



**EDMONTON
TRIBUNALS**

*Subdivision &
Development
Appeal Board*

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Date: October 1, 2019
Project Numbers: 160890356-001 & 002
File Numbers: SDAB-D-19-127 & 128

Notice of Decision

August 15, 2019 Hearing:

Summary of Hearing

i) Position of Mr. K. Haldane, Ogilvie Law, Legal Counsel for the Appellant, 1756282 Alberta Ltd.

[1] Mr. Haldane appeared to request a postponement of the hearing. He advised the Board that he did not receive a copy of the Disclosure from the City of Edmonton until 1:30 p.m. yesterday afternoon. The document is 74 pages long and he has not had sufficient time to review the contents.

[2] He advised the Board that he will be on vacation until September 5, 2019 and asked that the appeal hearing be scheduled after that date.

ii) Position of Development Compliance, Mr. J. Hogberg and Mr. J. Young:

[3] Mr. Young advised the Board that they did not object to the postponement request.

Decision

[4] That SDAB-D-19-127 and SDAB-D-19-128 be postponed to Thursday, September 19, 2019, at the verbal request of the Appellant and with the consent of the City of Edmonton.

Reasons for Decision

[5] The Appellant requested a postponement in order to allow additional time to complete a thorough review of the detailed written submission from the City of Edmonton that he received early yesterday afternoon.

[6] This is the first request for a postponement.

September 19, 2019 Hearing:

Motion:

“That SDAB-D-19-127 and 128 be raised from the table”

[7] On September 19, 2019, the Subdivision and Development Appeal Board (the “Board”) heard an appeal that was filed on July 16, 2019. The appeal concerned the decision of the Development Authority to issue the following Stop Order on June 26, 2019:

To comply with Orders to cease the General Industrial Use and remove all related materials by July 31, 2018.

[8] The subject properties are on Plan 5392AE Lots 66-68 and Plan 5392AE Lots 69-70, located at 16204 - 141 Street NW and 16268 – 141 Street NW, within the AG Agricultural Zone. The Carlton Neighbourhood Structure Plan and Palisades Area Structure Plan apply to the subject property.

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

- Copy of the Stop Orders;
- A written submission from Development Compliance Officer; and
- The Appellant’s written submission.

Preliminary Matters

[10] 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.

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

[12] The appeal was filed on time, in accordance with Section 686 of the *Municipal Government Act*, RSA 2000, c M-26 (the “Municipal Government Act”).

Summary of Hearing

i) *Position of Mr. K. Haldane, Legal Counsel for the Appellant, 1756282 Alberta Ltd.:*

[13] Mr. Haldane did not include Section 643 of the *Municipal Government Act* that deals with non-conforming Uses as it is included in the Agenda.

- [14] His client has owned the property for approximately six years and the outdoor storage Use has taken place on the property for the entire time.
- [15] He referred to TAB 1 of his submission, a copy of the Stop Orders.
- [16] He referred to TAB 2 of his submission, a copy of the subdivision plan showing the properties under appeal outlined on the plan. There are two titles for lots 66, 67, and 68, which is the south parcel. Lots 69 and 70 have separate titles.
- [17] He referred to the Site Plan showing that there is a Government road allowance and a railway to the west. The CN rail line was acquired in 1929.
- [18] The tenants on the property include a concrete company that was incorporated in 1976. He spoke to the principle of the company who indicated they have been storing concrete forms on the property for over 30 years.
- [19] He referred to TAB 2 of his submission, a map showing that the property is zoned AG Agricultural Zone. The north parcel, Lots 69 and 70 are being used for outdoor storage Use.
- [20] He referred to Tab 3 of his submission, aerial photographs that were taken in May 2017, showing the Use for the storage of concrete forms.
- [21] The photographs taken in May 2015 show the same Use as in 2017.
- [22] A permit application was made to demolish the residence on the property in 2013 or 2014.
- [23] In 2012, a residence is shown on the south parcel with the rest of the property being used for the storage of concrete forms.
- [24] In 2007, the property is being used for storage.
- [25] The aerial photograph shows the CN rail line and 141 Street west of the subject Site and what appears to be outdoor storage in May, 1983.
- [26] The September 30, 1981 photograph shows the outdoor storage taking place on the subject Site.
- [27] There are other buildings in 1981 but there is storage of industrial items.
- [28] The *Land Use Bylaw 5996* was replaced with the *Edmonton Zoning Bylaw 12800* after the last photograph was taken.

