



**EDMONTON
TRIBUNALS**

*Subdivision &
Development
Appeal Board*

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Date: December 16, 2016
Project Number: 188934610-001
File Number: SDAB-D-16-263

Notice of Decision

- [1] The Subdivision and Development Appeal Board (the “Board”) at a hearing on October 26, 2016, made and passed the following motion:

That the appeal hearing be tabled to November 23 or 24, 2016.

- [2] The Subdivision and Development Appeal Board (the “Board”) at a hearing on November 2, 2016, made and passed the following motion:

That the appeal hearing be tabled to December 7 or 8, 2016.

- [2] On December 8, 2016, the Board made and passed the following motion:

That SDAB-D-16-263 be raised from the table.

- [3] On December 8, 2016, the Subdivision and Development Appeal Board heard an appeal that was filed on September 28, 2016. The appeal concerned the decision of the Development Authority, issued on September 12, 2016 to refuse the following development:

Erect a fence higher than 1.2m in a Side Yard abutting a public roadway other than a lane.

- [4] The subject property is on Plan 3922HW Blk 36 Lot 19, located at 10336 - 80 Street NW, within the RF3 Small Scale Infill Development Zone. The Mature Neighbourhood Overlay applies to the subject property.

- [5] The following documents were received prior to the hearing and form part of the record:

- Copy of the Development Permit application with plans and photographs;
- Refused Development Permit decision;
- Canada Post receipt confirming delivery of the refusal decision on September 15, 2016;

- Correspondence from Sustainable Development Transportation Planning and Engineering; and
- Development Officer's written submissions, dated September 30, 2016.

Preliminary Matters

- [6] 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.
- [7] The Presiding Officer outlined how the hearing would be conducted, including the order of appearance of parties, and no opposition was noted.
- [8] The decision of the Development Officer was issued on September 12, 2016. Under subsection 686(1)(a)(i), an Applicant who wishes to file an appeal to the Subdivision and Development Appeal Board must file a notice of the appeal within 14 days after the date on which the person was notified of the decision. The Board is in receipt of a Canada Post Registered Mail notice confirming delivery of the decision to the Applicant on September 15, 2016. The notice of appeal was filed on September 28, 2016. Accordingly, the Board finds that the appeal was filed on time, in accordance with subsection 686(1)(a)(i) of the *Municipal Government Act*, RSA 2000, c M-26.

Summary of Hearing

i) Position of the Appellant, Mr. A. Tilley

- [9] Mr. Tilley referenced his reasons for appeal, noting his tempestuous relationship with his neighbour. He enjoys meditating in his garden. However, in the past, his neighbour and her husband (now deceased) have placed their lawn chairs within a foot of the fence between their two properties, and stare at him while he is in his garden. He has an organic garden and his neighbour has sprayed weed killer on his plants and snapped his plants. His other neighbours have also informed him that they have seen her snapping his plants.
- [10] One day, he discovered dead animal parts in his organic garden, and it was his submission that there is a clear trajectory from his neighbour's kitchen window to his garden. He had previously confronted his neighbour about this act, though she denied any wrongdoing.
- [11] As a result of his neighbour's actions, he would prefer that the extended Height be allowed for the entire portion of the fence, as his neighbour's actions have affected his enjoyment of his property both in the Rear Yard and the Front Yard. Referring to pictures of his property included in the Development Officer's written submissions, he pointed out the areas of his garden in the Front Yard that had been damaged by his neighbour's acts.

- [12] The pictures also showed the bamboo screening that extends the height of the fence. He considers the fence a decorative screen as it is zip-tied to the wire fence, and not fixed into the ground. It was his understanding that the 1.2 metre height maximum for the front yard fence is so that adjacent neighbours can access their driveways with clear sightlines. However, he noted that vehicles are typically not bigger than 1.2 metre in height, so they would not be able to look over the fence while inside their vehicles. Furthermore, the bamboo screen is effectively see-through, as it consists of individual reeds separated by approximately two millimeter gaps in between each reed.
- [13] He explained that his neighbour does have a front driveway, but he has never seen a vehicle access that driveway. Instead, there is a rear parking pad which is used by his neighbour's son, and occasionally someone who might be his neighbour's granddaughter.
- [14] Upon questioning by the Board, he stated that he has only received positive comments from his other immediately adjacent neighbour to the north. Other residents in the community have also approached him to compliment his garden. It was his belief that nobody in the neighbourhood objects to the fence height.
- [15] He acknowledged that it is possible for his neighbour to attack his front yard garden from the front rather than from the side. However, when she has attempted to do so in the past, he has been successful in catching her in the act. As such, he submitted that to avoid being caught, future acts of vandalism will continue to be initiated from her side of the fence. As such, the extended height will serve as a successful deterrent, and indeed, it has served as a successful deterrent.

