



**EDMONTON
TRIBUNALS**

*Subdivision &
Development
Appeal Board*

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Date: August 10, 2018
Project Number: 278270547-001
File Number: SDAB-D-18-112

Notice of Decision

- [1] On July 26, 2018, the Subdivision and Development Appeal Board (the “Board”) heard an appeal that was filed on **July 4, 2018**. The appeal concerned the decision of the Development Authority, issued on June 21, 2018, to refuse the following development:

Change the Use from a General Retail Store to a Minor Alcohol Sales, and construct interior alterations (BOSS LIQUOR)

- [2] The subject property is on Plan 1425609 Blk 8 Lot 87, located at 2230 – Trumpeter Way NW, within the (DC1) Direct Development Control Provision (Bylaw 16471) (the “DC1 Zone”). The Big Lake Area Structure Plan and Trumpeter Neighbourhood 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;
 - The Development Officer’s written submission; and
 - One email in opposition to the proposed development.

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*, RSA 2000, c M-26. (“*Municipal Government Act*”)

[7] The Presiding Officer explained that, because the proposed development is located within a Direct Development Control Zone, the jurisdiction of the Board is limited by Section 685(4) 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

(a) ...

(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.

[8] The Appellants were advised that the Board cannot vary the Development Authority's decision unless it is satisfied that the Development Authority did not follow Council's directions. Accordingly, the Appellants were asked to indicate how the Development Authority failed to follow Council's directions, specifically with respect to the relevant zoning regulations.

Summary of Hearing

i) *Position of the Appellant, Mr. Vidhu and Mr. L. Mital, building owner:*

[9] Mr. Mital advised that they relied upon the provisions of the DC1 Zone when considering the acquisition of this property and noted that Minor Alcohol Sales was a listed use.

[10] They were therefore surprised when the development permit application to change the Use from a General Retail Store to a Minor Alcohol Sales was refused. It was his opinion that the information contained in the provisions of the DC1 Zone was misleading to prospective buyers.

[11] This is a mixed use development that will contain residential and commercial development. Fifteen residential dwelling units are proposed and the required 22 parking spaces will be provided. Each residential unit will have one designated parking space for a total of 15 spaces. That leaves a surplus of seven parking spaces that will not be permanently designated. During the day most residents will be away at work and these spaces will be vacant and can be shared with the other Uses on the site.

[12] This development is a zero property line development. This means that the actual boundary of the site abuts the public sidewalk. This is done purposefully to encourage foot traffic to the site. It is also anticipated that residents living on site will be using the proposed Minor Alcohol Sales.

[13] Mr. Mital and Mr. Vidhu provided the following information in response to questions from the Board:

- a) All of the bays were designated as a General Retail Use when the original development permit application was submitted because tenancy had not yet been confirmed.
- b) Fifteen residential units have always been included as part of this development. Some change of Use development permit applications will be required as prospective commercial tenants are confirmed. At the present time, expressions of interest have been received for a General Convenience Store, Child Care Service, Pharmacy and other medical and professional offices.
- c) Mr. Vidhu advised that the site zoned AP is currently vacant and has not been developed as a park. It was his opinion that the City could change the park boundary because it has not yet been developed.
- d) He will have four or five employees that will pay taxes to the City.
- e) The site of the park is not fenced and it is not maintained by the City. There is no signage to indicate any future park development. The site has not been graded and is covered with weeds and wild vegetation. Children never play here and the site is used primarily for dumping excavation materials.
- f) They could not comment on how other property owners in this area would know that a park is planned for this site.
- g) The Appellants had no comment on the fact that the Development Officer referenced Section 85.6(d), an old provision of the *Edmonton Zoning Bylaw*, instead of Section 85.4, the current Section of the *Bylaw*, when reviewing the 100-metre separation distance requirement.
- h) The proposed Minor Alcohol Sales will be approximately 2,800 square feet in size, a different number than indicated on the plans provided to the Development Officer.
- i) Mr. Mital has owned this property for three or four years. He acknowledged that he should have reviewed the DC1 Zone in more detail to review all of the development regulations for a Minor Alcohol Sales Use. However, he questioned why Minor Alcohol Sales was included as a listed Use because the entire DC1 site is located less than 100 metres from the site that is zoned AP which means that a Minor Alcohol Sales Use could never be developed on this site.
- j) They assumed that the Minor Alcohol Sales Use would be approved because it was a listed Use.

