EDMONTON
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Subdivision &
Development
Appeal Board

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Date: July 5, 2018
Project Number: 277822135-001
File Number: SDAB-D-18-503

Notice of Decision

[1] On June 20, 2018, the Subdivision and Development Appeal Board (the "Board") heard an appeal that was filed on May 23, 2018. The appeal concerned the failure of the Development Officer to render a decision on the following Development Permit application:

To demolish a Commercial Building

[2] The subject property is on Plan I Blk 60, Lots 15-18, located at 8108 – 101 Street NW and 10110 – 81 Avenue NW, within the DC2 Site Specific Development Control Provision. The Strathcona Area Redevelopment Plan applies to the subject property.

[3] The following documents were received prior to the hearing and form part of the record:

- Copy of the Demolition Permit application with attachments;
- The Development Officer's written submissions; and
- The Appellant's written submissions.

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.

Summary of Hearing

i) Position of the Appellant, Mr. J. Murphy and Mr. K. Haldane, representing Ogilvie LLP:

[6] Mr. Murphy expressed some surprise that there was no one in attendance wishing to preserve the building in question because of the recent media attention. However, it was his opinion that the historical significance of this building has no standing in the matter before the Board.

[7] In April, 2017, the City of Edmonton issued an Order to the property owners to either repair the old brick building or demolish the structure, remove the foundation, and clear and level the site to adjacent grades in accordance with all Municipal and Provincial legislation. Following the issuance of the Order, the property owner had several discussions with the City regarding steps that could be taken to preserve the building. However, a solution was not found and the property owner initiated the Development Permit process to authorize demolition.

[8] Demolition of an existing structure is considered a change in use and therefore requires a Development Permit. The Development Permit application noted that this was a Class A Permit, which should be issued to the property holder as of right (Appellant Submission Tab 3).

[9] In this case, the Development Authority did not respond to the Development Permit application in accordance with section either 683.1 of the *Municipal Government Act*, RSA 2000, c M-26 (the "*Act*") or section 11 of the *Edmonton Zoning Bylaw*. The only request for additional information was made by the Heritage Officer and the property owner provided the requested historical documentation the day after the request was made. The Development Officer never did ask the property owner for any additional information after the application for the development permit was submitted.

[10] The development permit application was made on March 23, 2018. Section 11.2 of the *Edmonton Zoning Bylaw* states that :

> 1. unless extended by an agreement in writing between the applicant and the Development Officer, the Development Officer shall within 20 days after receipt of an application for development:
>   a. issue a written acknowledgement to the applicant advising that the application is complete; or
>   b. issue a written notice to the applicant advising that the application is incomplete, listing the documentation and information that is still required, and setting a date by which the required documentation and information must be submitted.

[11] Section 683.1 of the *Act* states that a development authority must, within 20 days after the receipt of an application for a development permit, determine whether the application is complete. If this determination is not made within the time required, the application is

deemed to be complete. The Development Officer never issued written notice to the applicant advising that the application was incomplete.

[12] Pursuant to section 684 of the *Municipal Government Act*, the Development Authority did not make a decision on the application for a development permit within 40 days after receipt of the application and the appeal was subsequently filed after the 40 day period expired.

[13] All of the steps taken by the property owner are the result of the Order issued by the City of Edmonton in April 2017 that instructed the property owner to either repair or demolish the building. The site is zoned DC2.129, Site Specific Development Control Provision. The General Purpose is to accommodate redevelopment on the site in the form of a high rise residential/commercial development that will be compatible with the objectives of the Old Strathcona Area Redevelopment Plan. The stated purpose is inconsistent with the existing development on this land.

[14] The Development Officer identified this application as a Class A permit. Redevelopment of the site to comply with the General Purpose of the DC2 Zone requires the existing building to be demolished to comply with the direction of Council to accommodate a high rise residential/commercial development on this site.

[15] A garage previously operated from this site but that Use has been discontinued for more than 6 months. It is physically and economically impossible to incorporate the existing building into any of the listed uses for this land.

[16] Pursuant to section 685(4) of the *Municipal Government Act* the appeal is limited to whether or not the Development Authority followed the direction of Council. In this case the Development Officer failed to make a decision on the application for the Development Permit within 40 days after its receipt and therefore did not follow the direction of Council.

[17] In this case, the property owners followed all of the required processes by applying for a Development Permit to demolish the building on this land. The Order issued by the City directed the owner to either repair or demolish the building.

[18] The memorandum from the Chief Planner to the Mayor dated April 16, 2018, confirms that the owner provided information and met the Special Information requirements for documenting historic resources on the inventory pursuant to section 14.12 of the *Bylaw*. It also states that the permit will be issued within one week providing that all other permit conditions are satisfied. (Appellant's Submission, Tab 8)

[19] Mr. Murphy and Mr. Haldane provided the following information in response to questions from the Board:

a) It was their opinion that issuance of the Development Permit for the demolition of this building will have no impact on the requirement of Alberta Culture and Tourism

that the owner conduct a Historic Resource Impact Assessment prior to taking any action with respect to the building. If the Development Permit is issued, it will simply be held in abeyance until the Provincial requirements are met.

b) The report provided to City Council states that structures listed on the Inventory of Historic Resources in Edmonton do not have any formal protection and can be demolished. If an owner refuses to designate a building on the Inventory, and wishes to pursue demolition, the only way the City can prevent this is by designating the building as a Municipal Historic Resource without the consent of the owner. However, this has not been done because it required the City to compensate the owner for any decrease in economic value. The Province is not required to compensate an owner in any way.

c) This site is not located within the Strathcona Historical Area and the City of Edmonton did not caveat the title to inform potential buyers of the historical nature of the building.

d) The historic significance of this property and the concerns regarding demolition of the building on the site should have been addressed at the Public Hearing that was held when the site was rezoned DC2 Site Specific Development Control Provision.

e) The site was purchased because of the intended use listed in the DC2 Zone. The new owners did not become aware of the historical nature of the property and the controversy surrounding it until a year after it was purchased.

f) The request for special information pursuant to section 14 of the *Edmonton Zoning Bylaw* did not occur. The Heritage Officer, not the Development Officer, did seek some information and it was provided to the Heritage Officer on April 12 or 13, 2018 and the appeal was filed on the 40th day. The memorandum to the Mayor dated April 16, 2018, confirms that any information requirements had been met.

g) Pursuant to section 685(4) of the *Municipal Government Act*, the Development Officer did not follow the direction of Council in two respects: first, because a decision was not made on this Development Permit application and second, because refusing the application will allow a Use that is not contemplated or viable in the DC2 Zone to continue.

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

[20] The Development Authority did not appear at the hearing and the Board relied on Ms. Lee's written submission.

Decision

[21] The appeal is **ALLOWED** and the Development Permit to demolish a Commercial Building is **GRANTED**, subject to the following:

CONDITION:

1. Immediately upon demolition/alterations of the building, the site shall be cleared of all debris.

ADVISEMENTS:

1. 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 (780-442-5311) for further information.
2. 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 of any purpose or as to the presence or absence of any environmental containments of the property.
3. 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 with 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 easements that might be attached to the Site.

Reasons for Decision

[22] The Appellant maintains that the Development Officer's failure to render a decision on the application for a Development Permit within time limits set in the *Municipal Government Act* constitutes a deemed refusal, a decision that is subject to appeal.

[23] The Board considered two issues to determine whether or not it had jurisdiction to hear the appeal. Firstly, had a deemed refusal occurred and, if so, had this appeal been filed within the time frame allowed in the *Act*; and secondly, had the directions of Council been followed by the Development Officer.

