

Date: July 21, 2016
Project Number: 221419935-001
File Number: SDAB-D-16-161

Notice of Decision

- [1] On July 7, 2016, the Subdivision and Development Appeal Board heard an appeal that was filed on June 9, 2016. The appeal concerned the decision of the Development Authority, issued on June 2, 2016, to refuse the following development:

construct a Semi-Detached House with front veranda, Basement development (NOT to be used as an additional Dwelling) and demolition of an existing Single Detached House and Accessory Building.

- [2] The subject property is on Plan 4347HW Blk 12 Lot 12, located at 11933 - 47 Street NW, within the RF1 Single Detached Residential Zone. The Mature Neighbourhood Overlay applies to the subject property.

- [3] The following documents, which were received prior to the hearing and are on file, were read into the record:

- Copy of the Development Permit application with attachments, proposed plans, and the Development Officer's refusal decision;
- Copy of the registered mail receipt confirming delivery of the decision on June 6, 2016;
- Development Officer's written submissions, dated June 28, 2016; and
- Appellant's written documents, received July 7, 2016

Preliminary Matter

- [4] At the outset of the appeal hearing, the Presiding Officer confirmed with the parties in attendance that there was no opposition to the composition of the panel.
- [5] 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, Tech View Homes Ltd.

- [6] The Appellant was represented by Ms. D. Coultts, Secretary for Tech View Homes Ltd. The property owner, Mr. M. Tewolde, also appeared before the Board.
- [7] Ms. Coultts explained that Mr. Tewolde has owned the property for a while. He now wishes to convert the Single Detached House into a Semi-Detached House, which would provide more opportunities to raise rental income for his family. The neighbours on both sides immediately adjacent to the subject property have expressed no concerns with respect to the proposed development. Many rental properties and Semi-Detached Houses are located across the street along 47 Street. The Appellant submitted that so long as the development regulations are complied with, there should be no concern with approving the proposed development.
- [8] Upon questioning by the Board, Mr. Tewolde identified two six-plexes on 47 Street, located between 118 Avenue and 119 Avenue. Two brand new duplexes have also been built along this street. The owners of the duplexes informed him that the properties had been built a couple of years ago.
- [9] Referring to an aerial map of the surrounding area, Mr. Tewolde also identified two churches: one on the southwest corner of 47 Street and 120 Avenue, and a second located on the northeast corner of 47 Street and 119 Avenue, which also has a rear parking lot located in the middle of the blockface.
- [10] Mr. Tewolde confirmed that he did not consult with the property owners located across the rear laneway.

ii) Position of the Development Officer, Mr. K. Yeung

- [11] Mr. Yeung stated that, with the exception of the locational criteria under Section 110.4(4) of the *Edmonton Zoning Bylaw*, the proposed development complies with all development regulations.
- [12] Mr. Yeung explained that his refusal was based mainly on the City of Edmonton's Residential Infill Guidelines, which sets out the locational criteria for Semi-Detached Housing developments in mature neighbourhoods. These Guidelines were established to protect the critical mass of Single Detached Housing existing within the interior of mature neighbourhoods. Mr. Yeung acknowledged that while the Guidelines provide some direction with respect to infill development in mature neighbourhoods, they do not constitute a statutory plan as defined under the *Municipal Government Act*.
- [13] Upon questioning by the Board, Mr. Yeung acknowledged that there appears to be at least one Semi-Detached House located at the northwest corner of 47 Street and 119

Avenue, and two more located on interior lots along the same street. However, these existing Semi-Detached Houses may have been built before 1996 and prior to the amendments to the locational criteria under Section 110.4(4).

- [14] The Board noted that the locational criteria under Section 110.4(4) appear to contemplate Semi-Detached Housing where appropriate, such as when situated near other high density residential developments or commercial uses. In this instance, other Semi-Detached developments already exist within the neighbourhood, and the subject property is located across from a church, while being located on the same blockface as a second church. In response, Mr. Yeung noted that the subject property does not abut directly to a church or other existing higher density residential development. Although it is in close proximity, which is one factor that is taken in consideration, he ultimately did not find any hardship posed by the subject Site which would justify a variance.
- [15] Upon questioning by the Board, Mr. Yeung stated that so long as parking as per the proposed plan is followed, he did not believe the subject development would have an adverse impact upon the neighbourhood or neighbouring properties. In his view, since the proposed development meets all development regulations, there would have been no issue with approving the development application, if not for the locational criteria.
- [16] When questioned as to why he had not discussed the possibility of rezoning with the Applicant, Mr. Yeung explained that although rezoning is an option, it would likely require additional timelines and costs to the Applicant. Furthermore, he is not a Land Use Officer and would not be qualified to provide information with respect to rezoning applications. His expertise as a Development Officer lies with planning and development, and in this regard, he did speak with the Applicant about exploring alternative development options, including the possibility of applying for other uses within the zone.

Decision

- [17] The appeal is **ALLOWED** and the decision of the Development Officer is **REVOKED**. The Development as applied for to the Development Authority is **GRANTED**, subject to the following **CONDITIONS**:
- 1) The development shall be constructed in accordance with the stamped and approved drawings.
 - 2) Immediately upon demolition of the building, the site shall be cleared of all debris.
 - 3) The proposed Basement development(s) shall **NOT** be used as an additional Dwelling.
 - 4) The maximum Height shall not exceed 8.6m, in accordance with Section 52 of the Edmonton Zoning Bylaw 12800.

