



**EDMONTON
TRIBUNALS**

*Subdivision &
Development
Appeal Board*

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Date: July 12, 2019
Project Number: 310729074-001
File Number: SDAB-D-19-099

Notice of Decision

- [1] On June 27, 2019, the Subdivision and Development Appeal Board (the “Board”) heard an appeal that was filed on May 22, 2019. The appeal concerned the decision of the Development Authority, issued on May 14, 2019 to approve the following development:

To operate a Major Home Based Business (massage center - YACYSHYN A.). Five visits per day by appointment only -no overlapping appointments. Hours of operation are from 10 AM to 6 PM from Monday to Friday. Expires on May 14, 2024

- [2] The subject property is on Plan 1223429 Blk 22 Lot 9A, located at 9517 - 71 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 approved Development Permit;
- The Development Officer’s written submissions;
- The Appellant’s written submissions;
- The Respondent’s written submissions;
- One email in opposition; and
- Online responses both in support and opposition to the proposed development.

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

- Exhibit A – City of Edmonton Parking Enforcement Warning submitted by the Appellant

Preliminary Matters

- [5] At the outset of the appeal hearing, the Chair confirmed with the parties in attendance that there was no opposition to the composition of the panel.
- [6] The Chair outlined how the hearing would be conducted, including the order of appearance of parties, and no opposition was noted.
- [7] The appeal was filed on time, in accordance with Section 686 of the *Municipal Government Act*, RSA 2000, c M-26 (the “*Municipal Government Act*”).

Summary of Hearing*i) Position of the Appellant, Mr. G. Feltham, representing Ms. R. Leckie:*

- [8] When they were initially approached by the Applicant they did not foresee any problems with the proposed home based business.
- [9] However, after speaking with a colleague who was dealing with an unfavorable situation as the result of a similar application, the decision was then made to seek advice from two Real Estate professionals, their real estate agent and one of his colleagues. Based on their concerns regarding the potential impact of the proposed development on their property value, the appeal was filed.
- [10] The letters submitted by the Applicant regarding parking were acknowledged but he questioned their position particularly based on the fact that neighbours have left notes on his vehicle if he has to park in front of their houses because he is not able to park on the street in front of his house.
- [11] A family friend was confronted about parking on the street by the Applicant while he was waiting for his vehicle to warm up. This is common practice during the winter months when residents start their vehicles to allow them to warm up. The Applicant apologized after she found out that the person she confronted was a family friend.
- [12] On another occasion, a car that they purchased for their daughter had to be left on the street over a weekend until it could be registered. During that time, a warning ticket, marked as *Exhibit A*, was issued in response to a complaint because a vehicle left unattended for 72 hours is considered to be abandoned.
- [13] The Applicant told him that she purchased the semi-detached unit a few months ago because she wanted to use the basement suite for her business. However, the Applicant did not discuss her plans or consider the impact on them before purchasing this property which seems to be backwards.

- [14] He questioned the fact that her real estate agent did not advise her to discuss the proposed plan in an attempt to obtain their approval as owners of the other half of the semi-detached house. It was his opinion that the same amount of approval would not be required if the proposed home based business was to be located in a single detached house.
- [15] A letter regarding the possible impacts of the proposed home based business received from their real estate agent was submitted to the Board. They were living in their half of the semi-detached before the Applicant purchased the other dwelling unit.
- [16] Infills were being built on the other side of the street and their agent advised them not to list their house until the infill developments were completed. When he found out that a Major Home Based Business permit had been issued next door, he voiced concern that they would be forced to reduce their selling price because of the signage and increased traffic that had the potential to create safety issues.
- [17] Potential buyers could also use the situation to low ball their offer or simply refuse to view the property which would limit the number of perspective buyers.
- [18] Clients of the proposed business may cross over their front yard in order to reach the front door of the subject site.
- [19] A second opinion obtained from another real estate agent who works with professional developers was also submitted. She highlighted the fact that the property is zoned RF3 which only permits a Minor Home Based Business. A Major Home Based Business is a Discretionary Use. The proposed development does not conform to the regulations for a Minor Home Based Business because of the signage and how it affects the curb appeal of their house.
- [20] If their home is for sale and potential buyers see signage for the business next door, they may not even bother viewing the property. Allowing signage for the business also negatively impacts curb appeal.
- [21] The other major concern is the aggravation that having a business operating next door will cause. Customers coming and going from the business will make it uncomfortable to use the amenity space in their front yard.
- [22] As stated by their real estate agent: “It would be irresponsible for the Appeal Board to allow the growing business and prosperity of the Homeowner in 9517 – 71 Avenue NW to take precedent over the Homeowner in 9515 – 71 Avenue.” Both owners should be treated equally in order to ensure that the use and enjoyment of their house is preserved. The viability of the proposed business with customers coming and going from the site should not be placed above their interests.

- [23] Mr. Feltham referred to the letter from the Applicant's real estate agent. He assumed based on the comments provided, that the agent was under the assumption that the proposed development is a Minor Home Based Business, not a Major Home Based Business. He agreed with the information provided regarding the number of property sales in the neighbourhood and noted that 90 percent of the sales are for Single Detached Houses which will not be impacted in the same way by the proposed business.
- [24] If the Respondent had purchased a Single Detached House an appeal would not have been filed because it would not have the same impact as approving a business in a housing unit that is shared.
- [25] Their agent may have been dealing with property owners that were operating Minor Home Based Businesses which do not generate the same amount of pedestrian and vehicular traffic. He often works from his house as do several of his friends but clients never come to their house which is a totally different situation. He is respectful of his neighbours and would never want to cause them concern.
- [26] It was noted that all of the support letters submitted by the Applicant were provided by neighbours who live in single detached houses and will not be impacted in the same way.
- [27] He reiterated that the use and enjoyment of their front yard will be lost because people will be coming and going from the subject site.
- [28] As per the *Edmonton Zoning Bylaw*, there shall be no exterior display or advertisement other than an identification plaque or Sign a maximum of 20 centimeters by 30.5 centimeters in size located on the Dwelling. However, a sandwich board sign is located on the Applicant's property.
- [29] As per the *Edmonton Zoning Bylaw*, the Major Home Based Business shall not generate pedestrian or vehicular traffic, or parking, in excess of that which is characteristic of the Zone in which it is located. The proposed business will increase traffic and parking by six vehicles every business day.
- [30] As per the *Edmonton Zoning Bylaw*, the Major Home Based Business shall not change the principal character or external appearance of the Dwelling or Accessory buildings. The business sign and increased traffic change the principal character and appearance of the Dwelling.

- [31] Ms. Leckie sent an email to the Development Officer asking what was meant by the statement that a Major Home Based Business shall not generate pedestrian or vehicular traffic, or parking, in excess of that which is characteristic of the Zone in which it is located. The Development Officer responded “the major home based business shouldn't create more traffic than would be normal for that neighbourhood. For instance, a commercial development has several cars going in and out all day long. A home based business should not generate this kind of traffic.” Based on the information provided by the Applicant about the proposed number of client visits this business will generate traffic that is not normal for the neighbourhood.
- [32] The Board should not allow a business to prosper and take precedence over their property. All properties should be treated equally because your home is a place to enjoy down time and relax. They have invested both financial and emotional equity into their home.
- [33] Mr. Feltham provided the following information in response to questions from the Board:
- a) They have a secondary suite but it is not used as a rental unit. The Applicant has a secondary suite that will be used for the proposed business.
 - b) There is a bench located in close proximity to the trees in their front yard where they often sit to read. People coming to the business can stop to ask for directions which will affect their enjoyment of the front yard.
 - c) He acknowledged that the size of signage is regulated by conditions imposed on the development permit but expressed concern that the sign may have only been removed from the site because of the appeal.
 - d) He works from home regularly and his wife does contract work which often allows her to work from home as well.
 - e) They would like to sell their house in the next 8 to 12 months.
 - f) Both units have a two car garage at the rear.
 - g) He was asked whether the proposed hours of operation, 10 a.m. to 6 p.m. Monday to Friday, lessen any potential impacts on the parking. During the day, parking will be less of a problem, but from 3:30 p.m. to 6:00 p.m. parking issues will increase. Parking also varies on different days of the week and the ongoing infill development brings workers into the neighbourhood who all require parking.
 - h) If someone is coming to look at their property and they see the business sign, they may not even look at the property. Even if they don't care about the business, the fact that the business is there can be used to their advantage to “low-ball” an offer. They will pay on the equity value of their house.

