



**EDMONTON
TRIBUNALS**

*Subdivision &
Development
Appeal Board*

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Date: June 24, 2016
Project Number: 163263441-001
File Number: SDAB-D-16-139

Notice of Decision

- [1] On June 9, 2016, the Subdivision and Development Appeal Board heard an appeal that was filed on May 17, 2016. The appeal concerned the decision of the Development Authority, issued on April 29, 2016, to refuse the following development:

To construct and operate a General Industrial Use building (Ace Pallets)

- [2] The subject property is on Plan 8021483 Blk 1 Lot 4, located at 11261 - 224 Street NW, within the IM Medium Industrial Zone. The Winterburn Industrial Area Structure 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:
- Copy of the Development Permit application, related plans, and refusal decision;
 - Development Officer's Written Submissions, dated June 2, 2016;
 - Correspondence between the Development Authority and Fire Rescue Services, dated December 16, 2014 and April 26, 2016, with three attachments regarding Alberta Fire Code interpretation and Fire Safety Plan Guidelines;
 - Notice letter from the Development Authority to the Appellant, dated October 15, 2015;
 - Development Authority Bylaw 11134;
 - Subdivision and Development Appeal Bylaw 11136;
 - Safety Codes Permit Bylaw 15894; and
 - *Pinilla v Calgary SDAB*, 2013 ABCA 291.

Preliminary Matter

- [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 explained to the parties that the Board's jurisdiction to hear appeals is derived, in part, from Section 686(1)(a)(i) of the *Municipal Government Act*, RSA 2000, c M-21, which states:

686(1) A development appeal to a subdivision and development appeal board is commenced by filing a notice of the appeal, containing reasons, with the board within 14 days,

(a) in the case of an appeal made by a person referred to in section 685(1), after

(i) the date on which the person is notified of the order or decision or the issuance of the development permit...

- [6] The Board must therefore determine whether the Appellant filed his appeal within the 14 days limitation period. If the appeal was filed late, the Board has no authority to hear the matter.
- [7] In this instance, the decision of the Development Officer was dated April 29, 2016, and the appeal was filed on May 17, 2016, therefore, it would appear that the appeal was filed outside the 14 days limitation period.
- [8] The Presiding Officer invited the parties to provide submissions in this regard.
- [9] The Appellant, Mr. W. Winter, Registered Engineering Technologist, was accompanied by the property owner, Mr. R. Atley.
- [10] Mr. Winter explained that he had expected the decision to be delivered to him via registered mail. However, he lives on an acreage, and registered parcels must be picked up at the nearest post office.
- [11] There also appeared to be some delay in the postal service. He submitted Exhibit "A", the registered mail envelope. Two Canada Post date stamps are visible, indicating either a mailing date of May 2 or May 3, 2016.
- [12] Mr. Winter was unsure as to the precise date that he received the notice, but he believed that he picked up the registered mail from the Calahoo Post Office on May 5, 2016.
- [13] The Development Officer, Mr. Welch, stated that the letter was mailed on April 29, 2016, the same day that he verbally advised the Appellant of the refusal. According to the City's internal records, the registered mail letter was received by the Appellant on May 3, 2016.
- [14] He acknowledged that it is possible that the postal service tracking system may be in error.
- [15] Upon reviewing Exhibit "A" and the information provided by the parties, the Board was satisfied that the Appellant was notified of the Development Officer's decision on May 5, 2016. Since the appeal was filed on May 17, 2016, the Appellant met the statutory time

limit pursuant to Section 686(1), and the Board therefore has jurisdiction to hear the appeal.

Summary of Hearing

i) Position of the Appellant, Mr. W. Winter

Water Supply for the Purposes of Fire Safety

- [16] The proposed development is located in the Winterburn Industrial area. When Winterburn Industrial was annexed by the City in 1980, there was no water supply to the subject Site. To this day, there is still no water service to the Site.
- [17] The proposed development will be a 223 square metre building for the business, Ace Pallets. According to Mr. Winter, Section 3.2.5.8(1) of the Alberta Building Code (“ABC”) states that water does not need to be supplied for a building that is under 600 square metres and not more than 3 storeys.
- [18] However, in his view, the ABC provides water supply guidelines for the purposes of building safety, whereas the Alberta Fire Code (“AFC”) provides water supply guidelines for the purposes of fire safety. Neither the ABC nor the AFC provide guidelines for water supply during building construction.
- [19] In the absence of clear guidelines with respect to construction phase water supply, Mr. Winter relied upon Section 3.2.5.8 of the ABC and submitted that the water supply requirements stipulated by the Development Authority and Fire Rescue Services are not needed.
- [20] Upon questioning by the Board with respect to fire safety measures on the construction site, Mr. Winter explained that fire extinguishers are located throughout the site, and equipped to all vehicles. If needed, Ace Pallets would be prepared to install fire safety measures that are equivalent to those of neighbouring properties.
- [21] Mr. Winter acknowledged that water supply will be required for the building at some point in the future. The intent is to install a boiler system.
- [22] Mr. Winter noted that since all construction equipment is already on-site, the building could be completed within a week, as it has no windows and has only three doors. He emphasized that the pallets themselves are more of a fire hazard than the building, which will be used only for the repair and storage of the company’s vehicles. It will not be used to run an automotive repair business. Equipment is also located at a safe distance from neighbouring properties, which should mitigate fire safety concerns.

