



**EDMONTON
TRIBUNALS**

*Subdivision &
Development
Appeal Board*

*10019 – 103 Avenue NW
Edmonton, AB T5J 0G9
P: 780-496-6079 F: 780-577-3537
sdab@edmonton.ca
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SDAB-D-19-039

Application No. 243625660-004

An appeal to construct an extension to an existing Uncovered Deck (new size: 4.22m x 8.57m), existing without permits, located at 1746 – Tanager Close NW, was **TABLED TO APRIL 10 or 11, 2019.**



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Date: March 28, 2019
Project Number: 266010257-006
File Number: SDAB-D-19-017

Notice of Decision

February 14, 2019 Hearing:

- [1] The Subdivision and Development Appeal Board (the “Board”) made and passed the following motion:

“That the appeal hearing be postponed until March 21, 2019.”

Reasons for Decision:

1. Legal Counsel for the Appellant and Legal Counsel for the City of Edmonton have both consented to a postponement.
2. Postponing the appeal hearing to a later date will allow sufficient time for further discussions related to the legal issues to occur.

March 21, 2019 Hearing:

Motion:

- [2] The Board made and passed the following motion:

“that SDAB-D-19-017 be raised from the table.”

- [3] The Board heard an appeal that was filed on January 16, 2019. The appeal concerned the decision of the Development Authority, issued on December 20, 2018, to approve, subject to conditions, the following development:

To change the use of 27 units of Apartment Housing (9-1 bedroom, and 18-2 bedroom Dwellings) to 48 units of Apartment Hotel, increase the height, and amend the floor layout (parking garage, 1-4 storeys), and to construct exterior and interior alterations (change the Building design, increase height, increase parking garage size) to an approved Building.

- [4] The subject property is on Plan 8220508 Blk 30 Lot 9, located at 17104 - 90 Avenue NW, within the CSC Shopping Centre Zone. The Summerlea Neighbourhood Area Structure Plan applies to the subject property.
- [5] 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; and
 - The Development Officer's written submissions including two Court of Appeal Decisions;
 - The Appellant's written submissions.
- [6] The following exhibits were presented during the hearing and form part of the record:
- Exhibit A - A joint submission from the Appellant and City of Edmonton
 - Exhibit B – Mark up of the approved development permit conditions

Preliminary Matters

- [7] At the outset of the appeal hearing, the Presiding Officer informed all in attendance that he and Mr. Gooch are known to each other and have worked together as consultants on a project in the past. The Presiding Officer confirmed with the parties in attendance that there was no opposition to the composition of the panel.
- [8] The Presiding Officer outlined how the hearing would be conducted, including the order of appearance of parties, and no opposition was noted.
- [9] 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 Mr. Gunther, Legal Counsel for the City of Edmonton, who was accompanied by Mr. Speidel, Legal Counsel for the Appellant*
- [10] Mr. Gunther provided the Board with a joint submission between the Appellant and the City of Edmonton (marked "Exhibit A").
- [11] Mr. Gunther stated that the main issue was Condition No. 2 of the approved permit:
2. PRIOR TO THE RELEASE OF DRAWINGS FOR BUILDING PERMIT REVIEW the owner must register an easement through the adjacent west property, as shown on Enclosure I, for the provision of waste services. The easement is required to accommodate waste services vehicles entering the site from the neighbouring west access. An unobstructed drive aisle connection must be

maintained. The City of Edmonton will be a party to this easement, and the easement must stipulate that the owner may not discharge the easement without the express written consent of the City of Edmonton. The City's Law Branch will prepare the easement documents. The owner must contact Matthew Bennett of the City of Edmonton Law Branch (matthew.bennett2@edmonton.ca) to obtain a fillable form of the draft easement document, a sample of which is attached as Enclosure II. The owner must complete the easement document details and return the signed easement to the Law Branch. The City will review and execute the agreement, and the fully executed easement will then be returned to the owner who is required to register the easement on all affected Certificates of Title and provide proof of the easement registration to the Development Planner PRIOR to the release of the drawings for the Building Permit.

- [12] He referred to Enclosure I of the joint submission showing the layout of the subject Site. There is an access between the existing parcel and the neighbouring property which is owned by West Edmonton Mall.
- [13] That access leads out to a traffic light which is a signalized intersection. There is free access from the intersection to the subject Site with a secondary access to the subject Site.
- [14] There was concern from Waste Management regarding garbage trucks servicing the site so there would not be congestion or backing up of the garbage trucks if there is only one access to the Site.
- [15] The Development Officer put Condition No. 2 in the approval requiring the developer to formalize that access to the adjacent property. The approval was conditional upon obtaining that access easement before the Development Permit could be approved.
- [16] There were concerns about whether the neighbouring landowner would be willing to register the access easement to the title on their land.
- [17] To the best of their knowledge, the access has been in place for over 30 years which raises legal issues about the required right to continue using that access and if it obscured or obstructed, there could be legal issues with that. However, that is outside of what the Board can deal with.
- [18] They agreed to require the developer to keep the access up to the property line as far as they can go.
- [19] He referred to the joint submission and stated that Condition No. 2 will be amended to read:

The owner shall construct and maintain vehicular access up to the west property line allow for access and egress to the adjacent parcel to the west (as shown on Enclosure 1 as an arrow signifying the "Cross Lot Access").

