



**EDMONTON
TRIBUNALS**

*Subdivision &
Development
Appeal Board*

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Date: June 16, 2017
Project Number: 000411946-005
File Number: SDAB-D-17-099

Notice of Decision

- [1] On June 1, 2017, the Subdivision and Development Appeal Board (the “Board”) heard an appeal that was filed on **May 3, 2017**. The appeal concerned the decision of the Development Authority, issued on April 24, 2017, to approve the following development:

To operate a Major Home Based Business. (Furniture Company, NO OUTDOOR STORAGE - ZEBRA CUSTOM FURNITURE), expires April 24, 2022.

- [2] The subject property is on Plan 4893HW Blk 31 Lot 3, located at 10303 - 80 Street NW, within the (RF3) Small Scale Infill Development Zone. The Mature Neighbourhood Overlay applies to the subject property.
- [3] The following documents were received prior to the hearing and form part of the record:
- A copy of the Development Permit application with attachments, an aerial photograph, and the approved Development Permit;
 - A copy of a previous SDAB decision (DAB/95-192); and
 - The Development Officer’s written submission;
- [4] The following exhibit was presented during the hearing and forms part of the record:
- Exhibit A – Photographs of other large vehicles parked in the neighbourhood submitted by the Appellant.

Preliminary Matters

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

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

Summary of Hearing

i) Position of the Appellant, Mr. R. Levesque:

[8] Mr. Levesque stated that he has been operating his business from this location with a business licence for the past 22 years and wants to retain the right to park his small cube van on the driveway or the street. The van is integral to the functionality of the business and has been parked on the driveway for the past 13 years without any known complaints from the neighbours.

[9] Furniture is now being finished off site and the van is used to transport the furniture which increases the use of the van.

[10] Storing his van off site will reduce the efficiency of his business. Signage was removed from the van to eliminate the commercial appearance.

[11] The business is operating from a large two-car garage that was approved in 1995.

[12] The property is always neat and tidy and there is no other outdoor storage.

[13] The majority of their customers appreciate the craftsmanship involved in building fine furniture.

[14] Mr. Levesque referenced photographs of other oversized vehicles and a City of Edmonton vehicle that are often parked within a kilometre of his property (*Exhibit A*). In his view, it is unfair to restrict the parking of his cube van and not others.

[15] Mr. Levesque and Ms. Rioux-Levesque provided the following with respect to questions from the Board:

- a) The van is used to pick up building materials used to construct the furniture and to deliver finished product to their customers.
- b) They own one personal vehicle.
- c) He was not aware of the conditions imposed on the original development permit that was issued in 1995. He questioned why his business licence was renewed every year even though he did not have a development permit.

[16] The Chair provided all of the parties in attendance with a copy of a May 4, 2017 decision of the Court of Appeal of Alberta (*Edmonton (City) v Edmonton (Subdivision and Development Appeal Board)*, 2017 ABCA140) that overturned a decision of the Board to allow an appeal and grant a development permit for a Major Home Based Business.

The Chair stated that the Board is bound by the decisions of the Court of Appeal. The Major Home Based Business approved by the Board was for a more intensive Major Home Based Business and the Board allowed numerous semi-trailer trucks to be stored on the site as part of the business. The Court of Appeal overturned that decision of the Board and found that it was unreasonable for the Board to approve the storage of trucks outdoors as part of a Major Home Based Business.

The Chair indicated that this decision limits the ability of the Board to consider outdoor storage as part of a development permit application for a Major Home Based Business.

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

- [17] Parking the cube van on the subject site is considered outdoor storage as it is used for the Major Home Based Business.
- [18] He worked with the Applicant in an attempt to reduce the number of deficiencies for the home based business. One of the compromises was to park the cube van off-site in order to remove the violation of having outdoor storage.
- [19] Allowing the cube van to be parked on the subject site would require additional variances including parking an overweight vehicle on the driveway.
- [20] Outdoor storage would change the appearance of the single detached house and would therefore be more suitable for an industrial location.
- [21] Mr. Yeung provided the following with respect to questions from the Board:
- a) If the Board allows the cube van to be parked on-site, it will trigger four additional variances.
 - b) Upon review of the recent Court of Appeal decision, outdoor storage is not captured in the definition of a Major Home Based Business. The on-site parking of any oversized vehicle does not comply with the Use class definition

iii) Rebuttal of the Appellant, Mr. R. Levesque:

- [22] He referenced photographs of the cube van parked on the driveway underneath mature trees and questioned why a variance could not be granted.
- [23] This is an arts and crafts business that works only on a referral basis.
- [24] He discussed several options with the Development Officer, including the purchase of a smaller van but was told that it would still appear too commercial. He questioned this rationale as anyone can own a van and park it on their driveway.

- [25] The Chair referenced the aforementioned Court of Appeal decision that found that the outdoor storage of semi-trailer trucks was unreasonable. The Major Home Based Business was located on an acreage site, the trucks could not be seen from the road, and none of the neighbours were opposed.

The Court of Appeal determined that the Board incorrectly interpreted the definition of a Major Home Based Business per section 7.3(7) of the *Edmonton Zoning Bylaw* which contains three central elements. First is the fundamental requirement that it involves “the use of an approved Dwelling or Accessory Building by a resident of that Dwelling for one or more businesses...” Second, the business use must be secondary to the residential use of the building. Third, the business use must not change the residential character of the Dwelling or Accessory Building. All elements of the Major Home based Business definition refer to the use of the dwelling or accessory building, making it clear that it is the building which must be used to conduct the business. The Major Home Based Business use class does not capture, nor is it intended to capture, business uses that occur on the property outside an approved dwelling or accessory building.