- k) They were advised that the suites in the basements of both semi-detached houses cannot be occupied because they do not comply with fire regulations. He questioned whether or not locating the proposed business in the basement suite required compliance with fire code regulations.

ii) Position of the Development Officer, Ms. C. Potter

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

iii) Position of the Respondent, Ms. A. Yacyshyn, accompanied by her Legal Counsel, Mr. J. Redman:

- [35] Ms. Yacyshyn has been a Registered Massage Therapist for four years.
- [36] She has worked in a clinical setting and from other houses in the City with both a Minor and Major Home Based Business permit. She has never experienced any problems operating her business from these locations.
- [37] Her prior residence was a rented duplex and letters of support have been provided by the attached neighbour as well as another neighbouring property owner.
- [38] The hours of operation are 10 a.m. to 6 p.m. It is not physically possible to work for 8 hours a day, five days a week or to see more than five clients per day. She works Monday and Wednesday 12:00 p.m. to 6:00 p.m. and does not work on weekends. The hours of operation allow her some flexibility.
- [39] Many of her clients have been referred by family and friends and have been with her since she began practicing. Most of her clients are between the ages of 30 and 45 and include professionals, artists, and healthcare professionals and she does not see walk-ins. All of her clients have to make an appointment using a valid credit card. It was her opinion that this practice should eliminate any concerns about strangers coming to her property.
- [40] A 30 minute break is scheduled between clients, which provide enough time to answer clients' questions, rebook appointments and ensure that the clients have left the house before the next client arrives.
- [41] There is no waiting area and she does not have any plans to hire employees or expand her practice.

- [42] This is first of all her personal residence and she does not want to do anything that would jeopardize safety or security for herself or her neighbours. This property was selected based on her desire to work from home. After living in the house, she determined that the basement was not the appropriate location to operate her business because it was cold and uncomfortable. The house has four bedrooms and a den and she plans to operate her business from the den on the main floor.
- [43] There is one bedroom and a washroom in the basement but it is not considered a legal secondary suite.
- [44] There is a double garage located at the rear of the property. She owns one vehicle and it is completely possible that her clients could park inside the garage.
- [45] Panoramic photographs of the street parking that were taken at different times of the day were referenced to illustrate that quite a few spaces were available. It was acknowledged that residents want to have the ability to park in front of their houses and she is willing to take steps to ensure that her client will not prevent that from happening.
- [46] She will comply with the condition that limits the size of any signage for her business. She is empathetic to the concerns of her neighbours and has removed the placard sign from her property. The sign was used mainly to help her exiting clients find her new location.
- [47] She canvassed the neighbours and provided an overview of her business. She received 12 signatures of support and five letters of support. The majority of neighbours were receptive to the operation of her business and some wanted more information on becoming clients.
- [48] Letters of support were also submitted from neighbours who resided close to her business while it was operating from another site in the city.
- [49] A level of care and support can be provided to her clients when working from her home that cannot be achieved in a clinical setting. She works extensively with clients from the LBTGQ community as well as clients with mental health issues. Stress for these clients can be alleviated simply by the fact that they do not have to attend a public clinic. Treatment options that can be offered from her home are not available in a traditional clinical setting.
- [50] She does not want to upset her neighbours or devalue their property and is willing to make compromises to ensure that their concerns are addressed.

- [51] It was Mr. Redman's opinion that the Appellant submitted opinion evidence from real estate professionals and he cautioned the Board not to place too much weight on that evidence.
- [52] Ms. Yacyshyn provided the following information in response to questions from the Board:
- a) There is no overlap of customers. She sees five clients per day, which is not a massive store front business.
 - b) If her clients park in the garage, they would access the house from the rear yard which is fenced.
 - c) Her clients will not be cutting across the front yard of the house because there is mature landscaping between her front yard and the Appellant's front yard.
 - d) Traffic will be minimal as many of her clients use public transit.
 - e) She provided letters of support. One adjacent property owner (the property to the west) indicated that they did not want to get involved. She went out on three different occasions but was still not able to speak to all of the neighbours. No one that she spoke to objected to her business. She left an information package with contact information for those neighbours that she was not able to speak to directly.

iv) Rebuttal of the Appellant

- [53] Mr. Fletham indicated that he would be comfortable if clients parked in the Applicant's garage and accessed the house from the rear.
- [54] The larger sign is not being used now but it could be used by the Applicant again in the future.
- [55] At this point, the Chair reiterated that the condition imposed on the approved Development Permit regulates the size of the sign that can be used.
- [56] Based on the fact that the Applicant previously operated her business from another semi-detached house in the City, he questioned why the Applicant did not realize how important it was to discuss her plans and obtain their support before proceeding with the development permit application. He suggested that her previous neighbour may not have been pursuing the sale of their property.

Decision

[57] The appeal is **DENIED** and the decision of the Development Authority is **CONFIRMED**. The development is **GRANTED** as approved by the Development Authority, subject to the following **CONDITIONS**:

Unless otherwise stated, all references to "section numbers" refer to the authority under the *Edmonton Zoning Bylaw #12800*, as amended.

1. The business owner must live at the site. The business use must be secondary to the residential use of the building and shall not change the residential character of the Dwelling or Accessory Building (Section 7.3(7)).
2. There shall be no exterior display or advertisement other than an identification plaque or sign a maximum of 20 cm (8") x 30.5 cm (12") in size located on the dwelling (Section 75.1).
3. The Major Home Based Business shall not generate pedestrian or vehicular traffic, or parking, in excess of that which is characteristic of the Zone in which it is located (Section 75.3).
4. There shall be no non-resident employees or business partners working on-site.
5. There shall be no more than 5 visits associated with the business per day. Clients visit must be by-appointment only and appointments shall not overlap.
6. Hours of operations must be between 10 AM and 6 PM from Monday to Friday.
7. There shall be no outdoor business activities, or outdoor storage of material or equipment associated with the business (Section 75.5).
8. No offensive noise, odour, vibration, smoke, litter, heat or other objectionable effect shall be produced.
9. The business use must maintain the privacy and enjoyment of adjacent residences and the characteristic of the neighborhood.
10. All parking for the Dwelling and Home Based Business must be accommodated on site unless a parking variance has been granted for this Major Home Based Business.

11. This Development Permit may be cancelled at any time if the Home Based Business as stated in the Permit Details changes (Section 17.2).
12. This approval is for a five year period from the date of this decision. A new Development Permit must be obtained to continue to operate the business from this location. This Development Permit expires on ****July 12, 2024****.

Reasons for Decision

- [58] A Major Home Based Businesses is a Discretionary Use in the (RF3) Small Scale Infill Development Zone. The Development Authority granted the Applicant a five year Development Permit to operate a Massage Therapy business from her house.
- [59] The Appellant appealed the granting of the permit, arguing primarily that the Major Home Based Business will increase the load on on-street parking, and will decrease the value of their residence (which is the other side of a semi-detached structure that houses both the Appellant and the Respondent).
- [60] No variances were requested or granted. The only issue before the Board is whether or not this Discretionary Use is reasonably compatible with existing land uses.
- [61] The Board finds that the proposed Major Home Based Business is reasonably compatible with existing land uses, and will only minimally impact the neighborhood, for the following reasons:
- a) The hours of operation are from 10:00 a.m. to 6:00 p.m. on weekdays only, when based on the evidence provided, on-street parking is not in peak demand.
 - b) There are no employees in the business.
 - c) The development permit limits the business to five visits a day and requires that appointments do not overlap. The Board notes that a waiting room is not proposed or included in the development permit application.
 - d) There was substantial support for the proposed development in this neighbourhood.
 - e) There is sufficient onsite parking for the proposed business.
 - f) The Board finds that the traffic and parking impact of this Major Home Based Business will be minimal.

- g) The Board does not find any cogent evidence to support the assertion that the Major Home Based Business will materially affect the value of the neighbouring parcel of land. No evidence from real estate appraisers was presented, and the letters from the realtors were overly general, did not address the specific nature of this development permit application, and were on the whole unconvincing.

[62] For these reasons, the Board agrees with the assessment of the Development Authority and finds that the proposed Discretionary Use is reasonably compatible with existing surrounding land uses. Therefore, the appeal is dismissed.

