

Edmonton Subdivision and Development Appeal Board

Churchill Building
10019 - 103 Avenue NW
Edmonton, AB T5J 0G9
Phone: 780-496-6079 Fax: 780-577-3537
Email: sdab@edmonton.ca
Web: www.edmontonsdab.ca

Date: July 10, 2015
Project Number: 146826062-002
File Number: SDAB-D-15-127

Notice of Decision

This appeal dated May 20, 2015, from the decision of the Development Authority for permission to:

Construct an Accessory Building (gazebo, hexagonal shape, sides 2.05m in length), and to install a hot tub (2.35m x 2.35m), existing without permits

on Plan 0524449 Blk 89 Lot 11, located at 8334 - Shaske Crescent NW, was heard by the Subdivision and Development Appeal Board at its hearing held on June 18, 2015. The decision of the Board was as follows:

June 3, 2015, Hearing

“that the appeal hearing be scheduled for June 25, 2015, at the written request of the Appellant.”

June 25, 2015, Hearing

“that SDAB-D-15-127 be raised from the table.”

Summary of Hearing:

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.

The appeal was filed on time, in accordance with Section 686 of the *Municipal Government Act*, R.S.A 2000, c. M-26.

The Board heard an appeal of the decision of the Development Authority to refuse an application to construct an Accessory Building (gazebo, hexagonal shape, sides 2.05m in length), and to install a hot tub (2.35m x 2.35m), existing without permits, located at 8334 - Shaske Crescent NW. The subject Site is zoned RSL Residential Small Lot Zone.

The proposed development was refused because of a deficiency in the minimum required Side Setback.

Prior to the hearing the following information was provided to the Board:

- A written submission received from Sustainable Development on June 19, 2015.

The Board heard from Mr. Hinz, representing the Appellant, Skovberg Hinz Barristers and Solicitors, who made the following points:

1. He represents the previous owner of the subject property.
2. The gazebo and the hot tub have existed for several years.
3. The gazebo was built by the previous owner with help from the previous owner of the abutting property to the east.
4. The Development Authority had two reasons for refusing the Development Permit application: non-compliance with the Side Setback and material or undue interference with the neighbouring property.
5. He noted that the Development Authority found there was no hardship preventing the gazebo from being placed in compliance with the Side Setback regulation and he conceded there is adequate space on the subject Site.
6. However, the current owner of the abutting property to the east (the “east abutting neighbour”) knew the gazebo and hot tub existed when they purchased the property. In his view, if the gazebo posed a difficulty with use and enjoyment, she would not have purchased the property.
7. A sale of the subject property prompted the application for a Development Permit application and this appeal. There were no complaints about the gazebo and hot tub. The east abutting neighbour was only responding to the notice letter she received.
8. Moving the existing gazebo 0.78 metres to the west will not eliminate any noise concerns.
9. Prior to applying for a Development Permit he spoke to the east abutting neighbour who indicated that she was concerned about the possibility of property damage if the hot tub leaked. He was advised by a previous property owner that this possibility has been addressed by a trench along the fence line between the two properties to direct water onto the street.
10. Given that the gazebo and hot tub have been in place for several years and predate her purchase, the east abutting neighbour could not argue the gazebo would decrease her property value.
11. The existing gazebo does not impact sight lines and may even create a screen to block the view of other neighbouring properties.

In response to questions by the Board, Mr. Hinz provided the following information:

1. He estimated that the deck connecting the house to the gazebo is approximately 2 feet high; however, he could not confirm the accuracy of his estimate.
2. Although the hot tub can be moved, the gazebo cannot be moved as it is situated on concrete pilings and secured to the ground. Because it is secured to concrete pilings, there is no risk of the gazebo falling onto the fence.