[24] Based on the evidence provided, the Board finds that the Development Permit application was submitted on March 23, 2018.

[25] Once applications for Development Permits are received, section 683.1of the *Act* places a positive duty on a development authority to determine whether or not they are complete, the relevant subsections provide:

> (1) A development authority must, within 20 days after the receipt of an application for a development permit, determine whether the application is complete.
>
> …
>
> (4) If the development authority does not make a determination referred to in subsection (1) within the time required under subsection (1) or (3), the application is deemed to be complete.
> (5) If a development authority determines that the application is complete, the development authority must issue to the applicant an acknowledgment in the form and manner provided for in the land use bylaw that the application is complete.
> (6) If the development authority determines that the application is incomplete, the development authority must issue to the applicant a notice in the form and manner provided for in the land use bylaw that the application is incomplete and that any outstanding documents and information referred to in the notice must be submitted by a date set out in the notice or a later date agreed on between the applicant and the development authority in order for the application to be considered complete.
> (7) If the development authority determines that the information and documents submitted under subsection (6) are complete, the development authority must issue to the applicant an acknowledgment in the form and manner provided for in the land use bylaw that the application is complete.

[26] This duty is echoed in section 11.2(1) of the *Edmonton Zoning Bylaw* which states:

> Unless extended by an agreement in writing between the Applicant and the Development Officer, the Development Officer shall within 20 days after receipt of an application for development a. issue a written acknowledgment to the Applicant advising that the application is complete; or b. issue a written notice to the Applicant advising that the application is incomplete, listing the documentation and information that is still required, and setting a date by which the required documentation and information must be submitted.

[27] Section 684 of the *Act* deals with deemed refusals, the relevant subsections provide:

> (1) The development authority must make a decision on the application for a development permit within 40 days after the receipt by the applicant of an acknowledgment under section 683.1(5) or (7) or, if applicable, in accordance with a land use bylaw made pursuant to section 640.1(b).

(2) A time period referred to in subsection (1) may be extended by an agreement in writing between the applicant and the development authority.
(3) If the development authority does not make a decision referred to in subsection (1) within the time required under subsection (1) or (2), the application is, at the option of the applicant, deemed to be refused.

[28] The Board received evidence that the Heritage Officer requested further information from the Applicant which was provided promptly. The Board was not provided with the details of the request and it is unclear whether it was made orally or in writing. Regardless, the Board finds that this request did not amount to written notice as required per the section 11.2(1) of the *Bylaw* or section 683.1 of the *Act*. Not all requests for information signal that an application is incomplete, the Board notes that per section 683.1(10) of the *Act*, a development authority may make requests for information despite issuance of an acknowledgement that an application is complete.

[29] The requirement that the Development Officer provide written confirmation of completeness or notice of deficiency is a substantive one imposed to preserve the key planning objectives of certainty and timeliness.

[30] The Board finds that the Development Officer did not issue either a written acknowledgment to the Applicant advising that the application was complete or a written notice advising that the application was incomplete, listing the documentation and information that was still required and setting a date for submission as required under the *Bylaw* and the *Act*. Further, the Board finds that there was no agreement in writing made between the parties to extend any of the times for acknowledgment that the application was complete. Therefore, the Board finds that the application was deemed complete on April 12, 2018 by operation of section 683.1(4) of the *Act*.

[31] No decision has been rendered by the Development Officer concerning this application (Development Officers Report, p.1). By operation of sections 684(1) and (3), the Appellant (as Applicant) was entitled to exercise its option to have the application deemed to be refused 40 days after April 12, 2018. The Appellant exercised that option.

[32] Consequently, the Board finds that the Development Permit application was deemed refused on May 22, 2018.

[33] Based on the evidence provided, the Board also finds that the appeal was filed in time on May 23, 2018 in accordance with section 686 of the *Act.*

[34] The subject site is located within a Direct Control District. Therefore, after finding that the appeal was filed in time, the Board considered whether the Development Officer had followed the directions of City Council as required per section 685(4) of the *Act* which states in part:

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

[35] The Board accepts the position of the Appellant that in this case the directions of Council were not followed. Both the *Bylaw* and the *Act* require a development authority to make a decision about the completeness of a Development Permit application and to render a decision within the timeframe set in the *Act*. This was not done. The Board finds that the failure to make these determinations as required and in a timely manner constitutes a failure to follow the directions of council.

[36] Accordingly, the Board continued on to consider, in accordance with the directions of Council, whether or not a Development Permit for demolition should be granted.

[37] The Board agrees with the Appellant that the proposed demolition is a "development" and that the Development Permit application was a prerequisite to legal development pursuant to section 683 of the *Act* for the following reasons:

a) The scope of the Development Permit application is to "Demolish a Commercial Building". Section 616(b)(iii) of the *Act* states that:

> Development means a change of use of land or a building or an act done in relation to land or a building that results in or is likely to result in a change in the use of the land or building.

b) The proposed demolition is an act done in relation to the building that will result in a change of Use. The last known Use authorized by a Development Permit on this site was as Garage. It is not a Listed Use for the direct control district, therefore it can only continue as a legal non-conforming Use. However, based on the evidence provided, the Garage has not operated in this building for more than six months so per section 643(2) of the Act, the last permitted Use cannot be continued and a change is inevitable.

c) In addition, section 12.2.1(o) of the *Edmonton Zoning Bylaw states*:

> A Development Permit is not required for demolition of a building or structure where a Development Permit has been issued for a new development on the same Site, and the demolition of the existing building or structure is implicit in that Development Permit

This implies that a Development Permit is required for demolition in all other situations.

[38] The Board finds that the Appeal should be allowed and the Development Permit should be granted for the following reasons:

a) Based on the evidence provided by the Appellants, which was not challenged by the Development Officer, the existing building is derelict and is not in a suitable condition to be economically repurposed for any of the listed Uses in this DC2 Zone.

b) The Board accepts the Development Officer's classification of the proposed demolition as a Class A development in the application and notes that in the memorandum provided to Mayor and City Council dated April 16, 2018, the Chief Planner for the City states in part that "The owner has provided and met all the Special Information Requirements for documenting historic resources on the Inventory, as per Edmonton Zoning Bylaw 12800" and "Providing all other permit conditions are satisfied, Urban Form and Corporate strategic Development will issue the permit within one week."

c) Given the Board's findings with respect to the completeness of the application and given that the demolition is a development which otherwise complies with the Bylaw, a permit must be issued per section 642(1) of the *Act*.

[39] The Board notes that a Development Permit is merely a prerequisite to legal development. It is not a decision about the Applicant's ultimate legal entitlement to carry out the proposed development. In other words, the issuance of a Development Permit to "demolish the Commercial Building" does not relieve the property owner from complying with any other applicable laws, including but limited to, any requirements or restrictions under the *Historical Resources Act*, RSA 2000, c H-9.

Ms. K. Cherniawsky, 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 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.

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Date: July 5, 2018
Project Number: 279175272-001
File Number: SDAB-D-18-089

Notice of Decision

[1] On June 20, 2018, the Subdivision and Development Appeal Board (the "Board") heard an appeal that was filed on May 26, 2018. The appeal concerned the decision of the Development Authority, issued on May 15, 2018, to refuse the following development:

> **To construct exterior alterations to a Single Detached House (to retain existing vehicular access off 105A Street NW and allow a parking space to be located within the Side Yard abutting the flanking public roadway)**

[2] The subject property is on Plan 2325AY Blk C Lot 11, located at 10542 - 68 Avenue NW, within the RF3 small Scale Infill Development Zone. The Mature Neighbourhood Overlay applies 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 submissions;
- The Appellant's written submissions; and
- Emails from an affected property owner.

