



**EDMONTON
TRIBUNALS**

*Subdivision &
Development
Appeal Board*

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Date: August 11, 2017
Project Number: 138791921-001
File Number: SDAB-D-17-135

Notice of Decision

[1] On July 27, 2017, the Subdivision and Development Appeal Board heard an appeal that was filed on **June 29, 2017**. The appeal concerned a Stop Order (the “Stop Order”) issued by the Development Authority issued on June 20, 2017, to:

Cease the General Industrial Use (Truck Yard) including all components of the business and remove all related materials by July 20, 2017.

[2] The subject property is on Plan 7722309 Lot 1, located at 18011 - 34 Street NW, within the (AG) Agricultural Zone. The Edmonton Energy and Technology Park Area Structure Plan applies to the subject property.

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

- A copy of an Alberta Court of Appeal decision: (*Edmonton (City) v Edmonton (Subdivision and Development Appeal Board)*, 2017, ABCA 140 (“ABCA 140”);
- A copy of the Edmonton Energy and Technology Park Area Structure Plan (the “ASP”);
- A copy of the Stop Order issued by the Development Authority;
- The Development Officer’s written submission; and
- The Appellant’s written submissions with supporting maps and photographs.

[4] The following exhibit was presented during the hearing and forms part of the record:

- Exhibit A – A revised PowerPoint presentation from the Development Authority

Preliminary Matters

- [5] At the outset of the appeal hearing, the Presiding Officer confirmed with the parties in attendance that there was no opposition to the composition of the panel.
- [6] The Presiding Officer outlined how the hearing would be conducted, including the order of appearance of parties, and no opposition was noted.
- [7] The appeal was filed on time, in accordance with section 686 of the *Municipal Government Act*, RSA 2000, c M-26.

Summary of Hearing*i) Position of the Appellant, Mr. K. Grewal, represented by Mr. V. Bhardwaj*

- [8] The Appellants currently use the subject Site in conjunction with a business. The business' trucks are parked at the Site overnight. Drivers park their personal vehicles at the Site during the day and drive the trucks out early in the morning, returning at the end of the work day. The trucks are always empty when they travel to and from the Site and weigh significantly less than vehicles used by surrounding property owners such as grain trucks and other farm machinery.
- [9] The current Use of the Site conforms to the intent of future zoning under the ASP. The ASP classifies their parcel of land as a "Logistics" precinct which references Trucking Yards. In their opinion, they should be allowed to continue the current use as it conforms to future Logistics zoning. Surrounding properties have already been developed in accordance with the ASP. The Appellant's intent is to rezone the subject Site as provided for under the ASP but have found this process difficult.
- [10] The Appellants applied for a Major Home Based Business Development Permit for the Site. The Permit was refused by the Development Authority. The Appellant's appealed to the Subdivision and Development Appeal Board. The Board allowed their appeal. The Board's decision was overturned by the Court of Appeal in May 2017, and the Development Authority's refusal was reinstated.
- [11] The Appellants subsequently applied for a permit as a Minor Impact Utility Service, which is a Discretionary Use in the (AG) Agricultural Zone.
- [12] The Appellants referred to the definition of Minor Impact Utility Services and feel that their current use meets the definition. They operate a private company but the majority of the company's work is for the City of Edmonton. The City hires their trucks to haul gravel, soil, snow, and salt for the construction of municipal utilities and the building and maintenance of municipal infrastructure and roads. They have been providing this service for many years.

- [13] They are expecting a decision on the Minor Impact Utility Service application in approximately two weeks but have received no indication if it will be approved or refused by the City. The only feedback they are aware of is from Transportation Services that have indicated that the present culvert is undersized and would have to be replaced.
- [14] On June 26, 2017, they received a notice to remove all of the trucks and business components by July 20, 2017. They are requesting that this compliance date of July 20, 2017, be extended by one year while they await the decision regarding the pending development permit decision. If their latest application for a Development Permit is refused, the extension of the compliance date would provide them with time to find appropriately zoned land, to which they could relocate the business operations and equipment. Relocation will be a major effort involving time, financial resources, and a new permit for the new location.
- [15] They confirmed that they are not contesting that the Development Authority was authorized to issue this Stop Order.

ii) *Position of the Development Authority, Mr. M. Doyle*

- [16] Mr. Doyle presented a PowerPoint presentation which was submitted as *Exhibit A*.

Site Context

- [17] The subject Site falls within the ASP, which has not yet been fully implemented. The subject site is still zoned (AG) Agricultural and is located near the southern tip of the ASP boundary. It is an irregularly shaped parcel of land approximately 1.9 hectares in size. The Site fronts onto 34 Street. The intent of the (AG) Agricultural Zone is to conserve agricultural and other rural uses.

Site and Development Compliance History

- [18] A photograph depicting the southern portion of the subject Site was referenced to show that the Site contains a principal dwelling, a white Quonset, the existing shop, and the truck yard.
- [19] The Councillor for the area has received 94 truck and industrial related complaints. There are currently many other Sites in the surrounding area under active investigation.
- [20] A complaint received on May 2, 2013 resulted in an inspection of the Site. A violation notice was issued on May 15, 2013. Enforcement was suspended from May 2013, until early 2015 to allow the owners to consider their options. An application for a Development Permit to operate a Home Based Business was made on September 22, 2015. The Development Officer refused the application, but was reversed by the Subdivision and Development Appeal Board (the "Board"). The Board's approval was appealed and overturned by the Court of Appeal on May 4, 2017. Enforcement of this site

was again suspended between October, 2015 and May, 2017, due to the appeal process. An inspection was conducted on June 9, 2017, and a Stop Order was issued on June 20, 2017.

