

Edmonton Subdivision and Development Appeal Board

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Date: July 17, 2015
Project Number: 159466458-001
File Number: SDAB-D-15-114

Notice of Decision

This appeal dated May 4, 2015, from the decision of the Development Authority for permission to:

Construct a Freestanding Minor Digital On-premises Off-premises Sign

On Plan 0927895 Blk 1 Lot 27, located at 18304 - 100 Avenue NW, was heard by the Subdivision and Development Appeal Board at its hearing held on June 4, 2015. The decision of the Board was as follows:

June 4, 2015 Hearing:

The Board heard from Mr. K. Haldane on behalf of Mr. J. Murphy, Counsel for the Appellant, MacDonald Outdoor Advertising, who provided the following information:

1. He indicated that they had anticipated the City of Edmonton Transportation Services Department would make a change in requirements; however this has not yet happened. The Appellant would like to proceed with the Transportation Safety Study.
2. There is no prejudice to any party as there is no Development Permit and no ongoing construction.

The Board heard from Mr. Ahuja, City of Edmonton Sustainable Development Department, who provided the following information:

1. There is no objection to the adjournment request.

Motion: "That the matter be adjourned to July 2, 2015."

Reason for Decision:

1. The Appellant and Sustainable Development have consented to the adjournment.
2. No other parties were in attendance at the hearing.

July 2, 2015 Hearing:

“that SDAB-D-15-114 be raised from the table”

Summary of Hearing:

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.

The appeal was filed on time, in accordance with Section 686 of the *Municipal Government Act*, R.S.A 2000, c. M-26.

The Board heard an appeal of the decision of the Development Authority to refuse an application to construct a Freestanding Minor Digital On-premises Off-premises Sign, located at 18304 – 100 Avenue NW. The subject Site is zoned DC2.876 Site Specific Development Control Provision. The development permit was refused because an excess in the maximum allowable Sign Area would contribute to light pollution and visual intrusion into residential properties south of 100 Avenue, the proposed location is within the 20 degree cone of vision and requires a Safety Review prior to approval, the proposed location is in the direct path of an existing traffic control signal and Transportation Services has determined that the proposed Sign will backlight the existing traffic control signal.

The Board received a written submission from the Development Authority on May 29, 2015, a copy of which is on file.

The Board received an email from an affected property owner opposed to the proposed development on June 2, 2015.

The Board notes that three affected property owners submitted their objections to the proposed development online.

The Board further notes that a Memorandum was received from Transportation Services on April 22, 2015 and an amended Memorandum was received from Transportation Services on June 26, 2015, a copy of which is on file.

At the outset of the hearing the Presiding Officer referenced Section 641(4) of the *Municipal Government Act*, Chapter M-26 which states:

Despite section 685, if a decision with respect to a development permit application in respect of a direct control district

- (a) is made by a council, there is no appeal to the subdivision and development appeal board, or
- (b) is made by a development authority, the appeal is limited to whether the development authority followed the directions of council, and if the

subdivision and development appeal board finds that the development authority did not follow the directions it may, in accordance with the directions, substitute its decision for the development authority's decision.

The Board heard from Mr. James Murphy, Legal Counsel, for MacDonald Outdoor Advertising, who noted that his appeal is governed by Section 641 of the *Municipal Government Act*. Based on case law from the Court of Appeal, jurisdiction and merit should be dealt with together. At this point, Mr. Murphy provided a detailed written submission.

At this point the Presiding Officer adjourned the hearing in order to allow some time for Board members and representatives from the Sustainable Development Department to review the written submission provided by the Appellant.

When the hearing resumed Mr. Murphy used a PowerPoint presentation, marked "Exhibit D" to make the following points in support of the appeal:

1. He provided his submission, marked "Exhibit A", which included the development permit application and reasons for refusal; the Direct Control Provision, DC2.876; Council report on DC2 to DC2 rezoning; Section 59E of the Sign Schedule; Section 720 of the Edmonton Zoning Bylaw; an excerpt from Fred Laux, Planning Law and Practice in Alberta; SDAB Decision SDAB-D-14-246; a rendering of the proposed Sign; a neighbour location map; and a Transportation Services Memorandum dated June 26, 2015.
2. He provided a revised Site Plan, marked "Exhibit B" and stated the proposed Sign is located on the Marriott Hotel site.
3. The hotel owners are hoping that the signage will improve business at the hotel, which has been slower than anticipated, by targeting vehicular traffic along 100 Avenue.
4. A third party advertising company will erect the Sign and the hotel will purchase space on the Sign as will other advertisers.
5. The proposed Sign is a curved digital billboard Sign with a six second interval changes and will be directed west down 100 Avenue and not towards the residential properties located south of 100 Avenue.
6. The subject Site is zoned DC2 and initially did not include Digital Signs as a listed Use.
7. The hotel owner had the Site rezoned to add Digital Signs as a listed Use and to accommodate the proposed Sign.
8. However, the inclusion of Schedule 59E instead of the Sign regulations contained in the CHY Highway Corridor Zone may have been an error and has resulted in the refusal of the development permit application.
9. The proposed Sign complies with all of the development regulations except for the maximum allowable Sign Area.
10. Mr. Murphy referenced photographs contained in his PowerPoint presentation to illustrate the location of the proposed Sign on the north side of 100 Avenue, where there is a row of hotels. He also referenced photographs to illustrate the berm along the south side of the avenue, which is between the residential properties and development on the avenue. There is a mix of evergreen and deciduous trees on the berm and the photos showed the difference between when foliage is on the trees and when it is not.