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*").

Summary of Hearing

i) Position of the Appellant, Ms. K. Bishop:

[7] Ms. Bishop purchased this property in 2007 with an existing attached garage that was built with the original house in 1953.

[8] In 2009, she applied for a permit to convert the attached garage to an art studio. The development permit was approved without any conditions and there was no mention of the need to remove the existing driveway or suggestion that the driveway may need to be removed in the future.

[9] The driveway is used for loading and unloading supplies and finished art from her studio.

[10] It was her opinion that the scope of the development application and the notice sent to property owners is somewhat misleading because it suggests that something is being constructed.

[11] She acknowledged that the parking space does not meet the minimum required length but referenced a photograph to illustrate that even when her vehicle is parked in the space there is ample room for pedestrians to pass by. Her vehicle is parked in the space for a maximum of 30 minutes twice a month to load and unload artwork and supplies from her studio.

[12] It was her opinion that this is a non-conforming structure that has existed for many years and should be allowed because the structure will not be altered or enlarged.

[13] Photographs of similar driveways that do not lead to garages without access from the back alley were referenced. When she asked the City why these were allowed to remain, she was told that it was because the property owners never applied for building permits so they were never flagged.

[14] It was her opinion that it is highly unfair that she be penalized because she followed the rules and applied for a development permit in 2009.

[15] None of the neighbours object to the existing driveway.

[16] If she had been informed of the concern about the driveway in 2009, different development options for the studio may have been explored.

[17] Ms. Bishop provided the following information in response to questions from the Board:

a) She acknowledged that the minimum required length for a parking space or a loading space cannot be provided.
b) The development permit that was approved in 2009 was not conditioned to require the removal of the driveway.

c) It is convenient to use the space to load and unload finished paintings in frames, boxes of reproductions, greeting cards, mugs and other supplies for her art business. The studio is not open to the public. Her art work is sold on line and to other retail outlets in the city.

d) The art studio is essentially part of the house but could be reverted back to a garage in the future because the framework was covered over not removed.

e) The Site Plan that was approved in 2009 did not include the location of a driveway in the flanking yard or the rear yard. However, photographs of site that include a portion the driveway were submitted with the development permit application in 2009 and were stamped approved.

f) Some of the other similar driveways identified in the submitted photographs do lead to existing garages.

ii) Position of the Development Officer, Mr. K. Yeung:

[18] The Development Authority did not appear at the hearing and the Board relied on Mr. Yeung's written submission.

Decision

[19] The appeal is **DENIED** and the decision of the Development Authority is **CONFIRMED**. The development is **REFUSED**.

Reasons for Decision

[20] This is an appeal of Development Permit Application No. 279175272-001. The scope of the application is to "Construct exterior alterations to a Single Detached House (to retain existing vehicular access off 105A Street NW and allow a parking space to be located within the Side Yard abutting the flanking public roadway)".

[21] The proposed development is comprised of a paved area which has been in existence on the subject corner lot for many years. Originally it led from the flanking roadway to an Attached Garage for the Single Detached House. In 2010, the Appellant was issued a Development Permit to "Convert the attached Garage to a Studio." Once the renovations were completed the paved area remained, but it no longer led to a Garage.

[22] The Board first considered whether the scope of permit was correct.

[23] Parking Areas and Driveways are mutually exclusive developments based on the definitions in the *Edmonton Zoning Bylaw*.

[24] Section 6 defines a Parking Area as: "an area that is used for the parking of vehicles. A Parking Area is comprised of one or more parking spaces, and includes a parking pad, but does not include a Driveway."

[25] Section 6 defines a Driveway as: "an area that provides access for vehicles from a public or private roadway to a Garage or Parking Area and does not include a Walkway."

[26] Based on a review of the photographic evidence, the site plans and the dimensions of the paved area, the Board finds the scope of permit is correct and the proposed development is a Parking Area and not a Driveway as it does not provide access for vehicles to either a Garage or a Parking Area. Given its limited dimensions, the paved area is the Parking Area.

[27] As the proposed development is a Parking Area, it requires variances to three of the development regulations set out in the Reasons for Refusal provided by the Development Authority:

a. Section 814.3(17) which states that regardless of whether a Site has existing vehicular access from a public roadway, other than a Lane, no such access shall be permitted to continue where an abutting lane exists;
b. Section 54.2.4(a)(i) which states that each required off-street parking space shall be a minimum of 2.6 metres wide with a minimum clear length of 5.5 metres exclusive of access drives or aisles, ramps, columns and that Parking spaces shall have a vertical clearance of at least 2.0 metres; and,
c. Section 54.2.2(e)(ii) which states that on a Corner Lot in a Residential Zone, parking spaces, in addition to complying with the other provisions of this Bylaw, shall not be located within the Side Setback abutting the flanking public roadway, other than a Lane.

[28] The Board finds that the requirements of section 54.1.4(a) do not apply because the proposed development is classified as Parking Area, not a Driveway.

[29] The Appellant made several arguments in favour of the issuance of the permit:

a. the Appellant has been unfairly singled out because she acted lawfully and obtained a Development Permit when in 2009 she converted the attached garage to a studio and at that time no one from the City mentioned that parking would be a problem, had she known, she might have done something different with her renovations;
b. many other similar paved areas exist in the neighbourhoood;

c. the paved area has existed for many years without any known complaint, the neighbours do not object to the continued use of the area as a parking and loading space and the problem with the driveway came to the City's attention because of the Urban Renewal planned for this neighbourhood;
d. no construction is involved and it will not be altered or changed in any way; and,
e. the Appellant wishes to use the paved area in a limited manner to load and unload art work and supplies from her art studio twice a month.

[30] It is unfortunate that the paved area was not explicitly addressed in the 2010 Development Permit. Neither a Driveway, nor a Parking Area, are mentioned in the Scope of Permit in the 2010 Development Permit which authorized renovations to replace the attached Garage with an art studio. There are no conditions requiring its removal, nor any variances allowing the Driveway to remain contrary to the development regulations in the 2010 Development Permit. While a small portion of the Driveway appears in one photograph, this photograph was submitted with the Building Permit application and stamped by a Safety Codes Officer and there is no mention of it remaining. More importantly, no Driveway, Parking Area or hard surfaced area is indicated in any way on the stamped approved Site Plan attached to the 2010 Development Permit reviewed by the Development Officer. Based on the totality of the evidence before it, the Board finds that the proposed development was not authorized under the 2010 Development Permit to remain as a Parking Area when the attached Garage was removed.

[31] The Appellant provided several photographs of similar existing paved areas in the neighbourhoood which appear to be non-compliant with the development regulations in the *Bylaw*. The Board did not find these examples persuasive. Many are located in a Front rather than Flanking yard, many appear significantly longer than the proposed development and some, but not all, lead to Parking Spaces or Garages. The Board did not receive any evidence regarding the legality of these developments, their specific dimensions or whether or not variances were granted if a development permit was issued. In any event, the Board is not bound by precedent and must consider this appeal individually based on its own unique merits.

