



**EDMONTON  
TRIBUNALS**

*Subdivision &  
Development  
Appeal Board*

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Date: November 17, 2017  
Project Number: 000931377-005  
File Number: SDAB-D-17-207

**Notice of Decision**

- [1] On November 8, 2017, the Subdivision and Development Appeal Board (the “Board”) heard an appeal that was filed on **October 13, 2017**. The appeal concerned the decision of the Development Authority, issued on September 19, 2017, to approve the following development:

**Change the Use from General Retail Stores to Restaurants and to construct interior alterations to expand the existing Restaurant Use (Total Public space 167.4 square metres)**

- [2] The subject property is on Plan 169HW Blk 10 Lot 8, located at 11218 - 76 Avenue NW and Plan 169HW Blk 10 Lot 9, located at 11216 - 76 Avenue NW and Plan 169HW Blk 10 Lot 10, located at 11212 - 76 Avenue NW and Plan 169HW Blk 10 Lots 6-7, located at 11222 - 76 Avenue NW, within the CSC Shopping Centre Zone. The McKernan / Belgravia Station Area Redevelopment Plan apply to the subject property.
- [3] The following documents were received prior to the hearing and form part of the record:
- Copy of the Development Permit application with attachments, proposed plans, and the approved Development Permit;
  - The Development Officer’s written submissions;
  - The Appellant’s written submissions;
  - The Respondent’s written submissions; and
  - Online responses.

**Preliminary Matters**

- [4] The Presiding Officer indicated that Administrative Staff contacted the Appellant who indicated that they would not be attending the hearing. The Appellant sent an email asking the Board to proceed based on her written submissions.

- [5] The Presiding Officer confirmed with the parties in attendance that there was no opposition to the composition of the panel.
- [6] The Presiding Officer outlined how the hearing would be conducted, including the order of appearance of parties, and no opposition was noted.
- [7] The Presiding Officer identified a preliminary jurisdictional issue and explained to the parties:
- i) The Board's power is constrained by the limitation period prescribed by Section 686(1)(b) of the *Municipal Government Act*, RSA 2000, c M-26 ("*Municipal Government Act*"), which states:
- 686(1) A development appeal to a subdivision and development appeal board is commenced by filing a notice of the appeal, containing reasons, with the board within 14 days,...
- (b) in the case of an appeal made by a person referred to in section 685(2), after the date on which the notice of the issuance of the permit was given in accordance with the land use bylaw.
- ii) On October 26, 2017, subsection 1(65) of *An Act to Strengthen Municipal Government*, SA 2017, c 13 was proclaimed. It modified Section 686(1)(b) of the *Municipal Government Act* to read "a development appeal to a subdivision and development appeal board is commenced by filing a notice of the appeal, containing reasons, with the board, in the case of an appeal made by a person referred to in section 685(2), within 21 days after the date on which the notice of the issuance of the permit was given in accordance with the land use bylaw."
- [8] The Board asked the parties for their submissions concerning whether the Appellant filed her appeal within the limitation period, noting that if the appeal was filed late, the Board has no authority to hear the matter.

### **Summary of Hearing on Preliminary Matter**

i) *Position of the Appellant, Ms. Gray*

- [9] Ms. Gray was not in attendance at the hearing and provided the SDAB Office with an email asking the Board to proceed with the hearing in her absence based on her written submission. She stated the following with regards to the filing on her appeal:

Please consider this appeal for the proposed building changes for 11212 76 Ave. (Plan 169HW Blk 10 Lot 10). This Appeal has been filed after the deadline, and leave is requested due to the preoccupation and considerations associated with my husband's mother suffering a stroke, and thereby requiring immediate attention.

*ii) Position of the Development Officer, Mr. Belzile*

[10] The appeal was filed after the notification period expired and thus already late based on the law prior to the amendments to the *Municipal Government Act* coming into effect.

[11] In his opinion, applying the changed provision in the *Municipal Government Act* would adversely affect the Respondent as they would not have been aware of it. He was not aware of the change until today and not sure if the information was even provided to the public.

*iii) Position of the Respondent, Mr. Roper*

[12] Mr. Roper took the same position as the Development Officer.

[13] He argued it was important for the Applicants to proceed with the development permit. The appeal was out of time and they would be prejudiced if the Board accepted jurisdiction on the late filed appeal.

**Decision on Preliminary Matter**

[14] The appeal was not filed on time, in accordance with Section 686 of *the Municipal Government Act*.

**Reasons for Decision**

[15] The Board's jurisdiction to hear an appeal is found in section 686(1)(b) of *the Municipal Government Act*. Until October 26, 2017 that provision read:

686(1) A development appeal to a subdivision and development appeal board is commenced by filing a notice of the appeal, containing reasons, with the board within 14 days,...

(b) in the case of an appeal made by a person referred to in section 685(2), after the date on which the notice of the issuance of the permit was given in accordance with the land use bylaw.

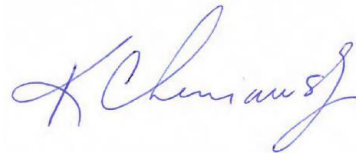
[16] The Board finds:

*i)* The decision of approval by the Development Officer is dated September 19, 2017.

