EDMONTON
TRIBUNALS
Subdivision & Development Appeal Board

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Date: December 15, 2016
Project Number: 224954590-003
File Number: SDAB-D-16-305

Notice of Decision

[1] On November 30, 2016, the Subdivision and Development Appeal Board heard an appeal that was filed on November 7, 2016. The appeal concerned the decision of the Development Authority, issued on October 31, 2016, to refuse the following development:

> Construct a Single Detached House with a front attached Garage, front veranda, fireplaces, rear partially covered deck (4.27m x 10.66m), 2nd floor balcony (1.83m x 4.57m), and Basement development (NOT to be used as an additional Dwelling)

[2] The subject property is on Plan 2128MC Blk 1 Lot 19, located at 13411 - 83 Avenue NW, within the RF1 Single Detached Residential Zone. The Mature Neighbourhood Overlay applies to the subject property.

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

- Copy of the Development Permit application with proposed plans;
- Refused Development Permit decision;
- Canada Post receipt confirming delivery of the refusal decision;
- Development Officer's written submissions, dated November 22, 2016;
- Response from Community Consultation under the Mature Neighbourhood Overlay;
- Correspondence between the Applicant and the Development Officer regarding privacy screening; and
- Appellant's written submissions and supporting documentation.

Preliminary Matters

[4] 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.

[5] The Presiding Officer 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.

Summary of Hearing

i) Position of the Appellant, Mr. S. Johnston

[7] Mr. Johnston was accompanied by Ms. S. MacLennan and Ms. J. Joly, Project Manager from Liv Homes.

[8] The Appellant understands the value of development rules and regulations and feel they play an important function. However, there are certain instances where the rules should not apply, as is the case before this Board.

[9] The Appellant submitted that the existing home could not be built today under the Mature Neighbourhood Overlay as both the basement elevation and Height would not comply. The lot configuration creates a significant hardship which is a factor in the development of the property.

[10] The proposed development remains under the Height requirement of 8.6 metres on the west side of the development, but a Height variance is required for the east side due to the side sloping lot. The Appellant has tried to minimize the required Height variance by reducing the pitch of the roof and lowering the ceiling heights from 10 feet to 9 feet. The proposed development visually conforms in Height to the neighbouring property to the west.

[11] The Rear Setback will be 40 feet from the City property line at the closest point. Mr. Johnston referred the Board to the previously submitted aerial view and plot plan which illustrate that the neighbouring properties extend further into the Rear Setback than what they are proposing. Also, the Mature Neighbourhood Overlay contemplates rear detached garages and the proposed development will have a front attached Garage similar to the existing home.

[12] Most of the stairs leading from the sidewalk to the front door serve as a retaining wall, and should not be considered as part of the front landing. Because of the slope of the lot, a large number of stairs are required to access the home safely. The Front Setback should be considered to be 9.45 metres. This home is essentially being built in exactly the same spot as the existing dwelling and the existing blockface is being maintained. If the home were to be moved forward, two mature 60 foot spruce trees would be lost. The stairs also form a retaining wall which is required due to the sloped lot.

[13] The proposed development positively impacts the area and improves the value of the street and the area in general. The Appellant obtained the support of the Community League and numerous neighbours including the most affected neighbour to the east. No response was received from the property directly to the west. The two lots to the rear are screened by mature trees, most of which will be salvaged. Both adjacent rear property owners are looking forward to seeing an improved family home rather than a speculative home.

[14] The total site coverage is well under the allowed 28 percent and the Side Setbacks remain quite significant.

[15] The Appellant did not realize there was an issue with the ridge line until the refused permit decision was issued. However, it was his position that the ridge line issue stemmed from the slope of the lot, and not the development itself.

[16] Upon questioning by the Board, the Appellant confirmed that he has reviewed the recommended conditions of the Development Officer and has no objections to any of them.

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

[17] Mr. Yeung agreed that the lot poses a hardship and stated that he would have considered approving the development if he had the ability to vary Height.

[18] It was his view that the results of the community consultation indicate there would be no material impact in granting the six required variances. He is satisfied with the community consultation process that was followed.

[19] He confirmed that the allowed Height to the ridge line of the roof would be 11.5 metres under the RF1 Single Detached Residential Zone, but in this case, it is 10.1 metres due to the Mature Neighbourhood Overlay. The Height to the ridge line of the proposed development is 10.65 metres which would require a 0.55 metre variance. Various methods of calculating the Height were used, but they all resulted in a Height variance being required.

[20] He agreed that the proposed front sidewalk arrangement is to ease the grade up to the front entry and to act as a retaining wall.

[21] Upon questioning by the Board, he confirmed that projections such as unenclosed steps and covered decks can project two metres into required setback according to the Mature Neighbourhood Overlay.

iii) Rebuttal of the Appellants

[22] The Appellant referenced previous SDAB decisions, particularly SDAB-D-16-227, which involved a development with similar issues to what the Appellant is facing, and required greater variances than those being proposed. The Appellant reiterated that he is trying to be as reasonable as possible while still building an attractive home.

Decision

[23] 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. Privacy screening will be installed on the left elevation to prevent visual intrusion into the adjacent property on the east side.

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

3. The proposed Basement development(s) shall NOT be used as an additional Dwelling. An additional Dwelling such as Secondary Suite shall require a separate Development Permit application.

4. Platform Structures greater than 1.0 m above Grade shall provide privacy screening to prevent visual intrusion into adjacent properties. (Reference Section 84.3(8))

5. The area hard surfaced for a driveway, not including the area used for a walkway, shall comply with Section 54.1(4).

6. Except for the hardsurfacing of driveways and/or parking areas approved on the site plan for this application, the remainder of the site shall be landscaped in accordance with the regulations set out in Section 55 of the Zoning Bylaw.