[32] The Appellant has indicated that she will only use the parking space a few times each month to load and unload artworks, materials and supplies. This may be the Appellant's intention; however, development approvals run with the land and per section 687(3)(d) of the *Municipal Government Act*, the Board must consider the overall impacts of approving the proposed development despite non-conformity with the applicable development regulations. If approved as a Parking Area, the paved space could be used without restriction for parking. The Board also notes that the minimum dimensions for on site loading spaces are in fact significantly larger than those for Parking Spaces and variances are often granted to locate required loading spaces on street if on-site space is lacking.

[33] The Board considered that the paved area has been in existence as is for many years without any known complaints and that, once informed of the details, the only neighbour to object changed her opinion to support the proposed development.

[34] Despite this support, the Board finds that the proposed Parking Space will have a negative impact on neighbourhood amenities due to its dimensions and proximity to the City property including the public sidewalk. The proposed Parking Space is only 3.0 metres in length or approximately 2.5 metres under the required minimum for an individual Parking Space. As the proposed Parking Space is only approximately 55% of the required minimum length and there is no Driveway, it cannot properly accommodate a vehicle. The photograph provided by the Appellant herself clearly shows that her parked vehicle will necessarily encroach on the abutting City property, including a small portion of the flanking public sidewalk. The Board noted that Transportation Services also identified this deficiency in the minimum required length of the Parking Space as a technical concern.

[35] Based on this deficiency alone, the Board has not granted the required variances. The Parking Area is too small for the purpose of providing even a single Parking Space and allowing it will materially adversely affect neighbourhood amenities by reducing sight lines along the public sidewalk leading to a potential safety hazard for passing pedestrians.

[36] For the above reasons, it is the opinion of the Board, that the proposed development will unduly interfere with the amenities of the neighbourhood and materially interfere with and affect the use, enjoyment and value of neighbouring parcels of land.

Ms. K. Cherniawsky, 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*, RSA 2000, c M-26. If the Subdivision and Development Appeal Board is served with notice of an application for leave to appeal its decision, such notice shall operate to suspend the Development Permit.

2. When a decision on a Development Permit application has been rendered by the Subdivision and Development Appeal Board, the enforcement of that decision is carried out by 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.

EDMONTON
TRIBUNALS
Subdivision &
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Date: July 5, 2018
Project Number: 267804471-001
File Number: SDAB-D-18-070

Notice of Decision

May 9, 2018 Hearing:

[1] The Subdivision and Development Appeal Board made and passed the following motion:

> "That SDAB-D-18-070 be TABLED to June 20 or 21, 2018 or June 27 or 28, 2018"

Reasons for Decision:

[2] The Appellant appeared before the Board and the Respondent provided written confirmation agreeing to the adjournment of this matter to the above noted dates.

[3] The City took no position with respect to the adjournment but informed the Board that in the Development Authority's view, the appeal is out of time; therefore, the Development Permit remains valid and no enforcement action will be taken prior to the next scheduled hearing.

June 20, 2018 Hearing:

Motion:

> "That SDAB-D-18-070 be raised from the table"

[11] On June 20, 2018, the Subdivision and Development Appeal Board (the "Board") heard an appeal that was filed on April 14, 2018. The appeal concerned the decision of the Development Authority, issued on November 24, 2017, to approve the following development:

To construct a Single Detached House with Basement development (NOT to be used as an additional Dwelling), fireplace, rear uncovered deck (under 0.6 metres in height), Unenclosed Front Porch

[12] The subject property is on Plan I7 Blk 93 Lot 34, located at 9843 - 86 Avenue NW, within the RF2 Low Density Infill Zone. The Mature Neighbourhood Overlay and the Strathcona Area Redevelopment Plan apply to the subject property.

[13] 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 approved Development Permit;
- The Development Officer's written submissions;
- The Appellant's written submissions; and
- Online responses.

Preliminary Matters

[14] At the outset of the appeal hearing, Mr. Handa disclosed that he serves on an Urban Design Committee with the Development Officer, Mr. George Robinson, but does not feel that would prohibit him from providing a fair and unbiased hearing. No one objected to the composition of the panel.

[15] The Presiding Officer outlined how the hearing would be conducted, including the order of appearance of parties.

[16] The Presiding Officer explained that the Board would first address the issue of jurisdiction and whether the appeal was filed outside of the allowable 21 day appeal period, pursuant to the requirements of the *Municipal Government Act*, RSA 2000, c M-26 (the "*Municipal Government Act*" or "*Act*"). The Presiding Officer asked the Appellant to provide evidence and submissions regarding the timing of the appeal.

Summary of Hearing

i) Position of the Appellant, Ms. R. Bell:

[17] Ms. Bell advised that she was not seeking a further postponement and confirmed that her appeal was filed on April 14, 2018.

[18] She is aware of the 21 day appeal period and the findings in the Court of Appeal in *Masellis* v. *Edmonton (SDAB)*, 2011 ABCA 157 (the "*Masellis*" decision). She received notice of this permit on November 29, 2017 via an email from Mr. M. Gunther from the City of Edmonton Law Branch advising her that the previous development permit had been withdrawn and a new Class A development permit had been issued. Therefore, it

was her assumption that the City and the Respondent were going to argue that this appeal was filed outside of the allowable appeal period.

[19] She has three main issues with the development. First, she has concerns regarding the windows on the west side of the proposed house that face her abutting property. Second, the front entrance way that is comprised of windows on either side of the glass front door, the equivalent of a window, and is positioned to face her house. Third, she is concerned about the rooftop deck.

[20] The *Masellis* decision found that the appeal period starts to run as soon as parties receive notice of a Class A permit. It was her opinion that this situation is distinguishable from the *Masellis* decision because of the fact that there was an appeal at the Court of Appeal running on these three issues. Between November 29, 2017 and April 14, 2018, there was a live appeal at the Court of Appeal set to be heard on the issues of visual and acoustic privacy, the rooftop deck and whether or not there was compliance with the Strathcona Area Redevelopment Plan. In this case, she questioned why she would have filed an appeal on the same three issues while she is waiting to be heard on them by the Court of Appeal.

[21] In the *McCauley* Court of Appeal decision, there was confusion around the existence of a permit and whether or not it had lapsed. The City was not clear on its position so the Appellants had to wait until they had clarity on what was happening with the initial permit. This situation is somewhat different because she had clarity that the permit had been cancelled, but the very same issues were set to be heard at the Court of Appeal. The Court's direction on the 21 day filing period is to balance the interests of the developer to know when the permit has been issued and the interests of an interested party to be able to address issues involved with the permit. In this case, the developer knew that the appeal was still running regarding her concerns about the windows on the west side of the house, the location of the glass front door, compliance with the Statutory Plan and the rooftop deck.

[22] Notice of the Class A permit stated that windows and privacy screen shall incorporate frosted glass in accordance with the stamped, approved drawings. The windows shall be positioned and frosted to avoid overlook into neighbouring properties and amenity areas, pursuant to Section 814.3(8) of the *Edmonton Zoning Bylaw*. When she saw windows, plural, she assumed that the Class A permit was issued to comply with the Mature Neighbourhood Overlay and that overlook onto her property would not occur**.** The word "windows" is plural and is important because this led her to believe that all of the windows that she was concerned about would be frosted when in fact only one window is required to be frosted.

[23] When she was advised by Mr. Gunther that the Class A permit was fully compliant, she asked to see the plans and was told that he would try to provide her with a digital copy of them. However, she was advised on March 14, 2018 that she could not receive a copy of the plans. So between November 29, 2017 when she asked to see the plans and March 14, 2018, she had no idea that there was a problem with the Class A permit. As she did

not know there is a problem why would she file another appeal especially because there is an appeal running at the Court of Appeal and the Class A permit notice indicates compliance.

