



**EDMONTON
TRIBUNALS**

*Subdivision &
Development
Appeal Board*

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Date: September 15, 2016
Project Number: 222889971-001
File Number: SDAB-D-16-206

Notice of Decision

- [1] On August 31, 2016, the Subdivision and Development Appeal Board heard an appeal that was filed on August 5, 2016. The appeal concerned the decision of the Development Authority, issued on July 28, 2016, to refuse the following development:

Install (1) Freestanding Minor Digital On-premises Off-premises Sign (7.62 metres by 3.65 metres (Off-premises) & 7.62 metres by 0.6 metres (On-premises).

- [2] The subject property is on Plan EDMONTO Blk HB, located at 10304 - 109 Street NW, within the UW Urban Warehouse Zone. The Special Area Downtown Overlay and Capital City Downtown Plan 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 attachments, proposed plans, and the refused Development Permit;
- Canada Post receipt confirming delivery of the refusal decision on August 2, 2016;
- Appellant's appeal letter and written submissions; and
- Development Officer's written submissions, dated August 25, 2016, with a memorandum from Urban Transportation.

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, Pattison Outdoor Advertising*

- [7] The Appellant was represented by legal counsel, Mr. J. Murphy Sr. (“Mr. Murphy”). He was accompanied by Mr. J. Murphy Jr., Mr. J. English, and Ms. E. O’Neill.
- [8] Referring to Tab 1 of the Appellant’s written submissions, a copy of the refused development permit, Mr. Murphy noted that the refusal decision included the following explanatory note: “The Zoning Bylaw establishes the separation distances between Digital signs and Off-premise Signs to prevent the proliferation of such signs.” Mr. Murphy submitted that proliferation is not the only factor to consider when determining whether to vary separation distances, and that the Development Officer has failed to consider these other factors. In effect, the Development Officer’s reason for refusal amounts to an argument that the bylaw regulation attempts to cure some evil, and therefore, the regulation cannot be varied. This approach to determining whether a variance should be granted is incorrect.
- [9] In support, he referred to *Newcastle Centre GP Ltd v Edmonton (City)*, 2014 ABCA 295 [Newcastle], at paras 6-7 (Tab 2 of Appellant’s Written Submissions), wherein the Court held that it was an error for the Board to have concluded that the bylaw creates a presumption of harm to the public, and that it cannot intervene unless that presumption is rebutted by the applicant. The Appellant submitted that based on *Newcastle*, the starting point is the presumption that the development will not have a material undue impact and will not hurt the amenities of the neighbourhood. The onus then falls on the Development Authority to demonstrate otherwise.
- [10] Mr. Murphy referred to Section 910.11(4)(h) of the *Edmonton Zoning Bylaw*, which states that “Signs shall comply with the regulations found in Schedule 59F.” He noted that Schedule 59F is a relatively robust Sign schedule, compared to other Sign schedules such as Schedule 59A, which is more restrictive. This distinction should be taken into consideration. He also noted that the entire Use class, Freestanding Signs, has been eliminated from new downtown zonings. Taken together, the Appellant submitted that City Council’s intent must have been to encourage the transition from older paper billboards to Digital Signs.
- [11] The Appellant also noted that with the exception of the separation distance requirement, the subject development meets all development criteria for Freestanding Off-premises Signs under Section 59F.3(2). As such, there would appear to be no reason to deny the requested variance.

- [12] Referring to a Google Earth image (Tab 6 of Appellant's Written Submissions) showing the separation distance for the two Signs which are within 171.35 metres of each other, Mr. Murphy pointed out the various visual barriers between these two Signs, including the 4.5 Storey Dorchester Building on the corner of 109 Street and 104 Avenue. The subject Sign is designed to attract southbound traffic on 109 Street, though it may also attract westbound traffic on 104 Avenue. By contrast, the other Sign is designed to attract northbound traffic on 109 Street. The impact, therefore, of the separation distance deficiency is non-existent, not only due to the 4.5 Storey building, but also because only the face of one Sign will be visible when travelling in any one direction. In support, the Appellant referred to a series of pictures from Tab 7 of the Appellant's written submissions.
- [13] Upon questioning by the Board, the Appellant clarified that the other Sign located within 171.35 metres is a one-sided Digital Sign also owned by Pattison. Its Sign face attracts eastbound traffic only. By contrast, the subject Sign faces north/northeast, and is intended to attract southbound traffic, though westbound traffic may be able to view the Sign at an angle. People inside the Dorchester Building, which is an office building, would also be able to view this Sign.
- [14] When questioned about the Sign Area of the subject development, Mr. Murphy pointed out that at 27 square metres, the subject Sign is much smaller than the maximum allowable Sign Area of 40 square metres (which would still fall under the separation distance criteria of 200 metres). The Appellant had considered that a larger Sign would be offensive to the intersection, and not to scale for the shopping centre Site on which it is located.
- [15] Mr. Murphy also clarified that the Appellant had no concerns with respect to the Development Officer's recommended conditions as set out in his written submissions, and confirmed that no trees would be removed from the Site, as the Appellant is obligated to comply with the existing landscaping plan.

ii) Position of the Development Authority

- [16] The Development Authority was represented by Mr. S. Ahuja.
- [17] Mr. Ahuja submitted Exhibit "A", a document entitled "The *Newcastle* Decision and Digital Off-premises Signs", which set out the Development Authority's position with respect to the interpretation and application of the *Newcastle* decision in relation to Digital Off-premises Signs.
- [18] In his view, the deficiency of 30 metres in the separation distance impacts upon the proliferation of Signs in the area, and he must consider the overall context when reviewing Sign applications. In this case, he had asked the Applicant whether the subject Sign could be moved further onto the property so as to minimize the separation distance

deficiency, but the Applicant declined. It was Mr. Ahuja's position that the Site itself presented no hardship.