Recommended Development Permit Conditions

- [23] The Board referred the Appellant to the proposed development permit conditions as recommended by the Development Officer. Should the Board decide to grant the development permit, some or all of these proposed conditions may form part of the Board's decision. The Board questioned whether the Appellant had any concerns with respect to these conditions.
- [24] The Appellant objected to the first proposed condition, requiring that the applicant provide an assessment of required construction phase firefighting water using the Fire Underwriter's Survey methodology. Mr. Winter reiterated his submission that there are no clear regulations with respect to construction phase water in either the ABC or the AFC.
- [25] In Mr. Winter's view, the second proposed condition requiring the payment of an \$85,598.00/ha on-site storm levy amounts to double taxation. It was his understanding that the levy contributes to a collective fund. In the future, should the City decide to install a water and sewage system, the fund would be used to offset the costs. Mr. Winter objected to paying for the costs of construction phase water supply, while also having to pay a levy for the future supply of water.
- [26] In addition to opposing the on-site storm levy, Mr. Atley expressed confusion with respect to the sixth recommended condition, requiring the owner to reconstruct an existing access from the site as an 11.5 metre wide culvert crossing. It was his understanding that this matter had already been resolved.

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

- [27] Mr. Welch was accompanied by representatives from the City of Edmonton's Fire Rescue Services, Ms. T. Edgecombe, Mr. C. Bardas, and Mr. B. Taylor.

Site History

- [28] Mr. Welch explained that a couple of years ago, a fire occurred on the Site, resulting in the evacuation of nearby roads and other sites within a six block radius. The fire took approximately four hours to control, and several more hours to extinguish.
- [29] Mr. Bardas stated that during the fire, one of the challenges faced by firefighters was the lack of accessible water. The nearest water source, a single fire hydrant, was approximately 1.2 kilometres away. Fire Rescue Services from nearby Parkland County had to provide support, and water tanks were needed to transport firefighting water.

- [30] To provide perspective regarding the fire risk presented by the subject property, Mr. Bardas explained that the Fire Insurance Rating for the City of Edmonton is rated 2 out of 10, whereas the rating for Winterburn Industrial is rated 9 out of 10.
- [31] Although the Appellant stated that equipment on the subject Site is located a safe distance from neighbouring properties, Mr. Bardas explained that when looking at fire spread or fire exposure, spatial separation from neighbouring properties examines various factors including the type of materials on-site. In this case, the risk of fire exposure is compounded by the storage of propane and fuel tanks on neighbouring properties, which is a major cause of fire spread. Furthermore, construction phase activities such as welding and cutting present significant fire risk. Should a fire break out, the on-site fire extinguishers will be insufficient for first responders.
- [32] The position of Sustainable Development is that the development raises concerns with respect to sufficient water supply for the construction phase of development. Following numerous attempts to resolve the matter with the Appellant, senior management directed that the development permit be denied.

Recommended Development Permit Conditions

- [33] The Board noted that one of the Development Officer's reasons for refusal relied upon the information requirements under Section 13.1(3) of the *Edmonton Zoning Bylaw*, which states that the Development Officer may require an applicant to submit additional information to verify compliance of the proposed development with the regulations of the *Edmonton Zoning Bylaw*. The Development Officer refused to issue the permit because the Appellant failed to provide information regarding the proposed development's compliance with the AFC.
- [34] The Board noted the AFC is not part of the *Edmonton Zoning Bylaw* and questioned whether it was appropriate to use Section 13.1 as a basis for refusing the permit. Furthermore, the proposed development is a Permitted Use without variances and the Board asked whether, in these circumstances it would have been more appropriate to issue a permit with conditions for AFC compliance.
- [35] Mr. Welch acknowledged that this particular development presents unique circumstances he has not encountered before. In this instance, the challenge is that construction phase water supply is not specifically within the purview of other departments such as Drainage or Transportation. For example, should the development be granted and the application moves forward to the Building Permit stage, the reviewing officer may fail to address the construction phase water supply issue because the ABC does not deal specifically with this matter. In short, due to the various statutory limitations upon the authority of various City departments, there is the possibility that the development will "fall through the cracks" and be approved, despite the significant fire risks. In Sustainable Development's view, to allow the development to occur due to gaps in the various regulatory frameworks could result in potential negligence claims against the City.