- k) Mr. Mital rhetorically asked the Board if the provisions of the DC1 Zone are written specifically for this site, why is Minor Alcohol Sales included as a listed Use.
- l) When the initial development permit application was made for the entire site, 62 parking spaces were required and the development permit was approved with 55 parking spaces, granting a variance for a deficiency of seven parking spaces.
- m) The proposed Minor Alcohol Sales Use will require an additional variance of one parking space. Street parking is available on Trumpeter Way.
- n) Each modular bay in the building is approximately 900 square feet in size. The proposed Minor Alcohol Sales Use will use three bays, approximately 2,800 square feet of floor space. If these three bays were designated as a General Retail Use, approximately six parking spaces would be required. However, the proposed Minor Alcohol Sales Use requires the provision of approximately eight or nine parking spaces.

ii) *Position of the Development Officer, Ms. Lee:*

[14] Ms. Lee provided the following information in response to questions from the Board:

- a) She confirmed that there was a typographical error in her reasons for refusal and her written submission. The total required parking for the site, including the proposed change in Use to a Minor Alcohol Sales requires 63 parking spaces, not 68 as indicated. She notes 55 are provided, which results in a deficiency of eight parking spaces.
- b) The proposed change in Use for this specific development requires a variance of one parking space. There is no additional space on site to accommodate this variance because the entire site is deficient.
- c) She was not prepared to grant the required variance of one parking space because a parking variance was previously granted for the entire development.
- d) She indicated that the main reason for refusing the development permit was the deficiency in the minimum required 100-metre separation distance from a park and that the one parking space variance was not the major deciding factor in her refusal.
- e) She noted that Section 85.6(d) was referenced in her refusal instead of section 85.4 because this section was in effect when this DC1 Zone was passed in June 2013.
- f) She explained to the Board that Development Officers have received direction from legal counsel to use sections of the *Edmonton Zoning Bylaw* that were in effect at the time of passing a DC1 Zone.

- g) She could not clarify why Council included Minor Alcohol Sales as a listed Use in this DC1 Zone when the entire site is located within 100 metres of a site zoned AP Public Park.
- h) She acknowledged that both Section 85.4 and Section 85.6(d) refer to a Site being used as a public park and do not contemplate how a Site is going to be used in the future. However, even though the Site is not currently being actively used as a public park, both the Neighbourhood Area Structure Plan and the Area Structure Plan identify this Site as a central park for this neighbourhood. Therefore, the 100-metre separation distance requirement was applied to this development because both the Neighbourhood Area Structure Plan and the Area Structure Plan are higher policy documents.

iii) Rebuttal of the Appellant

- [15] Mr. Mital reiterated his opinion that the minimum separation distance requirements do not apply because the site zoned AP is not currently being used as a park.
- [16] He asked the Board to grant a variance of one parking space because shared parking is available on site and street parking is also available.
- [17] Mr. Mital reiterated that Minor Alcohol Sales is a listed Use in the DC1 Zone.

Decision

- [18] The appeal is **ALLOWED** and the decision of the Development Authority is **REVOKED**. The development is **GRANTED** as applied for to the Development Authority, subject to the following **CONDITIONS**:
 1. All required parking and loading facilities shall only be used for the purpose of accommodating the vehicles of clients, customers, employees, members, residents or visitors in connection with the building or Use for which the parking and loading facilities are provided, and the parking and loading facilities shall not be used for driveways, access or egress, commercial repair work, display, sale or storage of goods of any kind. (Reference Section 54.1(1)(c));
 2. Any outdoor lighting for any development shall be located and arranged so that no direct rays of light are directed at any adjoining properties, or interfere with the effectiveness of any traffic control devices. (Reference Section 51);
 3. The display windows and entryways that front onto the public sidewalk associated with Trumpeter Way NW shall have a clear glazing constituting a minimum of 50% of the Façade. (Reference Bylaw 16471 Section 4.14(1)).