ii) Position of the Development Authority

- [16] The Development Authority was represented by Ms. S. Watts.
- [17] Ms. Watts explained that when she issued her decision, she had been unaware of the situation as described by the Appellant. At the time, her only reason for refusal had been the height of the fence. Though she could not say definitively as to why the Bylaw restricts fence height in the front yard to 1.2 metres, she submitted that it was likely due to safety issues surrounding visibility. In addition, it allows the front yard to remain open, and maintains walkable neighbourhood.
- [18] However, referring to the inspection photographs submitted, she noted that the bamboo screen is fairly transparent and would still provide a fair amount of visibility when accessing the adjacent driveway. The fence also does not encroach onto City right of way and there is 1.43 metres from the property line to the nearest sidewalk. In her opinion, lowering the front yard fence to 1.2 metres would not improve visibility very much.
- [19] Upon questioning, Ms. Watts confirmed that the Appellant could very well plant a hedge or some other form of vegetation higher than 1.2 metres.

Decision

- [20] The appeal is ALLOWED and the decision of the Development Authority is REVOKED. The development is GRANTED as applied for to the Development Authority, subject to the following CONDITION:
- 1) The portion of the fence that exceeds 1.2 metres in the Front Yard must be constructed out of materials that allow for light penetration through the fence.
- [21] In granting the development, the following variances to the *Edmonton Zoning Bylaw* are allowed:
- 1) Section 49(1)(d) is varied to permit the portion of the subject Fence that is constructed in the Front Yard to exceed 1.2 metres in Height by 0.63 metres, for a total of 1.83 metres.

Reasons for Decision

- [22] The proposed development is for the erection of a Fence higher than 1.2 metres in the Front Yard.
- [23] The Appellant requested a variance to the maximum Height of the Fence along the south property line in his Front Yard. He makes this request to allow for an increase in privacy between his residence and the residence immediately to the south.
- [24] The Board grants the variance for the following reasons:
- a) The evidence from the Appellant is that all of the neighbours he spoke with were in favour of the appeal. The Board notes that no one appeared at the appeal to oppose the development, and there was only one written online objection submitted to this Board.
 - b) The Fence extension is composed of a series of reeds which, being of an organic texture, have less of an impact on the neighbourhood than a solid fence made out of solid building materials.
 - c) The Fence does not encroach onto municipal land, and allows for 1.43 metre distance from the property line to the nearest sidewalk. This space reduces the impact of the Height extension on the visibility issues for the adjacent driveway.
 - d) The photographic evidence shows that the bamboo screening is itself partially screened on the north side by vegetation of varying heights, which further lessens the impact of the Fence extension on the amenities of the neighbourhood.
 - e) The existence of boulevard trees also reduces the impact of the subject Fence on the streetscape.

[25] For the above reasons, the Board finds that the proposed development will not unduly interfere with the amenities of the neighbourhood, nor materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land. The appeal is therefore allowed.

Ian Wachowicz, Chairman
Subdivision and Development Appeal Board

Board Members in Attendance:

K. Cherniawsky; A. Peterson; K. Hample; S. LaPerle

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 5th Floor, 10250 – 101 Street, Edmonton.
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 5th Floor, 10250 – 101 Street, Edmonton.

NOTE: The City of Edmonton does not conduct independent environmental checks of land within the City. If you are concerned about the stability of this property for any purpose, you should conduct your own tests and reviews. The City of Edmonton, when issuing a development permit, makes no representations and offers no warranties as to the suitability of the property for any purpose or as to the presence or absence of any environmental contaminants on the property.



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Date: December 16, 2016
Project Number: 224601991-003
File Number: SDAB-D-16-319

Notice of Decision

- [1] On December 8, 2016, the Subdivision and Development Appeal Board heard an appeal that was filed on November 16, 2016. The appeal concerned the decision of the Development Authority, issued on November 3, 2016, to approve the following development:

Change the use of a Warehouse Sales business to a Restaurant with an outdoor patio and maximum seating of 122, and to construct interior alterations. (Impero)

- [2] The subject property is on Plan 9220996 Blk B Lot 9C, located at 11807 - 105 Avenue NW, within the DC2 Site Specific Development Control Provision Zone under DC2.743. The 104 Avenue Corridor Area Redevelopment Plan and Central McDougall/Queen Mary Park Area Redevelopment Plan apply to the subject property.

- [3] The following documents were received prior to the hearing and form part of the record:

- Copy of the Development Permit application with plans;
- Approved Development Permit decision;
- Memorandum from Sustainable Development Urban Transportation;
- Development Officer's written submissions, dated December 1, 2016, including memorandum titled "City of Edmonton: Zoning Bylaw and Land Use Bylaw References";
- Correspondence from Appellant on previous appeal File Number SDAB-D-16-267 indicating his withdrawal of the appeal;
- Current Appellant's written submissions dated November 12, 2016;
- Respondent's supporting documents, including a petition of support;
- One email and one letter from neighbouring property owners in opposition to the development;
- Letter from the Queen Mary Park Community League in support of the development;
- One online response in opposition to the development; and
- One neutral online response.