- 5) Platform Structures greater than 1.0 m above Grade shall provide privacy screening to prevent visual intrusion into adjacent properties. (Reference Section 814.3(8))
- 6) Single Detached Housing/Semi-detached housing requires 2 parking spaces per dwelling; parking may be in tandem as defined in Section 6.1(100) (Reference Schedule 1 of Section 54.2).
- 7) The area hard surfaced for a driveway, not including the area used for a walkway, shall comply with Section 54.1 (4).
- 8) Except for the hardsurfacing of driveways and/or parking areas approved on the site plan for this application, the remainder of the site shall be landscaped in accordance with the regulations set out in Section 55 of the Zoning Bylaw.
- 9) All yards, visible from a public roadway other than a lane, shall be seeded or sodded within eighteen (18) consecutive months of the issuance of an Occupancy Certificate for the development. Alternative forms of landscaping may be substituted for seeding or sodding as specified in Section 55.2(4)(b).
- 10) Existing vegetation shall be preserved and protected unless removal is demonstrated, to the satisfaction of the Development Officer, to be necessary or desirable to efficiently accommodate the proposed development. (Reference Section 55.4(8)).
- 11) For Single-detached Housing, Semi-detached Housing and Duplex Housing, a minimum Private Outdoor Amenity Area shall be designated on the Site plan. Neither the width nor length of the Private Outdoor Amenity Area shall be less than 4.0 m. The Private Outdoor Amenity Area may be located within any Yard, other than a Front Yard, and shall be permanently retained as open space, unencumbered by an Accessory Building or future additions. (Reference Section 47)
- 12) This Development Permit shall be revoked if the conditions of this permit are not met.

Advisements

- 1) Any future deck development greater than 0.6m (2ft) in height will require development and building permit approvals.
- 2) Any future deck enclosure or cover requires a separate development and building permit approval.
- 3) Note that Secondary Suite Use Class does not include Semi-detached Housing.

- 4) Dwelling means a self-contained unit comprised of one or more rooms accommodating sitting, sleeping, sanitary facilities, and a principal kitchen for food preparation, cooking, and serving. A Dwelling is used permanently or semi-permanently as a residence for a single Household.
- 5) Household means: (1) one or more persons related by blood, adoption, foster care, marriage relationship; or (2) a maximum of three unrelated persons; all living together as a single social and economic housekeeping group and using cooking facilities shared in common.

For the purposes of this definition, two people living together in an adult interdependence relationship shall be deemed to be in a marriage relationship and each of the relatives of the parties to an adult interdependence relationship shall be considered to be related to the partners and to the other relatives thereof. One domestic worker or one boarder may be deemed the equivalent of a blood relative.

- 6) The driveway access must maintain a minimum clearance of 1.5m from the service pedestal and all other surface utilities.
- 7) Lot grades must comply with the Edmonton Drainage Bylaw 16200. Contact Drainage Services at 780-496-5500 for lot grading inspection inquiries.

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

- 1) Section 110.4(4) with respect to the locational criteria for Semi-detached Housing is waived.

Reasons for Decision

[19] Semi-Detached Housing is a Discretionary Use in the RF1 Single Detached Residential Zone.

[20] The only variance required with respect to this development is the locational criteria contained under Section 110.4(4) of the *Edmonton Zoning Bylaw*, which requires that Semi-detached Housing be located on either Corner Sites, Sites abutting an arterial road, where both Side Lot Lines abut existing Duplex or Semi-detached Housing, or where at least one side lot line abuts or is in close proximity to row housing, apartment housing or a commercial use.

- [21] This Site is located one lot in from a corner lot. In the course of the hearing, the Development Officer expressed the opinion that this development would likely not have an adverse impact on the neighbourhood because no parking variances are required.
- [22] The Board notes that the street along which the proposed development is located is far from a typical single detached residential street. There are two churches located on the street, one of which has a large parking lot in the middle of the blockface. At the end of the street, there are already three existing Semi-Detached Houses. As well, the neighbours directly to the north and south of the proposed development indicated their support for the development. Further, neither the community league nor any neighbours within the 60 metre notification radius voiced any opposition to the development.
- [23] The Development Officer referenced the Residential Infill Guidelines as one of the policy documents which factored into his decision. The Board notes that this document sets out General Guidelines for Residential Infill in Edmonton's Mature Neighbourhoods, and one of these guidelines emphasizes that "Higher intensity infill development should be focused on the edge of neighbourhoods." (page D3) The proposed development is located just one lot in from the corner.
- [24] Considering all the above, the Board is of the opinion that granting the variance to this development will not unduly interfere with the amenities of the neighbourhood, nor materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land.