ADVISEMENTS:

- a) Signs require separate Development Applications.
- b) The City of Edmonton does not conduct independent environmental checks of land within the city. If you are concerned about the suitability of this property for any purpose, you should conduct your own tests and reviews. The City of Edmonton, in issuing this 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.
- c) An approved Development Permit means that the proposed development has been reviewed against the provisions of this bylaw. It does not remove obligations to conform to other legislation, bylaws or land title instruments including, but not limited to, the *Municipal Government Act*, the Safety Codes Act or any caveats, restrictive covenants or easement that might be attached to the Site. (Reference Section 5.2).
- d) Unless otherwise stated, all above references to section numbers refer to the authority under the *Edmonton Zoning Bylaw* 12800 as amended.

[19] In granting the development, the following variances to the *Edmonton Zoning Bylaw* are allowed:

The minimum total required parking spaces of 63 as per Section 54.2, Schedule 1(A)(21) and Section 54.1(2)(h) is varied to allow a deficiency of 1 parking space for the proposed Minor Alcohol Sales, taking the previous variance of 7 parking spaces into account, thereby decreasing the minimum total required to 55 parking spaces.

Reasons for Decision

[20] Section 685(4) of the *Municipal Government Act* states:

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

- (a) ...
- (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.

- [21] Accordingly, the Board's review of the present circumstances is limited to determining whether or not the Development Authority followed the directions of Council as set out in the (DC1) Direct Control Provision (Bylaw 16471) (the "DC1 Zone") and the applicable regulations of the *Edmonton Zoning Bylaw* (the "Zoning Bylaw").
- [22] Minor Alcohol Sales is a Listed Use in the DC1 Zone pursuant to Section 3.12.
- [23] The Development Officer refused the application because the Site of the proposed development is located within 100 metres of a public park and because of an on-site parking deficiency.
- [24] Regarding the 100-metre separation distance, Section 4(24) of DC1 Zone states that Minor Alcohol Sales shall comply with the regulations found in Section 85 of the *Zoning Bylaw*.
- [25] At the time of the application for the development permit, Section 85.4 was, and still is, in effect. That section states:

85.4 Any Site containing a Major Alcohol Sales or Minor Alcohol Sales shall not be located less than 100 metres from any Site being used for community or recreation activities, public or private education, or public lands at the time of the application for the Development Permit for the Major Alcohol Sales or Minor Alcohol Sales. Sites that are greater than 2.0 hectares in size and zoned either CSC or DC2 are exempt from this restriction. For the purposes of this subsection only:

- a. the 100 metres separation distance shall be measured from the closest point of the subject Site boundary to the closest point of another Site boundary, and shall not be measures from Zone boundaries or from the edges of structures;
- ...
- d. the term "public lands" is limited to Sites zoned AP, and active recreation areas in the North Saskatchewan River Valley and Ravine System, as shown in Appendix I of Section 811 of this Bylaw, that are zoned A; it does not include passive areas in the North Saskatchewan River Valley and Ravine System, as shown in Appendix I of Section 811 of this Bylaw and other areas zoned A.

- [26] However, the Development Officer referenced Section 85.6(d) of the *Zoning Bylaw* when reviewing the application for the development permit. This section was repealed in 2016. Section 85.6(d) states:

85.6(d) Any Site containing Major or Minor Alcohol Sales Use Classes shall not be located closer than 100 metres to any Site being actively used for community or recreation activities, public parks, or public or private education at the time of the application for the Development Permit for the Alcohol Sales Use Class. Sites

that are greater than 2 ha in size and that are zoned either as CSC or as DC2, are exempted from this restriction. For the purposes of this subsection only: the term “public parks” is limited to park Sites zoned as AP Zone, and active recreation areas in the river valley that are zoned as A Zone; it does not include passive river valley areas and other areas zoned as A zone.

- [27] The Development Officer indicated that she used Section 85.6(d) because it was the section that was in effect when the DC1 Zone was created. The Development Officer apparently relied on Section 2.7 of the *Zoning Bylaw* for using the old section. Section 2.7 states:

2.7 Unless there is an explicit statement to the contrary in a Direct Control District or Provision, any specific reference in a Direct Control District or Direct Control Provision to a land use bylaw shall be deemed to be a reference to the land use bylaw that was in effect at the time of the creation of the Direct Control District or Provision.