- [21] Two new Development Permit applications have been submitted, which are currently under review:
- a) To change the use from Rural Farms to Minor Impact Utility Services (applied for on May 17, 2017).
 - b) To operate a Minor Home Based Business - administration office only for a trucking company (applied for on June 19, 2017).

When a Development Permit application has been made for a Permitted Use, there is typically no enforcement action taken, pending the outcome of application. In this case Minor Impact Utility Service is a Discretionary Use; therefore a Stop Order was issued.

- [22] The Appellant has been informed at various stages of the process that Minor Impact Utility Service is not the most appropriate use class, and General Industrial Use would be more suitable for a truck yard.
- [23] Four inspection photographs were referenced from June 19, 2017 to show the trucks and other buildings on the site. The white Quonset was used to service vehicles in the past but the inspection confirmed that this activity is no longer taking place.

Relevant Regulations

- [24] The general purpose of the (AG) Agricultural Zone is to conserve agriculture and rural farms. If a Site is too small for that use, Single Detached Housing would be the next appropriate use.
- [25] The current use of the Site most appropriately falls under General Industrial Use per section 7.5(2) of the *Edmonton Zoning Bylaw*, particularly clause 7.5(2)(d):

The storage or transshipping of materials, goods and equipment.

- [26] The Stop Order before the Board was issued by an Officer appointed to enforce the *Edmonton Zoning Bylaw* in accordance with section 645 of the *Municipal Government Act*. The development has existed for several years without development approval and does not meet the intent of the (AG) Agricultural Zone nor the *Edmonton Zoning Bylaw*.

Following his presentation, Mr. Doyle answered questions from the Board:

- [27] The Development Authority must make its decision based on the zoning and regulations currently in place, not possible future zoning. Mr. Doyle could not recall what the future zoning designation was for the subject parcel of land.

- [28] He is unable to discuss Development Permit applications that are currently under review and does not know when a decision will be issued.
- [29] He does not agree with varying the compliance date of the Stop Order and feels the Appellants have had ample time to find an alternative location to conduct their business or to apply for re-zoning. In his opinion it would only take a few weeks to bring the property into compliance. It is simply a matter of removing the trucks from the site and ceasing the use.
- [30] The complaints that have been received from this area had to do with visual and audible disturbances and the fact that 34 Street is not a truck route. He is only aware of one complaint in May, 2013 regarding the subject property and was unable to confirm if any other complaints were specifically about this property.

iii) Rebuttal of the Appellants

- [31] The Appellants asked the Board to look at a photograph from the Development Authority and explained that the photograph tells the story of their family and their livelihood. If they have to move the trucks it will rip apart the pattern of their life. It may not be economically possible to keep living here if they have to move the trucks elsewhere.
- [32] Removing the trucks does not serve the purpose of saving this area as an Agricultural Zone. A parcel of land must be 40 acres to be considered a rural farm. The subject Site is too small to be operated as a farm.
- [33] The various zones currently specified in the ASP have not been finalized yet. Parcels are currently being developed on an individual basis; the property to the east of them is currently being developed. Once the detailed planning of the area takes place all of the existing parcels will be identified and their business will easily fit in.
- [34] They dispute that their trucking company is creating excess noise. During certain times of the year, farming equipment in the area runs until midnight. Anthony Henday Drive and Manning Drive are designated truck routes in the immediate area and both roadways generate a significant amount of noise.
- [35] Apart from one complaint in 2013 there have never been any other complaints from neighbours regarding the activity of trucks on the land. Prior to their Home Based Business appeal they had canvassed their neighbours and received their support.
- [36] They reiterated that their trucks are always empty when they travel along 34 Street and do not weigh as much as the grain trucks and other farm machines that use this roadway.

- [37] They are actively looking for an alternate location but have not had any success in finding one within their price range. Two parcels they looked at were not large enough for all the trucks and the vehicles would have to be scattered over different parts of the City, which would not be feasible.

Decision

- [38] The appeal is **DENIED** and the decision of the Development Authority is **CONFIRMED**. The Stop Order is **UPHELD** and the compliance date is **VARIED to September 15, 2017**.

Reasons for Decision

- [39] The Board heard evidence that an Officer had authority under the *Municipal Government Act* to issue a Stop Order and that the Development Authority had grounds for issuing the Stop Order because a General Industrial Use was being carried out on the site without a Development Permit.
- [40] The Appellants did not contest either of these assertions, but were merely asking for a one-year stay of the Stop Order to allow them to either obtain a Development Permit that would authorize the Use of the Site as a Minor Impact Utility Service or to find an alternate location to store their trucks.
- [41] The Board heard evidence that the current Use of this site is compatible with the Use of the surrounding properties, and is in fact consistent with the contemplated future zoning of this Site under the ASP. Notwithstanding these considerations, the Board determined there were insufficient planning justifications for a variance to the terms of the Stop Order as requested by the Appellants. An extension of the magnitude requested by the Appellants would improperly authorize the continued Use of this Site, which is neither Permitted nor Discretionary in the (AG) Agricultural Zone, and is being carried out without the required Development Permit.
- [42] The Board heard evidence that complying with the Stop Order would not require significant steps by Appellants beyond driving the trucks to another location and ceasing business activities on the Site.

[43] The Board consequently affirms the Stop Order and varies the compliance date to September 15, 2017. This revised compliance date is intended to provide the Appellants with a reasonable amount of time to comply with the Stop Order.

A handwritten signature in blue ink, appearing to read 'A. Lund', is positioned above the typed name.