- [29] He referred to TAB 4 of his submission, an excerpt from *Land Use Bylaw 5996* that incorporates by reference the Land Use Bylaws of surrounding municipalities that were annexed into Edmonton in January, 1982. This included the subject property that was in the Municipal District of Sturgeon. He was not able to get a zoning map prior to 1982, so the earliest map he could get was February, 1982.
- [30] He referred to TAB 5 of his submission, an excerpt from the Zoning Map 5996 that governed Edmonton until it was replaced in June, 2001. South of the subject Site is zoned AG Municipal District of Sturgeon that was the governing land use until *Edmonton Zoning Bylaw 12800* replaced *Land Use Bylaw 5996*.
- [31] He referred to TAB 6 of his submission, showing that Outdoor Storage was a use on the land until 2001. If a permit was issued for the use of storage taking place on the property for approximately 40 years, it is a non-conforming Use.
- [32] He referred to TAB 7 of his submission, an excerpt from the Planning Law and Practice in Alberta that outlines the Burden of Proof.

.....once, a breach of the current rules has been proved, the evidentiary burden shifts to the alleged violator to produce evidence showing that his is a non-conforming use or building within the meaning of s. 643.

...that effect, he runs a grave risk of being found guilty of the infraction. However, if he produces sufficient evidence to raise a doubt about whether his case falls within s. 643, that doubt should be resolved in his favour.

...even in respect of matters about which the accused or defendant is in a much better position than the municipality to adduce evidence, the legal burden nevertheless remains with the municipality.

- [33] Here, there is a breach of the current rules given that the Use taking place on the land is not a listed Use in the AG Agricultural Zone
- [34] The burden then shifts to his client to produce evidence showing this is a legal non-confirming Use.
- [35] If the property owner provides sufficient evidence to raise a doubt about whether the case falls in Section 643, that doubt should be resolved in the property owner's favour. To raise this doubt, they submitting that there was more likely a permit issued at some point for the Use.
- [36] If the permit was ever issued, it was before the property owner acquired the land in 2013.
- [37] The property has been used for storage for over 30 years with no known complaints.

- [38] The client would expect that the legal burden to prove no permit exists remains with the municipality.
- [39] He referred to TAB 8 of his submission, an Alberta Court of Appeal decision, *Emeric Holdings Inc. v. Edmonton (City)*, 2009 ABCA 65 dealt with a parking lot. The city was the owner of the land and no requirement that a permit be issued for the Use.
- [40] A permit must have been issued as the Use has been taking place on the subject Site but they cannot find it since the property owner has not owned the property the entire time.
- [41] He referred to TAB 8, page 42, paragraph 14 of the Alberta Court of Appeal decision that reads:
- As I see it, the first question is whether the Appellant proffered sufficient evidence to satisfy the evidential burden as to whether a development permit ever issued...*
- [42] The Use has been taking place on the subject Site for over 30 years and they believe a permit was issued.
- [43] He referred to TAB 9 of his submission, an Alberta Court of Appeal decision, *Town of Stavely v. Fern Brothers, Stacey and Credit Foncier Trust Company*, 1987 Carswell Alta 272 that reads:
- ...a discontinuance requires an element of intention. It is true the owners here were not using the property for residential purposes but they were striving to do so. We would not hold the discontinuance to be found in the unavailability of tenants. To so hold would work a grave hardship on a landowner who had a right to continual lawful use, but is precluded from actual use by circumstances beyond his control.*
- In our opinion, what is required is a bona fide intention to use the premises and actual use so far as is practicable.*
- [44] In that case, the developer could not find a tenant so the Use that was non-conforming was discontinued for a period of time until a tenant could be found.
- [45] The intention remained to operate the use and limited by the circumstances, the non-confirming Use persisted on the site.
- [46] Under Section 643, if the Use is discontinued for 6 months you no longer have the Use.
- [47] The Appellant submits that the intensity has changed and the amount of space occupied by the industrial goods being stored there has changed over the years. However, the intention was to always operate the site for that purpose.
- [48] He referred to SDAB-D-15-057, a Board decision for a sign.

