

EDMONTON SUBDIVISION AND DEVELOPMENT APPEAL BOARD

Citation: Stantec Consulting Ltd. v Development Authority of the City of Edmonton, 2019
ABESDAB 10193

Date: December 13, 2019
Project Number: 325661133-002
File Number: SDAB-D-19-193

Between:

Stantec Consulting Ltd.

and

The City of Edmonton, Development Authority

Board Members

Mark Young, Presiding Officer
Brian Gibson
Melanie McCallum
Laura Delfs
Art Peterson

DECISION

[1] The Subdivision and Development Appeal Board (the “Board”) at a hearing on November 6, 2019, made and passed the following motion”

“That the appeal hearing be scheduled for December 10 or 11, 2019 at the written request of Legal Counsel for the Appellant.”

[2] On December 10, 2019, the Board made and passed the following motion:

“That SDAB-D-19-193 be raised from the table.”

[3] On December 10, 2019, the Board heard an appeal that was filed on October 11, 2019 for an application by Stantec Consulting Ltd. The appeal concerned the decision of the Development Authority, issued on September 20, 2019, to refuse the following development:

Change the use from a General Retail Store to a Liquor Store, limited to 275 square metres (Proposed Floor Area 165 square metres)

- [4] The subject property is on Plan 5809KS Blk 64 Lot 6, located at 10615 - 82 Avenue NW and Plan 5809KS Blk 64 Lot 7, located at 10631 - 82 Avenue NW, within the DC1 - Direct Development Control Provision. The Strathcona Area Redevelopment Plan 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 attachments, proposed plans, and the refused Development Permit;
 - The Development Officer's written submissions;
 - The Appellant's written submissions; and
 - Online responses.

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 appeal was filed on time, in accordance with Section 686 of the *Municipal Government Act*, RSA 2000, c M-26 (the "*Municipal Government Act*").

Summary of Hearing

- i) *Position of Ms. Lew, representing Stantec Consulting Ltd., who was accompanied by Mr. Burr, the Developer*
- [9] Ms. Lew read from her written submission.
- [10] The proposed Liquor Store is a high end wine store that is approximately 165 square metres (1776 square feet) in area.
- [11] The proposed Liquor Store is in the established neighbourhood of Queen Alexandra located adjacent to Strathcona and Garneau.
- [12] The commercial retail unit is located within the Southpark development, directly south of Whyte Avenue.

- [13] The subject Site was a former car dealership and is currently under construction with a mixed use development.
- [14] The Development Officer refused the development permit for the following reasons:
- i. Zoning Bylaw Section 85(1) – Any Liquor Store shall not be located less than 500 metres from any other Liquor Store.
- [15] The proposed Liquor Store is approximately 284 metres away (as the crow flies) from an existing Liquor Store and approximately a 340-metre walk from the existing Liquor Store.
- [16] Historically, there have been several Liquor Stores which have been approved within 500 metres of an existing Liquor Store since the *Edmonton Zoning Bylaw* was amended in 2007.
- [17] Since the Bylaw was approved, several amendments have been made to Section 85 of the *Edmonton Zoning Bylaw* including exemptions to restrictions on separation distances between Liquor Stores for large commercial sites in a suburban context and to add additional design and parking regulations.
- [18] It was their submission that in this case as City Council approved the zoning for the site in March 2017 with Liquor Stores (previously listed as Minor Alcohol Sales and Major Alcohol Sales) as a Permitted Use, City Council's direction was to permit a Liquor Store on the site despite the two Liquor Stores located within 500 metres that were existing at the time.
- [19] There are no other regulations in regards to Liquor Stores referenced within the DC1 Direct Development Control Provision.
- [20] The Development Officer has referred back to Section 85 of the parent *Edmonton Zoning Bylaw* for the refusal which the Subdivision and Development Appeal Board has the authority to vary.
- [21] The area is higher in density than some of the other developing neighbourhoods.
- [22] From the 2019 Municipal Census, there were 21,000 residents residing in the neighbourhoods of Queen Alexandra, Strathcona, and Garneau, nearly double the population of downtown.
- [23] The proposed Liquor Store is in conformance with the plans in place for the area. Plan Whyte promotes adding vitality and increased modern retail and business to the area with a population forecasted to include another 8,000 new residents within the next 25 years.

