



**EDMONTON
TRIBUNALS**

*Subdivision &
Development
Appeal Board*

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Date: February 16, 2017
Project Number: 232004667-001
File Number: SDAB-D-17-023

Notice of Decision

- [1] On February 1, 2017, the Subdivision and Development Appeal Board heard an appeal that was filed on **January 3, 2017**. The appeal concerned the decision of the Development Authority, issued on December 16, 2016, to refuse the following development:

Convert a Single Detached House to a Child Care Services (34 Children) and to construct interior and exterior alterations.

- [2] The subject property is on Plan 5580KS Blk 1 Lot 51, located at 15421 - 79A Avenue NW, within the (RF1) Single Detached Residential Zone. The Mature Neighbourhood Overlay applies to the subject property.

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

- A copy of the *Interpretation Act*;
- A copy of the Development Permit application with attachments, proposed plans, and the refused Development Permit;
- A Transportation Services memorandum submitted by the Development Officer;
- A community consultation submitted by the Development Officer;
- The Development Officer's written submission; and
- On-line responses from two properties in opposition to the proposed development.

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

- Exhibit A – Location of day homes in the area
- Exhibit B – A site plan
- Exhibit C – An aerial Google map of the area

Preliminary Matters

- [5] 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.
- [6] The Presiding Officer outlined how the hearing would be conducted, including the order of appearance of parties, and no opposition was noted.
- [7] As the Subdivision and Development Appeal Board office was closed from December 24, 2016 to January 2, 2017, inclusive, the Board found that the appeal was filed on time, in accordance with section 686 of the *Municipal Government Act*, RSA 2000, c M-26 and section 22 of the *Interpretation Act*, RSA 2000, c I-8.

Summary of Hearing*i) Position of the Appellant, Jonathan Cruze*

- [8] Mr. Cruze purchased this property because a Child Care Service is needed for this area. He wishes to open a small affordable daycare with 34 children to cater to the community needs. He originally proposed to accommodate more than 34 children, but felt that this limit was the best number to minimize any impact on the community. He is passionate about this business and it is his intention to help the community while at the same time making a modest living.
- [9] At the time of purchase he assumed the subject Site was a Corner Lot, which he knows is a locational criteria for a Child Care Services Use. He only found out about the utility lot on the corner after applying for the Development Permit.
- [10] He received much support when he canvassed the neighbourhood to discuss his proposal. The number of children was not indicated on the petition at the time the community consultation was conducted, however the signatories were advised verbally that there would be 30 to 34 children. Mr. Cruze clarified that there are stars beside the names of the property owners on his document to indicate that he spent substantial time speaking with them.
- [11] Mr. Cruze made a presentation to the Lynnwood Community League. The Community League took a neutral position regarding this development.
- [12] Many parents are struggling to find safe and secure day care spaces. It is his intention to allow parents to view the children throughout the day on-line using their cell phones. He wants the parents to have a strong grasp of the service he is providing.

- [13] A map of the immediate area was displayed to show the existing day homes operating across the street to the south of the freeway bridge (“Exhibit A”). He believes one operates evenings and weekends only and provides overnight services. The other one takes in a maximum of 6 younger children during regular working hours Monday to Friday.
- [14] While his consultation documents refer to “24/7” care, Mr. Cruze intends to open a traditional daycare with hours of operation from 6:00 a.m. to 6:00 p.m. Monday through Friday. His research indicated there is no need for overnight or weekend service in this area.
- [15] There will be 4 staff members, which meets the provincial requirement.
- [16] He believes there is parking along 156 Street, but that it is restricted during rush hours. He does not believe seasonal parking bans are in place. The daycare will not be creating traffic issues in front of the house because the rear Lane will be used for parking and drop-off. The rear Lane connects directly to 156 Street. He believes it dead ends about 8 houses towards the east, but is not entirely sure. He will come out into the rear yard of the Site to help families unloading children during the busy morning period.
- [17] In his opinion, the subject Site will become a Corner Lot in the future as the utility Lot will be used for road widening.
- [18] Mr. Malhotra, representing Proconsulting Design & Built reviewed the Floor Area chart on his Site Plan that provided the proposed room sizes for the various ages of children that will be cared for. The minimum required square footage needed per child varies depending on the age of the child; these minimum thresholds are exceeded in all cases. The kitchen is planned to be located in the centre of the home with an internal window to allow staff members to monitor the children while on their breaks.
- [19] The number of staff shown on this chart is a projection only and he confirmed that a maximum of 4 staff will be required. Their intention is to have 15 after school care spaces, 10 baby / toddler spaces and 9 pre-kinder spaces for a total of 34 children.
- [20] Mr. Cruze and Mr. Malholtra reiterated that the main reason for this centre is to provide affordable child care for the community.
- [21] No alterations have yet been made to the building; it is in the same state as it was when purchased.
- [22] In their opinion, there will be no issues with parking and drop off spots for the following reasons:
- (a) One staff member will be outside to assist parents dropping off their children during the morning rush and to ensure their safety.

- (b) It is common practice for parents to signify when children will be dropped off, which will allow the daycare staff to better plan the use of the parking spots.
- (c) Parents can make a quick stop in the Lane to drop off children.
- (d) Not all of the children arrive at the same time. The only children that arrive in the early hours of the morning are those of school age. The remainder of children will be dropped off between 9:00 a.m. and 10:00 a.m.
- (e) Less staff parking will be required as the staff members will be carpooling. This situation will mean that in reality one additional drop-off space will be provided.
- (f) Many of the children will come from the immediate neighbourhood and will walk there.
- (g) At one point they had considered demolishing the garage to increase the parking spaces but decided this was not necessary as they believe their proposed parking arrangements are adequate.

- [23] The most current parking plan was displayed and Mr. Maholtra marked the proposed staff parking space with an “S” (“Exhibit B”). The other two staff parking spaces are inside the garage, which provides 4 spaces for parent parking and drop-off.
- [24] The outdoor play area of 618 square feet will only be used by the toddlers with a maximum of 9 to 10 children using it at any one time. The older children will be walked to the playgrounds located at Lynwood and Rio Terrace Schools – a 5 to 10 minute walk along an arterial road. A future spray park will be located within one block of the property.
- [25] One neighbour who is opposed to the proposed development is the adjacent neighbour to the east who is operating a therapeutic massage business from his residence. Mr. Cruze indicated that he did not speak with all of the property owners along the block. Of the neighbours he did contact, some were in favour of their proposed development and some were not.
- [26] He does not see any safety concerns with the proposed location adjacent to a freeway and an arterial road. There is a berm separating the rear Lane from the freeway.
- [27] No one will be living at the house and it will be empty during evenings and weekends. This would be purely a commercial use.
- [28] Mr. Malhotra pointed out the location of the garbage pick-up area in the southeast corner of the subject Site on his drawings.