[20] The second change is what needs to happen if the neighbouring land owner obstructs them from continuing access through that site. The amendment is to read:

In the event that the owner of the adjacent parcel to the west hinders or obstructs the passage of vehicles between parcels, the owner shall take all reasonable steps to obtain a registered access easement on the adjacent west parcel, assert and enforce any acquired prescriptive rights, or make other arrangements to allow the free passage of vehicular traffic between the two parcels.

[21] In short, they asked them to do their best to keep the access open. If the neighboring land owner wants to litigate it, they can only ask the developer to do their best.

[22] Given there are no other concerns other than ensuring the safety when trucks are servicing the subject Site, the City is of the view that replacing Condition No. 2 is appropriate. Mr. Gunther provided the Board with a copy of the conditions that has been marked up showing the specific change in the conditions (marked "Exhibit B").

[23] Mr. Speidel stated that aerial photographs over time show that there were two accesses off of 90 Avenue north of the property. Years later the aerial photographs showed the major intersection being built, access to the west was removed, and access to the existing cross agreement.

[24] There was an agreement executed at the time to give up access they had and allow this access to be altered to take into account the six lane intersection at the light. He was not able to find additional information.

[25] This makes sense as when the second phase of West Edmonton Mall was being built, it created more traffic and a major intersection was created to accommodate east/west traffic and north/south traffic to the mall and onto the property.

[26] Mr. Speidel provided the following information in response to questions by the Board:

a. He confirmed that trucks maneuvering in the parking lot will not have a negative impact on the vehicles using the parking lot.

[27] Ms. Whalen (from the Transportation Department) provided the following information in response to questions by the Board:

a. Drawings were provided and reviewed. She stated that maneuvering can be accommodated on site but will have an impact to the way the site operates. This can be done with one access but it does impact the operation of the site. Trucks will have to drive in, back up, and maneuver around parking stalls which become congested. That is not the preferred situation but can be done on the site.

b. Trucks may have to alter the times when they access the site or have spotters when trucks are backing up.

ii) Position of the Community League

- [28] Ms. Belter is representing the Summerlea Community League.
- [29] She does not have a concern if the proposed development is constructed as proposed.
- [30] She is concerned with snow removal in the area. Residents adjacent to the overflow lot on 178 Street and 90 Avenue as well as on the other side where Westgate Shopping Centre is are experiencing flooding as snow is always piled in the same location and cuts off access for the community.
- [31] Noise is generated when the parking lot is cleared which impacts the residents.
- [32] She does not have a concern with the underground parking. She is agreeable with the property having one access point.
- [33] In her opinion, removing garbage earlier in the day will be better as it will not be as busy.

iii) Rebuttal of the Appellant

- [34] Mr. Speidel did not have anything to add in rebuttal.

Decision

- [35] The appeal is **ALLOWED IN PART** and the decision of the Development Authority is **VARIED**. The development is **GRANTED** as approved by the Development Authority, subject to the following amendments:

The Board **DELETES** the following condition from the Decision of Approval by the Development Authority:

2. PRIOR TO THE RELEASE OF DRAWINGS FOR BUILDING PERMIT REVIEW the owner must register an easement through the adjacent west property, as shown on Enclosure I, for the provision of waste services. The easement is required to accommodate waste services vehicles entering the site from the neighbouring west access. An unobstructed drive aisle connection must be maintained. The City of Edmonton will be a party to this easement, and the easement must stipulate that the owner may not discharge the easement without the express written consent of the City of Edmonton. The City's Law Branch will prepare the easement documents. The owner must contact Matthew Bennett of the City of Edmonton Law Branch (matthew.bennett2@edmonton.ca) to obtain a fillable form of the draft easement document, a sample of which is attached as Enclosure II. The owner must complete the easement document details and return the signed

easement to the Law Branch. The City will review and execute the agreement, and the fully executed easement will then be returned to the owner who is required to register the easement on all affected Certificates of Title and provide proof of the easement registration to the Development Planner PRIOR to the release of the drawings for the Building Permit.