Mark Young, Presiding Officer
Subdivision and Development Appeal Board

Board Members in Attendance

Ms. K. Thind, Ms. A. Lund, Mr. A. Bolstad

Important Information for the Applicant/Appellant

1. This is not a Building Permit. A Building Permit must be obtained separately from the Sustainable Development Department, located on the 5th Floor, 10250 – 101 Street, Edmonton.
2. Obtaining a Development Permit does not relieve you from complying with:
 - a) the requirements of the *Edmonton Zoning Bylaw*, insofar as those requirements have not been relaxed or varied by a decision of the Subdivision and Development Appeal Board,
 - b) the requirements of the *Alberta Safety Codes Act*,
 - c) the *Alberta Regulation 204/207 – Safety Codes Act – Permit Regulation*,
 - d) the requirements of any other appropriate federal, provincial or municipal legislation,
 - e) the conditions of any caveat, covenant, easement or other instrument affecting a building or land.
3. When an application for a Development Permit has been approved by the Subdivision and Development Appeal Board, it shall not be valid unless and until any conditions of approval, save those of a continuing nature, have been fulfilled.
4. A Development Permit will expire in accordance to the provisions of Section 22 of the *Edmonton Zoning Bylaw, Bylaw 12800*, as amended.
5. This decision may be appealed to the Alberta Court of Appeal on a question of law or jurisdiction under Section 688 of the *Municipal Government Act*, R.S.A. 2000, c. M-26. If the Subdivision and Development Appeal Board is served with notice of an application for leave to appeal its decision, such notice shall operate to suspend the Development Permit.
6. When a decision on a Development Permit application has been rendered by the Subdivision and Development Appeal Board, the enforcement of that decision is carried out by the Sustainable Development Department, located on the 5th Floor, 10250 – 101 Street, Edmonton.

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

Date: July 21, 2016
Project Number: 185136522-001
File Number: SDAB-D-16-163

Notice of Decision

[1] On July 7, 2016, the Subdivision and Development Appeal Board heard an appeal that was filed on June 9, 2016. The appeal concerned the decision of the Development Authority, issued on June 2, 2016, to refuse the following development:

change the use from Business Support Services to Minor Alcohol Sales and Professional, Financial and Office Support Services and to construct interior alterations

[2] The subject property is on Plan ND Blk 3 Lots 7-8, located at 10164 - 96 Street NW within the DC1 Direct Development Control Provision, Bylaw 16849 (Armature Area 3). The Quarters Downtown Area Redevelopment Plan applies to the subject property.

[3] The following documents, which were received prior to the hearing and are on file, were read into the record:

- Copy of the Development Permit application with attachments, proposed plans, and the Development Officer's refusal decision;
- Copy of the registered mail receipt confirming delivery of the decision on June 7, 2016;
- Development Officer's written submissions, dated June 13, 2016;
- Appellant's written submissions, dated June 29, 2016;
- One letter in opposition to the development; and
- Copies of Bylaw 16849 and the Quarters Downtown Area Redevelopment Plan.

Preliminary Matter

[4] At the outset of the appeal hearing, the Presiding Officer confirmed with the parties in attendance that there was no opposition to the composition of the panel.

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

i) *Position of the Appellant, Liquors on Jasper*

[6] The Appellant was represented by legal counsel, Ms. J. Agrios. Mr. S. Grewal and Ms. S. Grewal, the owners of the Appellant, Liquors on Jasper, were also present.

Background Information

[7] The owner of the existing Minor Alcohol Sales Use, Liquors on Jasper, has operated the business in the downtown area for approximately 20 years. For the last eight years, it has operated the business from its current location on 9539 Jasper Avenue.

[8] The Applicant seeks to relocate its business to 10164 – 96 Street NW, as its lease at the current location is expiring. The landowner is the City of Edmonton, which had originally acquired the building, in which Liquors on Jasper is located, for LRT expansion purposes. Under Section 85(3), a Minor Alcohol Sales Use cannot be located within 500 metres of another Minor Alcohol Sales Use. The only liquor store within 500 metres of the proposed liquor store is the Applicant's existing liquor store.

[9] Liquors on Jasper would like to cancel the development permit at the existing location. However, under Section 17.2(1)(e), a Development Officer may cancel an approved permit only if the landowner requests the cancellation via written notice to the Development Officer. The landowner, the City of Edmonton, has refused to request cancellation of the development permit.

[10] Upon questioning by the Board, the Appellant clarified that the existing liquor store is located within a complex of four buildings, owned by the City of Edmonton. All other tenants have already left the complex. One of the buildings, the Mitchell and Reed Auction House, is listed within the City's Inventory of Historic Resources, and the City's preference is that the buyer attempt to preserve this building. The City also prefers that a second building, the Graphic Arts Building, be relocated and preserved.

[11] Mr. Grewal has submitted a proposal to purchase the Site, which has been listed at \$1,500,000.00. However, he is unsure as to whether his bid will succeed, as the additional cost to preserve the historical buildings fall in the range of \$3 million to \$4 million, which Mr. Grewal is not prepared to spend.

Issues

[12] Referring to Tab 1 of the Appellant's written submissions, Ms. Agrios noted that the Development Officer has identified two reasons for refusal: first, the proposed liquor store is located within 500 metres of another liquor store, in contravention of Section 85(3) of the *Edmonton Zoning Bylaw*, and second, the Appellant has not met the Crime Prevention Through Environmental Design Criteria ("CPTED Criteria") pursuant to Section 85(7).