Mr. I. Wachowicz, Chair
Subdivision and Development Appeal Board

Board members in attendance: Mr. V. Laberge, Ms. S. LaPerle, Mr. R. Hobson, Ms. L. Gibson



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Date: July 12, 2019
Project Number: 301374010-001
File Number: SDAB-D-19-100

Notice of Decision

- [1] On June 27, 2019, the Subdivision and Development Appeal Board (the “Board”) heard an appeal that was filed on May 14, 2019. The appeal concerned the decision of the Development Authority, issued on April 25, 2019, to refuse the following development:

To construct a two-Storey Garden Suite (main floor garage 7.32 metres by 12.19 metres, second floor Garden Suite 7.06 metres by 12.19 metres), existing without permits

- [2] The subject property is on Plan 2938HW Blk 16 Lot 6, located at 7222 - 119 Street NW, within the RF1 Single Detached Residential Zone. The Mature Neighbourhood Overlay and McKernan/Belgravia Station Area Redevelopment Plan apply to the subject property.

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

- Copy of the Development Permit application with attachments, proposed plans, and the refused Development Permit;
- The Development Officer’s written submissions;
- The Appellant’s written submissions; and
- Four online responses in opposition to the proposed development.

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

- Exhibit A – Appellant’s Submission

Preliminary Matters

- [5] At the outset of the appeal hearing, the Chair confirmed with the parties in attendance that there was no opposition to the composition of the panel.

- [6] The Chair outlined how the hearing would be conducted, including the order of appearance of parties, and no opposition was noted.

[7] The appeal was filed on time, in accordance with Section 686 of the *Municipal Government Act*, RSA 2000, c M-26 (the “*Municipal Government Act*”).

Summary of Hearing

i) *Position of the Appellant, Mr. M. Hundert, representing MH Project Planning Ltd. and the property owner, Mr. M. Castro-Wunsch:*

[8] The Garden Suite is a Permitted Use in the (RF1) Single Detached Residential Zone as is the detached garage that was approved on September 28, 2011. A Building Permit was also issued on August 16, 2012.

[9] The approved Development Permit for the garage specified a building footprint of 12.19 metres by 7.32 metres. As constructed, the garage measures 12.19 metres by 7.32 metres and is located 1.0 metre from the north property line.

[10] The garage includes three vehicular parking spaces accessed by corresponding overhead doors. The garage has not been nor is it currently being used as a Dwelling.

[11] Subsequently, in January 2019, a development permit application was made to “Leave as Built a Garden Suite” located above the previously approved garage. This application was refused for four reasons. As stated in the scope of application for the development permit, the main floor garage is 12.19 metres by 7.32 metres which is consistent with the approved development permit for the construction of the garage as it exists. Both the Applicant and the Development Officer are in agreement on this point.

[12] However, the scope of application describes the development as a “two-storey Garden Suite.” It was his opinion that this description is incorrect and does not accurately represent the existing vehicular use of the entire main floor of the garage. The only exception to the vehicular-related use of the main floor is the dedicated entry and stairwell leading to the second floor and a small mechanical space under the stairwell to accommodate a furnace and hot water tank for the Garden Suite.

[13] A variance is required in the side yard setback and eave projection into the north side yard. The 1.0 metre side setback from the north property line is in accordance with the approved Development Permit that was issued for the garage. There is no practicable way to achieve the greater setback required by the Garden Suite in a situation of an existing garage. The property owner who shares this property line does not object to the reduced side setback nor the distance to the eaves from his property.

[14] He respectfully disagreed with the Development Officer’s calculation of the second floor area of the Garden Suite based on a review of the building drawings and section 87.3 of the *Edmonton Zoning Bylaw*. Based on his calculations, the floor area of the Garden Suite is 65.35 square metres. This calculation was arrived at by deducting the stairwell area as outlined in section 87.3 and an additional 11.71 square metres which is

inaccessible to the second floor because it coincides with the steeply pitched roof on the west side of the structure. This calculation accurately represents the total Floor Area of the Garden Suite because no part of the main floor of the garage contributes to the floor area of the Garden Suite. Therefore, the total floor area is well under the maximum allowed 130 square metres pursuant to section 87.3(b).

- [15] He acknowledged that a floor area of 65.35 square metres is greater than the permitted maximum of 50 square metres pursuant to section 87.3(c) of the *Edmonton Zoning Bylaw*. However it is representative of the large, house sizes in the surrounding community.
- [16] The original housing stock in this neighbourhood is being replaced by much larger houses. Photographs of existing garages along the rear lane were referenced, including a large four car garage which what appeared to be a second storey living space as well as the house and detached garage on the immediately adjacent property. The house and garage are finished with dark siding which creates an imposing massing effect.
- [17] This neighbourhood is in transition and the trend is to replace the original small houses with much larger houses and garages.
- [18] Elevations of the garage and the Garden Suite were referenced to illustrate that the elevation of the Garden Suite is approximately 3 feet higher to the peak and that the garage has been sited according to the approved plans. The massing impact of both is very similar when viewed from the lane or from neighbouring properties.
- [19] A significant number of property owners who reside within 60 metres of the subject site were canvassed. The majority of property owners, including the two most affected property owners, do not object to leaving the Garden Suite as it exists.
- [20] It was noted that two property owners who originally signed in support now oppose the development.
- [21] The main floor of the garage does not provide any dwelling or parking space for the Garden Suite.
- [22] The existing garage and Garden Suite are in keeping with the size and character of the neighbourhood, including the larger structures that have been built on the property to the south and at other locations along the rear lane.
- [23] The garage was built in accordance with the development permit application that was approved in 2011. The foundations were poured in compliance with the approved drawings. Subsequently the property owner decided to construct the garage with a second storey Garden Suite. The adjacent property owner to the north has provided support to leave the garage as it exists.

[24] Mr. Hundert and Mr. Castro-Wunsch provided the following information in response to questions from the Board:

- a) It was acknowledged that the garage does not comply with some of the conditions that were imposed on the development permit that was issued in 2011 but it was sited in accordance with the approved plans.
- b) Footings for the garage were poured but then construction was delayed in anticipation of proposed amendments to the *Edmonton Zoning Bylaw* regarding the development of Garden and Garage Suites. Construction of the Garden Suite was completed approximately three years ago.
- c) City Council recently amended the Floor Area requirements and increased the maximum allowable total Floor Area requirement from 120 square metres to 130 square metres.
- d) The existing development is characteristic of this older neighbourhood where older houses are being replaced with larger houses and accessory buildings.
- e) The garage is taller than the principal dwelling but a height variance is not required. The property owner intends to demolish the existing house and build a new house on the site. They plan to reside in the Garden Suite during this process.
- f) The three parking spaces inside the garage are used by residents of the principal dwelling. A surface parking space is provided for the tenants of the Garden Suite.
- g) Plumbing and electrical inspections have been completed by the City of Edmonton.
- h) Mr. Castro-Wunsch acknowledged that he made a mistake by not applying for a development permit before the Garden Suite was built. He was trying to expedite the process because he planned to live in the Garden Suite while a new house was built on the site.

ii) *Position of the Development Officer, Mr. R. Zhou:*

[25] Mr. Zhou provided the following information in response to questions from the Board.

[26] It was acknowledged that the subject lot is large and can accommodate larger structures. However, Garden Suites are meant to be accessory to the principal dwelling and have to be consistent with other accessory structures. If there is no restriction on the maximum allowable floor area, potentially a structure could be built that is larger than what is allowed and the massing impact has to be considered. A Garden Suite is allowed to be two storeys and this structure is 6.2 metres high. The height in addition to the floor area creates a massing and visual impact for neighbouring properties.

- [27] The structures appear to be very similar even with the added three feet to accommodate the Garden Suite.
- [28] There was an inquiry from a neighbour during the construction process.
- [29] The development permit that was approved in 2011 was for the construction of a three car garage, it did not include the development of a Garden Suite. The footprint of the building is the same, however, the garage is three feet higher and the roofline has been altered to accommodate the Garden Suite.
- [30] Floor Area is a defined term in the *Edmonton Zoning Bylaw* and requires everything inside the walls of the structure to be considered. Eaves are only allowed to project 0.6 metres into the side setback. This requirement is in line with the building code. The over projection of eaves can result in debris falling onto neighbouring properties.

iii) Position of the Belgravia Community League:

- [31] Mr. Huculak appeared on behalf of the Belgravia Community League. It was the decision of the Community League not to take a position regarding the proposed development.
- [32] However, the Community League is concerned about residents who circumvent the permitting process. In order to ensure that the process is fair, the Community League encourages residents to obtain the appropriate permits before commencing any construction.
- [33] He was glad to hear that the property owner regrets not applying for a development permit prior to building the Garden Suite.
- [34] He questioned why the inspection process did not identify the fact that a development permit had not been issued and expressed concern that the inspections were applied for after the fact.

iv) Rebuttal of the Appellant:

- [35] The inspections were done progressively and the final inspection would not have been finalized if this process had not been followed.

