EDMONTON
TRIBUNALS
Subdivision & Development Appeal Board

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Date: March 31, 2017
Project Number: 232611273-005
File Number: SDAB-D-17-055

Notice of Decision

[1] On March 16, 2017, the Subdivision and Development Appeal Board heard an appeal that was filed on February 17, 2017. The appeal concerned the decision of the Development Authority, issued on February 17, 2017, to refuse the following development:

> Construct a 3 Dwelling Apartment House with a front veranda, a rear detached Garage, and to demolish the existing Single Detached House and rear detached Garage

[2] The subject property is on Plan I23A Blk 162 Lot 25, located at 11131 - 85 Avenue NW, within the RA9 High Rise Apartment Zone. The High Rise Residential Overlay and the Garneau Area Redevelopment Plan apply to the subject property.

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

- Copies of the development application, refused Development Permit decision and plans (including revised drawings and an updated fire access plan);
- Email correspondence between the Development Officer and administration for the Board;
- Memorandum for City of Edmonton Fire Rescue Services, Waste Management, and Transportation Planning and Engineering;
- Development Officer's written submissions dated February 24, 2017;
- Appellant's supporting materials; and
- One letter in opposition to the development.

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

- Exhibit "A" – *Newcastle Centre GP Ltd v Edmonton (City)*, 2014 ABCA 295.
- Exhibit "B" – Photograph of subject property and surroundings.

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.

Community Consultation

[8] Prior to proceeding with the substantive matter, the Board identified that as the subject property falls under the High Rise Residential Overlay under section 816 of the *Edmonton Zoning Bylaw*, the Appellant was required to complete community consultation pursuant to section 816.3(11) of the Overlay. The Board requested that the parties provide information regarding the community consultation that was conducted.

[9] The Appellant explained that attempts were made to contact all property owners within the 60 metre notification area. Those owners who were available provided responses as per the documents set out in Tab 9 of the Appellant's supporting materials. In addition, the community league was consulted and with adjustments made to the development, indicated that they had no specific objections to the development. Property owners to the east of the subject property were also contacted and raised no objections. The Appellant was unable to reach the property owner to the west.

[10] The Appellant recognized the Board's duty to ensure that community consultation in accordance with the *Edmonton Zoning Bylaw* was conducted, as per the Alberta Court of Appeal's ruling in *Thomas v Edmonton (City)*, 2016 ABCA 57 [*Thomas*]. However, in the Appellant's view, *Thomas* does not require that the consultation materials be made physically available for the Board to view; rather, *Thomas* requires that the Board simply be satisfied that community consultation pursuant to the bylaw has been met.

[11] The original Development Officer who refused the application, Mr. C. Lee, was not in attendance. He was represented by his colleague, Mr. J. Angeles, who stated that based on the information provided to him by Mr. Lee, the community consultation was satisfactory to the Development Authority. Mr. Angeles did not have the opportunity to review the community consultation materials that had been submitted by the Appellant to Mr. Lee.

[12] Based on the information submitted by the parties, the Board found that there was substantial compliance with the community consultation requirements under section 816.3(11) of the High Rise Residential Overlay, and accepted jurisdiction to hear this appeal.

Summary of Hearing

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

[13] The Appellant was represented by legal counsel, Mr. J. Murphy and Mr. K.Haldane. Mr. S. Phee and Mr. J. McMartin were also in attendance.

[14] Referring to Exhibit "B", a photograph of the subject property and the immediate surroundings, the Appellant provided a summary of the area in which the property is situated. The subject property is currently derelict, which provides an opportunity for an infill development. From a land use perspective, the proposed development is therefore ideal and does not negatively impact any other property. From a legal perspective, the proposed development does require a series of minor variances and one larger variance pertaining to minimum lot size, but the proposed Apartment Housing is ultimately a permitted use within the RA9 High Rise Apartment Zone.

[15] Section 230.4(2) states that the minimum Site Area of developments within the RA9 Zone must be 800 square metres. The subject development is located on a lot of approximately 400 square metres. In his written submissions, the Development Officer stated that "Notwithstanding whether the qualification test [under section 11.3(1)(a)] is passed, the Development Officer may still refuse the application at their discretion if in their opinion the variance is inappropriate or in this case, the primary reason for refusal (requested variance) was an order of magnitude too great".