[13] In addition, Ms. Agrios drew attention to Section 641(4)(b) of the *Municipal Government Act*, which states that

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.

[14] Ms. Agrios submitted that the Development Officer failed to follow the directions of council by neglecting to consider several factors that would justify a variance to the 500 metre separation distance requirement under Section 85(3) of the *Edmonton Zoning Bylaw*. For that reason, the Board should substitute its decision for that of the development authority's, pursuant to Section 641(4)(b) of the *Municipal Government Act*, and grant the necessary variance.

Development Officer's Failure to Follow the Directions of Council

[15] Ms. Agrios submitted that the 500 metre separation distance requirement under Section 85(3) is part of the general regulations of the *Edmonton Zoning Bylaw*. Since the Development Officer has relied upon a general regulation in his reasons for refusal, the Development Officer should have exercised his discretionary powers in these circumstances to grant the variance.

[16] In support, Ms. Agrios referred the Board to Section 40, which states: "The General Development Regulations shall apply to all developments on all Sites, and shall take precedence except where the regulations of a Zone, Overlay or Development Control Provision specifically exclude or modify these provisions with respect to any Use." In other words, City Council has structured the *Edmonton Zoning Bylaw* such that the general development regulations of the *Edmonton Zoning Bylaw* apply in a Development Control Provision unless they are specifically ousted, including the Development Officer's discretionary power to vary.

[17] In this case, nothing in the Direct Control Provision specifically excludes or modifies the development regulations. As such, Ms. Agrios submitted that the directions of Council were not followed because the Development Officer simply applied the regulations without exercising his discretionary powers.

Effect of Development Officer's Failure to Follow the Directions of Council

- [18] Ms. Agrios submitted that since the Development Officer has failed to follow the directions of Council, the Subdivision and Development Appeal Board then steps into the position of the Development Officer and exercises that discretionary power in determining whether to grant the necessary variance. In such case, the Board's test for whether to grant a variance is derived from Section 687(3)(d) of the *Municipal Government Act*, which states in part that the Board may decide to grant a development permit even where it does not comply with the *Edmonton Zoning Bylaw*, if "the proposed development would not unduly interfere with the amenities of the neighbourhood, or materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land."
- [19] Ms. Agrios submitted that the proposed development meets the test established under Section 687(3)(d) for the following reasons:
- a) Apart from one letter of opposition, no others have been received, and none from the most impacted property owner abutting the subject Site. Ms. Agrios also noted that the owner who wrote the letter of opposition appears to believe that Mr. Grewal will continue to operate his store at the existing location, but Mr. Grewal has no such intentions. Further, the writer appears to be concerned about Alcohol Sales Use in general, but the Appellant noted that Minor Alcohol Sales Use is a Listed Use within this DC1 Zone.
 - b) Ms. Agrios submitted Exhibit "A", a Google Maps image of the proposed Site as it currently stands. Ms. Agrios noted that the property is an older, somewhat derelict building, which was formerly a print shop. Ms. Agrios then referred to Tabs 2 and 3 of the Appellant's written submissions, which included a rendering of the proposed development once exterior alterations are complete, and proposed floor plans for the development, which includes a small café in the north section of the building. Ms. Agrios submitted that these renovations will have a positive impact upon the neighbourhood, and may actually help support neighbourhood revitalization.

Requirement to Meet the CPTED Criteria

- [20] With respect to the Development Officer's second ground for refusal, Ms. Agrios explained that when the Applicant had initially moved forward with the development application, he understood that the proposed location for his new liquor store was located within 500 metres of his existing liquor store located at 9539 Jasper Avenue NW. However, he anticipated that the City would cancel the development permit for a Minor Alcohol Sales at the existing location without any issues, and he therefore moved forward with submitting plans for review.
- [21] When the 500 metre separation distance proved a greater hurdle than initially anticipated, he felt that incurring further costs to comply with the CPTED Criteria would be

meaningless should it be impossible to resolve the 500 metre separation distance. However, should the matter regarding separation distances be resolved, he will comply with the CPTED Criteria, and is amenable to a condition, should the Board choose to allow the appeal and grant the development permit, that he comply with the CPTED Criteria. Ms. Agrios emphasized that the Appellant was not seeking a variance to the CPTED Criteria under Section 85(7).

ii) *Position of the Development Officer, Mr. C. Chan*

[21] Mr. Chan confirmed that the Appellant also has a separate development application for exterior alterations to the subject property under review, which will require compliance with the CPTED Criteria. As such, the real concern with respect to the subject development under appeal is the 500 metre separation distance, which formed the basis for his refusal.

[22] Upon questioning by the Board, Mr. Chan explained that it was his understanding that, if he had granted the variance, then the development permit on the existing Site would become non-conforming. Once Mr. Grewal ceases his liquor sales operation at the existing Site, a new liquor store tenant would have to move in within six months, otherwise the permit would lapse. To avoid creating a non-conforming use, Mr. Chan refused the development permit.

