

Edmonton Subdivision and Development Appeal Board

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DATE: April 9, 2015
PROJECT NO.: 051557576-001
FILE NO.: SDAB-D-15-069

NOTICE OF DECISION OF THE SUBDIVISION AND DEVELOPMENT APPEAL BOARD

This appeal dated February 27, 2015, from the decision of the Development Authority for permission to:

Construct interior and exterior alterations to a Nightclub (Legal Briefs - 279 occupants)

on Plan B2 Blk 5 Lot 189, located at 10148 - 105 Street NW, was heard by the Subdivision and Development Appeal Board at its hearing held on March 25, 2015. The decision of the Board was as follows:

SUMMARY OF HEARING:

At the outset of the appeal hearing, the Chairman confirmed with the parties in attendance that there was no opposition to the composition of the panel.

Copies of the following documents are within the Board file:

- Decision SDAB-D-05-348, dated December 23, 2005;
- Decision SDAB-D-10-009, dated March 19, 2010;
- the Capital City Downtown Plan; and
- memorandum from the City of Edmonton Sustainable Development, dated March 23, 2015.

The Chairman first asked the parties to address the issue of jurisdiction and whether the appeal was filed within the allowable 14-day appeal period, pursuant to section 686 of the *Municipal Government Act*, R.S.A. 2000, c. M-26 (the "MGA").

The Board heard from Mr. Noce, Legal Counsel for the Appellant, Coast Edmonton Plaza Hotel – Okabe North America Inc., and Ms. Steer, General Manager of Coast Edmonton Hotel. Mr. Noce submitted the following documents:

- A detailed written submission, marked Exhibit "A";
- *McCauley Community League v. Edmonton (City)*, 2012 ABCA 86 ("McCauley"), marked Exhibit "B";
- *Coventry Homes Inc. v. Beaumont (Town of) Subdivision and Development Appeal Board*, 2001 ABCA 49 ("Coventry"), marked Exhibit "C";
- *Emeric Holdings Inc. v. Edmonton (City)*, 2009 ABCA 65 ("Emeric"), marked Exhibit "D";

- *Masellis v Edmonton (Subdivision and Development Appeal Board)*, 2011 ABCA 157 (“*Masellis*”), marked Exhibit “E”.

Mr. Noce provided the following information:

1. The Coast Edmonton Hotel is a full service hotel located east of the subject Site across 105 Street. He referenced photographs contained at Tab 1 of his written submission to illustrate the streetscape and the location.
2. Shade Gentlemen’s Club is a “strip club” that is operating from the subject Site, which is zoned UW Urban Warehouse Zone.
3. A development permit application to conduct interior and exterior alterations to an existing Nightclub with 279 occupants was approved by the Sustainable Development Department on October 24, 2005 and subsequently appealed by neighbouring property owners. On December 15, 2005, the SDAB upheld the approval of the Development Authority, but reduced the number of occupants from 279 to 250.
4. The appeal was filed because the Appellant has determined that the current Use of the subject Site is different from the Use that was approved in 2005 and the current Use will negatively affect the use, enjoyment and value of their property.
5. The current and actual Use of the site is a strip club, which falls under the definition of Adult Mini-Theatre under the *Edmonton Zoning Bylaw*. Adult Mini-Theatre is neither a Permitted nor Discretionary Use in the UW Urban Warehouse Zone.
6. Section 7.5(1) of the *Edmonton Zoning Bylaw* defines an Adult Mini-Theatre as:
an establishment or any part thereof, where, for any form of consideration, live entertainment, motion pictures, video tapes, video discs, slides or similar electronic or photographic reproductions, the main feature of which is the nudity or partial nudity of any person, are shown as a principal use, or are shown as an Accessory Use to some other business activity which is conducted on the premises, and where individual viewing areas or booths have a seating capacity of 10 persons or less.
7. Mr. Noce referenced promotional material, social media material, and internet searches relating to Shade Gentlemen’s Club, contained at Tabs 3 to 9 of his written submission, to show the subject Site is operating as an Adult Mini-Theatre and not a Nightclub.
8. Mr. Noce referred to Decision SDAB-D-13-264, in which the Board recognized the definition of “a Nightclub Use is problematic when evaluating the development permit application before the [SDAB].”
9. The Board has the authority to make an order or decision or issue or confirm the issuance of a development permit. Pursuant to Section 17.2(1)(a) of the *Edmonton Zoning Bylaw*, the Board has the authority to cancel the development permit where:
any person undertakes development, or causes or allows any development to take place on a Site contrary to the Development Permit.
10. Based on the law in Alberta, the time to appeal runs from when the interested party knew or should have known, that a development permit has been issued. In this case, the Appellant received promotional information from Shade Gentlemen’s Club on February 12, 2015, and determined that the Use had been changed from a Nightclub to an Adult Mini-Theatre.