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

- [29] The City of Edmonton allows a daycare to operate out of a home for up to 6 children without a Development Permit. In his view, 34 children is too many for a Single Detached House and it would create 6 times the impact regarding noise, traffic congestion and parking issues as would a 6-child daycare.
- [30] Mr. Shah had some concerns regarding the community consultation. Several of the signatures were from outside of the 60-metre notification area and there were incorrect or non-existent addresses on the petition. Also the petition never showed the amount of children proposed for the Child Care Service.
- [31] Attachment 4 of his submission shows the 14 properties within the 60-metres notification area. Most properties in the closest vicinity do not support the proposed development.
- [32] Although the Applicant mentioned that the two schools in the area were in support of the development, Mr. Shah has never received any communication from these schools or from the Lynnwood Community League.
- [33] He confirmed that 156 Street is an arterial roadway and street parking is not allowed on it at any time. Traffic flow on 156 Street will be impacted by people waiting to turn left into the rear Lane. People trying to exit the rear Lane onto 156 Street will also be impacted by parents backing out of the Rear Yard parking spaces. The existing rear Lane is very narrow and two vehicles cannot pass each other. Parking directly in front of the house on 79A Avenue is limited due to the proximity to the corner. All of these limitations could pose safety hazards when children are dropped off or picked up during rush hour.
- [34] The extra parking opportunities usually associated with Corner Lots are not available at this location making it unsuitable for a Child Care Service. There would be added concerns in winter. The rear Lane may not be cleared regularly and the extra traffic could create ruts. Problems with the rear Lane would result in the front street being used as a drop-off location contrary to recommendations from Transportation.
- [35] A Real Property Report, which should have been part of the documentation obtained at the time of purchase, would have indicated that this property was not a Corner Lot.
- [36] Mr. Shah was not aware that the Child Care Service Use was on both the basement and main floors and had based his parking requirements on the 110 square metre total area that is shown on the Site Plan. He confirmed that as per section 54.2, schedule 1 of the *Edmonton Zoning Bylaw*, a 220 square metre Child Care Service with 34 children would actually require 5 parking spaces for drop-off plus 3 parking spaces for staff for a total of 8 spaces.

- [37] The proposed parking spaces met the minimum standard size; however the required 7 metre wide clearance for vehicles entering and exiting the garage is not met. This should not be a problem as the drop-off spots would likely be empty when staff are entering or exiting the garage.
- [38] Mr. Shah was not sure how many houses were located along the block face and where the rear Lane ended.
- [39] The Presiding Officer allowed a Google aerial map to be shown to clarify the uncertainty of the rear Lane and block face. The map confirmed that there are 12 houses to the east of the subject property and the rear Lane does not dead end but exits to 79A Avenue after Property No. 13. A copy of this map was printed and marked "Exhibit C".
- [40] The Appellant told Mr. Shah there was an existing massage business next to the proposed development, but Mr. Shah was not able to confirm its existence through the City's internal system.

iii) Rebuttal of the Appellant

- [41] Mr. Cruze indicated that the subject house has both a front and rear entrance. Parents who are walking will use the front entrance and parents dropping children off in vehicles will use the rear entrance.
- [42] He is willing to work with the City to make any changes required to make this business successful without creating a negative impact on the community.

Decision

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

Reasons for Decision

- [44] A Child Care Service is a Discretionary Use within the (RF1) Single Detached Residential Zone.
- [45] Based on evidence received at the hearing the proposed development would require revisions to the refused plans for off street parking spaces, variances to applicable parking regulations and an additional variance to the locational criteria for the Child Care Service Use.

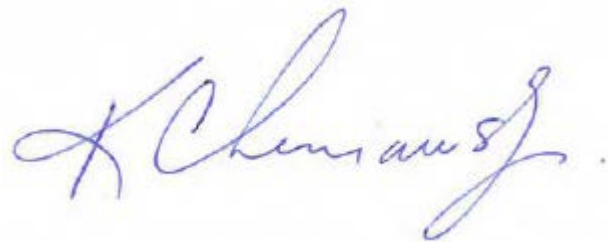
- [46] The Board was presented with mixed evidence regarding community support. Some of the adjacent, and therefore most affected owners, objected to the development, particularly given its scale. Although other individuals signed a petition circulated by the applicant in favour of the proposal, the Board has placed little weight on this petition as it contained many deficiencies. These included: failure to identify the number of children (a key determinant of the intensity of the proposed Use); the true hours of operation; and for one circulation, the incorrect address. Also, a significant portion of the listed addresses were non-existent or located a considerable distance from the notification zone and therefore were signed by individuals unlikely to be impacted by the development itself. In short, the materials submitted to Board were ambiguous and not persuasive.
- [47] This Discretionary Use is subject to locational requirements per section 80.4(b) of the *Edmonton Zoning Bylaw* (“the Bylaw”). One of these is the requirement for being located on a Corner Lot. The subject Site is not technically a Corner Lot. It abuts a very narrow public utility Lot on the flanking side along 156 Street. Given this circumstance, the Board has considered the subject Site substantially equivalent to a Corner Lot as defined in the Bylaw.
- [48] However, the subject Site does not have the usual attributes that make Corner Lots generally more appropriate for the proposed Use. In particular, the flanking roadway is an arterial roadway where parking is not allowed. Also, Transportation Services has determined the on-street parking along the Front Lot Line would create a safety issue and a negative impact for drivers and pedestrians turning onto 156 Street. Therefore the excess in on-street parking usually associated with Corner Lots is non-existent at this location. In fact, with the locational limitations, the subject Site has less suitable on-street parking than a typical interior Lot.
- [49] The Board finds there are planning concerns with safety, parking and traffic congestion associated with the proposed development, particularly given the intensity of impacts associated with dropping off and picking up 34 children:
- a) The rear lane provides the only means to access parking for the proposed development. It is not wide enough to accommodate two-way traffic. Parents will have to wait to access the off-street parking spaces.
 - b) The subject Site is only separated from 156 street by the narrow public utility Lot. This will factor will increase congestion along 156 Street (an arterial roadway) as parents wait to access the rear Lane.
 - c) Traffic in the lane itself will increase materially as the parents funnel into the Lane to drop off and pick up their children. The increased traffic will add to congestion in the Lane and will impact the conditions of the Lane, particularly in the winter months for the parents and the residents of the 13 Lots to the east along the block face.

- d) These concerns for neighbouring properties and passing traffic along 156 Street are exacerbated by the fact that this development requires three variances to parking, including a reduction in the number of required drop-off spaces, a waiver of the restrictions on tandem parking and a relaxation to the minimum radius required to access staff parking in the on-site detached Garage. Allowing these variances will magnify the traffic impacts. The proposed parking situation and congestion will also pose safety concerns for the children and parents as they come in and out of proposed development.

[50] The Board noted discrepancies between the refused plans and the submissions of the Appellant during the hearing and is concerned that these newly proposed revisions would have unanticipated impacts on parking, safety and access issues that were not vetted in accordance with the usual process.

[51] The Board also concurs with the opinion of the Development Officer that the number of children proposed (34 which is almost six times the threshold for the requirement of a Development Permit within an existing Single Detached House) is excessive and would create noise and nuisance impacts for the adjacent neighbour to the east who opposes the development. The rear yard will be occupied by parking and drop off spaces, an outdoor play area and a walkway to the Child Care Services Use. The scale of the development requires that the majority of the rear yard be hard surfaced for vehicles and vehicular access. This in turn pushes the 618 square foot play area immediately adjacent to the Side Lot Line shared with this neighbour.

[52] For the reasons above, the Board finds that the proposed development would generate an uncharacteristically excessive amount of traffic and associated adverse impacts. Given the limitations of the subject Site and its proximity to an arterial roadway, the Board finds a Child Care Service for 34 children is not reasonably compatible with the surrounding area. Additionally, the required variances to parking and access would unduly interfere with the amenities of the neighbourhood and materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land.



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

Board Members in Attendance:

Ms. A. Lund; Mr. R. Hachigian; Mr. J. Kindrake; Ms. S. LaPerle

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



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Date: February 16, 2017
Project Number: 230994782-002 /
238131880-001
File Number: SDAB-D-17-024 / 025

Notice of Decision

[29] On February 1, 2017, the Subdivision and Development Appeal Board heard two appeals filed on **January 5, 2017 together**. The appeals concerned two Orders dealing with two abutting Lots issued by the Development Authority on December 23, 2016, to:

Cease the Use (Non-Accessory Parking), REMOVE all signage associated with the Use (Non-Accessory Parking) from the site and PREVENT the recurrence of the Use (Non-Accessory Parking) by barricading the site to restrict vehicles from accessing the site for the Use (Non-Accessory Parking) on or before January 23, 2017.