3. While he knew that the most eastern corner of the hexagon shaped gazebo was located 0.12 metres from the property line, he could not confirm the distance between the fence and the next nearest two corners on the eastern side of the gazebo.
4. When asked to comment on the Development Authority's recommendation of a variance for projection of eaves should the gazebo be approved, he stated that no issues have been raised with regard to the eaves of the gazebo encroaching over the east abutting property.
5. Based on the aerial photograph on Page 6 of the Development Authority's submission, there did not appear to be a break in the fence line therefore he inferred that there was no encroachment of the gazebo into the east abutting neighbour's yard and there will be no shadowing impact on the neighbouring property.
6. He agreed that the fence is approximately 6 feet high and the gazebo is two to three feet higher than the fence. However, the hot tub is below the fence line; therefore, the neighbour cannot see the hot tub.
7. The noise level would be similar if the hot tub was situated on the deck.

The Board then heard from Mr. Zhao, the property owner, who made the following point:

1. His family would like to keep the existing gazebo and hot tub at their current locations.

The Board then heard from Ms. Ziober, representing Sustainable Development, who made the following points:

1. She reviewed her written submission and provided the Board with the background of the subject Site.
2. The east abutting neighbour was unsure how to file a complaint and did not want to create issues with her neighbour.
3. The east abutting neighbour advised the Development Authority of her concern that the hot tub would leak and damage her property. However, there is nothing in the *Edmonton Zoning Bylaw* to address that concern.
4. Her refusal was justified as there was no hardship to locating the gazebo and hot tub in compliance with the Side Setback, and the existing location right up against the fence interferes with the enjoyment of the abutting property to the east.

In response to questions by the Board, Ms. Ziober provided the following information:

1. Setbacks are required to provide comfort and separation from activities between neighbours. Use of the hot tub as an amenity is more intensive than use of a shed.
2. She clarified that there is an error in her submission and the property is not located in the Rosedale Area Redevelopment Plan and the Mature Neighbourhood Overlay. However, the decision was not based on either of those documents.
3. In her opinion, the gazebo would be less intrusive if it was relocated to the required Side Setback. Further, Setbacks are important for maintenance purposes.

4. She agreed the aerial photo in her submission shows that there are many nearby sheds and structures located in very close proximity to fences including the shed and gazebo in the south east corner of the subject Site and the play set in the south west corner of the abutting Site to the east.
5. The existing shed on the subject Site is also located next to the fence but does not require a Development Permit.
6. In her opinion, there will be a hardship to the property owners if the gazebo has to be moved since it is supported by pillars. However, this hardship would not have arisen if they had applied for a Development Permit and been advised of the required Setback before constructing the gazebo.
7. The play set on the abutting property does not require a permit as it is not considered an Accessory Building.
8. With regard to the location of the gazebo, she reiterated the importance of the required Setback and indicated, due to her previous experience as a Safety Codes Officer, she is aware that there are applicable fire regulations. However, fire safety concerns are dealt with in other regulations and the refusal was not based on those grounds.
9. The existing gazebo is under the maximum allowable Height.
10. No complaints were filed and properties are only inspected if a complaint is filed. Accordingly the development was reviewed only based on submitted documents. She could not confirm whether or not there were eaves on the gazebo.

In rebuttal, Mr. Hinz made the following points:

1. The east abutting neighbour did not have a concern with respect to eave projections.
2. It could be inferred that water run-off is not an issue given that the play set is located in the southwest rear corner of the abutting property against the fence.
3. No complaint was received from the east abutting neighbour regarding the maintenance of leaves and grass on the property or the visual impact of the gazebo.
4. The main concern is the location of the gazebo and hot tub. Moving them will not eliminate the noise levels.
5. In his opinion, there will be a hardship to the current property owners if they have to relocate the hot tub due to the structure being on concrete pilings.
6. He could not confirm if there was a privacy screen on gazebo; however, he is agreeable to the installation of screening on its east side.

Decision:

The appeal is ALLOWED and the decision of the Development Authority is REVOKED. The development is GRANTED as applied for to the Development Authority, subject to the following CONDITION:

1. The Appellant shall install privacy screening on the two most easterly sides of the gazebo from the fence line up to the roof of the gazebo.

