

***Edmonton Subdivision and
Development Appeal Board***

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SDAB-D-15-031

Application No. 147598066-001

An appeal to construct a 250 Dwelling Unit Apartment Housing development with ground floor commercial units (General Retail Stores) and underground parkade (Corners 1) on Lot 1, Block 1, Plan 1221938, located at 10225 – 95 Street NW, was **WITHDRAWN**

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DATE: March 12, 2015
PROJECT NO.: 148609144-014
FILE NO.: SDAB-D-15-035

NOTICE OF DECISION OF THE SUBDIVISION AND DEVELOPMENT APPEAL BOARD

This appeal dated January 29, 2015, from the decision of the Development Authority for permission to:

Construct an Accessory Building - rear detached Garage (7.01m x 6.71m) existing without a permit

on Plan I, Block 72, Lot 21, located at 9805 - 83 AVENUE NW, was heard by the Subdivision and Development Appeal Board at its hearing held on February 25, 2015. The decision of the Board was as follows:

SUMMARY OF HEARING:

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.

The appeal was filed on time, in accordance with Section 686 of the *Municipal Government Act*, R.S.A. 2000, c. M-26.

The Board heard an appeal of the decision of the Development Authority to refuse an application to construct an Accessory Building - rear detached Garage (7.01 metres by 6.71 metres) existing without a permit, located at 9805 – 83 Avenue NW. The subject site is zoned RF2 Low Density Infill Zone and is within the Mature Neighbourhood Overlay.

The development permit application was refused because no Principal Building has been approved on the proposed Site as the existing Single Detached House was built without permits and an As-Built Permit Application was refused by the Development Authority and the Subdivision and Development Review Board on December 11, 2014. Therefore, the proposed development shall not be approved prior to the Principal Use/building. In addition, there is an excess in the maximum allowable Site Coverage; and a deficiency in the distance between an Accessory Building and the lot line running parallel to any flanking public roadway, other than a lane.

SUMMARY OF HEARING (CONTINUED):

Prior to the hearing the following information was provided to the Board, copies of which are on file:

1. A written submission from the Development Officer dated February 11, 2015;
2. A written submission from the Appellant, Shawn Johanson, received February 20, 2015; and
3. An e-mail of opposition to the development from a neighbouring property owner received on February 23, 2015.

The Board heard from Mr. S. Johanson, the Appellant, who was accompanied by the builder, Mr. C. Vrabel, who provided the following information to the Board:

1. Mr. Johanson referred to the photos contained in his submission showing the Site and the area around the Site.
2. The Real Property Report submitted by Mr. Johanson shows that there is a 6.05 metre wide municipal boulevard between the curb and the property line. The garage is located 1.78 metres from the property line for a total distance of 7.83 metres from the garage to the curb, which he feels is very large. The required setback in the flanking side yard is 2.01 metres.
3. In SDAB-D-14-077 the Board allowed the existing 1.29 metre setback for the principal residence on the subject Site.
4. The principal residence setback has no impact on the amenities of the neighbourhood. No sight lines are affected and there is no sidewalk on the boulevard. If a 1.29 metre setback is acceptable for the principal residence, a setback of 1.78 metres for the garage should be allowed. This amounts to a variance of only 0.23 metres.
5. In determining the total site coverage, the development officer based her calculations on the previously submitted plan, which showed a 1.9 metre high deck, and found the total site coverage to be 46.5 percent. The updated Real Property Report shows the height of the deck has been lowered and is now 1.12 metres high.
6. Mr Johanson advised that that the deck height was measured from the ground, not from grade. The final grading is not in place and no drainage plan is in effect. He expects that once everything has been finalized including infill around the deck, the deck height will be 0.5 to 0.6 metres high when measured from the ground and therefore should not be included in the total Site Coverage. The revised total Site Coverage is 39.99 percent.

