



**EDMONTON  
TRIBUNALS**

*Subdivision &  
Development  
Appeal Board*

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Date: January 24, 2017  
Project Number: 181229790-005  
File Number: SDAB-D-17-005

**Notice of Decision**

- [1] On January 12, 2017, the Subdivision and Development Appeal Board (the “Board”) heard an appeal that was filed on December 15, 2016. The appeal concerned the decision of the Development Authority, issued on November 25, 2016, to refuse the following development:

**Construct an Accessory Structure (pergola over deck) and to install a hot tub (2.35 metres by 2.35 metres) in the rear yard of a Single Detached House, existing without permits**

- [2] The subject property is on Plan 8923294 Blk 126 Lot 34, located at 545 - BUCHANAN ROAD NW, within the RF1 Single Detached Residential Zone. The Bulyea Heights Neighbourhood Structure Plan and the Riverbend Area Structure Plan apply to the subject property.
- [3] The following documents were received prior to the hearing and form part of the record:
- Copy of the Development Permit application with attachments, proposed plans, and the refused Development Permit; and
  - The Development Officer’s written submissions.

**Preliminary Matters**

- [4] At the outset of the appeal hearing, the Presiding Officer confirmed with the parties in attendance that there was no opposition to the composition of the panel.
- [5] The Presiding Officer outlined how the hearing would be conducted, including the order of appearance of parties, and no opposition was noted.

[6] Prior to the hearing, the Board raised a jurisdictional issue regarding when the appeal was filed. The Board explained to the Appellant that it is constrained by the 14-day limitation period prescribed by Section 686(1)(a) of the *Municipal Government Act*, R.S.A 2000, c. M-26 ("*Municipal Government Act*"), which states:

686(1) A development appeal to a subdivision and development appeal board is commenced by filing a notice of the appeal, containing reasons, with the board within 14 days,

(a) in the case of an appeal made by a person referred to in section 685(1), after

(i) the date on which the person is notified of the order or decision or the issuance of the development permit.

[7] The Board must therefore determine whether the Appellant filed his appeal within the 14-day limitation period. If the appeal was filed late, the Board has no authority to hear the matter. The Presiding Officer pointed out that the Canada Post confirmation document indicated that the development permit refusal had been received on November 30, 2016 and that the Appellant confirmed in his reasons for appeal that he had received the refusal on November 30, 2016. Accordingly, it appeared that the 14-day appeal period had expired on December 14 but the appeal was not filed until December 15, 2016.

### **Summary of Hearing on Preliminary Matter**

i) *Position of the Appellant, Mr. Zapernick, who was accompanied by Ms. Zhao, the property owner*

[8] Mr. Zapernick is the real estate agent for the previous property owners, who had moved to Vancouver, and he made the Development Permit application on their behalf.

[9] The pergola and hot tub have been in existence since 2003. The previous property owners did not realize a development permit was required until the property was for sale. The previous property owners assumed the fence was on the property line and built the structure to the fence.

- [10] He has had no issues dealing with Sustainable Development, who have been helpful. After he applied for the development permit, the Development Officer suggested that he speak to the neighbours regarding the pergola and hot tub.
- [11] After he received the refused development permit on November 30, 2016, he wanted to speak to the Development Officer for clarification about the refusal.
- [12] He phoned the Development Officer and left a message on December 12, 2016 and his call was returned late in the day on December 14, 2016. He called the Board office immediately after he got off the phone but the office was closed.
- [13] He contacted the Board Office the next day and was informed that the appeal would be filed outside the 14-day notification period. He nonetheless filed his appeal on December 15, 2016.
- [14] The Presiding Officer referred to the reasons for the refusal listed in the notice and asked what clarification was needed.
- [15] Mr. Zapernick indicated that he wanted clarification about the 0.1 metre projection of the deck onto the property to the north and the 0.5 metre Setback for the hot tub. After speaking to the Development Officer, he was informed that the City does not get involved in encroachment issues. However, in his opinion, the City does get involved if part of the refusal is based on the projection onto the property to the north. With regard to the hot tub and pergola, he stated that he received support from the neighbour to the west.

*ii) Position of the Development Officer, Mr. McArthur*

- [16] In September Mr. McArthur suggested that Mr. Zapernick speak to the neighbouring property owners to get their support and that September 26, 2016 was the deadline to revise the application and remove the encroachments onto the adjacent property. After that deadline passed, he refused the application.
- [17] He confirmed that Mr. Zapernick left him a voice message on December 12, 2016. He was not able to return the phone call until late in the day on December 14, 2016.
- [18] Mr. McArthur would not be opposed to an extension of the appeal period, but does not believe the Board has the authority to grant extensions.