- [24] The plan identifies a need for small retail commercial opportunities along Whyte Avenue.
- [25] The proposed Liquor Store is in conformance with the new City Plan that identifies Whyte Avenue as a primary corridor offering a broad range of employment, retail, and commercial opportunities.
- [26] The proposed Liquor Store will provide employment opportunities and will provide residents with a variety of choices.
- [27] Mr. Burr spoke on behalf of the developer, One Properties and Wheaton Properties Group.
- [28] This is the first building in a multi-phase development.
- [29] The intent is to create a vibrant mixed use development with new residential units and attractive retail.
- [30] It is important to understand the intent of what they are trying to achieve.
- [31] He referred to the photographs submitted at the hearing showing another store operated by the proposed tenant that is a high end wine display and food pairings development. The intent is to provide an offering that is not currently available on Whyte Avenue.
- [32] The proposed development will complement their investment and provide new occupants and residents with an alternative choice. It is clear from their analysis that amenities such as a high end wine store will make their development more attractive and enhance the vibrant urban feel of the area.
- [33] In his opinion, the separation distance between Liquor Stores in Section 85 of the *Edmonton Zoning Bylaw* is monopolistic in nature or intent and is intended to limit supply and restrict consumer choice.
- [34] When City Council listed Minor and Major Alcohol Sales as Permitted Uses in the DC1, they gave direction that such uses should be allowed notwithstanding the presence of other Liquor Stores within 500 metres.
- [35] Ms. Lew and Mr. Burr provided the following information in response to questions by the Board:
- a. The *Municipal Government Act* does not allow the Board to vary the Direct Control Zone itself. However, where the Development Officer refuses the permit based on the parent bylaw and not a regulation within the Direct Control itself, the Board has the opportunity to vary the parent *Edmonton Zoning Bylaw*.
 - b. City Council approved Liquor Stores as Permitted Uses within the zone itself.

- c. There were two Liquor Stores within 500 metres of the proposed development at the time City Council passed the DC1. City Council had full knowledge of this and still included Liquor Stores as a Permitted Use in the DC1. This indicates their intent that the 500-metre separation distance should not prohibit a Liquor Store in the DC1.

ii) Position of Mr. H. Kandola, an Affected Property Owner in Opposition to the Appellant

- [36] Mr. Kandola is representing Tops Liquor Store which is located approximately 284 metres northwest of the subject Site.
- [37] His clients have had their stores since 1997.
- [38] The Tops Liquor store hours of operation are from 10:00 a.m. to midnight during the week and from 10:00 a.m. to 1:00 a.m. on the weekends.
- [39] The Liquor Store does not stay open past 1:00 a.m. due to crime in the area and the recent economic downturn.
- [40] There are approximately six Liquor Stores within a one-kilometer radius of the subject Site, not including bars.
- [41] He disagrees with the Appellant that what they are proposing is not currently available.
- [42] Some of the Liquor Stores in the area are within 650 metres to 900 metres of his client's Liquor Store.
- [43] His client's Liquor Store experiences crime and theft on most days.
- [44] The changes to the regulations in 2016 regarding Liquor Store separation distances granted an exemption to accommodate existing stores.
- [45] One of the areas granted the exemption was the Whyte Avenue commercial space.
- [46] The 500-metre separation distance has been effective in restricting further proliferation of new Liquor Stores along established commercial corridors such as Whyte Avenue.
- [47] A report from the Edmonton Police Service concluded that there was a significant positive correlation between the number of crimes and the number of Liquor Stores in areas where the distance between Liquor Stores is less than 379 metres on average.
- [48] In this case, the proposed store would be less than 379 metres from his client's store.
- [49] An Alberta Health Services report from June 2016 concluded that Liquor Store density could be a major public health concern and there appears to be a strong association between density and violence as well as underage drinking.

- [50] The Appellant feels that the 500-metre distance is monopolistic and should not apply in this higher denser community. This is irrelevant. These are arguments that have been made since 2016.
- [51] Council has considered these arguments but has maintained the reasonable limit on the distance between Liquor Stores.
- [52] In April 2016 a poll of 1,700 Edmonton residents conducted on behalf of the Alberta Liquor Stores Association found that close to 60 percent of Edmonton residents were opposed to any change that would eliminate the distance between liquor stores.
- [53] In 2019, City Council revisited the issue around Liquor Store distances as it applied to mature communities. They decided they would not change the 500-metre rule, even in higher density situations, which is one of the Appellant's arguments. Council felt that loosening the rules would cause the proliferation of Liquor Stores and the negative consequences that come with that.
- [54] In his opinion, the Development Officer followed the directions of City Council and these types of appeals should not be allowed.
- [55] Mr. Kandola provided the following information in response to questions by the Board:
- a. He confirmed that the distance between the Sobeys Liquor Store and his clients Liquor Store on 109 Street is 650 metres.

iii) Position of the Development Officer, Mr. N. Shah

- [56] The Development Authority did not appear at the hearing and the Board relied on Mr. Shah's written submission.

iv) Rebuttal of the Appellant

- [57] With regard to the Edmonton Police Service report, the Appellant spoke to the Police about Liquor Stores in general. The Police Service stated that they did not have any proof that Liquor Stores increase crime. The Police Service had no comment about increasing the density of Liquor Stores and stated they would deal with any issues by policing the area.

Decision

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

Reasons for Decision

[59] The proposed development is located in the DC1 Direct Development Control Provision (Bylaw 17848) the “DC1”. Therefore, this appeal is subject to Section 685(4)(b) of the *Municipal Government Act* which states:

685(4) Despite subsections (1), (2) and (3), 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.

[60] Accordingly, the Board must determine whether or not the Development Officer followed the directions of Council in refusing the proposed development permit.

[61] In the DC1, Major and Minor Alcohol Sales are listed Uses at the location of the proposed development.

[62] Section 3.2.1(l) of the *Edmonton Zoning Bylaw* states:

...

l. Major Alcohol Sales is deemed to be Liquor Stores

m. Minor Alcohol Sales is deemed to be Liquor Stores, limited to 275 square metres.