11. The berm was erected as a requirement of the Place LaRue West Neighbourhood Area Structure Plan.
12. The Sign has been sited closer to the building in order to comply with the minimum required 7.5 metres Side Yard.
13. The proposed curved Digital Sign is more appropriate for this location than a flat Sign because it is setback so far from 100 Avenue. The proposed curved Digital Sign has more pixels than a flat Sign and provides a clearer image.
14. The proposed Sign is convex with a viewing area of 22 feet.
15. The zoning north of 100 Avenue is all highway commercial.
16. Mr. Murphy referenced photographs and videos to illustrate the intersection of 184 Street and 100 Avenue and a temporary Sign that has been erected at the same location as the proposed permanent Sign. The proposed Sign will eliminate the need for the hotel to use temporary signage.
17. The photographs also illustrate that the area surrounding the subject Site on the north side of 100 Avenue is comprised of large scale hotels with a heavy volume of traffic along 100 Avenue.
18. The Place LaRue West Neighbourhood Area Structure Plan attempts to isolate the residential area located south of 100 Avenue from these developments.
19. Mr. Murphy showed a video of the intersection located at 184 Street and 100 Avenue demonstrating that there are numerous existing large Signs that are taller than the proposed Sign located along the north side of 100 Avenue.
20. The photographs and videos included in the PowerPoint presentation were taken from the vantage point of a person at standing height.
21. He referred to Tab 1 of "Exhibit A" and addressed the two reasons for refusal, firstly that the proposed Sign Area exceeds the maximum allowable Area for Minor Digital On-premises Off-premises Signs which would contribute to light pollution and visual intrusion into residential properties south of 100 Avenue.
22. He noted that the proposed Sign is not as wide or as high as the maximum allowable contained in the DC2 Bylaw and that the excess Sign Area would, therefore, be located at the bottom of the Sign. It was his opinion that this excess area would not contribute to light pollution with respect to the properties located south of the avenue on the other side of the berm.
23. The proposed Digital Sign will not spill light like older billboard Signs. Digital Signs are designed so their light is aimed at oncoming traffic.
24. The Development Officer concluded that the excess Sign Area would impact the neighbourhood without giving a reason. This conclusion doesn't make sense given that the excess area is located at the bottom of the Sign.
25. As a result of the concerns expressed by Transportation Services regarding traffic safety because of the proximity of the proposed Sign to a traffic signal, a revised Site Plan was prepared showing the proposed location of the Sign has been moved 60 metres to the east. The Transportation Safety Study was submitted to Transportation Services and after review, Transportation Services confirmed that they are no longer concerned as evidenced in a memorandum dated June 26, 2015, contained at Tab 10 of "Exhibit A". Therefore, now the sole issue is whether the excess area of the Sign will contribute to light pollution and visual intrusion into the residential properties south of 100 Avenue.

26. Section DC2.876.4(f) requires that landscaped yards with a minimum width of 7.5 metres be provided adjacent to 100 Avenue and 184 Street. Section DC2.876.4(z) includes specific regulations in addition to those included in Schedule 59E and any other provisions of the *Edmonton Zoning Bylaw*. Specifically, s. DC2.876.4(z)(i) states that all Digital Signs shall be designed to minimize light pollution and visual intrusion into residential properties south of 100 Avenue. Section DC2.876.4(z)(ii) states that any lighting on Signs higher than 10 metres and more than 7.5 metres north of 100 Avenue is to be oriented east/west and not face south. Section DC2.876.4(z)(iii) states that any Signs developed on a south facing wall above 10 metres in height or attached to any building above 10 metres in height that abuts 100 Avenue is to be backlit and designed to prevent light from emitting toward residential areas south of 100 Avenue.
27. The proposed Sign is less than 10 metres tall and has been designed to comply with all of these requirements.
28. Therefore, he asked the Board to infer that City Council had decided that 10 metres was the height at which light pollution and visual intrusion into the residential area to the south would become a problem.
29. The proposed Sign does not face the residential area to the south but is oriented towards traffic travelling east on 100 Avenue.
30. The proposed Sign now complies with the requirements of Section 59.2 of the *Edmonton Zoning Bylaw* as noted by the memorandum from Transportation Services contained at Tab 10 of “Exhibit A”.
31. He referenced a copy of the report contained at Tab 3 of his submission that was sent from the Sustainable Development Department to City Council in December 15, 2014 to support the rezoning application, which included the addition of Use Classes for three types of Digital Signs.
32. Specifically, the City had supported the rezoning application because the La Perle neighbourhood located south of 100 Avenue is separated from the subject Site by a 30 metre wide roadway and a five metre high landscaped berm.
33. Therefore, Mr. Murphy asked the Board to infer that City Council approved the Bylaw amendment to include this type of Digital Sign based on this knowledge.
34. The report also acknowledged that the development located along 100 Avenue is “highway commercial” and not neighbourhood commercial and that the additional Use classes for Digital Signs are appropriate and compatible for this area.
35. Sustainable Development recommended approval of the Bylaw amendments to City Council because the proposed Use Classes for Digital Signs were compatible for the area because of the berm that separates the subject site from the residential properties to the south and the sign is less than 10 metres high and faces west to target vehicles travelling east along 100 Avenue.
36. The proposed Sign complies with all of the regulations pursuant to Schedule 59E of the *Edmonton Zoning Bylaw* contained at Tab 4 of “Exhibit A” with the exception of maximum allowable Sign Area.
37. The proposed Sign is 7.92 metres high (less than the maximum allowable Height of 8.0 metres) and 7.32 metres wide (less than the 8 metres maximum allowable Width).
38. The proposed Sign exceeds the maximum allowable Sign Area of 20 square metres but the excess is located at the bottom of the sign.

