



**EDMONTON
TRIBUNALS**

*Subdivision &
Development
Appeal Board*

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Date: September 29, 2016
Project Number: 184429477-003
File Number: SDAB-D-16-224

Notice of Decision

- [1] On September 14, 2016, the Subdivision and Development Appeal Board heard an appeal that was filed on August 23, 2016. The appeal concerned the decision of the Development Authority, issued on August 5, 2016, to approve the following development:

Develop a Secondary Suite in the Basement of an existing Single Detached House, existing without permits

- [2] The subject property is on Plan 4628KS Blk 88 Lot 38, located at 4635 - 102A Avenue NW, within the Rf1 Single Detached Residential Zone. The Mature Neighbourhood Overlay and Edmonton-Strathcona County Joint Planning Study Area Secondary Suites and Garage Suites Overlay apply to the subject property.
- [3] The following documents, which were received prior to the hearing and are on file, were read into the record:
- Copy of the Development Permit application with proposed plans, photographs, and the approved Development Permit;
 - Development Officer's written submissions, dated September 9, 2016; and
 - Two online responses: one in support, and one in opposition to the development.

Preliminary Matter

- [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. P. Kirkham*

- [7] The Appellant submitted Exhibit “A”, a petition signed by neighbouring property owners in opposition to the development. He stated that the current tenants have committed various acts of vandalism and engaged in disruptive behaviors, which have necessitated calls to the City of Edmonton’s Bylaw Enforcement Services.
- [8] The tenants also are not good neighbours. For example, in the winter time, they do not remove snow properly. As a result, people who utilize on-street parking spaces are more likely to park in front of the Appellant’s home. In his view, the subject development is uncharacteristic of the neighbourhood, which is family-oriented with both young children and many who have resided for decades in the community.
- [9] Upon questioning by the Board, he stated he had approached the community league, who informed him that the subject property is not zoned for multi-family use. He noted that there is another member of the neighbourhood who had applied for a similar development but was denied. He was unable to confirm where she resided.
- [10] Upon questioning by the Board about his communications with the community league, Mr. Kirkham stated that he made a presentation about the proposed development and its potential impacts at a community league meeting. At the time, the community league did not appear to support the development.
- [11] He confirmed that he purchased his home in 1985 and lives next door to the subject property.

ii) Position of the Development Authority

- [12] The Development Authority was represented by Mr. K. Yeung and Ms. K. Pihooja.
- [13] The Development Officer requested the Board and the parties appearing before the Board to not disclose to the public the memorandum dated June 29, 2015, which had been attached to the Development Officer’s written report. He explained that the memorandum is a first draft of a planning study, and contains internal information that has not yet been finalized. The memorandum is in relation to the Edmonton-Strathcona County Joint Planning Study Area Secondary Suites and Garage Suites Overlay (the “Overlay”).
- [14] He then referred to the memorandum’s Attachment 2, titled “2010-2011 Cumulative Risk Assessment Gold Bar.” This attachment consisted of a map that illustrated the “risk contours” of residential homes in proximity to heavy industrial uses. The map identified the subject property as being within the “residential risk contour”, and outside the “commercial outdoor” and “commercial indoor” risk contours. Based on this, the

Development Authority was of the view that the potential risk was such that it was acceptable for the development of a Secondary Suite at this location.

- [15] Mr. Yeung also addressed Mr. Kirkham's presentation regarding a neighbouring property owner's application for a Secondary Suite that had been refused. He noted that the memorandum before the Board is dated June 29, 2015, and is the most current iteration. Any Secondary Suite applications submitted prior to this date would be assessed under a different scenario. It was his understanding that prior to 2015, and based on the locational restrictions of the Overlay, all Secondary Suites within the Overlay area, as per the Appendix I Map of the Overlay, would have been prohibited.
- [16] Mr. Yeung explained that it was anticipated that Council would remove the Overlay sometime next year. However, in the meantime, the Development Authority must continue applying the Overlay.
- [17] In this case, it was found that the development did not meet the locational requirements under Section 822.3(1)(a), and a variance was therefore required.
- [18] Section 822.3(1)(a) of the Overlay provides as follows:
1. Notwithstanding Secondary Suites being listed as Permitted or Discretionary Uses within the following zones, Secondary Suites shall be allowed within the portion of the proposed Edmonton-Strathcona County Joint Planning Area contained within the City of Edmonton, representing a buffer area 1.5 km wide, as shown in Appendix 1, only in accordance with the following:
 - a. Secondary Suites shall be Discretionary Uses within the RF1, RF2 and RSL Zones where the Side Lot Line abuts a lot in an Industrial, Commercial, Row Housing, or Apartment Zone, or is not separated from it by a public roadway more than 10.0 m wide.
- [19] The Board questioned whether Section 822.3(1)(a) was intended to operate so that only Secondary Suites that abut a lot in an Industrial, Commercial, Row Housing, or Apartment Zone, shall be considered Discretionary Uses, whereas those located further inside a residential zone and away from the Industrial or Commercial Uses would be considered Permitted Uses.
- [20] In response, the Development Authority expressed the view that Secondary Suites are not a listed use by operation of the phrasing, "Notwithstanding Secondary Suites being listed as Permitted or Discretionary Uses within the following zones, Secondary Suites shall be allowed... *only in accordance with the following [locational requirement]*". [Emphasis as per the Development Officer's oral submissions] In his view, if the Site does not meet the locational criteria, then it is no longer a listed use.