[30] The first subject property is on Plan B3 Blk 4 Lot 211, located at 10617 - 105 Street NW. The second subject property is on Plan B3 Blk 4 Lots 209-210, located at 10430 - 106 Avenue NW. The Lots are within the (CB1) Low Intensity Business Zone. The Central McDougall / Queen Mary Park Area Redevelopment Plan applies to the subject properties.

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

- A copy of the Central McDougall / Queen Mary Park Area Redevelopment Plan;
- A copy of SDAB-D-16-283;
- A copy of the Order by the Development Authority;
- The Development Authority's written submissions and attachments;
- A tabling request by the Appellant;
- A response from the Development Authority opposed to the tabling request;
- A submission and on-line response from a property owner in support of the Order;
- and
- A letter from the Central McDougall Community League.

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

- Exhibit A1, A2, A3 – Three sets of e-mails, submitted by the Appellant.
- Exhibit B – Leave Application to the Court of Appeal, submitted by the Appellant.

- Exhibit C – PowerPoint presentation, submitted by Mr. M. Doyle.
- Exhibit D – PowerPoint presentation submitted by Ms. Strate.

Preliminary Matters

- [33] 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.
- [34] The Presiding Officer outlined how the hearing would be conducted, including the order of appearance of parties, and no opposition was noted.
- [35] 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, Mr. F. Jutt represented by Mr. R. Noce

- [8] The Appellant is requesting a tabling until after their leave to appeal application regarding a refused Development Permit for the same properties is heard by the Court of Appeal on April 6, 2017.
- [9] On November 9, 2016 Mr. F. Jutt appeared before the SDAB for an appeal on a refused Development Permit application regarding the properties. The decision of the SDAB to deny the appeal was served on the respective parties on November 24, 2016. On December 9, 2016, the Appellant made an application in the Court of Appeal for permission to appeal the SDAB's decision.
- [10] The leave application was originally scheduled to be heard on February 22, 2017. On January 3, 2017, Mr. Noce received an e-mail from Mr. Gunther, City of Edmonton Law Branch, indicating he would be representing the City of Edmonton, but was not available on February 22, 2017.
- [11] After a series of e-mails between Mr. Noce and Mr. Gunther (marked Exhibits A1, A2, A3) the Appellants agreed to a revised leave to appeal date of April 6, 9:30 a.m. That date for the leave to appeal application has been confirmed.
- [12] The Appellants moved with relative speed in securing the original February 22, 2017, date. December 9, 2016, to February 22, 2017, is not really a long time apart considering holiday time, time required for the SDAB to prepare its record and lead time required by both parties to prepare their briefs.
- [13] The Stop Orders were not issued until after the leave to appeal application was filed. The City of Edmonton and all other parties present at the November 9, 2016, hearing were provided notice of the leave to appeal application prior to the Stop Orders being issued.

- [14] It was the City of Edmonton who requested the postponement to April 6, 2017, not the Appellants.
- [15] The Appellants are seeking an opportunity to be heard before the Court of Appeal which stays the process. If their leave application is not successful then their arguments regarding these Stop Orders would be weakened.
- [16] It is not without precedent that this Board has postponed matters while parties have dealt with other issues and an example regarding a non-accessory parking lot just off of 81 Avenue was provided. The Presiding Officer pointed out that in this example the postponement was requested on consent and prior to any SDAB decision on the Development Permit application.
- [17] The Presiding Officer asked Mr. Noce to clarify whether he proposed to proceed first with a preliminary request for a tabling of the hearing only or whether he was also presenting arguments on the merits of this appeal of the Stop Orders to the Board.
- [18] Mr. Noce's preference is that this hearing is adjourned today. Failing that they are ready to proceed and seek an amendment to the enforcement date. His client has complied with the requirements of the *Municipal Government Act* ("the Act") in regards to an appeal. Mr. Jutt would be prejudiced if he is not given the opportunity to continue operating before being allowed to bring forward argument to the Court of Appeal about why the SDAB got it wrong in November.
- [19] If the Appellants are successful in getting leave and ultimately successful in getting the appeal heard by a panel, they could continue to operate. If the SDAB were to proceed today and determine that the Stop Orders be upheld, then appeal before the Court of Appeal has become moot. They do not want to be prejudiced by the process until the Court of Appeal has made a decision on the leave application.
- [20] Mr. Noce reminded the Board that the April hearing date is the City of Edmonton's doing. If the original date of February 22, 2017, was still in place, he would only be asking for a delay of a matter of weeks.
- [21] Mr. Noce advised that if the Board were to decide to go ahead and hear the merits of the appeal today he would not be concerned if the same panel re-hears this matter. He is agreeable to presenting arguments for both the adjournment and postponement of the enforcement date in the Stop Orders contemporaneously in his main submission.

The Presiding Officer asked the other parties to speak to whether the adjournment request should be addressed first as a preliminary matter and then, depending on the Board's determination, the arguments with respect to the varying the Stop Orders would be heard; or, whether all arguments about postponement should be heard contemporaneously.

ii) Position of the Respondent, City of Edmonton Sustainable Development

- [22] Ms. T. Boutine, City of Edmonton Law Branch spoke to the procedure concerning the postponement requests. She was accompanied by Mr. M. Doyle, City of Edmonton Development Compliance.
- [23] The arguments regarding a postponement and those dealing with the appeal of the Stop Orders should be made separately as they are very different considerations.
- [24] They would like to speak only to the postponement and then would speak to the merits depending on the Board's decision.

iii) Position of Ms. K. Uhl, Adjacent Property Owner.

- [25] Ms. Uhl agrees with the City and feels the Board should address whether or not there will be an adjournment first.
- [26] She has taken time off to be here and if the hearing will be adjourned she would rather know that and move on with her day.

iv) Position of Mr. W. Champion, representing Central McDougall Community League

- [27] The Board should hear the adjournment issue first.
- [28] If the Court of Appeal were to deny the leave application this matter is done with.

v) Position of Ms. D. Strate, Adjacent Property Owner.

- [29] She is in full agreement with the City and the Board should be dealing with the adjournment date as the sole item today.

After a short recess the Presiding Officer explained to the parties in attendance that all arguments with respect to postponement either by adjournment or by variance to the Stop Orders would be heard contemporaneously.

vi) Position of the Appellant, Mr. F. Jutt represented by Mr. R. Noce

- [30] Mr. Noce is the lawyer for Jutt Management Inc. His client appeared before the SDAB back in November without counsel and the SDAB denied his appeal. Mr. Noce was then retained as legal counsel and filed for permission to appeal on December 9, 2017 (prior to the Stop Orders being issued). All parties present at the November hearing were notified.

- [31] The original date set for the leave application was February 22, 2017. Subsequently the City of Edmonton Law Branch asked for a postponement and his Client gave approval to find a new date. The most convenient date for the City of Edmonton was April 6, 2017, and the Appellants consented to this date.
- [32] When the leave application was filed Mr. Noce and the Appellant had no knowledge of any Stop Order. The original date of February 22 worked well with Mr. Noce's calendar, holidays, and ensured all parties had ample time to prepare their documents. There was no attempt on the part of the Appellant to circumvent or impede the Stop Order because none had been issued.
- [33] The postponement would ensure the status quo remains and his client is not prejudiced because his client feels there are legitimate issues for the Court of Appeal to consider.
- [34] If the leave request is successful his Client will continue to move forward with the appeal to get it before a panel as quickly as possible. If they are not successful their position would be weakened regarding the Stop Orders.
- [35] His stated arguments apply to both the request for an adjournment of this hearing and to the alternative request that the SDAB delay the enforcement date in the Stop Orders.
- [36] In the event that the SDAB does not grant the adjournment, but decides instead to vary the enforcement date, his client would be willing to have additional conditions placed on him to balance the interests of the Appellant and the Respondents until the Court of Appeal renders its decision. Some suggested conditions were to direct the Appellant to:
- (a) Hire security (1-2 security guards) on the dates the parking lot is used to minimize the impact to the community.
 - (b) Provide barriers to minimize lighting effects on other buildings.
 - (c) Provide staff to assist with traffic control.
- [37] Mr. Noce confirmed the parking is being used by people attending events at Rogers Place. The amount of traffic generated varies depending on the event. An Oil Kings game has a smaller audience than some of the other events. The impact of traffic movement to the neighbourhood is really for a short window of time – one hour prior to an event and again for one hour after an event.
- [38] There has always been activity on this Site. There was previously an old home as well as a car lot located here.