The Chair indicated that this is further reinforced by section 75(5) which provides that there shall be no outdoor business activity or storage in relation to a Major Home Based Business. Although this prohibition on outdoor business activity and storage is a regulation, and regulations can be varied by the Board, a variance is only available in certain circumstances. Outdoor business activity does not conform with the criteria of the Major Home Based Business Use class.

The Court found that the Board can only vary regulations and focused on “dwelling” and “accessory building”. As soon as outdoor storage is proposed, including the parking of a vehicle on site, the proposed use can no longer be classified as a Home Based Business. This decision was issued on May 4, 2017 and binds the Board.

- [26] Mr. Levesque advised that he only has one truck parked on site.
- [27] Storage inside the garage is limited and the cube van is used four days per week to pick up building materials and deliver finished product to his customers.
- [28] The cube van is too large to be parked inside the garage. Equipment used to build furniture is stored inside the garage.

Decision

- [29] The appeal is **DENIED** and the decision of the Development Authority is **CONFIRMED**. The development is **GRANTED** as approved by the Development Authority, subject to the following **REVISED CONDITION**:
1. This approval is for a 5 year period from the date of this decision. This Development Permit expires on June 16, 2022. Should the business continue to

operate at this location, an extension of the Development Permit must be approved prior to June 16, 2022.

[30] The Development Authority provided the following **CONDITIONS**:

1. The business owner must live at the site. The business use must be secondary to the residential use of the building and shall not change the residential character of the Dwelling or Accessory Building (Section 7.3(7)).
2. There shall be no exterior display or advertisement other than an identification plaque or sign a maximum of 20 cm (8") x 30.5 cm (12") in size located on the dwelling (Section 75.1).
3. The Major Home Based Business shall not generate pedestrian or vehicular traffic, or parking, in excess of that which is characteristic of the Zone in which it is located (Section 75.3).
4. Non-resident employees shall not be allowed.
5. The site shall not be used as a daily rendezvous for employees or business partners.
6. The site shall not be used by employees or business partners as a parking or storage location.
7. Maximum business associated visits shall not exceed 2 per week.
8. Client visit must be by-appointment only and appointments shall not overlap.
9. Hours of operation must be between 9:00AM to 6:00PM on Weekdays and Saturdays.
10. There shall be no outdoor business activities, or outdoor storage of material or equipment associated with the business (Section 75.5).
11. No person shall keep in any part of a Site in any Residential Zone any commercial vehicle, loaded or unloaded, of a maximum gross vehicle weight (G.V.W.) exceeding 4 500 kg. (Reference Section 45.1(a)) All commercial, industrial and overweight vehicles shall be parked at an approved storage facility. The Development Permit may be revoked if any commercial, industrial and overweight vehicles are parked or stored at the residential site.
12. No offensive noise, odour, vibration, smoke, litter, heat or other objectionable effect shall be produced.

13. The business use must maintain the privacy and enjoyment of adjacent residences and the characteristic of the neighbourhood.
14. Any expansion of the business such as an increase in customers, addition of employees, or additional equipment requires that a new Development Permit shall be obtained.
15. This Development Permit may be cancelled at any time if the Home Based Business as stated in the Permit Details changes (Section 17.2).

- [31] In granting the Major Home Based Business the following variance to the *Edmonton Zoning Bylaw* is allowed:
1. Section 54.2, Schedule 1(A)(3) and (8) is waived to allow three deficient parking spaces.

Reasons for Decision

- [32] The Appellant made an application and received a development permit for a Major Home Based Business to build custom furniture. The majority of the business occurs in an Accessory building located on the subject Site. The Development Authority imposed a number of conditions on the approved development permit, including a condition “that no person shall keep on any part of a Site in any Residential Zone any commercial vehicle, loaded or unloaded, of a maximum gross vehicle weight (G.V.W.) exceeding 4,500 kilograms, reference Section 45.1(a). All commercial, industrial and overweight vehicles shall be parked at an approved storage facility. The Development Permit may be revoked if any commercial, industrial and overweight vehicles are parked or stored at the residential site”.

The Appellant appealed the imposition of this condition.

- [33] The following evidence was provided to the Board:
- a) The Appellant uses a white cube van with a gross vehicle weight (G.V.W.) of 5,216 kilograms as part of the daily operation of his business.
 - b) The cube van is used to bring building materials to the Accessory building on the subject Site and to transport furniture to customers.
 - c) The cube van is too large to be stored inside the Accessory building on site. It is parked on the driveway that traverses the flanking side yard.

- [34] The Board is bound by the recent decision of the Court of Appeal of Alberta in *Edmonton (City) v Edmonton (Subdivision and Development Appeal Board)*, 2017 ABCA 140. In this decision, the Court of Appeal provided an interpretation of the definition of a Major Home Based Business, pursuant to section 7.3(7) of the *Edmonton Zoning Bylaw*.

Paragraphs 7 through 10 of the Court of Appeal decision concluded that the Major Home Based Business use class does not capture, nor is it intended to capture, business uses that occur on the property outside an approved Dwelling or Accessory building.

- [35] While the Court of Appeal noted that outdoor business activity or storage is prohibited by the regulations contained in section 75(5) of the *Edmonton Zoning Bylaw*, the Court of Appeal found that the definition of a Major Home Based Business does not allow the outdoor storage or parking of vehicles on Site. The decision stated “All elements of a Major Home Based Business definition refer to the use of the dwelling or accessory building, making it clear that it is the building which must be used to conduct the business”.
- [36] The Court of Appeal specifically found that “the outdoor storage/parking” of trucks related to the business brought the nature of the activity outside the definition of a Major Home Based Business.
- [37] The condition imposed by the Development Authority simply emphasizes and ensures compliance with these criteria. The condition requires “all commercial industrial and overweight vehicles to be parked at an approved storage facility”, which will ensure that no outdoor business activity or storage of commercial vehicles will occur on the subject Site. This will maintain the character of the proposed development as a Major Home Based Business.
- [38] For these reasons, the Board dismisses the appeal and confirms the decision of the Development Authority.