Preliminary Matters

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

Summary of Hearing*i) Position of the Appellant, Magic Lantern Theatres Ltd. Corporation (“Magic Lantern”)*

- [7] The Appellant was represented by Mr. B. Evans. Mr. Evans stated that he is an employee of Magic Lantern and was directed by his boss to attend the hearing.
- [8] It was his understanding that his company’s main concern with the proposed development is with the potential impact upon parking. His company’s head office located along 105 Avenue operates the largest private parking lot in the area. The parking lots serves the complex located immediately next to the subject development.
- [9] Upon questioning by the Board, he confirmed that his company does police the parking lot during the day. However, no oversight is provided in the evenings. There have been occurrences where the company’s vehicles have returned from a trip to unload their vehicles, only to find that the parking lot was being used.

ii) Position of the Development Authority

- [10] The Development Authority was represented by Mr. P. Adams.
- [11] Mr. Adams stated that the development was originally approved by a different Development Officer as a 170 seat restaurant, which was appealed to this Board. That application also required a parking variance. Following that decision, the Applicant reached out to the Appellant, and together with the Community League, worked out an agreement where the number of seats would be reduced. To ensure that proper processes were followed, the Applicant submitted a new application to the Development Authority, which provided a new opportunity to review the new plans. As a result of the new application, a new decision was issued, which triggered a new notification period.
- [12] The previous Development Officer calculated parking based on Schedule 66A of the old Land Use Bylaw 5996, and Mr. Adams confirmed that he also applied the same parking schedule.

- [13] The Board questioned where the Development Authority obtained its variance powers to vary parking. In reply, Mr. Adams noted that DC2.743 does not indicate that the Development Officer's variance powers under section 66 of the Land Use Bylaw 5996 should not be used. Section DC2.743.4(j) provides a direct reference to the regulations under Land Use Bylaw 5996. More specifically, he referenced section 66.1(2) of the Land Use Bylaw 5996:

Where the applicant for a Development Permit can demonstrate to the satisfaction of the Development Officer, through a demand study prepared and submitted with respect to the proposed development, that by virtue of the use, character, or location of the proposed development, and its relationship to public transit facilities and other available parking facilities, the parking requirement for the proposed development is less than any minimum or more than any maximum set out in the Parking Schedule, the Development Officer may allow a reduction from the minimum or an increase from the maximum in the number of parking spaces. The Development Officer shall submit the demand study to the City Engineer for his analysis, and the proposed reduction or increase may be approved by the Development Officer only with the City Engineer's concurrence or conditional concurrence. In no case shall the resulting number of parking spaces be less than one per Dwelling in the case of Residential Uses.

- [14] He confirmed that the Applicant submitted a parking justification form, which is the modern equivalent of the "demand study" referred to in section 66.1(2). This parking justification was submitted to the City's Transportation Department, specifically Urban Planning, which is the modern equivalent of the "City Engineer" referred to in section 66.1(2). Urban Transportation completed its analysis and expressed that it had no issues or concerns with the proposed parking variances.
- [15] Based on the above, the Development Officer submitted that in his view, the intent of section 66.1(2) has been substantively complied with.
- [16] The Board noted that in his written submissions, it would appear that both his variance powers under the old Land Use Bylaw 5996 and the current *Edmonton Zoning Bylaw 12800* were referenced. Mr. Adams clarified that he referenced section 11.4 of the *Edmonton Zoning Bylaw* because the current application is for a Restaurant, which is a Use Class that appears only in the current *Edmonton Zoning Bylaw 12800*. However, he confirmed that the variance powers he exercised were as identified in section 66.1(2) of the Land Use Bylaw 5996, which is worded slightly differently, though the powers afforded are similar.

iii) Position of the Respondent, Ms. E. Tesfastion

- [17] Ms. Tesfastion was accompanied by Ms. S. Clancy, Architect.
- [18] Ms. Clancy explained that they have discussed the proposed development with both the Community League and the North Edge Business Association, as Ms. Tesfastion wishes to satisfy the community. Based on their discussions and knowledge of the surrounding area, it was the Respondent's understanding that two condominium complexes are being developed, and the proposed Restaurant would be ideally situated to attract the new foot traffic. Ms. Clancy submitted that the Restaurant will contribute to the transition in this neighbourhood to a mixed use area.
- [19] The Board referenced both the new revised plans as well as the original plans submitted to the previous Development Officer. The Board questioned whether the new plans propose an outdoor patio, which does not appear on the previous plans. Ms. Clancy clarified that the outdoor patio had always been a part of the application. However, it was not included on the original plans and therefore was not included as part of the seating count. The revised plans clarify that the patio seating is also to be included in the seating count, which does impact the parking requirements. However, she stressed that the outdoor patio does not take away from the available parking space.
- [20] To address some of the concerns about the parking variances, Ms. Tesfastion has negotiated an informal parking agreement with the adjacent Goodlife Fitness Centre for staff parking. She confirmed that this agreement is not an official, off-Site Accessory Parking agreement.