- [39] It would be cleanest to grant the request for an adjournment which would recognize that his client has moved quickly with his leave request and picked the earliest possible date. They agreed to the City's postponement request rather than forcing the City to request the court for a postponement (although he conceded most courts would consent to a first request for a postponement).
- [40] The other aspect to consider is the real prejudice to his client. If his client is ultimately successful before the Court of Appeal, he will have lost the opportunity for income from the operation of the parking lots and the loss is not recoverable. There are 15 or 16 remaining home games between now and April 6.
- [41] If the SDAB wants to be seized of this matter, they can add conditions to the Stop Orders pertaining to barriers and landscaping to minimize impacts per section 687 of the Act.
- [42] The reality is without a postponement, seized or not, his client is prejudiced and the appeal is rendered moot. Through either an adjournment or a variance to the enforcement date he is just trying to find a balance allowing his client to operate and respecting the neighbours.
- [43] Mr. Noce conceded that his client never really had a valid Development Permit prior to operating. He applied for one but it was denied.
- [44] Mr. Noce does not know if Mr. Gunther was aware of the Stop Orders on January 3, 2017 at the time he made his postponement request. They were never mentioned when they were negotiating for a new date.
- [45] Asked how loss of income can be an issue if there never was a legal right to the income, Mr. Noce explained that he is looking at prejudice in a broader sense than the legal sense.
- [46] Mr. Noce read Items 8 to 13 from page 3 of the Leave to Appeal Notice to describe the basis of their appeal (Marked Exhibit B). The grounds will be further fleshed out in their brief.
- [47] Commercial operation of the two parcels of land as parking lots began near the beginning of October, 2016, at the time of the first Oiler's game. The parking lots have been used continuously since then only for Rogers Place events and not on a daily basis.
- [48] The house was already removed from the property when Jutt Management took possession on May 1, 2016, and they had no knowledge of it being there. It was not shown on the Real Property Report and the City tax assessment showed vacant land. The applicant demolished the building associated with the car dealership in July or August.

- [49] The date of the Development Permit application was July 29, 2016, and the refusal date was October 7, 2016. Mr. Jutt had numerous conversations with the City prior to taking possession of the property in May. He thought the main issue for refusal was that the lots were gravel. He therefore spent \$70,000 in July or August of 2016 to asphalt the properties. There were also some entrance and exit issues as the City wanted only the alley to be used and a minor landscaping variance was requested.
- [50] The Use is a Discretionary one, but the refusal was based on setbacks, landscaping and the fact that not enough buffer was provided between the subject property and the neighbours. It is important to keep in mind that the Use was not offensive to the Development Officer. The Development Officer didn't deny the application on a Discretionary Use basis, but the SDAB did.
- [51] The Board asked for elaboration on how the request to postpone will maintain the status quo for a development that never received a permit and has been operating since October 6, 2016. Mr. Noce feels his Appellant can still continue with the development with the acknowledgment that this continuation is at the sole risk of the developer, although he agrees that there is no permit in place. If a postponement is granted, the SDAB will not engage with these issues. If the Appellant is not successful in getting a leave application, the appeal regarding the Stop Orders may be withdrawn.
- [52] Other than using the land for parking on event days, all other development with regards to turning this into a full daily parking lot has been completely stopped. No parking meters are being installed, lines are not being painted and there is no mural or billboard.
- [53] The lots are currently dark because they are waiting for Epcor to install the meter. They have lights and high definition cameras ready to go. They have spoken to a few security companies and are working to maintain the Site to ensure it is kept clean.
- [54] The Appellant is willing to have two security personnel on site at least one hour prior to any event at Rogers Place until one hour after an event to maintain the safety and security of the Site. He is willing to work with the adjacent property owners to develop any interim measures to separate or minimize the impact of the development. The Appellant is willing to take all reasonable steps to work with the City of Edmonton to comply with Development Officer's requirements.
- [55] A condition regarding specific hours of parking would be difficult, but he has no problem with a clause linking to events at Rogers Place such as from two hours prior to an event until 6 a.m. the following morning. They do not want someone drinking and driving after an event.

vii) Position of the Respondent, City of Edmonton Sustainable Development, Ms. T. Boutine, Mr. M. Doyle, Mr. J. Young, Mr. T. Courtoreille, and Mr. J. Lazaruk

- [56] Ms. Boutine, City of Edmonton Law Branch, asked for clarification of the time lines regarding the Postponement Request.

Mr. Noce confirmed the appeal could be rescheduled within a week after the leave application is to be heard and suggested postponement to April 12 or April 19, 2017 which are regular meeting days of the Board.

- [57] M. Doyle, City of Edmonton Development & Zoning Services introduced a PowerPoint presentation, (“Exhibit C”) to summarize the 100 page document submitted prior to the hearing and provide some site history and review the relevant legislation that led up to the Stop Orders being issued.
- [58] A map was presented showing the location of the subject property and the immediately surrounding area as well as the laneway abutting the properties to the east. The subject land falls under the Central McDougall / Queen Mary Mark ARP and is zoned CB1 Low Intensity Business Zone. This zone allows for low intensity commercial and services Uses and should be sensitive to the bordering residential Use. The current Non-accessory Parking Use is Discretionary and is existing without permits.
- [59] The last valid Development Permit was issued on January 31, 2003, to operate an Automotive and Recreational Vehicle Sales / Rentals business. A permit to demolish the existing Single Detached House on the Site was issued on July 24, 2013.
- [60] On July 29, 2016, the Appellant applied to demolish the existing Automotive and Recreational Vehicle Sales/Rentals building and change the Use of the Site to Non-accessory Parking. This application was refused on October 7, 2016, and the decision was subsequently appealed to the SDAB which upheld the refusal on November 24, 2016. The building was demolished and the Site was paved over between August and September, 2016, without any permits.
- [61] Development Compliance received 8 complaints relating to the land use at the subject Site between August 2, 2016, and December 13, 2016. The most recent complaints occurred after the Stop Orders were issued. The subject of the complaints concerned visible and audible issues related to the Non-accessory Parking Use and that parking was occurring on weekends and after traditional business hours.
- [62] Municipal enforcement officers have issued 16 penalty tickets for operating a development without a permit and 4 penalty tickets for operating without a valid business licence. The officers informed the Appellant that the Use was illegal when they observed him on site directing traffic on event nights. Several photos of the illegal parking activity were shown taken on October 18, October 30, November 29, December 11, and December 17, 2016. The pictures also showed Panda Parking advertising being displayed on the Site as well as parking signs directed at monthly permit holders.