7. Landscaping shall be provided on a Site within 18 months of the occupancy of the Single Detached House. Trees and shrubs shall be maintained on a Site for a minimum of 42 months after the occupancy of the Single Detached House (Reference Section 55.2.1).

8. Two deciduous trees with a minimum Caliper of 50 mm, two coniferous trees with a minimum Height of 2.5 m and eight shrubs shall be provided on the property. Deciduous shrubs shall have a minimum Height of 300 mm and coniferous shrubs shall have a minimum spread of 450 mm (Reference Section 55.2.1).

9. All Yards visible from a public roadway, other than a Lane, shall be seeded or sodded. Seeding or sodding may be substituted with alternate forms of ground cover, including hard decorative pavers, washed rock, shale or similar treatments, perennials, or artificial turf, provided that all areas of exposed earth are designed as either flower beds or cultivated gardens (Reference Section 55.2.1).

10. Existing vegetation shall be preserved and protected unless removal is demonstrated, to the satisfaction of the Development Officer, to be necessary or desirable to efficiently accommodate the proposed development. (Reference Section 55.4(8)).

ADVISEMENTS:

1. Any future deck enclosure or cover requires a separate development and building permit approval.

2. Any future additional dwelling such as Secondary Suite shall require a separate development permit application.

3. The driveway access must maintain a minimum clearance of 1.5m from the service pedestal and all other surface utilities.

4. Lot grades must comply with the Edmonton Drainage Bylaw 16200. Contact Drainage Services at 780-496-5500 for lot grading inspection inquiries.

5. An approved Development Permit means that the proposed development has been reviewed only against the provisions of the Edmonton Zoning Bylaw. It does not remove obligations to conform with other legislation, bylaws or land title instruments such as the Municipal Government Act, the ERCB Directive 079, the Edmonton Safety Codes Permit Bylaw or any caveats, covenants or easements that might be attached to the Site. (Reference Section 5.2)

6. Unless otherwise stated, all above references to "section numbers" refer to the authority under the Edmonton Zoning Bylaw 12800.

[24] In granting the development the following VARIANCES to the *Edmonton Zoning Bylaw* are allowed:

1. The minimum distance from the front unenclosed steps to the property line along 83 Avenue NW (front lot line) of 7.6 metres as per Section 44.1.1 is varied to allow a deficiency of 1.5 metres, thereby decreasing the minimum allowed to 6.1 metres.

2. The minimum distance from the rear uncovered deck to the back property line (rear lot line) of 13.8 metres as per Section 44.3.b is varied to allow a deficiency of 1.6 metres, thereby decreasing the minimum allowed to 12.2 metres.

3. The minimum distance from the house to the rear property line of 15.8 metres as per Section 814.3.5 is varied to allow a deficiency of 3.6 metres, thereby decreasing the minimum allowed to 12.2 metres.

4. The maximum allowable Height (to midpoint) of 8.6 metres as per Section 814.3.13 is varied to allow an excess of 0.7 metres, thereby increasing the maximum allowed to 9.3 metres.

5. The maximum extension of the ridge line of the roof above the maximum height of 1.5 metres as per Section 52.2.c is varied to allow an excess of 0.55 metres, thereby increasing the maximum allowed to 2.05 metres.

6. The maximum allowable basement elevation of 1.2 metres as per Section 814.3.16 is varied to allow an excess of 0.7 metres, thereby increasing the maximum allowed to 1.9 metres.

Reasons for Decision

[25] The proposed development is a Permitted Use in the RF1 Single Detached Residential Zone.

[26] The front unenclosed steps also serve as a retaining wall to address the difference in elevations and for accessibility to the main floor entrance.

[27] Based on the evidence presented, the Board finds that there is a significant Grade difference which presents an unnecessary hardship and practical difficulties for developments on this Site. The overall topography of the subject Site is such that the lot drops 2 metres from the west to the east. A Height variance is required due to this marked change in the lot.

[28] The proposed Single Detached House has a walkout in the foundation which reduces the massing.

[29] The Board accepts that the Appellant will work to maintain the existing vegetation on the property to ensure the necessary privacy for all of the adjacent properties.

[30] Community consultation was conducted and the proposed development was either supported or no response was received. The Development Authority agreed that there was substantial compliance with the community consultation requirements. The Community League also supports this development.

[31] No objections were received from any neighbours and no one appeared in opposition to the proposed development. The most affected neighbour immediately adjacent to the East is in full support of the proposed development.

[32] The proposed development is well under the maximum permitted Site Coverage and the Side Setbacks significantly exceed the minimum required.

[33] For the reasons stated above, 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.

Brian Gibson, Presiding Officer
Subdivision and Development Appeal Board

Board Members Present:
K. Cherniawsky; R. Hobson; K. Hample; E. Solez

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.

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Date: December 15, 2016
Project Number: 231481614-001
File Number: SDAB-D-16-306

Notice of Decision

[1] On November 30, 2016, the Subdivision and Development Appeal Board heard an appeal that was filed on November 16, 2016. The appeal concerned the decision of the Development Authority, issued on November 9, 2016, to refuse the following development:

> Change the use from a General Industrial use to a Child Care Service (90 children), and to construct interior and exterior alterations (removing loading bay doors and replacing them with windows, and adding a new door)

[2] The subject property is on Plan B4 Blk 14 Lot 158, located at 10583 - 115 Street NW, within the DC1 Direct Development Control Provision. The Central McDougall and Queen Mary Park Area Structure plan applies to the subject property.

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

- Copy of the Development Permit application with proposed plans;
- Refused Development Permit decision;
- Development Officer's written submissions, dated November 25, 2016;
- Memorandum from Sustainable Development Transportation Planning and Engineering;
- Parking Variance Justification forms;
- Appellant's supporting documentation; and
- One submission from a neighbouring property owner in opposition to the development.

