



**EDMONTON
TRIBUNALS**

*Subdivision &
Development
Appeal Board*

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Date: March 28, 2018
Project Number: 273063464-001
File Number: SDAB-D-18-040

Notice of Decision

- [1] On March 14, 2018, the Subdivision and Development Appeal Board (the “Board”) heard an appeal that was filed on **February 15, 2018**. The appeal concerned the decision of the Development Authority, issued on February 14, 2018 to refuse the following development:

Construct and operate a temporary, surface Non-accessory Parking Lot (58 vehicular parking stalls, valid for up to 6 months from March 1, 2018 to August 31, 2018).

- [2] The subject property is on Plan B3 Blk 15 Lot 81, located at 11540 - Jasper Avenue NW and Plan B3 Blk 15 Lots 82-83, located at 11558 - Jasper Avenue NW, within the DC1 Direct Development Control Provision (Area 8 of the Oliver Area Redevelopment Plan). The Oliver Area Redevelopment Plan applies to the subject property.
- [3] The following documents were received prior to the hearing and form part of the record:
- A copy of the refused Development Permit;
 - The Development Officer’s written submission;
 - The Appellant’s written submissions;
 - Two petitions and one letter in support submitted by the Appellant; and
 - Letters in support of the proposed development from a neighbouring property owner and an adjacent business.
- [4] The following exhibits were presented during the hearing and form part of the record:
- Exhibit A – A Google aerial map of the area submitted by the Appellant; and
 - Exhibit B – A Landscaping Site Plan submitted by the Appellant.

Preliminary Matters

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

Summary of Hearing

- i) *Position of Ms. K. Petrin, speaking on behalf of the Appellant, Wheaton Properties, who was accompanied by Mr. G. Gardner*
- [8] The residents and tenants of the LeMarchand Mansion and Tower (“LeMarchand”) located south of 100 Avenue and east of 116 Street require a parking lot as their underground parkade is currently under construction, with an estimated completion date of August 31, 2018. The construction has caused the displacement of 210 vehicles.
- [9] Many of the residents of LeMarchand are elderly and concerned about where they will park during the construction period.
- [10] The intent is for the parking lot to be accessory to the operations and residences of the LeMarchand, while LeMarchand’s parkade undergoes renovations. The proposed parking lot will provide for 58 parking spaces.
- [11] The subject site is less than a 3 minute walk from LeMarchand. Ms. Petrin referred to a Google aerial map showing the location of the subject site and the location of the LeMarchand (Exhibit A).
- [12] The Appellants have not been able to locate other, alternative parking closer to LeMarchand. In Ms. Petrin’s opinion, this constitutes a hardship.
- [13] The parking lot will not be used as a paid parking lot.
- [14] Access to the parking lot will be from the rear lane on the north side of the site and will not interfere with traffic on Jasper Avenue.
- [15] Gates or lights that could have a negative impact on neighbouring properties will not be installed.

- [16] On-site signage will be installed identifying the private parking area. The parking lot will have regular security personnel monitoring the site.
- [17] The Appellants are proposing no additional landscaping for the site, other than planters, as it is only being used for six months.
- [18] Ms. Petrin attended an Oliver Community League Civics Committee meeting where concerns were heard regarding the congestion of on-street parking. The proposed development is an interim solution to find secure parking rather than congesting on-street parking. She had three discussions with the Oliver Community League regarding parking lots and, although they are generally opposed to surface parking developments in Oliver, they have remained neutral on the proposed development.
- [19] The Appellants referenced their petitions and indicated that 49 signatures in support from occupants of LeMarchand.
- [20] The property is located within the Oliver Area Redevelopment Plan (the “ARP”), which is a long range plan that sets policies for redevelopment of an established community. This application does not propose a redevelopment project but rather a temporary-interim use. The ARP does not contemplate appropriate or interim uses.
- [21] Section 54.2(2)(b) of the *Edmonton Zoning Bylaw* (the *Bylaw*) allows for accessory parking within 120 metres from the subject site. Ms. Petrin opined that the Development Officer had the authority to vary this development regulation.
- [22] Ms. Petrin and Mr. Gardner provided the following responses to questions from the Board:
- a. They confirmed that the subject site is owned by Canterra Developments. They understand that Canterra Developments’ long term plan is to build a mixed use development on the subject site; however, the subject site is currently vacant and not being used.
 - b. The subject site is located approximately 250 to 255 metres from the LeMarchand.
 - c. The company carrying out the renovations on the parkade at LeMarchand has provided August 31, 2018 as an estimated completion date, however, due to the variable nature of construction projects, the renovation project may not be completed until a later date.
 - d. In Ms. Petrin’s opinion, the interpretation of the ARP is not applicable to the proposed development as it will be used temporarily and the temporary parking lot will not prevent the long-term redevelopment of the subject site.