- [63] The Development Compliance Department became involved a little after September, 2016, and conducted an inspection on November 30, 2016. They found signage on the Site advertising parking, but there were no vehicles on the Site on that date.
- [64] A Municipal Government Act section 645 Stop Order was issued on December 1, 2016, with a compliance date of December 22, 2016. A site visit on December 22, 2016, showed a sole vehicle parked on the north property line and the monthly parking signs for permit holders were still on the Site.
- [65] The Stop Order issued on December 1, 2016, was subsequently rescinded and two replacement orders were issued. A separate Order was issued for each titled lot. The earlier order was not worded broadly enough to stop the Use. Verbiage was added to the new Stop Orders requiring the owner to barricade the Sites to prevent the parking Use from continually reoccurring. The compliance date on the new Orders was changed to January 23, 2017. These two Orders are the subject of today's appeal.
- [66] The CB1 Low Intensity Business Zone requires that developments be sensitive in scale with existing developments, in this case Apartment Housing. Non-accessory Parking is a Discretionary Use in this zone and is primarily intended for the use of employees or clients of developments within the area.
- [67] Google views from the PowerPoint presentation were shown to illustrate the negative visual impacts created by removing the mature trees and landscaping and paving over the entire parcel of land.
- [68] It is the opinion of Development Authority that this development is not meeting the intent of the *Edmonton Zoning Bylaw*. The complaints received demonstrate that allowing the continued Use is resulting in negative effects on the surrounding property owners. The Appellant was unsuccessful in getting a Development Permit, was denied on appeal and continues to operate without regard to regulations.
- [69] Given that this is a Discretionary Use, Mr. Doyle was asked if the development complied with all development regulations would it be compatible. He explained the Development Officer who refused the application did so because the current state of the property is not compatible with surrounding area and also because of traffic intensity given Transportation Services' recommendation that forced traffic to enter and exit the parking lots through the Lane.
- [70] The Stop Orders were issued to address the illegal use that continues to occur at the Site. Although tickets were issued they did not have any impact and the Appellant continues to operate illegally. Tickets are a preliminary step prior to the issuance of stop orders. Municipal Enforcement is not part of Development Compliance. Each department has its own mandate and each enforce on a case by case basis, based on the severity of impacts and circumstances occurring on the Site at the time.

- [71] Names attached to complaints are confidential, but the eight complaints previously mentioned did come from more than one person and consisted of both internal and external complaints.
- [72] Besides noise and visual impacts, concerns brought forward related to lack of landscaping, disparaging activity, and the types of people being attracted to the Site resulting in safety concerns of people gaining entry to their own dwellings.
- [73] The Appellants stated there is no way to prevent people from parking illegally, but the two Stop Orders require that barricades be erected.
- [74] Ms. Boutine is responsible for representing the City regarding these Stop Order appeals. Mr. Gunther is acting regarding the appeal of the Development Permit. These are independent appeals. Ms. Boutine is not aware if Mr. Gunther was aware of the Stop Orders at the time he made his postponement request of Mr. Noce.
- [75] The chronology of events is important. The applicant filed the Leave to Appeal application and set February 22, 2017, as the return date. The replacement Stop Orders were issued on December 23, 2017. In early January, the applicant consented to the postponement request of Mr. Gunther. If any prejudice existed to the Appellant that would have been the best time to raise it.
- [76] The Development Officer's first reason on the refused Development Permit stated that "Non-Accessory Parking is a Discretionary Use. In the opinion of the development officer, a non-accessory parking lot is not a suitable use adjacent to existing apartment housing. The subject site is located in an area that is designated medium-rise apartments." The landscaping deficiency was another reason for refusal. Cumulatively all items listed contributed to the refusal.
- [77] The City does not have a policy that no Stop Order will be issued if a Development Permit is refused and then appealed. In this case a Development Permit was never issued. There is no reason not to comply until the appeal is heard.
- [78] Mr. J. Young, representing Development Compliance for the City of Edmonton, stated that Bylaw Enforcement would still issue a Stop Order for the subject Lots even if a permit had been issued by the Board and then appealed by another party.
- [79] If there was an on-going re-zoning application or some sort of direction from City Council, there might some circumstances to suspend enforcing a decision.
- [80] He is not aware of any discussions between Mr. Gunther and Mr. Noce or whether or not Mr. Noce was lulled into an agreement.

- [81] Mr. Doyle indicated that he is not speaking to the original decision of the Development Officer. He is just enforcing the decision of the Board as there is no Development Permit for the ongoing Use. The proper development process was not followed.
- [82] He confirmed that the last valid Development Permit for the Corner Site was for an Automotive Sales Use and that business licence was cancelled.
- [83] With respect to conditions possibly being placed on the Stop Order, he assumed conditions like Landscaping were already discussed at the previous Development Appeal hearing.
- [84] Mr. Courtoreille, (Coordinator for General Enforcement for the City), and Mr. Lazaruk, (Complaints and Investigations) referenced the report that he submitted prior to the hearing.
- [85] During the construction of Rogers Place, the City created a development strategy to handle important chronic or recurring issues in the surrounding communities. One core issue was the likelihood of illegal Non-accessory Parking.
- [86] Based on their prior experiences with non-accessory surface parking lots around Rexall Place and Commonwealth Stadium, they created a proactive approach focusing on one hundred and thirty locations to ensure that non-approved developments would not affect the value and enjoyment of neighbouring properties.
- [87] Between September and December of 2016, their team focused on educating people to apply for permits and rezoning when they investigated development and business infractions. Over 18 shifts 23 tickets were issued, the bulk of which went to a few chronic offenders including the Appellant.
- [88] Minimal investment is required to allow illegal parking to take place on the subject Lots and the revenue is easy and fast.
- [89] During Rogers Place events, two Bylaw Enforcement Officers patrol the surrounding neighbourhood. With respect to the subject Lots, vehicles begin to arrive at around 5:00pm to 5:30pm and then things become busy at around 6:00pm to 6:45pm. By 6:45pm there are upwards of 60 vehicles and during these times residents arriving home after work have to deal with the increased traffic.
- [90] There has been an attendant present to direct traffic into the parking lots. They have had amicable conversations with the attendant who advised them that he was unaware there was no permit for the parking lots and he was just doing his job and then continued to do his job.
- [91] They provided the following responses to questions from the Board:

- a) Although the Panda Parking advertisement states that parking is available 24/7, they cannot speculate about whether the lots are used for parking during the day as they only inspect the Site in the evening during Rogers Place events.
- b) If property owners are not willing to engage in the development or rezoning process, they will enforce the stop orders. In this case, the illegal business causes a nuisance to the adjacent multi-family residential complex and the tickets issued to the property owner have not deterred the business from continuing to operate, therefore a section 645 Stop Order was issued. Compliance is their ultimate goal.
- c) They clarified that the previous tickets issued were for the illegal parking Use (lack of development permit and lack of business licence) and not issues such as noise and garbage.
- d) They have received complaints about noise, the conduct of people, and after hours issues, however the Edmonton Police Service dealt with those issues. Their shifts end at 8:00 pm.

viii) *Position of Ms. T. Boutine, Law Branch, City of Edmonton*

- [92] Ms. Boutine stated that the Stop Order process is independent from the Court of Appeal leave application process.
- [93] The development aspects that have been brought up at this hearing have already been discussed at the previous development appeal hearing and this appeal is dealing with the two Stop Orders.
- [94] The Board has received evidence that the Appellant is operating a Non-accessory Parking Use on the Lots illegally because there is no Development Permit or Business Licence.
- [95] The City does not consent to an adjournment of the Stop Order nor to the conditions proposed by Mr. Noce – not to February 22, 2017 not to a date in April, 2017. The City does not consent to allowing for the continuation of an illegal Use on the Site to any date.
- [96] It is important to highlight that even if the matter is tabled, the business is still operating illegally, notwithstanding the issuance of several tickets.
- [97] An adjournment with the imposition of conditions would not prevent the Appellant from continuing to operate his business which has directly affected the adjacent neighbours. The Board should consider the prejudice to the neighbours if the Appellant continues the Use in the interim.
- [98] With respect to Mr. Noce stating a prejudice to his client, she understands that the Appellant is entitled to a Court of Appeal leave application and a legal right to this appeal

process. But in the meantime, the Appellant is “bulldozing” all of the other legal processes and he was doing it even before he applied for a Development Permit.