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

- Exhibit A – Aerial photograph of the Site from Google Earth
- Exhibit B – Street view photograph of the subject block

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.

[8] The Presiding Officer referred to section 641(4)(b) of the *Municipal Government Act*, and identified that the parties should direct its submissions to whether the Development Officer failed to follow the directions of Council.

[9] The Presiding Officer also advised of the recent change to employee parking requirements under section 54.2 Schedule 1(A)(33)(b) of the *Edmonton Zoning Bylaw*. Required parking for employees had been changed from one parking space for every 33 square metres to one parking space for every 100 square metres of Floor Area. In addition, if the Child Care Service is within 400 metres of an LRT Station, one parking space is required per 360.0 square metres of Floor Space.

Summary of Hearing

i) Position of the Appellant, Ms. J. Skeffington

[10] Ms. Skeffington appeared with her client, Ms. H. Traim.

[11] Ms. Skeffington explained that they first met with the Development Officer on an inquiry basis to make sure they had all the relevant information prior to making their application. Nothing was mentioned at that time regarding the industrial nature of the area which could present hazards for a Child Care Service. The requirement for a Risk Analysis was never mentioned and the first they heard of it was when they received the refusal decision.

[12] They knew a parking variance would be required as there is no on-Site parking associated with this Site. They acknowledged that despite the new bylaw changes to minimum employee parking requirements for a Child Care Service, a parking deficiency still exists.

[13] They conducted the requested parking studies over a period of four to five days, and found that there was often in excess of 60 empty parking spaces in the immediate vicinity. They did not include the area north of 106 Avenue in the study. Also, the City of Edmonton Transportation Department had no concerns with parking.

[14] While the surrounding area may have been industrial at one time, it is in the latter stages of transition and is no longer used as such. The appearance of the buildings is deceptive and there are no longer any permitted uses under the current direct control district which would allow for any industrial use. She likened the area to downtown, where many of the existing brick heritage buildings were originally built as industrial buildings but are now used as lofts, offices and art galleries.

[15] The existing businesses in the immediate vicinity consist of non-industrial uses such as dance studios, Pilates and yoga studios, parking administration offices, a sign business, another daycare, Fat Franks, the Mustard Seed community office and the Ethiopian Community Association. There is rarely anyone present at the Community Association and the Alberta Taxi site is more of a dispatch office with a dozen cabs being present at any one time at the most. According to their website, Fast Signs creates promotional material and sells items like posters, logos on coffee mugs and small LED panels for trade shows.

[16] The closest industrial use is Soper's Supply just north of 105 Avenue and east of 114 Street. There is a large vacant area to the south which the Appellant presumes will be for future business condominiums. There are a large number of existing and new residential condominiums further to the south.

[17] There is low traffic in the area as it is not conducive to large vehicles or heavy traffic. However, the Appellant acknowledged that garbage trucks do drive through.

[18] Ms. Skeffington noted the location of the two small garbage cans on the site plan. When questioned if this was adequate, she indicated that the number may increase to four garbage cans or a small commercial container which could be placed in front of the two parking stalls that have been created. Dumping would have to be timed or cars moved to avoid interference. The Appellant did not anticipate creating a large amount of garbage.

[19] With respect to the community consultation, Ms. Skeffington explained that they visited as many neighbouring businesses as they could on two separate occasions and left information. The general response to the proposed development was positive. They did not obtain anything in writing and did not approach the other existing daycare. They had difficulty finding anyone present at some of the businesses as the dance studios and wellness centres are geared more to evening and weekend clients.

[20] An outside play area is proposed at the rear of the building adjacent to the lane. They are prepared to put up a more substantial fence to mitigate the issues created by the garbage dumpsters at the two adjacent businesses. The existing daycare has the same garbage issues that they would have.

[21] Upon questioning by the Board, Ms. Skeffington submitted that the Development Authority did not follow the directions of council as he based his refusal on the fact that the area is characterized by a number of General Industrial Use developments, which is

incorrect. Also, the Transportation Department had no concerns regarding the parking deficiency.

[22] Most of their parking requirements would be stop-and-go, and the peak times would be between 7:00 a.m. and 9:00 a.m., and again from 4:00 p.m. to 6:30 p.m. She confirmed they have no control over any of the outside parking around their building and they will have no designated drop-off spots like the existing nearby daycare has.

[23] There is occasional traffic in the back lane throughout the day and some small loading areas that are used once a week as well as some staff parking from other businesses. A daycare located in a shopping strip mall with a grocery store or restaurant has more traffic issues than the subject Site.

[24] There are many bus and bike routes in close proximity. Their target market is the existing residential area to the north as well as all the new residential condominiums being constructed in the area. She did acknowledge that some parents may drop off children enroute to work while travelling from another area.

[25] They have no objections to the conditions proposed by the Development Office if this development were to be approved.

ii) Position of the Development Officer, Mr. P. Adams

[26] Mr. Adams did a re-calculation of parking requirements as a result of the most recent Bylaw changes and advised there is now a deficiency of 10 parking spaces rather than 13 as per the original refusal.

[27] Transportation is supportive of the original parking variance but the Development Authority does not have to follow their recommendations and would prefer to see all of the requirements of the *Edmonton Zoning Bylaw* met.

[28] The lack of a commercial garbage container is a concern for him although he did not specifically list this on his refusal. It may be possible to re-configure the outdoor play area to extend behind the rear of the building to allow for a small dumpster where the current garbage cans are to be located, but he noted that such a configuration would eliminate the proposed parking spots. He could not comment on whether such a re-configuration would meet Provincial requirements for play areas.

[29] He acknowledged that the Applicants were not advised of the requirement of the Risk Management Analysis prior to it being included as a reason for refusal. At the time, the Appellants were pressing for a decision as quickly as possible.