- [28] However, the Board is of the view that Section 2.7 does not apply in the way it was interpreted by the Development Officer. This section states that any specific reference to a land use bylaw shall be deemed to be a reference to *the land use bylaw* that was in effect at the time of the creation of the Direct Control District or Provision. It does not say it shall be deemed to be a reference to *a section* of the land use bylaw that was in effect at the time a Direct Control District was created.

- [29] It is the Board’s view that Section 2.7 only applies when there is a reference in a Direct Control District to an older version of the land use bylaw. The intent of the section is to make it clear that development permit applications in Direct Control Districts created under an old land use bylaw must be evaluated pursuant to the provisions of that land use bylaw when that land use bylaw is specifically referenced. Section 2.7 is not intended to require old sections of the current *Zoning Bylaw* to be applied in Direct Control Provisions.

- [30] It would be completely unworkable for Applicants, and indeed this Board, to determine which specific sections of a land use bylaw were in effect at the time of the creation of a Direct Control District. There is no available resource to easily determine which sections were in force at a particular point in time. At the time of applying for development permits where the current *Zoning Bylaw* applies, Applicants should be able to reference the current provisions of the *Zoning Bylaw* to determine which regulations apply.

- [31] Further, Section 687(3) of the *Municipal Government Act* states:

687(3) In determining an appeal, the subdivision and development appeal board

(a.3) subject to clauses (a.4) and (d), must comply with any land use bylaw *in effect*; [Emphasis added]

This means that the Board must evaluate this appeal according to the current provisions of the *Zoning Bylaw* rather than the sections of the bylaw that were in effect when the DC1 Zone was created.

- [32] The Board concludes that the Development Officer did not follow the directions of Council because she used a repealed section of the *Zoning Bylaw* to refuse the application. However, as the reasons below demonstrate, the Board finds that regardless of which section is used, the 100-metre separation distance does not apply to the proposed development.
- [33] Section 85.4, the current section, states that there must be a separation distance of at least 100 metres from any site *being used for* among other things, public lands *at the time of the application* for the Development Permit. [Emphasis added] The term “public lands” is limited to, among other things, Sites zoned AP. It is important to note that Council could have stipulated that the 100-metre separation distance applies to any Site zoned AP. However, because of the words “being used for”, the Board concludes that it was Council’s intent that the 100-metre separation distance should be applied only in situations where the public lands are actually being used for park land at the time of the application.
- [34] This DC1 Zone is a horse shoe-shaped piece of land that wraps around a Site zoned AP to the south. The entire DC1 Zone is within 100 metres of the AP Site.
- [35] The evidence before the Board is that the lands zoned AP are not currently being used for public lands. The Board accepts the Appellant’s evidence that the Site is not fenced and it is not maintained by the City. There is no signage to indicate any future park development. The Site has not been graded and is covered with weeds and wild vegetation. Children never play there and the Site is used primarily for dumping excavation materials. Although it is probable that these lands will be developed as park land in the future, the Site is not being used as public land in a way that is defined in Section 85.4.
- [36] Accordingly, it is the opinion of the Board that the 100-metre separation distance required by Section 85.4 of the *Zoning Bylaw* does not currently apply to the proposed development.
- [37] Further, the Board notes that the entirety of this DC1 Zone is located within 100 metres of the Site that is zoned AP. The Board is of the view that Council would not have included Minor Alcohol Sales as a listed Use in the DC1 Zone unless there were some circumstances under which that Use could be allowed.
- [38] In the alternative, if the Board is incorrect and the repealed Section 85.6(d) of the *Zoning Bylaw* applies to this development, the Board concludes that the Development Officer misinterpreted that section and, therefore, did not follow the directions of Council.

