EDMONTON
TRIBUNALS
Subdivision & Development Appeal Board

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Date: May 18, 2018
Project Number: 272597618-001
File Number: SDAB-D-18-064

Notice of Decision

[1] On May 3, 2018, the Subdivision and Development Appeal Board (the "Board") heard an appeal that was filed on **February 10, 2018**. The appeal concerned the decision of the Development Authority, issued on January 23, 2018, to approve the following development:

> **Install a hot tub in the Rear Yard of a Single Detached House (2.22 metres in diameter).**

[2] The subject property is on Plan Q Blk 3 Lot 29, located at 9508 - 100A Street NW, within the (RF3) Small Scale Infill Development Zone. The Mature Neighbourhood Overlay, the North Saskatchewan River Valley and Ravine System Protection Overlay, the Floodplain Protection Overlay, and the Rossdale Area Redevelopment Plan apply to the subject property.

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

- A copy of the Development Permit application with attachments, information regarding the proposed water retention structure, the proposed plan, and the approved Development Permit.
- The Development Officer's written submission; and
- The Appellant's written submissions.

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

- Exhibit A – Photographs of hot tubs; and
- Exhibit B – A diagram outlining the location of hot tub in relation to the two subject properties.

Preliminary Matters

[5] At the outset of the appeal hearing, the Chair advised that the Respondent was not present and Board administration had been unable to contact him. The Board decided to

proceed with the hearing in his absence. 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. D. Williams

[8] Mr. D. Williams was accompanied by Mr. A. Hopkyns. They have lived at their property for 27 years and have always had good relations with their neighbours. Their neighbours have always understood the impact of living in tight confines due to the small lot sizes.

[9] Mr. Williams has worked with some of the top noise experts over the past 11 years through his involvement with the Rossdale Community league and an organization called Conserve. He has become an expert on noise and how to contain it.

[10] They cannot sleep because of the noise of their neighbour's hot tub. It is difficult to work in their garage and they cannot enjoy their backyard. The hot tub's noise can be heard in every room of their home and has been noticed by their guests. They have tried various brands of ear plugs to allow them to sleep but find them uncomfortable.

[11] They are not opposed to their neighbour having a hot tub. The Appellants have had a hot tub on their own property for over 25 years and they have exercised due diligence to ensure their hot tub is quiet and that it cannot be heard by any neighbours. They referred the Board to *Exhibit A* which contains photographs of their current and previous hot tub.

[12] They referred to *Exhibit B* which shows the location of the subject hot tub in relation to the property line between two tall, narrow homes. The noise, generated from the electric motor that drives the pump, is amplified as it travels down the channel between the two houses. The electric motor noise is grating and very hard on the human body.

[13] The Respondent has acknowledged that the hot tub is loud and that he can hear it from his third story bedroom and his garage when it is running.

[14] A Bylaw Enforcement Officer inspected the hot tub and found that the noise was right on the cusp of what was acceptable although the Appellants could not recall the exact decibel level. The Officer was reluctant to issue a ticket and recommended that a noise baffling system be installed and advised them to wear ear plugs to bed.

[15] They are prepared to work with the Respondent to come up with a solution and provided the following suggestions:

a) Sand bags could be placed around the pump creating a solid mass to contain the noise. An enclosure could be added to hide the sand bags.

b) The hot tub could be turned 180 degrees to allow the pump to face the rear lane. Noise would no longer be channeled down the corridor between the two houses and there would be room to build a better sound baffling system.

c) The best solution would be to sink the hot tub into the rear deck which would allow plenty of room for noise baffling, there would be no compliance issue and the Respondents would have more privacy.

[16] Mr. Hopkyns reviewed the timeline of their concerns:

a) The subject hot tub was installed in October 2017.

b) They spoke to their neighbour as soon as they noticed the excessive noise and were told that an installer from Arctic Spas would be called to address the issue.

c) They met with their neighbour on December 2 and indicated they were only concerned about the pump noise, not any other noise associated with the hot tub use.

d) They called Arctic Spas on December 9 and were advised that they could come out immediately.

e) They arrived at a temporary solution with their neighbour that the hot tub would be turned off between 9:00 p.m. and 7:00 a.m. This solution only lasted for five or six days.

[17] While the subject hot tub is branded as an Arctic Spa it is actually a Coyote hot tub which is an inferior brand manufactured for a milder climate. It does not have the required insulation and keeps cycling on and off to keep from freezing.

[18] They have documented the dates and times they were woken up in December by the hot tub noise.