[30] Although there are no currently listed General Industrial Uses within the current direct control district, this area is in transition and it was his understanding that it remains a

General Industrial Use area. For example, there is still a General Industrial Use attached to the Fast Signs location, although this business has recently moved.

[31] There were many reasons for refusal and they need to be considered as a whole, not individually. The adjacent trash collection areas and loading docks pose a concern as well as the lack of any on-Site parking or drop-off spaces.

[32] A Risk Assessment Study would identify such items as hazardous substances and the expected frequency of a hazardous event occurring. In the context of this Site, he would expect to see the impact of waste collection activities and vehicle traffic included as part of the study. The risk assessment is put together by a professional and is circulated to the City's risk assessment group for comments. The final decision would rest with the Development Authority.

iv) Position of the Queen Mary Park Community League

[33] The Community League was represented by Mr. R. Shuttleworth.

[34] Mr. Shuttleworth explained that he has been involved with the Community League as well as the North Edge Business Association in various capacities and is also a long term resident. He is very familiar with the area.

[35] There is still some General Industrial Use in the area that has been grandfathered in. As the area continues to transition, these developments are not intended to revert back to General Industrial Uses.

[36] He expressed bewilderment regarding the memorandum from the Transportation Department, indicating that there are no parking issues. A parking study completed late 2015 showed that parking in this area is at 104 percent capacity which indicates a significant degree of illegal parking.

[37] The auto rental shop on 115 Street does not have enough parking on site and illegally parks some of their vehicles on the street. The back alley behind Fat Franks is plugged every morning as vendors come in to pick up their supplies for the day. There have been heated exchanges between Fat Franks and the current daycare as the daycare clients go into Fat Frank's parking lot. The Mustard Seed across the lane was granted a parking variance to require zero parking spaces, yet they have 29 employees who drive to work.

[38] The North Edge Business Association is conducting another parking study to determine how much parking in the area is used by employees and by customers. The biggest complaint of area businesses is the lack of customer parking. The Community League is very concerned about more businesses being granted variances to parking and drop-off space requirements, which has a cumulative effect.

[39] The Community League tries to work with Applicants and the City of Edmonton Sustainable Development when new applications come in. However, with respect to this appeal, the Community League only found out about the proposed daycare the day before the hearing. The existing daycare operating in the area worked closely with the Community League and the Transportation Department which resulted in the designated drop-off spaces being created.

[40] There are already four daycares operating within a five block radius and two other applications pending (the current application as well as one on 107 Avenue). It was his view that it would not be a hardship to the neighborhood if this application was refused.

v) Position of Affected Property Owner in Opposition to the Development, Ms. R. Qarni

[41] Ms. Qarni was represented by legal counsel, Mr. D. Chmelyk. Her realtor, Mr. M. Pnaich, was also in attendance.

[42] An aerial photograph (Exhibit "A") was submitted to illustrate the location of Ms. Qarni's childcare business in relation to that of the Appellant's. The exhibit also showed the location of the outdoor play area and a loading dock directly to the east with some trucks parked there.

[43] Mr. Chmelyk noted that from the photographic evidence, angle parking on the front street side is very busy. This is a primary concern in light of his client's existing daycare for 94 children. They are not operating anywhere near capacity and parking is already at a premium. Approving a second daycare for an additional 90 children will make parking issues exponentially worse.

[44] Ms. Qarni also disagreed with the Appellant's assessment with respect to the traffic generated by nearby developments. The dance studio also located in the same building as her's is busy at all times of the day. The Ethiopian Community Centre is very busy with quite a number of activities and there is also a mosque operating near this centre. A lot of traffic is generated when members come for prayers. Many taxis come and go from the Alberta Taxi location.

[45] A daycare also requires drop-off spaces in the middle of the day because people work half days. The current daycare has issues with people from the dance studio using their designated drop-off spaces, resulting in their clients having to double park in the middle of the street in order to pick up their children.

[46] Mr. Chmelyk submitted Exhibit "B", a Google street view image showing the frontage of the two storey building where his client's business is located (far south end bay). He also pointed out the Appellant's location in the adjoining one storey building.

[47] Mr. Chmelyk submitted that the Development Officer followed the directions of Council. Referencing section 80(2)(d) of the *Edmonton Zoning Bylaw*, he submitted that there are Site conditions which may negatively impact the proposed Child Care Services Use. It was his position that the Development Officer considered the relevant factors by looking at the actual current on-site conditions, not future changes.

[48] His client's existing daycare was approved in 2014 and has been operating since October 2016. He is not aware if the DC1 Direct Development Control Provision was in place at the time of its approval. Ms. Qarni could not comment on what other businesses operate in the building other than a dance studio.

[49] Upon questioning by the Board, Ms. Qarni explained that there are no garbage containers located right next to her play area. She currently has four staff, which may increase to nine or ten once her business begins operating at full capacity. She has two or three parking stalls as well as four designated drop-off spots in front of the building.

[50] Her realtor, Mr. Pnaich, provided the following comments:

a) Ms. Qarni paid $350.00 for each of her four drop-off spaces.
b) Land was leased from the City as well as the landlord to allow her to put up a large fence to protect the outdoor play area from the truck traffic generated by the catering business across the rear lane.
c) Approval of a second daycare in such close proximity will hurt both of the businesses. The existing daycare is having difficulty attracting clients.
d) No Risk Assessment study was required at the time of their application.

vi) Rebuttal of the Appellant

[51] Ms. Skeffington explained that the parking study she conducted was within a 60 metre radius of the proposed development, and she had radically different results than what was described by the other parties. 106 Avenue is virtually vacant for parking and Exhibit "A" confirms this. She did concede that there are fewer open parking stalls between 12:30 p.m. and 1:00 p.m. However, there is also excellent bus service in the area and bike routes are available.