SUMMARY OF HEARING (CONTINUED):

7. The Appellant submitted the following during the hearing:
 - a. Exhibit 'A' - final plans for the house and garage; and
 - b. Exhibit 'B' - a brochure taken from the City of Edmonton website showing requirements for uncovered decks.
8. Exhibit 'B' indicates a development and building permit is required if the deck floor is over 0.6 metres above grade. The diagram in Exhibit 'B' shows that the height of the deck is measured from the ground surface.
9. He referred to the definition of Site Coverage contained in the *Edmonton Zoning Bylaw* at Section 6.1(93)(c) which excludes unenclosed inner and outer courts, terraces and patios, where these are less than 1.0 metres above Grade, from the Site Coverage calculation.
10. Exhibit 'A' shows that, with the uncovered deck excluded, the house covers 28.39 percent of the lot and the Garage covers 11.6 percent of the lot resulting in a total Site Coverage of 39.99 percent.
11. Regarding the allegation that the principal building does not have a valid Development Permit, he pointed out that a Development Permit for the principal building was upheld by the Board on April 11, 2014, in SDAB-D-14-077, and as such, there is a valid Development Permit in existence and the first reason for refusal is incorrect.
12. He referred to the definition of Accessory Uses and Buildings contained in Section 50.1(2) of the *Edmonton Zoning Bylaw*. The Development Permit issued in April has never been cancelled and is still valid notwithstanding that the existing building does not comply with it.
13. He took the position that steps must be taken to render a Development Permit invalid, but he was not able to refer to a specific section of the Bylaw outlining this.

Mr. Johanson provided the following responses to questions from the Board:

1. Construction of the Garage started in January 2014. There was no Development Permit for the Garage in place at that time. The Development Permit was applied for at the same time as the Development Permit for the house.
2. After the Board hearing in April 2014, the application for the Garage permit was refused and was not appealed.

SUMMARY OF HEARING (CONTINUED):

3. The Stop Order was issued in June 2014 and no work has been done on the Site since that date.
4. He confirmed that the definition of Height in the Bylaw relates to Height above Grade; however, he pointed out that when someone applies for a deck permit the City accepts measurements from the ground level, not from Grade.
5. He acknowledged that the existing deck is 1.12 metres above Grade. He reiterated that the ground level at this site is not yet final and it is anticipated that deck will be 0.5 metres to 0.6 metres above ground level when the work is complete.
6. The December 11, 2014, decision, SDAB-D-14-307, to refuse approval for the house as built does not have the effect of extinguishing the earlier Development Permit. There are specific ways to get rid of an existing permit and these have not been met. Nothing in SDAB-D-14-307 expressly extinguished or cancelled the Development Permit.
7. A permit was approved by the Development Officer and upheld by the Board so this permit exists. The fact that a separate application for an as-built structure might be required does not affect the original Development Permit.
8. It was pointed out by the Board that the Board had not been provided with revised plans for the as-built structure when deciding SDAB-D-14-307. Mr. Johanson stated that the lack of plans was inadvertent but it was obvious that the application was for something different.
9. Mr. Johanson stated that the Appellants were meeting the following Tuesday with Sustainable Development to consider the future of the Permit. In his view, this reinforced the validity of the development permit confirmed by the SDAB on April 11, 2014

The Board heard from Ms. F. Hetherington, City of Edmonton Sustainable Development Department, who provided the following information to the Board:

1. She indicated that this application for an Accessory building falls under the RF2 Low Density Infill Zone and the Mature Neighbourhood Overlay.
2. She referred to the definition of an Accessory building and confirmed that the principal Use must have a permit to allow an Accessory building.

SUMMARY OF HEARING (CONTINUED):

3. She referred to Section 17.1(2) of the *Edmonton Zoning Bylaw* which indicates that a Development Permit is not valid until “any conditions of approval, except those of a continuing nature, have been fulfilled.” In this situation the existing building exceeds the height condition in the permit and therefore, in her opinion, the permit is not valid.
4. She referred to 17.1(4) of the *Edmonton Zoning Bylaw* which indicates that if incorrect information is given a permit is invalid. The house was not built according to stamped plans so, in her opinion, the permit is invalid.
5. Regarding Site Coverage she stated that even though the deck has been lowered to a height of 1.12 metres above grade, the deck area still has to be considered in the overall Site Coverage as it is over 1.0 metres above grade.
6. She acknowledged that development officers often take deck heights from the adjacent ground, particularly when decks are built after the main development has been finished.
7. She confirmed that the Garage Side Setback is deficient by 0.23 metres. However, she saw no particular hardship on this lot being that it is rectangular and similar to others in this neighbourhood.
8. The Development Officer acknowledged that the POSSE permit has not been formally cancelled, but reiterated that the permit is not valid.
9. According to Section 17.2(1)(a) of the *Edmonton Zoning Bylaw* a Development Permit may be cancelled if “any person undertakes development, or causes or allows any development to take place on a Site contrary to the Development Permit”. She stated that the original permit was dated February 11, 2014 and that construction commenced within a 12 month period.
10. Ms. Hetherington confirmed there will be a meeting with the appellants the following Tuesday. Although she believes this is an invalid permit, one of the objectives of the City of Edmonton Sustainable Development Department is to clear up the record in the POSSE system.