[23] The Board referred to Section 85(5) of the *Edmonton Zoning Bylaw*, which states that “The issuance of a permit which contains a variance pursuant to Section 85.4 may be issued as a Temporary Development for a duration, to be determined by the Development Officer...” In response to questioning by the Board, Mr. Chan explained that such a Temporary Development would typically be issued for a duration of six months to one year.

iii) *Position of Affected Property Owner, E4C*

[24] Ms. T. Tellier appeared on behalf of E4C, a non-profit charitable organization that provides social services at a number of locations throughout the city, including one located on a triangular-shaped lot located along 96 Street and Jasper Avenue/101A Avenue. The site is located in the Flat Iron Building along Jasper Avenue, immediately across from the existing liquor store and just south of the proposed development.

[25] The Board determined that Ms. Tellier was a person affected by a decision of the Development Officer under Section 687(1)(d) of the *Municipal Government Act*, and passed a motion to hear her submissions with respect to the proposed development.

[26] Ms. Tellier explained that E4C provides social housing in the Flat Iron Building. When a liquor store was first proposed at the current location at 9539 Jasper Avenue, E4C was among those opposed. The organization was concerned because many of its clients have

drug and alcohol issues. However, it was her opinion that in the years since the Appellant has been operating at its current location, the liquor store has not contributed to clients' problems. The Appellant has been a good neighbour and E4C's clients have been treated well at the liquor store.

- [27] In her experience, the proximity of a liquor store has no particular impact upon an alcoholic's decision to purchase alcohol. If an alcoholic wants alcohol, he or she will travel to where it is available.
- [28] She recognized that the optics suggest that allowing alcohol sales in an area has a negative impact, but that has not been E4C's experience with the Appellant's liquor store.
- [29] She supports efforts to revitalize the area. She has no preference between the existing location and the new location for a liquor store in the area, and was not concerned about the possibility of having two liquor stores in the neighbourhood.

vi) *Rebuttal of the Appellant*

Creation of Non-Conforming Use

- [30] Ms. Agrios disagreed with the Development Officer's submissions with respect to how a non-conforming use is created. Ms. Agrios referred the Board to Sections 643(1) and (2) of the *Municipal Government Act*, which provide as follows:

643(1) If a development permit has been issued on or before the day on which a land use bylaw or a land use amendment bylaw comes into force in a municipality and the bylaw would make the development in respect of which the permit was issued a non-conforming use or non-conforming building, the development permit continues in effect in spite of the coming into force of the bylaw.

(2) A non-conforming use of land or a building may be continued but if that use is discontinued for a period of 6 consecutive months or more, any future use of the land or building must conform with the land use bylaw then in effect.

- [31] Section 616(r) defines "non-conforming "use" as:

a lawful specific use

(i) being made of land or a building or intended to be made of a building lawfully under construction at the date a land use bylaw affecting the land or building becomes effective, and

(ii) that on the date the land use bylaw becomes effective does not, or in the case of a building under construction will not, comply with the land use bylaw;

[32] In other words, a non-conforming use can only be created by an amendment in the *Edmonton Zoning Bylaw* as per Section 643(1) of the *Municipal Government Act*. In support, Ms. Agrios advised there was a recent decision of the Alberta Court of Appeal that confirmed that a legal non-conforming use is created only if there are two or more Major or Minor Alcohol Sales Uses operating as of the date of the enactment of the 500 metre separation distance provision. She did not know the case citation.

Expiry of Development Permit for Minor Alcohol Sales Use at Existing Location

[33] Ms. Agrios also disagreed with the Development Officer's submissions with respect to the expiry of the Development Permit for the Minor Alcohol Sales Use at the existing location at 9539 Jasper Avenue.

[34] Under Section 643(2) of the *Municipal Government Act*, a development permit expires only where that non-conforming use has been discontinued after six consecutive months or more. The existing liquor store is not a non-conforming use as defined under Section 643(1), as no other liquor stores within 500 metres existed at the time that Section 85 of the *Edmonton Zoning Bylaw* was passed.

[35] Further, even if the Board granted the subject development permit and allowed a second liquor store to operate within 500 metres at the proposed location, the development permit at the existing location on 9539 Jasper Avenue NW does not become a non-conforming use as contemplated under Section 643(2) of the *Municipal Government Act*, since the two liquor stores did not exist at the time that Section 85 of the *Edmonton Zoning Bylaw* was passed.

[36] Ms. Agrios submitted that for these reasons, should the Board grant the development permit at the proposed location, the Minor Alcohol Sales Use permit for the existing location at 9539 Jasper Avenue NW would not expire pursuant to Section 643(2).

Did the Development Officer follow the directions of Council?

[37] Notwithstanding the discussion about the creation of legally non-conforming uses, Ms. Agrios emphasized that the issue is whether the Development Officer followed the directions of Council. In that regard, Ms. Agrios distinguished Section 85(3)(b) of the *Edmonton Zoning Bylaw*, which concerns the creation of a legally non-conforming use, from Section 85(3)(a), a regulatory provision that requires the Development Officer to exercise his discretion in determining whether to grant a variance. Should the Board find that the Development Officer failed to follow the directions of Council, then the Board

must substitute its own decision for that of the Development Authority's, pursuant to Section 641(4) of the *Municipal Government Act*.