*ii)* The date of publication of the Newspaper Notice as required under section 20.2 of the *Edmonton Zoning Bylaw* was September 26, 2017.

*iii)* The Notice of Appeal Period per section 20.2 of the *Edmonton Zoning Bylaw* began September 26, 2017 and ended October 10, 2017.

- [17] Based on the *Municipal Government Act*, the Board finds that the appeal period expired on October 10, 2017, 14 days after the publication of the notice as required under the *Edmonton Zoning Bylaw*.
- [18] Accordingly as of October 11, 2017, the Development Permit issued September 19, 2017 was valid and the Applicant/Respondent was legally free to proceed with certainty based on the Development Permit.
- [19] The Board finds that the Notice of Appeal was subsequently filed on October 13, 2017 (after the expiry of the appeal period). The Appellant herself acknowledged in her written submission that she was aware that her appeal was out of time, but requested an extension based on personal circumstances. The Board notes that there are no provisions in the *Municipal Government Act* that would empower the Board to extend or waive the statutory deadline set out in section 686 for any reason.
- [20] The amendment to Section 686(1)(b) of the *Municipal Government Act* extending the 14 day appeal period to 21 days came into effect thereafter on October 26, 2017. The Board considered whether the new 21 day appeal period in effect as of the date of hearing should be applied in place of the earlier provision. The Board notes that there are no transition provisions in this *Act* directing it to apply the new 21 day appeal period in today's hearing.
- [21] The Board finds that, applying the new provision would extend the Appellant's right but also take away rights from the Respondent who on October 11, 2017 had a valid Development Permit which was not subject to appeal due to the expiry of the appeal period in Section 686(1)(b). Furthermore as noted above, in this case the Appellant was well aware when she filed her appeal that the applicable appeal period had expired.
- [22] Based on the above, the Board finds that provisions of the *Municipal Government Act* in effect up to October 26, 2017 shall apply. Therefore the Board finds that the appeal was filed outside the statutory appeal period. The Board neither allows nor dismisses the appeal as it does not have the jurisdiction to hear the appeal.



Ms. K. Cherniawsky, Presiding Officer  
Subdivision and Development Appeal Board

Board Members in Attendance

Mr. P. Jones; Ms. S. LaPerle; Mr. R. Hachigian; Ms. M. McCallum

**Important Information for the Applicant/Appellant**

1. This decision may be appealed to the Alberta Court of Appeal on a question of law or jurisdiction under Section 688 of the *Municipal Government Act*, RSA 2000, c M-26. If the Subdivision and Development Appeal Board is served with notice of an application for leave to appeal its decision, such notice shall operate to suspend the Development Permit.
  
2. When a decision on a Development Permit application has been rendered by the Subdivision and Development Appeal Board, the enforcement of that decision is carried out by the Sustainable Development Department, located on the 2nd Floor, Edmonton Tower, 10111 – 104 Avenue NW, Edmonton, AB T5J 0J4.



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DIALOG  
Care of: Dave Moore  
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Date: December 5, 2017  
Project Number: 244581351-001  
File Number: SDAB-D-17-211

**Notice of Decision**

[1] On November 8, 2017, the Subdivision and Development Appeal Board (the “Board”) heard an appeal that was filed on **October 13, 2017**. The appeal concerned the decision of the Development Authority, issued on October 5, 2017, to refuse the following development:

**Construct and operate a temporary Non-accessory Parking lot (surface parking lot with 310 vehicular parking stalls) for three (3) years from the date of issuance of the Development Permit**

[2] The subject property is on Plan 1425251 Blk 9E Lot 7, located at 10104 - 104 Avenue NW, within the AED Arena and Entertainment District Zone. The Downtown Special Area and Capital City Downtown Plan apply to the subject property.

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

- Copy of the Development Permit application with attachments, proposed plans, and the refused Development Permit;
- The Development Officer’s written submissions;
- Written Submissions from Legal Counsel for the Development Officer; and
- Written Submissions from Legal Counsel for the Appellant.

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

- Exhibit A – Copy of the Section 54.2 from *Edmonton Zoning Bylaw* submitted by Legal Counsel for the Appellant.
- Exhibit B – Copy of Excerpt from *Planning Law and Practice in Alberta*, submitted by Legal Counsel for the Appellant.