Mr. I. Wachowicz, Chair
Subdivision and Development Appeal Board

Board members in attendance: Ms. K. Cherniawsky, Mr. R. Hachigian, Ms. D. Kronewitt
Martin, Ms. C. Van Tighem

Important Information for the Applicant/Appellant

1. This is not a Building Licence. A Building Licence must be obtained separately from the Sustainable Development Department, located on the 2nd Floor, Edmonton Tower, 10111 – 104 Avenue NW, Edmonton, AB T5J 0J4.
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*, RSA 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 2nd Floor, Edmonton Tower, 10111 – 104 Avenue NW, Edmonton, AB T5J 0J4.

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



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Date: June 16, 2017
Project Number: 169004150-014
File Number: SDAB-D-17-074

Notice of Decision

- [1] The Subdivision and Development Appeal Board (the “Board”) at a hearing on April 26, 2017, made and passed the following motion:

“That SDAB-D-17-074 be tabled to June 1, 2017 at the written request of Legal Counsel for the Respondent and with the agreement of Legal Counsel for the Appellant and Sustainable Development.”

- [2] On June 1, 2017, the Board made and passed the following motion:

“That SDAB-D-17-074 be raised from the table.”

- [3] The appeal was filed on **April 3, 2017** and concerned the decision of the Development Authority, issued on March 29, 2017, to approve the following development:

Change the Use from Restaurant to Major Alcohol Sales Use and to construct interior alterations.

- [4] The subject property is on Plan 0424871 Blk 23 Lot 105, located at 2304 - 23 Avenue NW, within the (CSC) Shopping Centre Zone. The Silver Berry Neighbourhood Structure Plan and the Meadows Area Structure Plan apply to the subject property.

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

- A copy of the Silver Berry Neighbourhood Structure Plan and the Meadows Area Structure Plan;
- A copy of the Development Permit application with attachments, proposed plans, and the approved Development Permit;
- Bylaw 17836;
- A separation distance map;
- The Development Officer’s written submission;
- Documentation from Legal Counsel for the Appellant with respect to a postponement request and the appeal; and
- Documentation from Legal Counsel for the Respondent with respect to a postponement request and the appeal.

[6] The following exhibits were presented during the hearing and form part of the record:

- Exhibit A – A stylized map of the subject Site submitted by Legal Counsel for the Respondent; and
- Exhibit B – A copy of an Alberta Court of Appeal decision, *Rau v. Edmonton (City)*, 2015 ABCA 136, submitted by Legal Counsel for the Respondent.

Preliminary Matters

[7] At the outset of the appeal hearing, the Chair advised that he is a colleague of Mr. K. Haldane's father, Mr. D. Haldane, but that this would not impact his ability to provide a fair and unbiased hearing. There was no opposition to the composition of the panel.

[8] The Chair outlined how the hearing would be conducted, including the order of appearance of parties, and no opposition was noted.

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

[10] The Chair asked Mr. R. Noce, Legal Counsel for the Appellant and Mr. J. Murphy, Legal Counsel for the Respondent, to address postponement request.

Summary of Hearing

i) *Position of the Appellant, Mr. R. Noce, representing Liquor Stores Limited Partnership, by its General Partner, Liquor Stores GP Inc., regarding a postponement request:*

[11] The issues in this appeal are identical to the issues raised in the Alberta Court of Appeal Permission to Appeal Application, *Liquor Stores Limited Partnership v. Edmonton (City)*, 2017 ABCA 130, dated April 28, 2017. The Permission to Appeal Application was from the approval of the Board for a proposed liquor store at 23 Avenue and Rabbit Hill Road. His Client, Liquor Depot, filed an application for Permission to Appeal the decision of the Board. Mr. J. Murphy was Legal Counsel for the Applicant.

[12] This appeal is virtually identical to the issues of that appeal. Therefore, it would be prudent for the Board to postpone this appeal until a decision from a panel of the Court of Appeal is rendered because it will provide guidance to the Board.

[13] He acknowledged that the proposed development is a Permitted Use that complies with all of the development regulations pursuant to section 85(2) of the *Edmonton Zoning Bylaw*.

[14] The Court of Appeal considered the issue of whether or not his client was entitled to Notice and if a development permit application that complies with the requirements of

section 85(2) of the *Edmonton Zoning Bylaw* in an approved Zone is entitled to the issuance of a development permit as of right or can the Board justify denial of a development permit.

[15] At the Court of Appeal hearing, Mr. Murphy made the argument that because the Applicant complied with all of the development regulations, the development permit should be issued. It was Mr. Noce's argument that because the word "may" is contained in section 85(2), there is an element of discretion and the Board can therefore refuse the development permit application.

[16] In order to obtain Permission to Appeal Application, a three part test needs to be satisfied.

- a. First, there is the question of law and the Judge was satisfied that the issues presented were questions of law.
- b. Second, the Court has to determine the importance of the application of the law. In this case, Mr. Noce argued that the *Municipal Government Act* requires that notice be provided to every liquor store within 500 metres of the site of the proposed development and that all of the affected businesses were entitled to notice. The Court of Appeal found that given the special attention that section 85 of the *Edmonton Zoning Bylaw* gives to an Alcohol Sales Use, the entire community has a legitimate interest in the resolution of the notice questions.

Mr. Murphy argued that business consequences are an irrelevant consideration for land use planning and the Development Authority must grant a development permit application for any Site greater than 2.5 hectares in size that complies with the requirements of section 85(2) of the *Edmonton Zoning Bylaw*.

It was Mr. Noce's argument that section 85(2) expressly directs the Board to exercise discretion when there is an application for a development permit to sell alcohol within 500 metres of another similar business because of the use of "may".