[16] The Appellant submitted that the magnitude of a variance is not a factor when determining whether to grant a variance. In *Newcastle Centre GP Ltd v Edmonton (City),* 2014 ABCA 295 [*Newcastle*], the Alberta Court of Appeal reinforced that the legal test for waivers of development regulations is mandated by section 687(3)(d) of the *Municipal Government Act,* which states in part:

> the proposed development . . . would not (A) unduly interfere with the amenities of the neighbourhood, or (B) materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land . . .

[17] The Court held at paragraph 6 of *Newcastle* that it is an error to assume that "the bylaw creates a presumption of harm to the public, and [that] the Board cannot intervene unless that presumption is rebutted by the applicant." In other words, one cannot presume that there is "goodness" simply because a development complies with the regulations; in turn, one cannot presume that departure from the regulations (i.e. a variance) equates to harm. It therefore follows that the *magnitude* of a variance similarly does not create a presumption of harm. The test for granting a variance, regardless of magnitude, remains as set out in section 687(3)(d) of the *Municipal Government Act.*

[18] The Appellant also noted that the Development Officer's written submissions referenced section 11.3(1)(a) of the *Edmonton Zoning Bylaw*, which states: "a variance shall be

considered [by the Development Officer] 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". The Development Officer's test for granting variances, which is based on "hardship or practical difficulties", is distinguishable from the Board's test for granting variances, which is set out in section 687(3)(d) of the *Municipal Government Act.*

[19] With respect to section 687(3)(d), the Appellant submitted that the proposed development will increase the value of the immediately adjacent properties. Should the Board grant this development, the likelihood of the neighbouring properties being able to develop something similar will increase. Furthermore, the existing property on the subject lot is currently derelict, and the proposed development represents an improvement.

[20] The Appellant confirmed that the property immediately to the west consists of an Impark parking lot. The two lots immediately to the east at 11127 – 85 Avenue and 11125 – 85 Avenue consist of single family homes, with the second lot being owned by Epcor. Adjacent to this second lot immediately to the east at 11117 – 85 Avenue is an Epcor substation. The Appellant had previously contacted the residential neighbour at 11127 – 85 Avenue to raise the possibility of combining their two lots for a larger development, but nothing came from these discussions.

[21] The Board questioned whether approving this development will result in both isolation and sterilization of the two residential lots immediately to the east. Referring to the defined term for "isolation" as set out in the *Edmonton Zoning Bylaw*, the Appellant submitted that the proposed development will not result in isolation or sterilization.

[22] Section 6.1(59) defines "isolation" as follows: "when used with reference to a Site, that the Site is so situated with respect to a proposed development… that such Site would not comply with the minimum requirements of this Bylaw."

[23] Under the RA9 Zone, all developments require a Site Area of 800 square metres. The neighbouring residential lots require a variance to this regulation not because of the proposed development, but because those lots – as they currently exist – are smaller than 800 square metres. As such, the proposed development is not causing any "isolation" as contemplated by the bylaw.

[24] With respect to sterilization, there is nothing preventing the remaining two residential lots to the east from developing other uses. For example, the neighbouring lots could be developed in a fashion similar to the Appellant's proposed development; the property owners of those two lots could also combine their lots at a later date to develop a higher density development. As such, the proposed development could not be claimed as a cause for sterilization of either of the lots to the east.

[25] The Appellant also reviewed the applicable objectives for Sub-Area 5 within the Garneau Area Redevelopment Plan, and submitted that the proposed development substantially met those objectives. Regarding the objective "to provide a high density adult oriented

housing area", a three Dwelling Apartment House is about as high a density as possible for a lot of approximately 400 square metres. There is a possibility for a fourth unit to be developed in the future. However, the Appellant would prefer to first develop a three Dwelling Apartment House, and gauge the demand for parking before determining whether a fourth unit would be appropriate.

[26] The Appellant confirmed that the kitchen shown on the attic floor plan should be a wet bar. Should the Board require as a condition of approving the development permit that revised plans be submitted showing a wet bar, the Appellant would have no objections. With respect to the remaining recommended conditions as set out in the Development Officer's written report, the Appellant also had no objections.