- [19] Mr. Ahuja also noted that the subject Sign is not completely blocked off by the Dorchester Building, since the Sign faces northeast and faces partially toward the intersection.
- [20] When questioned by the Board about separation distance requirements under Section 59F.3(6)(e), Mr. Ahuja explained that when drafting the bylaw provisions, it is not possible to assign a specific separation distance for every slight increment in Sign Area, and a range had to be used instead.
- [21] He was not aware of any neighbours in opposition to the development.

iii) Rebuttal of the Appellant

- [22] Mr. Murphy agreed with the City's position as set out in Exhibit "A", namely, that even where an Appellant satisfies the Board that they have met the test established under Section 687(3)(d) of the *Municipal Government Act*, that there is no requirement for the Board to grant a relaxation or variance to the *Edmonton Zoning Bylaw*. Notwithstanding his agreement with the City's position, he questioned on what basis a variance would be refused for a development that meets the test under Section 687(3)(d)?
- [23] In this case, where the regulations establish a broad range of 20 square metres to 40 square metres Sign area, and only one separation distance is assigned to that range, the Board must look at whether the circumstances justify segmenting off a part of the separation distance requirement.
- [24] The Appellant also emphasized that the test established under Section 687(3)(d) does not distinguish between a "big" variance versus a "small" variance – in all instances, the test remains the same for the Board.

Decision

- [25] The appeal is ALLOWED, and the decision of the Development Authority is REVOKED. The development is GRANTED, subject to the following CONDITIONS:
- 1) This Freestanding Minor Digital Off-premises Sign permit is approved for a period of up to five years.
 - 2) The proposed Freestanding Minor Digital Off-premises Sign shall comply with the approved plans as submitted.

3) Minor Digital Off-premises Signs shall use automatic light level controls to adjust light levels at night, under cloudy and other darkened conditions to reduce light pollution, in accordance with the following:

a) Ambient light monitors shall automatically adjust the brightness level of the Copy Area based on ambient light conditions. Brightness levels shall not exceed 0.3 footcandles above ambient light conditions when measured from the Sign face at its maximum brightness, between sunset and sunrise, at those times determined by the Sunrise / Sunset calculator from the National Research Council of Canada; (Reference Section 59.2(5)(a))

b) Brightness level of the Sign shall not exceed 400 nits when measured from the sign face at its maximum brightness, between sunset and sunrise, at those times determined by the Sunrise/Sunset calculator from the national research Council of Canada (Reference Section 59.2(5)(b))

4) The proposed freestanding Digital On-Premises Sign shall comply with the following conditions in consultation with the Transportation Planning, in accordance to Section 59.2(11):

a) That, should at any time, Transportation Planning and Engineering determine that the sign face contributes to safety concerns, the owner/applicant must immediately address the safety concerns identified by removing the sign, de-energizing the sign, changing the message conveyed on the sign, and or address the concern in another manner acceptable to Transportation Planning and Engineering.

b) That the owner/applicant must provide a written statement of the actions taken to mitigate concerns identified by Transportation Planning and Engineering within 30 days of the notification of the safety concern. Failure to provide corrective action will result in the requirement to immediately remove or de-energize the sign.

c) The proposed sign shall be constructed entirely within private property. No portion of the sign shall encroach over/into road right-of-way.

ADVISEMENT:

1) Should the Applicant wish to display video or any form of moving images on the sign, a new Development Application for a major digital sign will be required. At that time, Transportation Services will require a safety review of the sign prior to responding to the application.

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

[26] In granting the development, the following variance to the *Edmonton Zoning Bylaw* is allowed:

- 1) The 200 metre separation distance requirement under Section 59F.3(6)(e) for a Minor Digital On-premises Off-premises Sign with a Sign Area between 20 square metres and 40 square metres is relaxed to permit a deficiency of 30 metres, equivalent to a minimum separation distance of 170 metres.

Reasons for Decision

[27] The subject development is a Freestanding Minor Digital On-premises Off-premises Sign, a Discretionary Use within the UW Urban Warehouse Zone, which is commercial in nature. In determining whether to allow the required variances and grant the development, this Board must reach the conclusion that the development is reasonably compatible with the surrounding uses.

The Board's Test Under Section 687(3)(d) of the *Municipal Government Act*

[28] Section 687(3)(d)(i) establishes the Board's test when determining whether to grant a variance:

687(3) In determining an appeal, the subdivision and development appeal board

...

