

Edmonton Subdivision and Development Appeal Board

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Date: March 4, 2016
Project Number: 179263305-003
File Number: SDAB-D-16-058

Notice of Decision

[1] On February 18, 2016, the Subdivision and Development Appeal Board heard an appeal that was filed on January 21, 2016. The appeal concerned the decision of the Development Authority, issued on January 11, 2016, to refuse the following development:

change the Use from Convenience Retail Stores to Specialty Food Services (36 sq.m Public Space) (Grandma Pizza)

[2] The subject property is on Condo Common Area (Plan 9023143), located at 9835 - 113 Street NW and Plan 9023143 Unit 233, located at 9837 - 113 Street NW, within the RA9 High Rise Apartment Zone. The Oliver Area Redevelopment Plan applies to the subject property.

[3] The following documents, which were received prior to the hearing and are on file, were read into the record:

- Appellant's Notice of Appeal and Reasons for Appeal, received January 21, 2016;
- Appellant's further written submissions accompanied by photographs and newspaper articles, received February 12 and 18, 2016;
- Canada Post receipt confirming delivery of the refused permit decision;
- Email from the Development Authority to the Appellant about the refused permit decision, dated January 11, 2016;
- Copy of the refused permit and plans;
- Development Officer's written submissions, dated February 10, 2016;
- Letter from the Oliver Community League in support of the development;
- Email from the Victoria Park Condominium Board, in support of the development;
- Email from an affected property owner, in support of the development;
- 6 online responses in support of the development; and
- 1 online response in opposition to the development.

Summary of Hearing

- [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 appeal was filed on time, in accordance with Section 686 of the *Municipal Government Act*, RSA 2000, c M-26.
- [6] The Presiding Officer noted that the Development Authority refused the application because the proposed Use requires 150 Dwellings or more, and although the Development Authority has the authority to waive or vary development regulations, it does not have the authority to vary or change Uses.

i) Position of the Appellant, J & J Pizza Production

- [7] The Appellant was represented by Mr. J. Kulig,
- [8] Mr. Kulig noted that the Victoria Park Building in which the subject development is located actually contains 120 dwellings, plus six independent units within the building for a total of 126 units.
- [9] He explained that when he applied for the development permit, a City employee reviewed the listed Uses under the RA9 Zone, and selected Specialty Food Services as the most appropriate Use classification. Since Mr. Kulig was unfamiliar with the process, he relied upon the staff member's expertise. However, the description of the business as stated in the Development Authority's decision is inaccurate, as J & J Pizza Production is a takeout/delivery only establishment, and does not have dine-in seating.
- [10] Mr. Kulig compared the business operation to a convenience store, wherein condominium residents might take the elevator down to the pizza shop, or neighbourhood customers might quickly drop in to pick up their orders. Although some seating is available for customers should they wish to wait for their orders, no pizza is actually served in the store. Further, no public restrooms are available to customers, and staff members have to use the restroom located within the condominium complex.
- [11] With respect to the Development Permit's advisement regarding parking, Mr. Kulig stated that customers do not typically require extended parking, as they simply stop by briefly to place or pick up orders. He noted that there is one stall directly next to the building that is available for customers picking up their orders. On-street parking on both the east and west side of 113 Street is available for periods ranging from 15 minutes to two hours from Monday to Friday, 9:00 a.m. to 5:00 p.m.
- [12] During questioning, Mr. Kulig clarified that the business was previously co-owned as J & P Pizza Delivery ("J & P"). However, when his partner left the business, Mr. Kulig

decided to apply for a new business licence. Although he does not have a copy of original development permit issued for J & P, he believes one must have been issued.

ii) Position of Victoria Park Condominium Board

- [13] The Victoria Park Condominium Board was represented by Mr. B. McFadden, the Board Chair.
- [14] Mr. McFadden stated that the subject development has been operating for 12 years as a pizza takeout and delivery service.
- [15] The parking demands generated by the pizza shop are not a concern for the Condominium Board, as there is a small roundabout in front of the building where people can park for short periods while they pick up their orders.
- [16] He noted that the City is also promoting higher density living and walkability, and the continued operation of the pizza shop – which serves both the residents of the condominium and the surrounding neighbourhood – furthers these objectives.
- [17] When questioned, he confirmed that a convenience shop once operated out of the subject site.