[19] He was asked whether he would have approved the development permit if signatures had been received in support from neighbouring property owners. Mr. McArthur indicated that he could not confirm that but it would have made the justification for granting the required variances easier.

*iii) Rebuttal of the Appellant, Mr. Zapernick*

[20] Mr. Zapernick had nothing to add in rebuttal.

**Decision on Preliminary Matter**

[21] The appeal was not filed within the 14-day appeal period mandated by Section 686 of the *Municipal Government Act*. Accordingly, the Board does not have the jurisdiction to hear the appeal.

**Reasons for Decision on Preliminary Matter**

[22] Section 686(1)(a)(i) states that a development appeal to a subdivision and development appeal board is commenced by filing a notice of the appeal, containing reasons, with the board within 14 days, in the case of an appeal made by a person referred to in section 685(1), after the date on which the person is notified of the order or decision or the issuance of the development permit.

[23] The refused Development Permit was sent by registered mail and received on November 30, 2016 as confirmed by a Canada Post registered mail notification.

[24] The Appellant confirmed in his reasons for appeal and at the hearing that he received the reasons for refusal on November 30, 2016.

[25] The Appellant called the Development Officer on December 12, 2016 to ask some questions about the refusal.

[26] The Development Officer did not return Mr. Zapernick's phone call until late in the day on December 14, 2016. By the time that phone call ended, the Board offices were closed. The Appellant did not file the appeal until December 15, 2016.

[27] The Board is satisfied that the Development Officer's reasons for refusal, which the Appellant received on November 30, 2016, are clear and unambiguous and that the Appellant had all the information he needed at that time to decide whether he should appeal the decision. Accordingly, the Appellant was properly notified of the decision on November 30 and the appeal period expired on December 14, 2016. The appeal was not filed until December 15.

[28] The Board finds that the appeal was not filed within the 14-day limitation period and that it does not have the jurisdiction to hear the appeal.

Mr. M. Young, Presiding Officer  
Subdivision and Development Appeal Board

**Important Information for the Applicant/Appellant**

1. This decision may be appealed to the Alberta Court of Appeal on a question of law or jurisdiction under Section 688 of the *Municipal Government Act*, 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, Edmonton.



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Date: January 24, 2017  
Project Number: 229334065-001  
File Number: SDAB-D-17-006

**Notice of Decision**

- [1] On January 12, 2017, the Subdivision and Development Appeal Board (the “Board”) heard an appeal that was filed on December 18, 2016. The appeal concerned the decision of the Development Authority, issued on December 9, 2016, to refuse the following development:

**Add a 1 Bedroom Dwelling to an existing 8 Dwelling Apartment Housing**

- [2] The subject property is on Plan 8355AK Blk B Lot 7, located at 10130 - 121 STREET NW, within the DC1 Direct Development Control Provision. The Oliver Area Redevelopment Plan applies to the subject property.
- [3] The following documents were received prior to the hearing and form part of the record:
- Copy of the Development Permit application with attachments, proposed plans, and the refused Development Permit; and
  - The Development Officer’s written submissions.

**Preliminary Matters**

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

[7] The Presiding Officer explained to the parties that this site is zoned DC1 Direct Development Control Provision. The Board's authority is limited under Section 641(4)(b) of the *Municipal Government Act*, which states:

641(4) Despite Section 685, if a decision with respect to a development permit application in respect of a direct control district

...

(b) is made by a development authority, the appeal is limited to whether the development authority followed the directions of council, and if the subdivision and development appeal board finds that the development authority did not follow the directions it may, in accordance with the directions, substitute its decision for the development authority's decision.

Accordingly, the Board needs to hear submissions with regards to how the Development Officer did or did not follow the directions of Council.

### **Summary of Hearing**

*i) Position of the Appellant, Ms. Gray, representing Ayre & Oxford*

[8] Ms. Gray is speaking on behalf of property owner who lives in Vancouver. The property was purchased in March 2016.

[9] The building has nine occupied units. The ninth apartment does not have a development permit. They want to legalize the ninth apartment so they can pay taxes and contribute to the City of Edmonton. The new property owner would like to buy more properties in Edmonton.

[10] The ninth apartment meets all the fire codes and was approved by the Fire Department.

[11] The ninth apartment was an old storage room that was converted to a 350 square foot suite and has been occupied for over five years prior to the building being acquired by the new property owners.

[12] The ninth apartment is inexpensive and is appropriate for students and professionals working downtown.

[13] The Appellant is asking for the ninth apartment to be grandfathered in so it can be legalized. The ninth apartment has a value of \$100,000.