- [38] Ms. Agrios referred the Board to *Parkdale-Cromdale Community League Association v Edmonton (City)*, 2007 ABCA 309 [*Parkdale-Cromdale*]. That decision concerned an appeal of a decision of the Subdivision and Development Appeal Board, wherein the Board held that "By including retail liquor sales as a permitted use [in the Direct Control Bylaw]... City Council in effect provided that retail liquor sales would be permitted no matter what other limitations might exist in the Zoning Bylaw." (para 8) The Court disagreed, and held that such an interpretation would be contrary to the express wording of Section 720.3(3) of the *Edmonton Zoning Bylaw*. The Court observed that "The mere listing of a series of permissible uses does not "specifically exclude" other general provisions of the Bylaw. The logic of this argument would exclude the application of all generic rules, which could not have been intended."
- [39] Although *Parkdale-Cromdale* dealt specifically with a DC2 Site Specific Development Control Provision, whereas the subject development before this Board concerns a DC1 Direct Development Control Provision, the Appellant submitted that the same principle applies in this case. Ms. Agrios reiterated her earlier submissions that, unless specifically ousted or modified by the Direct Development Control Provision, the general provisions of the Bylaw continue to apply, including the discretionary powers of the Development Officer.
- [40] In this case, it would appear that the Development Officer merely applied the regulatory provision under Section 85(3)(a), without exercising his discretionary powers by considering the unique circumstances surrounding the subject development which would otherwise justify a variance. In this way, the Development Officer failed to follow the directions of Council, and the Board should therefore substitute its own decision for that of the Development Authority's, pursuant to Section 641(4)(b) of the *Municipal Government Act*.
- [41] In exercising its authority under Section 641(4)(b), the Board must determine that the proposed development meets the test established under Section 687(3)(d). In this regard, Ms. Agrios noted that Ms. Tellier's oral submissions bolster her position that the proposed development would not unduly interfere with the amenities of the neighbourhood, or materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land.

Decision

- [42] The appeal is ALLOWED, and the decision of the Development Authority is REVOKED. The Development is GRANTED as applied for to the Development Authority, subject to the following CONDITIONS:

- 1) So long as the Appellant is operating a Minor Alcohol Sales Use at the proposed location at 10164 – 96 Street NW, and so long as this Development Permit remains

valid, the Appellant shall not operate a Minor Alcohol Sales Use at the existing location at 9539 Jasper Avenue.

- 2) The proposed development must meet the Crime Prevention Through Environmental Design Criteria as required under Section 85(7) of the *Edmonton Zoning Bylaw 12800*.
- 3) This development shall not be valid until the Crime Prevention Through Environmental Design condition is satisfied. A separate Development Permit is required for any exterior alterations.
- 4) Any outdoor lighting for any development shall be located and arranged so that no direct rays of light are directed at any adjoining properties, or interfere with the effectiveness of any traffic control devices. (Reference Section 51)

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

- 1) Section 85(3) with respect to the 500 metre separation distance between two or more Minor Alcohol Sales Uses is varied, to permit the development to be located 164 metres from an existing Minor Alcohol Sales Use, a variance of 336 metres.

Reasons for Decision

[44] Minor Alcohol Sales is a Listed Use within this DC1 Direct Control Provision.

[45] The Appellant has operated a Minor Alcohol Sales Use at 9539 Jasper Avenue for eight years. Its lease has expired and its landlord, the City of Edmonton, has the land up for sale. The Appellant wants to relocate and it has found a new location at 10164 – 96 Street NW. Its application for a development permit was refused by the Development Authority because the new location is located within 500 metres of the old location, contrary to Section 85(3) of the *Edmonton Zoning Bylaw*. The existing development permit at the old location can only be cancelled at the request of the owner of the land. The City of Edmonton has indicated that it will not request that the permit be cancelled.

[46] Section 641(4)(b) of the *Municipal Government Act* states:

641(4) Despite section 685, if a decision with respect to a development permit application in respect of a direct control district

...

- (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.

[47] To determine what the directions of Council are, the Board first considered the provisions of Bylaw 16849, the bylaw that created this direct control district. Schedule B of the bylaw, which contains the specific uses and regulations for this district, is silent about Minor Alcohol Sales, but it does specify in the General Purpose section that developments are to be carried out "in accordance with Section 860 of the Zoning Bylaw, The Quarters Downtown Area Redevelopment Plan and the Quarters Downtown Urban Design Plan." All of the sections and plans referenced are also silent with respect to Minor Alcohol Sales.

[48] In the course of the hearing, Section 40 of the *Edmonton Zoning Bylaw* was referred to in support of the position that the general provisions of the *Edmonton Zoning Bylaw* should apply to Minor Alcohol Sales in this district. However, Section 85, which deals with Minor Alcohol Sales, is not found in the general development regulations but in the Special Land Use Provisions of the *Edmonton Zoning Bylaw*.

[49] For the applicability of Special Land Use Provisions, Section 70 applies. It reads:

70. The Special Land Use Provisions apply to the Uses listed in the Land Use Zone in which they are located. They shall take precedence and be applied in addition to the requirements of the Zone, except where a Zone or Overlay specifically excludes or modifies these provisions with respect to any Use.