[52] It is not her experience that the dance studio is busy during the day, as she had difficulty getting someone to answer the door when conducting her community consultation.

[53] Exhibit "A" also shows the complete absence of any industrial activity and shows no large trucks or vehicles. She speculated that the only large truck traffic is when the garbage trucks come to empty the dumpster.

Decision

[54] The appeal is ALLOWED IN PART as it is the opinion of the Board that the Development Officer did not follow the directions of council. However, the development is REFUSED for the reasons that follow.

Reasons for Decision

[55] The proposed development is for a Child Care Service, which is a Listed Use in this direct control district, DC1 (Bylaw 14141 – Area 2 – Precinct D).

[56] One of the Development Officer's reasons for refusal was the absence of a Risk Assessment report as per section 14.6 of the *Edmonton Zoning Bylaw*; however the Applicant was never advised of this requirement. The Board finds that it cannot have been Council's intent to permit administration to render a decision without affording an Applicant a full opportunity to address and mitigate potential concerns during the application process. For this reason, the directions of Council were not followed, and the Board may choose to substitute its decision for that of the Development Authority's, pursuant to section 641(4)(b) of the *Municipal Government Act.*

[57] However, the Board declines to exercise its discretionary authority under section 641(4)(b) on the basis that the outdoor play area is located directly adjacent to trash collection areas and loading docks, and there remain General Industrial Uses found along the rear lane of 115 Street which create commercial traffic.

[58] The Board is cognizant of the nearby Child Care Service which also has a similar play area. However, the Board notes that in that case, the Applicant worked closely with City departments to mitigate parking and traffic impacts, and entered into a land lease to fence off the outdoor play area to provide additional protection. No such measures were proposed in this case. The Board finds that a Risk Assessment Study – or at the minimum, a comprehensive plan to mitigate the hazards to the play area – is therefore necessary for any Child Care Service in this area.

[59] The Board received evidence of parking congestion from an Affected Property Owner and the Community League; however, the evidence presented by the Appellant contradicted this. Based on the entirety of the information presented, the Board finds that there does appear to be a parking issue in this area. The requirement for ten drop-off spaces for a Child Care Service under Section 54.2, Schedule 1(A)(33) of the *Edmonton Zoning Bylaw* has not been met, and the Board is of the view that granting the required variances would have a negative impact on the parking situation in the area.

[60] The Board notes that an affected property owner had provided a letter raising financial concerns of a competing business. This is not a planning concern and the Board gives no weight to this document.

[61] For the reasons stated above, the Board finds that the proposed development will unduly interfere with the amenities of the neighbourhood, and materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land. The appeal is therefore denied and the development is refused.

Brian Gibson, Presiding Officer
Subdivision and Development Appeal Board

Board Members Present:
K. Cherniawsky; R. Hobson; K. Hample; E. Solez

Important Information for the Applicant/Appellant

1. This decision may be appealed to the Alberta Court of Appeal on a question of law or jurisdiction under Section 688 of the *Municipal Government Act*, RSA 2000, c M-26. If the Subdivision and Development Appeal Board is served with notice of an application for leave to appeal its decision, such notice shall operate to suspend the Development Permit.

2. When a decision on a Development Permit application has been rendered by the Subdivision and Development Appeal Board, the enforcement of that decision is carried out by the Sustainable Development Department, located on the 5th Floor, 10250 – 101 Street, Edmonton.

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EDMONTON
TRIBUNALS
Subdivision & Development Appeal Board

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Date: December 15, 2016
Project Number: 127227523-004
File Number: SDAB-D-16-273

Notice of Decision

[1] The Subdivision and Development Appeal Board (the "Board") at a hearing on November 2, 2016, made and passed the following motion:

> That the appeal hearing be tabled to November 30 or December 1, 2016.

[2] On November 30, 2016, the Board made and passed the following motion:

> That SDAB-D-16-273 be raised from the table.

[3] On November 30, 2016, the Subdivision and Development Appeal Board heard an appeal that was filed on October 7, 2016. The appeal concerned the decision of the Development Authority, issued on October 4, 2016 to refuse the following development:

> Construct an addition (3.33m x 7.39m Carport) to a Single Detached House, existing without permits.

[4] The subject property is on Plan 2034KS Blk 33 Lot 10, located at 15921 - 94 Avenue NW, within the RF1 Single Detached Residential Zone. The Mature Neighbourhood Overlay 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 proposed plans and photographs;
- Refused Development Permit decision;
- Canada Post receipt confirming delivery of the refusal decision;
- Development Officer's written submissions, dated November 22, 2016, including legal position of the Development Authority regarding Additions and Alterations to Non-Conforming Buildings;
- Response from Community Consultation under the Mature Neighbourhood Overlay;
- The Board's tabling decision, dated November 2, 2016;
- Previous decisions of this Board concerning the subject development, File Numbers SDAB-D-98-374 and SDAB-D-13-155;

- Appellant's written submissions and supporting documentation, including community consultation responses; and
- Two online responses and one email in opposition to the development.

Preliminary Matters

[6] 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.

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

[8] 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 the Appellant, Mr. O. Jagodnik

[9] Ms. Jagodnik was represented by legal counsel, Mr. N. Forster and Mr. D. Chmelyk.

[10] The Appellant submitted that the carport is characteristic of the neighbourhood. In support, legal counsel referenced Exhibit "A", a series of photographs identifying a number of garages and carports in the neighbourhood that abut right against fencing and/or property lines. The Appellant was uncertain as to whether these garages and carports had valid permits, but emphasized that the photos were submitted simply to show that carports such as the one before this Board are typical of the neighbourhood.

[11] The Appellant also provided a brief history of the carport. Eighteen years ago in 1998, the previous owner of the property, Ms. Potts appeared before a panel of this Board, at which time the Board held that the carport must be removed. Ms. Potts failed to inform the Appellant of this requirement when the latter purchased the property.