- [39] Section 85.6(d) states that the 100-metre separation distance applies to any Site being *actively used* for, among other things, public parks. [Emphasis added] The use of the word “actively”, if anything, reinforces the fact that the 100-metre separation distance only applies when the land has actually been developed for use as a park and is being used as such.
- [40] In her written submission, the Development Officer also referred to the Trumpeter Neighbourhood Structural Plan, which contains the following wording in relation to the Site zoned AP:
- The focal point and social centre of the Trumpeter is the urban village park. The layout of the surrounding collector roadway network and the location and orientation of this open space has specifically been designed to create an identifiable entrance way into the neighbourhood from the north and west collector roadway entrances. The urban village park is the neighbourhood’s central focus of community activity and interaction.
- [41] The Board finds that this wording is not relevant in determining whether the separation distance required in the regulations applies to the proposed development. The specific wording in the regulations takes precedence over the general wording of the NSP, which does not reference Minor Alcohol Sales at all.
- [42] The other reason for refusal of the development permit was a deficiency in the minimum required number of parking spaces, although the Development Officer stated that the parking space variance was not the major deciding factor in her refusal.
- [43] Section 4(23) of the DC1 Zone states that parking shall comply with the regulations found in Section 54 of the *Zoning Bylaw*.
- [44] The Board heard that, at the time a development permit application was made for the entire Site, the regulations required the provision of 62 parking spaces in the shared use parking lot based on all of the bays in the commercial part of the development being used for General Retail Sales. A development permit was subsequently approved and a variance was granted to allow a deficiency of seven parking spaces, for a total of 55 parking spaces on-site.
- [45] When the application was made to change the Use of three of the commercial bays to Minor Alcohol Sales, it required a recalculation of the parking requirements. Section 54.2, Schedule 1(A)(21) of the *Bylaw* states that Minor Alcohol Sales requires one parking space per 31.3 square metres of Floor Area.
- [46] The Development Officer’s report states that there is a requirement for 68 parking spaces because of the change in Use. However, the Development Officer clarified at the hearing that this was a typographical error. The change in Use to Minor Alcohol Sales results in the requirement of one additional parking space. The original development required 62

spaces and the additional space brings the requirement to 63 spaces. Because there are only 55 parking spaces on-site, this results in a deficiency of eight parking spaces.

[47] There is no indication that the Development Officer considered her variance power in Section 54.1(2)(g) of the *Zoning Bylaw* which states:

54.1(2)(g) The Development Officer may use their 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.

[48] The Board finds that by failing to consider this variance power to evaluate if a variance should be granted for the one additional parking space, she did not follow the directions of Council.

[49] The Board is of the opinion that the physical constraints of this Site do result in an unnecessary hardship or practical difficulties. Virtually any change in Use from General Retail Sales at this Site will require a parking variance due to the limited size of the Site. Restricting the entire Site to the General Retail Sales Use is an unnecessary hardship.

[50] The Board is also of the opinion that allowing a variance of one parking space to accommodate the change in Use will not unduly interfere with the amenities of the neighbourhood nor materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land for the following reasons:

- a) The Site has 15 residential dwelling units with each dwelling unit requiring one designated parking space. There are 22 parking spaces available for the residential uses in the shared parking lot with an excess of seven undesignated parking spaces. Those seven parking spaces are likely to be available to other users of the shared parking lot during the hours of operation of the Minor Alcohol Sales development.
- b) Those users visiting the Minor Alcohol Sales development will likely be spending only a few minutes there and will not be using parking spaces for long periods of time.
- c) Many patrons of the Minor Alcohol Sales development are likely to be from the immediate neighbourhood and will be coming on foot rather than by motor vehicle.
- d) There is on-street parking nearby that will further mitigate the impact of the one parking space variance.

[51] For all of the above reasons, the appeal is allowed.

A handwritten signature in blue ink, appearing to read "M. Young", is centered on the page. The signature is fluid and cursive, with a large loop at the end.

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

Board Members in Attendance: Mr. W. Tuttle; Mr. K. Hample; Mr. A. Peterson; Ms. E. Solez

Important Information for the Applicant/Appellant

1. This is not a Building Permit. A Building Permit must be obtained separately from Development & Zoning Services, located on the 2nd Floor, Edmonton Tower, 10111 – 104 Avenue NW, Edmonton, AB T5J 0J4.
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*, 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.
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 Development & Zoning Services, 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.