- e. They confirmed that they applied for a Non-accessory Parking Lot and the Development Officer reviewed the proposed development as Non-accessory Parking. Ms. Petrin's understanding is that the Non-accessory Use is usually applied to commercial parking lots, like those operated by Impark. They thought their proposed use was better classified as an accessory parking lot, but the Development Officer advised them that they should not apply for permit for an accessory parking lot with a variance in the distance as prescribed in s 54.2(2)(b) of the *Bylaw*.
- f. The Appellants will adopt safeguards to ensure that only residents and commercial tenants of LeMarchand make use of the parking on the subject site. Vehicles will receive a pass for the subject site and the building manager will register the license plates to ensure that they are allowed to park at the site. If cars are parked illegally they will receive a written warning and then will be towed.
- g. With regard to the Development Officer's suggested conditions, they indicated that most of them were acceptable, but they would oppose the condition requiring outdoor lighting to be installed as the parking lot will be temporary.
- h. They confirmed that they will place planters on the site for the duration the parking lot is used. They provided the Board with a landscaping Site Plan showing the five locations of the temporary proposed planters for the subject site (Exhibit B).

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

[23] The Development Officer provided a written submission and did not attend the hearing.

Decision

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

1. The Development Permit is valid from March 29, 2018 to December 31, 2018 or completion of LeMarchand's parkade renovation, whichever occurs earlier.
2. Landscaping shall be provided at the locations indicated on the Landscaping Plan, submitted as Exhibit B. The landscaping shall consist of temporary planters situated at each of the 5 locations noted on Exhibit B.

3. Continuous raised or pre-cast curbing of not less than 100 mm in height shall be provided adjacent to streets and required landscaped areas, 600 mm from the front of the parking stall. Concrete curb stops shall be placed to ensure that vehicles do not overhang boulevards, sidewalks, or required landscaped areas. Curbing shall also be required to clearly demarcate the required portion of Driveway leading to an internal roadway, aisle, ramp, parking space or loading space. (Reference: Section 54.6(3)(e) of the Edmonton Zoning Bylaw 12800).
4. Where continuing curbs are used as wheel stops, the measured size of parking spaces shall be reduced 1.0 m in length than otherwise required. In such instances, the parking layout should allow for the vehicle to overhang the curb by 1.0 m and such overhang areas must be clear of all obstructions (Signs, shrubs, trees, etc.) and shall not be regarded as a required landscaped area. (Reference: Section 54.6(3)(f) of the Edmonton Zoning Bylaw 12800).
5. Access from the site to 116 Street and Jasper Avenue exists but will not be permitted. Due to the proposed temporary use and nature of the development, concrete barriers must be provided between the parking stalls and the roadway to restrict access. The barriers must be located on private property.
6. Proposed access to the alley is acceptable to Subdivision Planning and a curb crossing permit is not required for alley access. However, there are existing power poles/utilities in the alley that will interfere with the proposed accesses. In order to avoid conflict with the existing utilities, the proposed accesses must be narrowed to a minimum 5 m wide to provide separate inbound and outbound accesses for one-way operation. The accesses must be properly signed indicating the operation of the access. With this, the minimum drive aisles must be maintained at a width of 7 m to accommodate 90 degree parking. Should relocation of the pole/guy-wire be required, all costs associated with relocation must be borne by the owner/applicant. The applicant should contact Ron Hewitt (780-412-3128) of EPCOR Customer Engineering for more information.
7. Permanent objects including signage, barriers, etc., must NOT encroach into or over/under road right-of-way.
8. There may be utilities within road right-of-way not specified that must be considered during construction. The owner/applicant is responsible for the location of all underground and above ground utilities and maintaining required clearances as specified by the utility companies. Alberta One-Call (1-800-242-3447) and Shaw Cable (1-866-344-7429; www.digshaw.ca) should be contacted at least two weeks prior to the work beginning to have utilities located. Any costs associated with relocations and/or removals shall be at the expense of the owner/applicant.