- [99] The Appellant has brought up installing lighting for security; however he would need an electrical permit to meet that condition.
- [100] If the Board places conditions on the Stop Orders such as installing murals and landscaping, the Appellant is doing through the back door, what he was not allowed to do through the front door. The proposed conditions would add to the illegal use of the properties and allow continued development of a Non-accessory Parking Use. If the Board adds conditions on trees and landscaping to the Stop Order, it is “bootstrapping” the Appellant’s appeal for the Court of Appeal leave application.
- [101] This development has always been illegal and this Stop Order appeal hearing is the not the forum for development conditions.
- [102] The City disagrees with the Appellant’s position that there is a prejudice because in this case the financial loss flows from an illegal Use. The prejudice to the other property owners and tenants who are using their property legally should be considered.
- [103] An illegal Use should not be allowed to continue at the expense of those using their properties legally.
- [104] Hiring security guards will not reduce traffic, noise or diminish the headlights shining into residences that can disrupt people all night, and hiring them for a couple hours in the evening will not do anything when vehicles are leaving throughout the night. The Stop Orders require the erection of barricades to ensure the illegal Use does not continue.
- [105] The adjacent property owners suffer lights and traffic at all hours, and a financial loss, landlords could lose tenants due to the impact from this illegal Use. The consequences of continued Use are inappropriate and not addressed by conditions.
- [106] Ms. Boutine provided the following responses to questions from the Board:
- a. She is uncertain whether this panel could be estopped by the previous SDAB decision on this development, however, if this panel imposes development conditions on a Stop Order without a Development Permit, this makes for a stronger estoppel case. The decision on the development has already been made and the Stop Orders should not be used to bypass that process.
 - b. With respect to the previous comment on “bootstrapping”, she clarified that if the Board gives a conditional Stop Order and allows a temporary Use with conditions, it creates inconsistent decisions and prejudices the earlier decision by bringing it into question for the Court of Appeal.

- c. She indicated if there had been an original Development Permit for this Use and residents moving in were aware of it, the negative impact might not hold as much weight.
- d. Asked whether there was a prejudice to the City if the Stop Orders were adjourned, Ms. Boutine believes that it would set a bad precedent contrary to the City's policy to deal with these matters expeditiously. She does not know if the adjournment would affect the Court of Appeal process and there would not be a financial prejudice. However adjourning these Stop Orders could impact the City's overall plans for the area, but there is no concrete evidence.

ix) Position of Ms. K. Uhl, an affected property owner in support of the Stop Order

- [107] Ms. Uhl is the property owner at 10620 – 104 Street, across the Lane from the subject Lots. The subject parking business has been operating since the opening of Rogers Place. She first saw cars parking there on September 8, 2016.
- [108] This business has disrupted residents' enjoyment of their property. Visually, the parking lots are just a giant slab of concrete that adds nothing to the community. The traffic impacts are so great that she keeps track of Rogers Place events so she knows when she should arrive and leave her home.
- [109] The only access to her parking lot is from the adjacent Lane that is used by the subject Lots, and Rogers Place events affect her access to her parking lot and greatly lengthens her commute.
- [110] Ms. Uhl and her husband will at some time sell their property and are concerned about the financial impact if the illegal parking lot is allowed to operate thereby reducing the value of their property.
- [111] She is concerned about the entire process and finds the Appellant to be disrespectful as he has not considered the adjacent neighbours. The Appellant made the decision to demolish the buildings, remove the trees and pave the lot with no permits. No one would be at this hearing if the Appellant had complied with the Orders and the rules. His decisions brought the parties to the hearing.
- [112] In her view, the Appellant is bullying his way to have an illegal business and now acts like a victim. She and her neighbours are the victims.
- [113] She has an issue with the credibility of the Appellant. He currently has no regard for tickets that are being issued and the decisions that have been made. In her opinion, the Appellant will continue to disregard any further decisions or conditions that are added to the Stop Orders. As he has continued to operate an illegal business in the face of prior sanctions, she has doubts he will follow any conditions.

[114] With respect to questions from the Board, Ms. Uhl provided the following:

- a. She confirmed that her property has a single access point to its parking lot, so everyone in her building is affected by the Appellant's development.
- b. There can be so much noise from the subject Lots when hockey games end (often between 11:00pm and 11:30pm) that she has to wear ear plugs on these evenings.
- c. She is not impacted by light from the subject Lots.
- d. She has witnessed cars parked in the Lane and some nights cars are boxed in because the parking lots are filled to the brim.
- e. Sometimes an odd car is parked on the subject Lots during the day, but she reiterated the parking lots are mainly used for Rogers Place events.

x) Position of Ms. D. Strate, an affected property owner in support of the Stop Order

[115] Ms. Strate is the owner and landlord of an apartment building located adjacent to the parking lots across the Lane to the east. She rents the apartments largely to overseas students attending nearby Grant MacEwan University.

[116] This development brings pandemonium. She feels that pedestrians and children are at risk walking at night. The lighting is poor and she feels there are safety issues.

[117] She submitted a PowerPoint presentation, ("Exhibit D") that was submitted at the previous SDAB hearing. She indicated that at the previous SDAB decision, she brought a petition with about 100 signatures in opposition to the parking lots.

[118] She has witnessed vehicles using the subject Lots as a shortcut during LRT crossings; vehicles parking on the sidewalks, and at night up to two hundred people using the small sidewalk abutting her property rather than the large sidewalk on the east of her property that was built to accommodate large numbers of people walking to the arena. They trespass on her property as shown in the photos. The associated noise is incredible. She has counted as many as 85 vehicles on the subject Lots. Potholes in the Lane were recently fixed and the added traffic will now put a lot of wear on the Lane. The increased traffic also brings panhandlers and drug dealers who approach patrons of the parking lots.

[119] There are 2-hour parking restrictions on the adjacent streets and completely restricted parking on 106 Avenue due to the LRT line. There are no legal parking lots north of 106 Avenue and all the people in the photos are attributable to the subject Lots. All of the concerns brought forth by the neighbours are caused by these parking lots.

- [120] The illegal parking lots have affected her tenants. She receives complaints. One long-term tenant whose unit faces the subject Lots has given notice that he is breaking his lease early and losing his deposit due to the negative impacts. She has told her tenants that things will change, but the situation is wearing on them. New tenants will be harder to attract in this economy with these negative impacts.
- [121] The Appellant continues to operate his business illegally. It seems crazy to discuss conditions under which the Appellant could continue to operate the parking lots. The residents are enduring the impacts and are prejudiced. It feels like she and her neighbours have no rights and no more options.
- xi) Position of Mr. W. Champion, Director of Planning and Development for the Central McDougall Community League, in support of the Stop Order*
- [122] Mr. Champion stated that Transportation Services will never allow street access to the subject Lots because of the LRT line and arterial roadway of 106 Avenue so any development without a permit should not proceed.
- [123] The Community League is trying to turn the community around and this parking lot is the last thing they need. Surface parking lots are antithetical to development.
- [124] The Appellant has been operating the parking lot illegally for 5 months now. He was first aware of parking on September 9, 2016. It does not make any sense to reward him with an illegal development and allow him to carry on. This Site has caused noise, congestion, and criminal activity. It impacts several buildings and is not compatible with the surrounding residential Uses.
- [125] Mr. Champion has personally counted 93 vehicles on the subject Lots, many of the vehicles are parked illegally by overpacking the Site.
- [126] There is no evidence that the Appellant has ever talked to any community members or showed interest to the community. There are 5100 people in Central McDougall and the Appellant has disrupted an entire community and continues to do so illegally. The noise and disruption in this area generated from the subject Lots are unbearable. Individuals sell drugs to the patrons of the parking lots.
- [127] The North Edge of the Area Redevelopment Plan states that surface parking lots are not to be adjacent to any arterial roads and the area is planned to be cosmopolitan.
- [128] This is an illegal Use, not a building. He cannot understand why the Board is considering extending the illegal Use. Rewarding illegal developments is inappropriate.