- [36] After various internal discussions, it was determined that construction phase water supply could be addressed under Section 15(4) of the *Edmonton Zoning Bylaw*. Typically, the Development Authority would apply Section 15(4) such that water supply requirements are a condition of an approved development permit.
- [37] However, it was determined that Section 15(4) could also be interpreted to allow a Development Officer to address deficiencies in water supply requirements at the development application stage. In this case, since the water supply requirements have not been met, senior management directed that the development permit be denied. It therefore followed that failure to meet the informational requirements under Section 13.1(3) for AFC compliance could also serve as grounds for refusal.
- [38] The Board drew attention to a 2013 Alberta Court of Appeal decision, wherein the Court held that “Building permits are governed by different legislation, the *Alberta Safety Codes Act*, RSA 2000, c S-1 and the *Alberta Building Code Regulation*, Alta Reg 117/2007 and are not within the Board’s jurisdiction” (*Pinilla v Calgary SDAB*, 2013 ABCA 291, at para 25). The Board questioned whether it was appropriate to address what appear to be Safety Codes matters before a hearing of the Subdivision and Development Appeal Board.
- [39] Mr. Bardas acknowledged that the Board’s jurisdiction is generally limited to matters under the *Edmonton Zoning Bylaw*. In this case, the Board’s jurisdiction to address construction phase water supply arises from Section 15(4) of the *Edmonton Zoning Bylaw*.
- [40] Further, he submitted that the Board is not being asked to apply the various Codes under the *Alberta Safety Codes Act*. Indeed, a large regulatory gap exists between the provisions of the *Alberta Safety Codes Act* and standards for urban municipality design. For example, the *Alberta Safety Codes Act* does not deal with the requirement for fire hydrants in neighbourhoods. There are also differences between water supply requirements under the *Alberta Safety Codes Act* compared to provincial environmental guidelines, which direct municipalities to develop fire safety measures that apply to construction standards. Finally, the *Alberta Safety Codes Act* does not account for the different fire safety needs of rural and urban environments.
- [41] Mr. Welch explained that the first recommended condition as set out in his written submissions serves as a “last resort” alternative solution that could fill the gap within the existing regulatory framework. The proposed condition states that “PRIOR TO THE RELEASE OF DRAWINGS FOR BUILDING PERMIT REVIEW, the applicant or landowner shall provide an assessment of required firefighting water for construction...” [emphasis as per original document]. In his view, this condition would be sufficient to prevent the development from moving forward without the implementation of proper water supply measures.

- [42] Upon questioning by the Board about the wording of the condition, Mr. Welch clarified that his preference would be for the “implementation” rather than an “assessment” of construction phase firefighting water. Mr. Bardas added that when Fire Rescue Services is involved with conditions for subdivision approvals, the standard phrasing for conditions is for the “provision” of construction site firefighting water, not mere “assessment.”
- [43] With respect to the proposed second condition, Mr. Welch clarified that the quoted rate is per hectare, but the subject Site is assessed at approximately 4/10 of a hectare, therefore, the Appellant would be paying less than \$85,598/ha for the Onsite Storm levy.

iii) Rebuttal of the Appellant

- [44] Mr. Winter stated that he has spoken with a representative from the Fire Underwriter, who stated that the Fire Insurance Rating for Winterburn Industrial has been assessed at 10 out of 10, and that the area would be rated a higher risk if possible.
- [45] He also noted that the Site consists of two lots, so in fact, the Onsite Storm levy would still total approximately \$85,598/ha.

Decision

- [46] The appeal is ALLOWED and the decision of the Development Authority is REVOKED. The development is GRANTED, subject to the following CONDITIONS:

1) PRIOR TO THE RELEASE OF DRAWINGS FOR BUILDING PERMIT REVIEW, the applicant or landowner shall provide firefighting water for construction using the Fire Underwriter’s Survey methodology, to the satisfaction of the Development Officer.

2) PRIOR TO THE RELEASE OF DRAWINGS FOR BUILDING PERMIT REVIEW, the owner shall enter into a Servicing Agreement in accordance to the following:

a) Permanent Area Contribution (PAC) & Sanitary Servicing Strategy Expansion Assessment (EA)

The PACs must be paid by entering into a servicing agreement, which will be prepared by Sustainable Development. The applicant/owner should contact Dan-Christian Yeung at (780) 496-4195, upon issuance of the Development Permit, when he/she is ready to initiate the servicing agreement and make payment.

Assessment area is **0.4138 ha**. The following is for information purposes and the rates are in year 2014. The final PAC amounts will be based on the prevailing rates at the time the applicant/owner pays and enters into a servicing agreement with the City.

- **Winterburn Industrial North (Yellowhead Industrial) Onsite Storm: \$85,598/ha**
- **Winterburn Industrial Area Master Plan: \$125/ha**
- **Area Master Drainage Study (NW Annex I-130): \$43/ha**
- **Winterburn Industrial North (Yellowhead Industrial) Onsite Sanitary: \$25,240/ha**
- There may also be PAC over-expenditure payment which can only be determined at the time the applicant/owner is ready to enter into a servicing agreement.
- **EA (WESS): \$23,278/ha**

3) PRIOR TO THE RELEASE OF DRAWINGS FOR BUILDING PERMIT REVIEW, the applicant or property owner shall provide a guaranteed security to ensure that landscaping is provided and maintained for two growing seasons. The Landscape Security may be held for two full years after the landscaping has been completed. This security may take the following forms:

- a) cash to a value equal to 100% of the established landscaping costs, or
- b) an irrevocable letter of credit having a value equivalent to 100% of the established landscaping costs.