**Preliminary Matters**

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

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

### Summary of Hearing

- i) Position of Mr. Wakefield, Legal Counsel for the Appellant, DIALOG, who was accompanied by Mr. Dubois, representing Katz Group*
- [8] Mr. Dubois is the Director of Design and Construction for Katz Group Real Estate, the current land owner for the Baccarat Casino Site. They also developed the adjacent Site, Phase 1, which includes Block K, the OEG Office, the Grand Villa Casino, and the Edmonton Tower. They are continuing to work on Phase 2, north of 105 Avenue and 104 Street.
- [9] TAB 1 shows the orientation of the site. Rogers Place faces east, north is the land in the Ice Phase 2, and the Baccarat Casino is on the other side of Rogers Place. Ice Phase 2 is before City Council for rezoning.
- [10] TAB 2 shows the aerial view of what they are hoping to put on the Baccarat Site. The Site currently has the Baccarat Casino with a parking lot. The Appellants want the Site to be developed as a commercial use with two towers, but they could not confirm the details other than that it will be a commercial development.
- [11] North of 105 Avenue is Ice Phase 2. According to the Master Plan, it will have 3000-4000 residents. They hope to start developing that area in 2018-2019. Block K is a building which contains the OEG Office, Grand Villa Casino, and the community rink. It is between the Baccarat Casino Site and Rogers Place. To the south is the Edmonton Tower, the JW Marriott and Legends Condos. Also to the south is the Stantec Tower which is under construction. The next project is the BG Building located on the old Grey Hound site. Its parkade is currently built to grade and after completion in December, the next development will be the five storey commercial podium portion and 44 storey residential rental building on the one end.
- [12] This is a significant amount of construction and they are trying to accommodate people in the downtown area just on a construction basis, not a permanent work basis.
- [13] TAB 3 is the Site Plan of the proposed parking lot. There will be 310 stalls, considerable screening and landscaping of the Site. The exits and entrances of the Site have been placed to accommodate Transportation issues.
- [14] They will be adding some parking stalls to the original Baccarat Casino Site, the remainder of the stalls have been used as parking for approximately 20 years.

- [15] The Grand Villa Casino is on the west side of Baccarat Casino. The operation is under the same management, it changed over in a matter of a week and the Site was always being used.
- [16] TAB 4, a rendering of the proposed development, shows how the Site will be used as an accessory Parking Lot for the construction of Ice Phase 1 and Phase 2 for the Grand Villa Casino, and the community rink.
- [17] TAB 4, Page 2 shows the existing lot which is not pretty. The existing Baccarat building is on a small portion of that lot. The additional parking stalls proposed for this area will be over and above the existing stalls which have been used for several years.
- [18] TAB 5 shows the North Area and the South Area parking lots. They received a three year approval for temporary parking on the lots in the North Area after joint discussions with the City, the Central McDougall Community League, and Katz Group Real Estate. They allocated funds for the use of the Central McDougall Community League and have support from the community to improve the North and South Area. The South Area is the subject Site, it is outside the Central McDougall Community League and under a separate zoning and discussion.
- [19] The North Area has an approved Development Permit for a 600 parking stall temporary parking. They propose 311 parking stalls on the subject Site. The total above ground parking will be less than 1000 parking stalls. This is a major requirement as they continue to build in the area. There will be between 2000 and 3000 people on site in Phase 1 alone as they finish construction of the Stantec Tower, the JW Marriott, and BG Building and podium. A 2000 car parkade will be built below that entire area of Ice Phase I for tenant use, once those buildings become occupied. Half of the parkade will open in October 2018 when residents and commercial tenants move in and take up those parking stalls. This will leave no parking for construction workers.
- [20] There will be a need for daily in and out parking as trade workers have company vehicles and tools with them and transit is not an option. A number of people who work downtown all day also park in this area. As most of the parking is completely at capacity for a majority of the day, their primary drivers are to accommodate workers during the construction and to recoup the cost to take down the building.
- [21] TAB 6 shows the proximity of the Baccarat Site to a number of public use buildings such as Rogers Place (80 metres), Grand Villa Casino (30 metres), the community rink (30 metres) and OEG headquarters (70 metres). Given that these distances are under the 120 metres limit in the regulations, there is a potential for an offsite accessory parking use. Parking has existed for a while on the subject Site and they are just trying to continue its use as accessory parking.
- [22] When asked by the Board to confirm the Use class for which they seek approval, the Appellants confirmed that the scope of the application for a Non-accessory Parking use is correct.



- [23] They are not asking the Board to reassess the Use and they did not apply for accessory parking because they want a temporary use which does not extend past the construction timeline. They want to build below grade parking which is the intent of the City's Bylaw.
- [24] TAB 7 shows a copy of the refused Development Permit. Reasons for Refusal No. 1 and 2 are unique to this application. The remainder of the Reasons for Refusal deal with items that can be addressed by conditions that can be negotiated between the City and themselves. This was done for the North Area as shown in the Development Permit for that parking lot (TAB 10).
- [25] As stated in TAB 8, the reason for this appeal is that they want to continue the Use of the surface parking in the parking lot that has existed for several years after the demolition of the Baccarat Casino.
- [26] The City and the Appellants want the Casino to be demolished. The Appellants have been issued a Demolition Permit; however, according to their business model, the demolition of the casino will be costly and revenue will be needed to offset that cost.
- [27] He reiterated that they have support for the development. Central McDougall Community League supported the North Area and the Baccarat Casino Site as they want development to start cleaning up this area. There is support from the Katz Group Real Estate that operates the Block K, Edmonton Tower, and the Ice District. Qualico owns the EPCOR Tower and other neighbouring developments in the Stationlands and supports the development.
- [28] The North Area will have only have 600 temporary parking stalls until December 2019. The South Area would extend the timeline for temporary parking stalls for construction use until 2021. The final build out will have 2000 parking stalls below grade under Phase 1 but those stalls are for tenant use in the high density development. Those parking stalls will not be available for the construction staff.
- [29] The Edmonton Tower has approximately 400 parking stalls. Most of the parking is for tenant use, there is some public parking but nothing significant.
- [30] There are 260 parking stalls below Block K for staff and users of the community rink, Grand Villa Casino, OEG, and Katz Group properties. There is not a lot of in and out parking available for Grand Villa Casino clientele. Parking has not been designed for full occupant load.
- [31] The Development Permit for the North Area (Tab 10) includes conditions of approval which are essentially the same as the Reasons for Refusal of the appealed permit. After the North Area was approved, the Appellants met with the City and finalized details for the completion of the parking lots to meet the conditions to the satisfaction of Sustainable Development.