[24] Mr. Gunther told her several times that the Class A permit did not include a rooftop deck. Therefore she assumed that there was no reason to file an appeal.

[25] She was contacted by Mr. Gunther on March 28, 2018 and advised that he had reviewed the plans and that there was one frosted window on the elevation facing her house. She asked Mr. Gunther what happens now because one window does not equal windows and two other windows on that elevation look into her upstairs bedroom and the windows on her main floor.

[26] By March 28, 2018, the second storey with the cutouts for the windows was constructed so she contacted her neighbours to see if they planned to frost those windows. She never received a response from her neighbours, but was told by Mr. Gunther that these windows would not be frosted.

[27] When she returned from Vancouver on April 6, 2018, the third storey had been constructed with two more windows for a loft overlooking her back deck and a rooftop deck was being constructed. She contacted Mr. Gunther to advise him of the situation and was advised that Bylaw Enforcement would investigate what was happening at the site.

[28] On April 13, 2018, Mr. Gunther advised her that a development permit application had been made for the rooftop deck. It was her opinion that it was always the intent to develop a rooftop deck because it would have to be supported structurally during the construction of the house. However, the development permit application was not made until after she could see that the deck was being built.

[29] She spoke with Mr. Gunther about how to proceed and decided on April 20, 2018 to discontinue the appeal at the Court of Appeal after she filed this appeal on April 14, 2018.

[30] It was her opinion that the appeal period started to run on March 28, 2018 when she knew that the proposed windows would create overlook because only one window would be frosted. Therefore, the appeal was filed within the 21 day appeal period.

[31] Adequate notice was not provided until March 28, 2018. It was her opinion that there is a gap in the process because while legislation provides 21 days to appeal notices of development permits it does not address any time line for appealing a decision or order of the Development Authority concerning enforcement. When the issues were raised with Bylaw Enforcement in April, 2018 about frosting the windows they chose not to do anything notwithstanding that the rooftop deck was under construction. The decision was made to allow construction on the house to continue without work continuing on the rooftop deck.

[32] She expressed concern that development of the rooftop deck was done through the back door because this issue was supposed to be addressed at the Court of Appeal. She is trying to resolve the issues without multiple Court actions.

[33] Ms. Bell provided the following information in response to questions from the Board:

a) She clarified that the Court of Appeal decision certified several issues: whether there was a misdirection with section 687(3)(d) of the *Municipal Government Act* when the Board concluded that noise should not be considered and whether the Board complied with the Strathcona Area Redevelopment Plan.

b) This is not a Class A permit because full compliance means compliance with the requirements of the Mature Neighbourhood Overlay regarding the placement of windows.

c) She explained that notice requirements are addressed in the *World Health* Court of Appeal decision. She questioned how an appeal on a Class A permit can be filed within 21 days when it is assumed that it complies with all of the development regulations. She clarified that she was referencing *World Health* merely for the basic principles in that case concerning adequacy of notice.

d) If you don't have discoverability, every time a permit is issued within 21 days the neighbours are being asked to file an appeal before they know the issues.

e) Her decision to withdraw the Court of Appeal action was based on private discussions with Mr. Gunther. She felt it was no longer required because this appeal was filed on April 14, 2018. She questioned why she would continue with the Court of Appeal case that dealt with the same issues.

f) Several discussions were held with the developer in an attempt to resolve the issues without success.

g) This appeal was filed on April 14, 2018 and the discontinuance at the Court of Appeal was filed on April 20, 2018.

h) The neighbours cancelled the previous development permit and applied for a new development permit application in an attempt to deal with the issues.

i) She mentioned the *McCauley* Court of Appeal decision because of the unique circumstances involved in the timing of that appeal. It was her opinion that this appeal also involves some unique facts especially because of the pending appeal at the Court of Appeal.

j) The Class A permit that was issued on November 24, 2017 indicated that windows would be frosted. She had no idea there was a problem until March 28, 2018, when she was advised that only one window would be frosted.

k) She knew on November 27, 2017, that the developer had cancelled the development permit application that was the subject of her appeal at the Court of Appeal. She knew that a redesign had been submitted as a Class A permit that was subsequently issued on November 29, 2017. If she had not had the protection of the pending appeal at the Court of Appeal, she may have filed an appeal on the Class A permit as soon as she received notice of it.

l) The fundamental concern is that citizens rely on the City to comply with all Statutory Plans and Bylaws when issuing a Class A permit.

ii) Position of the Development Officer, Mr. G. Robinson:

[34] Mr. Robinson advised that he did not make the decision regarding this approval and referenced the written submission prepared by Ms. Hetherington.

[35] There have been two development permit applications for a house on this property. Application No. 238988349-001, to construct a Single Detached House with a veranda, Rooftop Terrance with Privacy Screening, fireplace, rear uncovered deck (under 0.6 metres in height), Secondary Suite in the Basement, and to demolish the existing Single Detached House and Accessory Building (rear detached Garage) was issued as a Class B permit on May 3, 2017. This approval was appealed to the Board and subsequently to the Court of Appeal.

[36] In November, 2017, the Applicant requested that this development permit be cancelled.

[37] Application No. 267804471-001, to construct a Single Detached House with Basement development (NOT to be used as an additional Dwelling), fireplace, rear uncovered deck (under 0.6 metres in height), Unenclosed Front Porch, was approved with conditions as a Class A permit on November 24, 2017.

[38] Two new applications, Application No. 267804471-001, to develop a Secondary Suite in the Basement of a Single Detached House and to construct interior alterations (removing interior staircase to basement and Application No. 267804471-013, to construct an exterior alteration (rooftop deck) to an existing Single Detached House are currently on hold pending this appeal process. The original application which was a Class B permit did include a rooftop deck.

[39] The current application that is the subject of this appeal is a Class A permit and does not include a rooftop deck.

[40] Stamped Plan A-102 shows that on the main floor plan there is a window on the west elevation abutting the fireplace which is to be frosted. On the east elevation there is a

notation that the window is also to be frosted. Two windows on the main floor will be frosted. The plans show two windows to be frosted which complies completely with Condition 2.

[41] Mr. Robinson provided the following information in response to questions from the Board:

a) There are two separate development permit applications. The first one was cancelled.

b) The right to appeal as outlined in the *Act* exists only within a certain period of time following a decision being rendered by the Development Officer. The decision to issue the second permit is the action that is under appeal before the Board today.

c) Administration is prohibited from sharing plans on advice of counsel because of FOIP concerns. However, plans are viewable at the Edmonton Service Centre front counter at no cost. People may review the exterior elevations and the site plan, but they cannot share floor plans for privacy reasons. Neighbours are notified whenever a decision for a Class A permit is rendered by the Development Authority. The plans can be viewed in person or the Development Officer can be contacted to answer questions. If the approved plans are not followed that becomes a Bylaw Enforcement matter which is distinct from permit approval decisions.

d) He could not comment on conversations that the Appellant had with the City Solicitor regarding a release of the plans. Section 20.2 of the *Edmonton Zoning Bylaw* outlines the process to be followed for Class A notification. The letter provides a description of the development, its location, zoning overlays and provides contact information for the Applicant and the Development Authority. It does not specifically indicate that the plans are viewable at the City. A Class A notification letter dated November 26, 2017 was sent out to the Appellant.

e) He had no particular view on the cases cited by the Appellant during her submissions other than to note that the Board might have regard for certain pieces of the cases, but there are other pieces of the cases that are not applicable.

f) The rights of the Applicant and community have to be balanced. Elected officials continue to struggle with notification. Class A notification that applied in this case was introduced as a change to the Bylaw to provide neighbours an opportunity to receive notice and encourage discussion.

g) Notice was provided to the Appellant in a timely manner in accordance with the *Edmonton Zoning Bylaw*.

h) The Class A development permit currently under appeal does not include a rooftop terrace or a secondary suite. Application No. 238988349-001, involved the earlier Class B permit and it required four variances, one in site area, three for the step back

requirements and because the Development Officer deemed that the Development Permit included a secondary suite.

iii) Position of the Respondent, Mr. Engelman and Mr. Clark, the property owner:

[42] The original appeal was lengthy and dealt primarily with the variance required for the rooftop terrace step backs. Privacy and window overlook were only briefly discussed.