Ms. A. Lund, Presiding Officer
Subdivision and Development Appeal Board

Board Members in Attendance:

Mr. V. Laberge; Mr. A. Nagy; Ms. K. Thind; Mr. J. Wall

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.
2. When a decision 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 2nd Floor, Edmonton Tower, 10111 – 104 Avenue NW, Edmonton, AB T5J 0J4.



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Date: August 11, 2017
Project Number: 245184483-001
File Number: SDAB-D-17-137

Notice of Decision

- [1] On July 27, 2017, the Subdivision and Development Appeal Board (the “Board” or “SDAB”) heard an appeal that was filed on **June 29, 2017**. The appeal concerned the decision of the Development Authority, issued on June 22, 2017 to refuse the following development:

Install (1) Freestanding Off-premises Sign.

- [2] The subject property is on Plan 5718AE Blk 27 Lot 26, located at 7026 - 109 Street NW, within the (CB1) Low Intensity Business Zone. The Pedestrian Commercial Shopping Street Overlay (the “Overlay”) and 109 Street Corridor Area Redevelopment Plan (the “ARP”) apply to the subject property.
- [3] The following documents were received prior to the hearing and form part of the record:
- A copy of the ARP;
 - A copy of the Development Permit application with attachments, proposed plans, and the refused Development Permit;
 - The Development Officer’s written submission; and
 - The Appellant’s written submissions followed by an updated document.
- [4] The following exhibit was presented during the hearing and forms part of the record:
- Exhibit A – A photograph submitted by the Development Officer.

Preliminary Matters

- [5] At the outset of the appeal hearing, the Presiding Officer confirmed with the parties in attendance that there was no opposition to the composition of the panel.
- [6] The Presiding Officer outlined how the hearing would be conducted, including the order of appearance of parties, and no opposition was noted.

[7] The appeal was filed on time, in accordance with section 686 of the *Municipal Government Act*, RSA 2000, c M-26.

Summary of Hearing

i) *Position of the Appellant, Mr. J. Murphy, Ogilvie Law*

[8] Mr. Murphy explained that two aspects must be considered:

- a) Whether renewing a permit for a sign that has existed at this location since 1997 would have any negative impact on the use, enjoyment and value of neighbouring lands; and
- b) Whether or not a sign at this location is offensive to or otherwise manages to thwart the goals of the ARP.

[9] The Sign is completely unobjectionable from a practical point of view and when the relevant legislation is considered.

[10] Mr. Murphy referred to the Development Officer's reasons for refusal:

- a) Reason No. 1: The section referred to by the Development Officer (Policy 3.2.3.5 of the ARP) is incorrect and applies to the Mixed Use Commercial District. The correct policy is 3.3.3.6 as the sign is within the Medium-Scale Residential District, a different geographic area in the ARP.
- b) Reason No. 2: The section quoted (Section 59E.2(3)(e) applies to Freestanding On-premises Signs. The sign under appeal is a Freestanding Off-premises Sign; therefore this section does not apply.

[11] The Development Permit for the current sign was issued on August 28, 2012, with no variances and subject to the condition that the permit will expire in 5 years. This 2012 permit application was appealed to the SDAB (by an adjacent restaurant owner) but the SDAB upheld the Development Officer's decision of approval.

[12] His clients subsequently applied to change the sign to a Digital Sign. They received an approved permit on August 15, 2013, and put up the approved Digital Sign. On December 15, 2014, his clients received notice that this approval had been issued in error by the Development Officer and was now cancelled. As a result his clients removed the Digital Sign and replaced it with the current Freestanding Off-Premises Sign as the 2012 permit was still valid.

[13] The purpose of the CB1 Low Intensity Business Zone ("CB1 Zone") is to provide for low intensity commercial, office, and service uses located along arterial roadways that border residential areas. Freestanding Off-premises Signs is as a Discretionary Use in this Zone.

Section 330.4(10) states that signs shall comply with the regulations found in Schedule 59F. However, since this Site is subject to the Overlay, Sign Schedule 59E applies.

- [14] Schedule 59E.2(3)(e) states that Freestanding On-premises signs shall have a 45.0-metre radial separation from the listed signs but Freestanding Off-premises Signs are not included in this list. There is no reciprocal rule for any of the types of signs listed. In summary, this section only relates to Digital Signs. Mr. Murphy referred to a previous SDAB-D-15-003 that confirms that the radial separation requirement only goes one way.
- [15] The proposed sign meets all of the Freestanding Off-premises Sign requirements of Schedule 59E.3(2)
- [16] The proposed sign is located within one of the commercial strips on the 109 Street corridor and is not out of line with the immediate surrounding development. It is located on a service station Site which will most likely be re-developed at some point in the future. There is also commercial development across the street; therefore, the proposed development does not negatively impact the architectural theme of the area.
- [17] Schedule 59E.3(2)(i) is grandfathering language that appears in the *Edmonton Zoning Bylaw* as a result of negotiations that occurred when the new sign regulations were passed. There are no good and sufficient planning reasons in this instance for refusal of the sign.
- [18] Tabs 8 and 9 of the written submission contain photographs taken from different angles to provide context of the surrounding area of the sign. They show the commercial nature, the parking lots abutting the street as well as examples of other commercial signage in the area. The proposed sign is difficult to see and does not make any difference to the neighbourhood. It is only visible to southbound vehicles and is intended to target people commuting home from work, through a commercial area.
- [19] The photograph at Tab 10 shows the view from the front yard of the nearest residential building looking toward the subject Site. The sign is not visible at all from this location because the service station building completely blocks any view of the sign.
- [20] Mr. Murphy referenced the Overlay and the ARP to demonstrate that these plans do not provide any reasons to refuse the sign.
- [21] Section 800 (City-Wide Master Overlay) of the *Edmonton Zoning Bylaw* outlines how to read overlays and section 800.2(2) states the Overlay shall not be used to alter Permitted or Discretionary Uses except in accordance with subsection 800.4. The Overlays address themselves to development control regulations, not the Uses of land.
- [22] Section 819.1 states that the General Purpose of the Pedestrian Commercial Shopping Street Overlay is to maintain the pedestrian-oriented character of commercial areas, comprised of shopping streets in close proximity to residential areas of the City. The subject location is not pedestrian-oriented. While the City may plan that this area become

pedestrian-oriented in the future, there is currently no pedestrian-oriented character to maintain at this location.

