

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

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SDAB-D-16-009

Application No. 165696822-002

An appeal by, opposing the construction of an uncovered deck (deck extension for a deck: 5.01m x 3.03m) to a Single Detached House, existing without permits, located at 650 Albany Way NW, was **WITHDRAWN**.

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Date: January 21, 2016
Project Number: 181889299-001
File Number: SDAB-D-16-011

Notice of Decision

- [1] On January 7, 2016, the Subdivision and Development Appeal Board heard an appeal that was filed on December 4, 2015.
- [2] The appeal concerned the decision of the Development Authority, issued on November 30, 2015, to refuse the following development:
- To change the Use from Professional, Financial, and Office Support Services to Minor Alcohol Sales and to construct interior alterations (Royal Centre South) [unedited from the Development Permit]
- [3] The subject property is located on Plan 1320200 Blk 42 Lot 101, municipal description 2407 – 90B Street SW, within the DC2 (909) Site Specific Development Control Zone.
- [4] The following documents, which were received prior to the hearing and copies of which are on file, were read into the record:
- Appellant's Notice of Appeal form, with attachments, filed and dated December 4, 2015;
 - A letter from Rohit Group, the representative of the adjacent property owner at 2420 – 90B Street SW, dated Jan 4, 2016;
 - Copy of the Refused Development Permit, issued Nov 30, 2015; and
 - Written submissions of the Development Officer, dated Dec 9, 2015, with an attachment of the Alcohol Sales Use Map of the surrounding area.

Summary of Hearing:

- [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 appeal was filed on time, in accordance with Section 686 of the *Municipal Government Act*, RSA 2000, c M-26.

[7] The Presiding Officer noted that the subject site has been designated a direct control district under DC2 (909). As such, Section 641(4) of the *Municipal Government Act* limits the Board's powers with respect to this appeal and requires the Board to determine whether the Development Authority followed the directions of City Council. This section also provides that the Board may only substitute its decision for that of the Development Authority in the event it finds that the directions were not followed. The parties were asked to focus their submissions accordingly.

i. Position of the Appellant

[8] The Appellant appeared before the Board with his agent, Mr. S. Pragnell.

[9] Two development permit applications for Minor Alcohol Sales are at issue in this appeal, one made by himself, and one made by Rohit Group concerning an adjoining property located at 2407 – 90B Street SW (the "Rohit application").

[10] At the time the two applications were submitted, both sites were zoned EIB Ellerslie Industrial Business Zone where Minor Alcohol Sales was neither a Permitted Use nor a Discretionary Use.

[11] On November 16, 2015, Council passed bylaws rezoning the subject site DC2 (909) and the adjacent site DC2 (910). Both DC2 (909) and DC2 (910) include Minor Alcohol Sales as a Listed Use.

[12] As such, he submits that the Development Officer could not make a decision on either application until November 16, 2015, when DC2 (909) and DC2 (910) were passed by City Council.

[13] Since both DC2 Site Specific Development Control districts were passed on the same date, preference should be given to the Appellant's application, as the building in which his business is housed has already been constructed, whereas the adjacent property is still vacant, and the building has not yet been built. Indeed, the letter submitted by Rohit Group on January 4, 2016 states that they will proceed with construction in March 2016. In other words, the Appellant's proposed development should be considered first as it will come into operation much sooner than Rohit's proposed development.

[14] The Appellant contends that Council's intent with respect to the 500 metres separation distance between alcohol sales uses was to prevent the proliferation of such uses in older, established commercial areas. The Appellant noted and affirmed the position taken by Rohit Group concerning separation distances in its August 26, 2015 letter, which states in part:

We would respectfully submit that in suburban settings, the market (and of course zoning) be left to determine where liquor stores locate rather than having to adhere to a separation requirement that was intended to prevent a proliferation of this use along existing commercial corridors in older areas. From a land use impact perspective, we are not clear why there needs to be a separation requirement in suburban areas for a use that has a similar or even less impact than say a convenience store or take-out food establishment.

[15] The Appellant attempted community consultation, but the site immediately to the east of the subject site consists of eight single family residences, none of which were occupied. He also attempted to contact some properties to the south within the notification area, but nobody was home. Other lots within the area have not been developed.

[16] In his opinion, the proposed development will not impact nearby residential uses any more than other listed commercial uses.

[17] He began the site selection process for the proposed development approximately four months prior and purchased the condominium unit subject to rezoning. Following zoning approval from the City, he removed the conditions set out in his contract with the developer and was prepared to move forward with the development. At the time, the surrounding area was completely undeveloped, and he could not see any other liquor stores within the 500 metres separation distance.