iii) Position of Affected Property Owner, Mr. K. Quick

- [18] The pizza shop is popular, and has been providing a valuable service to the area for over 12 years. He has never noticed any parking issues caused by the pizza shop, as the business caters exclusively to take out/delivery customers.
- [19] Although Mr. Kulig compared his business to a convenience store, Mr. Quick noted that an actual convenience store would actually cause more nuisances than a pizza shop, as there is litter from convenience store items such as tobacco and lottery tickets.
- [20] Mr. Quick stated that the one online response received in opposition to the development referred to noise and traffic that he believes are concerns which have been addressed years ago, and are no longer an issue with respect to the subject development.

iv) Position of the Oliver Community League

- [21] The Oliver Community League was represented by Mr. D. Martin, who is both the Civics Director and a Board Member of the Community League.
- [22] Mr. Martin noted that the subject development is located in the most densely populated community within the City, in an area which encourages mixed Uses. Since City Council

has directed that greater walkability and pedestrian activity be encouraged within such neighbourhoods, buildings with mixed Uses are needed.

- [23] He acknowledged that the Use class definition requires that Specialty Food Services be located in buildings with 150 Dwellings or more, but it is the Community League's position that the number appears arbitrary. There appears to be no connection between the number of units and the types of businesses permitted in the building.
- [24] With respect to the parking advisement from the Development Permit decision, he emphasized that businesses located in the Oliver community are continually granted variances to parking requirements. Various popular businesses in the area which were granted such variances have not experienced any problems.

v) *Position of the Development Officer, Ms. S. Buccino*

- [25] Ms. Buccino clarified that her decision was based solely on the proposed Use, which is neither a Permitted nor Discretionary Use in the RA9 Zone. The note with respect to parking was provided only as an advisement and did not form the basis for her decision to refuse the application.
- [26] With respect to the original Development Permit issued for J & P Pizza, she searched through both the City's electronic and hard copy files, and could not locate an approved Development Permit for the business. She also confirmed that she was unable to locate a business licence for either the convenience store or for the pizza shop.
- [27] Based on existing documentation, it would appear that some records exist that reference a pizza shop. These records are as follows:
- i) In 1991, a Sign permit was issued for "Victoria Mini Mart". Upon questioning, Ms. Buccino confirmed that a Sign permit is, in fact, also a Development Permit. In this case, it would appear that a permit for a Convenience Store was granted simultaneously with the Sign permit.
 - ii) In 1999, a Safety Codes Complaint was created with respect to a side wall pizza oven vent, possibly in relation to the J & P pizza business.
 - iii) In 1999, a Commercial Gas Permit was issued, with the project name, "Grandma's Pizza".
 - iv) In 2011, a Plumbing and Gas Permit was issued for a pizza oven.
- [28] Mr. Buccino was unsure as to the approval process to obtain a Plumbing and Gas Permit. Although it may not be normal for Plumbing and Gas to sign off on a permit if there is no existing valid Development Permit, she noted that it may also not be necessary, since the Plumbing and Gas Permit relates to an oven and not to a Use.

- [29] With respect to the development approval process, she explained that she reviews each development application by applying the appropriate Use class definition.
- [30] In this case, her review focused on the entire Site, which included the Victoria Park Condominium building. She then reviewed the registered condominium plan, which stated that the Site consisted of 120 units. As such, she was unable approve the proposed Use, as there are no Specialty Food Services for less than 150 Dwellings listed in the RA9 Zone.

vi) Rebuttal of the Appellant, J & J Pizza Production

- [31] With respect to records, Mr. Kulig stated that the previous summer, he had requested copies of the original Development Permit. At the time, the Development Officer indicated that he had something, but was eventually unable to locate the information.
- [32] Mr. Kulig also submitted that a Development Permit must have been issued, since there are inspection stickers from City of Edmonton Plumbing and Gas Services adhered to the oven in his pizza shop.

Decision:

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

Reasons for Decision:

- [34] The Appellant pizza shop, J & J Pizza Production, and the predecessor company, J & P, have both been operated by Mr. Kulig as a takeout and delivery pizza establishment on the subject site for 12 years.
- [35] Based on evidence provided by residents of Victoria Park Tower, the Chair of the Victoria Park Condominium Board, the Civics Director of the Oliver Community League, and an affected property owner living within the notification area, this business is a popular establishment. The evidence before the board was that the proposed development has not, in its 12 years of operation, caused any parking problems.
- [36] Notwithstanding the above, there is no evidence before the Board that there was ever an approved Development Permit for the subject business.
- [37] The Board was presented with evidence that at one time, a Sign Permit for a Convenience Store was granted, and plumbing and gas permits were subsequently issued for "Grandma's Pizza". However, no Development Permit was found by the Development Officer after she searched for one in both the electronic and hard copy archives, and the Appellant was unable to produce a Development Permit before this Board.