[63] In refusing the development permit, the Development Officer relied on Section 85 of the *Edmonton Zoning Bylaw*, the relevant portions of which state:

1. Any Liquor Store shall not be located less than 500 metres from any other Liquor Store.

2. Notwithstanding subsection 85(1), a Liquor Store may be located less than 500 m from any other Liquor Store if located:

a. outside the boundary shown in Appendix 1 to Section 85, provided:

i. the Liquor Stores are located on separate Sites, and

- ii. at least one Liquor Store is located on a Site greater than 2.5 ha in size that is zoned CSCa, UVCa, GVC, TCC, DC1, DC2, CSC, CB1, CB2, CHY, CO or CB3.

...

6. Notwithstanding Section 11 of this Bylaw, a Development Officer shall only grant a variance to subsection 85(1) or subsection 85(2) as outlined in subsections 85(7), 85(8) and 85(9).
7. When the Development Officer receives an application for a Development Permit that is for the purpose of accommodating the temporary relocation of an approved Liquor Store within 500 m of its original location, a variance to subsection 85(1) or subsection 85(2) may be granted where:
 - a. the application for the Development Permit is for a Temporary Development, in order to limit the introduction of an additional Liquor Store within 500 metres of the original approved Development Permit;
 - b. the temporary location for any Liquor Store is not within 500 metres of any legally conforming Liquor Store; and
 - c. the application for a Development Permit will not result in a total Floor Area for a Liquor Store that is 10.0% greater than the Floor Area of the existing approved Liquor Store, to a maximum increase of 50 square metres.
8. When a Development Officer receives an application for a Development Permit that is for the purpose of accommodating the reversion of an existing approved Liquor Store back to its original location on a Site, a variance of subsection 85(1) or subsection 85(2) may only be granted where the application for the reversion is submitted to the Development Officer within 5 years of the date of vacating the original location and the application will not result in a total Floor Area that is greater than the original approved Liquor Store.
9. The issuance of a Development Permit which contains a variance pursuant to subsection 85(7) shall be issued as a Temporary Development for a duration of up to 5 years or less, to be determined by the Development Officer.

[64] The Development Officer relied on Section 85(1) to refuse the development permit because the proposed Liquor Store would be located within 500 metres of an existing Liquor Store. Section 85(2) does not apply in this situation because the proposed Liquor Store would not be located outside the boundary shown in Appendix 1.

- [65] Section 85(6) limits the Development Officer's discretion to grant variances to the 500-metre separation distance to certain very specific circumstances, none of which apply to this case.
- [66] Accordingly the Development Officer does not have the authority to grant a variance to the 500-metre separation distance in this situation.
- [67] The Appellant argued that the Development Officer made an error in interpreting Council's direction because, at the time the DC1 came into effect, there were two other Liquor Stores within 500 metres of the proposed development.
- [68] The argument is that City Council would not have listed Liquor Stores as a Use in the DC1 knowing that there were other Liquor Stores in the area that would prohibit such developments in the DC1.
- [69] The Board does not accept that submission. If City Council wanted to exempt Liquor Stores in the DC1 from the 500-metre separation distance requirement, they would have done so explicitly.
- [70] The Board is of the view that it would be improper to impute such an intention on part of City Council simply on the basis that Liquor Stores is a listed Use in the DC1.
- [71] There is the possibility that any other Liquor Stores within the 500-metre separation distance of the DC1 will cease to exist, thereby allowing a Liquor Store to be developed in the DC1 in the future. It is more reasonable to interpret Council's directions in this light rather than to impute an intention to implicitly waive the separation distance requirement.
- [72] The Appellant also argued that the Development Officer erred in interpreting the directions of City Council because the DC1 does not specifically include Section 85 within it. The argument is that, while the Board does not have the authority to vary the provisions of the DC1, the Board does have the power to grant variances to the *Edmonton Zoning Bylaw*.
- [73] The Board rejects this argument. Section 710.4(5) of the *Edmonton Zoning Bylaw* states:
5. 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.
- [74] Therefore, Section 85 is included among those regulations that apply to the DC1 and the Board concludes that the provisions of that section form part of the directions of Council that the Development Officer was obliged to follow. The Board notes that Section 710.4(5) says that the regulations apply in the Direct Development Control Provision unless such regulations are *specifically* excluded or modified. There is nothing in the DC1 specifically modifying or excluding the application of Section 85.

[75] The Board finds that the Development Officer did not err in interpreting the directions of City Council. Accordingly, the Board does not have the jurisdiction to interfere with the Development Officer's decision in this matter and the appeal is denied.



Mark Young, Presiding Officer
Subdivision and Development Appeal Board

CC: City of Edmonton, Development & Zoning Services, Attn: Mr. N. Shah / Mr. H. Luke
Stantec, Attn: Y. Lew
T. Burr
Tops Liquor, Attn: H. Kandola / A. Aggarwal / R. Aggarwal / J. Deol
Lizotte & Associates, Attn: S. Keomanivong

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 Development & Zoning Services, 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.