



Date: November 4, 2016
Project Number: 230419178-001
File Number: SDAB-D-16-257

Notice of Decision

[1] On October 20, 2016, the Subdivision and Development Appeal Board (the “Board”) heard an appeal that was filed on September 26, 2016. The appeal concerned the decision of the Development Authority, issued on September 20, 2016, to approve the following development:

Operate a Major Home Based Business (Massage Therapist - VIKI'S MODERN BEAUTY & MASSAGE THERAPY) - Expires September 20, 2021

[2] The subject property is on Plan 7540AH Blk 1 Lot 415, located at 11606 - 101 Street NW, within the RF5 Row Housing 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 attachments, proposed plans, and the approved Development Permit;
- The Development Officer’s written submission;
- The Appellant’s petition; and
- Letter and online response.

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

- Exhibit A – Pictures of the business at a previous location
- Exhibit B – Comments from Development Compliance Officer
- Exhibit C – Respondent’s Certificate from Natural Health Practitioners of Canada

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*, R.S.A 2000, c. M-26.

Summary of Hearing

i) Position of the Appellants, P. Lui and H. Wong

[8] The Appellants have lived at their property for approximately 10 years. They purchased this property because it was a nice quiet residential part of the Spruce Avenue neighbourhood. They do not want to live beside a Major Home Based Business. Their main concern is the client traffic. This is not the best part of town. They are striving to keep the neighbourhood safe. They want to minimize the influx of individuals in the area. They do not want the approval of this business to set a precedent for other Major Home Based Businesses to be approved and change their neighbourhood. Once a business is approved, more will follow. Businesses should stay in commercial areas.

[9] The Appellants do welcome their neighbours. They are close to a school, downtown, the hospital, NAIT and the LRT. The Appellant has had her vehicle vandalised, and license plate stolen. The property two houses north of the subject Site and next to the Appellant's home is a rental property and they are in a continuous struggle with the tenants.

[10] The proposed business will increase foot traffic. This is a safety issue. There is already a lot of foot traffic in the neighbourhood and the area is a thoroughfare for vagrants. Drug dealers frequent the area. They can include individuals on bicycles with backpacks. One neighbor came upon some individuals charging their phone on an outdoor electrical panel. When she approached them, they threw the phone at her, injuring her.

[11] The addition of the business will bring 5 extra unfamiliar individuals into the area. This will make it more difficult to confirm whether a person has a good reason for being in the neighbourhood, or is engaged in nefarious activities. Loitering individuals may be able see the business sign and claim they are present because of the business.

[12] The Respondent's existing business is currently in a business area. They submitted Exhibit A, pictures of the existing business. As evidenced in the pictures, there is quite a bit of signage, billboards and decals associated with the business. The area where that business was previously located was residential, but now it looks commercial, unlike the proposed location which is residential.

- [13] The house may require minor exterior alterations. The site of the proposed development does not have a ground level entry way. It is a bungalow with a raised basement. The Appellants will be able to see clients going up the stairs to enter the dwelling.
- [14] The Appellants submit 5 clients a day are too many. A Minor Home Based Business would be more appropriate. In order to run a business, clients must visit the house. They expect the business may get busier, resulting in even more people attending at the site. This will make the area more commercial and less of a quiet residential area.
- [15] The Appellants have submitted a petition of individuals who support the appeal.
- [16] The Board asked the Appellants whether they have concerns about noise from the business, given that the nature of business is massage therapy and the Respondent is allowed no more than 5 clients per day. The Appellants submitted they do not anticipate noise except for the entry way. Clients will have full view of their yard. Friends and family may visit any residence, but typically not as frequently as 5 times a day. If the entryway is moved to the side, it might have an effect on another neighbour.
- [17] The Appellants stated they do not expect to see the same size or number of signs as shown in the photos of the former location. However, any signage might attract walk-in customers.
- [18] The Appellants both work. They are home between 5:00 p.m. to 5:30 p.m. The hours of the proposed business are between 10:30 a.m. to 6:30 p.m. The Appellants do not think clients should be allowed on the weekend. The Appellants agreed that they might see one person at 5:00 p.m.
- [19] Businesses have cash on hand, and may attract nefarious individuals.
- [20] The business will be located on 101 Street, which is a good site for potential advertising.
- [21] The Appellants are not convinced any conditions placed on the business would be adhered to.
- [22] The Board stated that a Major Home Based Business was approved by City Council as a Discretionary Use in this Zone and asked the Appellants to explain any potential planning reasons why the use should not be allowed. The Appellants argued that while all neighbourhoods have people present that are unknown, most neighbourhoods do not have the levels of vagrancy and crime present in Spruce Avenue. They cannot put out garbage the night before or else the garbage is ransacked. This is an essentially an inner city neighbourhood.