In granting the development the following variances to the *Zoning Bylaw* are allowed:

Pursuant to Section 50.3(4)(b), a relaxation of 0.78 metres is granted to the minimum required distance of 0.90 metres from the Side Lot Line to the Accessory Building (gazebo).

Reasons for Decision:

The Board finds the following:

1. The proposed development is Accessory to a Permitted Use in the RSL Residential Small Lot Zone.
2. The gazebo and hot tub have existed at their current locations for several years with no known complaints.
3. The gazebo and hot tub were in their current locations when the subject property was sold to the current owners and also when the abutting property to the east was sold to its current owner.
4. Based on the Real Property Report submitted as part of the Development Permit Application, the gazebo is a regular hexagon shape. No single side of the gazebo is parallel to the (east) Side Lot Line. The gazebo comes to a point as it nears the (east) Side Lot Line. At this closest point, the gazebo is 0.12 metres from the (east) Side Lot Line.
5. The Real Property Report indicates each side of the hexagon is 2.05 metres in length. Therefore, the northeastern and southeastern corners of the gazebo on the sides which recede back from the closest point are each 1.145 metres from the (east) Side Lot Line. This configuration creates two triangular areas between the gazebo and the (east) Side Lot Line.
6. The Board finds this configuration ameliorates the lack of separation and leaves an adequate amount of space between the gazebo and the fence for routine maintenance.
7. The gazebo is within the maximum allowable Height for an Accessory Building.
8. The gazebo extends above the fence line and the Appellant is agreeable to a condition imposed by the Board to install privacy screening to ameliorate any privacy concerns.
9. The Board finds that the relocation of the gazebo by 0.78 metres to the west to meet the required setback will not materially change the impact of the gazebo and hot tub on neighbouring properties.
10. Based on the above, it is the opinion of the Board, that the proposed development with the requested variance 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.

Important Information for Applicant/Appellant

1. This is not a Building Permit. A Building Permit must be obtained separately from the Sustainable Development Department, located on the 5th Floor, 10250 – 101 Street, Edmonton.

2. Obtaining a Development Permit does not relieve you from complying with:
 - a) the requirements of the *Edmonton Zoning Bylaw*, insofar as those requirements have not been relaxed or varied by a decision of the Subdivision and Development Appeal Board,
 - b) the requirements of the *Alberta Safety Codes Act*,
 - c) the *Alberta Regulation 204/207 – Safety Codes Act – Permit Regulation*,
 - d) the requirements of any other appropriate federal, provincial or municipal legislation,
 - e) the conditions of any caveat, covenant, easement or other instrument affecting a building or land.
3. When an application for a Development Permit has been approved by the Subdivision and Development Appeal Board, it shall not be valid unless and until any conditions of approval, save those of a continuing nature, have been fulfilled.
4. A Development Permit will expire in accordance to the provisions of Section 22 of the *Edmonton Zoning Bylaw, Bylaw 12800*, as amended.
5. This decision may be appealed to the Alberta Court of Appeal on a question of law or jurisdiction under Section 688 of the *Municipal Government Act*, R.S.A. 2000, c. M-26. If the Subdivision and Development Appeal Board is served with notice of an application for leave to appeal its decision, such notice shall operate to suspend the Development Permit.
6. When a decision on a Development Permit application has been rendered by the Subdivision and Development Appeal Board, the enforcement of that decision is carried out by the Sustainable Development Department, located on the 5th Floor, 10250 – 101 Street, Edmonton.

NOTE: The City of Edmonton does not conduct independent environmental checks of land within the City. If you are concerned about the stability of this property for any purpose, you should conduct your own tests and reviews. The City of Edmonton, when issuing a development permit, makes no representations and offers no warranties as to the suitability of the property for any purpose or as to the presence or absence of any environmental contaminants on the property.