iv) Position of Property Owner in Support of the Development, Mr. A. Morgulis

- [21] Mr. Morgulis stated that he is the landlord for the subject property, and he wished to provide a development perspective for the subject Site.
- [22] He explained that when he purchased the building in 2003, it was for tire storage and some woodwork. He subsequently met with the City to incorporate all the Use classes which are now listed in DC2.743. As the City grows, these warehouse districts will transition to general use.
- [23] At the time, he also worked with the City to maintain parking along the north side, while south side parking is removed for the bike lane. He pointed out that Magic Lantern employees have parked in his parking area as well, but he has never enforced parking as he wished to be neighbourly.
- [24] He submitted that the proposed development's peak period will mostly be in the evenings, at which time, most of the other tenants have closed shop for the day.

v) *Position of the Queen Mary Park Community League*

- [25] The Community League was represented by Mr. R. Shuttleworth.
- [26] Mr. Shuttleworth confirmed the information provided by the Development Officer with respect to the original application and the subsequent discussions between the Community League, the City of Edmonton Parking Management, the landlord of the subject property, and the Applicant.
- [27] Mr. Shuttleworth explained that when the Community League becomes involved with a development proposal, they look at the overall impact of the development on the area, not just for that particular Site. At the time, they were concerned that the parking variance was too large, and the discussions therefore focused on reducing the parking requirements.

vi) *Position of the North Edge Business Association*

- [28] The Business Association was represented by Ms. L. Viarobo.
- [29] Ms. Viarobo acknowledged the efforts of the Applicant to work with the community. The Business Association is trying hard to attract destination businesses that are also pedestrian friendly. Based on her understanding of the development and the surrounding circumstances, it would appear that the appeal is essentially due to a conflict between the old warehouse use for this area, and the transition to new general use.
- [30] It was her view that the Development Officer has made the correct decision, as the proposed business fits within the applicable statutory plans, which anticipates additional residential uses and amenities.
- [31] As for the parking concerns, she noted that people coming to the area are now starting to recognize that there are alternative modes of transportation such as public transit or bicycling.

vii) *Rebuttal of the Appellant*

- [32] Mr. Evans stated that to the best of his knowledge, there is no access from the Goodlife parking lot to the subject property, and that without an official parking agreement, there is no guarantee of the parking arrangement.

Decision

- [33] The appeal is DENIED and the decision of the Development Authority is CONFIRMED. The development is GRANTED, subject to the Conditions as set out in the approved permit number 224601991-003, issued on November 3, 2016.

Reasons for Decision

- [34] The subject property is located in a direct control district established under Bylaw 15126. As such, the Board's jurisdiction is limited on this appeal to the operation of section 641(4)(b) of the *Municipal Government Act*, which states:

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.

- [35] The Board is therefore limited on this appeal to making a determination as to whether the Development Authority followed the directions of Council as set out in Bylaw 15123. At issue, in making that determination, is whether the Development Authority had the jurisdiction under the direct control bylaw to grant the parking variance that it did.

- [36] Direct Control Bylaw 15126 does not contain any specific parking regulations. Instead, it incorporates the parking regulations that are contained in section 66 of the Land Use Bylaw 5996. Section DC2.743.4(j) states: "Developments in this district shall be evaluated with respect to compliance with the General Development Regulations of Sections 50 to 79, inclusive, of the Land Use Bylaw."

- [37] Section 2.4 of the current *Edmonton Zoning Bylaw 12800* states:

Subject only to the provisions in the Municipal Government Act respecting legal non-conforming Uses and notwithstanding the effect it may have on rights, vested or otherwise, the provisions of this Bylaw govern from the Effective Date onward. In particular, no application for a Development Permit shall be evaluated under the procedural or substantive provisions of the previous Land Use Bylaw after the Effective Date, even if the application was received before the Effective Date.

- [38] However, section 2.4 is limited by section 2.7, which states:

Unless there is an explicit statement to the contrary in a Direct Control District or Provision, any reference in a Direct Control District or Direct

Control Provision to a land use bylaw shall be deemed to be a reference to the land use bylaw that was in effect at the time of the creation of the Direct Control District or Provision.