Any letter of credit shall allow for partial draws. If the landscaping is not completed in accordance with the approved Landscape Plan(s) within one growing season after completion of the development or if the landscaping is not well maintained and in a healthy condition two growing seasons after completion of the landscaping, the City may draw on the security for its use absolutely. (Reference Section 55.6).

4) PRIOR TO THE RELEASE OF DRAWINGS FOR BUILDING PERMIT REVIEW, the owner must enter into a Municipal Improvement Agreement with the City for the following improvements:

- a) removal of the existing 3.66 m culvert crossing to 224 Street (including removal of culvert pipe); and
- b) construction of a new 11.5 m culvert crossing to 224 Street, to be located a minimum of 9 m north of the south property line.

The Agreement must be signed by the property owner and returned to Transportation Services to the attention of Loli Fernandez (780-944-7683) including an irrevocable Letter of Credit in the amount of \$30,000 to cover 100% of construction costs. The Agreement will be forwarded directly to the owner for his signature. Once signed, the owner is required to have a Civil Engineer submit stamped engineering drawings for approval by the Transportation Services.

5) PRIOR TO THE RELEASE OF DRAWINGS FOR BUILDING PERMIT REVIEW, the owner must enter into a Servicing Agreement with the City of Edmonton for the payment of the ARA owing. This lot is within the Winterburn Industrial Arterial Roadway Assessment (ARA) catchment. The amount of ARA owing using the 2014 rate totals \$25,310 for the entire site. The assessment amount may be adjusted to reflect the current ARA rate at the time the Servicing Agreement is signed. The owner must contact Jordan Wachter (780-442-7042) of Sustainable Development for more information on the Servicing Agreement and ARA owing.

6) There is an existing access from the site to 224 Street; however, it does not meet current City of Edmonton standards. The owner must reconstruct the access as an 11.5 m wide culvert crossing to be located a minimum of 9 m north of the south property line.

7) There is an existing power pole in the vicinity of the proposed 11.5 m access to 224 Street, as per the Transportation Services memorandum dated 1 April 2015. The access must maintain a minimum clearance of 1.5 m from the power pole and/or guy-wire. The applicant should contact Andy Balding (780-412-3520) of EPCOR Distribution & Technologies for more information. Should relocation of the pole/guy-wire be required, all costs associated with relocation must be borne by the owner/applicant.

8) Any hoarding or construction taking place on road right-of-way requires an OSCAM (On-Street Construction and Maintenance) permit. It should be noted that the hoarding must not damage boulevard trees. The owner or Prime Contractor must apply for an OSCAM online at:

http://www.edmonton.ca/bylaws_licences/licences_permits/oscam-permit-request.aspx

9) Any boulevard damage occurring as a result of construction traffic must be restored to the satisfaction of Transportation Services, as per Section 15.5(f) of the Zoning Bylaw. The boulevard will be inspected by Transportation Services prior to construction, and again once construction is complete. All expenses incurred for repair are to be borne by the owner.

10) Bicycle parking shall be provided in accordance to Section 54.3 and to the satisfaction of the Development Officer.

11) The off-street parking, loading and unloading (including aisles or driveways) shall be hardsurfaced, curbed, drained and maintained in accordance with Section 54.6.

12) Landscaping shall be in accordance to the approved landscape plan, Section 55, and to the satisfaction of the Development Officer.

13) Exterior lighting shall be developed to provide a safe lit environment in accordance with Sections 51 and 58 and be to the satisfaction of the Development Officer.

14) 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 of the Edmonton Zoning Bylaw 12800).

ADVISEMENTS (As per Transportation Services Memorandum dated 1 April 2015):

1. The garbage location has not been identified on the site plan. Garbage bins must be located so that all turning maneuvers for the waste management vehicles are accommodated on site.

2. The Winterburn Industrial ARA catchment is set up as a means for cost sharing the arterial roadway construction within the Winterburn Industrial Area. For further information regarding Arterial Roadway Assessments, please contact Jordan Wachter (780-442-7042) of Sustainable Development, Current Planning.

3. Upon future development of the subject property, Transportation Services may require upgrades to the surrounding roadways. All costs associated with the upgrades shall be borne by the owner/applicant.

Reasons for Decision

[47] The proposed development is a General Industrial Use, which is a Permitted Use in the IM Medium Industrial Zone.

[48] Section 642(1) of the *Municipal Government Act* states: “When a person applies for a development permit in respect of a development provided for by a land use bylaw

pursuant to section 640(2)(b)(i), the development authority must, if the application otherwise conforms to the land use bylaw, issue a development permit with or without conditions as provided for in the land use bylaw.”