[43] The decision was made in consultation with the property owners to revise the permit that was under appeal at the Court of Appeal to remove the contentious points and apply for a Class A permit because of the time involved and the delay in the construction of this house.

[44] The property owner's former home was torn down and the new house is being built on the same site. They are living with family members in the meantime. Their intention was to streamline the process so that the house could continue to be built and then the contentious points dealt with at a later time.

[45] Mr. Engelman argued paragraph 42 of the *Masellis* Court of Appeal decision applies and the Appellant is out of time.

[46] Every attempt was made to revise the plans to ensure that this is now a Class A development. It is not viable to allow the appeal period to extend to whenever someone feels that a permit does not conform to a Class A development.

[47] Negotiations with the Appellant have occurred and will continue in an attempt to resolve the issues. There are currently two development permits on hold that need to be reviewed and a decision rendered. This process is delaying construction and can be construed as means to gain leverage.

[48] It was acknowledged that the appeal process may be imperfect, but also noted that it is a process that is binding and needs to be respected.

[49] Mr. Engleman acknowledged the Appellant's concerns, but noted that some of the windows that she is concerned about are transom windows that are 7 feet above floor level and cannot possibly have any impact on overlook or privacy. They are meant to bring light into the home and the owners do not want to needlessly reduce that light with frosting.

[50] He encouraged the Appellant to continue the Court of Appeal action if she was concerned about the way the Development Authority and the Board applied the requirements of the Mature Neighbourhood Overlay and other parts of the Act. However, he felt that the timing of this appeal is not dependent on the Court of Appeal action and that the Appellant failed to make a connection between that issue and the Class A development permit.

[51] Development permit applications were made on April 12, 2018 for the basement suite and the rooftop deck and the Appellant filed the appeal on April 14, 2018. It was his opinion that Ms. Bell became aware of those development permit applications and assumed that they had been processed and therefore she was getting into that 21 day period to preserve her limitation. On April 20, 2018, the Court of Appeal process was abandoned.

[52] Ms. Bell has made it clear that she understands the 21 day appeal period. She acknowledged receiving notice of the Class A permit in November, 2017.

[53] Mr. Engelman and Mr. Clark provided the following information in response to questions from the Board:

i) Mr. Engelman believes that the Secondary Suite will be approved as a Class B permit that could be appealed. Revisions have been made to the plan for the rooftop deck and that development should be approved as a Class A permit.
ii) The rooftop deck was the primary concern addressed at the first hearing. Mr. Clark explained that separate development permit applications were made for the rooftop deck and the secondary suite in order to allow construction to continue without removing the right of a citizen to file an appeal on those portions of the development.
iii) The decision was made to remove them from this development permit application to prevent further delays in the construction of the house. The objectionable components were isolated to be decided separately rather than holding up the entire development.
iv) The Appellant received notice from the developer and Legal Counsel for the City regarding the issuance of the Class A permit and it is clear that the appeal was filed outside of the 21 day appeal period.
v) The rooftop deck and related noise concerns were the primary concerns addressed at the initial appeal hearing. Privacy concerns relative to the rooftop deck were addressed at the initial hearing but not the location of windows and overlook concerns.

iv) Rebuttal of the Appellant

[54] Leave was granted on the issues surrounding the Strathcona Area Redevelopment Plan and privacy, both acoustical and visual.

[55] She never received notice of the issuance of the Class A permit that the Development Officer indicated had been sent to her.

[56] If she had known that she could make arrangements to view the plans why would she have spent so much time corresponding with Mr. Gunther. She was corresponding with him because of the Court of Appeal action but he never advised her that she could contact the Development Officer to view the plans.

[57] She became aware of the privacy issues on March 28, 2018 through conversations with Mr. Gunther.

[58] The fact that two development permit applications are currently on hold is a separate issue that has nothing to do with her.

[59] A Stop Order has not been issued and construction is continuing.

[60] The appeal was filed on April 14, 2018, because she was aware that the 21 day appeal period that started on March 28, 2018 was about to expire.

[61] Attempts have been made to address her concerns regarding the location and frosting of windows with the property owners without success. She did not think that it was necessary to file another appeal when she believed that the overlook issues pursuant to the Strathcona Area Redevelopment Plan would be determined by the Court of Appeal. These issues were discussed during her earlier appeal.

Decision

[62] The Board does not assume jurisdiction.

Reasons for Decision

[63] Ms. Bell (the Appellant) resides next door to the subject Site which is located in the RF2 Low Density Infill Zone and subject to the Mature Neighbourhood Overlay and the Strathcona Area Redevelopment Plan.

[64] In January 2017, Mr. Engleman (the Developer) was hired by the property owners to construct a new home on the subject Site. He applied for a Development Permit to replace the existing house.

[65] On May 3, 2017 Development Permit DP238988349-001 (the May Permit) was approved with notices as a Class B development for a Permitted Use, a Single Detached House with a Secondary Suite and a Roof Top Terrace with variances. The Appellant appealed the May Permit.

[66] On June 29, 2017 the Board approved the May Permit with three variances (SDAB-D-17-105):

> 1) Section 86(1) is varied to permit a Site Area of 353 square metres instead of 360 square metres.
> 2) Section 61(1)(a)(ii) is varied to permit the Stepback of the Rooftop Terrace from the rear of the house facing the alley to be 0.91 metres instead of 2.0 metres.

> 3) Section 61(1)(a)(iv) is varied to permit the Stepback of the Rooftop Terrace from the interior side façade facing 9847 – 86 Avenue NW to be 0.18 metres instead of 2.0 metres.

[67] The Appellant applied for permission to appeal that decision to the Court of Appeal.

[68] October 30, 2017 Madam Justice Crighton of the Court of Appeal, 2017 ABCA 354, allowed the application for permission to appeal and certified three questions for appeal:

> Accordingly, I grant the applicant permission to appeal on the following questions:
>
> > 1. Did the SDAB misdirect itself with respect to s 687(3)(d) when it concluded that noise and its impact on the amenities of the neighbourhood and the use, enjoyment or value of neighbouring parcels was beyond the purview of the Board;
> >
> > 2. Did the SDAB fail to comply with the Strathcona Area Redevelopment Plan contrary to s 687(3)(a.1) MGA including the duty to consult with abutting property owners.
> >
> > 3. Did the SDAB, by permitting the development officer to provide reasons at the appeal, fail to consider an issue or issues that were properly before it relative to the interpretation of s 687(3)(a.1).

[69] In November 2017, the Developer requested cancellation of the May Permit which was the subject of the judicial appeal.

[70] On November 22, 2017, the Developer applied for a new Development Permit "to construct a Single Detached House with Basement development (NOT to be used an as an additional Dwelling), fireplace, rear uncovered deck (under 0.6 metres in height), Unenclosed Front Porch."