- [23] The Respondent is moving from a business location to residential location. They also have an employee which makes this a true business.
- [24] Being close to NAIT, parking issues are already present.
- [25] The Board asked whether signage would provide identification so individuals would not knock on the Appellants' door in error. The Appellants stated they are more concerned that it gives people an excuse as to justify continued loitering for other reasons.
- [26] Even if the Respondent adheres to all applicable development regulations and conditions, the Appellants' three concerns remain: vagrants will have a legitimate excuse to be in the area; their residential area will turn into a commercial area; and, the precedent will be set for other businesses to be approved.

ii) *Position of the Development Officer, B. Liang*

- [27] The Respondent's business was previously located on 97 Street and that property was zoned DC1. That business was approved as a Personal Service Shop. This is an application for a Major Home Based Business. It must adhere to all regulations and conditions. Signage found at the previous location would not be allowed. Section 75(2) of the *Edmonton Zoning Bylaw* regulates noise. There is also a noise bylaw. The Development Officer does not expect noise issues from this business.
- [28] The Development Officer chose to regulate the intensity of visits and timeframes with two conditions. All appointments must occur between 10:30 a.m. and 6:30 p.m. No two appointments shall overlap. The Development Officer understands this business will occur 5 days a week and not on weekends, but he did not condition this.
- [29] The only plan required to be provided is a site plan. A Major Home Based Business is evaluated from the application form and verbal information provided by the Respondent. The Respondent is only allowed 1 treatment room, which can be located anywhere in the house. No waiting room is allowed. This is set out in Condition #8 of the Development Permit. The Development Officer can request an inspection to determine compliance.
- [30] The Residential Compliance team inspected the property on October 12, 2016. The Secondary Suite had been decommissioned to its satisfaction. The Development Officer submitted Exhibit B, notes from the Compliance Officer.

- [31] The Development Officer stated it is difficult to enforce the number of visits as they would be required to sit outside the business all day. Plus that evidence is inconclusive because it can be difficult to determine if the people on the site are family, friends, or clients. The Development Officer prefers to regulate the intensity and duration of the business visits and ensure certain elements are not present.
- [32] The Development Officer said two employees are proposed as there are 2 different types of massages provided: deep tissue and relaxation. The employee also takes care of the Respondent's child during the day when the Respondent is giving massages. This is why the Development Officer allowed only 1 treatment room. He does not want two rooms operating at the same time. He believes the conditions imposed are more practical for enforcement.
- [33] The main reason the Respondent is moving her business from commercial to residential is because she recently became a parent.
- [34] The Respondent only requires 3 parking spaces. They moved a fence and now have 4 parking spaces: 2 in the garage and 2 in the yard. They also have a space between the garage and the rear lane.
- [35] The Development Officer agreed with the Board that the condition could be strengthened to say appointments shall not overlap and must be 15 minutes apart.

iii) Position of the Respondent, E. Thai and C. Xue, on behalf of X.H. Yan

- [36] Mr. Thai submitted Exhibit C, a copy of the Respondent's Certification for massage therapy. The Respondent is running a legitimate massage business that issues receipts, and not a business that provides sexual services. The Respondent is moving her business because demand is decreasing. Many people are unemployed and they have no coverage for massage therapy.
- [37] They anticipate a maximum of 5 clients per day, but she will not have 5 clients every day. They will only use the size of signage that is allowed.
- [38] She had one employee before who would like to continue working. When the Respondent has a client, the employee takes care of the baby. Clients request the type of massage they want. Her employee also has clients she does not want to lose.
- [39] They agreed on the condition of 1 treatment room because that is feasible.
- [40] They have sufficient parking because they have removed the rear fence. They have a double detached garage with one space for the Respondent and one for the employee. They have an additional two spaces.

- [41] They have properly decommissioned the Secondary Suite.
- [42] They do not want to cause problems with the neighbors. They also want a safe neighbourhood and a full family life.
- [43] If business expands, they will consider moving to a commercial zone.
- [44] They have 2 bedrooms on main floor and 2 in the basement. They will only have 1 treatment room on the main floor. The Respondent works Monday through Friday 10:30 a.m. to 6:30 p.m. and is willing to have a condition that she will not have clients on the weekend. Clients will use the front door.
- [45] Mr. Thai confirmed he, his wife and child live at the site. They have one employee that works at the business.

iv) Rebuttal of the Appellants

- [46] Enforcement may be an issue. As stated by the Development Officer, the number of clients is difficult to enforce. It is hard to determine the number of visits because it can be hard to tell if an individual is a client or someone else. Once business picks up, it will be easy to convert another room into a treatment room.
- [47] The Appellants argue that if clients use the front door, they will park in the front and not the rear adding to on-street parking congestion. The Site will have to be altered because they have removed a fence and will need to install another fence to enclose the back yard.
- [48] If the economy rebounds, business will increase. The Respondent will require additional income as the child gets older.

Decision

- [49] 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 and subject to all conditions imposed by the Development Authority, with the exception of Condition number 8 which shall be replaced with the following:

...

8. The Major Home Based Business shall not generate pedestrian or vehicular traffic, or parking, in excess of that which is characteristic of the Zone in which it is located (section 75.3). All client visits shall be scheduled by appointment only between 10:30 AM to 6:30 PM, MONDAY THROUGH FRIDAY INCLUSIVE, and no two appointments shall overlap. No dedicated waiting room for this business shall be created inside the dwelling and there shall only be 1 treatment room used for the business.

...