- [23] Overlays change regulations and in this instance the regulation that is changed is the maximum permitted Height of a Freestanding Sign which is has been reduced from 8 metres to 6 metres. This is the extent to which this overlay applies to this Site.
- [24] The only issue remaining which could be of any controversy is the impact of the ARP. The subject sign is located in the south end of the plan which is called the Medium-Scale Residential District.
- [25] Policy 3.1.1 outlines the two ways that Streetscape Improvement may occur along 109 Street:
- a) “Incrementally, with private and public realm investments that accompany individual redevelopments, as directed by this plan or the Zoning Bylaw.
 - b) More holistically through a Comprehensive Streetscape Improvement Plan aligned with the Complete Streets Principles”.

Mr. Murphy indicated that as new development occurs, the area will become more pedestrian-oriented and large signs and street facing parking lots will disappear. The “Comprehensive Streetscape Improvement Plan” is a document that does not yet exist but will address the entire length of 109 Street from 60 Avenue to the junction of Walterdale Hill Road and 88 Avenue.

Currently this plan is anticipatory and speaks to the future. It recognizes that changes will only come about through the adoption of a “Streetscape Improvement Plan” or through redevelopment in the area.

- [26] Policy 3.3 provides an overview of the Medium-Scale Residential District and recognizes that the entire length of the strip is not entirely pedestrian oriented but hopes it will be in the future. The Board has to determine that if the sign is left in its current location, pending redevelopment of the Site, is this somehow going to thwart this goal. A photograph at the bottom of page 35 of the ARP shows a very large sign that would be visible from residential properties.
- [27] Policy 3.3.2 outlines the General Intent of the plan as it applies to the southern half of the plan area. This section states that the area contains “commercial nodes serving both local residents and the commuting public” and recognizes that parts of the plan are traffic-oriented rather than pedestrian-oriented. The commuting public is specifically who the proposed sign is targeting.
- [28] Policy 3.3.3.6 must be an aspirational statement because it states “Signage must be of a scale and type that respects the compact, pedestrian-oriented character of the District and related to local businesses”; however the subject Site does not fit this description.

The ARP states that “Billboards, roof-top, digital and off-premise signage of any type will not be permitted”. Mr. Murphy indicated that this language must be speaking to future zoning changes coming to the land. Off-premise signs are currently a discretionary Use on the subject Site. If you have a Use in the current Zoning and an ARP says the Use will always be refused, this creates a conflict. This section should be interpreted as directing that these types of signs will be refused when they are at odds with the goals and objectives of the ARP. The proposed Sign is not at odds with the goals and objectives of the ARP.

The objective of the ARP is to see Sites, like the gas station Site, redeveloped into something more pedestrian friendly. Approving the proposed sign has no effect on future redevelopment and does not hurt the goal of the plan in any way.

- [29] An Alberta Court of Appeal Case was referenced; **Bridgeland Riverside Community Association v. Calgary (City), 1982 ABCA 138.**

This case directs that if there is a conflict, the ARP will yield to the Zone because the Zoning is the final statement as to what can exist in an area. The ARP must be “read down” to be consistent with the zoning.

- [30] SDAB-D-16-117 was referenced, which was also a sign appeal, subject to the ARP. In this decision, the Board decided that an ARP could not prevent the Board from approving a development that is a listed Use. In this case the Board looked at the specific location of the sign and the goals and aspirations of the ARP and held it was not “precluded from approving the sign”.

- [31] Although the Board refused the sign in SDAB-D-16-117 that proposed sign was located in the north section of the plan and the General Intent of the north section is totally different per policy 3.2.2 of the ARP. The south section is a completely different area with much less pedestrian emphasis.

- [32] The subject Site was upgraded in 2010 from (CNC) Neighbourhood Convenience Commercial Zone to (CB1) Low Intensity Business Zone. The study for the ARP was well underway at that time.

- [33] In response to a question from the Board, Mr. Murphy stated that he is not certain if the words “this Bylaw” in Schedule 59E.3(2)(i) refer to the adoption of the new sign regulations in October, 2011 or the adoption of the *Edmonton Zoning Bylaw* in 2001. Either way he is comfortable in confirming that the proposed sign has had a lawful permit in accordance with this section.

- [34] The purpose of the five year time limit on the development permits granted for Signs is to allow for a sign to be reviewed again when things change in the area or there are changes in the applicable law.