[39] This Board, in reviewing section DC2.743.4(j), finds that this section is an express cross-reference to a provision of the old Land Use Bylaw 5996. The Board arrived at this finding for the following reasons:

- a) This direct control bylaw explicitly references both the current *Edmonton Zoning Bylaw 12800*, and the old Land Use Bylaw 5996. When referencing the current land use bylaw, it uses the words “Zoning Bylaw”; when it references the old land use bylaw, it does so specifically by capitalizing “Land Use Bylaw.”
- b) The General Development Regulations in the current Zoning Bylaw occur over sections 40 to 61. However, the general development regulations of the old Land Use Bylaw are in sections 50 to 79. Therefore, section DC2.743.4(j) is clearly an explicit cross-reference to particular sections of the old Land Use Bylaw 5996.
- c) Section 2.7 of the current Zoning Bylaw was interpreted by the Alberta Court of Appeal in *Parkdale-Cromdale Community League Association v Edmonton (City)*, 2007 ABCA 309, at paragraph 4 as follows:

Such cross-references might not, of course, be directly transferable to the provisions of the new Zoning Bylaw, and section 2.7 was required to ensure that such express references remained meaningful, and faithful to the original intent of the Bylaw.

- d) The only way for the reference to the general development provisions of the old Land Use Bylaw – that being sections 50 to 79 – can be meaningful is to consider it an express cross-reference to the old Land Use Bylaw 5996.

[40] Accordingly, when the Development Authority evaluated the parking requirements for this development by reference to section 66 of the Land Use Bylaw 5996, it was following the directions of City Council as set out in Bylaw 15126.

[41] What remains now is to determine whether the Development Authority assessed the parking requirements under section 66 of the old Land Use Bylaw 5996. The Board finds that it did.

[42] Section 66.1(2) of the old Land Use Bylaw 5996 states:

Where the applicant for a Development Permit can demonstrate to the satisfaction of the Development Officer, through a demand study prepared and submitted with respect to the proposed development, that by virtue of the use, character, or location of the proposed development, and its relationship to public transit facilities and other available parking facilities, the parking requirement for the proposed development is less than any minimum or more than any maximum set out in the Parking

Schedule, the Development Officer may allow a reduction from the minimum or an increase from the maximum in the number of parking spaces. The Development Officer shall submit the demand study to the City Engineer for his analysis, and the proposed reduction or increase may be approved by the Development Officer only with the City Engineer's concurrence or conditional concurrence. In no case shall the resulting number of parking spaces be less than one per Dwelling in the case of Residential Uses.

- [43] While a variance was granted to the parking requirements in Schedule 66A(1), section 66.1(2) contains an explicit variance power for the Development Authority to grant such a variance, if the Applicant provides certain items of information to the Development Authority, and the Development Authority subsequently obtains the approval of what is now known as the City of Edmonton Transportation Department.
- [44] The Board finds that the requirements set out under section 66.1(2) were met, and the Board notes that the Transportation Department had no issues with the parking variance requested. Therefore, the requirements of section 66.1(2) were met, and as section 66.1(2) was incorporated by reference in section DC2.743.4(j), the Development Authority followed the direction set by City Council in granting this variance. Accordingly, the Board must refuse this appeal.

Ian Wachowicz, Chairman
Subdivision and Development Appeal Board

Board Members Present:

K. Cherniawsky; A Peterson; K. Hample; S., LaPerle

Important Information for the Applicant/Appellant

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 - 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 5th Floor, 10250 – 101 Street, Edmonton.

NOTE: The City of Edmonton does not conduct independent environmental checks of land within the City. If you are concerned about the stability of this property for any purpose, you should conduct your own tests and reviews. The City of Edmonton, when issuing a development permit, makes no representations and offers no warranties as to the suitability of the property for any purpose or as to the presence or absence of any environmental contaminants on the property.



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Date: December 16, 2016
Project Number: 229347797-001
File Number: SDAB-D-16-320

Notice of Decision

- [1] On December 8, 2016, the Subdivision and Development Appeal Board heard an appeal that was filed on November 17, 2016. The appeal concerned the decision of the Development Authority, issued on October 28, 2016, to approve the following development:

Construct and operate a Temporary Shelter Service (51 beds temporary trailer for 2 years)

- [2] The subject property is on Plan EF Lot 139, located at 10006 - 105A Avenue NW, within the US Urban Services 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 plans;
- Approved Development Permit decision;
- Correspondence from:
 - Fire Rescue Services,
 - Sustainable Development Drainage Planning and Engineering,
 - Sustainable Development Real Estate and Housing, and
 - Sustainable Development Transportation Planning and Engineering;
- Development Officer's written submissions, dated December 2, 2016; and
- Written submissions of the McCauley Community League.

Preliminary Matters

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

- [5] The Presiding Officer outlined how the hearing would be conducted, including the order of appearance of parties, and no opposition was noted.
- [6] The appeal was filed on time, in accordance with section 686 of the *Municipal Government Act*, RSA 2000, c M-26.