Decision

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

1. The development shall be constructed in accordance with the stamped and approved drawings.
2. Only one of a Secondary Suite or Garden Suite may be developed in conjunction with a principal Dwelling. (Section 87.19).
3. A Garden Suite shall not be allowed within the same Site containing a Group Home or Limited Group Home, or a Major Home Based Business and an associated principal Dwelling, unless the Garden Suite is an integral part of a Bed and Breakfast Operation in the case of a Major Home Based Business. (Section 87.21).
4. Notwithstanding the definition of Household within this Bylaw, the number of unrelated persons occupying a Garden Suite shall not exceed three. (Section 87.20).
5. The Garden Suite shall not be subject to separation from the principal Dwelling through a condominium conversion or subdivision. (Section 87.23).
6. Façades facing a Lane shall have exterior lighting. (Section 87.17).
7. The Garden Suite shall have a covered entrance feature over the main door. (Section 87.18).
8. The driveway aisle shall be a minimum of 7.0 metres wide for 90 degree parking. (Section 54.2.4.a.vi).

ADVISEMENTS

1. The driveway access must maintain a minimum clearance of 1.5 metres all surface utilities.
2. Lot grades must match the *Edmonton Drainage Bylaw 18093* and/or comply with the Engineered approved lot grading plans for the area. Contact Lot Grading at 780-496-5576 or lot.grading@edmonton.ca for lot grading inspection inquiries.
3. Unless otherwise stated, all above references to "section numbers" refer to the authority under the *Edmonton Zoning Bylaw 12800*.
4. 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. (Reference Section 5.2)

5. A Building Permit is required for any construction or change in use of a building. Please contact the 311 Call Centre for further information.

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

1. The maximum allowable total Floor Area for a Garden Suite of 130 square metres as per section 87.3(b) is varied to allow an excess of 43 square metres, thereby increasing the maximum allowed to 173 square metres.
2. The maximum allowed Second Storey Floor Area of 50 square metres, as per section 87.3(c) is varied to allow an excess of 34 square metres, thereby increasing the maximum allowed to 84 square metres.
3. The minimum required interior (north) Side Setback of 2.0 metres, as per section 87.8 and 814.3(3)(c), is varied to allow a deficiency of 1.0 metres, thereby decreasing the minimum required to 1.0 metres.
4. The maximum allowed projection of eaves into a required Setback or Separation Space as per section 44.1 is waived.

Reasons for Decision

[38] A Garden Suite is a Permitted Use in the (RF1) Single Detached Residential Zone.

[39] The proposed development requires four variances to development regulations pursuant to the *Edmonton Zoning Bylaw*, specifically the maximum allowable total Floor Area for a Garden Suite, the maximum allowable second storey Floor Area for a Garden Suite, a deficiency in the minimum required interior Side Setback and an excess in the maximum allowable projection of eaves to the north property line.

[40] The history of this development is somewhat complicated. A development permit to construct an Accessory Building (detached Garage) was approved in 2011 but it did not include the development of a Garden Suite. The detached Garage was constructed in accordance with the approved plan, has the same footprint and is the same size.

[41] The Garden Suite was constructed after the detached Garage was built. Two main differences to that approval were noted by the Development Authority and acknowledged by the Appellant. Specifically, the existing detached Garage is approximately 2 feet, 10 inches higher and the shape of the roofline has been changed to accommodate the Garden Suite.

- [42] The Board notes that even with the increased Height, the existing detached Garage complies with the maximum allowable Height requirements and a variance is not required.
- [43] The Board notes that the development regulations that require variances are all designed to ensure that an Accessory Building appears to be secondary in nature to the Principal Dwelling and to control and limit the massing impact on neighbouring property owners.
- [44] The Board grants the variances for the following reasons:
- a) The massing of the existing Accessory Building is only marginally affected by the required variances and remains virtually the same as the structure that was approved in 2011.
 - b) This is a large lot that can accommodate the development of larger structures.
 - c) The existing detached Garage does not exceed the maximum allowable Site Coverage requirements or the Height requirements.
 - d) Based on a review of the photographic evidence provided, the proposed development is characteristic of this neighbourhood that is in transition. Many of the older, smaller houses are being replaced with larger houses and accessory buildings.
 - e) Extensive community consultation was undertaken and the majority of property owners who reside within 60 metres of the subject site, including the most affected adjacent property owners, do not object to leaving the Garden Suite as it exists. The Board also notes the non-opposition of a member of the Belgravia Community League who attended the hearing.
- [45] Based on all of the above, the Board finds that the proposed development with the conditions imposed and the variances granted will not unduly interfere with the amenities of the neighbourhood nor materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land.
- [46] Therefore, the appeal is allowed and the development granted.

Mr. I. Wachowicz, Chair
Subdivision and Development Appeal Board

Board members in attendance: Mr. V. Laberge, Ms. S. LaPerle, Mr. R. Hobson, Ms. L. Gibson

Important Information for the Applicant/Appellant

1. This is not a Building Permit. A Building Permit must be obtained separately from the Sustainable Development Department, located on the 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 the Sustainable Development Department, 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 &
Development
Appeal Board*

10019 – 103 Avenue NW
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Date: July 12, 2019
Project Number: 267185799-003
File Number: SDAB-D-19-101

Notice of Decision

- [1] On June 27, 2019, the Subdivision and Development Appeal Board (the “Board”) heard an appeal that was filed on May 31, 2019. The appeal concerned the decision of the Development Compliance Officer to issue the following Order on May 28, 2019:

To cease the Nightclub Use immediately and cease the operation of the Bar and Neighborhood Pub (118 square metres of public space/100 occupants) immediately and until such time that the property is in compliance with the approved plans and all conditions of Development Permit No. 227514182-006 or acquire a Development Permit that accurately reflects the current development at the property before June 19, 2019.

- [2] The subject property is on Plan B2 Blk 5 Lot 166, located at 10344 - 105 Street NW, within the UW Urban Warehouse Zone. The Special Area Downtown Overlay and Capital City Downtown Plan apply to the subject property.

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

- Copy of the Stop Order;
- The Development Compliance Officer’s written submissions;
- An email in opposition from the Downtown Edmonton Community League;
- An email in opposition from an affected property owner; and
- Numerous online responses in support of the Stop Order.

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

- Exhibit A – Photographs submitted by an affected property owner.

Preliminary Matters

- [5] At the outset of the appeal hearing, the Chair confirmed with the parties in attendance that there was no opposition to the composition of the panel.

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

Summary of Hearing

- i) *Position of the Appellants, Mr. S. Zaiffdeen and Mr. C. Allen, representing 1966318 Alberta Ltd.:*
- [8] They acknowledged that their development permit application for a Nightclub use has been refused by the Development Authority but that decision has not yet been appealed.
- [9] They questioned how the City expects new businesses to support the development of the downtown core when they have been set up from the onset for failure and huge personal losses.
- [10] They are compliant with a Bar and Neighbourhood Pub Use which is listed as a Permitted Use in the Urban Warehouse Zone, section 910.11(2) of the *Edmonton Zoning Bylaw*.
- [11] On November 30, 2017, the City of Edmonton signed off on the final inspection and determined that all of the requirements had been met. The design has not changed since that time.
- [12] Development Compliance Officers visited the premises on May 23, 2018 and provided their verbal opinion that they did not see any infractions and they never received any further follow up that change was required.
- [13] The business is operating in accordance with the drawings and plans that were approved by the City of Edmonton on July 7, 2017. These drawings were provided to their general contractor to complete the construction. Those drawings did not include walls or a door surrounding the proposed audio/visual area. Instead it included an elevated octagonal structure which is currently being used.
- [14] The audio/visual room referenced by the Development Compliance Officer was from a previous design.
- [15] Noise is not exclusive to a Nightclub Use. A Bar and Neighbourhood Pub, which is a Permitted Use in this Zone, can also generate noise. Noise is conducive of this area which is the Ice District also known as Edmonton’s Entertainment District which is outside of their control.
- [16] Their ultimate goal is to be a good neighbour and make changes that are within their control to address the issues.