- [32] This is a really a continuation of parking, whether described as accessory for the casino or the other nearby uses or for construction downtown. This Site has been continuously been used as a parking lot for several years and they are not changing the Use. They are accommodating the City Bylaw and constructing below grade parking for all their developments in Phases 1 and 2.
- [33] They asked for a three-year term specifically to serve the phased construction needs and they do not want to extend past that time. The temporary Use for three years is significant; it will accommodate parking for construction so the projects do not add an additional load to the downtown demand for parking for people that have full time jobs.
- [34] In response to questions by the Board, Mr. Dubois stated that approval for the parking lots with Central McDougall expires in 2019. They do not want to extend it. They have more land there now than what they are currently allowed to park on. There is another city block they do not park on north of 105 Avenue which is part of the deal with Central McDougall Community League. When the construction is complete, the need for parking will diminish. They have a good relationship with Central McDougall and do not want to change that by trying to extend the time duration.
- [35] They will be adding approximately 75 to 100 parking stalls (more likely 100) after the demolition of the Baccarat Casino.
- [36] A new entrance will be added to the site on 102 Street so there is more than one exit on event nights. There is a concern of overloading 105 Avenue and turning onto 101 Street either north or south. They are working with Transportation to have one exit on 102 Street and for traffic to go north or south and then east on 105 Avenue. The parking lot will be controlled when events are taking place as traffic will increase on these nights.
- [37] They have a permit to demolish the Baccarat Casino but cannot confirm when that will happen. They will reevaluate their plans if the proposed parking is refused.
- [38] They could not confirm if the three year timeline will be sufficient. They do not intend to extend the three years but a new Development Permit will be required if they chose to extend the timeline.
- [39] They do not have an agreement with the Central McDougall Community League for the subject Site as it is under different commercial zoning and is outside the Central McDougall area.
- [40] They did not approach the Downtown Business Association for their support.
- [41] They confirmed that 310 parking stalls are requested according to the submitted plans. They could not confirm the number of the parking stalls currently in place at the subject Site.

- [42] They will not restrict parking to construction workers, the parking lot will be open to who ever wishes to use it at a slightly less expensive rate during the day.
- [43] The parking lot will be accessible to the public and monitored by Impark. They will not force vehicles to empty the parking lot on event nights at Roger's Arena as it will be a public parking lot.
- [44] The Board then heard from Mr. Wakefield who stated that the Baccarat Casino has been there for several years and has provided parking for several years.
- [45] The operator of the Baccarat Casino (Gateway Casino and Entertainment Ltd.) is the operator of the Grand Villa Casino.
- [46] TAB 6 shows that the distances from the property line of the Baccarat Casino Site to the edge of the Uses such as the Grand Villa Casino and the community rink that are within the limit in Section 54.2.2 of the *Edmonton Zoning Bylaw*. This section outlines the location of Vehicular Parking Facilities and that required parking spaces may be provided on a Site located remotely, but no further than 120.0 metres from the original Site. He submitted Exhibit A, which is the most up to date version of Section 54.2.
- [47] The operator of the Baccarat Casino transitioned into the new space at the Grand Villa Casino with the same Use, they just moved across the Street. Parking that has been used for the Baccarat Casino and the parking requirements for the Grand Villa Casino have probably been grandfathered in.
- [48] He referred to an excerpt from Professor Laux, specifically the section "Plans State Goals and Do Not Regulate" (TAB 18) and referred to the *Bridgeland-Riverside Community Assn v Calgary (City)* (1982), 19 Alta. L.R. (2d) 361 ("*Bridgeland*") and *Hartel Holdings Co. Ltd. v. Council of the City of Calgary*, [1984] 1 SCR 337. They support the view that development is not illegal merely because it is at variance with the municipal development plan. The Plan is merely the policy, it is not the definitive regulation which dictates what can be done at the current time. The submitted cases deal with paramountcy between zoning and plans. Plans must be read down to follow the *Bylaw* which is the regulatory document.
- [49] The Capital City Downtown Plan was adopted in April 2010 and the amendment was done in 2013 to the McKay area (Tab 13). Page "11" (Appellant's submission) of this Plan sets out the Policies and future initiatives that contains new zoning regulations that provided development toward the vision. The plan is clearly a vision. The implementation strategy provides direction, identifies stakeholders, and proposed responsibility to help organize the City's efforts to deliver the Plan. Page "15" (Appellant's submission) states the Purpose of the Plan - to renew the vision for the Downtown. Page "18" (Appellant's submission) of the Plan addresses the Station Lands Area stating it is to be developed as a neighbourhood with mixed-use, high-density