Reasons for Decision

- [50] Section 160.3(6) states a Major Home Based Business is a Discretionary Use in the RF5 Row Housing Zone.
- [51] The Appellants argue that the proposed development should be refused as it will be a precedent setting commercial use. Based on their knowledge of site conditions at a pre-existing location, they believe it will have signage that is inconsistent with the residential character of the neighbourhood. Approving it will also increase the potential for loitering and provide persons with excuses to loiter. This impact is especially problematic given the demographics of the Spruce Avenue neighborhood, which has a high level of foot traffic and a history of petty crime, including property damage.
- [52] The Board disagrees that approving this business sets a precedent that will lead to the commercialization of the Spruce Avenue neighbourhood. This Board is not bound by its previous decisions. Whether or not this development is approved, the Board will be required to assess appeals regarding any future application for a Major Home Based Business, or for any other type of development, individually on its own merits.
- [53] The Appellants' concerns regarding intensity based on conditions at the previous location are addressed in part by the Respondent's submissions. The Respondent stated she is moving the business from a commercial location (which permitted signage) to a Major Home Based Business as demand has fallen due to downturn of the economy and their family circumstances have changed with the introduction of a child. Therefore, the business at the new location will be less intense than at the previous location.
- [54] Intensity of use is also addressed by the development regulations applicable to Major Home Based Businesses and by the conditions imposed in the Development Permit, in particular condition #8. To further address this concern, the Board has added a clause to condition #8 restricting business operations to Monday through Friday, inclusive. This limitation is consistent with the Respondent's business needs and they are amenable to it. The regulations and conditions will minimize any potential effects the proposed development may have on the neighbours or the neighbourhood.
- [55] The Board notes that any increase to intensity, by definition, would require a new Development Permit. Further, the existing permit is limited to a 5 years term, after which a new Development Permit will be required.

- [56] The Appellants provided no support for their opinion that a Major Home Based Business would increase criminal activities by creating an excuse for loitering. The Board notes that the proposed development involves daytime occupation of the subject Site by its owners and visits by legitimate clients, which may have positive security impacts for the immediate area.
- [57] The Appellants provided a petition “To stop the issuance of a Development Permit for a major home based business” with 12 signatures from neighbouring properties. However, the basis for the signatories objections are unclear and the Board cannot determine if they are tied to any stated planning reasons.
- [58] Based on the evidence provided, the Board is not convinced that there is a planning reason why the proposed development is not reasonably compatible with its surroundings.
- [59] The Board concludes that the proposed development is reasonably compatible with the neighbourhood. In addition, the proposed development will not unduly interfere with the amenities of the neighbourhood nor materially affect the use, enjoyment or value of neighbouring parcels of land.

Ms. K. Cherniawsky, Presiding Officer
Subdivision and Development Appeal Board

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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SDAB-D-16-258

Application No. 128010578-001

An appeal by Jeffrey Jirsch VS Anna Bashir to erect a Privacy Screen 8ft in height along the Southwest portion of the property, along a Required Side Yard was **TABLED TO DECEMBER 7, 2016**



Date: November 4, 2016
Project Number: 224504348-001
File Number: SDAB-D-16-242

Notice of Decision

[1] On September 29, 2016, the Subdivision and Development Appeal Board (the “Board”) made and passed the following motion:

“That the hearing for 224504348-001 (SDAB-D-16-242) be tabled to October 20, 2016, at the written request of the Appellant and with the consent of the Development Authority.”

[2] On October 20, 2016, the Board made and passed the following motion:

"That SDAB-D-16-242 be raised from the table.”

[3] On October 20, 2016, the Board heard an appeal that was filed on September 6, 2016. The appeal concerned the decision of the Development Authority, issued on August 24, 2016, to refuse the following development:

Change the Use from a General Retail Store to a Minor Alcohol Sales Use.

[4] The subject property is on Plan 1321077 Blk 4 Lot 1, located at 3881 - Allan Drive SW, within the CB1 Low Intensity Business Zone. The Ambleside Neighbourhood Structure Plan and the Windermere Area Structure Plan apply 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 refused Development Permit;
- The Development Officer’s written submission;
- The Appellant’s written submission; and
- Online response.

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

- Exhibit A – Video of subject Site and immediate vicinity
- Exhibit B – Copy of Zoning

Preliminary Matters

- [7] 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.
- [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*, R.S.A 2000, c. M-26.

Summary of Hearing

i) Position of the Appellant, Mr. Murphy, Q.C. on behalf of the Appellant

- [10] Mr. Murphy questioned whether the 100 metres restriction found in section 85.6 of the *Edmonton Zoning Bylaw* in fact applies to the proposed development. If it does, he is seeking a variance. In his opinion, the amenities of the neighbourhood will be increased by the proposed development. He reviewed his written submission.
- [11] Included in Tab 1, is a copy of the refused Development Permit. He asked the Board to make note of the date of application of June 23, 2016.
- [12] Included in Tab 2, is a series of emails, which cause him some concern. Mr. Murphy has continuously argued that the Development Officer should not appear before the Board to argue that their decision is correct. The Development Officer should merely explain her decision and rationale. Board hearings have turned adversarial.
- [13] Under Tab A is the Development Officer's first email to Sarah Stephenson dated August 15, 2016. The email states: "I am going to refuse this application. But in order to defend the decision at the Appeal Board, I would like to collect more comments from your department." At this point, the Development Officer has already made the decision to refuse the permit. Her refusal was dated August 24. This email is evidence that the Development Officer is overstepping her position before the Board.
- [14] Tab B contains a similar email to Peter Millar and Jackie Araujo. It indicates that the Development Officer was referred to them by Sarah Stephenson, a Planner in Program and Project Development.