Summary of Hearing

i) Position of the Appellant, McCauley Community League

- [7] The Community League was represented by Mr. P. O'Hara. Mr. O'Hara provided a summary of his involvement with community organizations, businesses and planning-related projects.
- [8] He recognized that everyone has the right to safe housing. However, the issue is whether the proposed development is appropriate on this Site. Mr. O'Hara expanded on his written submissions, highlighting various concerns as follows:
- a) The proposed development results in a loss of 16 parking spaces adjacent to Hope Mission, which will exacerbate parking stresses in the community, as Hope Mission staff will have to seek parking elsewhere on the street.
 - b) There is concern that the proposed Temporary Shelter Service, approved for a two year period, will serve as a permanent Temporary Shelter Service. The conditions of the permit provide for no provision for assessing impact on area businesses or the community.
 - c) The reduced setback means that the development will have a large Site Coverage, which is of particular concern in those instances where a large number of people are lining up outdoors to obtain entry into the facility.
 - d) As recently as April 2016, City Council passed a resolution to extend indefinitely the moratorium on using City funds for affordable housing in five Edmonton communities, including McCauley. The Appellant recognized that funding in this instance is coming from the provincial government, specifically the Ministry of Human Services. However, he has coordinated research and policy development regarding non-market housing in Edmonton, and based on 2010 data, McCauley was identified as one of thirteen high threshold neighbourhoods for non-market housing. There is concern about excessive concentration in this area.
 - e) A number of stakeholders were not consulted about the development, including the Community League and the Chinatown Business Association.
- [9] Mr. O'Hara provided a summary of the surrounding uses. To the north of the subject Site, across the street on 106 Avenue are four to five businesses; to the west on the same blockface is Jamieson Centre, a shelter run by the Applicant, as well as some administrative offices; to the south and across the street on 105A Avenue is Immigration Hall, which is also a part of Hope Mission; and to the east, across the street from the

subject property on 100 Street, is the George Spady detox centre, also run by the Applicant.

- [10] While it may appear that a number of emergency shelters are centred around the subject Site, it is his experience that there is often a ripple effect on the rest of the neighbourhood, dependent about the concentration and number of the non-market housing. This ripple effect adds to existing problems and impacts upon opportunities for other types of developments. Upon questioning by the Board, he clarified that the research indicates no causal links, though there are associated links between concentration and impact upon neighbouring businesses.
- [11] The Board referred to the Development Officer's written submissions, which indicated that a similar development for 30 beds was approved in 2002. In response, Mr. O'Hara noted that the community may not have been aware of the potential impacts of 30 beds upon the neighbourhood at the time.

ii) Position of the Development Authority

- [12] The Development Authority was represented by Ms. C. Prpich and Mr. M. Harrison. They were accompanied by Mr. C. Spencer, from Sustainable Developmetn Housing and Homelessness.
- [13] Ms. Prpich noted that Temporary Shelter Service is a residential-related Use class under the *Edmonton Zoning Bylaw*. She reviewed her written submissions, and noted that when she reviewed the subject application, she took into consideration that the abutting properties most affected by the setback deficiencies belonged to the same Applicant organization. Considering that the proposed Temporary Shelter Service is being approved for a temporary two year period, she opined that requiring landscaping would be an unnecessary hardship.
- [14] With respect to the surrounding areas, Mr. Prpich confirmed that there is surface parking on the southeast corner of 106 Avenue and 101 Street, and commercial development on the corner of 106 Avenue and 100 Street.
- [15] Mr. Prpich also clarified that contrary to the Appellant's submission, the City of Edmonton's Housing and Homelessness branch was indeed contacted with respect to the proposed development.
- [16] Upon questioning by the Board regarding the 2002 approval of a similar development for 30 beds, she confirmed that it was also for trailers. She speculated that it may have been an application for one trailer, and assumed that it would include washing facilities.
- [17] She confirmed that the current application requires no parking variance, as Temporary Shelter Service Uses do not require parking.

- [18] The Board noted that there appeared to be some confusion with the use of the term “temporary”. “Temporary Shelter Services” as a term is the defined Use Class which is the application before this Board. The permit itself is being issued on a “temporary” basis for a two year term. Ms. Prpich confirmed that this was her understanding as well, and that it is possible for a “Temporary Shelter Service”, which provides for short term emergency shelter services requiring such types of accommodations, to be developed and constructed on a permanent basis. When questioned, she was unsure of the Applicant’s business reasons for requesting a temporary permit.
- [19] The Board also sought clarification as to whether the *Edmonton Zoning Bylaw* provides for concentration controls as it does for other impactful developments such as Digital Signs or Major and Minor Alcohol Sales Uses. Ms. Prpich stated that she was unaware of any such limitations for Temporary Shelter Services, and no guidance is provided to the Development Officer as to what might be an appropriate number to consider for a “tipping point”.