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

CC:

Edmonton Subdivision and Development Appeal Board

Churchill Building
10019 - 103 Avenue NW
Edmonton, AB T5J 0G9
Phone: 780-496-6079 Fax: 780-577-3537
Email: sdab@edmonton.ca
Web: www.edmontonsdab.ca

Date: July 10, 2015
Project Number: 170516099-001
File Number: SDAB-D-15-135

Notice of Decision

This appeal dated May 28, 2015, from the decision of the Development Authority for permission to:

Operate a Major Home Based Business (Painting Contractor)

on Plan 1367HW Blk 16 Lot 23, located at 11614 - 76 Avenue NW, was heard by the Subdivision and Development Appeal Board at its hearing held on June 25, 2015. The decision of the Board was as follows:

Summary of Hearing:

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.

The Presiding Officer first addressed the issue of jurisdiction and whether the appeal was filed within the allowable 14-day appeal period, pursuant to section 686 of the *Municipal Government Act*, R.S.A. 2000, c. M-26 (the “MGA”).

The Board heard from Mr. Sikstrom, the Appellant, who provided the following information with regard to the timing of filing the appeal:

1. He has been in contact with the Development Authority who advised him that he had two weeks to file an appeal upon receipt of refused permit.
2. The Canada Post Register Mail Delivery Confirmation dated May 19, 2015 indicates that the refused permit was delivered on May 15, 2015.

The Board then heard from Mr. Robinson, representing Sustainable Development, who made the following points with regard to the date of the appeal being filed.

1. He did not have an objection to the Board proceeding with the appeal hearing.
2. He confirmed that Mr. Sikstrom was advised that he would have two weeks to file an appeal upon receipt of the refused permit.
3. He was unable to provide the date or specifics of the initial phone call advising Mr. Sikstrom that his development permit has been refused.

Motion:

That the Board assumes jurisdiction pursuant to Section 686(1)(a)(i) of the *Municipal Government Act*.

Reasons for Decision:

The Board finds the following:

1. Based on the evidence submitted by the Appellant, the Development Authority, and the Canada Post confirmation that was signed by the Appellant, the development permit refusal was received on May 15, 2015.
2. There was some verbal discussion between the Appellant and the Development Authority, but they could not provide exact dates or the content of that discussion.
3. Based on the evidence provided, the Board determined the Appellant was notified of the refusal of the development permit on May 15, 2015, and filed the appeal on May 28, 2015. Therefore, pursuant to section 686(1)(a)(i) of the *MGA*, the appeal was filed within the allowable 14 days.

Summary of Hearing Continued:

The Board heard an appeal of the decision of the Development Authority to refuse an application to operate a Major Home Based Business (Painting Contractor) located at 11614 – 76 Avenue NW. The subject site is zoned RF1 Single Detached Residential Zone and is within the Mature Neighbourhood Overlay and the McKernan/Belgravia Station Area Redevelopment Plan.

The Development Permit Application was refused because outdoor business activity or outdoor storage of material or equipment associated with the business is not permitted and because a Major Home Based Business shall not be allowed within the same Principal Dwelling containing a Secondary Suite.

Prior to the hearing the following information was provided to the Board, copies of which are on file:

- Documentation submitted with the Appeal on May 28, 2015;
- An email and a Canada Post confirmation submitted by the Development Authority on May 5, 2015;
- Four on-line responses from neighbouring property owners in opposition to the proposed development;
- One letter from a neighbouring property owner in opposition to the proposed development on June 22, 2015;
- One letter from a neighbouring property owner in opposition to the proposed development on June 23, 2015; and
- One letter from the Belgravia Community League in opposition to the proposed development on June 23, 2015.

The Board heard from Mr. Sikstrom, the Appellant, who made the following points:

1. He previously had a permit for a Minor Home Based Business and when he applied for a Major Home Based Business, he discovered there was a conflict with a Major Home Based Business and a Secondary Suite existing on the same property.
2. The majority of the letters received in opposition to the Major Home Based Business are concerned with the appearance and use of the property.
3. The fence and trees on the property were removed because they were in poor condition. He added gravel to the Rear Yard as the area where he stores the trailer was muddy.
4. He acknowledged the neighbour's concern that the property was becoming industrial.
5. He received complaints when he applied for a development permit for a Major Home Based Business.
6. He does not drive on neighbouring properties to manoeuvre the trailer associated with the Major Home Based Business onto the gravel area in the Rear Yard, where he stores it daily.
7. He did receive a complaint about outdoor material storage and cleaned up the Site, everything is now stored in the Garage and the trailer.