[129] The SDAB dealt with any possible conditions at the previous hearing. It does not make any sense to reweigh potential conditions again and it would be concerning if the Appellant was now granted a temporary development given that the prior Board was unwilling to allow the Use.

xii) Rebuttal of the Appellant

[130] Mr. Noce clarified that while the Development Officer stated the proposed Use was a Discretionary Use as reason 1 in his refusal, his rationale for the refusal was related to the variances.

[131] With respect to headlights from vehicles flashing into the adjacent apartments to the east, he indicated that they also have surface parking on the back of their buildings. There is a buffer between the subject Lots and those parking spaces and the lighting could be from their neighbours' vehicles.

[132] If the Board is not amenable to placing conditions, the Board has the authority to adjourn the Stop Order.

[133] Asked to comment on the point that the City could still enforce the Stop Orders if the Board simply adjourned the hearing, Mr. Noce indicated that issue would be addressed by changing the enforcement date. However, he also recognized that the City can always issue new Orders and they could have to continue to take another action. He had looked, but could not find any authority to prevent the City from issuing and enforcing an Order. But, at that point, he would proceed with a judicial stay application.

[134] He reiterated that he was not aware of the Stop Orders when he filed the Court of Appeal leave application. His client advised him that he was served the Stop Orders on or around January 3 or January 4, 2017.

[135] With respect to whether the Board has the authority to consider development conditions again, in his opinion the Board is not estopped as the Stop Order process is different.

[136] He reiterated that he is just asking the Board to halt the enforcement until the Courts decide. If his client chooses to act and continue the Use without a Development Permit, that is his client's choice. He recognizes there was never a Development Permit for this development.

Decision

[137] The appeal is **DENIED** and the decision of the Development Authority is **CONFIRMED**. The Stop Orders are **UPHELD** as issued.

Reasons for Decision

[138] The Appellant appealed Stop Orders 230994782-002 and 238131880-001 under section 687 of the *Municipal Government Act* (“the Act”) and the appeals of the two Stop Orders were heard simultaneously.

[139] The Board finds the following based on the materials submitted by the parties and provided at the hearing:

- a) The two Stop Orders apply to two abutting properties covering an area of approximately 0.21 hectares on two municipal addresses: 10430 - 106 Avenue and 10617 - 105 Street (the subject Site).
- b) The Appellant bought the properties in May 2016 intending to use the two abutting Lots for a Non-accessory Parking Use.
- c) The Appellant submitted Development Permit application number 24987724-006 on June 29, 2016 “To demolish an existing Automotive and Recreational Vehicle Sales/Rentals building and change the use of the site to Non-accessory Parking.”
- d) During the July and August 2016, the Appellant began development of the Site. He cleared the land removing a principal building and all vegetation, and paved the Site up to the City sidewalk with asphalt to facilitate the Non-accessory Parking Use.
- e) Currently, there is a fence along the north end of the Site which has some signage indicating the space is available for monthly parking. The Site has no landscaping whatsoever. It is not lit. No parking spaces are marked on the asphalt.
- f) The Non-accessory Parking Use began on the property in September 2016 to coincide with the opening of Rogers Place Arena and was underway commercially at the latest in early October, 2016. The Site is used predominantly for parking of up to 90 vehicles belonging to individuals attending events at Rogers Place Arena who come and go at times which match the events.
- g) On October 7, 2016, the Development Permit application was refused by the Development Authority. The Appellant appealed the refusal to the Subdivision and Development Appeal Board (the Board).
- h) On November 24, 2016, a panel of the Board denied the appeal and affirmed the refusal. All parties were notified.
- i) On December 1, 2016 the City issued a single stop order (the Initial Order). The Initial Order covered both properties. It ordered the Appellant to cease the Use (Non-accessory Parking) and remove all signage from the Site by December 22, 2017.

- j) On December 9, 2016 the Appellant applied per section 688 of the Act to the Court of Appeal for permission to appeal the November 24, 2016 Board decision. The leave application was initially set to be heard on February 22, 2017.
- k) Eight complaints have been received from internal and external sources about the development.
- l) Between September, 2016 and December, 2016 the Site was inspected by Municipal Enforcement Officers as part of a larger proactive initiative to deal with surface parking around the new arena. The officers observed that a Non-accessory Parking Use was occurring and issued 20 penalty tickets to the Appellant: 16 for development without a Development Permit and 4 for operation without a Business Licence. The officers spoke with the Appellant on some of these occasions.
- m) The Site was inspected again on December 22, 2016 at which time the ongoing Non-accessory Parking Use was again confirmed and documented.
- n) The Initial Order was rescinded and on December 23, 2016 the two new replacement Stop Orders were issued, one for each address. The two Stop Orders added the requirement that barricades be erected to prevent the illegal Use from continuing and gave a new compliance date of January 23, 2017. The two Stop Orders were accompanied by an explanatory cover letter and the Appellant (landowner) was personally contacted by phone on December 23, 2016.
- o) On January 5, 2017, the Appellant appealed the decision of the Development Authority to issue the two new Stop Orders and gave the following reasons for appeal to the Board: "We are in the process of having this matter being sent to the alberta court of appeal and we have a date of Feb 22. We are asking this be put off until after the decision from the court of appeal." [unedited].
- p) After some discussion amongst counsel during January, 2017 the Appellant's lawyer agreed to a request from the lawyer for the City (Mr. Gunther, who did not appear before this Board) to postpone the leave application from February 22, 2017 to April 6, 2017. On January 17, 2016 an adjournment to April 6, 2017 was confirmed.
- q) Notwithstanding, the decisions of refusal by the Development Authority and the Board, and the issuance of 20 tickets and the three Stop Orders, the Appellant has continued to use the Site for a Non-accessory Parking Use since it began in the fall.

[140] As the Appellant is currently seeking permission to appeal the Development Permit decision to the Court of Appeal, he has asked the Board to either

- a. postpone the matter by adjourning the hearing of this appeal of the two Stop Orders to April 12 or April 19, 2017 (a few days after the application for permission to appeal is heard); or,
- b. vary the terms of the two Stop Orders by extending the date of compliance to April 12, or April 19, 2017.

[141] If the second option is chosen, the Appellant is amenable to adding conditions to the two Stop Orders in conjunction with this change to balance the interests of the Appellants and the Neighbours until the Court of Appeal renders its decision by reducing the impact of the Non-accessory Parking Use on neighbouring properties. The Appellant specifically mentioned conditions to limit hours of operation, add supervision and security during hours of operation, provide some form of landscaping and add lighting.

[142] The Board has considered the following factors in making a determination about adjourning the hearing of this appeal of the two Stop Orders:

- a) In the interests of certainty and fairness for all the affected parties, the Act contemplates that generally subdivision and development decisions, including appeals under section 687 of the Act, will be decided promptly. The Board is required to hold a hearing within 30 days of receipt of a notice of appeal (section 686(2)) and must give its decision in writing, together with reasons for the decision, within 15 days after concluding the hearing (section 687(2)).
- b) This is the Appellant's first request for an adjournment.
- c) There was no suggestion before the Board that the Appellant required an adjournment due to circumstances beyond his control which prevented him from presenting his case to the Board about the validity or merits of the two Stop Orders. To the contrary, at the outset of the hearing his counsel indicated he was agreeable to proceeding to present his arguments for postponement by an adjournment or alternatively by a variation to the two Stop Orders contemporaneously.
- d) The Appellant asks to adjourn the matter until mid April because he will be seeking permission to appeal the November 24, 2016 Board decision to refuse a Development Permit for the Non-accessory Parking Use at a Court of Appeal leave hearing set for April 6, 2017. He is taking active steps to pursue that appeal.
- e) The City and the other affected parties object to any postponement because no permits have ever been issued to authorize the Use and the Appellant has illegally cleared the Site, commenced the Non-accessory Parking Use and continued to operate despite the Development Officer's refusal, the Board's confirmation of that refusal and the enforcement actions of the City.

