the application for Development Permit failed to capture the true extent of the business (particularly the level of outdoor storage) sought to be authorized by the Respondent.
- [60] It is also important to note that the subject matter of this appeal is the Development Officer's decision to approve an application for a Major Home Based Business. What has or has not occurred at the subject site prior to this hearing does not change what has been applied for or the nature of this appeal. Enforcement matters are beyond the scope of this Development Permit appeal.
- [61] The approved Development Permit is for a Major Home Based Business. Major Home Occupation is a listed Use in the DC2 Site Specific Development Control Provision. The Development Permit includes the following variance: "On-Site Storage – Outdoor storage for a trailer and indoor storage for a bobcat are allowed in related to this Major home based business (Section 75.5)."
- [62] As the subject Site is located in a Direct Control District, Section 641 of the *Municipal Government Act*, restricts the Board's usual appellate authority as follows:
- 641(4) Despite section 685, if a decision with respect to a Development Permit application in respect of a direct control district
- (a) ...
 - (b) is made by a development authority, the appeal is limited to whether the development authority followed the directions of council, and if the subdivision and development appeal board finds that the development authority did not follow the directions it may, in accordance with the directions, substitute its decision for the development authority's decision.
- [63] The Board must first determine whether or not the Development Officer followed the directions of City Council and may substitute its own decision only if it finds that the Development Officer failed to follow those directions.
- [64] The Board finds that the Development Officer failed to follow the directions of City Council for the following reasons.
- [65] First, the Development Officer erred by allowing a variance to the specified Use class, Major Home Based Business.

- [66] The Board is bound by the recent Alberta Court of Appeal decision *Edmonton (City) v Edmonton (Subdivision and Development Appeal Board)*, 2017 ABCA 140, which reviewed the definition of a Major Home Based Business and specified that this Use class is not intended to capture business activity occurring outside of an approved Dwelling or an Accessory Building.
- [67] According to the Court of Appeal:
- [8] The definition of the Major Home Based Business use class found in s. 7.3.7 of the Zoning Bylaw contains three central elements. First is the fundamental requirement that it involve “the use of an Approved Dwelling or Accessory building by a resident of that Dwelling for one or more businesses...”. Second, the business use must be secondary to the residential use of the building. Third, the business use must not change the residential character of the dwelling or accessory building.
 - [9] All elements of the Major Home Based Business definition refer to the use of the dwelling or accessory building, making it clear that that it is the building which must be used to conduct the business. As argued by the City, the Major Home Based Business use class does not capture, nor is it intended to capture, business uses that occur on the property outside an approved dwelling or accessory building.
 - [10] This interpretation is further reinforced by s. 75(5) of the Zoning Bylaw, which provides that there shall be no outdoor business activity or storage in relation to a Major Home Based Business. Although this prohibition on outdoor business activity and storage is a regulation, and regulations can be varied by the Board, a variance is only available in certain circumstances including that “the proposed development conforms with the use prescribed for that land or building in the land use bylaw”: Municipal Government Act, s. 687(3)(d)(ii). Outdoor business activity does not conform with the criteria of the Major Home Based Business use class.
- [68] The approved Development Permit application on its face included a request of outdoor storage to accommodate a trailer to be used in the proposed Major Home Based Business. Therefore, in accordance with the Court of Appeal Decision, the Board finds that it was an error to classify the development as a Major Home Based Business because the proposed outdoor storage brought the proposed development outside of the definition. Use class definitions cannot be varied or enlarged by the Development Officer or the Board.
- [69] Further, as noted above, the oral evidence from both the Appellants and the Respondents established that the Respondents were seeking approval for, and engaging in, outdoor storage and activity significantly beyond the parameters specified in the Development Permit application. The Respondents indicated that they would like permission for the outdoor storage of two to three commercial trailers (which would at times also be loaded with work related debris) and additional trucks associated with the Major Home Based Business. The Board notes that this more intensive level of outdoor storage described by the Respondent at the hearing runs even further afoul of the definition of Major Home Based Business enunciated in the recent Court of Appeal ruling.

