



**EDMONTON  
TRIBUNALS**

*Subdivision &  
Development  
Appeal Board*

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Date: January 31, 2018  
Project Number: 253125927-002  
File Number: SDAB-D-17-226

**Notice of Decision**

- [1] The Subdivision and Development Appeal Board (the “Board”) at a hearing on November 22, 2017, made and passed the following motion:

“That SDAB-D-17-226 be tabled to a date to be determined in January 2018.”

- [2] On January 17, 2018, the Board made and passed the following motion:

“That SDAB-D-17-226 be raised from the table.”

- [3] On January 17, 2018, the Board heard an appeal that was filed on October 27, 2017. The appeal concerned the decision of the Development Authority, issued on October 10, 2017, to refuse the following development:

Move on a storage building (6.1 m x 2.4 m) Accessory to a General Retail  
Stores Use building

- [4] The subject property is on Plan I Blk 68 Lot 9, located at 10340 - 82 Avenue NW, within the DC1 Direct Development Control Provision Zone. The Strathcona Area Redevelopment Plan applies to the subject property.

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

- Copy of the Development Permit application with attachments, proposed plans, and the refused Development Permit;
- The Development Officer’s written submission and four video submissions; and
- Appellant’s support materials including three letters of support.

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

- Exhibit “A” – Six photo boards (from the Appellant)

### **Preliminary Matters**

- [7] 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.
- [8] The appeal was filed on time, in accordance with section 686 of the *Municipal Government Act*, RSA 2000, c M-26.
- [9] The Presiding Officer outlined how the hearing would be conducted, including the order of appearance of parties, and no opposition was noted.
- [10] The Presiding Officer explained to the parties that this site is zoned DC1 Direct Development Control District. The Board's authority is limited under section 685(4)(b) of the *Municipal Government Act*, which states:

685(4) Despite subsections (1), (2) and (3), if a decision with respect to a development permit application in respect of a direct control district

...

(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.

The Chair requested that the Development Officer make his presentation first and explain how he followed the directions of council when making his decision.

### **Summary of Hearing**

*i) Position of the Development Officer, Mr. P. Belzile*

- [11] The Development Officer confirmed that all development regulations such as setbacks, FAR, Height, etc. are met. He relied mainly on the fact that the original design characteristics of the area (brick, wood, pressed metal, cast stone) are not met. The Heritage Planner agreed that the proposed development did not meet the architectural character of the neighbourhood.
- [12] While the regulations appear to be directed to buildings facing Whyte Avenue and the proposed development is to the rear of an existing building, he is of the opinion that streetscape regulations should also be applied to the rear of the property as there are several businesses in the immediate vicinity which face the lane. Any additional development within the lane should meet the architectural control test.

- [13] He made his decision based on Section 5(s) of the Strathcona Area Redevelopment Plan Historical Commercial DC1 Direct Development Control Provision which reads:

Notwithstanding the development regulations of this Provision, the Development Officer, in consultation with the Heritage Officer, may vary any regulation within this Provision if, in their opinion, such variances would not diminish the historical nature of a building or the area.

He was of the opinion that the proposed development would diminish the historical nature of the area.

- [14] He also considered Section 57.3 of the Edmonton Zoning Bylaw, which states:

In all non-industrial developments, the design and use of exterior finishing materials shall be to the satisfaction of the Development Officer who shall ensure, as far as reasonably practicable, that materials shall be used that ensure that the standard of the proposed buildings and structures shall be similar to, or better than, the standard of surrounding development.

- [15] In his view, a sea can is more typical of an industrial area, not a commercial shopping area. He acknowledged that the corrugated metal exterior of the sea can matches the facade of the Varscona Theatre across the lane. The decision to allow corrugated metal on the Varscona Theatre was made by Council through exceptional direct control regulations and this material is only located on the upper portion of the theatre; brick is maintained at street level.

- [16] The sea can came to the City's attention as a result of a complaint that the structure was being used to access neighbouring roof tops for the purpose of creating graffiti. He referred to four videos he had submitted that show people scaling the container. The sea can also creates a hiding space between it and the principal building. These issues demonstrate that section 58 of the *Edmonton Zoning Bylaw*, which sets out the general performance standards for safe physical environments, was not met.