11. The notice of appeal was filed on February 27, 2015 within the allowable 14 days from the date on which the Appellant knew, or should have known that a development permit may have been issued, pursuant to Section 686(1) of the *MGA*.
12. The property owner should make application for a new development permit for the proposed Use because the activities and Use occurring on the subject site have changed from a Nightclub to an Adult Mini-Theatre.
13. Mr. Noce referred to *Coventry*, *McCauley*, and *Masellis* to support his position that the Appellant filed the appeal within 14 days of notice of the non-compliance due to the change in Use.
He referred to *Emeric* for the proposition that the Appellant needs only to demonstrate a “doubt” for its appeal to succeed or at the very least to allow the Board to assume jurisdiction.
14. In this case the proposed development does not comply with the Edmonton Zoning Bylaw and the current Use would unduly interfere with the amenities of the neighbourhood and materially interfere with and affect the use, enjoyment and value of neighbouring parcels of land.

Mr. Noce provided the following responses to questions:

1. The Development Authority could issue a Stop Order regarding the change in Use, but the Board has the authority to revoke the development permit pursuant to Section 687(3)(d) of the *MGA* which states that in determining an appeal, the Subdivision and Development Appeal Board:
 may make an order or decision or issue or confirm the issue of a development permit even though the proposed development does not comply with the land use bylaw[.]
2. Decisions SDAB-D-05-348 and SDAB-D-10-009 were for a Nightclub Use.
3. However, the current Use is a strip club, which falls under the definition of Adult Mini-Theatre, not a Nightclub and the Board has the authority to assume jurisdiction and enforce the regulations of the *Edmonton Zoning Bylaw*.
4. The appeal was filed within the required 14 days, from February 12, 2015 to February 27, 2015 because February 12, 2015 does not count as part of the 14-day appeal period.
5. Mr. Noce has had discussions with the Sustainable Development Department regarding enforcement issues.
6. Mr. Noce conceded that the description of the proposed Use in SDAB-D-05-348 included scantily clad male dancers and that the General Manager of the Coast Edmonton Hotel was in attendance at the hearing.
7. The Nightclub that was approved in 2005 never opened and he could not find any evidence to support that Use. The only evidence he found was the operation of a Nightclub on the subject site in 2010.

The Board then heard from Mr. Bacon, representing the Sustainable Development Department, who provided the following information:

1. A Development Permit for a Nightclub, Legal Briefs, was approved in 2005. At that time the Site was in the EZ Zone. The review completed at that time determined that the proposed use included adult entertainment. The approval was appealed by a neighbouring property owner and subsequently approved by the SDAB in SDAB-D-05-348.
2. It was his opinion that the Use of the site has not changed.

Mr. Bacon provided the following responses to questions:

1. An Adult Mini-Theatre was defined in the *Edmonton Zoning Bylaw* in 2005, and it was neither a Permitted nor Discretionary Use in the EZ Zone.