[19] Mr. Williams and Mr. Hopkyns provided the following responses to questions from the Board:

a) In their view, a variance is required per section 50.3(5) of the *Edmonton Zoning Bylaw* which requires the hot tub to be located 0.9 metres from the side property line as well as from the garage on the subject site.

The Board clarified that the separation distance from the side property line does not apply as the hot tub is lower than the height of the fence.

b) The location of the hot tub is significantly impacting the enjoyment of their property. If the hot tub were to meet the 0.9-metre required separation distance from the garage there would be more room available to install a sound buffering system.

ii) Position of the Development Officer, Ms. S. Watts

[20] The Development Authority was not in attendance and the Board relied on Ms. Watts' written submissions.

iii) Position of the Respondent, Mr. D. Williams / Permit Masters

[21] The Respondent did not appear at the hearing.

Decision

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

1. The development shall be installed in accordance with the stamped and approved drawings.

2. There shall be no sprinklers or irrigation systems (above or underground) or any discharge into or onto the ground from roof leaders, downspouts or sump pump discharge spouts.

[23] In granting the development the following variance to the *Edmonton Zoning Bylaw* (the *Bylaw*) is allowed:

1. The minimum required separation distance of 0.90 metres from the hot tub to the detached Garage per section 50.3(5)(d) is varied to allow a deficiency of 0.61 metres, thereby allowing a separation distance of 0.29 metres from the hot tub to the detached Garage.

Reasons for Decision

[24] This appeal involves a Development Permit application for a hot tub in the (RF3) Small Scale Infill Development Zone. The hot tub is Accessory to a Single Detached House which is a Permitted Use in the (RF3) Small Scale Infill Development Zone.

[25] In the normal course, a hot tub would be a Permitted Accessory Use in this Zone; however, the subject Site is within the North Saskatchewan River Valley and Ravine System Protection Overlay. While section 12.2(1)(n) states that a Development Permit is not required for structures not exceeding 1.85 metres in Height ancillary to Residential Uses, section 12.2(3)(d) states:

> Notwithstanding Section 12.2.1 of this Bylaw, a development permit shall be required for the following developments on all Sites zoned residential within the area of application of the North Saskatchewan River Valley and Ravine System Protection Overlay:
>
> d. Water Retention Structures.

[26] A hot tub is included within the definition of a Water Retention Structure in section 6.1(124) of the *Bylaw*:

> **Water Retention Structures** means a structure designed to retain a large volume of water, a minimum of 0.378 cubic meters. This definition includes structures commonly referred to as swimming pools, skating rinks, ornamental ponds, **hot tubs**, whirlpools and spas, provided the minimum volume of water is met.

For this reason a Development Permit is required for this hot tub.

[27] There is another reason why a Development Permit is required for this hot tub. Section 12.2(1)(c) of the *Bylaw* states that a Development Permit is not required for:

> an Accessory building 10.0 m2 or less in area, provided it complies with the regulations of this Bylaw and is not a Hen Enclosure.

[28] Section 616(a.1) of the *Municipal Government Act* states that in this Part,

> "building" includes anything constructed or placed on, in, over or under land, but does not include a highway or road or a bridge that forms part of a highway or road.

[29] Section 6.1(2) of the *Bylaw* states:

> **Accessory** means; when used to describe a Use or building, a Use or building naturally or normally incidental, subordinate, and devoted to the principal Use or building, and located on the same lot or Site.

[30] This brings up the operation of section 50.3(5) of the *Bylaw* which regulates the location of an Accessory building. Section 50.3(5)(d) states:

> An Accessory building or structure shall be located not less than 0.9 m from a principal building and any other Accessory building or structure.

The evidence before Board is that the hot tub is 0.29 metres away from the Garage on the subject Site; therefore it is not in compliance with section 50.3(5)(d) and therefore requires a Development Permit.

[31] The Board heard evidence from the Appellants that essentially revolved around a single issue, namely that the noise being generated by the existing hot tub interferes with their enjoyment of their land. The Board had no evidence before it as to the extent of any actual measurement of the noise generated by the hot tub.

[32] The Appellants acknowledged that they did not oppose the concept of this hot tub or a hot tub being on the neighbouring land as they themselves also have a hot tub on their land. The issues were exclusively dealing with the noise generated by the existing hot tub on the subject Site.

[33] The Appellants had no concerns with the location of the hot tub, or the hot tub's proximity to the Garage on the subject Site, other than the potential for the location to be exacerbating the noise or to be increasing the noise generated by the hot tub.