- [38] The subject Site is located within the RA9 High Rise Apartment Zone. Permitted and Discretionary Uses for the RA9 Zone list only one potential, appropriate Use for the pizza shop, which is that of a Specialty Food Service.
- [39] Section 7.4(47) of the *Edmonton Zoning Bylaw* defines Specialty Food Services as a “development where limited types of prepared foods and beverages, excluding alcoholic beverages, are offered for sale to the public, for consumption within the premises or off the Site. This Use Class typically relies primarily on walk-in clientele, and includes coffee, donut, bagel or sandwich shops, ice cream parlours, and dessert shops.”
- [40] This definition fits the description of the pizza shop as described by the Appellant.
- [41] Section 230.3 lists the Discretionary Uses in the RA9 Highrise Apartment Zone. Section 230.3(19) states: “Specialty Food Services, for less than maximum seating of 40 occupants and 48 m² of Public Space, within developments containing 150 Dwellings or more”. The requirement that Specialty Food Services be located within developments containing 150 Dwellings or more is contained within the listing of Discretionary Uses and not within the development regulations governing this Zone. The Board is of the view that this requirement is, therefore, a modification of the nature of the Specialty Food Services Use that can be allowed in this Zone.
- [42] The hurdle that the Appellant must overcome is that the proposed Specialty Food Service is located in a building that has, at most, 126 Dwellings. The evidence was divided on this point, with the Development Officer submitting that according to the registered condominium plan, there are 120 Dwellings in the development on the subject Site, and Appellant indicating that there are 126 Dwellings. However, regardless of whether there are 120 or 126 Dwellings located on the subject Site, it is clear that the requirements of Section 230.3(19) have not been met.
- [43] The Board also finds that the proposed development does not fit any of the other Permitted or Discretionary Uses listed in the RA9 Zone.
- [44] Section 687(3)(d) of the *Municipal Government Act* states:
- 687(3) In determining an appeal, the subdivision and development appeal board
- ...
- (d) may make an order or decision or issue or confirm the issue of a development permit even though the proposed development does not comply with the land use bylaw if, in its opinion,
- (i) the proposed development would not
- (A) unduly interfere with the amenities of the neighbourhood, or

(B) materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land, *and*

(ii) *the proposed development conforms with the use prescribed for that land or building in the land use bylaw.* [emphasis added]

[45] The Board finds that the proposed development does not conform with any of the Uses prescribed in the *Edmonton Zoning Bylaw* for the RA9 Zone.

[46] As such, the Board is unable to exercise its discretionary powers under subsection 687(3)(d)(i) to waive the development requirements of the *Edmonton Zoning Bylaw*.

[47] Accordingly, the Board has no choice but to deny the appeal.

[48] The Board notes that if it had the ability to vary the requirement for 150 Dwellings under Section 230.3(19), it would do so for the following reasons:

1. The proposed development had universal support from all who appeared before the Board, including the Oliver Community League and the Victoria Park Condominium Board.
2. The amenity provided by a small pizza takeout/delivery establishment, which has existed for many years and serves to increase the pedestrian orientation of the streetscape, would enhance the amenities of the neighbourhood.
3. Similarly, the Board would grant any parking variance based on the evidence that:
 - a) the Development Officer expressed no concerns with the lack of parking;
 - b) the development has caused no parking problems during its 12 years of operations; and
 - c) the development is a takeout and delivery business which only makes use of short-term parking and does not generate a significant parking load.

[49] Notwithstanding the above, the Board is bound by the Use classification set by City Council through the *Edmonton Zoning Bylaw*, and it must accordingly deny this appeal.

Mr. I. Wachowicz, Chairman
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*, R.S.A. 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 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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SDAB-D-15-238

An appeal to comply with all conditions of Development Permit 149045660-001 or cease the Use and demolish all materials by September 25, 2015, located at 13004 – 33 Street NE was **WITHDRAWN**