[18] When asked by the Board to clarify his position with respect to Section 641(4) of the *Municipal Government Act*, the Appellant responded that in his opinion, the Development Officer failed to follow the directions of council because in circumstances where two DC2 Site Specific Development Control districts are approved on the same date, the application that can move forward should be granted approval to proceed. He submitted that Council would want to see business move forward rather than giving preference to what appears to be a placeholder development on the adjacent property. In this case, the Rohit approval acts as a placeholder, and in any event, the 500 metres separation regulation should only apply to operating businesses.

[19] The Appellant could not identify an explicit direction by Council providing that applications should be considered in the order which he advocated (with precedence given to the development which can be operational in the least amount of time); however, he considered this method sound business practice.

ii. *Position of the Development Officer*

- [20] Mr. I. Welch attended on behalf of Ms. E. Peacock, the Development Officer who refused the Development Permit.
- [21] Mr. Welch clarified that City Council has not addressed the issue of precedence. The Development Authority follows a “first in time, first in right” policy to determine the order in which applications are considered. In other words, the application submitted first takes precedence when considering separation distance requirements.
- [22] In this case, the application for the subject site was filed by the Appellant on November 3, 2015 and the Rohit application was filed on July 15, 2015. As such, the Rohit application received precedence and was considered and approved first. Subsequent applications such as the Appellant’s would therefore have to abide by the separation regulations given the pre-existing, approved permit.
- [23] Upon questioning from the Board, he stated that there is nothing to support the Appellant’s contention that the business which is prepared to move forward sooner with operations should be given precedence.
- [24] He acknowledged that City Council is indeed considering a revision to the exemptions to the 500 metres separation rule; however, no decision has been made yet. The August 26, 2015 Rohit letter suggests that one option being considered is to exempt sites of 0.8 ha. However, Mr. Welch stated that after speaking with internal staff involved with the amendment discussions, the exemption being considered is actually for sites of 2.8 ha. At this point, it is impossible to know what Council’s intent will be with respect to the exemptions.
- [25] The Development Officer also referenced Section 85(3)(a) of the *Edmonton Zoning Bylaw*, stating that the explicit wording makes it highly unlikely that it was Council’s intent to create two DC2 zones in which two non-conforming liquor stores may exist in contravention of Section 85(3)(a). After some questioning from the Board, it was noted that Section 720.3(3) states, in part, that “All Regulations in the Zoning Bylaw shall apply to development in the Direct Control Provision”, which would include Section 85(3)(a).
- [26] When questioned about how the Development Authority determines the number of alcohol sales use within the 500 metres radius, he stated that a Technician creates a map that displays all the alcohol sales use permits within the area. The Technician is then able to draw a radius around the subject property to identify permits within the 500 metres separation distance.

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iii. Rebuttal of the Appellant

- [27] The Appellant reiterated that neither application should have been considered or acted upon until the date of rezoning, in this case, November 16, 2015. Since both DC2 (909) and DC2 (910) were passed on the same date, the subject development should take precedence over the Rohit application. It cannot be Council's intent to hold up a permit that is ready to move forward. However, he acknowledged that there is nothing in the *Edmonton Zoning Bylaw* that stipulates such an approach.
- [28] In reply to the Development Officer's submissions regarding the upcoming exemptions for the 500 metres Separation Distance, he stated that if the Board were to consider waiting for Council's decision, it would cause delay to the Appellant. Instead, he proposed that the Board consider approving a temporary permit so that he can at least move forward temporarily with the business. Should it become necessary for him to move his business in the future, when the Rohit development becomes operational, he would do so.
- [29] The Appellant's rebuttal raised further questions that the Board wished to pose to the Development Officer, who was asked to return to the stand.

iv. Further Questioning of the Development Officer

- [30] He clarified that there is nothing in the *Edmonton Zoning Bylaw* that prohibits an applicant from applying for a prohibited or discretionary use. It is common for applicants to file advance applications to minimize potential lead time for development.
- [31] In response to the Appellant's contention that the clock does not start until the date that the two DC2 Site Specific Control districts were passed, the Development Officer stated that the fact that the two DC2 Site Specific Control Provisions were approved back-to-back does not raise any concerns. In his mind, the application made in July would still take precedence, regardless of when the DC2 zones were passed.

v. Surrebuttal of the Appellant

- [32] The Appellant reiterated his point that the "first in time, first in right" policy cannot be Council's intent in the circumstances surrounding this appeal.

Decision:

- [33] The appeal is DENIED and the decision of the Development Authority is UPHeld. The Development is REFUSED.

