

Edmonton Subdivision and Development Appeal Board

Churchill Building
10019 - 103 Avenue NW
Edmonton, AB T5J 0G9
Phone: 780-496-6079 Fax: 780-577-3537
Email: sdab@edmonton.ca
Web: www.edmontonsdab.ca

10033 81 Ave., NW
Edmonton AB
T6E1W7

Date: February 12, 2016
Project Number: 180570351-001
File Number: SDAB-D-16-040

Notice of Decision

[1] On January 28, 2016, the Subdivision and Development Appeal Board heard an appeal that was filed on January 4, 2016. The appeal concerned the decision of the Development Authority, issued on December 16, 2015, to refuse the following development:

Construct an Accessory Building (a shed- 3.05m x 3.66m), existing without permits.

[2] The subject property is on Plan I17 Blk 52 Lot 8, located at 10033 - 81 AVENUE NW, within the CB2 General Business Zone. The Pedestrian Commercial Shopping Street Overlay, Whyte Avenue Commercial Overlay, and Strathcona Area Redevelopment Plan apply to the subject property.

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

- Accessory Building Permit Application;
- Development Permit Application;
- Development Officer's written submissions;
- Refused development permit; and
- Canada Post registered mail delivery confirmation.

Summary of Hearing

[4] At the outset of the appeal hearing, the Presiding Officer confirmed with the parties in attendance that there was no opposition to the composition of the panel.

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

i) *Position of the Appellant, Mr. O. Moyen*

- [6] Mr. Moyen has lived at his property for fifteen years. He built an over-sized shed that fits around a gazebo to protect it during the winter months.
- [7] He acknowledged that the shed should be ten square metres, and that it is actually two feet larger on one side.
- [8] He advised the Board that the shed does not obstruct his neighbour's view, and that there is a warehouse next door with a twenty foot concrete wall.
- [9] Mr. Moyen's house was built in 1945, which was industrial land at the time. The house is a non-conforming use. He argued that Section 643(4) of the *Municipal Government Act* is relevant to his appeal because his shed is temporary and moveable, is not permanent, and is not attached to the building.
- [10] Mr. Moyen was asked to comment on the definition of "building" in Section 616(8)(1) of the *Municipal Government Act*, by which the Board is bound. Mr. Moyen argued that since the shed was allowed then, he should be able to keep it until the house is torn down.
- [11] He hopes to build a warehouse eventually, but asked the Board to grant a variance allowing him to keep the shed as it is in the meantime.

ii) Position of the Development Officer, Mr. K. Bacon

- [12] Asked to confirm that a shed smaller than ten square metres does not require a permit, Mr. Bacon agreed that it does not.

iii) Rebuttal of the Appellant

- [13] Mr. Moyen advised the Board that he is allowed to have a shed that is ten square metres, but argued that if he were to build a shed that size, part of the gazebo would stick out.

Decision

- [14] The appeal is DENIED and the decision of the Development Authority is CONFIRMED.

Reasons for Decision

- [15] The subject Site falls within the CB2 General Business Zone. In that Zone, Single Detached Housing is neither a Permitted nor a Discretionary Use.
- [16] A Single Detached House exists on the subject Site, and the subject Site is being used as Single Detached Housing, where the Appellant lives with his family.