39. The proposed Sign is not located within the minimum required Side Setback and does not exceed the maximum allowed number of Signs permitted on one site.
40. He referenced the table contained in Schedule 59E.3(5)(d) that sets out the minimum required separation distances for Minor Digital On-premises Off-premises Signs larger than 8.0 square metres. He pointed out that the Proposed Sign Area column contained references to signs larger than 20 metres squared and asked the Board to infer from that variances to allow signs greater than 20 square metres could be considered.
41. Section 720.3(3) of the *Edmonton Zoning Bylaw* states that all regulations in the Zoning Bylaw shall apply to development in the Direct Control Provision, unless specifically excluded. This includes the Development Authority's variance power contained in Section 11. City Council may provide absolute direction in the Direct Control Bylaw but in most cases some discretion is provided to the Development Authority and that is the case for this development.
42. It was his opinion that in this case the Development Officer does appear to exercise discretion while considering the size of the proposed sign.
43. Section DC2.876.4(z)(i) requires the Development Officer to exercise discretion in determining whether or not the proposed Sign creates light pollution and visual intrusion. This exercise of discretion is then subject to the right of appeal to the Subdivision and Development Appeal Board.
44. He referenced an excerpt from Planning Law and Practice in Alberta by Frederick Laux contained at Tab 6 of "Exhibit A" and noted that it was Laux's opinion that Section 641 of the *Municipal Government Act* does not exclude the jurisdiction of the Board in situations where a Development Officer has exercised discretion because it is impossible to determine if the direction of Council was followed.
45. Mr. Murphy referenced a previous decision of the Board contained at Tab 7 of "Exhibit A" and suggested that the rationale of that decision was that, if City Council has not specified regulations in a Direct Control Bylaw but rather has incorporated regulations by reference to the Zoning Bylaw, the Development Officer retains discretion. The exercise of this discretion is subject to appeal. In that case the Board was asked to exercise discretion that had been delegated to the Development Authority, which the Development Office did not exercise.
46. He referenced a rendering of the proposed Sign contained at Tab 8 of "Exhibit A". The rendering makes the Sign look two dimensional and does not show the curved nature of the Sign.
47. He referenced a map contained at Tab 9 of "Exhibit A" identifying the location of two of the three neighbours who have expressed opposition to the proposed Sign. One of these property owners resides quite far east of the proposed location and will only be able to see the back of the single sided Sign that will face west. It was apparent that that property owner was primarily concerned about the Sign located at the Wingate Hotel.
48. The Sign at the Wingate Hotel is much different than the proposed Sign. Specifically the Wingate hotel Sign is one metre higher than the proposed Sign and is a neon lit Sign, which exacerbates light pollution.
49. Mr. Murphy took a photograph from the property marked by an arrow on the map in Tab 9 of "Exhibit A" to illustrate that, when standing on 99A Avenue looking north, the hotel is not visible because it is blocked by the berm and mature trees located along the berm.

50. In response to a question Mr. Murphy indicated that there are some two storey houses located along 99A Avenue. However, the regulations contained in DC2.876 suggest that digital signage is only a concern when it exceeds 10 metres in Height.
51. He referred to photographs of the thick landscaping along the berm at 184 Street and 100 Avenue. He also referenced photographs of some comparable Signs, specifically a Sign located at 178 Street and Stony Plain Road with the exact dimensions as the proposed Sign. The photographs illustrate that the convex face does not increase light pollution when viewed from the side because the pixels are aimed at oncoming traffic.
52. He referenced photographs of a Sign located at 23 Avenue and Rabbit Hill Road that were taken at 4:00 a.m. in an attempt to capture light pollution in the dark. This Sign is a convex curved Sign. Photographs of the side of the Sign show that a slim band of light is visible. It was noted that the light from the street lights produced more glare in the photo. A photograph of the other side of this Sign illustrated that light was not visible until you approached the front of the Sign.
53. He referenced a photograph of an existing Major Digital Sign with scrolling text erected at another hotel located along 100 Avenue and stated that in his opinion, this type of Sign is more distracting than the proposed Sign.
54. Mr. Murphy concluded by stating that the proposed Sign is reasonable, in keeping with the spirit and intent of the Direct Control Provision Bylaw, compatible with the surrounding highway commercial development and complies with all of the development regulations except Sign Area.