The Board then heard from Mr. Murphy, Legal Counsel for the Respondent, 1005059 Alberta Ltd. (Shade Ltd.), and the property owner, Mr. White, who provided the following information:

1. The Appellant is asking the Board to issue a Stop Order based on a finding that the Use occurring on the subject site does not comply with a previously approved Development Permit. The appeal has been filed many years beyond the time in which an appeal could be filed.
2. The Development Permit issued in 2005 and confirmed by the SDAB is for precisely the use that is occurring on the Site.
3. A development permit application for a Minor Eating and Drinking Establishment with a maximum occupancy of 267 was made in 2005 because that was the Use Class that applied. The Development Officer and the Board approved the development with the inclusion of nude dancing.
4. Section 3.4(5) of the *Edmonton Zoning Bylaw* states that in any Development Permit, Direct Control Provision or Overlay issued or created prior to the enactment of this Bylaw:
the use major eating and Drinking Establishments is deemed to be a Specialty Food Services, Restaurants, Bars and Neighbourhood Pubs and Nightclubs use Classes.
5. After the development permit was issued in 2005, interior renovations were completed but the business never opened because of some disagreements between the business partners.
6. In 2010 a development permit application was made to complete exterior alterations to the building. This permit was appealed by the Coast Edmonton Hotel. The appeal was conceded at the hearing and the 2010 Development Permit application was subsequently revoked.
7. The Nightclub opened in 2010 with male strippers and a dance club operating later in the evening, but closed in 2011 because of a lack of business.
8. The Appellant and their legal counsel were aware of the development history of this property.
9. The Nightclub has now re-opened and is operating as a Nightclub pursuant to the definitions contained in the *Edmonton Zoning Bylaw*.

10. Mr. Murphy commented on the case law relied on by the Appellant. *Masellis* was based on the determination of constructive notice. *Emeric* is a burden of proof case addressing the shifting burden of proof with respect to Stop Orders.
11. If the Board determines that a new development permit is required or issues a Stop Order, the property owner has no recourse but to the Court of Appeal. The Board does not have the authority to act as the Development Authority in this instance.
12. He referred to valid business permits and liquor licences, which specifically mention that the business operates with exotic dancing.
13. The site was dormant from 2011 to March 6, 2015, but taxes have consistently been paid by the property owner. There is nothing in the *Edmonton Zoning Bylaw* to indicate that a development permit can be cancelled if a business is not operating.
14. Pursuant to Section 7.5(1) of the *Edmonton Zoning Bylaw* an Adult Mini-Theatre means:
an establishment or any part thereof, where, for any form of consideration, live entertainment, motion pictures, video tapes, video discs, slides or similar electronic or photographic reproductions, the main feature of which is the nudity or partial nudity of any person, are shown as a principal Use, or are shown as an Accessory Use to some other business activity which is conducted on the premises, and where individual viewing areas or booths have a seating capacity of 10 persons or less.
15. Pursuant to Section 7.4(37) of the *Edmonton Zoning Bylaw* a Nightclub means:
development where the primary purpose of the facility is the sale of alcoholic beverages to the public, for consumption within the premises or off the Site, in a facility where entertainment facilities take up more than 10% of the Floor Area. This Use typically has a limited menu from a partially equipped kitchen/preparation area and prohibits minors from lawfully utilizing the facility.

Mr. Noce made the following points in rebuttal:

1. The date that notice is received is not calculated as part of the 14-day appeal period that started on February 13, 2015.
2. Section 3.4 of the *Edmonton Zoning Bylaw* does not apply in this instance because the relevant permit was issued in 2005, after the implementation of the *Edmonton Zoning Bylaw* in 2001.
3. It was his opinion that the break in Use that occurred between 2011 and 2015 provides an opportunity to appeal because the Use has changed from that which was approved in 2005.
4. In 2010 the entertainment that included “stripping” was limited to one hour in the early evening and used to attract patrons to the Nightclub operating as a dance club. This has now changed and the entertainment that includes “stripping” is the primary attraction for the business.
5. The activities that occur on site, specifically nude dancers appearing on stage for the entertainment of patrons, fits the definition of an Adult Mini-Theatre, the main feature of which is the nudity or partial nudity of any person, shown as the principal Use.
6. The fact that taxes have been continuously been paid on this property is irrelevant.