- [49] All parties acknowledge that the proposed development is for a Permitted Use without variances. Section 642(1) indicates that in these circumstances, the Development Authority must issue the permit, although conditions may be imposed as provided for in the *Edmonton Zoning Bylaw*.
- [50] In his reasons for refusal, the Development Officer referred to Section 13.1(3), indicating that the Appellant had not provided any information regarding the proposed development’s compliance with the Alberta Fire Code (“AFC”). However, Section 13.1(3) speaks to information that is considered necessary to verify that the proposed use complies with the regulations of the *Edmonton Zoning Bylaw*, and makes no reference to compliance with the AFC. Accordingly, the Board is of the view that this was an improper reason to refuse the development permit.
- [51] Section 15(1) states that the Development Officer may only impose conditions on the approval of a permitted development if the power to do so is clearly specified elsewhere in the *Edmonton Zoning Bylaw*. Section 15(4) states that the Development Officer may, *as a condition of issuing a development permit*, require the applicant to make satisfactory arrangements for the supply of, among other things, water. [Emphasis added]
- [52] The Development Officer elected to refuse the development permit on the basis that the Applicant had not made satisfactory arrangements for the supply of water. In particular, the Development Officer was concerned about the supply of water as required by the AFC.
- [53] The Board is of the view that the wording of Section 15(4) regarding the supply of water is sufficiently broad to encompass all water requirements for development, including water requirements pursuant to the AFC. However, Section 15(4) does not provide authority to refuse a development permit for a Permitted Use without variances, even if satisfactory arrangements for water supply are not met. Rather, Section 15(4) provides authority to the Development Officer, and therefore this Board, to add a condition to a development permit for the supply of water. For this reason, the Board is of the view that the Development Officer erred in electing to refuse to issue the development permit as opposed to placing appropriate conditions on the development permit.
- [54] The Board heard evidence that the *Alberta Safety Codes Act* does not deal with the provision of water supply for firefighting purposes. The concern of both the Development Authority and Fire Rescue Services is that, by issuing the development permit, these necessary arrangements for firefighting water will fall through the gaps between the requirements of the AFC and the *Alberta Safety Codes Act*. However, the Development Officer did concede that a properly worded condition attached to the development permit would alleviate this concern.

- [55] The Board is of the view that the first condition attached to this development permit will address the need to ensure that the water supply to this development will be adequate for fire safety reasons during the construction phase.
- [56] All parties agree that the fire risk is extreme. The circumstances surrounding this development are unusual, and the Board is of the view that although it does not have the jurisdiction to deal with AFC matters, the presence of a significant fire risk constitutes a valid planning consideration.
- [57] In addition, the Board accepts that the Winterburn Industrial area, having been annexed by the City of Edmonton in 1980, presents various challenges with respect to utilities servicing. The Board heard evidence about a 2013 fire in the neighbourhood that resulted in challenges to firefighting personnel who had to battle the blaze with access to only a single fire hydrant located 1.2 kilometres from the fire. The Board accepts that Winterburn Industrial is inadequately serviced with water supply for firefighting purposes.
- [58] For the above reasons, this Board is of the view that the proposed development presents significant planning-related challenges such that the development should not occur unless there are appropriate conditions to ensure that water supply for firefighting purposes during the construction phase is adequate. Failure to provide a condition for the provision of required firefighting water during construction has the potential to materially impact the use, enjoyment and value of neighbouring properties. As such, the condition regarding the provision of water for firefighting during construction is appropriate.

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

Board Members in Attendance

K. Cherniawsky; C. Chiasson; R. Hobson

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*, RSA 2000, c S-1;
 - c) the requirements of the *Permit Regulation*, Alta Reg 204/2007;
 - d) the requirements of any other appropriate federal, provincial or municipal legislation; and
 - 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 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 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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TRIBUNALS**

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Date: June 24, 2016
Project Number: 187777099-001
File Number: SDAB-D-16-140

Notice of Decision

- [1] On June 9, 2016, the Subdivision and Development Appeal Board heard an appeal that was filed on May 17, 2016. The appeal concerned the decision of the Development Authority, issued on April 27, 2016, to refuse the following development:

To operate a Major Home Based Business (Storage and sales of trucks with demos inside closed shop- Hydro-Vac Unlimited Sales Ltd).

- [2] The subject property is on Plan 7521733 Blk 2 Lot 3, located at 2340 - 28 Avenue SW, within the RR Rural Residential Zone.
- [3] The following documents, which were received prior to the hearing and are on file, were read into the record:
- Appellant's written submissions, received June 9, 2016;
 - Copy of the Development Permit application and refusal decision;
 - Copy of the Canada Post receipt confirming delivery of the refusal decision on May 6, 2016;
 - Written submissions of the Development Officer, dated June 2, 2016;
 - Letter of opposition, dated and received June 9, 2016; and
 - Copy of the Board's 1999 decision, SDAB-D-99-043, as referenced in the Letter of opposition.

Preliminary Matter

- [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*, RSA 2000, c M-26.

Summary of Hearing

i) Position of the Appellant, Mr. K. Heather

[6] Mr. Heather was represented by legal counsel, Mr. P. Barrette.