The Court of Appeal found that this related legal question was of sufficient importance to merit a further appeal.

If any other liquor store within 500 metres of the subject site was entitled to notice and decided to participate in the appeal, could its submissions make a difference in the Board's decision? Could the Board properly take into account information about the consequences attributable to the presence of another liquor store in the area? Would it be a relevant consideration? If an Applicant for a liquor store development permit who meets the criteria set out in section 85(2) and section 320.2(12) of the *Edmonton Zoning Bylaw* was entitled to a development permit as of right, one would wonder about the utility of the notice

provision. On the other hand, if the issuance of a liquor store development permit is Discretionary, the value of the notice provision is obvious.

- c. The third test is whether or not the Permission to Appeal Application has a reasonable chance of success. In this case, the Court of Appeal agreed that the position was arguable.

The Court of Appeal has now directed Mr. Murphy and him to prepare a factum.

[17] Mr. Noce referenced paragraph 52 of the Court of Appeal decision and stated that because this issue was not decided by the Court of Appeal, the Board is in an awkward position because they cannot find that the development permit should have been issued as of right because the law is not yet settled on this point.

[18] In response to a question from the Board with respect to this appeal hearing, Mr. Noce acknowledged that his client is the only liquor store within 500 metres of the proposed development that should have received notice and that he became aware of the March 29, 2017 issuance of the development permit and appealed that decision on April 3, 2017. He conceded that in this case the notice requirement is not relevant. However, the legal issue is larger because it will have a broader impact. The Court of Appeal may determine that every liquor store within 500 metres must receive notice of the issuance of a development permit for a Major or Minor Alcohol Sales Use or an appeal hearing.

[19] He clarified that Mr. Murphy requested the previous postponement in April. He consented to the postponement even though he was prepared to proceed with the hearing at that time.

[20] In his opinion, any lawyer in the city who is asked to provide a legal opinion on this matter would have to say that the law of the day is currently in flux.

[21] If the merits of the appeal are heard today he would not disagree that the proposed development is a Permitted Use without a variance. However, evidence would be provided regarding whether or not the concentration of liquor stores in this neighbourhood is appropriate.

[22] If the Board proceeds with the hearing it is inviting another potential application to the Court of Appeal. In his opinion, the Board would not be doing either party any favours by making a decision today.

ii) *Position of Legal Counsel for the Respondent, Mill Creek Shopping Centre Ltd, Mr. J. Murphy in response to the postponement request:*

[23] In Mr. Murphy's opinion Mr. Noce did not provide a legal argument that would allow the Board to table their responsibilities and authority while waiting for the Court of Appeal to rule on this matter.

- [24] The issue of notice on which the Permission to Appeal Application was granted is not relevant because Mr. Noce and his client received notice and are in attendance today.
- [25] He referenced paragraph 41 of the Court of Appeal decision which states that the notice questions posed are of sufficient importance to merit a further appeal.
- [26] He referenced paragraph 43 of the Court of Appeal decision and stated that this approach has been taken by the Court of Appeal in recent decisions. The Court of Appeal looks at the fairness issue of whether or not notice was received and even if notice was received, would the submissions received make a difference.
- [27] If the Court of Appeal decides that notice was not required, the Court of Appeal may not consider section 85. Therefore, it should not be enough to grant the requested postponement.
- [28] Mr. Noce is incorrect in stating that his arguments presented to the Court of Appeal were rejected. The decision of the Court of Appeal simply states that the arguments presented by Mr. Noce were interesting enough to be reviewed by an entire panel.
- [29] There is a factual difference between that development and the proposed development in that a parking variance was required in that decision. The proposed development does not require any variances to the development regulations contained in the *Edmonton Zoning Bylaw*.
- [30] There would be severe prejudice to the Applicant if the postponement request is granted because the Court of Appeal is not likely to hear this matter until late autumn. Mr. Noce has complete control over the timing of the hearing because it is dependent on the filing of his documents with the Court of Appeal which is not required for several months.
- [31] In his opinion the balance between these issues favours proceeding with the hearing today.
- [32] Section 685(3) of the *Municipal Government Act* states that “no appeal lies in respect of the issuance of a development permit for a permitted use unless the provisions of the land use bylaw were relaxed, varied, or misinterpreted.”
- [33] There is nothing limiting the authority of the Board to make a decision on this matter today. The permit holder is the party that will be prejudiced if the hearing is postponed.
- [34] Mr. Murphy indicated that he would provide a legal opinion regarding section 85 of the *Edmonton Zoning Bylaw* to anyone who asked even in the face of the interesting position taken by the Court of Appeal.

[35] Mr. Murphy indicated that the parties in attendance are ready to proceed with the hearing and in the fairness of process and the interest of justice, there is no reason for the Board to suspend its authority in this matter.

iii) Position of the Development Authority, Mr. C. Chan in response to the postponement request:

[36] Mr. Chan did not have a position on the postponement request.

iv) Position of the Appellant, Mr. Noce, in rebuttal to the postponement request:

[37] Mr. Noce referenced other situations in which the Board has granted numerous postponement requests. In particular, an appeal of a Stop Order that was tabled numerous times even though it was negatively impacting neighbouring property owners.

[38] In his opinion, the Board has met its legal obligation to hear the appeal within 30 days.

[39] Legal Counsel for the Respondent made the initial postponement request.

[40] The Board has the authority to grant this postponement request. Any postponement request will prejudice someone.

[41] If the Court of Appeal determined that the verb “may” in section 85(2) is irrelevant, there is no longer any basis for this appeal.

[42] Two opposing views will be provided on how to interpret the law regarding the proposed liquor store. The issue will be the Board’s interpretation of section 85(2). In his opinion discretion is provided in section 85(2) that will allow the Board to determine that locating this liquor store within 500 metres of an existing liquor store is not appropriate. The Court of Appeal has directed Mr. Murphy and him to draft a factum on what the law should be.