Mr. Murphy provided the following responses to questions:

1. The 7.5 metres Side Setback is measured to the edge of the Sign from the property line, not to the pole at the center of the Sign.
2. The Highway Corridors Act does not apply to the proposed development but the Place LaRue West Neighbourhood Area Structure Plan specifies that the Use on the subject Site will be highway commercial in nature.
3. The proposed Sign is 12 feet (3.66 metres) high by 24 feet (7.32 metres) wide with a 2 foot (0.61 metres) band located at the bottom.
4. The Development Officer's use of language led him to surmise that the Development Officer exercised discretion and that discretion should be subject to appeal.
5. The size of the variance being required in this case, more than 50 percent greater than the maximum allowed Sign Area, should not determine the decision of the Board.
6. Mr. Murphy referenced "Exhibit C", a copy of a Court of Appeal decision, *Newcastle Centre GP Ltd. V Edmonton (City)*, 2015 ABCA 295, and stated that in that case a variance had been sought in the minimum required 500 metres separation distance between liquor stores. The Board refused the appeal because of the magnitude of the required variance. The Court of Appeal determined that the Board should not start from the presumption that a large variance will result in harm. Rather, the Board should apply Section 687(3)(d) of the *Municipal Government Act* to determine whether or not the specific development will unduly interfere with the amenities of the neighbourhood or materially interfere with the use, enjoyment or value of neighbouring parcels of land.

7. It was his opinion that the excess in Sign Area at the bottom of the proposed Sign will not unduly affect the amenities of the neighbourhood or the use, enjoyment or value of neighbouring properties and therefore meets the test.
8. It was his opinion that zoning bylaws are guidelines that can be varied.
9. Section 641 of the *Municipal Government Act* applies where City Council has provided an absolute direction. However, when City Council leaves matters to judgment, absolute direction has not been provided because Council cannot direct how discretion is exercised and the Board can review that exercise of discretion.
10. The Place LaRue West Neighbourhood Area Structure Plan addresses the tension between Use classes on the north side of 100 Avenue and the residential zones to the south by requiring the erection of the five metre landscaped berm.
11. If City Council determined that this would not mitigate the impact of Digital Signs, the three Use Classes for Digital Signs would not have been included in the DC2 Bylaw in December 2014. Mr. Murphy therefore asked the Board to infer that the berm is effective in mitigating the impact of the proposed Sign.
12. His client, MacDonald Outdoor Advertising, only deals in this type of convex sign because it is a higher quality Sign. In situations like this where a greater Setback is required, such signs maintain a high quality image even with the greater distance from the road.
13. The Sign is not brighter but allows more pixels and a higher clarity in image.
14. The proposed Minor Digital Sign will increase the aesthetics of the drive along 100 Avenue and will be less distracting and more attractive than the Major Digital Signs in this area.
15. It was his opinion that Schedule 59E.3(5)(d), contemplates Minor Digital On-premises Off-premises Signs that are larger than 20 square metres.
16. The minimum required 7.5 metres Side Yard requirement contained in DC2.876 is an absolute direction from City Council but the maximum allowable Sign Area is not set out in the DC2 Bylaw and is therefore not an absolute direction from Council.
17. Mr. MacDonald from MacDonald Outdoor Advertising clarified that the proposed Sign will be approximately 50 percent clearer than a 10 foot by 20 foot sign.

The Board then heard from Mr. Harry Luke and Mr. Sachin Ahuja, representing the Sustainable Development Department, who provided the following information:

1. Mr. Luke referenced the Zoning Bylaw amendment report from the Sustainable Development Department contained at Tab 3 of "Exhibit A".
2. Section 2 of that report is strictly an analysis of the Site conditions at the time of the rezoning application. It was not Sustainable Development's judgment regarding the suitability of Digital Signs for that site.
3. A good portion of the Landscaping along the five metres berm is comprised of deciduous trees that lose their foliage during the winter months.
4. He acknowledged that City Council allowed the development of Digital Signs on the subject Site by amending the DC2 Bylaw but emphasized that the regulations contained in Section 59.2 of the *Edmonton Zoning Bylaw* are applicable.
5. Sustainable Development recommended the addition of Digital Signs to the list of uses in DC2.876 and, if the proposed Sign had complied with the requirements of the bylaw, it would have been approved.