(d) 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 if, in its opinion,

(i) 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,

- [29] In regards to the Board's test under Section 687(3)(d), the Board was presented with the City's interpretation of the recent Alberta Court of Appeal *Newcastle* decision, and its applicability to Digital Off-premises Signs ("Exhibit 'A'"). While the Board agreed with the substance of the City's interpretation with respect to *Newcastle*, the Board noted that Exhibit "A" appeared to suggest that the Board has been applying *Newcastle* in such a way that all variances must be granted if the test under Section 687(3)(d) has been satisfied.
- [30] This Board emphasizes that such has not been the practice of this Board, and that even where a proposed development meets the test under Section 687(3)(d), the Board may still turn its mind to other factors when determining whether to grant or deny a variance.

Impact of the Subject Development

- [31] The subject Sign is located in an industrial zone, surrounded by commercial properties. There are no neighbouring residential uses that would be impacted by the subject Sign at this location on 10304 – 109 Street NW. The Board further notes that the Sign area is smaller than the maximum 40 square metres allowable for a separation distance of 200 metres. The Board accepts that the smaller Sign area results in less impact at this location, and that the subject Digital Sign is compatible with surrounding commercial uses.
- [32] The Board also accepts that the Appellant must still adhere to the approved landscaping plans for this Site, notwithstanding this development. Ensuring compliance with the landscaping plan is important to maintain the aesthetics of the overall Site.

Sign Orientation

- [33] With respect to the other Sign located further east, the Board has found that it is virtually impossible to see both signs, given the structures that are in between.
- [34] The Board finds that the proposed Sign is oriented mainly to attract southbound traffic on 109 Street, although it also attracts westbound traffic on 104 Avenue to a lesser degree. The other Sign located within 200 metres of the subject Sign is located further east, and is oriented to attract eastbound traffic on 104 Avenue. Based on the submissions of the Appellant and the photographic evidence presented, the Board accepts that it is not possible to view both Sign faces concurrently, given the structures that exist between both Signs.

Lack of Opposition

- [35] Finally, the Board notes that the City of Edmonton Urban Transportation Department did not object to the proposed development, nor did any neighbouring property owners provide submissions or appeared in opposition to the development.
- [36] For the above reasons, it is the opinion of the Board that the proposed development will not unduly interfere with the amenities of the neighbourhood, nor materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land. The subject development therefore meets the test established under Section 687(3)(d) of the *Municipal Government Act*, and the appeal is allowed.

Mr. V. Laberge, Presiding Officer
Subdivision and Development Appeal Board

Board members in attendance:

Mr. B. Gibson, Ms. G. Harris, Ms. S. LaPerle, Mr. A. Nagy

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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Date: September 15, 2016
Project Number: 221457423-001
File Number: SDAB-D-16-207

Notice of Decision

- [1] On August 31, 2016, the Subdivision and Development Appeal Board heard an appeal that was filed on August 3, 2016. The appeal concerned the decision of the Development Authority, issued on July 19, 2016, to approve the following development:

Install a Freestanding Off-premises Sign (6.1 m x 3 m - facing West)

- [2] The subject property is on Plan 6228HW Blk 4 Lot 8, located at 9617 - 63 Avenue NW and Plan 6228HW Blk 4 Lot 7, located at 9617 - 63 Avenue NW, within the IM Medium Industrial Zone.
- [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 attachments, proposed plans, and the approved Development Permit;
 - Correspondence related to the Appellant's request for postponement;
 - Appellant's appeal forms and photographs; and
 - Development Officer's written submissions, dated August 12, 2016.

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. No opposition was noted.
- [5] The Presiding Officer noted that the Board's administrative office had been notified that the Appellant had requested a postponement as he was waiting to receive materials requested from the City via a request filed under Alberta's *Freedom of Information and Protection of Privacy Act*. The Appellant clarified that he was in receipt of those materials and was prepared to proceed with the hearing. No objections were noted from the other parties in attendance.

- [6] The Presiding Officer outlined how the hearing would be conducted, including the order of appearance of parties, and no opposition was noted.
- [7] The appeal was filed on time, in accordance with Section 686 of the *Municipal Government Act*, RSA 2000, c M-26.

Summary of Hearing

i) Position of the Appellant, Akhurst Machinery Ltd.

- [8] The Appellant was represented by Mr. N. Rollins.
- [9] Mr. Rollins explained that he opposes the subject Sign because it will cause a distraction, hinder the view into his property's showroom, and will negatively impact property values. Upon questioning by the Board, he clarified that the showroom does attract drop-in customers, as it is located on 63 Avenue, a major thoroughfare. It was his view that the Sign will impact the number of drop-in customers.
- [10] He also expressed concerns about sunshading, as the subject Sign will be 16 feet high, resulting in a shadow along the entire corner of his building. The sunshading could potentially block light into the showroom, and may affect lighting within the showroom itself.
- [11] Referring to pictures he had submitted, he noted that there are numerous Signs already existing along the street, and the subject development will have a negative impact upon the overall streetscape. One of these photographs appeared to have a hand-drawn overlay of the proposed Sign superimposed over the Appellant's building, and upon questioning, Mr. Rollins clarified that he was the one who drew the overlay of the proposed Sign. It was his belief that the overlay was an accurate reflection of where the Sign would be located, based on bylaw regulations requiring that the Sign be setback approximately 3 metres or 10 feet from the side street.
- [12] Mr. Rollins also expressed concerns about safety, as the Sign is located near a busy intersection that has a history of accidents. In support, he submitted Exhibit "A", collision statistics for 2013 to 2015 inclusive, obtained from the City of Edmonton through his FOIP request. It was his view that the proposed Sign will result in more collisions.
- [13] Upon questioning by the Board, he clarified that his property and the two lots to the west of his property are part of a strip mall, set off from the boulevard along 63 Avenue.
- [14] The Board noted that in the Respondent's written submissions, there was mention of a previously existing paper billboard. The Appellant stated that he has been operating out of that location for 40 years, and he was not aware of any existing Sign during that entire time.

