



**EDMONTON
TRIBUNALS**

*Subdivision &
Development
Appeal Board*

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Date: July 13, 2016
Project Number: 134240188-005
File Number: SDAB-D-16-148

Notice of Decision

- [1] On June 28, 2016, the Subdivision and Development Appeal Board (the “Board”) heard an appeal that was filed on **June 3, 2016**. The appeal concerned the decision of the Development Authority, issued on June 2, 2016, to refuse the following development:

To construct an addition (increase of Dwellings from 179 to 188 units on a new loft floor and adding an interconnected mezzanine floor that connects to the General Retail Use units within the main floor podium; and adding a penthouse mezzanine floor within the Dwelling unit on the 40th floor); and to construct exterior and interior alterations to a mixed-use development Apartment Housing and main floor General Retail Uses. (This is a revision to Development Permit numbers 134240188-001 and 134240188-003). (Encore Condominiums)

- [2] The subject property is on Plan NB1 Blk 3 Lots 209-210, located at 10180 - 103 Street NW, within the HA Heritage Area Zone (Special Area Downtown). The Capital City Downtown Plan applies to the subject property.

- [3] The following documents, which were received prior to the hearing and are on file, were read into the record:

- A Development Permit Application, including the plans of the proposed Development;
- The refused Development Permit;
- The approved Development Permits on the subject property; and
- The Development Officer’s written submissions.

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

(a) Exhibit A:

- (i) *Omega2 Corp. v. Edmonton (City)*, 2005 ABCA 449 (“*Omega*”)
- (ii) *Newcastle Centre GP Ltd. v Edmonton (City)*, 2014 ABCA 295 (“*Newcastle*”)

Preliminary Matters

- [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 Presiding Officer outlined how the hearing would be conducted, including the order of appearance of parties, and no opposition was noted.
- [7] The appeal was filed on time, in accordance with Section 686 of the *Municipal Government Act*, RSA 2000, c M-26 (the "*Municipal Government Act*").

Summary of Hearing

i) Position of the Appellant, J. Murphy, QC

- [8] The Appellant clarified that this Development Permit application was refused only because of an excess in maximum allowable Floor Area Ratio ("FAR"). The HA Heritage Area Zone does not provide any maximum Density regulations.
- [9] The Appellant referred the Board to the definition of FAR in Section 6.1(35) of the Edmonton Zoning Bylaw, which means the numerical value of the Floor Area of the building or structure relative to the Site upon which it is located.
- [10] The Appellant stated that the current development has been approved at the current height and other current exterior dimensions. However, the Development Officer could not approve more square feet inside the building.
- [11] The Appellant stated that his client is redesigning the podium, to convert excess open public space into usable commercial and residential space by adding 9 residential units on a new level and a raised mezzanine level with retail space. These changes add square footage. Under Section 910.7(6)(c) of the *Edmonton Zoning Bylaw*, an increase in FAR of up to 14 is allowed where the Development Officer is satisfied that new developments fit within the urban context of the area and that adverse environmental impacts such as sun shadow and wind are minimized, but the client needs more FAR.
- [12] Pursuant to Section 11.4(2), the Development Officer cannot vary FAR except as otherwise provided for in the *Edmonton Zoning Bylaw*. In the Appellant's opinion, the Development Officer would have approved the Development Permit if she could have because the proposed changes are internal and the development would 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.

Further, in granting the previous approval, the Development Officer was already required to ascertain the development fits within the urban context of the area and that adverse environmental impacts such as sun shadow and wind are minimized.

- [13] There have been no objections from the Community League or affected neighbours.
- [14] The Appellant argued that there can be no adverse impact because everything is happening within the building. The Appellant suggested one potential rationale for limiting maximum FAR is to align with other applicable developmental regulations that limit the number of people allowed to live on a site. However, as noted previously, the HA Heritage Area Zone does not regulate density.
- [15] The Appellant submitted the *Omega* case for support. This case involved similar facts in a RA9 Zone. Although that development was within the allowable Height and Density, it exceeded the maximum allowable FAR. The Board in that case declined to grant the variance because the Appellant was looking for a 24 percentage increase in FAR. According to that Board, the *Edmonton Zoning Bylaw* sets a limit and if an Appellant wants to go over the maximum, then the development will probably impact the neighbors and amenities. The Court of Appeal granted Leave to Appeal on that decision. In the Appellant's opinion, the Court of Appeal confirmed that the relevant issue is the impact of the variance, not the size of the variance. In this case, it would make no difference if the Appellant sought a 100 percent increase, because all the proposed changes are internal and it has been previously determined that the building volume is acceptable to the Development Officer and neighbours.
- [16] The Appellant referred the Board to *Newcastle* for the proposition that there is only one test for a variance found in Section 687 of the *Municipal Government Act*, namely will the variance unduly interfere with the amenities of the neighbourhood, or materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land. It is the position of the Appellant that the Board should not start with the position that the bylaw variance creates an immediate presumption of harm. In this case, the variance test is met.
- [17] As a more practical result, the proposed development creates a more efficient use of space within the building.
- [18] Upon questioning from the Board, the Appellant confirmed the changes to the podium add a floor with 9 residential units and mezzanine retail space and move some mechanical equipment. The Development Officer has approved everything that could be approved and all changes are located on the inside.