The Board **IMPOSES** the following condition to the Decision of Approval by the Development Authority:

2. The owner shall construct and maintain vehicular access up to the west property line allow for access and egress to the adjacent parcel to the west (as shown on Enclosure 1 as an arrow signifying the "Cross Lot Access").

In the event that the owner of the adjacent parcel to the west hinders or obstructs the passage of vehicles between parcels, the owner shall take all reasonable steps to obtain a registered access easement on the adjacent west parcel, assert and enforce any acquired prescriptive rights, or make other arrangements to allow the free passage of vehicular traffic between the two parcels.

[36] **The development is NOW subject to the following CONDITIONS (as proposed by the Development Authority and agreed to the parties to this appeal):**

1. PRIOR TO THE RELEASE OF DRAWINGS FOR BUILDING PERMIT REVIEW, the applicant or property owner shall pay a Sanitary Sewer Trunk Charge fee of \$24423.00. All assessments are based upon information currently available to the City. The SSTC charges are quoted for the calendar year in which the development permit is granted. The final applicable rate is subject to change based on the year in which the payment is collected by the City of Edmonton.
2. The owner shall construct and maintain vehicular access up to the west property line allow for access and egress to the adjacent parcel to the west (as shown on Enclosure 1 as an arrow signifying the "Cross Lot Access"). In the event that the owner of the adjacent parcel to the west hinders or obstructs the passage of vehicles between parcels, the owner shall take all reasonable steps to obtain a registered access easement on the adjacent west parcel, assert and enforce any acquired prescriptive rights, or make other arrangements to allow the free passage of vehicular traffic between the two parcels.
 - A. Access to the subject site from 90 Avenue exists, as shown on Enclosure I. Any modification to the existing access requires the review and approval of Subdivision Planning. No additional access will be permitted to 90 Avenue.

- B. Pedestrian connections including applicable curb ramps must be provided on site from the building entrances to the public sidewalk, as shown on Enclosure I. The proposed sidewalk connection to the public sidewalk is acceptable to Subdivision Planning.
- C. No objects are permitted to encroach onto, over or under road right-of-way, as shown on Enclosure I.
- D. 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.
- E. Garbage bins must be located so that all turning maneuvers for the waste management vehicles are accommodated on site. It will be the responsibility of property owner/management to keep the collection area clear at all times. We also recommend paint/signage to prevent or minimize the possibility of vehicle parking in this area.
- F. 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:

https://www.edmonton.ca/business_economy/licences_permits/oscam-permit-request.aspx

and,

<https://www.edmonton.ca/documents/ConstructionSafety.pdf>

- G. Any 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 *Edmonton Zoning Bylaw*. All expenses incurred for repair are to be borne by the owner.
3. The Site shall comply with the approved Landscaping Plan and Landscaping Conditions in Development Permit #266010257-002.
 4. All required parking and loading facilities shall only be used for the purpose of accommodating the vehicles of clients, customers, employees, members, residents or visitors in connection with the building or Use for which the parking and loading facilities are provided, and the parking and loading facilities shall not be used for driveways, access or egress, commercial repair work, display, sale or storage of goods of any kind. (Reference Section 54.1.1.c)
 5. The off-street parking, loading and unloading (including aisles or driveways) shall be hardsurfaced, curbed, drained and maintained in accordance to Section 54.6.
 6. No parking, loading, storage, trash collection, outdoor service or display area shall be permitted within an approved Setback. (Reference 320.4.5)
 7. Bicycle parking shall be provided in accordance to Section 54.3 and to the satisfaction of the Development Officer.
 8. Any outdoor lighting for any development shall be located and arranged so that no direct rays of light are directed at any adjoining properties, or interfere with the effectiveness of any traffic control devices. (Reference Section 51)
 9. Trash collection and loading areas shall be screened from view from any adjacent Sites and public roadways, to the satisfaction of the Development Officer. (Reference Section 320.4.5)
 10. The attic space above the fourth storey shall only be used for mechanical or electrical equipment servicing the development, shall not be connected to the fourth storey by a stair case, and shall not be used in any way as operational space including but not limited to storage, dwellings, amenity space, or business floor area.

ADVISEMENTS:

- a. This Development Permit is NOT valid until the Notification Period expires in accordance to Section 21.1. (Reference Section 17.1)
- b. This Development Permit is NOT a Business Licence. A separate application must be made for a Business Licence. Please contact the 311 Call Centre (780-442-5311) for further information.