ii) Position of the Development Officer, Mr. S. Ahuja

- [15] Mr. Ahuja clarified that the subject development is a Discretionary Use because it is less than the required 100 metre separation distance from a Residential Zone. The subject Sign is 41.58 metres from a Residential Zone as provided by the Development Officer.
- [16] Upon questioning by the Board with respect to the accuracy of the hand drawn overlay of the subject Sign in the Appellant's submissions, Mr. Ahuja clarified that his review was based on the property survey submitted as part of the Appellant's application. He confirmed that based on the property survey, the Sign does appear to be setback three metres from the road.
- [17] He also explained that it could be possible for the setback to be increased and the Sign moved further south. However, he did not consider this option as almost half the Sign is already situated halfway across the side of the building. He acknowledged that the subject Sign does cover a portion of the Appellant's building, but he also considered other mitigating factors, such as the number of existing Freestanding Off-premises Signs along 63 Avenue.
- [18] He was not aware of any additional aesthetic treatments to the rear of the Sign, and explained that the rear would consist of structural and electronic elements.
- [19] Mr. Ahuja was not aware of any opposition to the development, other than that of the Appellant.

iii) Position of the Respondent, Pattison Outdoor Advertising

- [20] The Respondent was represented by Mr. J. Murphy, Jr.
- [21] Mr. Murphy also clarified that there was an error in his written documents, which had indicated that there had been a pre-existing Sign on the Site. He explained that he had confused the subject development with a different Sign application.
- [22] Mr. Murphy submitted that the Appellant does not have an entitlement to walk-in traffic or to vehicular traffic along 63 Avenue. Further, no person is entitled or has the right to a view or access to light. In support, he referenced Section 69(3) of the *Law of Property Act*, RSA 2000, c L-7, which provides as follows:

Improvements made on wrong land through error

69(1) When a person at any time has made lasting improvements on land under the belief that the land was the person's own, the person or the person's assigns

(a) are entitled to a lien on the land to the extent of the amount by which the value of the land is enhanced by the improvements, or

(b) are entitled to or may be required to retain the land if the Court is of the opinion or requires that this should be done having regard to what is just under all circumstances of the case.

(2) The person entitled or required to retain the land shall pay any compensation that the Court may direct.

(3) No right to the access and use of light or any other easement, right in gross or profit a prendre shall be acquired by a person by prescription, and no such right is deemed to have ever been so acquired.

[23] In his view, the Appellant's main concerns revolve around the view into his showroom, and the impact upon his business. It was the Respondent's position that the subject Sign does not interfere with, nor does it encroach upon, the Appellant's property.

[24] The proposed development is for a static billboard, and is not for a Digital Sign. It is oriented 90 degrees perpendicular to the road, and is not angled toward residential properties. Mr. Murphy explained that although this orientation may negatively impact sightlines toward the Sign, it is the Respondent's preference to not advertise into people's windows. In his view, the subject Sign is characteristic of the IM Medium Industrial Zone.

[25] With respect to the Board's prior questioning about moving the subject Sign further south onto the Site, he explained that the Sign cannot be relocated in this manner, due to the placement of the Sign's transformer.

Decision

[26] The appeal is DENIED, and the decision of the Development Authority is CONFIRMED. The development is GRANTED, subject to the CONDITIONS as set out in the Development Officer's decision.

[27] In granting the development the following variances to the *Edmonton Zoning Bylaw* are allowed:

- 1) The 100 metre separation distance requirement under Section 59F.3(6)(e) for a Minor Digital On-premises Off-premises Sign with a Sign Area less 20 square metres is relaxed to permit a deficiency of 4 metres, equivalent to a minimum separation distance 96 metres.

Reasons for Decision

[28] Under Section 420.2(15), Freestanding Off-premises Signs not within 100 metres of a Residential Zone is a Permitted Use in the IM Medium Industrial Zone. However, given

that the subject Development is less than 100 metres from a Residential Zone (it is 41.58 metres south of the nearest residential property, or deficient by 58.42 metres), the subject Sign becomes a Discretionary Use in the IM Medium Industrial Zone, pursuant to Section 420.3(10).