6. Subsequent to the refusal of this application in April 2015, the Appellant has provided a new Site Plan showing a new location for the Sign as well as information solicited directly from Transportation Services.
7. He referenced the Site Plan for the original proposed Sign showing the location of the Sign at the southwest corner of the site, 7.5 metres from both the south and west property lines.
8. Although that siting for the Sign met the locational criteria, the Development Officer and Transportation Services felt the Sign did not meet the traffic safety requirements.
9. He referenced the new Site Plan, which had been submitted by the Appellant today, showing the proposed Sign relocated 60 metres to the east.
10. Although the new location had been presented to Transportation Services for review, the new Site Plan had not been submitted to the Development Authority prior to this hearing.
11. The only information that the Development Authority had with respect to the proposed new location was the memorandum from Transportation Services dated June 26, 2015 which indicated that they did not object to the proposed new location.
12. The Development Officers give every opportunity to an Applicant to make revisions prior to making a decision. It is very frustrating when information is submitted following the decision of the Development Officer.
13. It was his opinion that the new Sign location requires a new development permit application with notice to affected property owners.
14. He expressed concern regarding the dimensions of the sign as provided by the Appellants. He referred to the representation of the proposed Sign that had been submitted by the Appellants. On it he had put the measurements for the face of the Sign as being 24 feet wide and 14 feet high with an additional 2 feet at the bottom to display the name of the hotel and other information. The calculations made by him at the bottom of the representation indicated a Sign Area of 35.72 square meters, which exceeds the initial proposed sign area of 31.2 square metres.
15. It was his opinion that DC2.876 is neither incomplete nor ambiguous. It does not provide discretion to the Development Officer and therefore the decision of refusal complies with the direction from city council.
16. Digital Signs are a Discretionary Use in every zone within the *Edmonton Zoning Bylaw*.
17. Section DC2.876.4(z)(i) is an additional requirement to the requirements of section 59.2 of the *Edmonton Zoning Bylaw* that must be met first.
18. The Place LaRue West Neighborhood Area Structure Plan requires that negative impacts must be mitigated. The berm was intended to mitigate noise but DC2.876 contains additional requirements with respect to light.
19. DC2.876 was used to impose special regulations to address the incompatibility between the neighbouring zones.
20. The 10 metres threshold referred to by Mr. Murphy is not specific to Freestanding Signs.
21. This requirement was included in the previous version of DC2.876 and was intended to apply to more than Digital Signs.
22. It was his opinion that the new Site Plan submitted by the Appellant today is not accurate with respect to scale.

They provided the following responses to questions:

1. The curvature of the proposed Sign provides extra exposure that would not be provided with a flat screen Sign.
2. All Digital Signs must have ambient light sensors to allow dimming of the Sign.
3. Sustainable Development is concerned about light pollution and visual impact and neighbouring property owners have also expressed concerns about these matters.
4. A rezoning application for a DC2 zone is in effect a contract zoning.
5. Some schedules of the *Edmonton Zoning Bylaw* have embedded variance powers, such as Schedule 54, but Schedule 59E does not contain specific variance powers.
6. Section 11.4 of the *Edmonton Zoning Bylaw* is very specific regarding the variance powers of the Development Officer. This limitation applies unless it is specifically changed by the Direct Control District Bylaw.
7. In typical situations where a permit for a Sign is being applied for, the Development Officer would be able to vary the size of a proposed Sign.
8. The inclusion of Schedule 59E in DC2.876 provided direction from City Council regarding Sign regulations and it was the interpretation of the Development Officer that there was no variance power with respect to the regulations in that schedule.
9. DC2.876 specifically applies the regulations contained in Schedule 59E.
10. It was his opinion that the comments made by the Appellant regarding lighting and the 10 metre Height threshold were purely anecdotal.
11. The 10 metre Height threshold applies to all Signs, not just Digital Signs.
12. The Digital Sign regulations were adopted in 2011 and have been a learning experience for the City.
13. The proposed Sign will be larger than allowed and will, therefore, create more light and contribute to light pollution.
14. They have not had an opportunity to evaluate the proposed new location of the Sign in relation to other existing Signs. The Site Plan should be drawn to scale to ensure that the Sign is sited correctly.
15. It was his opinion that neighbouring property owners should be notified about the proposed change in location.

Mr. Murphy made the following points in rebuttal:

1. The fact that the decision of the Development Authority was based on the old Sign location and not the one submitted today does not necessitate a new development permit application.
2. If the appeal was denied and a new development permit application was submitted, the Appellant would be advised that there is a six month waiting period because the same development is being proposed on the same Site.
3. Relocating the Sign was an attempt to address the biggest problem, mainly the safety concerns raised by Transportation Services and in doing so the concerns regarding light pollution and visual intrusion have not been exacerbated.
4. They could not go back to the Development Authority at this point because they are *functus*.
5. Locating the Sign to the east will not change the fact that property owners along 100 Avenue both east and west of the subject site have received notice. The notice sent to the property owners did not specify the location of the Sign on the site.
6. The residents residing south of the subject site who expressed concerns did not address the specific location of the proposed Sign.