- [49] He referred to the 2015 SDAB decision to show how it is not an uncommon occurrence for permits going missing. They did a permit history on the site and only found a demolition permit for the residence.
- [50] In the 2015 SDAB Decision, the issue was varying the distance between signs.
- [51] In that decision, the Development Officer indicated the Superboard does not necessitate a variance as it has no valid permit.
- [52] He referred to his submission showing a Violation Notice dated March 10, 2015. The Order states:
-the Applicant is to obtain a Development Permit for the Freestanding Off-premises Sign or remove it from the Site.
- [53] He referred to a 1988 SDAB Decision (DAB/88-435) in his submission. In the decision, the Board approved the proposed Sign.
- [54] The sign was a General Advertising Sign and in 1988 there was no time limit on sign permits. There was a category for temporary signs but that was a separate use and not for a general advertising sign which was governed by a different section.
- [55] The requirement of that section was to remove a sign before the expiry date but there was no general rule for the expiry date. In the Board's decision, there was no expiry date for the permit that was issued.
- [56] In the 1988 decision, the sign is located approximately at 70 Street and Yellowhead Trail in the CN right of way. The Stop Order, approximately 17 years later, the sign is listed at 12520 - 66 Street and he has confirmed that this is the same sign.
- [57] That shows the City cannot always find permits, and in this instance, the permit could have been issued while the property was in the Municipal District of Sturgeon.
- [58] He contacted the Municipal District of Sturgeon show indicated they could not search permits by address or legal description.
- [59] In the Development Compliance Officer's (DCO) submission, in the key considerations, they state that all options have been exhausted.
- [60] In his opinion, all options to gain a permit or change zones can never be exhausted. They could rezone or make other applications.
- [61] In the DCO's written submission, in the key considerations, they state that a check with the County confirmed that any permits granted to site pre-annexation have been sent to the City of Edmonton which, when searched did not reveal any pertinent documents.

- [62] He questions the reliability of the County's records that were sent and probably going back before the annexation in 1982.
- [63] Even with the sign permit in the 1988 SDAB decision, the permit was not found 17 years later.
- [64] There have been several changes to the ownership since the permit was likely issued.
- [65] Section 643 exists for a reason and the Law in the Court of Appeal Decision in *Emeric Holdings Inc. v. Edmonton (City)*, 2009 ABCA 65 and the wording in Planning Law & Practice in Alberta is there for a reason. This is to protect the development rights of subsequent owners who may be in the position like his client having the municipality say there is not permit for what has been ongoing for several years.
- [66] The Use has been ongoing on the subject Site for over 30 years with no known complaints until his client owned the site.
- [67] The titles on all of the adjacent properties were issued after 2001, after the use was taking place on the subject Site.
- [68] The use was there when the homes were developed.
- [69] In his opinion, there was a permit for this Use which is a legal non-conforming Use.
- [70] Mr. Haldane provided the following information in response to questions by the Board:
- a. He confirmed that his client has not applied for a development permit.
 - b. His client was in the process to rezone the property but did not move forward with that due to economic reasons.
 - c. There was no discussion with the City to continue the Use and clean the property. His client would be agreeable to a condition imposed by the Board to clean the property.
 - d. The parcels west of the subject Site is zoned IM Medium Industrial that has large warehouses on the sites. He could not confirm is there is anything similar to the Use on the subject Site.
 - e. The properties east of the subject Site are residential acreages.
 - f. He could not confirm what the definition of Outdoor Storage was in the Municipal District of Sturgeon Bylaw.
 - g. The distinction between Permitted and Discretionary is the Permitted Use can take place on the site as of right if it complies with the regulations. If it is Discretionary, the Development Officer or the SDAB could refuse the Use if they find it is not appropriate.

- h. They have been using the whole site for the purpose of this Use.
 - i. If there was a permit for the whole site for all 5 lots for industrial storage, that would have been replaced by a permit for the residence. That area for the residence cannot have the storage Use on it. It would have ceased using that area for storage and lost the non-confirming Use for that portion of the land.
- [71] He could not confirm what Use is taking place on the properties shown in the 1981 photograph. The residence in the photograph is a Permitted Use.
- [72] There could have been a residence and outdoor buildings on the properties.
- [73] They have no issue with the Stop Order other than they believe it is not correct as a permit was issued years ago.
- [74] If the Board finds the Stop Order was issued correctly, they are requesting an additional six months for his client to relocate the business.