commercial, residential, institutional and major potential sports and entertainment neighbourhood uses. Page “19” (Appellant’s submission) of the Plan outlines the Land Use and Development Policies. Section CC3.1 outlines the Intensification of Land Uses in the Station Lands and redevelopment of lands. Section CC3.4 outlines the Station Lands Site Planning and Design. Section CC3.5 outlines the Potential for a Sports and Entertainment District.

- [50] Rogers Place was not open at the time the Plan was drafted. The Plan supports the development of the district.
- [51] The Capital City Downtown Plan, City of Edmonton, 2011 International Downtown Association Achievement Awards Submission states at Page “21”, A New Vision for Downtown in 15 years. He stated that in 2025 Downtown will be Sustainable Vibrant, Well-Designed, and Accessible which is what the Katz Group targets (TAB 13).
- [52] The Downtown Plan is future oriented as shown by examples he cited of forward language and they are ensuring that they will achieve this in their developments. The Plan is aspirational and visional. Mr. Dubois stated that the Katz Group has been involved in this process all along. The Katz Group is doing exactly what the vision statement proposes, they developed this area three times faster than anticipated; therefore, there is a need for the parking lot. They may even exceed the 2025 goal.
- [53] There is no conflict with the Plan as the Plan is future-oriented and flexible. Flexibility is needed to meet the long term goals of the Plan. The proposed parking lot with 300 stalls, most of which already exist, is pretty “small potatoes.”
- [54] The Plan prohibits new parking lots. As there is already parking on the subject Site, the proposed development will not be different than what is already taking place - it is not new.
- [55] A short time ago, there were four surface parking lots at the intersection of 101 Street and 104 Avenue. The Edmonton Tower was built on one of the parking lots. All the proposed developments in the area will have underground parking. The plan is to develop the Baccarat site with underground parking, they just need a little help as they try to fast-track this huge development.
- [56] Section 910.12 is the AED Arena & Entertainment District Zone. It applies to the Site in question and the Ice District. He outlined the General Purpose of this Section of the *Edmonton Zoning Bylaw* and noted Section 910.12(3)(1) states Non-accessory Parking is a Discretionary Use.
- [57] Section 910.4(1)(f) is a Downtown Wide Regulation dealing with Surface Lots. The Appellants want the Board to exercise its variance power under Section 687(3)(d) of the *Municipal Government Act* as there is no change in the use, nor any negative impact on adjacent properties.

- [58] In his opinion, a variance is appropriate because the parking lot is temporary for three years, does not really change the historical use of the site over the past 25 years and it is an improvement to what is there now. It takes time to redevelop an area and the Appellant is only asking for a three year development which is an improvement on the subject Site.
- [59] The development complies with the Plan which is visionary and contemplates a timeline of 2025. The *Edmonton Zoning Bylaw* is the more detailed implementational instrument of the Plan. The *Municipal Government Act* gives the Board a variance power and that applies to the *Bylaw* including the Section 910 prohibition of surface lots. It is well within the Board's authority to vary this section.
- [60] The scope of application under appeal is the same as the scope of application for the North Area. The only difference is the number of parking stalls with a three year period. The Reasons for Refusal in this application appear as conditions of approval in the decision for the North Area.
- [61] Reason for Refusal 1 is not true, the development is consistent with the Plan. Reason for Refusal 2 can be varied and should be varied. Reasons for Refusal 3-8 are not reasons to refuse. They are requirements including landscaping, parking for disabled, loading and unloading that the City would normally want for a true redevelopment of the Site for this use, however as this is just for three years they should not be required. They were not required for the North Area.
- [62] The Appellants are agreeable to the conditions suggested by the Development Officer in her report. They can work with the City as they did with the North Area to negotiate details.
- [63] In sum, this is a practical problem: how do you get the development built while accommodating construction. It cries out for a solution.
- [64] This is a minor development for the same Use adding only 75 stalls and section 687(3)(d) provides the Board the legal avenue to grant the variance.
- [65] When asked whether this is a new development, Mr. Wakefield stated no because: the Casino moved across the street so the continuation of the parking lot is the same; the development stays within the envelope of preexisting development so it is old; and, intensity is only increasing by 75 stalls which is *deminimus*. There is less parking in this area since the Edmonton Tower was built. In his opinion, the proposed parking lot is not new as the use is being continued.
- [66] The proposed parking lot will be temporary and screening will be provided on the Site.