- [17] Mr. Belzile provided the following responses to questions from the Board:

- a) The historical designation extends for one block north and one block south of Whyte Avenue.
- b) The principal building is on the Historical Resources Inventory but is not on the Register of Historic Resources. Because it is listed on the Inventory, the DC1 Direct Development Control Provision does not require the property to provide any parking.
- c) During certain events, such as the Fringe, the alleys are busy with pedestrians. It is his opinion that the lane is not to be used just for trash and parking but that the historical character of the area should be transposed to the alley. While he couldn't find any

written policy on this point, he believes there have been discussions with the Old Strathcona Foundation to activate the alleys around Whyte Avenue.

- d) A development permit is required because the proposed development is not temporary in nature. Its intent is for year-round storage and it is a permanent aspect of the business. In his opinion a temporary development would be for six months or less.
- e) Pressed metal is a decorative metal component with embellished features on it. The metal sea can is made of structural steel that is corrugated.
- f) In response to questions from the Board, Mr. Belzile confirmed that while the decision of refusal makes no mention of section 5(s), he considered his variance powers contained in this section when making his decision.
- g) He has had no discussions with the Appellant regarding ways to make the sea can more architecturally appealing. It appears that the sea can has been painted recently and is not rusty. However, it still looks like a sea can. Even if the proposed development was made of other material, the safe physical environment issues would still be present.

*ii) Position of the Appellant, Vivid Print*

[18] The Appellant was represented by Mr. M. Wilson. He was accompanied by Ms. B. Wilson-Waeland, also of Vivid Print.

[19] The Appellant first opened his business in 2007 out of the Garneau Theatre and moved to Whyte Avenue in 2009. Many of the area's historical buildings have been lost over the last 10 years and there are only three remaining on his block.

[20] The Appellant clarified the principal building is not on the Historical Inventory and was built in 1965. The building two doors east was on the Registry but was demolished two years ago.

[21] The current Strathcona Area Redevelopment Plan ("ARP") was first drafted in 1998, and the emphasis for commercial buildings was on the public-facing portion of the buildings, not on the back alley. This ARP will soon be superseded by a new Plan. It is hoped that the incoming Plan will contain an amendment allowing sea can containers, but with guidelines such as the prohibition of sea cans with rust.

[22] Section 7(c) of the DC1 Direct Development Control Provision states:

Notwithstanding Section 3 of this Provision, recognizing that 83 Avenue NW is not the primary pedestrian oriented shopping street that is 82 Avenue NW, this Sub Area allows for the redevelopment of the Varscona Theatre with architectural and design regulations more fitting of this Use, but still reflecting the scale and historic nature of the area.

This section shows that Council feels that 83 Avenue is historically significant but that it is not as important as Whyte Avenue. The alley behind 83 Avenue would be even less important.

- [23] The Appellant worked for the Old Strathcona Foundation at one point but this Foundation no longer exists. He currently sits on the executive of the Old Strathcona Business Association which is made up of both business and property owners. While there has been some discussion of developing the alley to make it more pedestrian friendly, there has been no widespread support for this. The alley becomes almost completely blocked off by fencing during events such as the Fringe festival.
- [24] Several other business owners in the immediate vicinity also use sea cans for storage. These containers allow small, independent businesses to be able to operate on Whyte Avenue. He explained that many of the buildings on Whyte Avenue do not have basements that can be used for storage. As such, instead of using valuable retail space for storage, inventory can instead be stored in sea cans.
- [25] While the proposed development has been in place for five years, the Appellant feels it should be considered a temporary development as there are no services attached and it can be moved around at any time. The container is used to store inventory. It is located in the back alley which does not have a historical component and does not see a lot of pedestrian use.
- [26] Mr. Wilson showed six photo boards to illustrate the following points:
- a) The sea can is located approximately 15 metres away from the Varscona Theatre and is the same colour as the exterior cladding on the theatre. It aligns with the back of the adjacent building and does not stick out into the lane.
  - b) Photos looking in both directions along the alley illustrate that the exterior of the surrounding buildings facing the alley are finished with acrylic stucco, vinyl siding or cinder blocks. There is no historic component to any of these finishes.
  - c) Several nearby buildings, including the Varscona Theatre and the three businesses immediately next to them, have corrugated metal finishes on the fronts of the buildings.
  - d) Graffiti is present on buildings in the area whether a sea can is present or not.
  - e) Security cameras have been installed and pictures of people hanging around the sea can have been posted on social media. People now know the cameras are there and are intentionally posing in front of the container. This has actually increased security because there is a constant stream of people who are aware they are being watched.