[12] In 2012, a dispute arose with the adjacent neighbours to the west of the subject property, Mr. Green and Ms. Mellott, with respect to whether a shed on the Appellant's property was encroaching onto the neighbouring property. It was the Appellant's position that the neighbours' sole concern at the time was with the shed and not the carport, as supported by the Questioning on Affidavit of Mr. Green in 2014. The shed has since been removed and those concerns have been mitigated.

[13] Upon questioning by the Board, the Appellant provided the following clarification regarding the construction of the carport:

a) In 1954, the house was built, and sometime between 1954 and the 1990s, the carport was built, though the Appellant speculated it was likely constructed earlier.
b) In 1998, a compliance issue arose with the previous property owner, Ms. Potts. The matter was heard before a panel of this Board, at which time, the Board required that the carport be removed. Ms. Jagodnik was unaware of this requirement.
c) In 2013, an application was made for the construction of a carport (7.39 metres x 3.3 metres). The Board refused that application.
d) In 2016, a new application was made for the construction of a carport (7.39 metres x 3.0 metres), which is slightly smaller than the 2013 application, with slightly different setbacks.

[14] The Board drew attention to the legal principle of issue estoppel, and questioned whether the matter being brought before this panel of the Board had already been adjudicated by the Board in 2013. The Appellant submitted that issue estoppel does not apply in this case for several reasons:

a) In 2013, the neighbouring property owners led evidence regarding the carport being a cause for drainage concerns, which resulted in the neighbours' basement being flooded. Following that hearing, the Appellant subsequently consulted with a Flood Prevention Inspector who discovered that the downspouts had been installed incorrectly on the neighbouring house. There is therefore new evidence that is being raised today that was not brought before the 2013 Board.
b) In 2013, the Appellant was not represented by legal counsel, and therefore was unaware that she could make the argument before this Board that the carport was a legally non-conforming structure.
c) In 2013, the application was for a carport addition at 7.39 metres x 3.3 metres, which was a slightly reduced size when compared to the current application. The application before this Board is for a carport addition of 7.39 metres x 3.33 metres.
d) *Res judicata* does not apply as the parties before this Board are different than the parties in the previous appeals: in 1998, the Applicant was the previous owner, Ms. Potts. It was conceded that the Applicant was a party in the 2013 appeal.
e) Notwithstanding the above, it remains the legal right of an individual to reapply for the same permit.

[15] Citing the Development Officer's refusal decision with respect to the non-conformity of the subject building, the Appellant submitted that pursuant to section 643 of the *Municipal Government Act*, a non-conforming building should be allowed to exist. Upon questioning by the Board about whether it is the house itself that is non-conforming, or whether the carport is also non-conforming, the Appellant acknowledged that there is no evidence of an approved permit for the carport which would make it legally non-conforming today. However, it was the Appellant's position that the City has found that the building including the carport is non-conforming, as set out in its reasons for refusal.

ii) Position of the Development Authority

[16] The Development Authority was represented by Mr. G. Robinson.

[17] Mr. Robinson clarified that Sustainable Development was not taking the position that the entire structure, including both house and carport, was legally non-conforming. Rather, it is the house itself that is considered legally non-conforming. The carport is existing without permits, and the carport is considered an addition to the non-conforming house.

[18] The carport also adds to the non-conformity, and in this regard, the Development Officer referred the Board to the legal position of the Development Authority regarding Additions and Alterations to Non-Conforming Buildings, which had been submitted as part of its materials.

[19] Upon questioning by the Board regarding the Real Property Report ("RPR"), Mr. Robinson noted that only page two of three had been submitted. At this point, the Appellant provided the entirety of the RPR, marked as Exibit "B". Page one of the RPR was dated November 23, 2012. It would appear that page one of the RPR represents the current house and carport on Site, minus the shed; page two shows the proposed carport.

[20] The Development Officer clarified that the carport requires a minimum side yard setback of 2.0 metres. The RPR indicates 1.21 metres from the property line to the carport, and the refusal was based partially on this deficiency of 0.79 metres.

[21] In sum, it was the Development Authority's position that the Site did not present any particular hardship so as to prevent a garage or carport to be located elsewhere on the Site. Upon questioning by the Board, Mr. Robinson identified the structure at the front of the house as a deck which could be removed to accommodate a detached Accessory structure.

ii) Position of Neighbouring Property Owners in Opposition to the Development

<u>Mr. R. Laban and Ms. A. Laban</u>

[22] Mr. Laban disagreed that the Appellant was not aware of the non-compliant carport. For the 1998 appeal, Ms. Jacodnik conducted community consultation in the neighbourhood requesting support for the carport development.

[23] Mr. Laban acknowledged that he did provide a letter of support for the 1998 appeal, but that the support was conditional upon his understanding that repairs would be made to the carport. He felt at the time that he was being reasonable in accommodating a new neighbour.

[24] His primary concern is not with the cosmetic issues arising from the carport, but from the fact that it is not complying with the Bylaw. In his view, the age of the carport is irrelevant, as it is the non-compliance factor, and the resultant impact upon neighbouring properties, that is a concern. Ms. Laban expressed the hope that if the carport were to comply with the setback requirements, there would no longer be a need for the Appellant to shovel snow onto neighbouring properties.

[25] At this point, the Board recalled Mr. Robinson to clarify the setback deficiencies. Mr. Robinson explained that under the Mature Neighbourhood Overlay, a development is required to have a minimum of 2.0 metres on each side for the Side Yards, for a total of 20% of the site width. The carport increases the non-conformity. If the carport were removed, then the 20% site width requirement would be met. He further clarified that the carport does not increase the non-conformity to the rear setback, nor the east side setback.