[14] In response to questions from the Board, Ms. Gray stated that she does not believe the ninth apartment has been assessed or that taxes have been paid on it.



- [15] She stated that the storage unit had two walls added to separate the bedroom and living space. It has a full bathroom and bedroom and the appropriate window to comply with fire codes. The ninth apartment was missing a kitchen space; however, a small kitchen was added. The structural walls were not moved. She stated that large storage spaces are often made into smaller apartments.
- [16] She could not confirm when the ninth apartment was converted but believes there were three different tenants living there before the building was purchased by the new owner.
- [17] She was asked to comment on whether the Development Officer followed the directions of Council and if allowing the creation of an additional Dwelling in the building was Council's intention. Ms. Gray stated that she is not familiar enough with the DC1 Direct Development Control Provision. She understood that there were to be no new apartment developments within this portion of the Oliver area. She reiterated that they do not want to create or build anything; they just want a permit for what is already there. The ninth apartment will not affect parking. In her opinion, the Development Officer probably followed the directions of Council.

ii) *Position of the Development Officer, Mr. Angeles*

- [18] Mr. Angeles did not have a presentation but was in attendance to answer questions from the Board.
- [19] The Presiding Officer asked the Development Officer to comment on Section 643(3) of the *Municipal Government Act* which states that a non-conforming use of part of a building may be extended throughout the building but the building, whether or not it is a non-conforming building, may not be enlarged or added to and no structural alterations may be made to it or in it. Specifically, he was asked if he had the authority to approve extending the non-conforming Apartment Housing use to the ninth apartment notwithstanding the fact that Apartment Housing is no longer a listed use in the DC1.
- [20] Mr. Angeles confirmed that there is an approved Development Permit for an eight Dwelling Apartment Housing. Apartment Housing is no longer a listed use in the DC1. The issue here is that adding another Dwelling to the existing eight Dwelling Apartment House increases the intensity of the use. If the development involved expanding one of the original eight Dwellings, he would have applied Section 643(3) of the *Municipal Government Act* and allowed it. However, because the proposed development involves the creation of a whole new Dwelling, he felt that he could not allow this because Apartment Housing is not a listed use in the DC1.
- [21] He confirmed that the existing Development Permit specifies that the approved development is an eight dwelling Apartment Housing use.

- [22] Mr. Angeles confirmed there have been no complaints regarding the existing building, the ninth apartment or parking. However, since Apartment Housing is not a listed use, he is bound by the regulations of the DC1 and cannot approve the proposed development.
- [23] He stated that, even if Apartment Housing were a listed use, the Density, parking, and Floor Area Ratio would increase by adding the ninth apartment. Because he does not have the authority to vary Density, he would still have denied the application.
- [24] Regarding the reference in Section 643(3) to structural alterations, he stated that his opinion is that it has to be a change to a load bearing wall to be a structural alteration.

*iii) Rebuttal of the Appellant, Ms. Gray*

- [25] In her opinion, the ninth apartment is a change in space and not a new development. The space was changed from a storage room to a small suite.
- [26] The ninth apartment is not advertised with a parking space and parking is not an issue.
- [27] The storage space was previously a bachelor suite with only one wall separating the sleeping area from the living space. They added walls to create a separate bedroom. The plumbing and wiring have not been changed.
- [28] She is not aware of any development permits for the ninth apartment.
- [29] The bachelor suite existed prior to the new owners purchasing the property in March 2016. She reiterated that the owners only want to get an approved permit for the ninth apartment, they do not want to change it in any way.

**Decision**

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

**Reasons for Decision**

- [31] A development permit was issued for the existing eight Dwelling Apartment Housing in 1957. The *Edmonton Zoning Bylaw* was subsequently amended and now the Apartment Housing is located in the DC1 Direct Development Control Provision (Area 1) (the "DC1") of the Oliver Area Redevelopment Plan. The DC1 was last amended on April 4, 2016.