[71] On November 24, 2017, the Development Officer issued Development Permit 267804471-001 to construct a Single Detached House as a Class A Permit (the November Permit). Neither the scope of the November Permit, nor the stamped approved plans for the November Permit include a Rooftop Terrace or a Secondary Suite.

[72] According to the Development Officer, city records indicate notice was provided to the Appellant by letter dated November 26, 2017 as required in the *Bylaw*. (Report of Development Officer, p1)

[73] The Appellant denies receiving this notice, but indicated that her former lawyer, Mr. Wakefield, was sent an email by the Developer indicating:

i) his company had cancelled the May Permit which was the subject of her appeal to the Court of Appeal;
ii) they had completed a project redesign and resubmitted for a Class A permit which does not require any variances to the MNO or the RF2 zoning; and,
iii) no roof deck had been applied for in the reapplication (Appellant's submission, p18).

[74] During oral submissions, the Appellant stated that at this time she was aware that the May Permit was cancelled and that a new Development Permit (the November Permit) had been issued. She received an email dated November 29, 2017 from Mr. Gunther, counsel for the City, confirming its issuance and stating "Given that the permit was fully compliant with all zoning Bylaw regulations (thus Class A), there was no basis for the application to be refused" and "according to the approved permit the rooftop deck has been completely removed." A copy of the approved November Permit was included in the email (Appellant's Submission A, p10). A copy of this email was provided to the Board by Mr. Gunther who did not appear in person.

[75] From this point forward, the Appellant dealt with the matter personally and continued to communicate directly with the Developer and with Mr. Gunther seeking confirmation that there would be no Rooftop Terrace added to the house and no variances to the MNO (Appellants Submission A, p. 10).

[76] She had several communications with Mr. Gunther about the pending judicial appeal of the May Permit and asking to view the approved plans for the November Permit. Mr. Gunter initially indicated he would try to provide them, but ultimately explained in December that due to privacy considerations he could not provide her with a copy (Appellants Submission A, p. 10). By email dated March 14, 2018, Mr. Gunther advised the Appellant that the owners would have to consent to disclose the plans.

[77] During the hearing, the Development Officer stated that the Appellant could have accessed these plans if she had attended the City offices in person, but that to his knowledge this option was not communicated with the Appellant. He was not privy to discussions between the Appellant and Mr. Gunther.

[78] On March 21, 2018, the Appellant asked about frosting on the windows and ultimately on March 28, 2018, Mr. Gunther sent an email to the Appellant which indicated he had seen the plans and confirming that a window facing the Appellant's property was to be frosted.

[79] On April 22, 2018, the City received two additional Development Permit applications from the Developer for the subject Site:

i) Application 267804471-011 to develop a Secondary Suite in the Basement of the existing Single Detached House.
ii) Application 267804471-013 to construct an exterior alteration (rooftop deck) to an existing Single Detached house.

[80] The Development Officer indicated that the permit for a Secondary Suite will require two variances and the Rooftop Terrace application is a Class A Development which will not require any variances. Rooftop Terraces are permitted in this zone. Both applications are currently on hold and no decision has been made with respect to them.

[81] On April 14, 2018, the Appellant filed this appeal of the November Permit with the Board. The November Permit is the only matter currently under appeal before the Board.

[82] On April 20, 2018 further to negotiations between herself and Mr. Gunther, the Appellant filed a discontinuance of her pending appeal of the cancelled May Development Permit.

[83] The Board first considered whether the appeal was filed on time in accordance with section 686(1) of the *Act* which provides in part that a development appeal to a subdivision and development appeal board is commenced by filing a notice of the appeal, containing reasons, with the board,:

> (b) in the case of an a appeal made by a person referred to in section 685(2), within 21 days after the date on which the **notice of the issuance of the permit** was given in accordance with the land use bylaw. [Emphasis added]

[84] At the initial hearing, the Development Officer took the position that the appeal was out of time and the November Permit remained valid. Therefore, he indicated that no enforcement action would be taken prior to the next scheduled hearing. At the subsequent hearing, the Development Officer took no further stance on late filing, but confirmed the City's position that:

i) the approved development is Class A Development which conforms to the applicable development regulations;
ii) Condition 2 on the November Development Permit has been met as the approved plans show two windows which must be frosted as part of compliance with the requirements in section 817.3(8) of the Mature Neighbourhood Overlay;
iii) the stamped approved plans do not include a rooftop deck or a Rooftop Terrace, but Rooftop Terraces are permitted in any event; and,
iv) the Appellant was notified of the issuance of the November Development Permit in accordance with the *Bylaw* in November, 2017.

[85] The Developer and the property owners argued that this appeal was commenced well beyond the 21 day period which they believe started on issuance of the November Permit for the following reasons:

i) The Appellant was well aware of the issued November Permit in November, 2017 and her actions demonstrate that she understands the need to file an appeal to preserve her rights.
ii) They cancelled the May Permit and submitted revised the plans without the contentious issues (the Rooftop Terrace and the Secondary Suite) to enable the

balance of the construction to proceed as a Class A Development pursuant to the November Permit. Now they wish to deal with these two aspects of the development and so have asked for them as separate developments. All steps were lawful and were not meant as a deception. The two new pending permit applications will be subject to appeal.

iii) The *Masellis* decision confirms that they should be entitled to rely on the issued November Permit and have the certainty 21 days after its issuance to proceed with lawful construction in accordance with the approved plans.

[86] The Appellant advanced several arguments to support her position that this appeal has been filed within the statutory 21 day limit.

[87] First, the Appellant argued that notice must be sufficient to be effective per the Court of Appeal decision in the *World Health Edmonton Inc.* v *Edmonton (City)*, 2015 ABCA 377 ("*World Health*"). The Board agrees with this general principle. However, the situation in that case was significantly different – that appellant was not sent an actual notice of the issuance of the Development Permit and did not see the published notice, but appealed within one week of becoming aware of that the City had issued a permit. Further, the published notice did not adequately describe the nature of the approved development, its location or its municipal address. An earlier fire also complicated the notice issue.

[88] There is no comparable error or confusion here. The Appellant received a copy of the issued Development Permit for a Single Detached House to be constructed on the lot abutting her own. The Board also notes that even in *World Health*, the Court of Appeal focuses on notice of the issuance of a permit as a pivotal event.

[89] The Appellant argued that as the November Permit was for a Class A Development and as she was not allowed to see the plans, the appeal period did not start to run until March 29, 2018 when she was first told that only one window facing her property would be frosted. This was the date that she first received information suggesting it was not a Class A Development as there was a breach of Condition 2 and that there would be a variance due to overlook of her property contrary to section 814.3 of the Mature Neighbourhood Overlay.

[90] The Board disagrees. Based on the plain wording of section 686(1)(b), notice of the issuance of the Development Permit is the event which must be communicated and which triggers appeal rights specified for Class A Developments in section 685(3) of the *Act*. No provision in the *Bylaw* or the *Act* was cited to the Board requiring that notice to affected parties include copies of site plans, elevations or other drawings for a Class A Development.

[91] The Board acknowledges the Appellant's understandable frustration with the City officials and her repeated unsuccessful attempts to gain information (which according to the Development Officer could have been made available to her). However, any misinformation on the part of the City is a separate matter between the Appellant and the City. The Board finds that the information provided by Mr. Gunther in April 2018, does

not extend the appeal period of the November Permit which had been issued several months earlier.