- [17] The house on the subject Site was built in 1945. While the Board heard no evidence on this point, given that there was no objection to the existence of the house by the Development Authority, and given that it is not before the Board, the Board will assume there is a permit for the Single Detached House existing on the subject Site.
- [18] This would make the house on the subject Site a “non-confirming use” within the definition set out in Section 616(r) of the *Municipal Government Act*, which is as follows:
- (r) “non-confirming use” means a lawful specific use
 - (i) being made of land or a building or intended to be made of a building lawfully under construction at the date a land use bylaw affecting the land or building becomes effective, and
 - (ii) that on the date the land use bylaw becomes effective does not, or in the case of a building under construction will not, comply with the land use bylaw;
- [19] The application is for an Accessory building, namely a shed. Section 6.1(2) of the *Edmonton Zoning Bylaw* defines “Accessory” as “...when used to describe a Use or building, a Use or building naturally or normally incidental, subordinate, and devoted to the principal Use or building, and located on the same lot or Site”.
- [20] The Board finds, and it was admitted by the Appellant, that the shed is Accessory to the use of the land as a Single Detached House. As Single Detached Housing is neither a Permitted nor a Discretionary Use in the CB2 General Business Zone, and, as the principal use of the subject Site is a non-confirming use, the development cannot be granted.
- [21] Section 643(4) of the *Municipal Government Act* states that “a non-confirming use of part of a lot may not be extended or transferred in whole or in part to any other part of the lot and no additional buildings may be constructed on the lot while the non-confirming use continues”.
- [22] Section 616(1)(a.1) defines “building” as “... anything constructed or placed on, in, over or under land, but does not include a highway or road or a bridge that forms part of the highway or road”.
- [23] It is clear that the shed, even if simply placed on the subject Site, is a building within the definition of the *Municipal Government Act*. As such, to allow this accessory structure would be to extend the non-confirming use of the subject Site from one part of the lot to another part of the lot in contravention of Section 643(4).
- [24] The Board also notes that Section 643(4) explicitly prohibits the construction of additional buildings on the lot while the non-confirming use continues. This applies to any building, of any sort, while the non-confirming use continues. The evidence before the Board is that the Appellant uses the Site for Single Detached Housing. As a result, no

building, regardless of size, can be built on the lot while the non-conforming use continues.

[25] As a result, the appeal is denied and the decision of the Development Authority is confirmed.

Mr. I. Wachowicz, Chairman
Subdivision and Development Appeal Board

Important Information for the Applicant/Appellant

1. This decision may be appealed to the Alberta Court of Appeal on a question of law or jurisdiction under Section 688 of the *Municipal Government Act*, R.S.A. 2000, c. M-26. If the Subdivision and Development Appeal Board is served with notice of an application for leave to appeal its decision, such notice shall operate to suspend the Development Permit.

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.

Edmonton Subdivision and Development Appeal Board

Churchill Building
10019 - 103 Avenue NW
Edmonton, AB T5J 0G9
Phone: 780-496-6079 Fax: 780-577-3537
Email: sdab@edmonton.ca
Web: www.edmontonsdab.ca

PO Box 5341 Station Main
Edmonton AB
T9E 6L7

Date: February 12, 2016
Project Number: 181265183-002
File Number: SDAB-D-16-042

Notice of Decision

[1] On January 28, 2016, the Subdivision and Development Appeal Board heard an appeal that was filed on January 4, 2016. The appeal concerned the decision of the Development Authority, issued on December 18, 2015, to approve the following development:

To change the use from a General Retail Store and Personal Service Shop to a General Retail Store with Accessory Creation and Production Establishment, Private Club (378.96 square metres public space), and Commercial School (70 seats).

[2] The subject property is on Plan B4 Blk 14 Lot 205, located at 10552 - 114 Street NW, within the Direct Development Control Provision (DC1 (14143)). The Central McDougall/Queen Mary Park Area Redevelopment Plan applies to the subject property.

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

- Development Permit Application;
- Approved Development Permit;
- Crime Prevention Through Environmental Design Assessment conducted by TRL Consulting;
- Development Officer's Parking Variance Justification;
- Development Officer's written submissions;
- 60 Metres Notification Radius online responses; and
- Email from T. Stadnick objecting to the proposed development.

Summary of Hearing

[4] At the outset of the appeal hearing, the Presiding Officer confirmed with the parties in attendance that there was no opposition to the composition of the panel.

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

i) *Position of the Appellant, Mr. D. Myers*

- [6] Mr. Myers is concerned that the proposed development will increase the demand for parking in the area, which is already congested. He advised the Board that the commercial school portion of the proposed developments falls short by sixty parking spaces and he cannot understand where the parking will be made up.
- [7] Mr. Myers was advised that regardless of what business operates in the building, a parking variance will likely be required. He responded that the previous tenant was a dog daycare, which was more of a drop-off type of business and presented no parking issues.
- [8] He confirmed there is angle parking and two unrestricted loading zones in front of the business.