- [29] No submissions were made by the parties with respect to whether the 100 metres separation distance criteria under Section 420.3(10) may be characterized as a development regulation which the Board may vary, or whether it is attached to the listed Use which the Board does not have the authority to vary. As no submissions were made, the Board makes no finding in this regard, but had it determined that the separation distance criteria is a development regulation, the Board would have granted the variance of 58.42 metres.
- [30] The Sign Area of the subject development is approximately 18.3 square metres. Pursuant to Section 59G.2(5)(d), the Sign must be at least 100 metres from other Off-premises Signs. The subject Sign is approximately 96 metres west of another Off-premises Sign, and a variance is therefore required.
- [31] When determining whether to grant a variance to a development regulation, the Board must be satisfied that the development meets the test established under Section 687(3)(d) of the *Municipal Government Act*. This provision provides, in part:
- 687(3) In determining an appeal, the subdivision and development appeal board
- ...
- (d) 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 if, in its opinion,
- (i) 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,
- [32] When analyzing the distance between the Sign and the residential neighbourhood, the Board notes that the subject development is a static billboard Sign, oriented perpendicular to 63 Avenue, and across from the residential neighbourhood to the north of 63 Avenue. Based on the parties' submissions and written materials, the Board is satisfied that the Sign does not face onto residential properties. The Board also notes that there are service roads on both the north and south sides of 63 Avenue, which would help to mitigate the impact of the Sign upon the residential properties located north of the Sign on 63 Avenue.
- [33] The Appellant contended that the subject Sign will result in sun-shadowing upon the Appellant's property. However, no formal sun-shadow study was submitted, nor was

there any further information provided to the Board in support of the Appellant's position. As such, the Board is not convinced that any shadowing caused by the Respondent's Sign will be to such an extent as to materially interfere or affect the Appellant's use and enjoyment of his property.

- [34] The Board was also in receipt of traffic collision statistics for the intersection at 63 Avenue and 96 Street, spanning a period of three years from 2013 to 2015. This information was provided in support of the Appellant's position that the subject Sign will result in an increase to traffic collisions. While the Board accepts that there is a history of vehicular accidents at this intersection, the statistics by themselves do not prove that the addition of a Sign at this intersection will result in more collisions. The Board further notes that the City of Edmonton Urban Transportation Department was not opposed to this development. As such, the Board is not convinced that the subject Sign gives rise to traffic safety concerns which would warrant a refusal of the development.
- [35] Finally, with respect to the required 100 metre separation distance from other Off-premises Signs pursuant to Section 59G.2(5)(d), the subject development is deficient by 3.77 metres. No submissions were made by the parties with respect to how this deficiency of 3.77 metres would result in undue interference with the amenities of the neighbourhood, or material interference with neighbouring parcels of land. The Board also notes that there were no letters of opposition to this Sign, nor did anyone appear to oppose the development. Given that the subject Sign is located in an industrial zone, in a neighbourhood with existing Signs, the Board is satisfied that the Sign is compatible with surrounding Uses, and that granting a variance of 3.77 metres to Section 59G.2(5)(d) will have a minimal impact upon surrounding properties.
- [36] For the above reasons, it is the opinion of the Board that the proposed development will not unduly interfere with the amenities of the neighbourhood, nor materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land. The subject development therefore meets the test established under Section 687(3)(d) of the *Municipal Government Act*, and the appeal is denied. The development is granted.

Mr. V. Laberge, Presiding Officer
Subdivision and Development Appeal Board

Board members in attendance: Mr. B. Gibson, Ms. G. Harris, Ms. S. LaPerle, Mr. A. Nagy

Important Information for the Applicant/Appellant

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 - 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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Date: September 15, 2016
Project Number: 118027037-025
File Number: SDAB-D-16-208

Notice of Decision

- [1] On August 31, 2016, the Subdivision and Development Appeal Board heard an appeal that was filed on August 9, 2016. The appeal concerned the decision of the Development Authority, issued on July 28, 2016, to approve the following development:

Construct a 125 Dwelling Apartment House building (Signature 3).

- [2] The subject property is on Condo Common Area (Plan 1520328), located at 5151C - Windermere Boulevard SW, within the RA9 High Rise Apartment Zone. The Ambleside Neighbourhood Structure Plan and Windermere Area Structure Plan 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:

- Copies of the Development Permit application with attachments, proposed plans, Traffic Impact Study, Crime Prevention Through Environmental Design (“CPTED”) Assessment, and the approved Development Permit;
- Copy of the Board’s previous decision for file number SDAB-D-13-217;
- Appellant No. 1’s photographs, and written submissions;
- Appellant No. 2’s written submissions;
- Development Officer’s written submissions, dated August 18, 2016;
- Correspondence from Waste Management, Transportation Planning, and Fire Rescue Services;
- Correspondence regarding the revised Landscape Plan and Wind Impact Statement; and
- Two online responses and two emails in opposition to the development; and
- Written submissions from a neighbouring property owner 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 Appellant 1, Mr. R. Mack*

- [7] Mr. Mack was accompanied by Mr. T. Barlott, an affected property owner residing within the 60 metre notification area.
- [8] The Appellant summarized his concerns as set out in his reasons for appeal.