- [35] His client is not aware of any complaints regarding the proposed sign other than in 2012 when the sign was appealed to the SDAB by a restaurant owner immediately to the south. The appeal was unsuccessful and the Sign was approved. He is not aware of any concerns voiced by Transportation Services.
- [36] The Appellants are not aware of any imminent redevelopment plans for the current Site and the service station lease has recently been extended. He would have no issue with a condition of approval stating that if the Site were to be redeveloped, the sign permit would be cancelled. He is also not aware of any environmental issues related to the Site. His client is not opposed to any of the recommended conditions of the Development Officer should this sign be approved.
- [37] It is up to the Board to determine why there is a good planning reason to refuse the sign as City Council allowed this Use to be on this Site. Mr. Murphy compared it to the physician's test of "Do No Harm".
- [38] He agrees with the SDAB-D-16-117 decision, which states the Board is not bound by the ARP but should consider it to arrive at a decision. The ARP cannot simply be dismissed but the proposed sign is compatible with the ARP as it is in the middle of a commercial area and is completely hidden from any residential area.
- [39] To his knowledge, there is no alley behind the sign and the building to the south, just a building setback of approximately 10 feet. The north face of the adjacent building is a cinder block wall with no windows.
- [40] The sign is situated to avoid the canopy of the gas station.
- ii) *Position of the Development Officer, Mr. S. Ahuja and Mr. M. Gunther, City of Edmonton Law Branch*
- [41] Mr. Gunther made a presentation on behalf of the Development Officer. Mr. Ahuja was also present.
- [42] While it is rare for legal counsel to get involved in a sign matter, in this case the City is concerned that the ARP is being misinterpreted. Counsel's aim is to help the Board properly interpret and apply the *Zoning Bylaw* and the ARP.
- [43] Mr. Gunther has no issues with the majority of the Appellant's statements other than the position taken regarding the ARP. This is a Statutory Plan passed under the authority of the *Municipal Government Act*. It expressly states that there are not to be billboards or off-premises Signs. It is rare to see such direct language in a Statutory Plan. While Counsel agrees with the Appellant that Area Redevelopment Plans tend to be aspirational in nature, in this case there is an express direction.
- [44] When you have a Permitted Use you have a right to a Development Permit for that Use. It does not matter what the Overlays or Statutory Plans state. For a Discretionary Use, there will be locations in the Zone where that Use is appropriate and locations where it is

inappropriate. In deciding whether or not a Discretionary Use is appropriate, the Development Authority must consider the planning context, any applicable regulations such as Statutory Plans, any other policy document, geographical context or land Use conflicts. For example, if you have an application to build an industrial plant right next door to a residential property, and both are Permitted Uses, this Board cannot stop these incompatible uses. If both were Discretionary Uses, there is a role for the Board and the Development Authority to play in determining if the Uses are compatible. In this case, the Statutory Plan guides what the vision is, and what the aspiration is for a smaller subset of the municipality.

- [45] When deciding whether or not to grant a permit for a Discretionary Use, a Statutory Plan is a key factor and must be complied with as directed by the *Municipal Government Act*. A Statutory Plan cannot be disregarded.
- [46] A Statutory Plan is intended to provide guidance as to the appropriate Uses in a particular context. The role of the Board is to read the documents in its entire context, harmoniously as per “Driedger’s Principle”, a fundamental rule of statutory interpretation.
- [47] In the Alberta Court of Appeal decision, **Rossdale Community League v Edmonton (City), 2017 ABCA 92 (“Rossdale”)** (paragraph 11), the Board had been asked to reconcile two Statutory Plans that were in conflict. The Court indicated that the central task facing the Board was to interpret the various planning documents in a harmonious way.

In this same paragraph there is a citation from a British Columbia Court of Appeal decision, **Society of Fort Langley Residents for Sustainable Development v. Langley (Township), 2014 BCCA 271**, where the Court states in paragraph 18 of that decision:

[...] municipal legislation should be approached in the spirit of searching for the purpose broadly targeted by the enabling legislation and the elected council, and in the words of the Court in *Neilson*, “with a view to giving effect to the intention of the Municipal Council as expressed in the bylaw upon a reasonable basis that will accomplish that purpose”.

That comment has been adopted by the Alberta Court of Appeal.

- [48] With regard to SDAB-D-16-117, Mr. Gunther agrees with the Appellant that the Board’s jurisdiction is not ousted by the ARP. When the Board’s jurisdiction is ousted, it cannot hear an appeal. For example, the *Municipal Government Act* states there is no jurisdiction for a Board to hear an appeal on a Permitted Use with no variances. He does not dispute that the Board has jurisdiction to hear this appeal and does not dispute that the Board should be making a determination as to whether or not this permit for Discretionary Use ought to be issued. He does assert that it would be unreasonable and legally incorrect for the Board to approve an Off-premises or billboard-style sign in light of the express language found in the ARP.