ii) *Position of the Development Officer, Mr. I. Welch*

- [9] Mr. Welch advised the Board that the Respondent's business is a legal non-conforming use and that any development in the building will require a parking variance. He noted that there is no viable site within 120 metres of the proposed development that can be used for accessory parking, which presents significant hardship for the Respondent.
- [10] Mr. Welch explained the four Use Classes designated to the proposed development, as follows:
- (a) Retail Store: the proposed development sells adult sex toys;
 - (b) Creation and Production Establishment: a side part of the business that creates custom clothing and equipment;
 - (c) Private Club: Mr. Welch acknowledged that the proposed development is essentially a Commercial School, but advised the Board that the City's practice is to designate those establishments with sexually explicit content as a private club; and
 - (d) Commercial School: the proposed development holds classes for customers to learn about products.
- [11] Mr. Welch explained that he calculated the parking required by the *Edmonton Zoning Bylaw* based on the following floor area measurements:

Upper Floor

- General Retail Store: 206.71 square metres;
- Private Club: 378.46 square metres; and
- Storage and Common Area: 104.135 square metres.

Lower Floor

- General Retail Storage, Shipping Area, and Receiving Desk: 111.03 square metres.

[12] In granting the parking variance, Mr. Welch also considered the hours of the commercial school portion of the proposed development, which are 7pm to midnight on Friday and Saturday evenings. He argued that parking can be shared without causing undue demand.

iii) Position of the Department of Transportation, Ms. M. Modrovic and Mr. Metcalf

[13] Mr. Modrovic and Mr. Metcalf conducted their own parking assessment for the proposed development and appeared before the Board to answer questions with respect to the parking variance.

[14] In making their decision, they considered the proposed development's hours of operation and the fact that the retail component of the proposed development will generate some, but not much, traffic. They advised that overflow parking will be on-street parking, and that there will be higher demand for parking in the evening hours. They also considered bike routes, pedestrian traffic, and that 104 Avenue, 107 Avenue, and 116 Street are major transit routes, in making their decision.

[15] They visited the subject Site during the work day, and, although there is a high parking demand in the area, there were some available parking stalls. During the evening visits there were more parking available because most of the other businesses in the area operate during the day. On Saturday after 6pm there was a lot of parking available.

[16] They confirmed that parking requirements for Queen Mary Park have changed and that the area is going through a transition.

iv) Position of the Respondent, Ms. N. Uhryn

[17] Ms. Uhryn advised the Board that the business has two parts: a wholesale and retail business (including a custom leather goods creation business), and a Commercial School (product discussion seminars).

[18] She further noted that the custom manufacturing was an accessory component of the wholesale and retail business.

[19] She advised the Board that the area is not planned in a way that provides adequate parking without a variance.

[20] With respect to parking logistics for the proposed development, she argued that the business only has a few employees, most of whom walk to work, that they have personal relationships with their clients and have asked them not to park in front of the Appellant's

business, that MacEwan University student traffic contributes to the parking congestion in the area, and that their peak hours are from 7pm to midnight, which is outside of the hours of most other businesses in the area.

v) *Position of Affected Property Owners in Support of the Respondent, Mr. M. Fitton, Landlord*

[21] Mr. Fitton confirmed that the previous tenant, a dog daycare business, boarded approximately fifty dogs, including weekend boarding. He advised the Board that, with respect to parking requirements, the proposed development is less intensive than the dog daycare business.

vi) *Rebuttal of the Appellant*

[22] Mr. Myers is not making a moral objection to the business; he is concerned about an increase in what is already limited parking space in the area. He argued that if the business expands, parking will be an ever bigger issue for his business.

Decision

[23] The appeal is DENIED and the decision of the Development Authority is CONFIRMED.

Reasons for Decision

[24] The application for the development sought pertains to a subject Site located within Area 2, Precinct D of the DC1 Direct Control for Queen Mary Park, as set out in Bylaw 15126.

[25] As this is a direct control provision, the extent of the Board's jurisdiction in dealing with this appeal is set out in section 641 of the *Municipal Government Act*. In particular, section 641(4)(b), which states:

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

(b) ...

(c) 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 directs it may, in accordance with the directions, substitute its decision for the development authority's decision.

[26] The Board undertook an analysis to determine whether or not the Development Authority followed the directions of council as set out in Bylaw 15126.