Traffic Impacts

- [9] The Appellant submitted that the subject development will have a negative impact upon traffic in the Ambleside community, particularly Ambleside Drive, a road that abuts the development. Located near Anthony Henday Drive, which experiences traffic in excess of that which was initially anticipated by the City, the subject development will further exacerbate the existing traffic problems. There is also a lack of adequate public transit service, and the subject development will result in more people commuting by private automobiles, further contributing to traffic congestion.
- [10] Mr. Mack also expressed concerns about the Revised Traffic Impact Study, which raised several traffic-related issues that he did not believe the City had addressed. He noted that development in the Ambleside area has reached only 30% of capacity, such that future traffic impacts remain unclear. However, he pointed out that the traffic numbers anticipated for 2014 were already surpassed in 2009. It was his view that although traffic studies were conducted by the City, the information or conclusions from those studies were wrong. The City, therefore, should work with the community to resolve these traffic concerns before approving further developments.
- [11] He also noted that the excessive traffic gives rise to noise disturbances, yet there are no fences or sound barriers to mitigate the noise from Anthony Henday Drive.
- [12] Upon questioning by the Board, Mr. Mack acknowledged that other neighbourhoods in the City also feed traffic onto Anthony Henday Drive.

Street Parking and Non-Compliance with Permit Conditions

- [13] The Appellant reviewed the various problems that neighbouring residents have encountered with Signature Towers One and Two, namely that the developer has not complied with the conditions set out in the 2013 decision of the Subdivision and Development Board. In that decision, the Board made it a condition of the permit approval that the underground parkade must be completed within two years, yet the parkade remains incomplete. Due to the incomplete parkade, residents of Signature Towers One and Two must utilize on-street parking.
- [14] The Appellant also disagreed with correspondence from Sustainable Development, which stated that extensions to development permit conditions may be considered where the developer is cooperative and committed toward completing the development. In Mr. Mack's view, no construction has occurred with respect to the parkade for three years.

Reduced Property Values

- [15] Mr. Barlott referred to a table of property values which compared 2015 municipal tax assessments with 2016 assessments. He noted that property values have declined, and pointed out that Edmonton has the third highest reported apartment vacancy rate in Canada at 4.2%. He submitted that the subject development will further decrease property values and affect the resale price.
- [16] Upon questioning by the Board, the Appellant acknowledged that the downturn in the economy may be a factor in dropping property values, but he also noted that overall city tax assessments have increased, whereas assessments of properties along Ambleside Drive have declined. It was his view that the declining prices are largely due to the subject development.

Required Variance to the Floor Area Ratio

- [17] The Presiding Officer explained that the proposed development does not comply with the land use bylaw in only one respect: it proposes a Floor Area Ratio ("FAR") of 3.1 instead of 3.0, in contravention of Section 230.4(3). As such, the issue before this Board is how the proposed development and the required variance to the FAR criteria gives rise to a material impact upon neighbouring properties.
- [18] In response, the Appellant stated that an increase in the FAR would result in less space for parking, which impacts entry/egress exit to the Site, and raises safety concerns with respect to emergency vehicular access.

Remedy Sought

- [19] Upon questioning by the Board, the Mr. Mack and Mr. Barlott stated that they hoped for several outcomes to this appeal. First, they expressed the wish that the development be

deferred to provide time for the City to give further consideration to the Statutory Plan, parking, and traffic concerns. In particular, they would like additional time to review the Traffic Impact Study.

[20] Second, they stated that they wish to see the development occur without any variances.

[21] Third, they would like to see the Board's 2013 decision enforced, and the completion of the underground parkade.

[22] Upon questioning by the Board, they acknowledged that when they purchased their properties, they were aware that the subject Site was zoned RA9 High Rise Apartment Zone. However, they did not fully comprehend what the zoning could entail. They had spoken with industry professionals, including developers and contractors, who had informed them that a high rise apartment at the subject Site would never occur.

ii) Position of Appellant 2, Infusion Condominium Corporation (the "Corporation")

[23] The Appellant was represented by Ms. T. Spink. She was accompanied by Mr. M. Reilly, a member of the Corporation.

[24] The Corporation represents three buildings consisting of 156 units, located directly west of the subject development, across from Ambleside Drive.

[25] It was the Corporation's view that the development is not suitable to the neighbourhood. In addition to the concerns expressed by Appellant 1, the Corporation expressed concerns about sun-shadowing caused by the subject development, which is a different height than the existing Signature Towers One and Two. Further, the proposed building does not include sufficient reflective surfaces to compensate for the loss of natural light.

[26] Mr. Reilly also described how the subject development has impacted the community. Pedestrians and strollers are unable to access sidewalks due to construction and dump trucks parked on the streets. In his view, a variance should not be granted because the developer has not acted in good faith.

iii) Position of Affected Property Owner, Mr. J. Yang

[27] Mr. Yang echoed the concerns of the Appellants. In addition, he expressed the view that notwithstanding the development being located in the RA9 High Rise Apartment Zone, development regulations must be followed, including the requirement that the FAR shall be 3.0.