- [17] They have done their due diligence and are willing to work with community members and the Public Service Compliance Team. Signage has been posted around the building which states “Please be courteous of our neighbours and keep the noise level down while outside”.
- [18] It was their opinion that they comply with both the definition of a Bar and Neighbourhood Pub and a Nightclub. A Bar and Neighbourhood Pub is a Permitted Use in the Urban Warehouse Zone and a Nightclub is a Discretionary Use in this Zone.
- [19] The only two differences between the definition of these Uses is that a Nightclub is a facility where entertainment facilities take up more than 10 percent of the Floor Area and a Nightclub prohibits minors from lawfully utilizing the facility.
- [20] The *Edmonton Zoning Bylaw* does not include a definition for an entertainment facility and it is not outlined online.
- [21] The development permit and the plans were approved by the City of Edmonton.
- [22] It was their opinion that they were not given the opportunity to rectify any non-compliant issues through the inspection process.
- [23] A meeting was held on May 31, 2019 to discuss the issues. They asked what changes were required in order to comply with the Bar and Neighbourhood Pub Use and were advised that it was unlikely that they would be able to meet the requirements. At no time, where they ever provided any direction on how to rectify the situation.
- [24] They have invested their own and their families’ money to make their dream a reality. It was their opinion that shutting down their business immediately without the opportunity to rectify the issues borders on oppressive conduct by the City of Edmonton and is not justified.
- [25] Mr. Zaifdeen and Mr. Allen provided the following information in response to questions:
- a) They have never exceeded the maximum occupancy limit.
 - b) The original drawings were revised to make the washroom space accessible.
 - c) The drawings that were stamped approved on July 7, 2017 reflect the way the facility is today.
 - d) The walls and door that were proposed to enclose the audio visual room were removed prior to the final approval.
 - e) The initial drawings were submitted on May 23, 2017.

ii) *Position of the Development Compliance Officers, Ms. E. Peacock and Mr. J. Hogberg, Mr. I. Welch, Development Officer and Mr. M. Gunther, Legal Counsel:*

- [26] The Chair asked Ms. Peacock to address the evidence provided by the Appellants, specifically the fact that two sets of drawings were submitted. The original set of drawings included enclosed spaces but the set of drawings that was approved did not include those enclosed spaces.
- [27] Mr. Gunther advised that Mr. Welch will be clarifying the floor area that was included in the calculation of public space.
- [28] Ms. Peacock reviewed the Site context, history, applicable regulations, the findings of the Development Compliance Team and the enforcement actions taken.
- [29] The subject site is located in downtown Edmonton and development is guided by the Capital City Downtown Plan which is a Statutory Plan. Section 622 of the *Municipal Government Act* requires that decisions made by the Development Authority are consistent with the land use policies established within the Area Redevelopment Plan.
- [30] Section 710 of the Capital City Downtown Plan states that “in order to protect downtown residential areas from the impact of Bars and Neighbourhood Pubs and Nightclubs, these Uses will be controlled through zoning regulations that stipulate location and maximum size”.
- [31] Aerial photographs were referenced to illustrate that the subject site is located close to the Ice District. A high rise multi dwelling apartment building with retail space on the main floor podium that was built in 2010 is located immediately north of the subject site, there is a lane to the west, a vacant lot to the west and 105 Street to the east.
- [32] The subject site is zoned (UW) Urban Warehouse Zone with Downtown Special Area Zoning regulations.
- [33] The subject building houses two businesses. Silk, a restaurant with 116.1 square metres of public space was approved on December 6, 2016 and is located in the southern portion of the building. Entendre, a Bar and Neighbourhood Pub Use was approved on May 29, 2017 with 118 square metres of public space and is operating from the northern portion of the building.
- [34] The original development permit application was created on January 5, 2017. Following a review by the Development Authority, the application for a Bar and Neighbourhood Pub Use was refused on March 10, 2017 because the proposed development included more than 120 square metres of public space and more than 100 occupants.

- [35] As a Discretionary Use, the Development Authority referred to the Statutory Plan, the Capital City Downtown Area Redevelopment Plan and land use policies that require the protection of downtown residential areas from the impacts of Bars and Neighbourhood Pubs and Nightclubs per zoning regulations that stipulate location and maximum size.
- [36] On April 21, 2017, the second development permit application for Entendre was submitted for review. The Development Authority approved a development permit for a Bar and Neighbourhood Pub Use on May 29, 2017. Approval was issued as a Class A development permit because the proposed Use was found to be a Permitted Use in the (UW) Urban Warehouse Zone based on the revised public space area and because the proposed development did not require a variance to *Edmonton Zoning Bylaw* 12800.
- [37] Developments that are found to be a Permitted Use without variances are considered to be compatible with and have minimal land use impacts to surrounding areas. Notification to affected property owners is not required and the 21 day appeal period does not apply. The Development Officer is not required to review the land use policies contained in the Statutory Plan because as a Permitted Use the Use should comply with the Plan.
- [38] Since Entendre opened there have been 34 Bylaw complaints regarding noise. The first complaint was received on December 1, 2017 and the most recent complaint was received on March 26, 2019.
- [39] Pursuant to section 23 of the *Edmonton Zoning Bylaw*, it is an offence to undertake development in contravention of an approved development permit, including any conditions of approval. It is also an offence for any person to commence a use or change the intensity of Use if a development permit is required but has not been issued or is not valid. For example, even if the Nightclub only operates on some nights, a development permit would be required for a Nightclub Use at any time.
- [40] In the (UW) Urban Warehouse Zone, a Bar and Neighbourhood Pub Use can be considered either a Permitted or Discretionary Use depending on the public space area but a Nightclub Use is a Discretionary Use with a limit on size when adjacent to residentially zoned lands.
- [41] The definition of a Bar and Neighbourhood Pub and a Nightclub were reviewed. A Bar and Neighbourhood Pub means development where the primary purpose is the sale of alcoholic beverages, there is a limited menu and minors are prohibited during some hours of operation. A Nightclub means development where the primary purpose is the sale of alcoholic beverages, entertainment facilities take up more than 10 percent of the Floor Area, there is a limited menu and minors are prohibited from lawfully utilizing the facility. The big difference between the two is the requirement for more than 10 percent of the Floor Area to be taken up by entertainment facilities.
- [42] An entertainment facility is not defined in the *Edmonton Zoning Bylaw*. Historically, designated dance floor areas have been considered as an entertainment facility area.

While the floor plans for Entendre do not include a designated dance floor, multiple inspections found that the public space areas were being used as a dance area.

- [43] The definition for a Nightclub requires that more than 10 percent of the Floor Area be used as an entertainment facility. The total floor area is 325 square metres. Public space is 118 square metres. If that is divided by the total floor area, it results in approximately 36 percent of the public space being used as entertainment area.
- [44] Public Space is defined in the *Edmonton Zoning Bylaw* and typically includes space that is open to the public and not restricted to only employees.
- [45] Development Compliance Officers are designated Officers and act as a Development Authority to exercise development powers and perform duties on behalf of a municipality in accordance with section 624 of the *Municipal Government Act*. The mandate of Development Compliance is to ensure the lawful and orderly development of land through compliance with Zoning Bylaws and other land use legislation. This mandate is achieved through research, education and enforcement. Development Compliance Officers have the authority to issue violation notices, tickets and *Municipal Government Act* Orders in order to gain compliance. Factors taken into consideration are health and safety, public interest and land use impacts.
- [46] Following a complaint filed on December 5, 2017 that Entendre was operating as a Nightclub, Development Compliance conducted multiple inspections to determine if there was a contravention of the approved Development Permit that was issued for the operation of a Bar and Neighbourhood Pub with 118 square metres of public space and 100 occupants.
- [47] On May 18, 2018, a Violation Notice was issued for Entendre operating as a Nightclub with dedicated entertainment facilities, the restriction of minors and the primary purpose for the sale of alcohol. Following this Development Compliance, in consultation with Development Approvals, determined that Entendre was operating in accordance with the approved development permit. Development Compliance would continue to support the Public Safety Compliance Team to see if future re-evaluation of this issue might be required.
- [48] The Violation Notice issued on May 18, 2018 stated:

An inspection of the above noted property by this Department revealed that a Nightclub Use (Entendre) is operating. Indicating factors that a Nightclub has been developed include: the primary purpose of the development is the sale of alcoholic beverages, there is dedicated entertainment facilities and the development restricts minors during all hours of operation. According to our records no development permit has been issued for the Nightclub Use.