Ms. Hetherington provided the following responses to questions from the Board:

1. She confirmed that if there is no permit for the principal building Site Coverage is not an issue for the Accessory building.
2. When asked if the house could be revised to conform with the original Development Permit she felt this would be unrealistic.

SUMMARY OF HEARING (CONTINUED):

3. She confirmed that the Development Authority and the Appellant are meeting on March 3, 2015, to discuss the situation and to determine how to go forward. She believes a new application will be required as there are six reasons for refusal on the As-Built Development Permit Application.
4. She confirmed the original application was granted in February 2014.
5. She was unable to clarify the effects on a Development Permit if development had not been started within a year.
6. When asked her opinion on the validity of the Development Permit in light of SDAB-D-14-307 she stated the decision was regarding whether the house could be left as built and did not relate directly to the original Development Permit.
7. The Development officer stated that a Secondary Suite in the principal dwelling would not be considered because the plans did not provide for an additional parking space.

In rebuttal Mr. Johanson provided the following information to the Board:

1. He advised he had sent an e-mail to the Development Officer several months ago requesting that the originally proposed Secondary Suite be removed from the Development Permit application.
2. He questioned why the City was considering cancelling the development permit if it is invalid. He felt that this reinforced his point that there was a valid permit in place.
3. Further, he questioned why, if the City is currently “reviewing the validity of the permit”, they are now taking the position that the permit is invalid.
4. He confirmed that Building Permits had been issued for the existing structures on site.
5. He pointed out that this is the second application for the Accessory building; the first application had been refused. If the Board upholds the Refusal today the Appellant would not be able to re-apply for one year.

DECISION:

that the appeal be DENIED and the decision of Refusal by the Development Officer be UPHELD.

REASONS FOR DECISION:

The Board finds the following:

1. That an issued development permit with conditions is considered to be one document under Section 17.1(2).
2. That there is an expectation that an appellant in applying for a development permit, undertakes to construct the building according to the approved plans.
3. The original permit issued February 11, 2014, and upheld by the Board on April 11, 2014, in SDAB-D-14-077, included plans stamped as approved and eight conditions. The first condition relates to the height of the building:

The height of the principal building shall not exceed 8.6 metres nor 2 ½ Storeys as per the Height definition of Section 6.1(49) of the *Edmonton Zoning Bylaw* 12800.
4. In SDAB-D-14-307 on December 11, 2014, the Board found that the Single Detached House as built on the Site did not comply with the height condition outlined in the April Development Permit. The Board found the Single Detached House was a 3 Storey structure and the Height from Grade to the mid-point of the roof was 9.97 metres and the Height from Grade to the ridge line of the roof is 10.37 metres.
5. The Board concurs with the Development Officer in that the Single Detached House does not comply with condition number 1 of the April Development Permit, as granted by the Board in SDAB-D-14-077.
6. As the conditions have not been fulfilled the Board determines that the April Development Permit is invalid as per Section 17.1(2) of the *Edmonton Zoning Bylaw* which states:

When an application for a Development Permit has been approved by the Subdivision and Development Appeal Board, it shall not be valid until any condition of approval, except those of a continuing nature, have been fulfilled.
7. Section 50.1(2) of the *Edmonton Zoning Bylaw* states:

Accessory Uses and Buildings are permitted in a Zone when Accessory to a principal Use which is a Permitted use in that same Zone and for which a Development Permit has been issued.
8. As no valid Development Permit exists for a principal Use on the Site there can be no application for an Accessory Building.
9. As the Board has found that there is no valid development permit for this site, the Board does not need to consider the two other reasons for refusal cited by the Development Officer.

IMPORTANT INFORMATION FOR 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.

Patricia Jones
SUBDIVISION AND DEVELOPMENT
APPEAL BOARD

NOTE: Citizens can call 311, 24-hours a day, every day of the year for access to City of Edmonton information, programs and services.