- [67] When asked to explain the absence of any indication regarding the location of storage areas, including the storage area for snow, the Appellants explained that parking stalls will be used to pile snow on the parking lot but that was not outlined in the plans. They are willing to revise the plans to show this.
- [68] When asked to explain the absence of designated disable parking spaces, the Appellants explained that they can add these to the drawings after consultation with the City as the City requires.
- [69] In reality, this is a hybrid use between accessory parking and Non-accessory Parking. The Grand Villa Casino has underground parking for staff with some disabled parking. There is not enough underground parking to meet the capacity of the casino so the parking lot is required to accommodate the Grand Villa Casino which is accessory to the Casino Use.
- [70] In their opinion, this is a viable option for this area. The site will be used for the parking lot with no buildings being developed.
- [71] The Appellants noted that the other parts of the Plan dealing with the problem of surface parking in other sub Areas describe how allowing surface parking developments creates in a long term disincentive to development. This is not true for the subject Site. The reverse is true. Other development opportunities will provide a disincentive to continue the surface parking Use. In this case, transitioning the area takes work and the permit will facilitate the transition.
- ii) *Position of Mr. Gunther, representing the City of Edmonton Law Branch, who was accompanied by the Development Officer, Ms. Louie*
- [72] Ms. Louie read her written submission to the Board.
- [73] Notwithstanding that the Appellant agrees to imposing the terms of the conditions imposed on the parking lot for the North Area, Mr. Gunther believes the Board would either need to review revised plans or grant variances to some of the requirements.
- [74] When asked if the temporary nature of the development would account for granting variances to the regulations listed in Reasons for Refusal 3-8, Mr. Gunther stated that this application was turned down primarily for Reasons for Refusal 1 and 2 because the development is inconsistent with Council's intent.
- [75] The remaining variances are a double-edged sword. The City believes the development should not be allowed. That said, if it were approved the City would usually expect to see a higher level of compliance with issues like landscaping. However, imposing those requirements on a temporary three year permit would be wasteful as they would just be stripped off in three years.

- [76] The lot for the North Area is a separate site. It is zoned DC1, so different regulations apply and the suggested conditions may not necessarily be the same.
- [77] There is clear direction in the Area Redevelopment Plan that there is not supposed to be surface parking lots downtown.
- [78] In response to a question regarding a discrepancy in the number of parking spaces, Ms. Louie indicated there was a revision made to plans to accommodate setbacks. There are 310 parking spaces demarcated on the stamped refused plans.
- [79] To Ms. Louis's knowledge, the existing parking area is graveled and has always been graveled. Parking behind the Baccarat Casino was approved as accessory. There is a permit for the Baccarat Casino with accessory parking; she is not certain if it meets the minimum requirements but parking was shown. The parking lot was just for the Baccarat Casino. It was part and parcel of the requirement for parking associated with the Casino Use. The first permit to demolish the Baccarat Casino building expired. A second permit to demolish the Baccarat Casino building is still in effect.
- [80] Mr. Gunter indicated the Board must consider whether there is a right to an accessory parking Use or an element of legal Non-conformity so that the Board ought to or can disregard the Area Redevelopment Plan.
- [81] In deciding whether this parking is accessory or Non-accessory, the Board has to look at is what has been in place, what is in place and, as a result of those things, what development rights there are to use the parcel for parking.
- [82] The application before the Development Officer is for Non-accessory Parking, but the Appellant has framed the parking Use as accessory. It is better referred to as Non-accessory Parking.
- [83] Every development will have a parking requirement. The Arena & Entertainment District Zone is unusual because it has both minimum and maximum parking requirements because the District is meant to be pedestrian and transit oriented.
- [84] Mr. Gunther supplied the Development Permit and the Development Officer's technical review for the Arena annex, Block K. The minimum parking requirement is 59 spaces and maximum parking allowance is 117 stalls. That development has 265 stalls so it is already in excess of maximum parking requirements. Block K required a variance of more than double the maximum parking spaces and it was granted. When that Development Permit was issued, it was never considered, acknowledged or suggested that parking from the Baccarat Casino site would be incorporated as Accessory Parking for the development taking place around it in Block K.

- [85] From the evidence submitted, it is clear that regardless of proximity, the proposed development is not accessory parking. It meets the definition of Non-accessory Parking because is not limited to the Grand Villa, nor to the Uses in Block K. Stalls are available daily at reduced rates to any member of the public. This meets all the elements of Non-accessory Parking.
- [86] With regards to the legal Non-conforming Use argument, if the Board in fact finds the proposed development is Non-conforming, that right would exist in perpetuity not just for the 3 years, as applied for under this temporary permit.
- [87] Section 643 of the *Municipal Government Act* is restrictive in its scope. “Grandfathering” is only applicable when there is an existing permit in place for a use and then the Bylaw subsequently changes to prohibit that use. The caselaw is consistently clear that onus to prove legal Non- confirming use is on the person asserting it – here, the onus is on the Appellant to prove the existence of the Development Permit. See *Rogers v Wood Buffalo*, 2014 ABCA 107 and *West Nipissing v Lafond* 2017 ONSC 3097.
- [88] To have a legal Non-confirming Use that trumps the wording in the Bylaw, the Appellant has to establish the Use predated the current bylaw. Having parking behind the Baccarat Casino for the Baccarat Casino is not a legal Non-Conforming use and gives the Appellant no rights. There is no evidence of a Development Permit for Non-accessory Parking on the site. Even if people were using the Site for that purpose, it was not being done lawfully with a permit. The Development Permit approved for the Baccarat Casino included parking just for that use.
- [89] He cannot comment whether or not there is any Development Permit for Non-accessory Parking on that site as he has not seen the original Development Permit. The Board ought to consider this a new application for Non-accessory Parking without any established rights to any land use including, accessory parking or Non-accessory Parking.
- [90] It is clear the proposed Use, Non-accessory Parking, is not a desired use or a lawful use for downtown.
- [91] There is some suggestion that pursuant to the *Bridgeland* case, the Board, notwithstanding section 687(3)(a.1) of the *Municipal Government Act*, can overlook statutory plans, view them as policy and make any decision it wishes. That is not a correct statement of law.