Site Context

[7] The subject property is accessed via the front drive entrance using a public cul de sac. The truck shop is located in the northernmost Accessory building on the property. To the east of the Accessory building is a line of trees running east-west. Trucks are also parked behind this row of trees. Further north of this tree line is an open field of approximately 80 acres. In addition to the truck business, the Site also runs a bee hive and tree farm operation. The neighbour appearing in opposition to the development resides west of the subject property.

Proposed Development

[8] The proposed development is for the sale of new and used vacuum trucks. To avoid disturbing neighbours, truck testing is restricted to the inside of the shop. Trucks are tested outside the shop only when the customer has expressed serious interest and has the purchase funds prepared. The shop has various insulation measures, including R24 insulation in the walls and Styrofoam insulation for the door.

[9] Mr. Heather explained that due to his wife's illness, he is looking to sell the business, at which point, the trucks will be removed immediately from the property as a condition of sale. In the meantime, the business must continue operating to some extent to demonstrate its viability to potential buyers. He therefore requests that the Board grant a temporary development permit of five years or as long as the Board deems fit.

[10] Upon questioning by the Board, Mr. Heather explained that he has already downsized the business. Currently operating with three trucks, the business averages approximately two client visits per week, and receives occasional UPS deliveries. His wife is the only other employee. In addition, once or twice a week, vacuum trucks may arrive or leave the property. Vehicle maintenance is restricted to his own pickup truck and other personal vehicles.

[11] Mr. Heather acknowledged that the existing business is operating without a permit. Initially, he had set up the operation to provide maintenance and repairs for his tree farm operation. He is now applying for a development permit for the truck sales business due to a noise complaint from the neighbouring property owner, which resulted in a Bylaw compliance inspection. Upon questioning by the Board with respect to noise complaints, Mr. Heather clarified that when business was at its peak, he was operating approximately 10 to 11 vehicles. However, he emphasized that he has now downsized his business.

Development Officer's Reasons for Refusal

- [12] Mr. Barrette submitted that the primary issues under appeal relate to the outdoor storage of three trucks, as well as the gross vehicle weight of the vacuum trucks stored on-site, which are in excess of the maximum allowable weight of 4,600 kilograms pursuant to Section 45(1) of the *Edmonton Zoning Bylaw*.
- [13] Referring to the Appellant's written submissions, Mr. Heather provided a summary of nearby properties with approved Major Home Based Businesses, including a gravel truck operation as well as a plumbing business with three trucks over 4,500 kilograms. Mr. Heather submitted that these businesses are similar, if not more disruptive than the proposed development.
- [14] Mr. Barrette also referred the Board to three previous decisions of the Subdivision and Development Appeal Board. He noted a March 2012 decision wherein the property at 3245 – 28 Avenue SW was approved for a Major Home Based Business for a plumbing company, including the outdoor storage of two cube vans which exceed the maximum allowable vehicle weight. A subsequent July 2012 decision approved a Major Home Based Business for the property at 2340 – 28 Avenue SW. This development permit also allowed the storage of three trucks exceeding the maximum allowable vehicle weight.
- [15] Finally, Mr. Barrette drew attention to the letters of support from two neighbouring property owners on the same cul de sac, including the neighbour immediately to the east of the Appellant.

ii) Position of the Development Officer, Mr. J. Angeles

- [16] Upon questioning by the Board, Mr. Angeles stated that he was aware of a history of complaints with respect to the subject property. However, he did not have these records on hand. The Board recessed briefly to provide time for Mr. Angeles to obtain this information, which was submitted as Exhibit "A".
- [17] Exhibit "A" showed that since 1999, two complaints have been filed against the subject property: one for operating an unlicensed business, and the second for storing 13 vacuum trucks in the yard.
- [18] Mr. Angeles acknowledged that although most applications for Major Home Based Businesses in the surrounding area were refused by other Development Officers, the majority of these refusals were successfully appealed to the Subdivision and Development Appeal Board. As such, it would appear that the outdoor storage of overweight vehicles in excess of 4,600 kilograms may now be considered characteristic of the neighbourhood. However, as a Development Officer, it is his view that he has an obligation to refuse developments which do not comply with the *Edmonton Zoning Bylaw*.