- [21] The Board questioned the reasonableness of such an interpretation. Section 822.1 sets out the General Purpose of the Overlay, which states in part: “The purpose of this Overlay is to limit the expansion of Secondary Suites... in order to limit residential intensification in proximity to industrial uses”. When read together, it would appear that Section 822.3(1)(a) is intended to fulfill the General Purpose of the Overlay by regulating the intensification of residential uses near industrial or commercial zones.
- [22] Upon questioning, the Development Authority acknowledged that prohibiting intensification in residential centres further from industrial zones while allowing Secondary Suites and intensification near industrial zones would lead to an absurd result.
- [23] Section 800.2(2)(b) of the *Edmonton Zoning Bylaw* states that “The [City-Wide Master] Overlay shall not be used... to alter Permitted or Discretionary Uses”. Mr. Yeung clarified that the City-Wide Master Overlay consists of the general regulations that apply for any overlay. However, in this case, the locational criteria in the Edmonton-Strathcona County Joint Planning Study Area Secondary and Garage Suites Overlay conflicts with the general regulations of the City-Wide Master Overlay. Despite this conflict, he stated that it is important to note that the subject development meets all applicable development criteria as set out under Sections 54.2, 86, 110 and 814.
- [24] Referring to the site plans submitted as part of the original application, the Board questioned whether the third parking space, marked as “P3”, meets the requirements of the *Edmonton Zoning Bylaw*. The Development Authority clarified that there is indeed sufficient space for a third sport using tandem parking, which is permitted for a Secondary Suite. The required 7.0 metres access for an angled driveway has also been provided.
- [25] Upon questioning by the Board, Mr. Yeung stated that with the exception of the development compliance complaint for the existing illegal Secondary Suite, there are no other compliance or complaint records.

iii) Position of the Respondent, Mr. C. Finnman

- [26] Mr. Finnman acknowledged that he has experienced ongoing problems with the current tenant for some time. At one point, the tenant had rented out the basement suite to another individual without Mr. Finnman’s authorization. The basement tenant was subsequently evicted, at which time, Mr. Finnman decided to renovate the basement suite. He has had problems obtaining rent from the current tenant, but was unaware of the issues he had been causing to neighbours such as Mr. Kirkham. Now that he has been made aware, he will expedite the eviction of the existing tenant.
- [27] Upon questioning by the Board, Mr. Finnman confirmed that he was aware the existing basement suite was not legal when he purchased the property. However, as a real estate agent, he has found that it is not uncommon for homes to have illegal Secondary Suites.

Approximately one year ago, he began basement renovations and when the City inspector came on-site to inspect the upgraded electrical system, a compliance complaint was lodged. Mr. Finnman subsequently received a compliance notice, which resulted in the current development application before this Board.

iv) Rebuttal of the Appellant

- [28] The Appellant expressed concerns about the three off-street parking spaces. He also identified the subject property as lying between the “residential risk contour” and the “sensitive risk contour” on the map in Attachment 2 of the memorandum.

Decision

- [29] The appeal is DENIED and the decision of the Development Authority is CONFIRMED. The development is GRANTED as approved by the Development Authority, subject to the CONDITIONS as set out in the approved permit issued on August 5, 2016, for Project Number: 184429447-003.

Reasons for Decision

- [30] The subject development is for a Secondary Suite in the RF1 Single Detached Residential Zone, which is a Permitted Use under Section 110.1. This development is also located in the Edmonton-Strathcona County Joint Planning Study Area Secondary, Garage and Garden Suites Overlay (the “Overlay”).

- [31] The Board heard evidence that a risk assessment has been conducted with respect to this Overlay area and the intent is to remove the Overlay at some point in the next year or so, which would remove the restrictions on the development of Secondary Suites in this area.

- [32] Section 822.1 states that the General Purpose of this Overlay is

...to limit the expansion of Secondary Suites and to limit the creation of any Garage and Garden Suites within a portion of the Edmonton-Strathcona County Joint Planning Study Area to the Use opportunity that existed prior to the adoption of Bylaw 14750, in order to limit residential intensification in proximity to industrial uses until such time as more definitive criteria may be established to prescribe residential development within the Study Area, at which time this Overlay may be subject to amendment.

- [33] It is important to note that the General Purpose specifically directs that the Overlay is intended “to limit the expansion of Secondary Suites...in order to limit residential intensification in proximity to industrial uses”.