- [49] In response to a question, Ms. Peacock indicated that she did not have any information regarding the method used to calculate the entertainment space and the percentage was not included in the Violation Notice.
- [50] Development Compliance continued to receive complaints that a Nightclub was operating from this location. Inspections were conducted to gather information about the operation of the business and to determine if it was compliant with the approved development permit.
- [51] The decision to issue the Order was made on May 29, 2019. The Order stated:
1. Cease the Nightclub Use IMMEDIATELY.
AND
 2. Cease the operation of the Bard and Neighbourhood Pub (118 square metres of public space/100 occupants) IMMEDIATELY AND UNTIL SUCH TIME THAT the Property is in compliance with the approved plans and all conditions of Development Permit No. 227514182-006
OR
 3. Acquire a Development Permit that accurately reflects the current development at the Property before June 19, 2019.
- [52] The Order was sent by registered mail and via email which was confirmed to be received at a meeting held on May 31, 2019 with the land owner and business operator. The Order was subsequently appealed to the Subdivision and Development Appeal Board.
- [53] The *Municipal Government Act* Order required the Nightclub Use to cease immediately. Three inspections were conducted in 2019 and all found that the primary function was the sale of alcoholic beverages, minors were restricted and dancing was taking place in the public space.
- [54] Photographs taken inside the venue and from the website were referenced that highlight the existing conditions. They demonstrate the lack of food service and the online advertising shows bottle service and the DJ booth.
- [55] A photograph taken on April 12, 2019, illustrates that the DJ booth is not an enclosed space. Public access is provided on both sides of the seating. Even though the Nightclub Use may not be occurring at all times, an approved development permit for a Nightclub Use is required for the Use to be operating at any time.
- [56] The Order required that the operation of the Bar and Neighbourhood Pub cease until such time that the Property is in compliance with the approved plan and the conditions imposed on the approved development permit.
- [57] The plan that was approved on May 29, 2017 includes a public space of 118 square metres. The floor plan shows that the public space included the dining room and bathroom. Areas not included were the bar, audio visual room, a portion of the entrance

way, coat check area, cooler, storage rooms and a portion of the corridor leading to the washrooms.

- [58] A revised floor plan was submitted on July 7, 2017 and stamped by the Development Officer. This plan refers to the public space area as 95 square metres. It appears that the coat room and reception area were redesigned, the size of the bar area was reduced, the seating plan was revised, washroom, kitchen and the audio visual room were redesigned. However, it could not be determined how the public space was calculated based on this floor plan. The Development Officer did not revise the development permit to reflect a new public space area.
- [59] In September 2017, a second set of revised drawings was submitted and reviewed and stamped by a Safety Codes Officer but not stamped by the Development Officer. It could not be determined if the Development Officer viewed these changes to the floor plan. This set of drawings identified the public space as 114.2 square metres, excluding the audio visual room, two circulation space areas, reception and the coat check area and an existing corridor adjacent to the washroom. This plan highlights the fact that the approved July 7, 2017 plan may not have reflected the public space accurately.
- [60] An inspection conducted on April 12, 2019, determined that the audio visual room included on the approved floor plan did not exist and there was continuous seating behind the DJ booth. The approval was for 118 square metres of public space and did not include the audio visual room as part of that calculation. If the audio visual room is included in calculation of public space, it exceeds 120 square metres. Photographs taken on April 12, 2019 were referenced to illustrate that the audio visual room does not exist. The approved plan includes two raised booths on either side of the audio visual room. However, the photograph clearly illustrates that seating extends along the entire length of the wall. This represents a contravention of the approved development permit and a material misrepresentation of the application, pursuant to section 17.2 of the *Edmonton Zoning Bylaw*.
- [61] The three floor plans were compared. The original approved plans include an audio visual room that was never constructed. Even though the revised floor plan submitted in September 2017 was not stamped by the Development Officer, it highlights the fact that the public space is 114.2 square metres and not 95 square metres as indicated on floor plans that were submitted in July 2017. Therefore, the public space area may not have been accurately reflected on the floor plan that was submitted in July 2017.
- [62] In response to the Order, a development permit application was made on May 31, 2019, to change the Bar and Neighbourhood Pub Use to a Nightclub Use. The development permit application was refused on June 10, 2019. The Development Officer determined that the proposed Use is a Nightclub which is a Discretionary Use in the Urban Warehouse Zone. The proposed development was refused because it does not comply with the land use policies contained in the Capital City Downtown Plan and the proposed public space was calculated to be 162.7 square metres. It was the opinion of the Development Officer that the proposed Nightclub Use will have an undue negative

impact on the adjacent and surrounding residential land uses with respect to noise and general disruption. It was noted that the refused floor plan is identical to the floor plan that was approved on July 7, 2017.

- [63] It was determined that the development permit contained a misrepresentation of the public space area. At times the entertainment facilities are greater than 10 percent of the floor area, which results in a Nightclub Use. As such the Capital City Downtown Plan encourages regulating and controlling similar Uses to protect downtown residential areas from negative impacts.
- [64] Mr. Gunther indicated that the Nightclub Use goes beyond the calculation of floor area and because the audio visual room was not constructed in accordance with the approved plans, this creates a specific problem because there is a threshold that determines the difference between a Permitted and a Discretionary Use. The inclusion of the audio visual room as non-public or public space is the determining factor as to whether this is a Permitted or Discretionary Use.
- [65] Ms. Peacock and Mr. Gunther provided the following information in response to questions from the Board:
- a) None of the inspections found that the occupancy limit of 100 was being exceeded.
 - b) The noise complaints are relevant because noise can impact land use. The Court of Appeal has determined that it is incorrect for the Board to find that noise is a community standard issue. It is overly simplistic to say that noise is not a land use planning issue because one of the primary goals of land use planning is to ensure compatibility of land uses. One of the main reasons that two Uses might conflict is because the residential component is disturbed by what is happening with the commercial component. Noise is tied to land use. In this case, the community has identified a land use conflict because of what is happening on the subject site.
 - c) The definition of Nightclub includes a Dance Club which comes with the expectation of generated noise, excitement and loud music. The definition of a Bar and Neighbourhood Pub includes a beverage room or a cocktail lounge and although alcohol is served, there is not the expectation for loud dance music that is permissible in the Nightclub Use. A true Bar and Neighbourhood Pub would not generate the same level of noise as a Nightclub.
 - d) Noise is addressed in the Community Standards Bylaw. Noise bylaw complaints are dealt with under a separate process but a Nightclub cannot operate from this location especially without a valid development permit.
 - e) It was acknowledged that the definitions for a Bar and Neighbourhood Pub and a Nightclub are very similar. However, City Council has listed them as separate Uses. Therefore, it is recognized that there are different land use impacts for each Use. The Development Officer is also required to classify a proposed development according to

what they see as most reflective of the proposed Use. The ultimate role of the Development Officer is to slot the proposed Use into the most appropriate category.

- f) A Nightclub includes a Bar and Neighbourhood Pub in the definition but the inverse is not true. The definition of Bar and Neighbourhood Pub Use does not include a Nightclub. This suggests that a Nightclub is a more intense and possibly disharmonious land use when dealing with land use conflicts.
- g) The most obvious difference between a Bar and Neighbourhood Pub and a Nightclub is the 10 percent of floor area used for entertainment purposes. This is referenced in the definition of a Nightclub. Typically a dance floor or area used for dancing is considered as an area that would constitute an entertainment facility. The Board will have to interpret based on the evidence provided whether or not this constitutes an entertainment facility.
- h) Based on the photographs and the information obtained from the website, it has been determined that virtually all of the public space in this establishment appears to be used not only as an entertainment facility with a DJ booth and for dancing but also as a Nightclub because of the listed Uses included in the definition. The business model will direct whether or not people come to an establishment to dance and party or to sit at a table to have a drink. It was Mr. Gunther's opinion that it was the intention of City Council by setting out these two Uses to recognize that there can be facilities located in the vibrant downtown community or in other zones that may be in close proximity to a residential zone where people can go to have a drink. However, because the definition of a Nightclub includes dance clubs and cabarets, Uses with higher land use impacts and a higher potential to create land use conflicts, a Nightclub is listed a Discretionary Use or in some instances not even listed as a Use in a Zone. This is indicative of the direction of Council to ensure that a Nightclub, which will generate more noise and offsite impacts to neighbours, is not issued a development permit as of right.
- i) In this instance, a development permit was issued for a Bar and Neighbourhood Pub Use at this location based on the information that was provided by the Applicant because it complied with the definition for that Use. However, after the doors were opened, the establishment was decked out with neon lights and loud music and was operating as a dance club, which is defined as Nightclub Use which has created significant land use conflicts. It is the City's concern that what is occurring at this establishment on a nightly basis is not what the Applicant applied for and not what the neighbours signed up for when they purchased their condominium units in the adjacent residential towers.
- j) Operating hours are regulated by AGLC. Minors are prohibited from lawfully using a Nightclub at all while they are only prohibited during limited hours from accessing a Bar and Neighbourhood Pub. Noise is inherent in a Nightclub Use which includes the operation of a cabaret or a dance club in contrast to a Bar and Neighbourhood Pub

where people come to sit and have a drink. It is conceivable that excessive noise could be generated by a Bar and Neighbourhood Pub but it is not the expectation.