iii) Position of Affected Property Owner, Mr. D. Kuefler

- [19] Mr. Kuefler explained that his driveway is a little less than 100 feet from the subject property. His property and the subject property are one of the few located on the cul de sac that accesses 28 Avenue SW. Although the cul de sac is officially a public road, its maintenance is actually borne by the property owners on the cul de sac, who share responsibility in clearing snow from the cul de sac, and mowing the grass at its centre.
- [20] Although the Appellant referenced other neighbouring properties with approved Major Home Based Business permits, Mr. Kuefler noted that those properties are directly accessible via a major road. The subject property, however, is accessed by a small cul de sac. When a truck accesses this cul de sac, any other vehicle heading in the opposite direction has to stop to let the truck pass. Furthermore, the constant use of the cul de sac by the Appellant's overweight trucks has caused the cul de sac to deteriorate. Its restoration would require the City to repave the road using other materials such as clay.
- [21] Upon questioning by the Board, Mr. Kuefler acknowledged that in the past year, the number of trucks accessing the cul de sac has decreased, and the noise impacts have also similarly reduced. However, previous to these changes, he counted up to 13 trucks stored on the property, in addition to auxiliary vehicles such as trailers being hooked to the trucks.
- [22] Mr. Kuefler also brought attention to the 1999 decision of the Board, wherein the subject property was approved for the construction of a storage building, not to be used for commercial or industrial business activities (SDAB-D-99-043). However, since then, the Appellant has operated a commercial business out of this building. The business operation impacts him because he can still hear the trucks running from within the Accessory building. He can also see the building from his house, though the Appellant's principal building is situated between the Accessory building and his own property.
- [23] Upon questioning by the Board, Mr. Kuefler acknowledged that the Appellant does not typically operate his business during the evenings, and that he does not hear the noise emitted from the trucks when he is inside his house.
- [24] With respect to the comparable properties of approved Major Home Based Businesses in the neighbouring area, Mr. Kuefler noted that the property located on 2370 – 28 Avenue SW was approved prior to the City's annexation. He also noted that the approved permit for the property at 3245 – 28 Avenue SW was for a plumbing company and the storage of cube vans, which are significantly smaller than the vacuum trucks.
- [25] Mr. Kuefler submitted Exhibit "B", consisting of three prior decisions of the Subdivision and Development Appeal Board. In his view, these decisions demonstrate comparable proposed developments which were refused by the Board.

[26] After a brief recess to provide the Appellant with an opportunity to review Exhibit “B”, the hearing resumed.

iv) Rebuttal of the Appellant

[27] Mr. Heather stated that vacuum trucks are limited to 80 decibels and similar ones are driven everyday on City roads. Mr. Barrette drew attention to the letter of support from the owner of 2340 – 28 Avenue SW, who stated that “Having the occasional truck arriving, leaving or being stored on the Heather’s property is less annoying than... the city garbage truck on a Tuesday morning.”

[28] Mr. Heather also noted that Mr. Kuefler makes use of a water truck that transports water to his property approximately once every two weeks. This water truck weighs anywhere between 30,000 to 40,000 pounds, which is considerably heavier than the vacuum trucks and is a more likely reason for the breakdown of the cul de sac’s surface.

[29] With respect to the three previous decisions of the Board submitted as Exhibit “B”, Mr. Barrette noted that SDAB-D-91-77 is a decision wherein the Board actually granted the development permit, and SDAB-D-98-009 concerns a scope of application that is irrelevant to the case before this Board. The remaining decision, SDAB-D-97-175, is distinguishable on the facts – in that case, the Board refused a development permit for the storage of four overweight vehicles that accessed the Site on a daily basis, idling for half an hour early in the morning before leaving the Site. Mr. Barrett submitted that the sheer amount of activity is distinguishable from the proposed use for the subject development.

[30] Upon further questioning by the Board, Mr. Heather clarified that he owns two used vehicles that are stored on another site located in Strathcona County which will be transported to the Site at some point. He is anticipating the delivery of two more new vehicles that he recently purchased. When the Board noted that the business activity would appear to indicate that he is not, in fact, winding down his business, Mr. Heather responded that he does fully intend to sell his business, but in the meantime, he needs to continue making sales. Mr. Heather also confirmed that he does not operate a shop or office facility at the Strathcona County Site.

Decision

[31] The appeal is **ALLOWED** and the decision of the Development Authority is **REVOKED**. The development is **GRANTED**, subject to the following **CONDITIONS**:

- 1) This development is limited to two years from the date of this decision, expiring on **June 24, 2018**.
- 2) No more than three oversized vacuum trucks are permitted to be stored on the property at any one time.

- 3) Storage of the aforementioned oversized vacuum trucks is limited to the area east of the Accessory storage shed, behind the line of trees oriented east-west along the northern section of the property.
- 4) No repair work is permitted on the property.
- 5) All testing or demos of vehicles for sale shall be limited to the inside of the Accessory storage shed.
- 6) Business hours are limited to the hours of 8:00 a.m. to 5:00 p.m., Monday to Friday.
- 7) Pursuant to Section 75 of the *Edmonton Zoning Bylaw*:
 - a. There shall be no exterior display or advertisement other than an identification plaque or Sign a maximum of 20 cm x 30.5 cm in size located on the Dwelling;
 - b. There shall be no mechanical or electrical equipment used that creates external noise, or visible and audible interference with home electronics equipment in adjacent Dwellings;
 - c. The Major Home Based Business shall not generate pedestrian or vehicular traffic, or parking, in excess of that which is characteristic of the Zone in which it is located;
 - d. Non-resident employees or business partners are not permitted to work on-site.
 - e. With the exception of conditions 2) and 3) above, there shall be no outdoor business activity, or outdoor storage of material or equipment associated with the business. Indoor storage related to the business activity shall be allowed in either the Dwelling or Accessory buildings;
 - f. the Major Home Based Business shall not change the principal character or external appearance of the Dwelling or Accessory buildings;
 - g. a Major Home Based Business shall not be allowed within the same principal Dwelling containing a Secondary Suite or within the same Site containing a Garage Suite or a Garden Suite and an associated principal Dwelling, unless the Home Based Business is a Bed and Breakfast Operation and the Secondary Suite or the Garage Suite or the Garden Suite is an integral part of the Bed and Breakfast Operation.