7. He referenced a photograph contained in the PowerPoint presentation to illustrate that even when there is no foliage on the deciduous trees, the houses behind the berm cannot be seen from 100 Avenue.
8. Sustainable Development indicated that the berm provides protection to the residential area for Signs that are less than 10 metres in Height, which can be inferred from DC2.876.
9. Even if the Sign is moved 60 metres to the east, it complies with the separation distance requirements set out in Schedule 59E.3(5)(d) of the *Edmonton Zoning Bylaw* because the proposed Sign is more than 400 metres away from the closest Digital Sign. A variance is not being requested for this requirement or the Side Setback. If the Sign does not comply with both of these requirements it cannot be built.
10. Sustainable Development should have been aware that the Sign could be moved to address the concerns of Transportation Services.
11. It is common for Appellants to revise Site Plans at a Board hearing and in his experience it happens regularly.
12. He agreed that it was important for the Sign to comply with Section 59.2 of the *Edmonton Zoning Bylaw*.
13. The Development Authority had offered a new characterization of the reasons for refusal, specifically that discretion was not provided to vary the maximum allowable size of the Sign.
14. In his experience it is common for the Development Authority to use discretion to vary requirements in a Direct Control Zone.
15. It was his opinion that the concerns of the Development Officer were not related to the size of the Sign but rather light pollution and visual intrusion.
16. The *Edmonton Zoning Bylaw* incorporates variance powers except where specifically excluded and that variance power allows the Development Office to allow a variance to the size of the proposed Sign.
17. Section DC2.876.4(z)(i) requires an exercise of discretion because there is no way to measure light pollution and visual intrusion. The Development Authority is required to make a discretionary decision.
18. The Development Officer testified that even if the Sign complied with the size requirements, it could be refused for contributing to light pollution. This amounts to an acknowledgement by the Development Officer that the decision to refuse the permit was discretionary, and based on light pollution and visual intrusion, not the size of the Sign.
19. A 10 foot by 20 foot Sign will not work at this location because of the Side Setback requirement and the lower resolution of that type of screen.
20. The addition of extra Sign Area at the bottom of the Sign will not impact the amenities of the residential properties located south of 100 Avenue or the commercial developments along 100 Avenue.
21. The inclusion of Schedule 59E in the amendment of DC2.876 may have been an oversight by the hotel owners who may not have been aware of the impact of including that Schedule in the rezoning application.
22. A smaller curved Sign could be manufactured with the same level of clarity but consistency of size with other Signs throughout the City would be lost and it would be more expensive to manufacture because it would be a custom build.
23. The proposed Sign is eight metres in Height and the berm is five metres high, which means that the Sign cannot be seen by residents to the south because of the berm is located close to the houses and it will block the view of the proposed Sign from the houses.

24. In certain situations it is not possible to negotiate with a Development Officer after a development permit application is submitted, which necessitates an appeal to the Board.
25. Neighbours received notice of the appeal regarding the development of a Sign on the Site and the location of the Sign was not provided, which is normal practice.
26. Section 720.3(3) of the *Edmonton Zoning Bylaw* incorporates all administrative regulations, including the variance power in Section 11, in DC2 provisions unless specifically excluded in the DC2 provision. There is no language in DC2.876 that specifically excludes the Development Officer's variance power with respect to the regulations in Schedule 59E.3.
27. The relocation of the Sign is a minor change and requiring a new development permit application will have the effect of slowing down the entire development permit decision making process and preclude consideration of revised Site Plans at Board hearings.
28. If the Board refuses the development permit application based on the original location and the failure to comply with Section 59.2 of the *Edmonton Zoning Bylaw* and the concerns of Transportation Services with respect to safety, an identical application will be made in six months that will be essentially the same as the one before the Board today.

Decision:

that the appeal be DENIED and the decision of the Development Authority CONFIRMED regarding the first ground of refusal that the proposed sign would contribute to light pollution and visual intrusion into residential properties south of 100 Avenue, contrary to Section DC2.876.4(z)(i).

Reasons for Decision:

The Board finds the following:

1. Minor Digital On-premises Off-premises Signs is a listed Use in DC2.876 Site Specific Development Control Provision ("DC2.876").
2. The Board was required to determine if it could consider the revised Site Plan submitted by the Appellant in this appeal.
3. The second reason for refusal cited by the Development Authority was that the proposed sign did not comply with Section 59.2(2) of the *Edmonton Zoning Bylaw* because it would interfere with the view of a traffic control signal on the northeast corner of the intersection at 100 Avenue and 184 Street.
4. To address this, the Appellant prepared a revised Site Plan that located the proposed sign 60 metres further east than the location in the original application. This was submitted to Transportation Services, who then removed their objections related to Section 59.2(2).
5. The Development Authority expressed concern that they had not had an opportunity to review the revised plan with respect to separation distances from other Digital Signs and that affected property owners had not been notified of the proposed new location.
6. The Board finds that it can consider the revised plan with the change in location. As is the usual practice, the notice to property owners did not specify the location of the Sign on the site. The contents of a new notice to affected property owners would be the same. Accordingly, the Board finds that it is unlikely that additional objections to the proposed development would result. Regarding separation distances, a condition can be imposed

regarding the minimum required separation distance from other Signs if the Board decides to issue a development permit.