Mr. B. Green and Ms. J. Mellott

[26] Ms. Mellott explained that the carport is attached to the fencing between her property and the Appellant's property. The Appellant removed the lattice on this fencing, and due to the slope of the carport's roof, the snow from the carport's roof ends up on the Greens' property. In addition, Ms. Mellott was concerned about the structural integrity of the carport.

[27] Ms. Mellott expressed her hope that should the carport be removed or at the very least be set further back on the Appellant's property, it would prevent the Appellant from shoveling snow from the carport onto the Greens' property.

iii) Rebuttal of the Appellant

[28] The Appellant explained that following the tabling motion that was passed by the Board on November 2, he subsequently spoke with legal counsel for the Development Authority, who indicated that community consultation under the Mature Neighbourhood Overlay was required for this development. After discussing further with the Development Officer, the Appellant obtained a copy of the standard form that is circulated by the City for community consultations. The Appellant submitted this information to the Development Authority.

[29] The Board observed that although it was in receipt of the community consultation forms dated on or around October 20, 2016, it did not have any consultation information dated after November 2, 2016. At this point, Ms. Jagodnik realized that the community consultation forms following the November 2 tabling motion were not forwarded to the Board.

[30] The Board recalled the Development Officer, Mr. Robinson, who confirmed that the Development Authority was in receipt of the community consultation forms. However,

its policy is to not disclose the contents of the community consultation results due to the personal information enclosed, and in adherence to Alberta's *Freedom of Information and Protection of Privacy* Act.

[31] Upon questioning by the Board, Mr. Robinson confirmed that the community consultation showed that there were several who supported the development, and several in opposition. The community consultation forms did contain information outlining the variances required under the Mature Neighbourhood Overlay. In his view, the consultation satisfied the consultation requirements under the Overlay.

[32] Following Mr. Robinson's clarification of the community consultation process, the Appellant continued with rebuttal, clarifying that as per the engineer stamped structural design submitted to this Board, the subject development proposes four new posts, which should address the Greens' concerns about structural integrity.

[33] Upon questioning by the Board, the Appellant confirmed the dimensions of the carport currently stands, that being 4.21 metres east-west at the rear, 4.25 metres at the front, and 7.39 metres north-south.

[34] The Appellant also confirmed that the roof of the shed as shown on page three of the RPR has been removed.

[35] Upon questioning by the Board with respect to the recommended conditions of the Development Officer as set out in his written report, legal counsel requested a brief recess to discuss with the Appellant. Upon returning, the Appellant indicated that generally speaking, the conditions were acceptable.

[36] However, the Appellant identified that due to parallel proceedings in the Alberta Court of Queen's Bench, there may be some logistical challenges with respect to condition 3, which stipulated that the carport modifications be completed 45 days from the date of the Board's decision. In this regard, the Appellant proposed an amendment to the condition, permitting the changes to be completed by February 8, 2017, or later. .

iii) Surrebuttal of the Property Owners in Opposition to the Development

[37] Mr. Laban expressed concern about setting a date to ensure that the Appellant complies with the recommended conditions. He would prefer that the required carport modifications be completed sooner.

[38] Ms. Mellott expressed continued concerns with respect to the shed. Other than the roof being removed, the rest of the structure remains, and the shed is still attached to part of her fence. The Board noted that pursuant to recommended condition number two, the shed shall have to be removed.

Decision

[39] The appeal is DENIED and the decision of the Development authority is CONFIRMED. The development is REFUSED.

Reasons for Decision

[40] The proposed development is for the construction of an addition (3.33 metres x 7.39 metres carport) to a Single Detached House. This carport has been the subject of two prior appeals to this Board. Both times, the development was refused.

[41] In *Sihota v Edmonton (City),* 2013 ABCA 43 [*Sihota*], the Alberta Court of Appeal confirmed the test for issue estoppel in planning decisions. That decision was based on the Supreme Court of Canada's ruling in *Danyluk v Ainsworth Technologies Inc.,* 2001 SCC 44. In *Sihota,* the Court held at paragraph 8:

> In order for the doctrine to be engaged:
>
> (a) the same issue must be involved,
>
> (b) the decision said to create the estoppel must be final,
>
> (c) the same parties or their privies must be involved, and
>
> (d) as a discretionary matter, it must be fair and just to apply the doctrine of issue estoppel in the particular circumstances.
>
> As a threshold consideration, there must be a "judicial" aspect to the decision for issue estoppel to arise.

[42] The threshold consideration has been met: the Subdivision and Development Appeal Board ("SDAB") is a quasi-judicial tribunal established under section 627 of the *Municipal Government Act,* exercising adjudicative authority as granted in sections 683 to 687 for the purposes of development appeals.

[43] Having met the threshold consideration, the Board turned its mind to the four conditions set out in *Sihota,* and finds that all four conditions have been met.

i) The same issue must be involved.

[44] The Board finds that the same issue is involved for the reasons that follow.

[45] It is uncertain when the carport was constructed as an addition to the Single Detached House that is owned by the Appellant. The carport has been the subject of two prior SDAB decisions:

a) In 1998, the Board granted a leave as built permit for a Single Detached House subject to the condition that the attached carport be removed forthwith. The issue came before the Board as a result of a sale of the property to the Appellant. In its decision, the Board noted that there was a 1994 condition of development that the carport be removed, and the Board held that the carport encroaches into the required Side Yard requirements, and negatively affected the amenities of the neighbourhood.

b) In 2013, the Appellant's application to "Construct an addition to a Single Detached House (7.39 metres by 3.3 metres – Carport)" was refused by the Board. In its decision, the Board noted the earlier 1998 decision of the Board, and that an Order had been issued to the property owner to remove the carport in 1998. That Order was never complied with. The Board concluded, based on the evidence of the City, the Appellant in that case, and the same adjacent neighbours, that the carport would unduly interfere with the amenities of the neighbourhood and would materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land.