- [92] The *Bridgeland case* does not make sense; it was decided in 1982 under former legislation, at a time when there were no development appeal boards. A lot of money, time, and effort goes into an Area Redevelopment Plan. It is an over-simplification of the *Bridgeland case* to say that an Area Redevelopment Plan can be overlooked, or to simply say it is aspirational to be complied with one day perhaps and simply disregarded in the mean time.
- [93] The *Bridgeland case* says a statutory plan cannot effectively remove the use; it does not say that if there is a conflict between the *Bylaw* and the Plan, that the Plan must be disregarded.
- [94] Here the *Edmonton Zoning Bylaw* and statutory plans are clear: the direction of City Council is that parking lots are not desired.
- [95] In *Rossdale Community League vs Edmonton (City)*, 2017 ABCA 90 the Court adopted a statement from the BC courts. When interpreting legislation, part of the goal is to interpret what council is trying to say by asking should this development take place in this particular location.
- [96] When the Development Officer reads the *Edmonton Zoning Bylaw* and the Area Redevelopment Plan, surface parking is not a desirable use. The Board must ask itself, what is the goal when interpreting the *Area Redevelopment Plan* and *Edmonton Zoning Bylaw* and then draw a conclusion about whether the use ought to take place at this location.
- [97] It is not just the directions which discourage this use, but also the entire context including provisions on grand boulevards and streets and on encouraging public transportation. The Area Redevelopment Plan indicates 104 Avenue and 101 Street are two grand boulevards of downtown. The Area Redevelopment Plan is explicit in the shift for Rogers Place and work to use other mode of transportation.
- [98] The Area Redevelopment Plan is direct and explicit. The Bylaw provision cited in the Reasons for Refusal is direct and explicit. Redevelopment is done Development Permit by Development Permit, it is not done simply by a flipped switch. Even though the proposed development is just for a term of three years, it is not consistent with the Plan to uphold the permit.
- [99] Mr. Gunther was asked about whether the fact that Non-accessory Parking is a listed Discretionary Use in the AED Zone creates a direct conflict with the Area

Redevelopment Plan such that pursuant to *McCauley Community League v. Edmonton (City)*, 2012 ABCA 224 (“*McCauley*”), the Arena & Entertainment District Zone should prevail and how that would affect the analysis about the appropriateness of the proposed development. He replied there must be a true conflict between the Area Redevelopment Plan and Bylaw, in order for one to be read down. Like a constitutional division of powers analysis, there has to be no reasonable possibility of complying with both to create a true conflict. In such a case, the Area Redevelopment should be read down. Here there is no true conflict, both documents indicate that the development should be denied.

- [100] He is uncertain why Non-accessory Parking is a listed Use. However, he noted that in this area, land is sub-divided as strata parcels not condo parcels. There is a large lot subdivided underground lot for a parkade. There is one parcel that includes a parkade proposed as Non-accessory Parking.
- [101] Non-accessory Parking can be located underground, in which case it is not a surface lot. Surface parking is not a use, just a description of the Non-accessory Parking Use.
- [102] A Discretionary Non-accessory Parking Use is reasonable in some contexts in this Zone, but a surface gravel lot is not reasonable.
- [103] There is a demand for parking in the area, but there are already 2,000 parking stalls.
- [104] The Board asked for clarification about why a permit for 3 years for a temporary use is not consistent with the Area Redevelopment Plan. Mr. Gunther replied any Area Redevelopment Plan is visionary/aspirational. The issue is how do we carry out the aspirations of the plan. Each time a Development Permit is issued, it represents an opportunity to either further the aims of the plan or to diverge from the plan.
- [105] Unless there is a specific date when the plan comes into force, it immediately applies, and with each Development Permit, the Development Officer tries to make the best decision and the legally correct decision that brings one to closer to the goals.
- [106] What is better in this case, an empty lot not generating revenue or a Development Permit for a three year Non-accessory Parking lot? Which decision brings you closer to that vision? In his view, refusal is better because issuing this Development Permit delays the vision by 3 years because the development will generate income for the next three years. This reduces incentive to find another development for this Site which would be in compliance with the Plan.