Reasons for Decision:

- [34] This is an appeal from the decision of the Development Authority to refuse an application for a change of Use from Professional, Financial, and Office Support Services to Minor Alcohol Sales.
- [35] The facts of this case are unusual:
- a. The subject site is located approximately 170 metres from the adjacent property.
 - b. The subject site and the adjacent property were zoned EIB Ellerslie Industrial Business Zone where Minor Alcohol Sales was not a Permitted or Discretionary Use. Despite this fact, on July 15, 2015 the Rohit Group applied for a Minor Alcohol Use on the adjacent property and on November 3, 2015, the Appellant applied for a Minor Alcohol Use on the subject site.
 - c. On November 16, 2015, both sites were rezoned direct control. DC2 (909) was passed for the subject site, approving Minor Alcohol Sales as a Listed Use. DC2 (910) was passed for the adjacent property, also approving Minor Alcohol Sales as a Listed Use.
 - d. Following the Development Authority's general "first in time, first in right" policy, the application that had been submitted first was given precedence. The Rohit application was therefore approved first and subsequently, the Appellant's application was considered.
 - e. Since the Rohit application had been previously approved, the Appellant's development did not meet the 500 metres separation distance required under Section 85, and was refused.
- [36] As the subject site was rezoned to DC2 (909) on November 16, 2015, this appeal is governed by Section 641(4)(b) of the *Municipal Government Act*, which limits the Board's powers with respect to direct control districts. The section requires the Board to determine whether the Development Authority followed the directions of City Council and provides that only if the Board finds that the Development Authority failed in this regard may the Board substitute its decision for that of the Development Authority's.
- [37] The applicable Directions of City Council with respect to (DC2) Site Specific Development Control districts are found under Section 720 of the *Edmonton Zoning Bylaw* and in DC2 (909) itself. Section 720.3(3) states: "All Regulations in the Zoning Bylaw shall apply to development in the Direct Control Provision, unless such Regulations are specifically excluded or modified in a Direct Control Provision."
- [38] Section 85 of the *Edmonton Zoning Bylaw* states:
- Major and Minor Alcohol Sales shall comply with the following regulations:
- ...

3. any Major or Minor Alcohol Sales Use shall not be located closer than 500.0 m from any other Major or Minor Alcohol Sales Use. For the purposes of this subsection only:

- a. the 500.0 m separation distance shall be measured from the closest point of the Major or Minor Alcohol Sales Use to the closest point of any other existing or approved Major or Minor Alcohol Sales Use; and
- b. if there are two or more Major or Minor Alcohol Sales Uses lawfully operating within 500 m of each other as of the date of the enactment of this Section they shall be considered legal non-conforming uses.

[39] Neither DC2 (909) nor DC2 (910) specifically excludes or modifies the 500 metres separation distance required under Section 85, therefore, Section 85 applies in this case, pursuant to Section 720.3(3).

[40] The Appellant submitted that the Development Authority failed to follow the directions of council by using the dates of application rather than November 16, 2015 (the date that DC2 (909) and DC2 (910) were passed) to determine the order in which the two applications would be considered. The Appellant further submits that since both DC2 (909) and DC2 (910) were passed on the same date, the clock would start on both applications at the same time, and the application closest to becoming operational should take precedence. In this case, the determining factor should be the physical state of the building in which the respective developments are housed. Therefore, the Development Authority should have given precedence to the Appellant's application.

[41] The board is not convinced that the Development Authority failed to follow the directions of council by adopting a "first in time first in right" policy in this case for the following reasons:

- a. There is no explicit direction by City Council in the *Edmonton Zoning Bylaw*, nor is there an explicit provision in the *Municipal Government Act*, establishing a method for determining the order in which applications must be considered.
- b. Absent such an explicit direction, it is implicit that the Development Authority must adopt a fair and reasonable policy.
- c. The "first in time, first in right" policy is a fair, reasonable and certain method to determine the order in which applications must be considered
- d. Further, the Board is not convinced that City Council has implicitly directed a "most likely first to open doors, first in right" method to determine the order in which applications should be considered. Such a method would require the Development Authority to determine which applications are further along in the legal, development or construction phases, and establish its decision-making timelines on that basis. Such a practice would be speculative, arbitrary, unreasonable and impractical.

- [42] As the Development Authority did not err by giving precedence to the Rohit Group application, the Board finds that pursuant to Section 720.3(3), the Development Authority was then bound by the separation distance requirements for Alcohol Sales Uses under Section 85, and therefore followed the directions of Council in refusing the Appellant's Development Permit.
- [43] For the reasons above, the Board finds that the approach adopted by the Development Authority does not amount to a failure to follow the directions of council and pursuant to Section 641(4)(b) of the *Municipal Government Act*, the Board is unable to substitute its decision for the Development Authority's. The appeal is therefore denied.

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.

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.

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

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