ii) Position of the Development Compliance Officer, Mr. J. Hogberg and Mr. J. Yeung

- [75] A General Industrial Use is not a listed Use in the AG Agricultural Zone. A development permit application would be refused.
- [76] They do not believe the fees were paid during the rezoning process and would not be valid.
- [77] They met with the property owners several times at the subject Site and provided them with options laid out in the current Order and the 2016 Order. They are aware that the Use is not allowed and they would have to change the land use designation.
- [78] They were notified by complaints from the adjacent land owners regarding the Use of the lot. The file was started in 2014.
- [79] If a development permit is granted, screening and landscaping enhancements are part of the development permit conditions. The Use is not permitted so the option to change screening and visibility improvements are not discussed.
- [80] The industrial nature of the lot does not fit in with the Statutory Plans. They would need to rezone the property and amend the plans as well. The Neighbourhood Structure Plan (NSP) designates this land for low density residential that would be part of the rezoning application and would accompany an application to amend the NSP as well.

- [81] The Appellant has already explored the rezoning option and did not follow through with the process. They are not leaving that as an option for them to explore rezoning and continue operating. If they apply for rezoning, they would need to cease the Use until they have approval to get a permit once the rezoning is complete.
- [82] The Appellant was aware of the issues since 2014. They explored the reapplication and rezoning process with the Appellant but they did not follow through. They are expected to cease the Use on the property until it is legalized.
- [83] They confirmed that the houses east of the subject Site were there when the property was being used for Agricultural Use.
- [84] They did not review the entire railway line to see if there are other industrial uses in the area. The lots southeast of the subject Site are zoned IM Heavy Industrial which would allow Industrial Uses on those lots.
- [85] They do not believe the subject Site has always been used as Agricultural.
- [86] With regard to Section 643, Non-conforming Uses, a permit needed to be issued for the Use to be considered non-conforming. At the time of annexation, the records are sent over but the County and the City could not find any permits.
- [87] No permits were transferred from the Municipal District of Sturgeon to the City for the subject Site.
- [88] They are opposed to granting an extension for the Appellant to comply with the Order. The file has been open since 2014 and the Appellant has been aware for several years the Use on the property is illegal. In their opinion, they have been given several extensions.
- [89] The Appellant talked about raising doubt. That is not legislation and nothing the Board is bound by. The Board is not bound by precedence.

iii) Rebuttal of the Appellant, Mr. Haldane

- [90] In TAB 3 of his submission, the aerial photograph taken in May 2013, his client acquired the title transfer in that year.
- [91] The aerial photos show what is on the property at that time.
- [92] The house on the corner is not present in 2007 but is in the 2012 photo.
- [93] In the DCO's submission, they are saying there is no permit for the Use on the property. He is here to prove that a permit existed. The permit could have been issued any time up to June 2001 and was a listed Use on the property.

- [94] When the *Edmonton Zoning Bylaw* came into effect, they lost the Municipal District of Sturgeon Bylaw. A permit could have been issued for the Use any time up to 2001.
- [95] His client was not aware that the property was being used illegally.
- [96] The property zoned DC2 Direct Development Control Provision north of the subject Site is a Religious Assembly.
- [97] The Development Compliance Officer did not find a permit for the house either just the demolition permit for the house.
- [98] Planning Law & Practice in Alberta is an authority the Board can have regard to and Court of Appeal Decisions are binding and speak to what he has spoken to.
- [99] This is the first time this matter has come to this Board for determination.

Decision

- [100] The appeal is DENIED and the decision of the Development Compliance Officer is UPHeld. The wording of the Stop Order is VARIED as follows:
1. Cease the General Industrial Use and remove all related materials by **April 1, 2020**.

Reasons for Decision

- [101] In determining an appeal from a Stop Order under Section 645 of the *Municipal Government Act* (the “MGA”), the Board must consider whether the Stop Order was validly issued under the MGA and the associated regulations.
- [102] The Board was provided with arguments that the Use is a legal non-conforming Use under Section 643 of the MGA. If the Appellant is correct in this assertion, it would render the Stop Order invalid as the development would then be considered to comply with planning legislation.
- [103] The Board disagrees with the Appellant that the Use is a legal non-conforming Use on the basis that it is not satisfied sufficient evidence was presented to satisfy the evidential burden that a development permit for outdoor storage ever was issued.
- [104] Legal Counsel for the Appellant relied on several historical aerial images and the Municipal District of Sturgeon *Land Use Bylaw 388/81* that was in force at the time of annexation.