[43] If the Court of Appeal determines that section 85(2) provides discretion, the matter would be sent back to the Board for a new hearing. If the Board proceeds today, it is inviting further litigation and it will not save any of the parties involved any real time.

Decision

[44] The postponement request is **DENIED**.

Reasons for Decision

[45] The Board acknowledges that the Permission to Appeal Application granted by the Court of Appeal does create some uncertainty in the law. However, uncertainty in the law can

occur for numerous reasons and does not prevent the Board from making a decision to the best of its ability. The Board acknowledges that it may have to hear evidence regarding the suitability of the proposed liquor store within 500 metres of an existing liquor store or other land use planning reasons in order to make a decision.

[46] The Board also notes that not all Permission to Appeal Applications proceed to a full panel of the Court of Appeal. Matters are often settled between the parties involved and therefore the legal issues regarding section 85(2) of the *Edmonton Zoning Bylaw* may not be addressed by the Court of Appeal and would remain in flux.

[47] The decision of the Board may not be affected by the decision of the Court of Appeal.

[48] The Board can hear evidence on all matters, including whether or not granting a development permit for the proposed liquor store is appropriate for various planning reasons.

v) *Position of the Appellant, Mr. Noce, representing Liquor Stores Limited Partnership, by its General Partner, Liquor Stores GP Inc.*

[49] Mr. Noce advised that he is Legal Counsel for Liquor Depot.

[50] He acknowledged that the development permit application was approved without variances on a site zoned (CSC) Shopping Centre Zone.

[51] Section 85(1) of the *Edmonton Zoning Bylaw* states that any Major Alcohol sales or Minor Alcohol Sales shall not be located less than 500 metres from any other major Alcohol Sales or Minor Alcohol Sales. This section is modified by section 85(2) that sets out of a number of conditions that need to be satisfied in order to allow the Development Officer or the Board to exercise discretion to grant the development permit.

[52] He conceded that the subject site is located outside the boundary shown in Appendix I to section 85 and that the proposed development is located on a Site greater than 2.5 hectares in size on land that is zoned (CSC) Shopping Centre Zone.

[53] He referenced a Google map to illustrate that Liquor Depot is located approximately 218 metres west of the proposed location. There is one other liquor store located approximately 613 metres east of the proposed location. If the proposed liquor store is approved there will be three liquor stores located within 900 metres of each other and will increase the number of liquor stores by 100 percent.

[54] In his opinion the site is visually one shopping centre although 24 Street runs north and south separating the two sites.

[55] Section 85(2) provides discretion to the Board to determine whether or not the increase of liquor stores in the same shopping centre is beneficial for this neighbourhood and the

Board should consider what planning reasons would support the proposed liquor store to be approved when there is already an existing liquor store in such close proximity.

- [56] The Development Authority determined that if the requirements of section 85(2) are met, a development permit must be granted. The Board has also taken this position that when the development requirements for a Permitted Use are met, discretion cannot be applied. However, the Board does have discretion in this matter because it states that notwithstanding subsection 85(1), a Major Alcohol Sales or Minor Alcohol Sales may be located less than 500 metres from any other Major Alcohol Sales or Minor Alcohol Sales if all of the following regulations are met. The use of the verb “may” provides discretionary powers.
- [57] The use of the verb “may” was addressed in the Permission to Appeal Application.
- [58] He referenced an excerpt from *Planning Law and Practice in Alberta* by Frederick Laux contained at Tab 6 of his written submission which states that a person whose interest might be purely financial is an “affected” person.
- [59] Even if the Board considers the interests of Liquor Depot to be purely financial, they have the right to participate and provide reasons as to why this neighbourhood should not have another liquor store.
- [60] Several studies have been completed to demonstrate the impact that the proliferation of liquor stores has on a neighbourhood.
- [61] In response to a question from the Board, Mr. Noce advised that the issue of status was raised at the Court of Appeal. The Board could hear from someone but determine that they are not affected and not put any weight on the evidence provided in their decision.
- [62] City Council made the decision to treat liquor stores differently than other developments. They also decided that the separation distance between liquor stores should be at least 500 metres and that certain conditions should be imposed if the Site is outside the map area contained in Appendix I of section 85.
- [63] The Board has the discretion to determine whether or not another liquor store is appropriate at this location which serves the same community. There are no planning reasons to justify the development of another liquor store in such close proximity to an existing liquor store. The neighbourhood does not need another liquor store and the proposed development does not add any value to the neighbourhood.
- [64] Mr. Noce and Mr. Hewson (Legal Counsel for Liquor Depot) provided the following with respect to questions from the Board:
- a. The Development Authority may have erred by failing to consider the discretionary powers available in section 85(2) of the *Edmonton Zoning Bylaw*.

- b. Three liquor stores located within 900 metres of each other would increase the concentration of liquor stores to an unacceptable level. All of the liquor stores will be located on the north side of 23 Avenue, serve the same communities and two of them will be located in the same shopping centre.
- c. Mr. Hewson clarified that there is a Save-On Foods store, a bank, Tim Hortons and Shoppers Drug Mart located in the Meadows Shopping Centre. Two banks and a restaurant have been developed in the Mill Creek Shopping Centre. Meadows Recreation Centre is located east of the subject site.
- d. There is more traffic in the Meadows Shopping Centre. Liquor Depot opened at this location in 2009.
- e. Mr. Noce indicated that the Board could exercise discretion and determine that the concentration of liquor stores in the suburbs do not have the same impact as the concentration of liquor stores in the inner city.
- f. The Board's discretion in this matter is similar to the discretionary powers provided in section 687(3)(d) of the *Municipal Government Act* and allowing this development will unduly interfere with the amenities of this neighbourhood because the proposed liquor store is not required to service this area and will increase the number of liquor stores by 100 percent.

vi) Position of the Development Officer, Mr. C. Chan:

[65] Mr. Chan appeared to answer questions of the Board. However, the Board did not have any questions for the Development Officer.

vii) Position of the Respondent, Mr. J. Murphy, representing Mill Creek Shopping Centre Ltd.