In response to questions by the Board, Mr. Sikstrom provided the following information:

1. The paint associated with the business is a flammable product; however, in his opinion, it is not a hazardous product. It is properly stored in a closed metal container.
2. The property owner is not prepared to relinquish the permit for the Secondary Suite.
3. He shares the house with four other people including university students. They use the main floor and basement kitchens.
4. The trailer associated with the Major Home Based Business is approximately 20 feet long.
5. There is still sufficient amenity space behind the Principal Dwelling.
6. The Garage is used for storage of personal items and business supplies. Therefore, no vehicles are parked in the Garage.
7. The truck and trailer used for the business and a vehicle used for personal use are parked in the backyard.
8. The business involves painting parking lots at night when the parking lots are empty.
9. His hours vary. He typically leaves for work between 9:00 p.m. and 10:00 p.m. and returns at approximately 5:00 a.m. the next morning.
10. There are no customer visits to the subject Site.

The Board then heard from Mr. Robinson, representing Sustainable Development, who made the following points:

1. He provided the Board with a written submission of the history of the subject Site, marked "Exhibit A".
2. The Minor Home Based Business was approved in March, 2013 with a condition that there shall be no outdoor storage of materials associated with the home based business.

3. Two complaints were received in June of 2014 regarding materials being stored outside and the 20 foot trailer parked on the property.
4. In 2015, an additional complaint was received regarding two trailers being stored on the property.

In response to questions by the Board, Mr. Robinson provided the following information:

1. Although he did not cite Section 75.9 of the *Edmonton Zoning Bylaw* as a reason for refusal, based on the evidence of the Appellant at the hearing in his opinion the proposed Major Home Based Business would be more appropriately located in a Commercial or Industrial area.
2. Only one trailer is currently stored on the property.
3. Storage of business related equipment or materials in the Garage or Accessory Building is permitted under a Major Home Based Business. However, outdoor storage is not permitted.
4. The Principal Dwelling is being used as a Lodging House as the Appellant has stated there is five persons residing on the subject property and both kitchen facilities within the Dwelling are being utilized. Section 7.3(6) of the *Edmonton Zoning Bylaw* states, "Lodging Houses means a building or part of building, used for Congregate Living, containing Sleeping Units and four or more persons, and where there is no provision of on-site care, treatment or professional services of a physical or mental health nature. This Use Class does not include Extended Medical Treatment Services, Detention and Correction Facilities, Fraternity and Sorority Housing, Group Homes, and Limited Group Homes."
5. Section 76.7 of the *Edmonton Zoning Bylaw* states that no Major Home Based Business, Secondary Suite, Garden Suite or Garage Suite shall be permitted as part of a Lodging House development or on the Site of such development.

The Board heard from Mr. Wensel, a neighbouring property owner, who made the following points:

1. He lives across the rear Lane from the subject Site.
2. The home based business has expanded.
3. He and other neighbouring property owners also operate home based businesses and have off-site storage in a commercial or industrial property in compliance with the *Edmonton Zoning Bylaw*. The Appellant should do the same.
4. The trailer parked on-site is too large and is a safety concern for children riding bikes in the rear Lane.
5. He questioned whether two resident employees are allowable in the *Edmonton Zoning Bylaw*.
6. In his opinion, the subject Site has been operating as a Lodging House for several years and the property owner has not adequately maintained the property.