[27] It is his opinion that the decision of the Development Officer is incorrect and the proposed development will not diminish the historical nature of the immediate back alley or the area. There is nothing historic in the back alley and most of the building stock on this block, other than a few registered buildings, is only 20 years old.

*iii) Rebuttal of the Development Officer*

[28] Mr. Belzile stands by his decision which he notes was also based on the security related guidelines provided in sections 57 and 58 of the *Edmonton Zoning Bylaw*.

[29] He acknowledged the letters of support from adjacent property owners.

*vi) Rebuttal of the Appellant*

[30] The Appellant declined the opportunity for rebuttal.

## **Decision**

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

## **Reasons for Decision**

[32] The proposed development is Accessory to a listed Use in the DC1 Strathcona Area Redevelopment Plan Historical Commercial, amended by Bylaw 18164, passed by City Council on September 11, 2017.

[33] Because the proposed development is in a direct control district, the discretion of the Board is constrained by the provisions of section 685(4)(b) of the *Municipal Government Act*, which reads:

685(4) Despite subsections (1), (2) and (3), if a decision with respect to a development permit application in respect of a direct control district

...

(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.

- [34] The Board must therefore first determine if the Development Officer followed the directions of Council when he refused to grant a development permit for the proposed development.
- [35] The Board tabled this hearing on November 22, 2017, because it was unclear to the Board from the written submission of the Development Officer whether in fact he had considered the variance powers contained in section 5(s) of the Direct Control Bylaw 18164. Section 5(s) states:
- Notwithstanding the development regulations of this [Direct Control] Provision, the Development Officer, in consultation with the Heritage Officer, may vary any regulation within this Provision if, in their opinion, such variances would not diminish the historical nature of a building or the area.
- [36] The Board notes that section 5(s) not only grants variance powers to the Development Officer, but also establishes the criteria on which development decisions must be made by the Development Authority and by this Board within this direct control district.
- [37] Based on the written materials submitted by the Development Officer, the Board finds that the Development Officer did consult with the Heritage Officer per section 5(s). In addition, at the January 17, 2018 hearing, the Board heard from the Development Officer that he had, in fact, considered whether the proposed development would diminish the historical nature of the area by reflecting on a number of factors, including:
- a) The impact of the proposed development upon the laneway as a whole;
  - b) The use of corrugated structural metal as opposed to traditional decorative pressed metals referred to in section 5(h) of the direct control regulations;
  - c) The distinction between the use of corrugated structural metal in the subject development compared to the use of decorative metal in other nearby developments such as the Varscona Theatre;
  - d) The impact of the sea can upon security and conditions for a safe physical environment; and
  - e) The movement toward activating alleys in the Whyte Avenue area to create more pedestrian-friendly spaces.
- [38] When these factors were taken together, he concluded that the proposed development could diminish the historical nature of the Whyte Avenue area, including the laneway adjacent to the sea can. Consequently, he elected to not exercise the variance powers available to him under section 5(s).

- [39] The Board finds that the factors considered by the Development Officer were appropriate considerations in determining whether the proposed development would diminish the historical nature of the Whyte Avenue area. Accordingly, the Board finds that there was no error in the Development Officer's decision to refuse the application and that he did follow the directions of council per section 685(4)(b) of the *Municipal Government Act*.
- [40] Having found that the Development Officer did follow the directions of council, the Board has no jurisdiction to consider the merits of the appeal or to substitute its own decision for that of the Development Authority's.

Noel Somerville, Presiding Officer  
Subdivision and Development Appeal Board

Board Members in Attendance

Ms. K. Chernawsky, Mr. A. Bolstad, Ms. S. LaPerle, Ms. D. Kronewitt Martin



**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 2nd Floor, Edmonton Tower, 10111 – 104 Avenue NW, Edmonton, AB T5J 0J4.

*NOTE: The City of Edmonton does not conduct independent environmental checks of land within the City. If you are concerned about the stability of this property for any purpose, you should conduct your own tests and reviews. The City of Edmonton, when issuing a development permit, makes no representations and offers no warranties as to the suitability of the property for any purpose or as to the presence or absence of any environmental contaminants on the property.*