- [27] The Board notes that General Retail Stores, Private Clubs, and Commercial Schools are all listed Uses in the Direct Control Bylaw.
- [28] The Development Authority found that certain elements of assembly and custom fabrication of products that were to be sold in the General Retail Store were Accessory to the three listed Uses applied for, and, in particular, Accessory to the Use of the General Retail Store.
- [29] The Board confirms the decision of the Development Authority in this regard. The Board notes that the definition of “General Retail Store” specifically states that “...Accessory Uses may include the assembly or repair of products sold on Site, or minor public services such as postal services or pharmacies”.
- [30] The Board finds that the assembly and custom fabrication elements of the proposed Use are indeed accessory to the General Retail Store component of the business. Accordingly, the Development Authority followed the directions of council as it pertained to allowing these Uses on the subject Site.
- [31] The Development Authority granted a variance of 57 parking stalls. The Board must determine whether, in granting such a variance, the Development Authority followed the advice of Council.
- [32] The Direct Control Bylaw 15126 does not set out unique parking requirements. Section 4(n) of the Direct Control Bylaw simply states that “Vehicular and Bicycle Parking for all Uses shall be in accordance with Section 54 of the Zoning Bylaw.” Accordingly, City Council has, in the Direct Control Bylaw, directed the Development Authority to follow Section 54 of the *Edmonton Zoning Bylaw*.
- [33] Section 54.1(2)(g) of the *Edmonton Zoning Bylaw* states that:
- the Development Officer may use his variance power to relax the vehicular parking requirements in Schedule 1, the Bicycle Parking requirements in Schedule 2 and the loading requirements in Schedule 3, however such a variance shall only be considered in cases where the nature of the Use, the size of the Site, or other physical constraints result in a situation where the requirements cannot be met on-site without unnecessary hardship or practical difficulties.
- [34] The Board finds that the variance was appropriate given the nature of the Use, the size of the Site, and other physical constraints of the proposed development resulted in a situation where the requirements of Schedule 1 could not be met without unnecessary hardship or practical difficulties.
- [35] The Board heard evidence from both the Development Officer and the landlord that the parking requirements of Section 54 would require a variance for the subject Site for

almost any proposed Use that would be a listed Use in this DC1 Bylaw. This creates a situation of hardship, as well as practical difficulties.

- [36] The Board heard evidence from the Respondent that the nature of their Private Club and Commercial School is such that the majority of their parking requirements are in the evening between 7pm and midnight. As a result, their dominant hours of operation would not conflict with other on-street parking Uses in the neighbourhood.
- [37] The Board also heard evidence from two representatives from Transportation Services that prior to 5pm there was significant on-street parking usage, and that after 6pm the demand for on-street parking significantly declined.
- [38] Transportation Services supported the Development Authority's granting of the variance on the basis of their own parking analysis, which included more than one Site visit on various days and hours, including weekend hours.
- [39] For these reasons, the Board finds that, in granting the variance, the Development Authority was justified to do so, pursuant to Section 54, and, as such, followed the direction of City Council as set out in the DC1 Bylaw.
- [40] Therefore, according to Section 641(4)(b), the appeal is denied.

Mr. I. Wachowicz, Chairman
Subdivision and Development Appeal Board

Important Information for the Applicant/Appellant

1. This is not a Building Permit. A Building Permit must be obtained separately from the Sustainable Development Department, located on the 5th Floor, 10250 – 101 Street, Edmonton.
2. Obtaining a Development Permit does not relieve you from complying with:
 - a) the requirements of the *Edmonton Zoning Bylaw*, insofar as those requirements have not been relaxed or varied by a decision of the Subdivision and Development Appeal Board,
 - b) the requirements of the *Alberta Safety Codes Act*,
 - c) the *Alberta Regulation 204/207 – Safety Codes Act – Permit Regulation*,
 - d) the requirements of any other appropriate federal, provincial or municipal legislation,
 - e) the conditions of any caveat, covenant, easement or other instrument affecting a building or land.
3. When an application for a Development Permit has been approved by the Subdivision and Development Appeal Board, it shall not be valid unless and until any conditions of approval, save those of a continuing nature, have been fulfilled.
4. A Development Permit will expire in accordance to the provisions of Section 22 of the *Edmonton Zoning Bylaw, Bylaw 12800*, as amended.
5. 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.
6. When a decision on a Development Permit application has been rendered by the Subdivision and Development Appeal Board, the enforcement of that decision is carried out by the Sustainable Development Department, located on the 5th Floor, 10250 – 101 Street, Edmonton.

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