7. The Board must decide if it has jurisdiction to substitute its decision for that of the Development Authority. Section 641(4)(b) of the *Municipal Government Act* states:
if a decision with respect to a development permit application in respect of a direct control district is made by a development authority, the appeal is limited to whether the development authority followed the directions of council, and if the subdivision and development appeal board finds that the development authority did not follow the directions it may, in accordance with the directions, substitute its decision for the development authority's decision.
8. The Appellant submits that the Development Authority did not follow the directions of Council. The basis for this submission is essentially that the Development Authority exercised discretion in making its decision. Such an exercise of discretion does not follow Council's direction because it is impossible for Council to specify how such discretion should be exercised. Therefore, whenever the Development Authority exercises discretion in deciding whether or not to issue a development permit in a direct control district, the Board has the jurisdiction to substitute its decision for that of the Development Authority. The Board must determine if the principles of statutory interpretation support this submission.
9. In Canada, the courts have consistently applied Elmer Driedger's so-called golden rule of statutory interpretation, which is that the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
10. With respect to the scheme of the *Municipal Government Act* regarding development permits in districts other than direct control districts, section 640(2)(b) states that, for districts other than direct control districts, the land use bylaw must prescribe permitted uses and uses allowed at the discretion of the development authority. Section 642(1) states that a development authority is required to issue a development permit for a permitted use if the development conforms to the land use bylaw. Section 685 provides a right of appeal to a subdivision and development appeal board if a development authority fails to issue a development permit or issues a development permit subject to conditions. The section provides that there is no right of appeal in respect of a development permit for a permitted use unless the provisions of the land use bylaw were relaxed, varied or misinterpreted.
11. Section 685, therefore, provides that there is a right of appeal in situations where a development authority has exercised discretion when deciding whether or not to issue a development permit.
12. Section 687(3) gives a subdivision and development appeal board considerable discretion in dealing with these appeals. The boards may confirm, revoke or vary the development permit or any conditions or substitute a permit of their own. They can issue development permits that do not comply with the land use bylaw if they are of the opinion that the development will not unduly interfere with the amenities of the neighbourhood or materially interfere with the use, enjoyment or value of neighbouring parcels of land.
13. The statutory scheme makes it clear that, in all districts except direct control districts, discretionary decisions by the Development Authority in respect of development permits are subject to appeal and that the Board has broad discretion when dealing with those appeals.
14. The situation is quite different for direct control districts. Section 641(2) states that in direct control districts council may regulate development in the district in any manner it considers

necessary. Section 641(3) gives council power to delegate decisions regarding development permit applications with directions it considers necessary. Section 641(4) provides that despite the right of appeal provided by section 685, an appeal from a development authority's decision is limited to whether the development authority followed the directions of council. If a subdivision and development appeal board concludes that these directions were not followed, it may substitute its decision but it is also limited to following council's directions. The broad powers the Board has regarding other development permit appeals are significantly limited in these circumstances. The only consideration is ensuring that the directions of council are followed.

15. This review of the statutory scheme in respect of development permit appeals shows that, in districts other than direct control districts, an exercise of discretion by the Development Authority gives rise to a right of appeal and the Board has considerable latitude in dealing with those appeals. However, for direct control districts, the sole issue to be considered on appeal is whether the directions of Council were followed and the Board's powers are limited to ensuring that they were.
16. A purposive reading of section 641(4)(b) does not support the Appellant's submission that any exercise of discretion by the Development Authority automatically triggers a right of appeal to the Board. Such an exercise of discretion does give rise to a right of appeal in all other zones but it is clear that the Legislature intended that appeals regarding direct control districts should be treated differently. The plain reading of the section indicates that the only consideration for the Board in determining whether it has jurisdiction to interfere with the decision is whether the directions of Council were followed. If the Legislature had intended that the Board should automatically have the right to substitute its decision for that of the Development Authority every time discretion was exercised, it could have included explicit language in section 641(4)(b).
17. The Board does not agree with the Appellant's submission that an exercise of discretion by the Development Authority is tantamount to not following the directions of Council because Council can't specify how discretion should be exercised and has, therefore, exercised less than complete direct control. The Board is of the view that, if Council has given the Development Authority discretion, either specifically in the direct control provision in question or by reference to other sections of the Zoning Bylaw, the Development Authority is following the directions of Council so long as it exercises the discretion in the way Council intended.
18. If the Development Authority fails or refuses to exercise discretion that has been delegated to it in a direct control provision, this would amount to a failure to follow Council's directions and give the Board jurisdiction to intervene.
19. If the Development Authority exercises discretion that has been delegated to it in a direct control provision in an unreasonable manner, this would amount to a failure to follow Council's directions and give the Board jurisdiction to intervene because it is implicit that delegated discretion must be exercised reasonably. In determining if discretion has been exercised reasonably, the Board must determine whether the decision falls within a range of possible acceptable outcomes that are defensible in respect of the facts and law. If it does, the Development Authority has followed the directions of Council and the Board cannot intervene.
20. If the direct control provision is silent on particular matters and has left gaps in the regulations governing the direct control district, any decisions by the Development Authority

with respect to those matters fall outside the directions of Council and give the Board jurisdiction to deal with them pursuant to its powers under section 687(3).