[15] In Tab C, Peter Millar responds the proposed development is “more likely to impact Citizen Services (community development) but from [his] perspective and experience that bylaw standards were developed to reduce the real and perceived impacts of alcohol on minors.” This statement is exactly opposite of the law as set out by the Court of Appeal in *Newcastle Centre GP Ltd. v. The City of Edmonton et. al.*, 2014 ABCA 295 (Tab 3) (“*Newcastle*”). At paragraphs [6] and [7] of that decision, it states:

An attempt to try to reconcile the Reasons’ internal conflicts would be to interpret the Reasons as follows. We, the Board, have a power to grant variances, but the bylaw creates a presumption of harm to the public, and we the Board cannot intervene unless that presumption is rebutted by the applicant. That is an error.

The legal test for such waivers is in the *Municipal Government Act*, and is clear. Section 687(3)(d) mandates this test:

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

[16] The Board cannot start with presumption that requiring a variance to the bylaw creates a presumption of harm.

[17] Included in Tab 4, is an aerial view of the subject Site identified by a red dot and zoned CB1. The adjacent site to the west is zoned CSC. Qualico owns both pieces of property. The CB1 site is being developed right now. To the north is the AP site, which includes a school under construction.

[18] Tab 4 includes the plan of subdivision. The site where school is situated is 1 big parcel. Two parcels are cut out from the west. One will be a fire hall. The school site extends well beyond the school property. One can see the line, but this is not a subdivision line. The boundary between the CB1 site and the school site is in reality 240 metres away in distance but title to title is only 30 metres away.

[19] The CSC site adjacent to the west will not be developed for several years. They are waiting for more housing to be built, so that there is sufficient population to support the CSC developments. In the meantime, there is sufficient activity and occupancy to develop the CB1 site. The property was rezoned from CNC to CB1 to accommodate this development.

[20] On the north boundary of the two sites is the old Ellerslie Road, which was realigned to the south. This road is open legally, but closed for vehicles. It is currently a walkway. To the south, is a Public Utility Lot. There is good physical separation between the subject site and school site. It is not 100 metres, but it is sufficient physical separation.

- [21] Section 85 contains the Alcohol Sales provisions from the *Edmonton Zoning Bylaw*. Section 85.3 provides that “any Major or Minor Alcohol Sales Use shall not be located closer than 500.0 metres from any other Major or Minor Alcohol Sales Use.” Two Alcohol uses cannot exist within 500 metres of each other. If a Development Permit for a Major or Minor Alcohol Sales Use exists, it is not possible to issue another Development Permit for a Major or Minor Alcohol Sales Use on a property 400 metres away without variances. The radial separation distance refers to use and the use is secured when a Development Permit is issued, whether or not the Major or Minor Alcohol Sales Use has been built.
- [22] In contrast section 85.6 states “any Site containing Major or Minor Alcohol Sales Use Classes shall not be located closer than 100.0 metres to any Site being actively used for community or recreation activities, public parks, or public or private education at the time of the application for the Development Permit for the Alcohol Sales Use Class.” This is different language than the separation distance language from Section 85.3. It does not say 100 metres from a Site where the use is available or the Development Permit has been issued. It says 100 metres away from “any Site being actively used” for that purpose and that Site has to being actively used for the purpose at the date of the application of the Major or Minor Alcohol Sales Use.
- [23] The application was made on June 23, 2016. On that date, construction was still occurring on the Site so the Site was not actively being used for the school. There is no doubt there was going to be a school and the Development Permit for the school had been issued. However, at the date of application, the Site was not actively being used as such.
- [24] Under Tab 6, is some literature from the Edmonton Public School Board website. It states that the school is to be completed in July 2016 and would not open until September 2016. In July 2016, the school was still under construction.
- [25] Notwithstanding that permits were issued for the school and permits were issued for the public park to the south of the school, based on the wording of section 85.6, the separation regulation does not apply to the proposed development. This is a very technical reading, but the rules are very technical and to the extent not caught, an owner should be able to develop a property as they see fit.
- [26] If the Board accepts the Appellant’s interpretation that the separation requirement in section 85.6 does not apply, this is simply a Discretionary Use appeal. In that case, the Board cannot turn down the application solely on the basis that it is not a reasonably compatible Discretionary Use due to proximity to the school/park site. That conclusion wrongly imposes a standard greater than the development regulation.