[34] The Board does not have sufficient evidence before it to be convinced that the proximity of the hot tub to the Garage will have any bearing on the sound propagation from the hot tub to the neighbouring parcel of land. No sound study or engineering report was submitted. The Appellants asserted that the proximity of the hot tub to the Garage would increase the sound propagation onto their lot, but had no evidence to back up that assertion.

[35] As a result the Board finds the fact that the hot tub being located 0.29 metres from the Garage on the subject Site rather than 0.9 metres will not in itself have an impact upon the neighbouring land, and that fact alone will not unduly interfere with or affect the use or enjoyment of the Appellant's property. A variance to section 50.3(5)(d) has therefore been granted.

[36] The Board notes that the granting of this permit allows a hot tub to be built in accordance with the submitted site plan approved by the Development Authority. This does not relieve the owners of the subject Site from complying with the *Community Standards Bylaw 14600* and in particular with Part 3 of that Bylaw dealing with noise control.

[37] For the above reasons, the appeal is denied and Development Permit is granted.

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

Board Members in Attendance:
Mr. M. Young; Mr. A. Nagy; Ms. S. LaPerle; Mr. R. Hobson

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.

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Date: May 18, 2018
Project Number: 154286546-011
File Number: SDAB-D-18-065

Notice of Decision

[1] On May 3, 2018, the Subdivision and Development Appeal Board (the "Board") heard an appeal that was filed on **April 10, 2018**. The appeal concerned the decision of the Development Authority, issued on March 14, 2018, to approve the following development:

Construct a 16 Dwelling Apartment House building.

[2] The subject property is on Plan 1422318 Blk 7 Lot 6A, located at 11723 - 101 Street NW, within the (RA7) Low Rise Apartment Zone. The Medium Scale Residential Infill Overlay 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 Development Permit application with attachments, proposed plans, and the approved Development Permit;
- The Development Officer's written submissions;
- The Appellant's written submission; and
- The Respondent's written submission.

Preliminary Matters

[4] 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.

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

[6] 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. J. Wilhelm

[7] The appeal was scheduled to start at 10:30 a.m.; the actual start time was 11:39 a.m. The Appellant had still not arrived and the hearing proceeded in the absence of the Appellant. The Board relied on the Appellant's written submissions.

ii) Position of the Development Officer, Mr. K. Bacon

[8] The Development Authority was not in attendance and the Board relied on Mr. Bacon's written submissions.

iii) Position of the Respondent, RK Investments Ltd., represented by Mr. S. Rattan

[9] RK Investments purchased the subject property on March 15, 2018. The previous homes on the lot had already been demolished by the previous developer that intended to build a 16 unit Apartment House building on the subject site.

[10] It is RK Investment's intent to start construction as soon as possible. They had hoped to finish the project this summer but have been significantly delayed due to this appeal process.

[11] Mr. Rattan does not believe that isolation of the abutting lot to the north should be a reason for refusing the subject development. The Appellant has several options available:

a. The Appellant still has the option of consolidating with the lot to the north (10731 – 101 Street for future redevelopment).

b. The Appellant can continue renting their home out to students which he currently does.

c. The Appellant could build a new single family home on the property.

[12] Both RK Investments and the previous owner of the subject property attempted to purchase the Respondent's property without success. RK Investments made an offer to purchase the Appellant's property at a value above the City's assessed value but the offer was refused. The Appellant's property is currently listed for sale but in Mr. Rattan's view, the asking price is unrealistic.

[13] RK Investments is still willing to purchase the Appellant's property at a fair price but it would not be incorporated into the proposed development. It would be too expensive to have the architectural and engineered drawings re-done at this point.

[14] The Appellant's concerns regarding neglect of the subject property, problems caused by the demolition of the previous homes and damage to the fence, were caused by the previous owner. RK Investments is a responsible builder and all of these issues will be taken care of once construction starts.

[15] Sufficient parking will be provided as part of the proposed development.

[16] The Appellant's concerns regarding sunlight are addressed by providing the required setbacks between the two properties and the required height restrictions.

[17] The subject site has been vacant since 2014 and neighbours have indicated to RK Investments that they want a nice building constructed as soon as possible.

Decision

[18] The appeal is **DENIED** and the decision of the Development Authority is **CONFIRMED**. The development is **GRANTED** as approved by the Development Authority.