- [49] Regarding the Appellant's statement that the plan is aspirational and a vision for the future, the future is right now. This ARP was passed in the intervening period between when the last Development Permit was approved for an off-premises sign on this Site and when the Appellant applied for the permit under appeal. An Off-premise sign is not a Use that is envisioned for the redevelopment of this particular corridor of the city.
- [50] Planning legislation is expected to be drafted with an eye to the future and does not come into effect immediately. The future comes about piece-by-piece as Development Permit applications come in and decisions are made as to the allocation of future resources. Here we have express direction in the ARP that no Off-premises Signs or billboards should be allowed. Now that the ARP is in effect, the Development Authority will refuse applications for those Uses. In this particular case there has been a change in legislation and it is a perfect example of why sign permits have a 5 year time limit imposed on them.
- [51] A substantial amount of neighbourhood consultation has gone into developing the ARP and a number of proposals and drafts were made prior to being passed into law by City Council. Once it goes into law it has the same force and effect as any other Bylaw in the City. It is a collective vision of many affected parties as to how this important stretch of roadway can be improved.
- [52] The Appellant stated that a reference is made regarding "maintaining" a pedestrian-oriented character but that this reference should be disregarded since that is not the character of the subject location right now. In the *Rossdale* decision, the Board was asked to determine the relevance of the Rossdale Area Redevelopment Plan to an application for a Development Permit to intensify the use of the Rossdale fire hall. That ARP said that the fire hall would be "retained". The Appellants argued that since the fire hall was not operating currently, this reference should be read down or disregarded.
- The Court of Appeal determined that such an interpretation "relie[d] on a strained and technical reading of the text", see *Rossdale*, paragraph 13.
- City Council and the consulted parties are trying to improve the streetscape and to allow some of these commercial nodes to become more pedestrian-oriented, and to provide a more welcoming corridor to and from downtown. It is inconsistent to continue to allow billboard style developments along this stretch.
- [53] Contrary to the Appellant's evidence, there is an alley separating the restaurant and the gas station. This is important because the ARP notes that should there be a proposal to close this alley in the future and it will actually be a pedestrian connection to the park behind the restaurant.
- [54] Mr. Gunther provided the following responses with respect to questions from the Board
- a. Policy 3.1.1 of the ARP refers to streetscape improvements and the redevelopment of sidewalks and boulevards. This streetscape improvement section does not address how the whole ARP should be used in the development

process. Item 1.6 does, it is entitled, “How to Use this Plan”. Under Item 1.6, it states “Applications for development permits must be reviewed in the context of the policies laid out in this plan”.

- b. The ARP does not differentiate between temporary and permanent developments; however, Off-premises Signs are always going to be temporary developments because the 5 year limitation period is a regulation in the *Edmonton Zoning Bylaw*.
 - c. The grandfathering clause in Schedule 59E.3(2)(i) does not reference Statutory Plans or other factors that may exist. The purpose of this section is that if a variance is granted the first time a sign permit is approved, a new sign permit will not be denied on the basis that the same variance is required. This particular section refers specifically to the *Edmonton Zoning Bylaw* (Bylaw 12800). The Statutory Plan is Bylaw 16242, a completely separate Bylaw, and this section would not be applicable.
 - d. The Development Officer confirmed that the main reason of refusal is based on the ARP, which applies to all the lands within its boundaries. The Board cannot determine that one block should follow the ARP and another block should not.
- [55] Mr. Ahuja submitted a photograph (*Exhibit A*) from Google Street View, which shows the subject Site, the subject sign and the Parklken Restaurant.
- [56] Mr. Ahuja and Mr. Gunther provided the following responses with respect to questions from the Board
- a. Mr. Ahuja confirmed that the first reason of refusal should be policy 3.3.3.6 not policy 3.2.3.5 as stated on the refused permit.
 - b. Mr. Ahuja referenced Schedule 59E.2(3)(e) as a reason for refusal because he felt a Freestanding Off-premises Sign Use was an omission in the regulation.
 - c. Mr. Gunther acknowledged that the Freestanding Off-premises Sign Use is not under the Schedule 59E.2(3)(e) regulation but he does not have the authority to withdraw this reason for refusal.
 - d. Mr. Gunther stated that there is no conflict between the *Edmonton Zoning Bylaw* and the Statutory Plan. The *Edmonton Zoning Bylaw* does not guarantee that an Off-Premise sign can be built in a CB1 Zone, instead; it identifies Off-Premise signs as a Discretionary Use. A number of factors should be considered when reviewing a Development Permit application for an Off-Premise Sign. One consideration is the ARP. The ARP and the Zoning Bylaw are both pieces of legislation, passed by City Council. They are presumed to operate harmoniously. We have a Discretionary Use so there is the ability, in certain contexts, to obtain a

permit, but no right to it. Another piece of legislation, the ARP, states no Off-premises signs in this particular strip. They are read together to say there are no billboards permitted on this particular land.

- e. Sometimes one piece of legislation is so decisive it effectively makes the decision about whether or not a Discretionary Use should be allowed. Section 687(3)(a.1) of the *Municipal Government Act* says the Board “must comply... with statutory plans”. The ARP is so decisive that other factors should have a minimal impact on the Board’s ultimate decision. There is no conflict because both pieces of legislation can be read harmoniously and City Council’s intention is very clear.
- f. Analyzing a Statutory Plan is not a separate exercise from the Discretionary Use analysis; it is part of it. Given the strong language in the *Municipal Government Act*, it is probably the most important part of the Discretionary Use analysis. In this case the Board cannot interpret the ARP in a reasonable fashion to conclude this development is allowed. The Board must comply with any Statutory Plan in the absence of a direct conflict.
- g. An example of a true conflict is if you have a Permitted Use and you have a Statutory Plan that prohibits that Use. This is a conflict because the *Municipal Government Act* and *Edmonton Zoning Bylaw* state a permit must be granted while the Statutory Plan says no.
- h. Mr. Gunther confirmed they are only aware of the 2012 complaint from a neighbouring property owner. Mr. Ahuja indicated that there was no feedback from Transportation Services as only Digital signs are circulated to Transportation Services.
- i. Mr. Gunther disagrees that this sign serves one of the general intents of the ARP which is to have commercial nodes that serve the commuting public. The reality is that this is a commuting street leading in and out of downtown. The vision of the document is to guide development and civic improvements to improve the quality of this stretch of road. While billboard signs may serve the commuting public, they are expressly excluded in this Plan.
- j. Implementing a condition on the permit stating that the sign permit will be cancelled if redevelopment were to occur would not impact anything since there are no imminent plans to redevelop the Site.
- k. There is an expectation that a business can erect a sign in front of their business which is so fundamental that On-Premises Signs are a Permitted Use in the CB1 Zone. There is no discretion involved; therefore, there is limited ability to apply the ARP.
- l. Billboards are always a Discretionary Use, which allows the Development Authority and the Board the ability to refuse or to impose conditions and to

consider the provisions of any applicable Statutory Plans. A proposed billboard sign advertising another party's services or operations on a property is more controversial because billboards have the effect of creating additional visual blight and more development, not necessarily of the highest quality. Even if an On-Premise and Off-Premise sign have the same built form, it matters what copy is on a sign. The importance of the sign copy is reflected in the fact that City Council has separate rules for On-Premise and Off-Premise signs.