[50] The Board finds that no provisions of this direct control district specifically exclude or modify Section 85. Accordingly, Section 85 applies to Minor Alcohol Sales in the district. The Development Officer referred to this section when he considered this development permit application.

[51] The Board heard that, when the Development Officer applied Section 85(3) he determined that the proposed location of the Minor Alcohol Sales Use was within 500 metres of the existing Minor Alcohol Sales Use. He then looked to Section 85(4) and concluded that his variance powers with respect to that 500 metre separation distance were limited by Section 85(4)(c) because he felt that granting the variance would result in the existing Use becoming a non-conforming use. Once he concluded that he did not have the power to grant a variance to the 500 metre separation distance regulation, he simply refused to issue a development permit.

[52] Section 85(4) provides as follows:

Notwithstanding Section 11 of this Bylaw, a variance of Section 85.3 may only be granted where:

- a. the application for a development permit is solely for the purpose of accommodating the relocation, within 500.0 m of its original location, of an existing approved Major or Minor Alcohol Sales Use,
- b. the application for a development permit will not result in a total Floor Area that is greater than the existing approved Major or Minor Alcohol Sales Use being relocated, and
- c. the granting of a variance will not result in any conforming Major or Minor Alcohol Sales Use becoming a non-conforming use pursuant to the Municipal Government Act, except where:
 - i. the Major or Minor Alcohol Sales Use has relocated from its previous original location,
 - ii. the granting of the variance is to accommodate the reversion of an existing approved Major or Minor Alcohol Sales Use back to its original Site, and
 - iii. the application for the above reversion is submitted to the Development Officer within 5 years of the date of vacating the original location.

[53] The Board is of the view that the Development Officer erred in his conclusion that allowing the variance would create a non-conforming use, which is defined under Section 616(r) of the *Municipal Government Act* as follows:

616(r) “non-conforming use” means a lawful specific use

- (i) being made of land or a building or intended to be made of a building lawfully under construction at the date a land use bylaw affecting the land or building becomes effective, and
- (ii) that *on the date the land use bylaw becomes effective* does not, or in the case of a building under construction will not, comply with the land use bylaw; [Emphasis added]

[54] Section 643(1) provides further guidance with respect to the creation of a non-conforming use:

643(1) If a development permit has been issued on or before the day on which a land use bylaw or a land use amendment bylaw comes into force in a municipality *and the bylaw would make the development in respect of which the permit was issued a non-conforming use* or non-conforming building, the development permit continues in effect in spite of the coming into force of the bylaw. [Emphasis added]

- [55] In short, it is not a *variance* to the *Edmonton Zoning Bylaw* that creates a non-conforming use, as the Development Officer thought, but an *amendment* to the *Edmonton Zoning Bylaw*.
- [56] Further support for the position that allowing the variance will not create a non-conforming use is found in *Liquor Stores Limited Partnership v Edmonton (City)*, 2015 ABCA 63 [*Liquor Stores*], a leave to appeal decision by a single justice of the Alberta Court of Appeal.
- [57] In *Liquor Stores*, one of the issues was how the Subdivision and Development Appeal Board dealt with Section 85(3) when considering whether to grant a variance to allow a new Minor Alcohol Sales Use within 500 metres of an existing Minor Alcohol Sales Use. Section 85(3) states:
- 85(3) any Major or Minor Alcohol Sales Use shall not be located closer than 500.0 m from any other Major or Minor Alcohol Sales Use. For the purposes of this subsection only:
- (a) the 500.0 m separation distance shall be measured from the closest point of the Major or Minor Alcohol Sales Use to the closest point of any other existing or approved Major or Minor Alcohol Sales Use; and
- (b) if there are two or more Major or Minor Alcohol Sales Uses lawfully operating within 500 m of each other as of the date of the enactment of this Section they shall be considered legal non-conforming uses.
- [58] The Board found that the two liquor stores were not legally non-conforming uses because they did not co-exist at the date that the 500 metre separation distance requirement under Section 85 was enacted. On the leave to appeal application, a proposed ground of appeal was that the Board had erred on this point. The Court dismissed this ground of appeal, noting that Section 85(3)(b) only considers two or more lawfully operating Major or Minor Alcohol Sales Uses to be legal non-conforming uses if they are operating within 500 metres of each other “as of the date of the enactment of [Section 85].” (*Liquor Stores* at para 11)
- [59] The Board finds that granting a variance to the 500 metre separation distance regulation will not create a legally non-conforming use as contemplated under the *Municipal Government Act* or Section 85(3)(b) of the *Edmonton Zoning Bylaw*.
- [60] The Board finds that the Development Officer erred when he concluded that he could not exercise the variance power granted pursuant to Section 85(4). Accordingly, the Board is of the view that the Development Officer did not follow the directions of Council. In granting the Development Officer variance power regarding the 500 metre separation

distance, it is implicit in Council's directions that the Development Officer would correctly interpret the limits of his discretion. That is not the case in this instance.