[66] Mr. Murphy submitted a copy of Alberta Court of Appeal decision, *Rau v. Edmonton (City)*, 2015 ABCA 136, marked *Exhibit B*.

[67] A development permit for a Permitted Use that complies with all of the development regulations of the *Edmonton Zoning Bylaw* has been issued to his client.

[68] It is Mr. Noce's opinion that this is irrelevant because the verb "may" is used in section 85(2) of the *Edmonton Zoning Bylaw*. The *Municipal Government Act* does not provide the Board with jurisdiction to refuse this development permit.

[69] The only issue is whether or not the proposed development complies with the requirements of section 85(2). City Council recently amended section 85 to change the blanket 500 metre separation distance requirement because it was no longer feasible. The

separation distance was reduced outside the Mature Neighbourhood Overlay if certain conditions were met.

- [70] He referenced section 85(2)(a) contained at Tab 3 of his written submission. These two shopping centres are located on two separate sites, have separate ownership, do not share parking or property taxes. The Sites are separated by the collector roadway that is 24 Street.
- [71] The Site is located outside the boundary shown in Appendix 1 to section 85 and both Sites are greater than 2.5 hectares in size and are located in the (CSC) Shopping Centre Zone. The subject site is comprised of three developable lots and has an overall size of 2.99 hectares.
- [72] Section 85(2) has to be read in the entire context of section 85 and that the use of the verb “may” in section 85(2) does not provide discretion to the Board. There is no discretion for a Permitted Use that complies with all of the development regulations.
- [73] The use of the verb “may” instead of “shall” in this section provides discretion to the Applicant. It does not import discretion to the Development Authority or the Board to step away from the nature of a Permitted Use. This would result in the creation of a blurred line between Permitted and Discretionary Uses.
- [74] City Council chose to reduce the minimum 500 metres separation distance in certain circumstances as long as other criteria are met instead of making a Major Alcohol Sales Use a Discretionary Use. City Council is not concerned about concentration and the proliferation of liquor stores in a neighbourhood if all of the development criteria are met.
- [75] Section 640(2)(b) of the *Municipal Government Act* states:
- a land use bylaw must, unless the district is designated as a direct control district pursuant to section 641, prescribe with respect to each district, the one or more uses of land or buildings that are permitted in the district, with or without conditions, or the one or more uses of land or buildings that may be permitted in the district at the discretion of the development authority, with or without conditions, or both.
- [76] Section 642(1) of the *Municipal Government Act* states:
- When a person applies for a development permit in respect of a development provided for by a land use bylaw pursuant to Section 640(2)(b)(i), the development authority must, if the application otherwise conforms to the land use bylaw, issue a development permit with or without conditions as provided for in the land use bylaw.

[77] Section 685(3) of the *Municipal Government Act* states:

despite subsections (1) and (2), no appeal lies in respect of the issuance of a development permit for a permitted use unless the provisions of the land use bylaw were relaxed, varied, or misinterpreted.

[78] The Court of Appeal determined that an appeal can be heard but the appeal cannot be allowed unless the provisions of the land use bylaw were relaxed, varied or misinterpreted. In this case, the provisions of the land use bylaw were not relaxed or varied.

[79] He referenced an Alberta Court of Appeal decision, *Chrumka v. Calgary (Development Appeal Board)*, 1981 ABCA 282, contained at Tab 8 of his written submission. The Court of Appeal determined that a land use bylaw must provide for permitted uses, or discretionary uses, or both; it does not contemplate both such uses operating at the same time in respect of an application.

[80] Paragraphs 11 and 12 of the *Chrumka v. Calgary (Development Appeal Board)*, decision sets out provisions that require the Development Authority to issue a development permit for a Permitted Use. In this case the Development Appeal Board found that the use in question could be both Permitted and Discretionary. However, the Court of Appeal determined that was incorrect. The decision further determined that no discretion is given to the development officer.

[81] The use of the verb “may” in section 85(2) does not provide discretion.

[82] Mr. Murphy referenced a Supreme Court of Canada decision, *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, contained in TAB 9 of his written submission.

[83] Section 85(2) has to be read in the context of the entire legislation. If you come to a conclusion that renders any of that impossible or contrary you have read in an unreasonable absurdity. Mr. Noce has asked the Board to apply discretion to section 85(2), which cannot possibly occur with a Permitted Use.

[84] City Council could have made the decision to make Alcohol Sales a Discretionary Use but they chose not to.

[85] Mr. Noce did not provide any evidence to persuade the Board to use their discretion to refuse the proposed development. He put the onus on my client to demonstrate good planning reasons to allow the proposed liquor store at this location. The onus is not on his client to justify that the neighbourhood needs another liquor store or to proceed with a Permitted Use at this location. The owners of the liquor store would not have made the application if they did not think there was a demand.