iii) Position of the Respondent, SNC Lavalin and Alberta Infrastructure

- [20] The Respondent was represented by Mr. M. Dawson, but he deferred to the representatives from Alberta Infrastructure, as SNC Lavalin was acting as an agent for the provincial ministry when it made its application.
- [21] Alberta Infrastructure was represented by Mr. J. Prosser and Mr. A. Alarcon.
- [22] Mr. Prosser explained that the subject project was initiated in response to an ongoing need for beds for their building’s tenant, Hope Mission. Their tenant had been using the Edmonton Remand Centre to provide overflow Temporary Shelter Services on extremely cold days. The fact that the Hope Mission was operating out of two separate locations for its emergency shelter services presented logistical difficulties and challenges. This project would therefore not only address some of the impacts of the closure of the Remand Centre, but also some of the aforementioned logistical challenges.
- [23] With respect to the Appellant’s submissions regarding the consultation process, Mr. Prosser explained that the proposed development did not represent a significant change to the area. The operation of the Temporary Shelter Service will remain entirely on the same Site on which Hope Mission is located. The same staff who run Hope Mission will also run subject development, and will in fact be able to run the services more efficiently as the Temporary Shelter Service will now operate from one location.
- [24] It was therefore Alberta Infrastructure’s view that the proposed development was actually a good fit for the surrounding area. The adjacent building is already providing the current proposed services to the target market; there is sufficient room in the parking lot of the subject Site itself to construct the two trailers without having to develop on a separate Site; and it was his understanding that the tenant could arrange alternative parking to

accommodate the elimination of some of the parking spaces in this parking lot. Considering these factors, the proposed development on this subject Site seemed logical.

- [25] Upon questioning by the Board, Mr. Prosser stated that it was his understanding that in the first year of the permit granted for the Temporary Shelter Services operating out of the Remand Centre, 120 beds was approved; in the second year, that number dropped and though he did not have an exact figure, he believed it was for more than 50 beds.
- [26] Mr. Prosser confirmed that Alberta Infrastructure had not been aware of the city's moratorium on the use of city funding to provide for non-market housing; this was something he became aware of only after the appeal was filed.
- [27] Mr. Prosser did not know of his tenant's long term plan for the proposed Temporary Shelter Service, nor of its viability. It was his understanding that the temporary two year permit was to deal with the immediate challenges presented by the closure of the Remand Centre. However, he submitted that the tenant, Hope Mission, would be better able to provide clarification in this regard.

iv) Position of Person Affected by the Decision of the Development Authority, Hope Mission

- [28] Hope Mission was represented by Mr. B. Reith, Director.
- [29] Responding to the Appellant's comments about spreading affordable housing throughout the city rather than concentrating in the McCauley area, Mr. Reith noted that Hope Mission has attempted one such development, and was met with opposition and a strong sense of "Not In My Backyard" syndrome. With respect to the City's moratorium, it was his view that the moratorium covers only funding for affordable housing, and not for emergency temporary shelter services.
- [30] With respect to impacts upon neighbouring properties, Mr. Reith identified a sort of "boundary" surrounding what he terms the Hope "District", which is bound by 101 Street to the west extending north up to the Brick on 107 Avenue, and toward the east up to the new Royal Alberta Museum Site. In effect, these major arterial roads serve as a kind of "boundary" for the emergency shelter services provided by Hope Mission, which should mitigate the impacts identified by the Appellant.
- [31] With respect to the previously approved development in 2002, he clarified that it was in fact for 60 beds, not 30. Two trailers were constructed side-by-side, one for 30 youth, and one for 30 men, each with washroom facilities. The entire development took up the whole parking lot.
- [32] He disagreed with the view that the proposed development serves as an attractor for homeless people, as the homeless are already on the streets in the area. In fact, the development will take some of the homeless off the streets and provide them with safe shelter.

- [33] Mr. Reith acknowledged that some of the parking has been lost due to this development. However, he clarified that these spaces were being used by staff, two Hope Mission trucks, and six converted ambulances. Hope Mission has separate off-site parking, and the ambulances and trucks have been relocated to this off-site parking. He is currently seeking alternative arrangements with Alberta Infrastructure for the remainder of the half dozen staff parking spots which have been impacted by the development.
- [34] Upon questioning by the Board with respect to the reasoning behind the request for a temporary permit, Mr. Reith explained that his vision for Hope Mission is to have an entirely brand new building to address the increasing homeless and at-risk population. He would prefer to demolish the trailer in the future, and build a permanent expanded structure to handle a greater capacity. In the meantime, the two year permit will help to keep down the costs of having to constantly move equipment in and out.
- [35] Mr. Reith also clarified that the two trailers being proposed will not be connected to the existing Hope Mission facilities.