- k) There is a difference between the Use classes that goes beyond the requirement that more than 10 percent of the public space is used as an entertainment area. In this case, it is the City's position that 36 percent of the public space is being used as entertainment area. In order to comply with the development permit that was issued for a Bar and Neighborhood Pub, the amount of public space being used as an entertainment area needs to be reduced and the establishment has to operate in a manner that is typical of listed Uses contained in the definition of a Bar and Neighborhood Pub as opposed to the Uses listed in the definition of a Nightclub.
- l) The issue goes beyond what percentage of the public space is being as dance floor area. There is a fundamental characterization of the Use that is taking place at this location that needs to be made by the Board. The Board must then determine whether the premise is being operated as a Bar and Neighbourhood Pub or a Nightclub. If the Board finds that this is a Nightclub Use, then the Stop Order must be upheld.
- m) It was Mr. Gunther's opinion that entertainment is not defined in the *Edmonton Zoning Bylaw* in order to provide flexibility. This was done intentionally because if a list of activities to define entertainment was included and nothing else could be considered as entertainment it would be difficult to capture every eventuality. A Bar and Neighbourhood Pub may have a dance floor but is usually not the central focus of the business and in order to comply with the definition of the Use, the dance floor cannot be more than 10 percent of the public space.
- n) Based on a review of the inspection photographs, the only seating provided is bench seating that is located along the perimeter of the room and there is an area in the middle of the room to allow dancing. The room is set up intentionally to play loud music and provide room to dance. Therefore, the best way to define the activities that are occurring in this facility is to call it a dance club.
- o) It was acknowledged that a Bar and Neighbourhood Pub may on occasion offer live music on a weekend, but the intended Use is not a Nightclub or Cabaret on a night after night basis.
- p) Mr. Welch, Development Officer, who reviewed several of the development permit applications for this establishment explained that the drawings that were approved and stamped in July 2017 included areas that were meant to provide table seating but to the best of his recollection, the tables were never installed.
- q) Mr. Hogberg, the Development Compliance Officer who inspected the premises on April 12, 2019, confirmed based on his recollection that stool seating was not provided along the bar and there was not table seating in that part of the room. The main seating was located along the north wall close to the DJ booth and along the back wall of the facility. Tables were also located along the back wall of the room.

iii) Position of Affected Property Owners in Opposition to the Appellant:

Mr. R. Noce, Legal Counsel, representing an affected property owner, Ms. Cairo:

- [66] Ms. Cairo owns a condo unit on the second floor of the Quest building located at 10338 - 105 Street. The Quest building has a two storey podium. The main floor has commercial units and the second floor has residential units.
- [67] Mr. Noce supplied a series of pictures, marked *Exhibit A*, which demonstrate the location of his client's property and balcony in relation to the development. The properties share a party wall and Ms. Cairo's balcony overlooks the entrance to Entendre.
- [68] Ms. Cairo is the most directly impacted and affected property owner from the use that is occurring on this site.
- [69] Bars and Neighbourhood Pubs, for less than 100 occupants and 120 square metres of Public Space, is a Permitted Use in the (UW) Urban Warehouse Zone.
- [70] Bars and Neighbourhood Pubs, for more than 100 occupants and 120 square metres of Public Space, is a Discretionary Use in the (UW) Urban Warehouse Zone.
- [71] However, in their opinion, the operations and marketing are more akin to a Nightclub, which is a Discretionary Use in the (UW) Urban Warehouse Zone.
- [72] There have been numerous complaints and fines levied. However, the noise pollution carries on unabated.
- [73] The "square metres" of the Public Space is relevant. If the Board determined the development is utilizing more public space than approved under the development permit, the Board is obligated to uphold the Stop Order.
- [74] The permit original issued was issued as a Class A permit. No one received notice of the approval of that development permit and therefore no one had the ability to challenge that permit. At that time, the information the City had supported that decision and neighbouring property owners would not have successfully appealed a Class A permit.
- [75] If the Board upholds the Stop Order, then the Appellants can reapply for a Discretionary Use permit. Notices will be sent and the appeal can come before the Board again in one way or another.
- [76] If the Board finds the Appellants are not operating within their Development Permit in terms of Public Space, it is not necessary for the Board to consider whether this is a Nightclub Use. The Board should only look at the Nightclub Use if they find the Appellants are operating within the proper Public Space requirements.

- [77] The evidence put forward by the City as a result of inspections clearly identifies the operating Use as a Nightclub. The Appellants did not address their operations, hours of operation, the DJ or the dance floor.
- [78] The impact on Ms. Cairo's quality of life has been significant. She has only been able to live in her condominium for a short period of time because of the impacts of this business. She is paying the mortgage on her condominium but rents and lives at another property. She has been unable to sell or rent her condominium unit but has made the decision not to reside in her condo unit because her quality of life means more than the money she is losing on this building.
- [79] Ms. Cairo looked forward to living downtown. When she heard about the proposed development, she wrote a letter to the developer and expressed concerns about property value. She was assured that it was not a nightclub. The day after the development opened, her son moved out. She made numerous complaints, drove across the city and slept elsewhere. A renter lasted one night. There have been no potential buyers. She has lost all of her desire for wanting to live downtown. She cannot live there, she cannot rent it, and she cannot sell it. She has lost her home and the value of her home.
- [80] It is clear from the evidence, that this is a Nightclub. They originally applied for a Nightclub that was refused, but they still went ahead and opened a Nightclub.
- [81] The noise complaints and fines being levied have not been significant enough to change their operation.
- [82] The Community Standards and License Appeal Committee will deal with noise issues, but only if the proposed development is complying with *Edmonton Zoning Bylaw* requirements.
- [83] Mr. Noce adopts the City's analysis.
- [84] Mr. Noce concluded that the Board has a two prong test. First of all, it must be determined whether or not the threshold for the Bar and Neighbourhood Pub exceeds that of a Permitted Use. If the Board finds that this establishment exceeds those requirements, then the Stop Order must be upheld, the business is at an end and they must reapply for a development permit that reflects the use of the site. The issue of Nightclub is immaterial at that point. However, if the threshold is below that of a Permitted Use, is the business operating as a Nightclub. If so, then offside and Stop Order must be upheld.
- Ms. J. Wanke*
- [85] Ms. Wanke is the President of the Condo Association for the building located across the street to the east.
- [86] The Appellants are violating a Class A permit. If they applied properly, it would have been before the Board with proper comments.
- [87] The *Edmonton Zoning Bylaw* definitions are poor.
- [88] The new arena impacts their neighbourhood less than this business.

[89] They are constantly dealing with people and the police.

[90] She deals with complaints daily.

[91] The impact of the development on the neighbourhood is drastic

Ms. D. Mann

[92] Ms. Mann is a neighbour of Ms. Cairo. She has felt the same impacts as Ms. Cairo, but not to the same level because she is clearly the most impacted neighbour. She estimates that her unit has been devalued by \$100,000.00. The development is having a huge effect on their lives.

Mr. J. Panesar

[93] Mr. Panesar lives at street level in a building located across the street from the subject site.

[94] He has lived downtown for 12 years but stays at his parent's house on the weekends.

[95] The nightlife typically settles down by midnight, even during the playoff runs.

[96] The original application was for a large development. There are two operations operating from this location with a shared kitchen.

[97] You might not hear the music, but you can feel the music

[98] When there are fewer people at a smaller establishment, there is more movement, nightclub hopping. Once they stand outside, it is the city's problem.

[99] One small group of people is impacting the rights of so many others.

[100] You would expect entertainment district property values to increase but that has not been the case in this area.

[101] There are longer line-ups because of the smaller capacity. There is increased ingress and egress. He would be curious to know the average amount of occupants that come and go.

[102] The business opens at 11 p.m. and remains open until 3 a.m. They are advertising as a Nightclub. Videos are available from nightclub promoters.

[103] He has been inside before. It is not a restaurant. There is coat check, security, greeted at the bar, and no tables.

v) *Rebuttal of the Appellant*

[104] The photographs submitted were taken after the business was closed. Some were advertising photos. The tables are moved nightly.