- [86] He referenced a stylized plan of the site (*Exhibit A*) to illustrate that the entrance from 24 Street to both sites is staggered. The northwest corner is owned by a separate owner who plans to develop a specialty food service. All of the uses on this site are tied together by cross access and shared parking.
- [87] He referenced his supplemental submission to review the history of how the two shopping centres came into existence under the Silver Berry Neighbourhood Structure Plan. The amendment to the Silver Berry Neighbourhood Structure Plan created two sites separated by 24 Street. The two commercial sites will be accessed by 23 Avenue.
- [88] This area was never intended to be one shopping centre. These are two shopping centres that are competitive with each other. At some stage it was determined that there is enough volume and demand in the neighbourhood to support two shopping centres.
- [89] Mr. Noce did not provide any evidence to the Board to support his contention that there is an over concentration of liquor stores in this area. None of the neighbours appeared in opposition, and no evidence was provided to demonstrate that this neighbourhood has a weakened character and cannot support two liquor stores. Mr. Noce has put the onus on the Board to determine that there is a problem and refuse the development permit application.
- [90] Mr. Noce could not describe the test that the Board should use to exercise their discretion and conclude that the proposed development would add to the proliferation of liquor stores in this neighbourhood. It is certainly not section 687(3)(d) of the *Municipal Government Act*. This test is applied to determine variance power to grant variances not Discretionary Uses.
- [91] *Rau v Edmonton (City)*, 2015 ABCA 136 determined that the Board does not have any general authority to refuse a development permit for a Permitted Use and discretion is not provided in section 85(2) of the *Edmonton Zoning Bylaw*.
- [92] If the Board is concerned that section 85(2) provides discretion in this matter, discretion can only be exercised based on evidence provided. Mr. Noce did not provide any evidence that would cause the Board to exercise discretion and refuse this development permit application.

viii) Rebuttal of the Appellant, Mr. Noce

- [93] City Council has determined that liquor stores are dealt with differently than other developments.
- [94] Section 85(1) states that a liquor store shall not be located within 500 metres of any other liquor store. The Board can vary that requirement. The Board can also vary section 85(2) if they determine that allowing the development of a liquor store within 500 metres of an existing store is not appropriate.

- [95] He acknowledged that there was no neighbourhood opposition to the proposed development but noted that the notification area was very limited.
- [96] Section 85(2) provides discretion to the Board and the language should be different if discretion is not permitted.
- [97] The Board can determine that the proposed liquor store at this location is not acceptable. There is no dispute that there will be three liquor stores located within 900 metres if the proposed development is approved, an increase of 100 percent in this neighbourhood.
- [98] The Board must determine if this is excessive.

Decision

- [99] The appeal is **DENIED** and the decision of the Development Authority is **CONFIRMED**. The development is **GRANTED** as approved by the Development Authority.

Reasons for Decision

- [100] Major Alcohol Sales is a Permitted Use on a Site greater than 2.5 hectares in size that is zoned (CSC) Shopping Centre Zone.
- [101] The development permit was issued without a variance to any of the development regulations pursuant to section 85 of the *Edmonton Zoning Bylaw*.
- [102] The Appellant's liquor store is located 218 metres west of the proposed site. Legal Counsel for the Appellant acknowledged that the proposed development is a Permitted Use at this location and conceded that the calculation of the separation distance provided by the Development Authority was accurate. The Appellant also conceded that the subject site is located outside the boundary shown in Appendix 1 to section 85 of the *Edmonton Zoning Bylaw* and complies with section 85(2)(b).
- [103] In most circumstances this would end the analysis. However, the Board was presented with an appeal of a development permit for a Permitted Use and none of the provisions of the land use bylaw were relaxed, varied, or misinterpreted.
- [104] Section 685(3) of the *Municipal Government Act* states:
- Despite subsections (1) and (2), no appeal lies in respect of the issuance of a development permit for a permitted use unless the provisions of the land use bylaw were relaxed, varied, or misinterpreted.
- [105] Legal Counsel for the Appellant argued that section 85(2) of the *Edmonton Zoning Bylaw* was misinterpreted by the Development Authority.

- [106] The Appellant argued that even though the proposed development is a Permitted Use, the Development Authority failed to consider the use of the verb “**may**” in section 85(2) which provides the Development Authority with discretion to refuse a development permit application even if all of the development regulations are met.
- [107] Section 85(2) of the *Edmonton Zoning Bylaw* states that “notwithstanding subsection 85(1), a Major Alcohol Sales or Minor Alcohol Sales **MAY** be located less than 500 metres from any other Major Alcohol Sales or Minor Alcohol Sales if all of the following regulations are met”. The Appellant conceded and the Board finds that all of those regulations were met. The Appellant argued that Major Alcohol Sales “may” be located less than 500 metres from another liquor store if the regulations are met but it does not mean that a development permit must be issued. Therefore the Development Authority erred in finding itself compelled to issue the development permit the moment the regulations contained in section 85(2) were met.
- [108] The Board did not agree with the argument put forward by the Appellant because section 85(2) has to be read in conjunction with section 85(1). This provides the general regulation for the entire City and without compliance with additional regulations a liquor store shall not be located less than 500 metres from another liquor store. Section 85(2) simply states that prohibition does not universally apply. It does not apply if:
- a) The Major or Minor Alcohol Sales are located on separate Sites, which is the case in this application;
 - b) The Major or Minor Alcohol Sales are located outside the boundary shown in Appendix 1 to Section 85; and
 - c) At least one of the Major Alcohol Sales or Minor Alcohol Sales is located on a Site greater than 2.5 hectares in size that is zoned CSCa, UVCa, GVC, TC-C, DC1, DC2, CSC, CB1, CBS and CHY.
- [109] Based on the evidence provided, the proposed liquor store and the existing liquor store are both located on sites that are greater than 2.5 hectares in size in the (CSC) Shopping Centre Zone, which is one of the listed zones.
- [110] The Board accepts the argument of Legal Counsel for the Respondent regarding the findings of the Court of Appeal decision in *Chrumka v. Calgary (Development Appeal Board)*, 1981 ABCA 282, that a particular use on a particular site cannot be both permitted and discretionary. The *Edmonton Zoning Bylaw* clearly lists the proposed development as a Permitted Use. None of the development regulations contained in the *Edmonton Zoning Bylaw* need to be relaxed or varied in order to allow the proposed development to proceed.