[19] The Board asked the Appellant to comment on the piecemeal approval of the Development and the fact the extra Height was approved in the previous permits because the FAR was not exceeded. The Appellant stated the development was done in stages because the excess in Height could not have been approved if there was an excess in FAR. However, no extra Height is being asked for under this Development Permit. An excess in FAR could be an issue if other variances are also required, such as Density. In this case, there are no other variances.

[20] Upon questioning from the Board, the Appellant confirmed there is no change to the amenity space and the building has lots of amenity space. The requirements for parking have been met.

ii) Position of the Development Officer, Cindy Lieu

[21] The Development Officer stated a FAR of up to 14 is allowed and the Appellant is looking for an excess of 1.1.

[22] The Development Officer confirmed that there are no Density requirements in the HA Heritage Area Zone.

[23] The Development Officer confirmed that the Appellant is redesigning the interior of the podium, adding 9 residential units on a raised level and a mezzanine level with retail space.

[24] The development is still pedestrian oriented. There is ample amenity space and parking.

[25] Upon questioning from the Board, the Development Officer stated there is no increase in maximum allowable Height under this Permit. She did concede that she would not have been able to allow the extra Height under the second Permit if the Appellant had also sought to increase the FAR in that second Permit as well.

[26] The Development Officer is satisfied that new development fits within the urban context of the area and that adverse environmental impacts such as sun shadow and wind are minimized in accordance with the *Edmonton Zoning Bylaw*.

[27] The Development Officer confirmed there has been no opposition to the proposed development at any stage.

[28] The Development Officer concluded that if she had the power to vary FAR, she would do so as, in her view, the proposed development will unduly not interfere with the amenities of the neighbourhood nor materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land.

iii) Rebuttal of the Appellant

[29] The Appellant noted under the second permit approval, additional Height was approved, but FAR was not exceeded in an effort to control building massing. Under this permit, there are no changes to building form; there are only internal changes to the podium. There is no change to the previously approved Height.

[30] The Appellant concluded that the development 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.

Decision

[31] 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. PRIOR TO THE RELEASE OF DRAWINGS FOR BUILDING PERMIT REVIEW:
 - a) the applicant or property owner shall pay a Sanitary Sewer Trunk Fund fee of \$210,184.00.
 - b) the applicant or property owner shall pay a Lot Grading fee of \$220.00.
2. All minor mechanical equipment on a roof of any building shall be concealed by screening in a manner compatible with the architectural character of the building, or concealed by incorporating it within the building. (Reference: Section 910.7(5)(c)(iii) of the *Edmonton Zoning Bylaw*)
3. The ground floor level portion of the façade abutting a Public Roadway, other than a lane, shall be comprised of transparent, non-reflective, non-tinted, non-obscured glazing. (Reference: Section 910(8)(a) of the *Edmonton Zoning Bylaw*)

4. Urban Transportation provides the following condition:

Urban Transportation has reviewed the resubmitted drawings, dated 2016-04-21, and has no concerns with the proposed increase of Dwelling units from 179 to 188 units, originally 164 Dwelling units. The proposed 194 parking stalls are within the minimum and maximum required 153 and 248 stalls inclusive. All conditions as per the original Development Permit number 134240188-001.

NOTES:

1. This Development Permit is subsequent to issued Development Permit numbers 134240188-001 and 134240188-003. Refer to the Development Permit conditions on the preceding issued permits, to the satisfaction of the Development Officer.

2. Residential Sales Trailers require a separate development permit. Construction trailers must be located on private property or within the hoarded area.