- c. Signs require separate Development Applications.
- d. A building permit is required for any construction or change in Use of a building. For a building permit, and prior to the plans examination review, you require construction drawings and the payment of fees. Please contact the 311 Call Centre (780-442-5311) for further information.
- e. The City of Edmonton does not conduct independent environmental checks of land within the City. If you are concerned about the suitability of this property for any purpose, you should conduct your own tests and reviews. The City of Edmonton, in issuing this Development Permit, makes no representations and offers no warranties as to the suitability of the property for any purpose or as to the presence or absence of any environmental contaminants on the property.
- f. 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)
- g. Unless otherwise stated, all above references to section numbers refer to the authority under the *Edmonton Zoning Bylaw 12800* as amended.
- h. Upon the first Development Permit Inspection and determination that landscape construction has been completed in compliance with the approved Landscape Plan, 20% of the approved Guaranteed Landscape Security shall be collected and retained for a period of 24 months from the date of first Development Permit Inspection.
- i. Sites that are not completed or are not compliant with approved Landscape Plans at the first Development Permit Inspection, shall be required to submit a Security for incomplete work, up to and including the full value of the approved Guaranteed Landscape Security value.
- j. The applicant is advised that more than a 12% difference in the ramp slope may result in vehicles “bottoming out” at the break-over point.

[37] The Development Authority’s decision contained the following variances:

- 1. Parking - The site has 75 parking spaces, instead of 81, a deficiency of 6 parking spaces. (Section 54.2 and Schedule 1(A))
- 2. Loading Space - There are 2 instead of 3 Loading Spaces. (Section 54.4.3).

3. Discretionary Use - Apartment Hotels is approved as a Discretionary Use (Section 320.3.2).

Reasons for Decision

- [38] The Development Officer approved subject to conditions and variances an application to Change the use of 27 units of Apartment Housing (9-1 bedroom, and 18-2 bedroom Dwellings) to 48 units of Apartment Hotel, increase the height, and amend the floor layout (parking garage, 1-4 storeys), and to construct exterior and interior alterations (change the Building design, increase height, increase parking garage size) to an approved Building.
- [39] The Appellant owner appealed Condition No. 2 of approval, regarding an easement through the adjacent west property.
- [40] The Board was presented with a joint submission regarding a change to Condition No. 2 from Counsel for the Appellant and Counsel for the City of Edmonton.
- [41] The parties provided the Board with the background content and reasons for changes to Condition No. 2 in the approved Development Permit. All parties agreed to the amended condition given that there may have been an issue with the original condition with regards to obtaining proper legal authorization to permit this access on a permanent basis.
- [42] Accordingly, the Board accepts the joint submission provided with the amended condition of the approved development permit.
- [43] Further, the decision of the Development Authority identified three (3) variances as noted in paragraph 37 above. Given the Class B approval of this development, notice of the development was provided as required under the *Edmonton Zoning Bylaw*. It appears to this Board that there were no notices of appeal submitted through that prescribed notice period that had issue with any of the three (3) variances.
- [44] Upon receipt of this appeal, the Board, as required under Section 686(3) of the *Municipal Government Act*, notified neighbouring properties owner and the Community League of this hearing. It was from this notice process, the following two responses were received.
- [45] The Board heard from a representative of the Summerlea Community who affirmed the comments provided in her email that she was agreeable to the approved drawings which have not been changed and did not have an issue with the revised condition.
- [46] The Board acknowledges an email received just prior to the hearing in opposition to the development. It expressed a concern of too many hotels in the area and that this is a residential area. The Board does not support that conclusion given that this development is located on a predominately commercial oriented avenue and that the change of use

does not make this proposed development unreasonably compatible with the neighbourhood. Given the commercial nature of the surroundings, the Board finds that this proposed development is reasonably compatible with the neighbourhood.

- [47] The Board notes the proposed application is a change of use application and the appeal concerned one specific condition of the approved Development Permit. Notwithstanding, the Board must also confirm the Development Authority's decision with respect to the other two (2) variances. Namely, a shortfall of six (6) parking spaces and one (1) loading space.
- [48] The Board was not presented with any compelling planning evidence that would lead to the conclusion that pursuant to Section 687(3)(d) of the *Municipal Government Act* that by granting these two variances, the proposed development would unduly interfere with the amenities of the neighbourhood or materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land. When asked directly about the variances, the representative who appeared on behalf of the Community League, expressed no concerns with any of the variances.
- [49] Therefore, in conclusion, the Board finds that this development is reasonably compatible with the neighbourhood and that by granting the variances, the development would 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.

Mr. V. Laberge, Presiding Officer
Subdivision and Development Appeal Board

Board Members in Attendance:

Mr. B. Gibson; Mr. C. Buyze; Mr. A. Peterson; Ms. L. Delfs

Enclosure

c.c.

City of Edmonton, Development & Zoning Services, Attn: Mr. Adams / Mr. Luke
City of Edmonton, Sustainable Development, Attn: Mr. Plummer / Ms. Whalen
City of Edmonton, Law Branch, Attn: Mr. M. Gunther

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.