iii) Position of the Development Officer, Mr. K. Bacon

- [28] Mr. Bacon was accompanied by Ms. K. Sizer from the City of Edmonton Urban Transportation.
- [29] Mr. Bacon explained that total floor area of the Site is determined relative to the size of the Site. Where the FAR is 3.0, the total floor area is permitted to be three times the size of the Site. In this case, increasing the FAR to 3.1 results in an extra 1184 square metres floor area for the entire Site, inclusive of all three buildings.
- [30] Under Section 230.4(3), the Development Officer may vary the FAR if three criteria are met: first, the development has larger individual unit floor plates; second, additional indoor Amenity Areas and facilities are provided; and three, density provisions are met. Mr. Bacon stated that that the subject development meets all three criteria.
- [31] With respect to the unit floor plate, Mr. Bacon provided comparables from other RA9 Sites similar to this suburban style development. The subject development has unit floor plates averaging 1030 square feet. The comparables provided averaged 740 square feet and 910 square feet.
- [32] With respect to indoor Amenity Areas and facilities, Mr. Bacon explained that the subject development is required to provide 7.5 square metres of Amenity Space. The developer has provided more than what is required through patio space and extra indoor building amenities.
- [33] With respect to density requirements, Mr. Bacon explained that the subject Site could accommodate up to 405 Dwellings. Instead, the development proposes 364 Dwellings for the entire Site.
- [34] When reviewing the development application, Mr. Bacon considered whether the variance to the FAR would result in variances to other regulations (such as parking space requirements). No other variances were needed, which was one factor he considered. He also recognized that a high rise development located on a larger Site could result in a larger impact upon neighbouring properties. As such, he considered other factors such as Height, massing, and visual impact. In addition to the applicable Statutory Plan, these factors provide an additional layer for review when assessing Discretionary Use applications.
- [35] Upon questioning by the Board, Mr. Bacon explained that were it not for the Apartment Housing being located on a Site larger than 1.0 hectares, the proposed development would be a Permitted Use in the RA9 Zone. He acknowledged that listing Apartment Housing over 1.0 hectares as a Discretionary Use allows the Development Officer to review the application to ensure the Site is not overbuilt.

- [36] Mr. Bacon also stated that although no formal community consultation process was required, he was aware of the community's concerns regarding traffic. In cooperation with Urban Transportation, he did meet with neighbourhood residents.
- [37] Upon questioning by the Board with respect to the Revised Traffic Impact Assessment, Ms. Sizer explained that it is normal for any traffic study to make projections into the future. She noted that the Anthony Henday Drive is a provincial roadway, and ongoing studies are being conducted.
- v) *Position of the Respondent, New Studio Architecture*
- [38] The Respondent was represented by Mr. T. Dixon. He was accompanied by Mr. R. Lam of Westrich Pacific.
- [39] Mr. Lam explained that the parkade construction delay was due to changes in the original proposal. Initially, the subject development was intended to be 60 metres tall; however, this was revised to 53 metres, which would require a different variance. The developer also engaged in community consultation, which resulted in a revised development for a 45 metre tall building for 125 units. The Traffic Impact Assessment also took longer than expected.
- [40] He reaffirmed the developer's commitment to completing the development, and stated that Signature Tower Three is financially secured for completion. The developer has been prepared to start construction for months, but has been awaiting approval of the development permit.
- [41] Mr. Dixon stated that the Signature Towers development has been a five year process, and that this third tower will be the final building, allowing the project to finally be completed.
- [42] In his view, the subject development is consistent with the Ambleside Neighbourhood Structure Plan. He emphasized that the building will not require additional infrastructure, roads, or utilities.
- [43] In his view, increasing the FAR would allow for greater on-site Amenity Space so that residents can enjoy their homes more, without requiring that they go off-site for the same amenities.
- [44] Upon questioning by the Board, the Respondent stated that with the reduction of the building height to 45 metres, the sun-shadowing impact will be minimized. The Respondent noted that sun-shadow studies had been previously conducted, but the studies will need to be updated for the revised building height. From the previous studies, it would appear that the majority of sun-shadowing will be cast upon the commercial

buildings located to the north of the property. In the Respondent's view, adding reflective materials will not address the sun-shadow concerns expressed by Appellant 2.

vi) Rebuttal of Appellant 1, Mr. R. Mack

[45] The Appellant reiterated concerns about construction delays, the developer's non-compliance with the conditions of the Board's 2013 decision, and the clarification needed with respect to the Revised Traffic Impact Assessment study.

[46] Appellant 2 declined to provide rebuttal.

Decision

[47] The appeal is DENIED and the decision of the Development Authority CONFIRMED. The development is GRANTED as approved by the Development Authority, subject to the conditions as set out in the Development Officer's decision.

[48] In granting the development, the following variance to the Edmonton Zoning Bylaw is allowed:

- 1) Section 230.4(3) is relaxed to permit a Floor Area Ratio of 3.1 instead of 3.0.

Reasons for Decision

[49] The proposed development is Discretionary Use in the RA9 High Rise Apartment Zone because it is located on a Site larger than 1.0 hectares, pursuant to Section 230.3(1).

[50] The Board accepts the Development Officer's submission that the reason for this otherwise Permitted Use in an RA9 zone to be reviewed as a Discretionary Use is that the property is located on a Site over 1.0 hectare. The Discretionary Use provides an additional lens for review, through which the Development Officer can ensure that the Site is not overbuilt for instance.