- [27] If the Board determines that Section 85.6 applies, they are seeking a variance.
- [28] The Site plan under Tab 7 went in with the Development Permit application. They wanted the Development Officer to look at the reality of the situation and consider granting a variance. The site to site boundary is less than 100 metres, but the proposed development is located 240 metres away from the school yard. The boundary of the school site is artificially extended because the school site was never subdivided from the AP parcel. There is really good physical separation between the proposed development and the school site. The building faces south and backs to the school site. Behind building on the northern boundary of the subject Site is a fence over 6 feet in Height that prevents direct access from the school site. An individual must walk at least 140 metres from the proposed location of the liquor store to get past the fence and reach the nearest point of access to the AP parcel.
- [29] Nothing in Development Officer's materials or decision speaks to this separation distance. There was no assessment made at the time the decision was made. After she made her decision and reached out to other city departments, the Development Officer raised the section 687 test and came up with the rationale that customers could purchase alcohol at the proposed development to consume at the park which affects minors. This rationale makes no sense. If people are going to drink at the park, they are going to drink at the park, no matter if the liquor store is there or not. It is better that they have to go through someone to buy liquor. Other laws applicable to the proposed development prohibit sales to intoxicated individuals.
- [30] The Development Officer did not determine whether in reality the section 687 test is met following the direction of the Court of Appeal per *Newcastle*. The test used by the Development Officer is the one the Court of Appeal in *Newcastle* said not to use.
- [31] This facility creates an amenity as currently the next closest liquor store is 3 kilometres away. The Area Structure Plan states that one of its goals is to create commercial sites that serve the neighbourhood. This is what this development does. This liquor store is not a destination, but for convenience. The idea is not to bring people from all over the city but provide a neighbourhood amenity.
- [32] The Baptist Church expressed a concern about alcohol sales being near a school. However, the school site is in reality 240 metres north of the proposed development. The area between the school site and the subject Site include a publically accessible sports facility, soccer fields and a baseball field. There is also a big berm by in the south portion of the site to be used as a toboggan site.

- [33] The submitted landscaping plan shows a row of trees that provides further separation. The Development Officer states that the fence on the park site is not a full blockade, because individuals need to be able to access the park. While people can get in and out of the park site, they cannot get in and out of the back side of the commercial property due to the fully blocked fence along the north Lot Line of the subject property.
- [34] Mr. Murphy reviewed a video he took 2 weeks ago, marked Exhibit A. He went to the back of the subject Site and starting walking east past the developer's fence and the two buildings on the CB1 site. The most westerly building has door in rear for loading. The liquor store is located in the building to the east. The fence is continuous and extends beyond the buildings.
- [35] Mr. Murphy continues walking north. There is a temporary construction fence. There will not be a blockade fence as individuals will need to access the park site from the south end. The Board can see physical separation between the park site and the school. There is also a fire hall, a sliding hill which serves as a berm, and trees. This demonstrates that the actual physical separation from the school site is significant.
- [36] The next portion of the video is taken from the baseball diamond showing the sliding hill and the back end of building, which will not have any signage identifying the proposed development. Behind the construction fence, a soccer field on the south of the park site also separates it from the school.
- [37] The next portion of the video is taken from the bottom of the sliding hill. The Board can see the buildings, the proposed location of the fire hall and some landscaping. The park site and commercial site are separated by a fence, utility right of way and a walkway.
- [38] The last portion of the video is taken along Allen Drive. There is a significant distance to the school from the road.
- [39] There is nothing that can unduly interfere with the amenities of the neighbourhood, nor materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land.
- [40] The proposed Site is already isolated because it is a commercial development close to residential properties. There needs to be sufficient separation from the residents. The proposed use is no more impactful than any other general retail use.
- [41] Under Tab 8, another aerial picture shows the Appellant's two abutting sites directly south of the school/park site. They are separated by Allen Drive, one is zoned CSC and the other is zoned CB1. The CSC site is greater than 2 hectares. An Alcohol Sales Use is a Permitted Use on the CSC site and the 100 meters separation distance per Section 85.6 does not apply. On the CB1 site, Minor Alcohol Sales Use is a Discretionary Use.

Notices went to the neighbours, with comment only from the Baptist Church. If the proposed Minor Alcohol Sales Use is approved on the CB1, the 500 metres restriction would apply and the ability to put the Alcohol Use on the CSC site would disappear. There would be no proliferation of liquor stores. The owners want to put the amenity on the site they are developing first rather than wait. They want to put bigger retail uses on the CSC site.

- [42] Tab 9 includes the CB1 rezoning report that went through City Council unanimously. There is no mention or concern about the Minor Alcohol Sales. Mr. Murphy submitted Exhibit B and compared the uses listed on CB1 sites and CSC sites. It was rezoned to a CB1 site to allow for neighbourhood type amenity services.
- [43] If the Board determines the school site is actively being used, Mr. Murphy asks for a variance. The bylaw is written for general cases. The school site itself is a significant distance. The proposed development meets the Section 687 test. There will be no impact, but in fact an amenity is being added. Individuals will be able to buy liquor in their neighbourhood. The Area Structure Plans calls for commercial or retail, which could reasonably be expected to include alcohol sales.
- [44] Upon questioning from the Board, Mr. Murphy confirmed that the sliding hill exists, but he is not sure when it was built.
- [45] The Board asked Mr. Murphy to explain when something starts actively being used. He believes that it is not enough for something to be built, it must also be open. It does not say actively being developed or actively being constructed. The use has to manifest itself for section 85.6 to apply. Students should be present. There should be a playground, public access, people using hill fields, but none of that was happening the date of application. It is a matter of degree.
- [46] Section 85.3 talks about uses; it does not speak about actively being used. Uses are secured by the issuance of permits. Section 85.6 talks about activities. Those activities must be manifest and brought to fruition. Those activities must be occurring before the section applies.
- [47] The Board asked Mr. Murphy to comment about whether a school is actively being used during the summer when no students are present. In his view, once a school starts being used, it is being used. During the summer, a school is being used. Here the school is not being used at all because it is still under construction. Once the use manifests itself, then that section applies and, as of date of the application, the use had not manifested itself.