iii) Rebuttal of the Appellant

- [57] Mr. Murphy confirmed that he had made an error in stating there was no lane between the gas station and the restaurant.
- [58] He disagrees with the City's assertion that the rules are different for On-premises and Off-premise Signs – the size requirements are exactly the same for each. The City had a difficult time explaining the greater impact that an Off-premises Sign would have as opposed to an On-premises Sign. If the *Edmonton Zoning Bylaw* gives an applicant the right to either demand a Development Permit or the right to say I need consideration for a Development Permit, the ARP cannot take these rights away without being in conflict with the Zoning.
- [59] He stressed that he has brought the precise wording of the ARP and *Edmonton Zoning Bylaw* to the Board's attention, which is something the City has failed to take into account.

At this point Mr. Gunther objected that Mr. Murphy is introducing new argument to which he would not have an opportunity to respond and is splitting his case. The Chair ruled that Mr. Murphy be allowed to proceed.

- [60] Mr. Murphy reiterated that there is a conflict between the ARP and the *Edmonton Zoning Bylaw*, which the Court of Appeal has told us how to resolve.
- [61] Policy 3.3.3.6 of the ARP states billboards will not be permitted but it does not specify by whom, when, and under what circumstances. Do these words mean they will eventually not be Permitted when City Council changes the Zoning? Do they mean the Development Officer cannot allow billboards but the Board can? When they say the Use will not be permitted do they mean it will only be Discretionary?
The only way that the reading of the ARP can be harmonious with the Zoning is if the prohibition on billboard signs is not absolute. If the prohibition on billboard signs with third party advertising on them is absolute then there is absolutely a conflict. But if you try to find meaning in these words that can live with the fact that the lands are still zoned to allow this Use, you can arrive at a solution.
- [62] Either there is a conflict in which case the case law says "read down" the ARP because the Zoning takes priority or there is a harmonious way to read the Zoning Bylaw and the

ARP. The ARP provisions should be read as aspirational rather than an outright ban on billboards. They must be looked at in terms of what the goal of the Plan is, and the Board should consider whether approving these signs any harm to the Plan. This interpretation eliminates the conflict.

- [63] He disagrees with the City's position that there is no conflict if the Zoning says you can have "a, b, c, or d" and the Plan says you can have "a, b, or c" but not "d". This is a conflict. He has a difficulty with the City's approach because the City is saying the Board has discretion to approve or not to approve, but the Board cannot approve.
- [64] The discussion regarding the *Rossdale* case dealt with retaining the fire hall which is a distinguishable factual scenario. When the Court of Appeal was discussing retaining the fire hall, the building had always been there, though its use had changed over time. Here, the pedestrian-oriented character does not yet exist. An area's character cannot be maintained if it has never existed.
- [65] In closing Mr. Murphy stated that it is his understanding that the second reason for refusal is not relevant. Schedule 59E.2(3)(e) does not reference Freestanding Off-premises Signs, only Digital Signs.

Decision

- [66] The appeal is **DENIED** and the decision of the Development Authority is **CONFIRMED**. The Development is **REFUSED**.

Reasons for Decision

- [67] The proposed development, a Freestanding Off-premises Sign, is a Discretionary Use in the (CB1) Low Intensity Business Zone.
- [68] The Appellant applied for a new Development Permit for a Freestanding Off-premises Sign. A sign has existed on the subject Site nearly continuously since 1997, but the Development Permits have been time limited, and the sign owner must periodically apply for a new Permit.
- [69] The last Development Permit was granted for 5-year period with the view that when the Sign was up for renewal, the Development Authority would assess the suitability of the Sign with regard to changes that occurred in the interim period. Relevant changes include changes to statutes and changes to the character of the surrounding community.
- [70] Since the last Development Permit was issued, there have been e two significant statutory changes. Two new statutory instruments now apply to the Subject Site:

- a. the ARP; and
- b. the Overlay.

[71] Policy 3.3.3.6 of the ARP references signage:

Signage must be of a scale and type that respects the compact, pedestrian oriented character of the District and related to local businesses. Billboards, roof-top, digital and off-premise signage of any type will not be permitted.

[72] This provision conflicts with the *Edmonton Zoning Bylaw* (the “*Zoning Bylaw*”), which provides that a Freestanding Off-premises Sign is a Discretionary Use in the (CB1) Low Intensity Business Zone.

[73] The Alberta Court of Appeal has provided direction to the Board on how to decide an appeal related to a Development Permit for a Discretionary Use :

The object and purpose of a discretionary use is to allow the development authority to assess the particular type and character of the use involved, including its intensity and its compatibility with adjacent uses, **Rossdale Community League (1974) v. Edmonton (Subdivision and Development Appeal Board), 2009 ABCA 261 at paragraph 14.**

[74] The Board heard competing interpretations of the test that it should apply to this appeal given the interaction between the *Zoning Bylaw* and the ARP:

- a. In Mr. Gunther’s view, when exercising its discretion as to whether to allow the proposed Use on the subject Site, the Board could not reasonably reach any other conclusion but that the Sign is not allowed because of the express language in policy 3.3.3.6 of the ARP.
- b. In Mr. Murphy’s view, the Board has greater latitude because there is a conflict between the ARP and the *Zoning Bylaw*. The *Zoning Bylaw* takes precedence; and the ARP is just one factor for the Board to consider when exercising its discretion.