- [61] Accordingly, pursuant to Section 641(4) of the *Municipal Government Act* the Board has the jurisdiction to substitute its decision for the Development Officer's decision to ensure that Council's directions are followed.
- [62] Section 85(4) allows the variance of the 500 metre separation distance regulation only where the application for a development permit is to accommodate the relocation of an existing Minor Alcohol Sales Use, where the relocation will not result in a total Floor Area greater than the existing Use, and the granting of a variance will not result in any conforming Alcohol Sales Use becoming a non-conforming use. The Board finds that all these conditions are met in this instance and it has the power to consider a variance.
- [63] In considering whether to grant a variance, the Board must apply Section 687(3)(d) of the *Municipal Government Act*. That provision states that the Board may issue a development permit even though the development does not comply with the *Edmonton Zoning Bylaw* if, in its opinion, the proposed development would not unduly interfere with the amenities of the neighbourhood or materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land. In short, the impact of this specific development on this particular neighbourhood and the neighbouring parcels of land is what the Board must consider before it can allow a variance to the 500 metre separation distance regulation.
- [64] In considering the impact that the proposed Minor Alcohol Sales Use would have at the new location, the Board was swayed by the evidence of Ms. Tellier, who appeared as a representative of E4C, an organization that operates several social housing projects for disadvantaged people in the area.
- [65] Ms. Tellier indicated that, when the current Minor Alcohol Sales Use was applied for, her organization was one of those that argued against a liquor store at that location because of concerns that a liquor store so close to the E4C facility across Jasper Avenue would have a negative impact on E4C's clients, particularly those with drug or alcohol problems. However, she stated that from the time that this Alcohol Sales Use has been operating at its existing location, she has found that they have been good neighbours and she has not seen any deterioration in the neighbourhood resulting from its operation.
- [66] Ms. Tellier appreciated that there were negative optics associated with having a second liquor store in the area, but based on her experience, she did not believe that the liquor store itself would contribute to a deterioration of existing conditions.
- [67] The only evidence that the Board received against the proposed development was a written statement from an affected neighbour who felt that allowing a second liquor store in the neighbourhood could result in significant harm to the community, given the site's proximity to the Salvation Army and E4C facilities that assist individuals experiencing or recovering from substance abuse addictions.

- [68] Because Ms. Tellier's organization deals with vulnerable people in this neighbourhood on a daily basis at a location in close proximity to the existing Minor Alcohol Sales Use, her evidence is particularly relevant. The Board finds her evidence more compelling than the concerns of the affected neighbour.
- [69] No one else appeared at the hearing either in support or opposition to a second liquor store in the area.
- [70] There is no doubt that this inner-city neighbourhood is under stress as a result of vulnerable people suffering from a host of problems such as homelessness, mental health issues and substance and alcohol abuse. However, the Board heard no evidence to suggest that these problems are attributable to the location of Alcohol Sales Uses in the area. Although the conventional view is that the proliferation of liquor stores in the inner-city generally creates problems, the evidence before this Board is that the existing Minor Alcohol Sales Use, which has operated for eight years, has not created problems in the neighbourhood. To the contrary, the Appellant was described as a good neighbour. There is no reason to believe that the liquor store will operate any differently at the new location or that allowing it to exist within 500 metres of the existing Minor Alcohol Sales Use will be detrimental to the neighbourhood.
- [71] Based on the plans and drawings submitted by the Appellant, the Board is also of the view that the proposed development will result in significant improvements to the built form at the new location and will be an improvement to the neighbourhood.
- [72] For the above reasons, the Board is of the opinion that granting a variance of 336 metres to Section 85(3)(a) and allowing this development will not unduly interfere with the amenities of the neighbourhood nor materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land.

Mark Young, Presiding Officer
Subdivision and Development Appeal Board

Board Members in attendance

Ms. K. Thind, Ms. A. Lund, Mr. A. Bolstad

Important Information for the Applicant/Appellant

1. This is not a Building Permit. A Building Permit must be obtained separately from the Sustainable Development Department, located on the 5th Floor, 10250 – 101 Street, Edmonton.
2. Obtaining a Development Permit does not relieve you from complying with:
 - a) the requirements of the *Edmonton Zoning Bylaw*, insofar as those requirements have not been relaxed or varied by a decision of the Subdivision and Development Appeal Board,
 - b) the requirements of the *Alberta Safety Codes Act*,
 - c) the *Alberta Regulation 204/207 – Safety Codes Act – Permit Regulation*,
 - d) the requirements of any other appropriate federal, provincial or municipal legislation,
 - e) the conditions of any caveat, covenant, easement or other instrument affecting a building or land.
3. When an application for a Development Permit has been approved by the Subdivision and Development Appeal Board, it shall not be valid unless and until any conditions of approval, save those of a continuing nature, have been fulfilled.
4. A Development Permit will expire in accordance to the provisions of Section 22 of the *Edmonton Zoning Bylaw, Bylaw 12800*, as amended.
5. This decision may be appealed to the Alberta Court of Appeal on a question of law or jurisdiction under Section 688 of the *Municipal Government Act*, R.S.A. 2000, c. M-26. If the Subdivision and Development Appeal Board is served with notice of an application for leave to appeal its decision, such notice shall operate to suspend the Development Permit.
6. When a decision on a Development Permit application has been rendered by the Subdivision and Development Appeal Board, the enforcement of that decision is carried out by the Sustainable Development Department, located on the 5th Floor, 10250 – 101 Street, Edmonton.

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