21. Applying this analysis to the instant appeal, the Board finds that the Development Authority's decision does comply with the directions of Council. There are no gaps in DC2.876 as there were in the direct control provision dealt with in SDAB decision SDAB-D-14-246, which was referred to by the Appellant. Nor is this a case where the Development Authority has failed to exercise discretion that has been delegated to it. Further, the Board is of the view that the Development Authority exercised its discretion reasonably.
22. Section DC2.8764(z) states that Schedule 59E shall apply to Minor Digital On-premises Off-premises Signs. The Development Authority followed the directions of Council and used section 59E.3(5)(c)(ii) to determine the maximum area allowed for the proposed Sign. That section states that for Minor Digital On-premises Off-premises Signs the maximum Area shall be 20 square metres for proposed Signs that are Freestanding Signs.
23. Based on a review of the plans the Development Authority determined that the proposed Sign exceeds the maximum allowable Sign Area by 11.2 square metres.
24. Section DC2.876.4(z)(i) states that all Digital Signs shall be designed to minimize light pollution and visual intrusion into residential properties south of 100 Avenue. As was pointed out by the Appellant, this section gives the Development Authority discretion to decide if the proposed Sign will result in light pollution and visual intrusion into the residential neighbourhood. The Development Authority followed the directions of Council and exercised its discretion, stating: "In the opinion of the Development Officer, any excess sign area other than permitted for the Minor Digital On-premises Off-premises Sign, would contribute to light pollution and visual intrusion into residential properties south of 100 Avenue, contrary to Section DC2.876.4(z)(i)."
25. The Development Authority also followed the directions of Council in s. DC2.876.4(z)(ix) in determining whether the Sign complied with s. 59.2 of the Zoning Bylaw. As was indicated previously, the Development Authority's refusal on this ground has been rendered moot because the re-location of the proposed sign 60 metres to the east has eliminated the non-compliance with s. 59.2(2).
26. Accordingly, the Board does not have the authority to substitute its decision for the decision of the Development Authority.
27. In the alternative if the Board is wrong and it does have the authority to substitute its decision for that of the Development Authority, the Board finds that the required variance in the maximum allowable Sign Area would not have been granted for the following reasons:
 - a) It is evident from s. DC2.876.4(z) that Council was concerned about the impact of light pollution and visual intrusion from signs on the residential neighbourhood south of 100 Avenue. The provisions in this section are additional requirements to those contained in Schedule 59E. The directions in Subparagraphs (i), (ii), (iii), (v), (vi) and (viii) are all intended to minimize the impact of signs on the neighbourhood. In Subparagraph (i) Council has specifically directed that Digital Signs, like the proposed Sign, must be designed to minimize light pollution and visual intrusion into the neighbourhood.
 - b) The proposed excess in Sign Area is 11.2 square metres over the 20 square metres maximum specified in s. 59E.3(5)(c)(ii), which is 56% larger than the maximum. This means that the proposed Sign will project 56% more light than a similarly designed sign that complies with the schedule. The size of the variance alone is not determinative of

- whether it will result in light pollution or visual intrusion into the neighbourhood, but considered with the factors discussed below, the Board finds the variance is too large.
- c) The Appellant submits that, because all the excess area is located at the bottom of the Sign, the berm between the Sign and the neighbourhood will block any view of the excess area. However, the berm is only five metres high, which is lower than the upper windows on a two-story house. The photographs and videos provided by the Appellant were taken at standing height and do not depict the view that a home owner would have from a second story window. Many of the trees on the berm are deciduous and would be bare for several months of the year and would not block light from the Sign. The Board is of the opinion that some if not all of the excess sign area would be visible from the second story of houses on the other side of the berm.
 - d) The Board notes that bedrooms are often located on the second storey of houses. The proposed Sign would change its image every six seconds. The Board is of the view that this constant changing of images would be very intrusive, particularly after dark.
 - e) The Board concludes that the design of the proposed Sign does not minimize light pollution and visual intrusion into residential properties south of 100 Avenue and that issuing a development permit for it would be contrary to the directions of Council in DC2.876(4)(z)(i).
28. The reasons in the preceding paragraph are also the reasons the Board finds the decision of the Development Authority to be reasonable and within the range of possible acceptable outcomes that are defensible in respect of the facts and law.

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*, 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.
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 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.

Mr. M. Young, Presiding Officer
Subdivision and Development Appeal Board