3. All signage including for hoarding shall require a separate Development Application.

4. A Building Permit is required for any construction or change in use of a building. For a building permit, and prior to the Plans Examination review, you require construction drawings and the payment of fees. Please contact the 311 Call Centre for further information.

5. An approved Development Permit means that the proposed development has been reviewed only against the provisions of the Edmonton Zoning Bylaw. It does not remove obligations to conform with other legislation, bylaws or land title instruments such as the *Municipal Government Act*, the ERCB Directive 079, the *Edmonton Safety Codes Permit Bylaw* or any caveats, covenants or easements that might be attached to the Site.

6. This Development Permit is not a Business Licence. A separate application must be made for a Business Licence.

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

1. The maximum allowable FAR of 14 per Section 910.7(4)(a)(ii) and Section 910.7(6)(c) is varied to allow an excess of 1.1, thereby increasing the maximum allowable FAR to 15.1.

Reasons for Decision

- [33] Section 910.7(2)(b) states Apartment Housing is a Permitted Use in the HA Heritage Area Zone.
- [34] Section 910.7(3)(i) states General Retail Stores is a Discretionary Use in the HA Heritage Area Zone.
- [35] The building in which the proposed development is located was previously approved under Development Permit numbers 134240188-001 and 134240188-003.
- [36] The proposed development involves only internal changes to add to the Apartment Housing and General Retail Store Uses within the existing (previously approved) built form. The proposed development involves no changes to the exterior dimensions of the building and, most notably, there is no proposed change to Height.
- [37] Based on the parties' submissions, the internal changes will alter the amount of usable floor area which changes the FAR ratio and necessitate a single variance. No other variances to any of the applicable development regulations are associated with the proposed development.
- [38] While the proposed development adds dwelling units to the building, the Board notes that under the HA Heritage Area Zone, there is no limitation on the maximum allowable Density and in fact no density requirement. Thus, increasing the number of Dwelling units under this development permit does not require a variance.
- [39] The Board accepts the submission of the Development Officer that but for the limitation on her variance powers in the *Edmonton Zoning Bylaw*, she would have granted the requested variance to FAR.
- [40] The Board received no letters of opposition, nor did anyone attend the hearing in opposition to the proposed development. Further, the Board accepts the Development Officer's submission there has been no opposition to the building or the proposed development at any stage.
- [41] The Board notes that some of the parcels of land adjacent to the Site have greater allowances in the maximum allowable Height and FAR. Thus, the Board also agrees with the Development Officer's submission that the proposed development fits within the urban context of the area.

[42] Based on the above, the Board finds the proposed development does 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.

Mr. V. Laberge, Presiding Officer
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.



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Date: July 13, 2016
Project Number: 221958128-001
File Number: SDAB-D-16-149

Notice of Decision

- [1] On June 28, 2016, the Subdivision and Development Appeal Board (the “Board”) heard an appeal that was filed on **June 3, 2016**. The appeal concerned the decision of the Development Authority, issued on May 27, 2016, to approve the following development:

To change the use from a General Retail Store to a Pawn Store (Cash Canada Pawn Shop).

- [2] The subject property is on Plan I Blk 65 Lots 13-15, located at 10650 - 82 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 and are on file, were read into the record:
- A Development Permit Application, including the plans of the proposed Development;
 - The approved Development Permit;
 - The Development Officer’s written submissions;
 - One Appellant’s submission, including a petition in opposition to the proposed development;
 - Comments of opposition to the proposed development from adjacent neighbours; and
 - The Respondent’s submission, including a petition in support 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 (the “*Municipal Government Act*”).
- [7] After both Appellants presented their evidence, a property owner within the 60 metres notification radius provided evidence that put into question whether the Board gave proper notice of its hearing in accordance with Section 686(3) of the *Municipal Government Act*, which provides:

The subdivision and development appeal board must give at least 5 days’ notice in writing of the hearing

(a) to the appellant,

(b) to the development authority whose order, decision or development permit is the subject of the appeal, and

(c) to those owners required to be notified under the land use bylaw and any other person that the subdivision and development appeal board considers to be affected by the appeal and should be notified.