[92] This issue was dealt with squarely by Mr. Justice Watson of the Court of Appeal in the leave to appeal decision *Masellis.* He applied the Court's earlier ruling in *Coventry Homes* (which considered appeal periods when no notice is required by bylaw) to conclude that the window of opportunity to challenge a Development Permit starts to run when the affected party has constructive or actual knowledge of the issuance of the Development Permit.

[93] Mr. Justice Watson rejected the notion that the start of the appeal period could be delayed until the affected party received notice of an error regarding the classification of a development due to a failure on the part of city officials in identifying the need for a variance (at para 42):

> With great respect to the applicants' very experienced and dutiful counsel, this proposal is not arguable as a substitute for Coventry Homes. Forcing builders and developers to abide risk arising from an unforced error by a municipality in issuing a permit would seriously undermine the ability of builders and developers to rely on the authority of a permit. Accepting this as law would unquestionably inject the type of uncertainty in the development process that this Court in Coventry Homes expressly rejected at para 32"

He makes the same point again at para 47:

> Finally, as noted earlier, the applicants assert that they were stonewalled and misled by the City in connection with the permit. This does not raise an arguable basis to distinguish *Coventry Homes* either. The applicants were not misled in relation to a reason not to proceed under s.685(3) of the *MGA*. There were not told there was no permit. Moreover, Mr. and Mrs. Masellis believed that they had not been getting enough information from the City so, as the SDAB found, it fell to them to translate their belief of a "misinterpretation" into an appeal.

[94] Here, as in *Masellis*, the Appellant did not lack the ability to complain or appeal the November Permit, she lacked evidence of default.

[95] If the Board is incorrect and a misrepresentation or subsequent revelation of noncompliance with applicable development regulations of an overlay or the underlying zone could delay the start of the 21 day appeal period, the Board finds that no misrepresentation in fact occurred in this case for the following reasons:

i) Unlike *Masellis* where an error was admitted and proven, the Development Officer has maintained throughout that this is a Class A Development - there is no admission of factual error concerning compliance with any applicable regulation.

ii) The stamped approved plans show two windows are to be frosted windows in accordance with Condition 2 of the November Permit and in furtherance of section 814.3(8). Section 814.3(8) requires the Development Officer to ensure that overlook is reduced (not eliminated) through a number of mechanisms. It does not require frosting of all or even any particular windows. Overlook can also be reduced by transom windows, a technique also evident in the stamped approved plans.

[96] The Appellant also argued that this appeal was commenced in time as although she was repeatedly told there was no Rooftop Terrace in the plans, based on her observations, it was revealed in April, 2018 that the Developer was building a Rooftop Terrace contrary to the November Permit.

[97] The Board finds this argument without merit for the following reasons:

i) The Development Officer did not approve a Rooftoop Terrace for this Single Detached House. It is not included the Scope of Permit for the November Permit, nor does it appear in the stamped approved plans.
ii) All parties agree that there is a separate outstanding application for a Development Permit for a Rooftop Terrace. Any future decision made about that pending development permit will trigger the appeal rights of the applicant, the owners, the Appellant and any other affected parties.
iii) Permit issuance and permit enforcement are distinct issues. Development Permits are issued as a prerequisite to legal development per section 683 of the *Act*. The issuance of the November Permit authorized the Developer to construct a Single Detached House in accordance with the scope of permit and stamped approved plans. Any subsequent failure to build in accordance with those approved plans will be addressed by the City through its discretionary powers under the *Act* to issue Stop Orders.
iv) Allowing a failure to build in accordance with an approved Development Permit to extend the time limit to appeal that permit would seriously undermine the ability of builders and developer to rely on the authority of a permit. This would create precisely the uncertainty and havoc the Court of Appeal warned against.

[98] Finally, the Appellant argues that the 21 day time limit did not start to run on November 29, 2017 as her three issues of concern (the entryway, the Rooftop Terrace and the windows facing her home) remained to be dealt with in the pending Court of Appeal proceeding involving the cancelled May Permit until she discontinued that appeal in April, 2018 after filing the Appeal of the November Permit. She contends that that her pending judicial appeal distinguishes this case from the *Masellis* decision.

[99] The Board finds that a pending appeal of a development permit which is subsequently cancelled does not extend or delay the start of the statutory time limit to appeal a separate Development Permit for the following reasons:

i) This proposition is contrary to the plain wording of section 686(1)(b) which requires the appeal to be made “within 21 days after the date on which the notice of the issuance of the permit was given in accordance with the land use bylaw.” The

purpose of this section is to further the planning objectives of certainty and timeliness. Notice of the issuance of a permit is a distinct provable triggering event which balances the competing interest of the developer to proceed with certainty once a development has been approved and the interest of an affected party to challenge an approved development within a limited time period after becoming aware of the development.

ii) The Appellant did not provide any authority for this proposition and the Board finds no reason to distinguish those cases on the basis of pending litigation of a cancelled permit.

iii) The Board finds this proposition contrary to the rationale Court of Appeal rulings in *Coventry Homes* and *Masellis.* Extending appeal deadlines due to preexisting litigation of cancelled permits would be particularly problematic. It could create significant construction delays of approved Class A Developments for an uncertain periods of time at the option of one affected party who objects to a development which is no longer being pursued.

iv) This result also runs contrary to the intent of section 642(1) which requires development authorities to issue permits for Class A Developments.

[100] In any event, the Board finds that the legal issues raised by the May Permit and the November Permit are not the same:

i) The May Permit was issued by the Board as a Permitted Use after consideration of the impact of three specific variances: two relaxations to the required Stepback for a Rooftop Terrace and one relaxation for the minimum Site Area necessitated by the inclusion of a Secondary Suite.

ii) The November Permit was issued as a Class A Development for a Permitted Use which does not include a Rooftop Terrace or a Secondary Suite. None of the three variances granted in the May Permit are required for the November Permit.

iii) Further while privacy generally is at issue in both cases, the Board notes that per para 9 of the SDAB decision SDAB-D-17-105, Ms. Bell explained that she understood the development required a number of variances, but she intended to speak only to the variances related to the Rooftop Terrace. She submitted that the proposed development will negatively impact the peaceful use and enjoyment of her property. A review of the Board's decision reveals that Ms. Bell provided further submissions about privacy and noise due to the reduction of the required Stepback of the Rooftop Terrace and the impact of the requested variances on resultant size, potential uses and impact of the Roof top Terrace area. Neither windows, nor the entryway were further noted as issues of concern. This is understandable as the task before the Board in that appeal was to determine if the three requested variances met the Board's usual test in section 687(3)(d) of the *Act*.

[101] In sum, for the reasons above, the Board has found that:

i) The only Development Permit under appeal in this hearing was the one issued November 24, 2017 (the November Permit).

ii) The Development Officer sent out notice of the issuance of the November Permit to the Appellant as required by the *Bylaw*, but it was not received by the Appellant.

iii) The Appellant had actual knowledge of the issuance of the November Permit and received a copy of the issued November Permit on November 29, 2017. This is sufficient notice of the issuance of the permit to start the 21 day appeal period in section 686(1)(b) of the *Act*.

iv) This appeal of the November Permit was filed more than four months later on, April 14, 2018.

[102] Accordingly the Board concludes that it has no jurisdiction to hear this appeal as it was not filed within the statutory limit and the Board neither confirms varies or vacates Development Permit 267804471-001 to construct a Single Detached House as a Class A Permit (the November Permit).

Ms. K. Cherniawsky, 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 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.