[75] Mr. Murphy urged the Board to adopt the articulation of law provided in a previous decision of the Board, SDAB-D-16-117. The decision concerned a Development Permit application for a sign on a site that was subject to ARP. That sign was in a different section of the ARP but subject to a provision that replicates the prohibition on off-street signage found in policy 3.3.3.6.

[76] The Board adopts the articulation of the law from the previous decision of the SDAB:

The Community League argued that per section 687(3)(a.1) of the *Municipal Government Act*, the Board has no jurisdiction to allow this appeal of the refusal to issue a development permit for a Discretionary Use because that type of Use is prohibited under Section 3.2.3.5 of the 109 Street Corridor ARP.

The Board disagrees with this proposition. In *McCauley Community League v Edmonton (City)*, 2012 ABCA 224, the Alberta Court of Appeal considered section 687(3)(a.1) and the relationship between an area redevelopment plan and the general *Zoning Bylaw* in particular. The Court referred to the case of *Bridgeland Riverside Community Assn. v. Calgary (City)*, 1982 ABCA 138, where it had concluded that, although the provisions of plans enacted by local governments limit the powers of development appeal boards, they do not eliminate the narrow saving power contained in section 687(3)(d) (paras 34-37). The Court concluded at paragraphs 39 and 40 that:

The Board appreciated the Zoning Bylaw is a regulatory document that takes precedence over the ARP if there is a conflict between the two... The Board reasonably interpreted the requirements of the ARP and properly and reasonably exercised its discretion under s. 687(3)(d) of the *Municipal Government Act*.

Based on the McCauley decision, the Board concludes that the provisions of an ARP do not oust the discretion of the Board or limit its jurisdiction to consider this appeal. Indeed, the McCauley decision clearly contemplates that the Board exercise its discretionary powers when interpreting the requirements of an area redevelopment plan.

Although the Board disagrees with the position of the Community League and the Development Officer, the provisions of the 109 Street Corridor ARP remain very germane to the exercise of the Board's discretion. The Board has therefore taken into account the provisions of the (CB1) Low Intensity Business Zone, the Pedestrian Commercial Shopping Street Overlay and the 109 Street Corridor ARP (including the prohibition) in determining whether or not to approve the proposed Discretionary Use.

[77] The Board holds that the terms of the ARP are not definitive but very germane to its exercise of discretion. The Board notes the ARP:

(a) contains a policy prohibiting off-premise signs,

(b) Contemplates that the closed lane to south of the subject Site should become a pedestrian thoroughfare between 109 Street and Violet Archer Park.

[78] The Board accepts that Freestanding Off-premises Signs are treated differently in the *Zoning Bylaw* than Freestanding On-premises signs because Off-premises signs contribute to the increased commercialization and proliferation of Signs. The visual blight created by On-premise signs must be balanced against the corresponding benefit provided by the On-premise signs -- they provide important information about the businesses located on a Site. Off-premise signs do not provide an equally salient benefit.

[79] The Board notes and adopts the reasons of the previous SDAB-D-16-117 decision, at paragraph 14, with regard to the relationship between On-premises Signage and the pedestrian-oriented goals of the ARP and the Overlay:

It is clear that pedestrian-orientation encompasses more than the notion of unimpeded physical movement or pedestrian safety. Section 819.3(10) indicates that pedestrian-oriented development must consider various architectural and aesthetic features intended to enhance a pedestrian's sensory experience. It is the Board's view that the proposed development does not support this objective. Indeed, the Appellant stated during his oral submissions that the Sign will not affect the average individual walking down the street, as he or she will likely not notice the Sign.

- [80] Mr. Murphy urged the Board to read the ARP as being merely aspirational and having no relevance to this area given that it is in transition and lacks many of the characteristics one would expect from a pedestrian-oriented streetscape.
- [81] The Board acknowledges that this area is in transition. There have been some pedestrian oriented developments. The Development Officer provided a photograph, marked *Exhibit A*, showing that the restaurant to south of the subject Site has developed a pedestrian-oriented frontage. Yet, the policy directives in the ARP remain imperfectly achieved. It is through the Development Permit process that the City is able to implement the policies set out in the ARP. The Board notes that the ARP specifies that "applications for Development Permits must be reviewed in the context of the policies laid out in this plan."
- [82] With regard to second ground for refusal of the Development permit, namely it contravened Schedule 59E.2(3)(e) of the *Zoning Bylaw*, the Board accepts Mr. Murphy's submission that this provision does not apply to the proposed Development and this ground for refusal makes no part of the Board's reasons for refusing this appeal.
- [83] The Board's discretionary power is not ousted by the prohibition regarding off-premises signage contained in the ARP; however, the ARP is a germane consideration when the Board decides whether or not a proposed Discretionary Use is compatible with adjacent uses. Given the overall objectives and vision of the ARP, and the specific provisions applicable to the subject Site, the Board is of the opinion that this Freestanding Off-premises Sign is no longer appropriate or reasonably compatible with the surroundings at this location. Accordingly, the appeal is denied.



Ms. A. Lund, Presiding Officer
Subdivision and Development Appeal Board

Board Members Present:

Mr. V. Laberge; Mr. A. Nagy; Ms. K. Thind; Mr. J. Wall;

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