- [48] The Board asked whether the definition of Public Education Services set out Section 7.8(11) of the *Edmonton Zoning Bylaw* contemplates the process of development as a component of actively being used. Under this section, Public Education Services means development which is publicly supported or subsidized involving public assembly for educational, training or instruction purposes, and includes the administration offices required for the provision of such services on the same Site. This Use Class includes public and separate schools, community colleges, universities, and technical and vocational schools, and their administrative offices. This Use Class does not include Private Education Services and Commercial Schools.
- [49] In response, Mr. Murphy referred the Board to Section 85.6.c, which states the term "public or private education facilities" is limited to elementary through to high schools inclusive only, and does not include dance schools, driving schools or other commercial schools.
- [50] The Board asked Mr. Murphy to comment on the whether hyperlinks to the words "public" and "private" in Section 85.6.c to the definitions of Public Education Services and Private Education Services should help with the interpretation of the separation requirement. He indicated this is a narrowing from the definition that includes things otherwise not caught. References to use class are capitalized throughout the Bylaw. Further the official Bylaw does not include the hyperlinks, those are added after. In *Rizzo*, the Supreme Court of Canada set out rules of statutory interpretation. Words mean what they say. In this case, the school was being constructed for that purpose, but was not being actively used at the date of application.
- [51] The Edmonton Public School Board Information package indicated that new students will be accepted in February 2016 for the fall of 2016. Mr. Murphy printed this documentation approximately 2 weeks ago.
- [52] In Section 85.3.a, the 500.0 metres separation distance shall be measured from the closest point of the Major or Minor Alcohol Sales Use to the closest point of any other existing or approved Major or Minor Alcohol Sales Use. In Section 85.6.a, the 100.0 metres separation distance shall be measured from the closest point of the subject Site boundary to the closest point of another Site boundary, and shall not be measured from Zone

boundaries or from the edges of structures. In Mr. Murphy's opinion, the distance gets skewed in this case because of the particular sites in issue.

- [53] A Major or a Minor Alcohol Sales is a Permitted Use on the abutting CSC site. However, in their opinion, this use, a Minor Alcohol Sales, in the CB1 is currently a better fit for the area. On a plain reading of the *Edmonton Zoning Bylaw*, putting the use on the CB1 prohibits the use on the CSC site, unless a variance is granted to the 500 metres separation distance.
- [54] If the school is actively in use, it sterilizes the whole site. The park use is close and has a Development Permit. Some landscaping is in place. However, the park site was not being used or even finished so it was not being actively used.
- [55] In any event, there is significant separation between the proposed development and the school site. There is 240.32 metres from the edge of school playground to the door of the development. An individual exiting the proposed development must walk 140 metres to reach the nearest edge of the school and park site.
- [56] The CSC site is located 101 metres away from the school site so while it is closer in walking distance than the proposed location, it meets the separation requirement of section 85.6.

ii) *Position of the Development Officer, Ms. C. Li*

- [57] Although the application was received June 23, 2016, the fee was not paid until July 11, 2016. Pursuant to Section 13 of the *Edmonton Zoning Bylaw*, the development review does not start until the date fees are paid.
- [58] The submitted emails were part of her usual internal circulation. It is necessary to consult other departments because the school and parkland is city owned property and different departments are consulted. Sarah Stephenson was the main contact for facility and landscape. The Development Officer was then re-directed to other departments.
- [59] The Bylaw report submitted by the Appellant shows that the rezoning was approved to give more business opportunity to the subject Site. It was not rezoned to make changes specific to a Minor Alcohol Use, nor is this use explicitly discussed.
- [60] The Ambleside Neighbourhood Structure Plan designated the school and parkland sites and the Appellant should have been aware of the designation.
- [61] Section 4.5.3 of the Ambleside Neighbourhood Structure Plan specifically addresses the subject Site and provides in part:

There is one Neighbourhood Commercial site located at the intersection of Ellerslie Road and Allan Drive. The location of this commercial site provides efficient and convenient access to local residents and is intended to serve the day-to-day needs of the neighbourhood and neighbouring communities.

Neighbourhood Commercial uses are located in the southwest portion of the Plan area to provide residents with local retail and commercial services within walking distance and transit access. This supports the creation of an active, walkable centre where people will use alternative means of transportation to meet their daily needs locally. This encourages frequency of use, greater activity, local awareness, surveillance and community safety.

- [62] In her view, the proposed use is not consistent with encouraging community safety.
- [63] Under Section 85, the 500 metres separation distance from another liquor store is measured from door to door, whereas the 100 metres separation distance from school site is measured from property line to property line.
- [64] The park site is being actively used. Once the Development Permit is approved, the applicant can start construction immediately because there is no building permit required. Once construction starts, the site is being actively used.
- [65] With regards to the physical separation between the two lots, no solid fence surrounds the park site to block access from the south. The landscape plans includes deciduous trees which will not impede access to the park. A walkway connects the front of the subject site to the back corner where one can freely enter the park.
- [66] Sites that are greater than 2 hectares in size and that are zoned either as CSC or as DC2, are exempted from the application of Section 85.6.
- [67] The Development Officer used pictometry to determine that the adjacent CSC site is located approximately 100 metres from the school site and will not require a variance to section 85.6. In her opinion, the adjacent CSC site is more suitable for the proposed development.
- [68] The school was approved in November 2014 and the outdoor participant facility around February, 2016. Once the Development Permit is approved for a park, construction can start right away because there is no need for a building permit because there is no building. Thus once the Development Permit is issued, a park therefore starts being actively used.