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

- 1) Section 45(1)(a) is varied to allow up to three overweight vehicles (vacuum trucks) exceeding 4,600 kilograms on the Site.
- 2) Section 75(5) is varied to permit the outdoor storage of three overweight vehicles (vacuum trucks). The storage of these vehicles shall be limited to the portion of the subject Site as set out under condition 3) (see above).

Reasons for Decision

- [33] Under Section 240.3(6), Major Home Based Business is a Discretionary Use in the RR Rural Residential Zone.
- [34] Based on the evidence provided, the nature and scope of the proposed development fits the definition of a Major Home Based Business pursuant to Section 7.3(7) of the *Edmonton Zoning Bylaw*, which states:
- Major Home Based Business means development consisting of the use of an approved Dwelling or Accessory building by a resident of that Dwelling for one or more businesses such businesses may generate more than one business associated visit per day. The business use must be secondary to the residential Use of the building and shall not change the residential character of the Dwelling or Accessory building. The Dwelling may be used as a workplace by a non-resident. This Use Class includes Bed and Breakfast Operations but does not include General Retail Sales.
- [35] Based on the evidence heard, the Board is of the opinion that the scale and intensity of the proposed use is appropriate in this neighbourhood. The Board accepts that there are several other properties within the neighbourhood that have similar operations with storage of overweight vehicles. The Board is of the view that with the attached conditions, the business will be reasonably compatible with the surrounding area.
- [36] The affected neighbour who appeared in opposition to the development gave two planning reasons to justify why he felt the development permit should be denied: one being the noise originating from the vehicles being tested and the visual impact of the outdoor storage of these vehicles, and the second stemming from the operation of the vehicles causing road problems to the cul de sac which is used to access the Site from 28 Avenue SW.
- [37] The Board notes that the two other neighbours on the cul de sac voiced no concerns at all in their letters of support about noise issues or about road repair problems. The Board accepts the evidence that, although the shop in which the truck testing is conducted is not sound proof, it has good sound insulation. The concerned neighbour himself indicated that over the past year, the amount of noise had decreased. He also noted that he did not hear noise in the evening or when he was inside his house.
- [38] With respect to the road repair problems, the Board heard evidence, which it accepts, that there is a large water truck using the cul de sac on a biweekly basis that may contribute to the road repair issues.

- [39] With respect to the potential impact of permitting the outdoor storage of three overweight vehicles, the Board considered that the subject Development is situated on a large rural property of over six acres, which is similar in size to the properties in the immediate area. The subject property is also well separated from its neighbours and screened by trees.
- [40] Having considered the Site context, including factors such as the extensive size of the subject property and the existence of landscape screening, the Board is satisfied that the visual impact of the outdoor storage has been sufficiently mitigated.
- [41] The Board received a number of past decisions of the Board, some of which approved Major Home Based Businesses of a similar nature, while others denied such applications. The Board notes that it is not bound by precedent and that each case must be determined on its own merits. However, the Board notes that these decisions demonstrate that there are a number of developments in the immediate area where the storage of overweight trucks has been allowed. In this neighbourhood, this is not uncharacteristic.
- [42] The Board was provided with a copy of decision SDAB-D-99-043, which approved a development permit on the Site for the shop building that the Appellant now uses for demonstrating and repairing the hydro-vac trucks. One of the conditions imposed at the time was that the building would not be used for commercial or industrial business activities. The Board which granted that development permit accepted the evidence of the Appellant that the building would be used for woodworking and the storage of recreational and personal vehicles.
- [43] By the Appellant's own evidence, he has been using that building for many years for commercial purposes, contrary to the condition. For this reason, the Board has concerns about the Appellant's credibility regarding the scope of business related activities and how much longer he intends to operate the business. The Appellant claims that he is actively attempting to sell the business and that when he does there will be no further oversize trucks on the Site. Until that happens, he will have no more than three oversize vehicles on the property at any given time.
- [44] The Board is of the view that, in the circumstances, it is appropriate to issue a development permit for a two year duration with appropriate conditions regarding the scope of work that can be carried out. This will give the Appellant adequate time to sell the business and alleviate some of the concerns of the affected neighbour.

[45] For the above reasons, the Board is of the opinion that the variances granted 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.

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

Board Members in Attendance

K. Cherniawsky; C. Chiasson; R. Hobson

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*, RSA 2000, c S-1;
 - c) the requirements of the *Permit Regulation*, Alta Reg 204/2007;
 - d) the requirements of any other appropriate federal, provincial or municipal legislation; and
 - 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 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 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.