- f) If an adjournment is not granted, the Appellant argued that his pending application for permission to appeal will be impacted or rendered moot and he will suffer prejudice in the form of lost revenue from not operating the Non-accessory Parking Use for events scheduled to occur at Rogers Place between now and the date that the leave to appeal application is heard.
- g) The Board finds that the ongoing appeal of the November 24, 2016 Board decision refusing a Development Permit and the current appeal of the two Stop Orders issued on December 23, 2016 are separate matters. Refusing or granting an adjournment of the Stop Order appeals has no impact whatsoever on the Appellant's ability to pursue his appeal of the November 24, 2016 Development Permit decision.
- h) The Board notes that adjourning the hearing will not impact the legal status of the two Stop Orders, nor the legal status of the Non-accessory Parking Use. Accordingly, the lost revenue which the Appellant cites as the prejudicial impact can only be derived if he continues to operate the Non-accessory Parking Use in contravention of the Act and the Bylaw. In other words, the Appellant's potential prejudice is the loss of a stream of income that can only come from continuing an illegal Use which the Appellant has knowingly operated in the face of the decisions of refusal made by the Development Authority and the Board, and the issuance of twenty tickets and the three Stop Orders.
- i) Furthermore, the cited prejudice itself is speculative and may never materialize. The Development Permit appeal is before the Court of Appeal and the Board cannot presuppose the result in an ongoing Court of Appeal application. Also, the pending April 6, 2017 application is for leave to appeal. Even if leave to appeal is granted, the Board cannot presuppose the outcome in the substantive appeal on the merits.
- j) On the other hand, if the adjournment is granted and the illegal Use continues until April, the neighbours who have opposed the development from its inception, argue they will certainly continue to suffer prejudice in the form of ongoing severe nuisance impacts including noise and light; security concerns; impairment of access and egress as they share the Lane with patrons of the Site; and, loss of quiet enjoyment of their property as patrons trespass over their property to access the Site. They also believed that they would suffer financial loss as the Use devalues the resale value of their properties, although no evidence was provided to support this opinion. The landlord of the abutting Lot to the east indicated that in addition to ongoing tenant complaints, as a direct result of the negative impacts of the ongoing Non-accessory Parking Use, she has already lost a long term tenant who may be difficult to replace creating an additional financial loss.
- k) An adjournment may be of no practical effect. While the City and the Appellant agreed that an adjournment would not impact the validity of the Stop Orders, they presented conflicting submissions about the practical impact of an adjournment. The Appellant indicated that he expected the City would not enforce the Stop

Orders if an adjournment was ordered. The City provided evidence to the contrary, that in the normal course it promptly enforces its decisions and Stop Orders pending appeal so an adjournment would have no practical impact. Although the City recognized there could be exceptional circumstances, no such circumstances existed concerning the Stop Orders at issue in this case where the City opposed the adjournment. The Board notes that the discretion to enforce the Stop Orders rests with the City.

[143] In light of these considerations, the Board is not persuaded that it would be appropriate to adjourn the hearing of the two Stop Order appeals until after the application for leave to appeal is heard on April 6, 2017.

[144] The two Stop Orders under appeal provide in part:

“This property is zoned CB1 (Low Intensity Business Zone) in accordance with section 330 of the Edmonton Zoning Bylaw. Our investigation revealed that a Non-Accessory Parking Use has been developed. The City of Edmonton has not issued a development permit to develop and Non-Accessory Parking Use, which is contrary to Section 683 of the Municipal Government Act, R.S.A 2000, c.M-26.1.

Section 5.1 states No Person:

1. Shall commence, or cause or allow to be commenced, a Development without a development Permit therefore issued under the provisions of Section 12 of the Bylaw; or
2. Shall carry on, or cause or allow to be carried on a development without a Development permit therefore issued under Section 12 of this Bylaw.

[145] Both Stop Orders order the Appellant to “CEASE the Use (Non-Accessory Parking), REMOVE all signage associated with the use (Non-Accessory Parking) from the site and PREVENT the recurrence of the use (Non-Accessory Parking) by barricading the site to restrict vehicles from accessing the site for the Use (Non-Accessory Parking).”

[146] The two Stop Orders also state: “This order is to be complied with on or before January 23, 2017.”

[147] The Board upholds the two Stop Orders for the following reasons:

- a) Based on the submitted materials, the Board finds that the two Stop Orders were issued to the registered owner of the properties by properly appointed officials in accordance with the requirements of section 645(2) of the Act.
- b) Based on the evidence submitted by all of the parties, the Board finds that the Appellant developed and is operating a Non-accessory Parking Use at the two municipal addresses which comprise the Site.

- c) No development permit has ever been granted authorizing a Non-Accessory Parking Use for any portion of the Site.
- d) This Use is occurring on an ongoing basis, in contravention of section 683 of the Act and section 5.1 of the *Edmonton Zoning Bylaw* (“the Bylaw”).

[148] Accordingly the Board finds that the two Stop Orders were correctly issued and they are hereby confirmed.

[149] The Board declines to vary the terms of the two Stop Orders for following reasons:

- a) The Board finds that reasons stated above with respect to the prejudices that will be suffered by the respective parties associated with granting or refusing an adjournment of the hearing apply with equal force the Appellant’s specific request to alter the date for compliance in the two Stop Orders from January 23, 2017 to April 12 or 19, 2017.
- b) Furthermore, the Board notes that, in combination with extension of the enforcement date, the Appellant proposes the insertion of conditions into the Stop Orders concerning hours of operation, landscaping, lighting and security. The proposed conditions are not intended to preserve the Site, nor to facilitate the orderly cessation of the unauthorized Non-accessory Parking Use. On the contrary, the proposed conditions are to be added to the Stop Orders to facilitate or regulate a Non-Accessory Parking Use while reducing its impact on the neighbouring properties until the Court of Appeal renders its decision on leave to appeal.
- c) On November 24, 2016, a panel of the Board denied the Development Permit for this Use. That decision is currently under appeal in separate proceedings. While the proposed conditions may be appropriate for insertion into a Development Permit, they are not appropriate terms for inclusion in a Stop Order issued after the Board has made the decision to deny a Development Permit.
- d) The addition of these conditions presupposes that the unauthorized Use will continue. In so much as varying the Stop Orders in this manner could be considered tantamount to sanctioning the denied Use or to issuing some form of interim permission for a Non-accessory Parking Use (contrary to the November 24, 2016 Board decision and to section 683 of the Act and section 5.1 of the Bylaw), the Board finds this action would be unwarranted and an unauthorized, improper interference in the ongoing Development Permit decision appeal process.
- e) Also, neither the Act, nor the Bylaw, expressly authorizes the Board to grant an interim stay to approve the continuance of a Use that the Board previously denied pending the outcome of the application for leave to appeal to the Court of Appeal. To the contrary, section 17(1)(3)(c) of the Bylaw provides that in the event a Development Permit is issued and subsequently appealed, that permit is suspended

pending exhaustion of the appeal processes. Per section 23.1(4) it is an offence for any person to continue to develop after a Development Permit has been suspended.

- f) Taking a purposive approach and in view of section 17(1)(3)(c), it is illogical and contrary to the spirit of the Bylaw that under the terms of a Stop Order, in a case where Development Permit has been refused by the Development Authority and the Board, an illegal Use could nonetheless be authorized and further developed in accordance with stated conditions pending determination of the application for leave to appeal.

[150] The Board notes that this decision in no way precludes the Appellant from pursuing his application for permission to appeal the November 24, 2016 decision before the Court of Appeal, nor from pursuing any other interim judicial remedy.



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

Board Members in Attendance:

Ms. A. Lund; Mr. R. Hachigian; Mr. J. Kindrake; Ms. S. LaPerle

Important Information for the 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.
2. When a decision 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 NW, Edmonton.