[27] Upon questioning by the Board, the Appellant confirmed that all garbage enclosures had been approved. Other criteria related to fire safety and entry/egress are Building Code requirements which will be addressed at a later stage.

ii) Position of the Development Authority

[28] The Development Authority was represented by Mr. J. Angeles, who appeared on behalf of his colleague, Mr. C. Lee, the Development Officer who issued the original refusal decision.

[29] Mr. Angeles acknowledged that all developments in the RA9 Zone, including both discretionary and permitted uses, require a Site Area of 800 square metres. As such, all the 400 square metre lots in this zone will experience the same deficiency and require a variance.

[30] Mr. Angeles confirmed that the parking requirements were based on three units, and that the proposed parking is satisfactory. Should the Applicant wish to develop a fourth unit in the future, a new application must be submitted.

[31] Isolation is also not a problem for the proposed development. Under the *Edmonton Zoning Bylaw,* a "Site" consists of one or more abutting lots. As it remains possible for two of the three residential lots to combine into one 800 square metre lot, thereby complying with the Site Area requirement, the Site is not truly "isolated" as contemplated by the bylaw.

Decision

[32] 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) Within 15 days of the close of the hearing, and prior to the issuance of the Board's written decision, the Appellant shall provide revised plans for the attic floor, showing that the kitchen is to be replaced with a wet bar.
2) The attic unit with the wet bar shall not be converted into an additional unit. The decision of this Board is for the approval of a development permit for a three Dwelling Apartment House.

3) DEVELOPMENT AND ZONING SERVICES CONDITIONS AND ADVISEMENTS

1. WITHIN 14 DAYS OF DATE OF APPROVAL, prior to any demolition or construction activity, the applicant must post on-site a development permit notification sign (Section 20.2).

2. The Development shall be constructed in accordance with the stamped approved drawings.

3. PRIOR TO RELEASE OF DRAWINGS TO PLANS EXAMINATION FOR BUILDING PERMIT REVIEW, The applicant or property owner shall pay the outstanding Sanitary Sewer Trunk Charge Fee of $2439.00 CAD. This rate is quoted for the calendar year of 2017 only. Actual fee will be the applicable rate at time of payment.

4. PRIOR TO RELEASE OF DRAWINGS TO PLANS EXAMINATION FOR BUILDING PERMIT REVIEW, The applicant or property owner shall pay the outstanding Lot Grading Fee of $250.00 CAD. This rate is quoted for the calendar year of 2017 only. Actual fee will be the applicable rate at time of payment.

5. LANDSCAPING shall be in accordance with the approved landscaping plan, Section 55, and to the satisfaction of the Development Officer.

6. PRIOR TO RELEASE OF DRAWINGS TO PLANS EXAMINATION FOR BUILDING PERMIT REVIEW, a guaranteed Landscaping security, from the property owner, shall be submitted to ensure that Landscaping is provided and maintained for two growing seasons. Only the following forms of security are acceptable: cheque to a value equal to 100% of the landscaping cost; or an irrevocable letter of credit in the amount of 100% of the Landscaping cost. The estimated cost of the Landscaping shall be calculated by the owner or the owner's representative and shall be based on the information provided on the Landscape Plan. If, in the opinion of the Development Officer, these estimated costs are inadequate, the Development Officer may establish a higher Landscaping cost figure for the purposes of determining the value of the Landscaping security. If the Landscaping security is offered in the form of a cheque it shall be cashed and held, by the City, without interest payable, until, by confirmation

through inspection by the Development Officer, the Landscaping has been installed and successfully maintained for two growing seasons. Partial refund after installation of the Landscaping or after one growing season shall be considered upon request of the owner, at the sole discretion of the Development Officer. Any letter of credit shall allow for partial draws by the City if the Landscaping is not completed in accordance with the approved Landscape Plan(s) within one growing season after completion of the development; or the Landscaping is not well maintained and in a healthy condition two growing seasons after completion of the Landscaping. The City may draw on a cashed security or a letter of credit and the amount thereof shall be paid to the City for its use absolutely. All expenses incurred by the City, to renew or draw upon any letter of credit, shall be reimbursed by the owner to the City by payment of invoice or from the proceeds of the letter of credit.

4) TRANSPORTATION PLANNING AND ENGINEERING CONDITIONS:

1. The proposed access is to the alley and a curb crossing permit is not required for an alley access.

2. 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.