[46] The Board has never made a finding that would lead to the conclusion that the carport was authorized. In each decision, the Board has required the removal of the carport.

[47] The Appellant has argued that the scope of application in 2013 was for a slightly reduced carport of 7.39 metres by 3.3 metres, whereas it now applies for a 7.39 metres x 3.33 metres carport, a difference of 0.03 metres or 30 centimetres, therefore, the issues are different. The Board disagrees. First, the Board finds this difference to be *de minimis* – the carport remains substantially the same. Second, the refused Application for a Minor Development Permit lists the Scope of Application as: "To construct an addition (3.33m by 7.39m carport to a Single Detached House, existing without permits." Further, the Real Property Report submitted by the Appellant and stamped refused on October 4, 2016 refers to a "proposed carport – existing w/o permits" at 7.39 metres by 3.33 metres.

[48] At the heart of the matter in each case has been an application for a development permit authorizing the same addition – a carport – to a Single Detached House. In each case prior to the one before this Board, the SDAB has concluded that the carport should be removed.

[49] Furthermore, the legal situation concerning the legal status of the Single Detached House has not changed since the 2013 SDAB decision. It was suggested that both the carport and the house together comprise the non-conforming structure. The Board disagrees and accepts the position of the Development Authority as stated at the hearing by Mr. Robinson.

[50] Section 643(1) of the *Municipal Government Act* sets out the circumstances in which a development becomes a legally non-conforming use or building:

> **643(1)** If a development permit has been issued on or before the day on which a land use bylaw or a land use amendment bylaw comes into force in a municipality and the bylaw would make the development in respect of which the permit was issued a non-conforming use or non-conforming building, the development permit continues in effect in spite of the coming into force of the bylaw.

[51] There is no evidence before this Board that the carport addition has ever had an approved permit, and indeed, the Appellant acknowledged this fact during questioning by the Board. The carport therefore cannot be properly characterized as a non-conforming use or building as that term is contemplated under section 643(1) of the *Municipal Government Act.* The Board finds that it is the Single Detached House which became a legally non-conforming building with the enactment of the Mature Neighbourhood Overlay in 2001.

[52] As such, although the parties in 2013 did not specifically address the legally non-conforming status of the house, the issue remains the same – that of the subject carport which has existed since at least 1998 without an approved permit. The decision was made based on the submissions of the same individuals and on consideration of an aerial photograph of the area, as well as pictures of other carports in the area submitted by the Appellant in the current appeal.

ii) The decision said to create the estoppel must be final.

[53] Both the 1998 and the 2013 decision were final decisions of the Board, subject only to the right of appeal to the Alberta Court of Appeal on a question of law or jurisdiction, pursuant to section 688(1) of the *Municipal Government Act.* No appeal was filed, the respective appeal periods have expired, and those decisions stand.

iii) The same parties or their privies must be involved.

[54] The Board finds that the same parties or their privies are involved in this case. Based on the evidence presented to this Board, the Board finds that although Ms. Jagodnik was not the Applicant in 1998, she was aware of both the non-compliance issue and the decision of the Board requiring the removal of the carport, as both related to her compliance certificate which was required for the sell and purchase of the subject property. In all development permit decisions, it is always the case that development permits run with the land and not with the owner. The Appellant, as a successor in title, should not be permitted to re-litigate the same issue due solely to a change in ownership.

[55] With respect to the 2013 appeal, the Development Authority approved the development, which was appealed by the neighbouring property owner, Mr. Green. Neighbouring property owner, Mr. Laban, also appeared in opposition to the development. Ms. Jagodnik appeared as the Respondent. Now, in 2016, the Development Authority has refused the development, which has been appealed by Ms. Jagodnik. Both Mr. Green and Mr. Laban again appeared in opposition to the development. In both cases, the same parties or their privies are involved: the Development Authority, Ms. Jagodnik, and neighbouring property owners, Mr. Green and Mr. Laban.

iv) It must be fair and just to apply the doctrine of issue estoppel in the particular circumstances.

[56] In *Sihota*, the Court held at paragraphs 14 to 15:

> [14] The issue here is not whether the SDAB is bound by its previous decisions, nor whether it is bound by the decisions of the development officer. Issue estoppel does not arise because the prior decision is "binding on the tribunal", although that is the effect. Issue estoppel means the prior decision is "binding on the parties" [emphasis as per original]; issue estoppel prevents them from re-litigating what has already been decided. So the issue is whether the municipality and the developer are bound by previous decisions relating to the use of the subject land.
>
> [15] **In planning matters, it is generally fair for the doctrine of issue estoppel to be applied against both owners and municipalities. Owners cannot simply ignore limitations on permits, or complete denials of permission to develop (subject to the ability to reapply for a refused permit after a waiting period has passed: s. 640(5)).** [emphasis added] Likewise, once a municipality has authorized a development, it cannot later revoke or ignore that permission. As noted, the planning provisions of the statute involve a balancing of the rights of the public and landowners. It would be unfair, and economically untenable, to permit significant investments in one year, and then allow the municipality to declare the intended use unlawful in a later year.

[57] The need for certainty is equally true for the affected neighbours and the Development Authority. Given that the factual situation has remained substantially the same, that the legal situation pertaining to the house and the carport remain identical to the 2013 appeal, and that this carport has been the subject of litigation since 1998, the Board finds that the interests of all parties in finality and certainty indicate that this case is the appropriate circumstance to apply the doctrine of issue estoppel.

[58] Having found that issue estoppel applies to this case, the Board denies the appeal, and the development is refused.

Mr. B. Gibson Presiding Officer
Subdivision and Development Appeal Board

Board Members in Attendance:
Ms. K. Cherniawsky; Mr. K. Hample; Ms. E. Solzez

Important Information for the Applicant/Appellant

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