9. Any hoarding or construction taking place on road right-of-way requires an OSCAM (On-Street Construction and Maintenance) permit. OSCAM permit applications require Transportation Management Plan (TMP) information. The TMP must include:
 - the start/finish date of project;
 - accommodation of pedestrians and vehicles during construction;
 - confirmation of lay down area within legal road right of way if required; and
 - to confirm if crossing the sidewalk and/or boulevard is required to temporarily access the site.

10. It should be noted that the hoarding must not damage boulevard trees. The owner or Prime Contractor must apply for an OSCAM online at:
https://www.edmonton.ca/business_economy/licences_permits/oscam-permit-request.aspx
<https://www.edmonton.ca/documents/ConstructionSafety.pdf>

11. Any alley, sidewalk or boulevard damage occurring as a result of construction traffic must be restored to the satisfaction of Development Inspections, as per Section 15.5(f) of the Zoning Bylaw. All expenses incurred for repair are to be borne by the owner.

Subdivision Planning provide the following advisements:

1. The section of Jasper Avenue from 109 Street to 124 Street is slated for full reconstruction beginning in 2019 which will include improvements to the streetscape of Jasper Avenue by creating a multi-purpose environment. Please contact Satya Gadidasu at 780-496-2407 with the Imagine Jasper Avenue Revitalization group for more information.
2. Permanent access locations and designs will be further reviewed with the future submission of a development application for the site.
3. There is an existing bus stop on 116 Street adjacent to the site.

NOTES:

1. All signage including for hoarding shall require a separate Development Application.
2. The applicant/owner is responsible for ensuring that the proposed development does not encroach on or impair the operation of any existing hydrants and/or valves that are located either in the boulevard, sidewalk, or the street. If a conflict exists then it will be responsibility of the applicant/owner to rectify the problem by:
 - 1) redesign of the proposed development followed by a resubmission for approval to the City or,

- 2) relocation of the utility which is to be done by the City staff at the sole expense of the applicant/owner.

For further information, please contact the Drainage Branch of the Asset Management.

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

1. The minimum 120-metre requirement between two remote Sites for Accessory parking per section 54.2(2)(b) is waived.
2. The minimum requirement of two landscaped islands per section 54.2(3)(b) is waived.
3. The requirement for parking spaces for the disabled per section 54.1(3) is waived.

Reasons for Decision

[26] Section 685(4) of the *Municipal Government Act* (the *Act*) states:

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

...

(b) is made by a development authority, the appeal is limited to whether the development authority followed the directions of council, and if the subdivision and development appeal board finds that the development authority did not follow the directions it may, in accordance with the directions, substitute its decision for the development authority's decision.

Did the Development Authority Follow the Directions of Council?

[27] The Board cannot overturn a decision of the Development Authority unless it finds that the Development Authority failed to follow the directions of Council. The Board finds that the Development Authority failed to follow the directions of Council when the Development Officer characterized the proposed development as a Non-accessory Parking Use.

[28] Section 7.4(41) of the *Edmonton Zoning Bylaw* (the *Bylaw*) defines Non-accessory Parking as a:

development providing vehicular parking which is not primarily intended for the Use of residents, employees or clients of a particular development. Typical Uses include surface parking lots and parking structures located above or below Grade.

- [29] The Board heard evidence that the proposed development is intended to provide parking to residents and tenants of LeMarchand during the parkade renovation project. Section 50.1 of the *Bylaw* stipulates that Accessory Use developments are allowed on sites where they are Accessory to a Principal Use that would also be allowed on that site. In this case, the Accessory Parking is being provided on a site located in Area 8 of the Oliver Area Redevelopment Plan (the “ARP”) and LeMarchand is located in Area 9 of the ARP. These listed uses under the Direct Control Zones governing these two areas are essentially the same, but for a few differences in the allowed sign types. None of these differences are material to this application.
- [30] When asked why they applied for a Non-accessory Parking permit as opposed to an Accessory parking permit, they stated that they were acting on the advice of the Development Officer for the appropriate Use. The Development Officer indicated that an Accessory parking permit would not be considered.
- [31] The Development Officer failed to follow the directions of Council when it characterized this proposed development as Non-Accessory Parking; the proposed development should have been for an Accessory Parking Use.