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

4. 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.

It should be noted that the hoarding must not damage boulevard trees. The owner or Prime Contractor must apply for an OSCAM online at:

http://www.edmonton.ca/transportation/on_your_streets/on-street-construction-maintenance-permit.aspx

5) FIRE RESCUE SERVICES ADVISMENTS

1. Edmonton Fire Rescue Services Access Guidelines for Part 9 Buildings specify that the unobstructed travel path (measured from a fire department vehicle to the entry of the building) must be a minimum 1.5m of clear width (noted on site plan attachment) and if gates will be in place they must be non-locking)

2. Ensure that the protection of adjacent properties has been provided in accordance with EFRS Adjacent Property Protection Guidelines and AFC 5.6.1.2. This information has been included for your information and implementation during the construction of this project.

For additional information please see:

Protection of Adjacent Building STANDATA - http://www.municipalaffairs.alberta.ca/documents/ss/standata/fire/fci/fci-09-02.pdf

Adjacent Property Protection Guideline
Reference: AFC 5.6.1.2 Protection of Adjacent Building

1) Protection shall be provided for adjacent buildings or facilities that would be exposed to fire originating from buildings, parts of buildings, facilities and associated areas undergoing construction, alteration or demolition operations.

3. Ensure that a Fire Safety Plan is prepared for this project, in accordance with the EFRS Construction Site Fire Safety Plan Template (attached to email). A formal submission of your Fire Safety Plan will be required for a Building Permit to be issued (please do not forward your Fire Safety Plan at this time). If you have any questions at this time, please contact Captain Bruce Taylor at cmsfpts@edmonton.ca.

[33] In granting this development, the following VARIANCES are allowed:

1) Section 230.4(2) is varied to permit a deficiency of 396 square metres, for a total Site Area of 404 square metres instead of the required 800 square metres.

2) Section 816.3(9) is varied to permit a deficiency of 0.32 metres, for a Side Setback of 1.68 metres instead of the required 2.0 metres.

3) Section 230.4(9) is varied to permit a deficiency of 1.7 square metres, for an Amenity Area of 20.8 square metres instead of the required 22.5 square metres.

4) Section 46(5) is varied to permit the proposed Amenity Area to be located within a required Separation Space.

5) Section 48.2(1) is varied to permit a deficiency of 0.32 metres, for a proposed Separation Space of 1.68 metres between the Principal Living Room Window and the property line, instead of the required 2.0 metre Separation Space.

6) Section 48.3(1) is varied to permit a deficiency 0.32 metres, for a proposed Separation Space of 1.68 metres between the Habitable Room Window and the property line, instead of the required 2.0 metre Separation Space.

7) Section 48.3(3)(e) is varied to permit the On-site Amenity Area to be located within the required 4.5 metre Privacy Zone in front of a Habitable Room Window.

8) Section 54.2, Schedule 1(A)(1) is varied to permit one of the required parking stalls to be provided in tandem.

9) Section 54.2(4)(a)(iv) is varied to permit one of the required parking stalls to be 2.7 metres in width rather than the required 3.0 metres. This parking stall is permitted to be obstructed on both sides.

10) Section 55.3(1)(c)(i) is varied to permit a 60:40 ratio of deciduous trees to coniferous trees and shrubs, instead of the required 50:50 ratio.

Reasons for Decision

[34] The proposed development is for a three Dwelling Apartment House, which is a permitted use in the RA9 High Rise Apartment Zone. The High Rise Residential Overlay under section 816 of the *Edmonton Zoning Bylaw* applies.

[35] Section 816.3(11) of the Overlay states:

> Where an application for a Development Permit does not comply with the regulations contained in this Overlay:
>
> a. the applicant shall contact the affected parties, being each assessed owner of land wholly or partly located within a distance of 60.0 m of the Site of the proposed development and the President of each affected

Community League, at least 21 days prior to submission of a Development Application;

b. the applicant shall outline, to the affected parties, any requested variances to the Overlay and solicit their comments on the application;

c. the applicant shall document any opinions or concerns, expressed by the affected parties, and what modifications were made to address their concerns; and

d. the applicant shall submit this documentation as part of the Development Application.