[111] Section 642(1) of the *Municipal Government Act* states:

when a person applies for a development permit in respect of a development provided for by a land use bylaw pursuant to Section 640(2)(b)(i), the development authority must, if the application otherwise conforms to the land use bylaw, issue a development permit with or without conditions as provided for in the land use bylaw.

[112] Section 685(3) of the *Municipal Government Act* states:

despite subsections (1) and (2), no appeal lies in respect of the issuance of a development permit for a permitted use unless the provisions of the land use bylaw were relaxed, varied or misinterpreted.

[113] Pursuant to section 685(3) of the *Municipal Government Act*, the Board cannot overturn the decision of approval made by the Development Authority and on this basis alone would deny the appeal.

[114] Legal Counsel for the Appellant argued that these statements of law are currently in flux because of the Application for Permission to Appeal, *Liquor Stores Limited Partnership v. Edmonton (City)*, 2017 ABCA 130. Paragraph 52(a) of that decision states that:

Is an applicant for a liquor store development permit that is located less than 500 metres from another liquor store but meets the requirements set out in ss. 95(2) and 320.2(12) of the Edmonton Zoning Bylaw 12800 entitled to a development permit as of right? Or may the development authority and Edmonton's Subdivision and Development Appeal Board decline to grant a development permit if satisfied that another liquor store in the 500 metre zone would increase the concentration of liquor stores to an unacceptable level or that other valid land-use planning reasons justify denial of a development permit?

[115] The Board finds that this is not a finding of law by the Court of Appeal but rather grants permission for the Applicant to argue this point before a full panel of the Court of Appeal. It is not a statement of current law.

[116] However, in light of administrative efficiency, the Board heard evidence and considered the issues addressed by Justice J.A. Wakeling in the Application for Permission to Appeal. Specifically, the Board considered whether or not, even if it did have any discretion, the proposed liquor store located within 500 metres of the Appellant's existing liquor store would increase the concentration of liquor stores to an unacceptable level or if any other land use planning reasons would result in the refusal of this approved development permit.

[117] The principal argument of Legal Counsel for the Appellant was that if the appeal is denied and the development approved, there would be three liquor stores located within 900 metres of each other and two of them would be on the same site, servicing the same community.

[118] The Board does find that this would increase the concentration of liquor stores to an “unacceptable” level for the following reasons:

- a) The third liquor store referenced by the Appellant is located 613 metres from the subject site, east of 17 Street which is a major arterial roadway and will not have any impact on the proposed liquor store on the subject site.
- b) The proposed liquor store and the existing liquor store have a separation distance of 218 metres.
- c) No evidence was provided to demonstrate that there would be any deleterious effects on the community by approving the proposed development. Based on the evidence provided, this is a relatively new suburb that has not previously suffered from any of the consequences that may arise from the proliferation of liquor stores.
- d) The Board considered the question of what is an unacceptable level of the concentration of liquor stores and was guided by the new development regulations adopted by City Council. City Council amended section 85 of the *Edmonton Zoning Bylaw* on December 12, 2016 and established Bylaw 17836. In this amendment, City Council stipulated that in certain areas of the City, primarily areas located in major commercial areas or outside the centre of the City, it is acceptable to have more than one liquor store located within 500 metres of each other as long as they were located on separate sites and that one of the sites was greater than 2.5 hectares in size.
- e) The proposed liquor store complies with these development regulations and is itself evidence that allowing the development will not increase the concentration of liquor stores to an unacceptable level.
- f) Even if the Board had discretion to refuse this development permit that complies with the requirements of section 85(2) of the *Edmonton Zoning Bylaw*, evidence was not provided regarding any specific land-use planning reasons to justify denial of the development permit. The only argument provided by the Appellant was that approving this development would result in twice as many liquor stores in this neighbourhood. Even though the Appellant referenced recent studies that have been conducted to demonstrate the deleterious impacts of the proliferation of liquor stores on a neighbourhood, details of those studies were not provided.

[119] In conclusion, if the decision of the Board with respect to its lack of discretion to deny a development permit for the proposed Major Alcohol Sales Use is wrong, the Board still chose not to exercise discretion. This decision was made because no valid land use planning reasons were provided to persuade the Board that granting a development

permit for the proposed development on the subject site would increase the concentration of liquor stores to an unacceptable level.

[120] Based on the above, the appeal is denied and the decision of approval by the Development Authority is confirmed.

Mr. I. Wachowicz, Chairman
Subdivision and Development Appeal Board

Board Members in Attendance:

Ms. K. Cherniawsky; Mr. R. Hachigian; Ms. D. Kronewitt Martin; Ms. C. Van Tighem

Important Information for the Applicant/Appellant

7. This is not a Building Permit. A Building Permit must be obtained separately from the Sustainable Development Department, located on the 2nd Floor, Edmonton Tower, 10111 – 104 Avenue NW, Edmonton, AB T5J 0J4.
8. Obtaining a Development Permit does not relieve you from complying with:
 - f) 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,
 - g) the requirements of the *Alberta Safety Codes Act*,
 - h) the *Alberta Regulation 204/207 – Safety Codes Act – Permit Regulation*,
 - i) the requirements of any other appropriate federal, provincial or municipal legislation,
 - j) the conditions of any caveat, covenant, easement or other instrument affecting a building or land.
9. 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.
10. A Development Permit will expire in accordance to the provisions of section 22 of the *Edmonton Zoning Bylaw, Bylaw 12800*, as amended.
11. This decision may be appealed to the Alberta Court of Appeal on a question of law or jurisdiction under section 688 of the *Municipal Government Act*, RSA 2000, c M-26. 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.
12. When a decision on a Development Permit application has been rendered by the Subdivision and Development Appeal Board, the enforcement of that decision is carried out by the Sustainable Development Department, located on the 2nd Floor, Edmonton Tower, 10111 – 104 Avenue NW, Edmonton, AB T5J 0J4.

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.