v) *Position of RK Architects*

- [36] RK Architects was represented by Architects, Ms. K. Devries and Mr. G. Martindale. Mr. Martindale explained that he was both the Architect and the Director for this project.
- [37] The two proposed trailers would be very easily decommissioned, and the nature of the structure is such that by definition under the Building Code, it is a temporary structure. He confirmed that even the washroom facilities are temporary units as well.
- [38] He acknowledged that from his perspective, landscaping on the Site would be ideal. However, he noted that there is no landscaping to begin with, and based on the budget that he had to work with, landscaping would not have been possible.

vi) *Rebuttal of the Appellant*

- [39] The Appellant noted that the 2002 approval for a similar Temporary Shelter Service was never evaluated for its impact upon the neighbourhood. Although some employees from Sustainable Development Housing and Homelessness may have been aware of the subject development, he speculated that the Executive Director likely was not.
- [40] Mr. O'Hara also disagreed with Hope Mission's submission that the moratorium was restricted to affordable housing. In his view, it is a moratorium on both affordable and emergency housing.

Decision

- [41] The appeal is DENIED and the decision of the Development Authority is CONFIRMED. The development is GRANTED for a two year period, expiring on October 28, 2018, subject to the CONDITIONS as set out in the approved permit number 229347797-001, issued on October 28, 2016.
- [42] In granting this development, the following VARIANCES to the *Edmonton Zoning Bylaw* are allowed:
- 1) Section 55.3(1)(b)(i) is varied to permit zero trees and shrubs to be provided for the subject development, instead of the required 20 trees and 33 shrubs.
 - 2) Section 510.4(1) is relaxed to permit a deficiency of 1.28 metres to the distance from the proposed Temporary Shelter Service trailers to the front property line along 105A Avenue, for a total of 4.72 metres instead of the required 6.0 metres.
 - 3) Section 510.4(3) is relaxed to permit a deficiency of 4.27 metres to the distance from the proposed Temporary Shelter Service trailers to the side property line shared with the abutting lot to the west and with 100 Street, for a total of 0.23 metres instead of the required 4.5 metres.

Reasons for Decision

- [43] The proposed development is for a Temporary Shelter Service, which is a Discretionary Use in the US Urban Services Zone.
- [44] Discretionary Uses should be allowed unless the evidence before the Board demonstrates that the proposed Use is incompatible with the surrounding existing land uses. In this matter, the Board heard evidence that the proposed Temporary Shelter Service is in fact characteristic of the immediate neighbourhood.
- [45] Having reviewed both the documentary evidence and oral submissions of the parties, the Board finds that the uses to the west of the subject property consist of a vacant lot and the arterial road of 101 Street. To the east is a large storage facility. To the south is another shelter, and to the north is a commercial development. With the potential exception of the commercial area to the north, the proposed Temporary Shelter Service is not incompatible with the surrounding uses. The Board notes that no one from the commercial development to the north attended the hearing, nor provided written submissions, in opposition to the proposed development.
- [46] The proposed Use is an intensification of the existing Use on the subject property, which is currently being used for Temporary Shelter Services, and the proposed development serves as a two year temporary expansion of this existing operation. The Board has noted

that there are no residential developments directly adjacent to the subject property, no nearby schools, parks or Major or Minor Alcohol Sales. As a result, the Board finds that the proposed development is not an incompatible use with the existing and surrounding land uses, therefore this Discretionary Use is allowed.

- [47] The Board now has to consider whether to uphold the variances granted by the Development Authority, namely, variances to landscaping requirements, as well as relaxations to the front and side setbacks for the distance from the property line to the proposed Temporary Shelter Service trailers.
- [48] With respect to all the variances, the Board notes that the permit granted by the Development Authority is itself a temporary permit expiring in two years. This temporary permit reduces the need – and indeed, even the wisdom of a landscaping plan – when the proposed structures may not be in the proposed locations two years from now.
- [49] Additionally, aerial photography of the subject property shows that with the exception of some vegetation immediately to the south on 105A Avenue, sparse landscaping is typical of this neighbourhood. For these reasons, the variance to the landscaping requirement is granted.
- [50] With respect to the variances to the Front and Side Setbacks, the Board notes that the commercial development north of the subject Site also extends entirely to the east boundary along 100 Street, so this type of Setback relaxation is again, not atypical of developments in this area. When considered in light of the fact that the structure immediately to the east of the subject property and across from 100 Street is a warehouse, the impact of the reduced setbacks is limited.
- [51] For the above reasons, the Board finds that the proposed development will not unduly interfere with the amenities of the neighbourhood, nor materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land. The appeal is therefore allowed.

Ian Wachowicz, Chairman
Subdivision and Development Appeal Board

Board Members Present:

K. Cherniawsky; A Peterson; K. Hample; S. LaPerle

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 5th Floor, 10250 – 101 Street, Edmonton.
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 5th Floor, 10250 – 101 Street, Edmonton.

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.