[34] Section 822.3(1)(a) provides as follows:

1. Notwithstanding Secondary Suites being listed as Permitted or Discretionary Uses within the following zones, Secondary Suites shall be allowed within the portion of the proposed Edmonton-Strathcona County Joint Planning Area contained within the City of Edmonton, representing a buffer area 1.5 km wide, as shown in Appendix 1, only in accordance with the following:
 - a. Secondary Suites shall be Discretionary Uses within the RF1, RF2 and RSL Zones where the Side Lot Line abuts a lot in an Industrial, Commercial, Row Housing, or Apartment Zone, or is not separated from it by a public roadway more than 10.0 m wide.

[35] The Development Officer interpreted this provision to mean that in the RF1 Zone, Secondary Suites are Discretionary Uses where they abut an Industrial, Commercial, Row Housing, or Apartment Zone. In other areas of the Overlay that do not abut these zones, a Secondary Suite would not be considered a listed use by operation of the Overlay.

[36] The Board disagrees with this interpretation. Given that the purpose of the Overlay is to limit residential intensification in proximity to industrial and commercial uses, it does not make sense that areas within the Overlay further away from industrial and commercial uses would be subject to a prohibition on Secondary Suites, whereas areas at the edge of the Overlay next to industrial and commercial uses could have Secondary Suites as Discretionary Uses.

[37] Another problem with the Development Officer's interpretation is that Secondary Suites would not be a listed use in areas of the Overlay that did not abut an Industrial, Commercial, Row Housing, or Apartment Zone. The proposed development would, therefore, be prohibited. The Development Officer purported to grant a variance to allow this development. However, the Development Officer does not have the power to grant variances to permit Uses that are not allowed.

[38] Section 11.3(2) of the Zoning Bylaw states:

11.3 The Development Officer may approve, with or without conditions as a Class B Development, an application for development that does not comply with this Bylaw where:

...

2. the proposed development would, in his opinion, conform with the use prescribed for that land or building in this Bylaw

- [39] In other words, if the Development Officer's interpretation is correct and the Secondary Suite Use is neither permitted nor discretionary at this location, he cannot grant a variance to allow it. Under Section 687(3)(d)(ii) of the *Municipal Government Act*, the Board is also prohibited from granting variances to allow development that does not conform to the listed Uses in a Zone.
- [40] In the Board's view, the appropriate interpretation of Section 822.3(1)(a) is that Secondary Suites located in areas of the Overlay that do not abut industrial uses are to be considered Permitted Uses.
- [41] The evidence before the Board was that the proposed development requires no variances. Section 11.2(4) of the Zoning Bylaw states:
- 11.2 The Development Officer shall receive all applications for development and:
- ...
4. shall approve, without conditions, or with such conditions as required to ensure compliance, an application for development of a Permitted Use provided the development complies with the regulations of this Bylaw, or shall refuse an application for development of a Permitted Use if the development does not comply with the regulations of this Bylaw, unless the Development Officer uses discretion pursuant to Sections 11.3 and 11.4 of this Bylaw
- [42] Accordingly, because this is a Permitted Use without variances, the Development Officer was required to grant a development permit.
- [43] Further, in the absence of misinterpretations of the *Edmonton Zoning Bylaw*, there is no right of appeal with respect to a development permit for a Permitted Use without variances, pursuant to Section 685(3) of the *Municipal Government Act*, which states: "Despite subsections (1) and (2), no appeal lies in respect of the issuance of a development permit for a permitted use unless the provisions of the land use bylaw were relaxed, varied or misinterpreted."
- [44] The objections raised by the Appellant regarding the proposed development did not relate to misinterpretations of the *Edmonton Zoning Bylaw*. Rather, his concerns were that renters in general are not engaged with their communities and do not perform proper upkeep or maintenance of the property. Traffic congestion, parking issues, noise, and increased risk of theft and vandalism were also raised. He was also concerned about the behaviour of the renters at this particular property and the problems they have caused in the neighbourhood. However, none of these issues relate to this Board's authority over development regulations. These issues are matters more appropriately addressed by the

City of Edmonton's Bylaw Enforcement Services. In short, the Appellant did not raise any planning or development related issues with respect to the proposed development.

[45] Although the Development Officer erred in his interpretation of the Overlay, the end result is correct in that a development permit was issued for the proposed development.

[46] For the above reasons, the appeal is denied and the Development Officer's decision is confirmed.

Mark Young, Presiding Officer
Subdivision and Development Appeal Board

Board Members in Attendance

B. Gibson; M. Jummun; J. Kindrake; A. Bolstad

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.



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SDAB-D-16-225

An appeal to Change the use of a portion of a Professional, Financial and Office Support Service to an Indoor Participant Recreation Service (gymnastics/dance/karate), located at 3564 – Allan Drive SW was TABLED to October 12 or 13, 2016.