[19] In granting the development the following variance to the *Edmonton Zoning Bylaw* (the *Bylaw*) is allowed:

1. The Isolation regulation per section 210.4(15) is waived.

Reasons for Decision

[20] Apartment Housing is a Permitted Use in the (RA7) Low Rise Apartment Zone.

[21] The proposed development complies with all relevant development regulations with the possible exception of 210.4(15) which states:

> Apartment Housing, Group Homes, Lodging Houses, Row Housing and Stacked Row Housing shall not isolate another Site within this Zone of less than 800 m2. The Development Officer may exercise discretion in those cases which would isolate another Site within this Zone of less than 800 m2, having regard to the location, age and nature of the Use or Uses on the Site that would be isolated.

Isolation is defined in section 6.1(62) of the *Bylaw*:

> when used with reference to a Site, that the Site is so situated with respect to a proposed development, and abutting existing development, proposed development for which a Development Permit has been issued, public roadways and natural features, that such Site would not comply with the minimum requirements of this Bylaw. Isolate has a similar meaning.

[22] The Development Authority did consider the criteria mentioned in section 210.4(15) and, after having regard for location, age and nature of the Use on the abutting Site to the north, decided to grant the permit notwithstanding the Isolation issue raised in this situation.

[23] The Board notes that the Development Authority considered Isolation to be an issue because the current Site Area and Site Width of the abutting property to the north is not sufficient for any Uses. The Site Area and Site Width are insufficient for development in the (RA7) Low Rise Apartment Zone.

[24] The Board notes, however, that this Isolation and lack of sufficient Site Area and Site Width only exists for the site to the north, and is not being altered or affected by the proposed development.

[25] All the proposed development does with respect to the current and existing Isolation of the lot to the north is to make consolidation of the subject Site with the lot to the north less likely to occur. It does not prevent consolidation, as a sale could occur after granting this permit.

[26] The Board notes that there is another consolidation option open to the property owner of the Site to the north of the subject Site which would be consolidation with the parcel of land to the north of that parcel.

[27] The Board notes there is evidence before the Board of attempts at consolidation of the subject Site with the Appellant's property although these attempts have been unsuccessful to date.

[28] It is an issue as to whether or not a variance to section 210.4(15) is even required, given that it may not be "Apartment Housing" that is causing the Isolation to the Site to the north. It is already isolated due to its existing Site Width and Site Area. Nevertheless, for the sake of clarity, the Board will grant a variance to this provision, for the following reasons:

a) As indicated above, the Isolation already exists and is not being created by the proposed development.

b) The property owner of the lot to the north has other options for consolidation.

c) The *Bylaw* grants the Development Authority the right to grant variances to a proposed development when those variances are necessitated by hardship, and as the Development Authority found, the site to the north could be seen as a lot that would have a hardship attached to its Site Width and Site Area.

d) The Board notes that the current Use of the lot to the north is a single family residence which is a Use that, while discretionary, is not in accordance with the purpose of the (RA7) Low Rise Apartment Zone: "To provide a Zone for Low Rise Apartments."

[29] The subject Site would be sterilized if the development of a Permitted Use that required no variances to all the other regulations in the *Bylaw* was not allowed to be built because of a potential Isolation issue to an existing lot to the north.

[30] The practical effect would be to prevent the property owner of the subject Site from developing Permitted Uses on the Site that comply with all other regulations. The Board agrees with the Development Authority that this would create an unnecessary hardship for the subject Site.

[31] For these reasons the Board confirms the decision made by the Development Authority that having regard to the location, age and nature of the Use on the Site to the north that the proposed development should be allowed notwithstanding section 210.4(15). Despite the Isolation variance the proposed development complies completely with *Bylaw*.

[32] The Appellant in their submissions raised the issue of parking, but the Board notes that no parking variance is required and that the proposed development complies with all on-site parking requirements of the *Bylaw*.

[33] The Appellant also raised issues of sunlight penetration. The Board does not consider this to be a reason to allow the appeal as the proposed development meets the maximum Height and Setback requirements of the (RA7) Low Rise Apartment Zone. In addition, the third and fourth stories are stepped back an additional 2.1 metres to 3.9 metres from the north property line in order to minimize massing, privacy and shadowing impacts.

[34] No written opposition was received from anyone in the neighbourhood and no one appeared in opposition.

[35] The Board finds that the proposed development 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.

[36] For these reasons the appeal is denied.

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

Board Members in Attendance:
Mr. M. Young; Mr. A. Nagy; Ms. S. LaPerle; Mr. R. Hobson

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