- [69] There has been no response from Citizen Services. The only response from the City Department was previously discussed.
- [70] The Board asked the Development Officer whether the nature of this park, a sports field versus a heavily treed area, limits the potential impact of the proposed development. In the Development Officer's opinion, this location still has potential to attract patrons of the proposed development to enter the park to drink.
- [71] The Development Officer was asked to explain why the CSC location is more preferable given that it is 100 metres from the park and school site whereas the proposed location is at least 140 metres walking distance from the nearest access point given the perimeter boundary fence along the north Lot Line. She believes the CSC site is preferable for the liquor store because it has a greater Site Area, greater separation distance, and is across the street. In her view, the subject site is more convenient to get to the park, but she agreed it could be easily accessed from either site.
- [72] The only planning impact is safety and her specific safety concern is that individuals may buy alcohol at the proposed development and bring it to park. The park is public and accessible by individuals of all ages.
- [73] The Development Officer believes there are safety CPTED issues and has recommended a CPTED report in her suggested conditions.
- [74] The criteria used to assess a Discretionary Use are whether it complies with the general purpose of the zone and general concept of the Area Structure Plan.
- [75] Regardless of the solid fence along the north of the subject Site, there is still a walkway from the proposed development to the park and school site.
- [76] The City's computer system determined the separation distance and the required magnitude of the variance. The distance from south boundary of the school is 20.12 metres. There is also an intervening 10 metres Right-of-Way.
- [77] Since the City owns the land, the school district would have received notice of this appeal, and the Development Officer has heard nothing.

iii) Rebuttal of the Appellant

- [78] Mr. Murphy believes the variance calculated at 30 metres is correct based on the Ambleside plan of subdivision on the 3rd page of Tab 4.

- [79] The first thing that should be done to evaluate the appropriateness of a variance is a site visit. Mr. Murphy does not believe the Development officer visited the site. The Board can have a better appreciation of the site because of the video.
- [80] Regardless of when the Development Permits fees were paid, according to the City's record, the application date is June 23, 2016. He is not sure that there would be any factual difference material to the outcome of this appeal if the Board determined that the application date was July 11, 2016, instead of June 23, 2016.
- [81] After the decision was made, the Development Officer went in search of evidence to support her decision.
- [82] The Appellant was well aware of the site location and surroundings as they were an integral part of the subdivision and plan. There was not just rezoning of the property; the Area Structure Plan was also amended.
- [83] The Appellant wanted to put this use in the CB1 because the subject Site is already developed and it is a smaller site more suitable to a Minor Alcohol Sales Use.
- [84] The school is in fact closer to the CSC site. Bar and Neighbourhood Pub, a use which involves serving alcohol, is a Permitted Use in the CB1 Zone.
- [85] This is not a situation involving the social issues associated with an inner city park.
- [86] Zoning is to provide neighbourhood conveniences and the proposed use provides one such convenience.
- [87] Other than the email from the church, there is no opposition to the proposed development or at least it can be inferred that individuals were not upset enough to respond.
- [88] The Development Officer did not offer enough evidence that the park site was actively used on the date that the application went in. The only evidence about active use of the school is found in the Edmonton Public School Board information. In fact, there is evidence that construction was on-going on the application date.
- [89] Mr. Murphy has no issues with the Development Officer's recommended conditions. His client is also agreeable to a condition that there shall be no Fascia Sign on back of the building advertising the proposed used.

Decision

- [90] 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/NOTES**:

- 1) There shall be no Fascia Sign that identifies the Minor Alcohol Sales use permitted on the north face of the building containing the proposed development.
- 2) The proposed development must meet the Crime Prevention Through Environmental Design Criteria as required under Section 85.7 of the *Edmonton Zoning Bylaw* 12800.
- 3) No parking, loading, storage, trash collection, outdoor service or display areas shall be permitted within a required Yard and loading, storage, parking and trash collection areas shall be screened from view from any adjacent site and public roadway in accordance with Section 55 of the *Edmonton Zoning Bylaw*.
- 4) 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 of the *Edmonton Zoning Bylaw* 12800.)
- 5) 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))
- 6) All access locations and curb crossings shall have the approval of the City Transportation and Streets Department prior to the start of construction. (Reference Section 53(1))

NOTES:

- 1) The Development Permit shall NOT be valid unless and until the conditions of approval, save those of a continuing nature, have been fulfilled; and no notice of appeal from such approval has been served on the Subdivision and Development Appeal Board within the time period specified in subsection 21.1 (Reference Section 17.1).
- 2) This Development Permit is not a Business License. A separate application must be made for a Business License.
- 3) Signs require separate Development Applications.
- 4) 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 for further information.
- 5) 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.
- 6) 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.
- [91] In granting the development the following variance to the *Edmonton Zoning Bylaw* is allowed:
- 1) The minimum 100.0 metres distance required between a Site containing Minor Alcohol Sales Uses and any Site being actively used for community or recreation activities, public parks, or public or private education at the time of the application for the Development Permit for the Alcohol Sales Use Class per Section 85.6 of the *Edmonton Zoning Bylaw* is reduced by 70 metres, thereby decreasing the minimum required distance to 30 metres.