Summary of Hearing on Procedural Matter

i) Position of Property Owner within the 60 metres notification radius, Mr. R. Friedman

- [8] Mr. Friedman indicated that he only received notice of this hearing on Friday June 24, 2016 and did not have time to properly prepare. He did not check his mail on Thursday June 23 but did on Wednesday June 22 and the notice was definitely not present in his mailbox.
- [9] Mr. Friedman canvassed several of his condo board members over the weekend. At least 9 out of 21 members had not received notice of the hearing either. On Monday June 27, he contacted his property manager, who had not received notice of the hearing. He was asked by the condo board members if he could attend the hearing.
- [10] Mr. Friedman was unsure if anyone in his building was canvassed by petitioners from either party.

ii) Position of the Respondent, Mr. T. Latimer on behalf of Cashco PW Inc.

[11] Mr. Latimer asked the Board to consider what is meant by the word “notice” in Section 686(3) of the *Municipal Government Act*.

[12] The Board’s notice is dated June 14 and mailed shortly after. It is reasonable to assume that Mr. Friedman should have received it a couple days later. There can always be someone that comes forward who did not receive proper notice and if so the matter will never be heard.

[13] Mr. Friedman was able to get in touch with and therefore notify affected owners who asked him to come present to the Board.

[14] Upon questioning from the Board, Mr. Latimer indicated consultation on behalf of the Respondent was performed after the appeal was filed and there was probably an overlap of consultation between the Appellants and Respondent. The Respondent’s submitted petition does not clearly set out which property owners within the 60 metres notification radius were spoken to.

iii) Position of the Development Officer, Mr. I. Welch

[15] Mr. Welch asked the Board to consider whether there was constructive notice through the circulating petitions and to confirm whether the 5 days’ notice was actually met.

iv) Position of Appellant #1, Ms. J. Kostoulias on behalf of Mr. A. Joyce

[16] Ms. Kostoulias noted that the signatures on the Respondent’s petition are dated June 24, 2016.

v) Position of Appellant #2, Mr. M. Davison on behalf of Old Strathcona Business Association

[17] Mr. Davison had nothing to submit in regards to the procedural matter.

Decision on Procedural Matter

[18] The Board finds that proper notice was not given in accordance with Section 686(3) of the *Municipal Government Act* and thus remits the matter back for a rescheduling of the hearing to a later date in order for proper notice to be effected. The matter will be heard afresh on the rescheduled date and any submissions from this hearing will not be considered but must be resubmitted.

Reasons for Decision

- [19] Section 686(3) of the *Municipal Government Act* provides “the Subdivision and Development Appeal Board must give at least 5 days’ notice in writing of the hearing to the appellant, to the development authority whose order, decision or development permit is the subject of the appeal, and to those owners required to be notified under the land use bylaw and any other person that the subdivision and development appeal board considers to be affected by the appeal and should be notified.”
- [20] The Board finds that Mr. Friedman and owners of other units in his building were owners required to be notified under the *Edmonton Zoning Bylaw*.
- [21] Section 22 of the *Interpretation Act*, RSA 2000, c I-8 provides that “if an enactment contains a reference to a number of days expressed to be clear days or to “at least” or “not less than” a number of days between 2 events, in calculating the number of days, the days on which the events happen shall be excluded.” Thus, the date of receipt of notice and day of the hearing are excluded from the calculation of 5 days.
- [22] The Board accepts Mr. Friedman’s evidence that he received his written notice of hearing from the Board on Friday June 24, 2016 by regular mail and further that several owners within his condo had not yet received written notice from the Board on that date.
- [23] Based on Section 22 of the *Interpretation Act*, the Board finds that Mr. Friedman and other owners of units in his building received less than 5 days notice of the June 28, 2016 hearing. Therefore, the written notice provided by the Board failed to comply with the requirements set under Section 686(3) of the *Municipal Government Act*.
- [24] An argument was put forth that constructive notice, through the petitions circulated by the parties, may have been sufficient to satisfy the notice requirements of Section 686(3). The Board makes no finding whether constructive notice might be sufficient in general to satisfy the notice requirements. In this case, however, the Board finds the petitions did not provide adequate constructive notice of this hearing to satisfy Section 686(3) of the *Municipal Government Act* for the following reasons:
- i) the petitions were initiated by the parties, not the Board,
 - ii) the petitions did not provide sufficient details of the hearing; and,
 - iii) the addresses listed in the petitions did not clearly identify which property owners within the 60 metres notification radius were spoken to, and specifically did not include any reference to Mr. Friedman’s address.

[25] Having found that proper written notice of the hearing was not given in accordance with Section 686(3) of the *Municipal Government Act*, in the interests of procedural fairness, the hearing must be rescheduled to allow for the proper written notification of property owners within the 60 metres notification radius.

Mr. V. Laberge, 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*, 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.
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.