In response to questions by the Board, Mr. Wensel provided the following information:

1. He is concerned that the business operates during the evening. However, he conceded that this did not conflict with the children riding in the rear lane.
2. In his opinion, there is approximately 12 feet of amenity space remaining in the Rear Yard and vehicles parked on the subject Site do not encroach onto the rear Lane.
3. Approximately 80 percent to 90 percent of the Rear Yard is being used for storage of materials or parking of vehicles.

The Board heard from Ms. Boman, representing the Belgravia Community League, who made the following points:

1. The subject Site is not in the area designated in the Area Redevelopment Plan for Commercial uses.
2. The Community League would like to see businesses that serve the residential area.

In response to questions by the Board, Ms. Boman provided the following information:

1. She now recognizes that Home Based Businesses are Discretionary Uses throughout the RF1 Single Detached Residential Zone, she did not realize this at the time she prepared her written submission.
2. Given the scale of the business and storage in both the Garage and trailer, this Major Home Based Business would be more appropriately located in a Commercial or Industrial area.

In rebuttal, Mr. Sikstrom made the following points:

1. He was not previously aware of the complaints that were received once he applied for a Major Home Based Business Permit.
2. He would like to continue to operate the Major Home Based Business for one more year before seeking an alternate location for his business.

Decision:

The appeal is DENIED and the decision of the Development Authority is CONFIRMED. The development is REFUSED.

Reasons for Decision:

The Development is refused for the following reasons:

1. Major Home Based Business is a Discretionary Use in the RF1 Single Detached Residential Zone.

2. The proposed development contravenes Section 75.5 of the *Edmonton Zoning Bylaw*, which prohibits outdoor business activity, or outdoor storage of material or equipment associated with the business. Based on the evidence at the hearing and the information stated in the Development Permit application, outdoor storage is now required for the proposed development. The 20 foot trailer and all other materials associated with the proposed development can no longer be stored within the existing on-site Accessory building (Garage).
3. The proposed development also contravenes Section 75.9 of the *Edmonton Zoning Bylaw* which states that the Major Home Based Business shall not be allowed if, in the opinion of the Development Officer, such Use would be more appropriately located in a Commercial or Industrial Zone having regard for the overall compatibility of the Use with the residential character of the area. Based on the evidence, the Board concludes that the proposed development would be more appropriately located in a Commercial or Industrial Zone for the following reasons:
 - i. The Appellant's business, commercial painting of parking lots, has grown and now materials associated with the business must be stored in both the on-site Accessory building (Garage) and a 20 foot trailer kept in the Rear Yard.
 - ii. The rear fence and trees have been removed from the subject Site and a large portion of the amenity space in the Rear Yard has been hardsurfaced with gravel to accommodate storage of the 20 foot trailer and the truck which pulls it daily.
 - iii. The proposed Major Home Based Business involves storing a large amount of flammable paint products.
4. The proposed development contravenes Section 75.10 which prohibits a Major Home Based Business within the same principal Dwelling containing a Secondary Suite unless the Secondary Suite is an integral part of the Bed and Breakfast Operation. Based on the evidence submitted by the Appellant, the principal Dwelling contains a Secondary Suite in the basement that is available for use and is being used by the five individuals currently living at the Site.
5. The Board notes that five letters were received in opposition to the proposed development with concerns regarding the suitability and compatibility of the proposed development in a residential area given storage of materials, including flammable paint, on-site outdoor storage of the 20 foot trailer and changes to the Site to accommodate the business.
6. Based on the above, the Board concludes that allowing this appeal would unduly interfere with the amenities of the neighbourhood and materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land.

Important Information for Applicant/Appellant

1. This decision may be appealed to the Alberta Court of Appeal on a question of law or jurisdiction under Section 688 of the *Municipal Government Act*, R.S.A. 2000, c. M-26. If the Subdivision and Development Appeal Board is served with notice of an application for leave to appeal its decision, such notice shall operate to suspend the Development Permit.

2. When a decision on a Development Permit application has been rendered by the Subdivision and Development Appeal Board, the enforcement of that decision is carried out by the Sustainable Development Department, located on the 5th Floor, 10250 – 101 Street, Edmonton

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

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