Reasons for Decision

- [92] Under Section 330.3(20), Minor Alcohol Sales is a Discretionary Use in the CB1 Low Intensity Business Zone.
- [93] The subject Site is located 30 metres south of a large undivided site identified for use as a school and park in the Ambleside Neighbourhood Structure Plan. A Development Permit was issued on February 12, 2016 to operate an Outdoor Participant Recreation Services on a portion of the site. A Development Permit was issued on November 7, 2014 to construct a Public Education Services Use building (Ambleside Edmonton Public School) on the northern most portion of the site. The boundary for the school yard is 240 metres from the subject Site, but the property has not been subdivided. The southern portion of the site has been approved as a park and does not require a building permit.
- [94] Section 85.6 requires a 100 metres separation from a Site being "actively used...for public or private education at the time of application for the Development Permit...". The Appellant argued that section 85.6 does not apply because on June 23, 2016 (when the Appellant applied for the Development Permit) and on July 11, 2016 (when the Appellant paid the fee), the school was under construction and slated to open September 2016; and, the Park was also under construction and not in active use.

[95] The Appellant took the position that “being actively used” requires a school be open for providing education services and not merely under construction with imminent plans for the provision of educational services. The Board disagrees for the following reasons:

- i) The Appellant agreed that an education facility could be actively in use at times when classes were not being offered, otherwise applicants for Minor Alcohol Sales Development Permits could avoid the operation of section 85.6 by submitting their application during the summer holidays, when schools were closed. He conceded that such an interpretation would be absurd.
- ii) While there are differences between sections 85.3 and 85.6, the former imposes a separation distance of 500 metres between Major or Minor Alcohol Sales Uses, whereas the latter only imposes a separation distance when a Site is being "actively used". The Board notes that "active use" is not defined anywhere in the Bylaw.
- iii) The purpose of the term “actively used” is to avoid needlessly sterilizing a Site from being used for alcohol sales on the basis of speculative or historical uses. A speculative use might include where a Development Permit had been issued, but the development had not yet commenced, leaving open the possibility of the permit expiring under section 22 of the *Edmonton Zoning Bylaw*. A historical use would include where a Site had been abandoned or fallen out of the prior use.
- iv) Here the Development Permit had been issued 18 months earlier. Construction associated with the school was reaching completion during the summer of 2016. According to materials submitted by the Appellant, the school had been accepting applications for the 2016-2017 year from new students as of February 2, 2016 and for transferring students as of March 14, 2016.
- v) Having regard for the degree of activity on this Site as of June 23, 2016, and interpreting the section purposively and so as to avoid absurdity, the Board finds that the Edmonton Public School Board and the public was actively using this site for public education at the time of application. Accordingly, section 85.6 applies to the subject Site, and the Development Permit requires a variance.

[96] The Board grants a variance to Section 85.6 for the following reasons:

- i) The sole planning consideration raised by the Development Officer was a safety concern that patrons purchasing liquor would consume it in the nearby park negatively impacting users of the school/park site. The Board notes Minor Alcohol Sales is not only type of development allowed in the CB1 Zone that involves serving alcohol to patrons. Bar and

Neighbourhood Pub of a smaller scale is a Permitted Use that could involve the same risk.

- ii)* The proximity of the subject Site and the school/park site is visually mitigated because the building that will contain the proposed development faces south and away from the school/park site. Also, the view toward the rear of the subject Site is partially obscured by the toboggan hill/berm and the landscaping along the south end of the school/park site.
- iii)* The sites are separated by a berm and a walk-way.
- iv)* A solid barrier fence runs along the north lot line of the subject Site. The fence is over 6 feet in Height and has no openings. The fence creates practical barrier increasing the minimum separation for pedestrians traversing the two sites. A pedestrian must travel 139 metres from the proposed use to the nearest accessible corner of the school/park site.
- v)* The immediately adjacent site to the west is zoned CSC Shopping Centre Zone. Minor Alcohol Sales, is a Permitted Use on that site which, due to its size, is exempt from section 85.6. A Class A Minor Alcohol Sales use could be constructed on that site within shorter direct access to the school/park site than the proposed development. It is a distance of 100 metres from the CSC site on foot to the school/park site.

[97] The Board received one letter of opposition citing proximity to the school/park site, but no planning rationale. The site conditions noted above and the imposition of Condition 1 prohibiting signage that identifies the Minor Alcohol Sales use on the north wall of the building which faces the school/park site mitigate potential impacts of proximity.

[98] The proposed development is consistent with the section 4.5.3 of Area Structure Plan and Neighbourhood Structure Plan, which deals with this particular site. The proposed development will provide efficient and convenient access to local residents and serve the day-to-day needs of the neighbourhood and neighbouring communities.

[99] Minor Alcohol Sales is Discretionary Use. The Development Officer's sole concern relates to the relaxation of the required separation distance. Given the Board's determination on that issue, the Board finds no planning reason to deny the application and concludes the proposed development is reasonably compatible with surrounding developments.

[100] Based on the above, the Board concludes that the proposed development will not unduly interfere with the amenities of the neighbourhood nor materially affect the use, enjoyment or value of neighbouring parcels of land.

Ms. K. Cherniawsky, Presiding Officer
Subdivision and Development Appeal Board

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*, R.S.A. 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.