[51] The development requires one variance to the Floor Area Ratio ("FAR"). Section 230.4(3) provides as follows:

The maximum Floor Area Ratio shall be 3.0, except that the Development Officer may use his variance power to increase this maximum for developments with larger individual unit floor plates and additional indoor Amenity Areas and facilities, and which comply with the density provisions of this Section. Any application for a development proposed to exceed 3.0 F.A.R. shall be a Class B Development.

- [52] The development proposes a FAR of 3.1, and therefore, a variance of 0.1 to the FAR is required.
- [53] When considering whether to exercise his discretion to allow this variance and grant this variance, the Development Officer considered various factors and statistical data to justify his decision:
- a) An additional 0.1 FAR equates to 1184 square metres across the entire Site, inclusive of the three buildings.
 - b) He was satisfied that the unit floor plates were larger than average. Compared to comparable high rise buildings located in other RA9 Zones, averaging 740 square feet and 910 square feet per unit floor, the proposed development averages 1030 square feet.
 - c) He was satisfied that the development provides for more indoor Amenity Space than what is required.
 - d) With respect to density, the Development Officer indicated that the maximum number of Dwellings permitted for the entire Site is 405 Dwellings, whereas the actual proposed is for 364 Dwellings for the entire Site.
- [54] The Board accepts the Development Officer's analysis of the subject Site with respect to the FAR criteria. In addition, the Board finds that the subject development complies with every applicable regulation for Apartment Housing in the RA9 Zone, save for the FAR regulation.
- [55] When determining whether to grant a variance to a development regulation, the Board must be satisfied that the development meets the test established under Section 687(3)(d) of the *Municipal Government Act*. This provision provides, in part:
- 687(3) In determining an appeal, the subdivision and development appeal board
- ...
- (d) 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 if, in its opinion,
 - (i) 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,
- [56] The Board heard submissions to the effect that the subject development will unduly interfere with the amenities of the neighbourhood due to its impact upon existing traffic and on-street parking concerns. However, the Board was provided with a Revised Traffic

Impact Assessment, which the Urban Transportation Department has reviewed. The Board accepts that the results of the study have been accepted by the City's Urban Transportation department and that they have no opposition to this development.

- [57] With respect to concerns about on-street parking, the Board first notes that the subject development meets all off-street parking criteria under the *Edmonton Zoning Bylaw*. Second, once built out, the Site will in fact have more parking spaces than what is required under the parking regulations of the *Edmonton Zoning Bylaw*.
- [58] The Board is not unsympathetic to the concerns expressed by neighbouring property owners with respect to existing traffic congestion, on-street parking, construction debris, and non-compliance with previous Board decisions. However, illegal on-street parking, enforcement of Board decisions, and unsightly construction debris fall within the purview of bylaw enforcement. With respect to traffic congestion in the neighbourhood as well as on major thoroughfares such as the Anthony Henday Drive, the Board has no jurisdiction or authority to resolve these issues. Decisions related to municipal or provincial infrastructure fall within the purview of City Council or the provincial legislature.
- [59] In addition, in determining whether the subject development is compatible with the surrounding community, the Board turned its mind to Section 687(3)(a.1), which states that "In determining an appeal, the subdivision and development appeal board... must comply with the land use policies and statutory plans and, subject to clause (d), the land use bylaw in effect". The applicable statutory plan is the Ambleside Neighbourhood Structure Plan ("Ambleside NSP"). It is clear that Council's intent with respect to the Ambleside NSP was that the subject Site be zoned RA9. The plans for the subject Site, as it exists today, continue to be for an RA9 Zone. The zoning has not changed since the conception of the Ambleside NSP.
- [60] The Board has reviewed the Ambleside NSP, which promotes pedestrian-friendly routes and walkability throughout the neighbourhood. The Board finds that the entire Site has direct access to the commercial complex located to the north. While Ambleside's public transit system has not been fully built out, the Ambleside Neighbourhood Structure Plan does contemplate that once the system is complete, there will be sufficient service to provide for the transit needs to this Site and the Ambleside community as a whole. The Board further notes that according to the maps provided in the Ambleside NSP, the subject property is within walkable distance to the future Transit Centre/Park and Ride. The Board therefore finds that once complete, the subject development will be compatible with the surrounding Uses as well as the development goals of the Statutory Plan.
- [61] The Board was presented with an analysis of property assessment differences between 2015 and 2016. The Board has determined this to be an internal review and not done by an outside expert or arms-length assessor. The Board also had concerns that other market conditions or locational criteria were not considered when trying to purport that the sole reasons for these changes in assessed value were entirely an outcome of this

development. It is also important to note that this analysis was done prior to the existence of this proposed third building on this development site.

- [62] The Board notes that a sun shadow study has been received and accepted by the Development Officer as part of their review of this application. There was nothing presented to the Board that by granting the variance to FAR it would have any material effect on the neighbourhood.
- [63] For the above reasons, it is the opinion of the Board that the proposed development will not unduly interfere with the amenities of the neighbourhood, nor materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land. The subject development therefore meets the test established under Section 687(3)(d) of the *Municipal Government Act*, and the appeal is denied. The development is granted.

Mr. V. Laberge, Presiding Officer
Subdivision and Development Appeal Board

Board members in attendance:

Mr. B. Gibson, Ms. G. Harris, Ms. S. LaPerle, Mr. A. Nagy

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.