The Board’s Scope for “Substitute” Decision-Making in Direct Control Districts

- [32] Once the Board has established that the Development Officer failed to follow the directions of Council, the Board can “substitute its decision for the Development Authority’s decision”. When exercising this substitute decision-making power, the Board must exercise the same discretionary powers as were available to the Development Officer under the Direct Control provisions. The Alberta Court of Appeal made this point of law clear in its recent decision, *Garneau Community League v Edmonton (City)*, 2017 ABCA 374 at para 29:
- To the extent that council’s directions gave a development authority the ability to consider “the merits of the development”, the subdivision and development appeal board has similar authority. However, there is no basis for a subdivision and development appeal board to have broader powers on appeal than the development authority with respect to land in a direct control district.
- [33] The Development Authority provided a number of grounds for refusing to grant the development permit – some of these grounds related to the Development Authority’s determination that the proposed development was inconsistent with the objectives and policies of the ARP, other grounds related to the proposed development’s non-compliance with the *Bylaw’s* Development Regulations on parking and landscaping.
- [34] The *Bylaw* stipulates the scope of the Development Authority’s ability to consider the merits of the development, having regard for the objectives and policies of the ARP and the Development Regulations in the *Bylaw*. The Board must now exercise this scope of authority afresh.

Objectives and Policies in the ARP

[35] With respect to the objectives and policies of the ARP, section 710.4(3) of the *Bylaw* for (DC1) Direct Development Control Provisions that states:

a development **may** also be evaluated with respect to its compliance with:

- a. the objectives and policies of an applicable Statutory Plan;
- b. the General Regulations and Special Land Use Provisions of this Bylaw;
and
- c. the regulations of abutting Zones.

The language of this section is permissive, not mandatory, in that “a development **may** also be evaluated...” Section 28 of the *Interpretation Act*, RSA 2000, c I-8 specifies that “may shall be construed as permissive and empowering”, as contrasted with “shall”, which “is to be construed as imperative.”

[36] The Board accepts the submission from the Appellant that the objectives and policies in the ARP, which promote pedestrian-oriented developments, and discourage auto-oriented uses and Non-Accessory Parking lots on Jasper Avenue are intended to guide future redevelopment. The proposed development will be located on an otherwise vacant lot and the proposed development is a short-term, Accessory Parking lot. Having regard for the short-term nature of the development and the current state of the subject Site, the Board is satisfied that this development is not inconsistent with the objectives and policies in the ARP.

[37] In finding that the temporary parking lot is not inconsistent with the objectives and policies in the ARP, the Board notes that:

- ii)* the ARP discourages the use of Auto-oriented uses, they are not prohibited.
- iii)* The Oliver Community League was consulted regarding the proposed development and did not take a position with the appeal, even though the Oliver Community League is generally opposed to surface parking lots in the neighbourhood.

Varying the Development Regulations in the *Bylaw*

[38] Section 710.4(5) of the *Bylaw* stipulates that:

All regulations in this Bylaw shall apply to development in the Direct Development Control Provision, unless such regulations are specifically excluded or modified in a Direct Development Control Provision.

- [39] The Development Officer assessed the proposed development using the parking and landscaping development regulations found in the *Bylaw*, determined that variances were required, and refused to grant those variances.
- [40] In determining whether or not the Board can or should grant a variance to the Development Regulations, the Board cannot exercise its normal variance powers under section 687 of the *Act*, but rather, the Board is exercising the variance power of the Development Authority as set out in section 11 of the *Bylaw*. Like the parking and landscaping development regulations, the Development Officer's variance power under section 11 of the *Bylaw* is also incorporated into the (DC1) Direct Development Control Provision by section 710.4(4) of the *Bylaw*.
- [41] Section 11.3(1)(a) of the *Bylaw* limits the Boards' variance power:
- a variance shall be considered only in cases of unnecessary hardship or practical difficulties peculiar to the Use, character, or situation of land or a building, which are not generally common to other land in the same Zone;
- [42] The Board finds there is hardship. The temporary renovation project on the underground parkade at LeMarchand has displaced 210 vehicles. The density of development and intensity of use in the Oliver area means there is a lack of alternative parking available. The residents and commercial tenants of LeMarchand do not have adequate parking facilities during the renovation period. Additionally, the Appellant provided some evidence that the renovation project has intensified the use of on-street parking, which has the potential to negatively impact to neighbouring residents and business owners, and visitors to the area.
- [43] Having found a hardship, the Board is able to grant a variance to the development under section 11.2(1) of the *Bylaw* that states:
- The Development Officer may approve, with or without conditions as a Class B Discretionary Development, an enlargement, alteration or addition to a non-conforming building if the non-conforming building complies with the Uses prescribed for that land in this Bylaw and the proposed development would not, in their opinion:
- a. unduly interfere with the amenities of the neighbourhood; or
 - b. materially interfere with or affect the use, enjoyment or value of neighbouring properties.
- [44] The Board finds that this test is satisfied. The Board finds that the proposed development may have a positive impact on the neighbourhood by alleviating overflow parking from LeMarchand that is currently being relocated to on-street parking.