- [105] They have an agreement with the restaurant. They have an extensive food menu. This was approved by Alberta Health Services and AGLC. Many Bars and Neighbourhood Pubs have bottle service and DJs.
- [106] The Appellants referred to the three drawings that were submitted. The first drawings show an AV room put in place by architect to maximize space. The second drawing was made to comply with bathroom regulations. Doors cannot swing into fire evacuation. They removed the AV room, which was stamped by the development team. The third drawings included more revisions to the washroom but no other changes were made. The contractor built according to the third set of drawings which are not much different than the initial drawings that were approved.
- [107] When they were inspected for business licence, would they not have noticed that they were using 40 square metres of additional space? That is a huge discrepancy.
- [108] Why are they are not calculating the public space based on the most recent approved drawings? They disagree with the City's calculation.
- [109] Some restaurants have a DJ all the time and offer bottle service. They have a full service menu and customers sit down. Some nights the DJ is better than others and customers want to dance. How do you stop customers who get up at their table and want to dance?
- [110] There are three tables on the dance floor that are not moved. The bar stools are moved after 10:00 p.m. to allow an egress path.
- [111] Most of the inspections were done at night. There are multiple other establishments that being operated exactly the same way.
- [112] They would have liked to been given the opportunity to address the issues and remedy the problems.
- [113] The Appellants were asked how this development is different than a Nightclub. They offer full food service and wine is offered. Their first priority is to have people seated and book functions like stags, stagettes, and dinners.
- [114] The definitions of Bar and Neighbourhood Pub and Nightclub are very similar.
- [115] They acknowledged that lineups occur but they try to control them and do turn people away in an attempt to limit the noise, and limit the number of customers that are allowed outside to smoke. They work with the Public Service Compliance Team. It is hard to follow customers to their cars to ensure that they are quiet. There is an empty lot nearby that has been turned into a parking lot. Even if they are closed, noise will be generated by other businesses.
- [116] They have minimized hours on some days because of financial constraints.
- [117] They have tried to minimize issues with the neighbourhood and want to create jobs as finances allow.

[118] The following information was provided in response to questions from the Board:

- a) They open at 8 o'clock Tuesday through Friday. They have private bookings for birthdays. The business closes at 2:00 a.m. Sometimes they close at midnight or 1:00 a.m. depending on business.
- b) Minors are allowed and they book children's birthday parties. Minors are not allowed after 8:00 p.m.
- c) They are subject to AGLC regulations. AGLC requires them to ID all of their customers and they have a scanning system for safety.
- d) He talked to some neighbours after the ticket was issued. Some of them were contacted in an attempt to resolve the problems.
- e) Signs have been installed to control patrons outside. Volume levels are controlled. Bass decibels have been minimized. There is sound-proofing, two layers of drywall with foam, a two inch gap and then 36 inches between the their building and the infrastructure installed on the Quest Tower.
- f) The Public Service Compliance Team has measured the noise level and they have never exceeded the maximum allowable limit. They have complete control over the level of the music and have changed the direction of the speakers away from the wall next to the Quest Tower. They have paid for additional sound proofing along the wall shared with Quest.

Mr. Noce inquired whether the restaurant is closed and for sale.

[119] The Appellants confirmed that the restaurant is for sale and it is closed but the kitchen is still operational for Entendre. They still have a full service kitchen to facilitate the full service menu. It is possible that Entendre may explore more of a restaurant use in the future.

Decision

[120] The appeal is **DENIED** and the Stop Order is **UPHELD**.

Reasons for Decision

[121] Based on the materials before it, the Board is satisfied that the Stop Order was issued pursuant to section 645(1) of the *Municipal Government Act* by a duly authorized Development Compliance Officer and in compliance with the procedural requirements of the *Municipal Government Act*.

[122] In 2017, a Development Permit was granted to the Appellants as a Class A permit because it was an application to operate a Bar and Neighbourhood Pub Use for less than

100 occupants and 120 square metres of Public Space, which is a Permitted Use in the (UW) Urban Warehouse Zone and no variances were required.

- [123] After reviewing the evidence provided by the City of Edmonton and hearing the submission on this point by the Appellants, the Board is satisfied that an excess of 120 square metres of Public Space was being used at the time the Stop Order was issued.
- [124] The drawings attached to the development permit application identified 118 square meters of Public Space.
- [125] The Board notes that that calculation of Public Space did not include what was then designated as an audio visual room. That room was never constructed and instead was turned into a DJ station. That DJ station is built in front of bench seating which would be physically accessible to patrons of the establishment. Given that the DJ station is in excess of 7 square metres, for this reason alone, the Public Space in this development is in excess of 120 square meters and therefore was not a Bar and Neighbourhood Pub with less than 120 square metres of Public Space which was approved by the Development Authority as a Permitted Use.
- [126] The Board acknowledges that a few months after the Development Permit was granted, the Development Authority, somewhat perplexingly, stamped a revised set of drawings. However, the revised set of drawings did not reflect what existed at this site. The audio visual room was removed from the revised drawings but it clearly showed an elevated platform with no seating behind it which would remove the DJ station room from the Public Space calculation. The development was not constructed according to the revised plan because there is continuous seating located behind the DJ station. This is clearly Public Space which should have been included in the calculation of Public Space.
- [127] For this reason alone, the Stop Order must be upheld because the development does not comply with the approved Development Permit.
- [128] An additional reason to uphold the Stop Order is that the site is not being operated as a Bar and Neighbourhood Pub but rather as a Nightclub.
- [129] Under Section 7.4(6) of the *Edmonton Zoning Bylaw*, Bars and Neighbourhood Pubs is defined as:
- Development where the primary purpose of the facility is the sale of alcoholic beverages to the public, for consumption within the premises or off the Site. This Use typically has a limited menu and minors are prohibited from patronizing the establishment during at least some portion of the hours of operation. Typical Uses include neighbourhood pubs, bars, and cocktail lounges. This Use does not include Cannabis Lounges.
- [130] This definition is best interpreted in conjunction with another use definition being that of a Nightclub.

[131] Under Section 7.4(39) of the *Edmonton Zoning Bylaw*, a Nightclub is defined as:

Development where the primary purpose of the facility is the sale of alcoholic beverages to the public, for consumption within the premises or off the Site, in a facility where entertainment facilities take up more than 10 percent of the Floor Area. This Use typically has a limited menu from a partially equipped kitchen/preparation area and prohibits minors from lawfully utilizing the facility. Typical Uses include dance clubs, cabarets, nightclubs, lounges, neighbourhood pubs and bars, beverage rooms, and cocktail lounges. This Use does not include Cannabis Lounges.

[132] A Nightclub is the appropriate Use classification to be used when applying for a dance club, cabaret or nightclub.

[133] After hearing all of the evidence, the Board finds that the actual use of this site is that of a Nightclub or a dance club for the following reasons:

- a) The evidence provided by the Appellant was that the business does not open prior to 8:00 p.m. and regularly closes at 2:00 a.m. These business hours are more in line with a Nightclub Use and not a Bar and Neighbourhood Pubs Use.
- b) There are routine lineups and every person is required to provide identification upon entry. This practice is more common place for a Nightclub rather than a Bar and Neighbourhood Pub.
- c) The City of Edmonton provided and the Appellant acknowledged that their advertising materials show wall to wall people, no one sitting, everyone standing, surrounding the DJ station. They acknowledged that dancing is routine and the advertising they produced illustrates that this establishment is operating as more of a Nightclub Use than a Bar and Neighbourhood Pub Use.
- d) Based on a review of the photographic evidence that was provided in combination with the advertising evidence obtained, it has been determined that almost all of the public space is used for dancing which can be considered as an entertainment facility that exceeds the maximum allowable 10 percent threshold for such a facility. Therefore, the business is operating as a Nightclub, pursuant to section 7.4(39) of the *Edmonton Zoning Bylaw*.
- e) The Board acknowledges that the difference between a Bar and Neighbourhood Pub Use and a Nightclub Use is not precise and that the definitions are certainly capable of overlap. However, when all of the evidence is considered in its totality, the Board finds that the subject site is predominantly being operated as a Nightclub and not as a Bar and Neighbourhood Pub.

[134] For these reasons, the Board finds that the Stop Order was validly issued and the appeal is denied.

Mr. I. Wachowicz, Chair
Subdivision and Development Appeal Board

Board members in attendance: Mr. V. Laberge, Ms. S. LaPerle, Mr. R. Hobson, Ms. L. Gibson

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 the Sustainable Development Department, 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.