[36] The Board was in receipt of correspondence from the Community League, as well as the City of Edmonton Fire Rescue Services, Waste Management, and Transportation Planning and Engineering, expressing no opposition to the proposed development. The Appellant also submitted additional information pertaining to the canvassing of property owners within the 60 metre notification area. Though this information had been provided to the Development Authority, it was not initially clear to the Board whether property owners within the notification area had been properly consulted.

[37] Based on the information provided by the Appellant during the course of the hearing, the Board accepts that attempts were made to consult with all property owners in the notification area. While some property owners were unavailable, those whom the Appellant was able to contact expressed no opposition to the development. The Development Authority was satisfied with the consultation that was conducted by the Applicant. For these reasons, the Board finds that the Applicant substantially complied with the community consultation requirements under section 816.3(11) of the Overlay.

[38] The Board notes that it was in receipt of one letter in opposition to the development. However, the letter-writer owned property outside the 60 metre notification area. As such, although the Board gave consideration to this letter of opposition, less weight was placed upon it. The Board also notes that correspondence submitted by the Appellant indicates that after adjustments were made to the proposed development, the Community League expressed no opposition to the development.

[39] With respect to the proposed development, ten variances are required. However, the Board accepts that all parties are in agreement that of these variances, only one is in contention: that is, the minimum Site Area required under section 230.4(2) of the RA9 Zone is 800 square metres, whereas the Site Area of the subject lot is 404 square metres, representing a deficiency of 396 square metres.

[40] As noted in the Development Officer's written submissions, the remaining variances (pertaining to Side Setback, Amenity Area, Separation Spaces, Parking, and Landscaping) do not impact neighbouring property owners. The Development Authority therefore would have considered granting variances to the remaining deficiencies, but for

the 396 square metre deficiency to the Site Area. As no evidence to the contrary was submitted at the hearing, the Board accepts the submissions of the Development Officer in this regard, and focuses its inquiry on the deficiency in Site Area.

[41] In *Newcastle*, the Alberta Court of Appeal reaffirmed that the Board's test for determining whether to grant a variance to a development regulation is set out under section 687(3)(d) of the *Municipal Government Act*, which provides as follows:

> 687(3) In determining an appeal, the subdivision and development appeal board
>
> …
>
> (d) may make an order or decision or issue or confirm the issue of a development permit even though the proposed development does not comply with the land use bylaw if, in its opinion,
>
> (i) the proposed development would not
>
> (A) unduly interfere with the amenities of the neighbourhood, or
>
> (B) materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land,

[42] The Board has determined that the proposed development, located on a lot of 404 square metres, 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, for the following reasons:

a) The Board finds that the proposed design is compatible with the surrounding area, and will not sterilize the adjacent lots to the east and west. The two immediately adjacent lots to the east are currently Single Detached Houses, with the potential to either develop a higher density building of similar design on one lot, or a larger, higher density development by combining the two lots to meet the minimum 800 square metre requirement.
b) The Board reviewed both the Garneau Area Redevelopment Plan, as well as the concerns raised in the letter of opposition. Although the Board acknowledges that there appears to be a preference for the development of high rise apartment buildings located on 800 square metre lots within this zone, there is nothing that explicitly precludes smaller developments such as the proposed three Dwelling Apartment House to be located on smaller lots.
c) There will be no adverse impact upon neighbouring parcels of land, particularly given the existing mature vegetation in the surrounding area, and that the total landscaping requirement has been met.

[43] For the above reasons, it is the opinion of the Board that the proposed development will not unduly interfere with the amenities of the neighbourhood, nor materially interfere

with or affect the use and enjoyment of neighbouring parcels of land. The subject development therefore meets the test established under Section 687(3)(d) of the Municipal Government Act, and the appeal is allowed.

Patricia Jones, Presiding Officer
Subdivision and Development Appeal Board

Board Members in Attendance
Ms. K. Cherniawsky, Mr. A. Peterson, Ms. G. Harris, Ms. M. McCallum

Important Information for the Applicant/Appellant

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

2. Obtaining a Development Permit does not relieve you from complying with:

    a) the requirements of the *Edmonton Zoning Bylaw*, insofar as those requirements have not been relaxed or varied by a decision of the Subdivision and Development Appeal Board,
    b) the requirements of the *Alberta Safety Codes Act*,
    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 5th Floor, 10250 – 101 Street, Edmonton.

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