- [45] The Board notes that a long-term surface parking lot on the subject Site would have serious potential to unduly impact neighbouring properties and is inconsistent with the policies in the ARP. However, given the temporary nature of the proposed development, those concerns are alleviated.
- [46] The Development Officer provided the Board with information indicating that it had previously heard an appeal from a refused application to use the subject Site as Non-accessory Parking for a two-year period, SDAB-D-16-010. In that decision, the Board confirmed the Development Authority's refusal to issue the permit. The Board finds that the application before it today is materially different: the current application is for a significantly shorter time period, and for an Accessory Parking Use.
- [47] The Development Officer indicated that variances would be required for landscaping under section 55 of the *Bylaw* and the parking requirements under section 54.2(3)(b) of the *Bylaw*.
- [48] The Board accepts the Landscaping Plan that was submitted by the Appellant as *Exhibit B* in full satisfaction of its landscaping requires. Therefore, the Board is not granting a variance to section 55. The Board emphasizes that the Landscaping Plan is acceptable for this development due to the short-term, temporary nature of the proposed development.
- [49] The Board is granting three variances related to parking. Two of the variances were identified by the Development Officer and relate to the need for two landscaped islands, section 54.2(3)(b) and parking spaces for the disabled, section 54.1(3). Additionally, the Board has determined that the use in question is Accessory Parking and a variance is required to section 54.2(2)(b), which allows for Accessory Parking within 120 metres of the principal Use. Here, the Accessory Parking is located approximately 250 metres from the principal Use. The Board finds these three variances are warranted given the lack of available parking closer to LeMarchand and the short-term, temporary nature of the proposed development.
- [50] The Board has varied the initial application to allow the Use of the subject site as an Accessory parking lot until December 31, 2018 or the completion of the parkade renovations at the Site **whichever occurs earlier**. The Board has varied the development permit application in this way to recognize both the delay caused by the development permit application process and the evidence heard from the Appellant that parking renovations can be of an uncertain length.
- [51] The Board notes that no letters were received in opposition to the proposed development and no one appeared in opposition at the hearing.

[52] Based on the above, it is the opinion of the Board that the variances required by the proposed development will not unduly interfere with the amenities of the neighbourhood, and materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land.



A. Lund, Presiding Officer
Subdivision and Development Appeal Board

Board Members in Attendance: V. Laberge; A. Peterson; A. Bolstad; N. Hack

Important Information for the Applicant/Appellant

1. This is not a Building Permit. A Building Permit must be obtained separately from Development & Zoning Services, located on the 2nd Floor, Edmonton Tower, 10111 – 104 Avenue NW, Edmonton, AB T5J 0J4.
2. Obtaining a Development Permit does not relieve you from complying with:
 - a) the requirements of the *Edmonton Zoning Bylaw*, insofar as those requirements have not been relaxed or varied by a decision of the Subdivision and Development Appeal Board,
 - b) the requirements of the *Alberta Safety Codes Act*,
 - c) the *Alberta Regulation 204/207 – Safety Codes Act – Permit Regulation*,
 - d) the requirements of any other appropriate federal, provincial or municipal legislation,
 - e) the conditions of any caveat, covenant, easement or other instrument affecting a building or land.
3. When an application for a Development Permit has been approved by the Subdivision and Development Appeal Board, it shall not be valid unless and until any conditions of approval, save those of a continuing nature, have been fulfilled.
4. A Development Permit will expire in accordance to the provisions of section 22 of the *Edmonton Zoning Bylaw, Bylaw 12800*, as amended.
5. This decision may be appealed to the Alberta Court of Appeal on a question of law or jurisdiction under section 688 of the *Municipal Government Act*, RSA 2000, c M-26. If the Subdivision and Development Appeal Board is served with notice of an application for leave to appeal its decision, such notice shall operate to suspend the Development Permit.
6. When a decision on a Development Permit application has been rendered by the Subdivision and Development Appeal Board, the enforcement of that decision is carried out by Development & Zoning Services, located on the 2nd Floor, Edmonton Tower, 10111 – 104 Avenue NW, Edmonton, AB T5J 0J4.

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