- [32] At some time after the development permit was issued, a storage room in the Apartment Housing was converted into first, a bachelor suite, and later into a one bedroom apartment. These conversions were done without development permits.
- [33] The new owner of the Apartment Housing is applying for a development permit for this additional apartment (the “ninth apartment”)
- [34] The DC1 does not include Apartment Housing as a listed Use.
- [35] Section 641(4)(b) of the *Municipal Government Act* states that despite section 685, if a decision with respect to a development permit application in respect of a direct control district is made by a development authority, the appeal is limited to whether the development authority followed the directions of council, and if the subdivision and development appeal board finds that the development authority did not follow the directions it may, in accordance with the directions, substitute its decision for the development authority’s decision.
- [36] Accordingly, the Board cannot vary the decision of the Development Officer unless it concludes that the Development Officer failed to follow the directions of Council. To determine what the directions of Council are, the Board must look to, among other things, the provisions of the DC1.
- [37] The Development Officer refused to issue a development permit for the ninth apartment because he was of the view that the ninth apartment would be new Apartment Housing in the DC1 and this would not conform to the uses prescribed in the DC1.
- [38] Section 15.2(2) of the DC1 states that the rationale for Area 1 is to provide for a mixed use area that encourages the retention of existing older residential structures by providing opportunity for the conversion of these older structures to small scale, low impact commercial uses. Accordingly, the Board concludes that Council’s intention was that existing residential structures in Area 1 would be converted over time to small scale commercial uses.
- [39] Further, Section 15.2(3) of the DC1 lists the uses prescribed for Area 1 and Apartment Housing is not one of the listed uses. The Board notes that for Area 5 of the DC1, Apartment Housing *is* a listed use. From this, the Board concludes that in Area 1, where the proposed development is located, Council intended that there should be no new Apartment Housing developed.
- [40] Section 616(b)(iv) of the *Municipal Government Act* defines “development” as including a change in the intensity of use of land or a building...that results in or is likely to result in a change in the intensity of use of the land or building.
- [41] The Board finds that the proposed ninth apartment would be new Apartment Housing development in the DC1 and that the Development Officer did follow the directions of Council by refusing to grant the development permit.

[42] The Board is also of the view that the Development Authority does not have the legal authority to approve development that does not conform with the use prescribed for that land in the *Edmonton Zoning Bylaw*. Section 640(6)(b) of the *Municipal Government Act* states:

640(6) A land use bylaw may authorize a development authority to decide on an application for a development permit even though the proposed development does not comply with the land use bylaw or is a non-conforming building if, in the opinion of the development authority,

...

(b) the proposed development conforms with the use prescribed for that land or building in the land use bylaw.

[43] This Board operates under similar constraints with respect to approving uses that do not conform with the use prescribed in the *Edmonton Zoning Bylaw* (Section 687(3)(d)(ii) MGA). Because Apartment Housing is not a listed use in the DC1, neither the Development Authority nor the Board has the authority to allow the development of the proposed ninth apartment.

[44] The Board considered the application of Section 643 of the *Municipal Government Act* to this situation. It reads in part:

643(1) If a development permit has been issued on or before the day on which a land use bylaw or a land use amendment bylaw comes into force in a municipality and the bylaw would make the development in respect of which the permit was issued a non-conforming use or non-conforming building, the development permit continues in effect in spite of the coming into force of the bylaw.

...

(3) A non-conforming use of part of a building may be extended throughout the building but the building, whether or not it is a non-conforming building, may not be enlarged or added to and no structural alterations may be made to it or in it.

[45] According to Section 643(1), the development permit for the original eight Dwelling Apartment Housing continues in effect in spite of the enactment of the DC1 and the decision to not list Apartment Housing as a use allowed in Area 1. Section 643(3) states that a non-conforming use of part of a building may be extended throughout the building providing the building is not enlarged and no structural alterations are made.

[46] If it is assumed that the interior walls and other alterations that were constructed to create the ninth apartment do not amount to structural alterations, it appears that the ninth apartment is an extension of the non-conforming use of the building throughout the building as provided for in Section 643(3).

- [47] The Development Officer said he considered this section but he concluded that he did not have the power to approve new Apartment Housing in the DC1 because it was not a listed use.
- [48] The Board agrees with this interpretation. Although Section 643(3) appears to allow the extension of a non-conforming use of part of a building throughout the building in certain circumstances, the specific prohibition against allowing development that does not conform with the use prescribed in the land use bylaw contained in Section 640(6)(b) takes precedence over that general section.
- [49] The Board concludes that the Development Officer did follow the directions of Council and that the Board does not have the jurisdiction to interfere with his decision.

Mr. M. Young, Presiding Officer  
Subdivision and Development Appeal Board

**Important Information for the Applicant/Appellant**

1. This decision may be appealed to the Alberta Court of Appeal on a question of law or jurisdiction under Section 688 of the *Municipal Government Act*, 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.
  
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**SDAB-D-17-007**

**Application No. 111305898-001**

An appeal by **1223382 Alberta Ltd. / Witten LLP** to Comply with an Order to revert the building back to a Single Detached House AND acquire a Development Permit for interior alterations to complete the work AND reduce the number of occupants living in the building down to a single Household. This Order must be complied with before January 17, 2017 was **TABLED TO FEBRUARY 8, 2017.**