- [70] Second, the Development Officer also erred by applying the wrong land use bylaw.
- [71] When the Direct Control was enacted, the *City of Edmonton Land Use Bylaw 5996* was in effect. In *Parkdale-Cromdale Community League Association v. Edmonton (City)*, 2007 ABCA 309, the Alberta Court of Appeal concluded that section 2.7 of the *Edmonton Zoning Bylaw* (which states that any specific reference in a Direct Control Provision to a land use bylaw shall be deemed to be a reference to the land use bylaw that was in effect at the time of the creation of the Direct Control District) only applies if there is an express cross-reference in a Direct Control Provision passed before 2001 to a provision of the old *Land Use Bylaw*. In the absence of an express cross-reference in the Direct Control Bylaw to the *Land Use Bylaw 5996*, it does not prevail over section 2.4 of the *Edmonton Zoning Bylaw* (which states the *Edmonton Zoning Bylaw* shall prevail).
- [72] In this Direct Control, there is an express cross reference for the Use Class to the *Land Use Bylaw 5996*. Section DC2.369.5.b states Major Home Occupations shall be in accordance with Section 85 of the *Land Use Bylaw*.
- [73] According to the Development Officer's written submission, she considered Section 85 of the *Land Use Bylaw*. However, the Board finds that all references in the approved Development Permit including all the imposed conditions and the single variance cite Sections in the *Edmonton Zoning Bylaw*. The Development Officer explained that she simply followed department policy and applied the standard conditions and *Edmonton Zoning Bylaw* references as she would in any Major Home Based Business application. The Board considers this to be a failure to follow the Court of Appeal Decision as the *City of Edmonton Land Use Bylaw 5996* was expressly cross-referenced, yet the conditions and variance all reference only the *Edmonton Zoning Bylaw*.
- [74] However, this error is unlikely to have a substantive impact here because the provisions under both versions of the bylaw are practically identical.
- [75] Third, according to the Development Officer's submissions, she considered the proposed development to be a Discretionary Use based on the wording of section 12 of the *Bylaw*. Therefore, she assessed the proposed development using the two standard tests applicable to Discretionary Uses set out in her written submission (compatibility with surrounding Uses and the absence of planning reason to deny the application).
- [76] As the application is on a Site designated Direct Control and is not exempted under section 12.3, per Section 12.4 of the *Bylaw* the proposed development is a Class B Discretionary Development. This designation necessitates the issuance of notices of the approval to neighbouring properties. This designation does not mean that the listed Use is also a Discretionary Use. Discretionary Uses and Discretionary Developments are not synonymous terms. Therefore, the Development Officer failed to follow the directions of City Council in applying the additional tests applicable to Discretionary Uses when assessing the application.

- [77] Fourth, the Development Officer failed to follow the directions of City Council under Section 11.2(a) of the *Bylaw* in the exercise of her power to grant the specified variance. The section provides in part: “In approving a Development Permit Application pursuant to Section 11.2, the Development Officer shall adhere to the following: (a) a variance shall be considered only in cases of unnecessary hardship or practical difficulties peculiar to the Use, character, or situation of land or a building, which are not generally common to other land in the same Zone.”
- [78] In her written and oral submissions, the Development Officer explained that she found a practical difficulty peculiar to the application for two reasons. First, the bobcat would be used for the business and would also be reasonable for personal use associated with the 4,044 square metres corner lot. Second, the applicant is a sole proprietor of a landscaping and garden renovation business so it made sense to use the trailer to haul landscaping tools and equipment to project sites.
- [79] The first reason relates to the bobcat, however the variance allows a single trailer to be stored outdoors and requires the bobcat to be stored in the garage so this reason is not relevant to the variance granted by the Development Officer. The second reason describes economic grounds unrelated to any peculiar hardship unique to this application and not generally common to other land in the Zone. Accordingly, the Board finds that the Development Officer applied the wrong test in granting the variance.
- [80] Since the Board found that the Development Officer did not follow the directions of Council it may, per section 641, in accordance with the directions, substitute its decision for the Development Officer’s decision.
- [81] For the reasons set out in paragraphs 65 – 69 above, the Board finds that the proposed development should be refused. Based on the written submissions and presentations of all parties, the Board finds that the proposed outdoor storage of the trailers, refuse and vehicles precludes the proposed development from being categorized as a Major Home Based Business Use per the Court of Appeal Decision, *Edmonton (City) v Edmonton*, 2017 ABCA 140.
- [82] In addition, given the significant difference and uncertainty between what the Respondent initially requested in his application and what he appeared to be seeking authority to do pursuant to the Development Permit, the Board is unable to determine whether or not the proposed Use, without any outdoor storage, would be accessory to the Use of the Principal Dwelling or would change or interfere with the residential character of the neighbourhood.

[83] Finally, the proposed development does not fit within the definitions of any of the other listed Uses in the DC2.369.

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

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.