Mr. Murphy made the following points in response to new information introduced in rebuttal by Mr. Noce:

1. He questioned the information provided that there was only one hour of dancing occurring when the business operated in 2010.
2. If a new development permit is required for a change in Use, it would have to be reviewed by the Sustainable Development Department and if it was refused the property owner would have the right to appeal that decision.

Mr. Noce made the following point in rebuttal:

1. He clarified that he referenced his notes from the hearing that was held in 2010 regarding the amount of nude dancing that was occurring in 2010.

MOTION:

that the Board not assume jurisdiction.

REASON FOR DECISION:

The Board finds the following:

1. The Board applied Section 686(1)(a)(i) of the *MGA*, and finds that the appeal was not filed within the allowable 14 days, based on the following:
 - a) A development permit to conduct interior and exterior alterations to an existing Nightclub was approved with a maximum of 279 occupants in 2005. This approval was unsuccessfully appealed by the Coast Edmonton Hotel to the SDAB who upheld the decision of approval by the Development Authority with a condition that the occupancy be reduced to 250 occupants.
 - b) The Board notes that in Decision SDAB-D-05-348 the Respondent described the intent of the Club to be an all-male performance club catering primarily to a female clientele with a full liquor service, limited food service and a “quiet” second floor. Further reference was made to signage that advertised the presence of scantily clad males within the subject property.
 - c) The Board notes that the General Manager of the Coast Edmonton Hotel, Mr. Hans VanBloedau, was in attendance at this hearing.
 - d) The Respondent provided evidence that the approved interior alterations were completed after the development permit was issued in 2005. This was confirmed in the Memorandum received from the City of Edmonton Sustainable Development dated March 23, 2015, and was not disputed by any of the parties who attended this hearing.
 - e) The Board therefore finds pursuant to Section 22 of the *Edmonton Zoning Bylaw* that the development permit issued in 2005 has not expired.

- f) The Sustainable Development Department approved a development permit application to perform exterior alterations to the building (recladding and repainting the façade) in 2009. This approval was appealed to the SDAB. In Decision SDAB-D-10-009 the SDAB revoked the approved permit with the consent of the property owner, which in effect, cancelled the exterior alterations permit. This hearing of the SDAB provided notice to the Appellant that development was occurring on the subject site.
 - g) The Respondent provided evidence that a Nightclub featuring exotic entertainment operated at this location between 2010 and 2011. This evidence was not refuted by the Appellant at the hearing. This provided further notice to the Appellant regarding the nature of the activities that were occurring at the subject location, particularly exotic entertainment.
2. Further, the *Edmonton Zoning Bylaw* does not include a provision that allows the Board to conclude that the development permit issued in 2005 is invalid simply because the business was closed from 2011 to 2015. Section 686(3)(e) of the *MGA* does not extend authority to the Board to effectively cancel a development permit that was previously granted by the SDAB and in effect issue a Stop Order to which the property owner would have limited rights of appeal.
 3. If there has been a change in Use on the subject site, the remedy lies with Bylaw Enforcement and ultimately the issuance of a Stop Order.
 4. The Board does not have jurisdiction to extend the time for filing an appeal. Having determined that the Appellant received notice of the proposed Use at least as early as 2010, the appeal was filed more than 14 days following the date on which the Appellant received notice of the decision of the Development Authority, the Board cannot take jurisdiction to hear this appeal.

IMPORTANT INFORMATION FOR 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*, R.S.A. 2000, c. M-26.
2. When a decision on a Development Permit application has been rendered by the Subdivision and Development Appeal Board, the enforcement of that decision is carried out by the Planning and Development Department, located on the 5th Floor, 10250 – 101 Street, Edmonton.

Mr. R. Colistro, Chairman
SUBDIVISION AND DEVELOPMENT
APPEAL BOARD