- [105] Counsel submitted that these photographs provided a sufficient basis to demonstrate that the lands have been used for the purposes of outdoor storage since annexation or at some time before the City's current *Edmonton Zoning Bylaw* was implemented, removing the Use from the zone entirely.
- [106] The Board disagrees. To the contrary, the Board finds that it is more likely based on the photographic evidence that the land was used for Agricultural purposes and storage on the site is ancillary to the Site.
- [107] The earliest photograph produced by the Appellant was dated around the time of annexation in 1982. In that photograph, there appear to be 3 buildings on the site and a pronounced connection between the subject sites and the apparent farmland to the east. Based on these factors, the Board believes it is more likely that the land was being used for one of the Permitted Uses in *Municipal District of Sturgeon Land Use Bylaw 388/81*, such as farming or single family residence, than the Discretionary Use of Outdoor Storage.
- [108] The second photograph produced by the Appellant was a Google image from 2004. This image again shows conditions similar to the first image and the Board is not satisfied that there was a transition to an outdoor storage use at this time.
- [109] The third photograph produced by the Appellant is dated July, 2007. Again, it still appears that the Use was either agricultural or residential and that storage was ancillary to those permitted uses.
- [110] The earliest indication of a more intensified use of the parcel for the purposes of outdoor storage akin to the current Use on the site appears in the photograph dated May, 2012. This would be after the adoption of the current *Edmonton Zoning Bylaw* and at a time where the Use would no longer be available to the subject site.
- [111] The Board can only determine that between 2007 and 2012, the Use appears to have shifted from agricultural or residential to heavily industrial outdoor storage based.
- [112] This inference is further bolstered by the fact that a demolition permit was granted in July, 2013, for the house on the subject site. When these circumstances are considered together, the Board believes it is more reasonable to conclude that the residential Use was the true Use of the site from before annexation until it was abandoned by way of the demolition permit.
- [113] For these reasons, the Board is not satisfied that the Appellant has reached the threshold laid out in the Court of Appeal decision *Emeric Holdings Inc. v. Edmonton (City)*, 2009 ABCA 65.
- [114] In consideration of the Board's finding that the development is not a legal non-conforming Use, the Board must then consider if the Stop Order was validly issued.

- [115] The Appellant raised no concerns with how the Stop Order was issued from a procedural perspective. Therefore, in reliance on this submission and based on the materials presented, the Board is satisfied that the correct process was followed in issuing the Stop Order and that the requisite information was included in said Order.
- [116] Therefore, the Board finds that the Stop Order has been issued correctly and upholds the Development Compliance Officer's decision.
- [117] However, the Board is willing to grant the six month extension requested. This is not in any way condoning the Use that currently exists on the site. The Board has definitively concluded that the current Use is an illegal Use for the lands.
- [118] The Board's decision to grant the extension is only to allow the Appellant time to move the business activities to another location and allow the current tenants of the lands to sort their affairs. In the Board's view, these are reasonable circumstances to grant an extension to the Stop Order.



Mr. R. Handa, Presiding Officer
Subdivision and Development Appeal Board

Board Members in Attendance:

Ms. G. Harris; Mr. R. Hobson; Ms. L. Gibson; Mr. A. Bolstad

c.c. City of Edmonton, Development Compliance, Attn: Mr. J. Hogberg / Mr. A. Jabs

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 Development & Zoning Services, located on the 2nd Floor, Edmonton Tower, 10111 – 104 Avenue NW, Edmonton, AB T5J 0J4.

NOTE: The City of Edmonton does not conduct independent environmental checks of land within the City. If you are concerned about the stability of this property for any purpose, you should conduct your own tests and reviews. The City of Edmonton, when issuing a development permit, makes no representations and offers no warranties as to the suitability of the property for any purpose or as to the presence or absence of any environmental contaminants on the property.



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SDAB-D-19-153

Application No. 323977703-001

An appeal to construct a front addition and interior alterations to a Single Detached House (3rd level, add 2 bedrooms, 2 bathrooms: 1st and 2nd levels, extend living room and new front entrance; basement, extend foundation and add bonus room, NOT to be used as an additional Dwelling) was **TABLED TO OCTOBER 24, 2019.**