- [107] The Board asked for Mr. Gunter's comments about the compatibility of the proposed development with surrounding uses which is one of the factors the Board must consider in assessing the proposed Discretionary Use. He replied that he does not have evidence that it is not compatible, other than the legislative provision which indicates that it is not desirable. The City is not taking issue with compatibility of the development with surrounding Uses in the context of the test for a variance or objecting the Use on that basis. He confirmed that Section 910.4(1)(f) which states that no surface parking shall be allowed other than accessory parking that is located at a rear of the building and is accessed from the abutting alley would have to be waived if the permit were to be approved.
- [108] He acknowledged that the proposed development is a Discretionary Use for the subject Site, but argued that it is prohibited in the Area Redevelopment Plan and is not an appropriate Discretionary Use.
- [109] The Board's decision about allowing the Discretionary Use turns on the Bylaw, the plan and the Board's residual discretion to apply general planning principles to make it a determination as to whether it is an appropriate decision in the circumstances.

*iii) Rebuttal of the Appellant Mr. Wakefield and Mr. Dubois*

- [110] The appeal is simpler than the submissions suggest. There is a building across the street with a Casino Use within 30 metres of the original Baccarat Site. The Bylaw states that you can have off-site parking at this distance. Therefore at least a portion of the accessory parking with the original Baccarat Casino can be carried over to the new Casino which moved across the street, it is still the same use.
- [111] According to the submitted excerpts from *Planning Law and Practice in Alberta*, once an appellant has raised a reasonable doubt about a Non-conforming use, the onus shifts back to the City to disprove it. The Appellants have raised that doubt and the onus is on the City.
- [112] Section 643 Non-conforming use provisions apply because
- i)* there was a Development Permit for the Baccarat Casino and it contemplated parking on the site from 25 years ago to the present;
  - ii)* the Baccarat Casino moved across the street it has the same operator and is the same business;
  - iii)* accessory parking is allowed up to 120 metres; and,

- iv) parking never ceased while the *Bylaw* changed to AED zoning.
- [113] He agrees with many of the submissions of counsel for the City. He agrees with the interpretation that City Council adopted a Plan and a *Bylaw* that restricts surface parking if allowing it means that there is no incentive to redevelop the land.
- [114] Practically the choices are that the Baccarat building could be demolished and used as a parking lot or it could stay as it is. The Board can grant variances at their discretion if it is a desirable result. Here, variances should be granted because this is not a change in Use, it does not affect the amenities of the area and it is not incompatible with neighbouring uses.
- [115] Refusal will not magically result in some other development, the lot will stay as is. There is presently no alternative development.
- [116] The Area Redevelopment Plan and the *Edmonton Zoning Bylaw* work together, they share a vision and common goal. The issue is the practical question of how a goal can be achieved. Redevelopment is not done over night. There is no conflict if you add in a time element.
- [117] It has been a stretch to meet all the redevelopment contemplated in the Plan. They have had a helpful partnership with the City and they support the 15 year time line. Refusing the permit will not make them permanently redevelop the site. They do not currently have a client to redevelop this Site. As previously argued, the three year permit encourages development efforts.
- [118] The *Edmonton Zoning Bylaw* is always subject to the Board's authority to grant a variance per section 687(3)(d) for a desirable result. This is the equitable component of the law in place since Roman Times.
- [119] Mr. Dubois stated that they are working on developing the adjacent site.
- [120] In their opinion, a three year term for the parking lot is reasonable.
- [121] The parking lot should be grandfathered in. If Section 643 is applied, they have an original permit for the Baccarat Casino with parking for several years. The operator of the Baccarat Casino has not changed, the business is the same, so they are entitled to have parking 120 metres away.
- [122] Mr. Dubois stated that the Katz Group has viewed their relationship with the City as a very positive and helpful partnership and that they were part of the Area Redevelopment plan and rezoning for the Ice District. They are supportive of the Plan and agree with the 15 year timeline. They are willing to negotiate with the City if the proposed development is approved to match the similar items that they negotiated on the north parking in the South Area.

**Decision**

[123] The appeal is DENIED and the decision of the Development Authority is CONFIRMED. The development is REFUSED.

**Reasons for Decision**

[124] This is an appeal of a decision of the Development Officer to refuse an application to “Construct and operate a temporary Non-accessory Parking lot (surface parking lot with 310 vehicular parking stalls) for three years from the date of issuance of the Development Permit.”

[125] Eight Reasons for Refusal are listed. The parties agreed that the first two reasons, that the proposed development is contrary to Policy CC 3.4 of the Capital City Downtown Plan and Section 910.4(1)(f)(i) of the *Edmonton Zoning Bylaw* (the Bylaw) were most significant. The remaining six Reasons for Refusal identify specific points of noncompliance with development regulations concerning matters such as the minimum number of trees, storage, disabled parking spaces, hard surfacing of the lot, landscaping, landscape islands, and any amenities in the required building setbacks including street furniture, fountains and public art.

[126] The subject Site is located to the east of Rogers Arena (the Arena) and Block K, on the northwest corner of 104 Avenue and 101 Street. It abuts both those roadways.

[127] It is also located within the Downtown Special Area and zoned AED - Arena and Entertainment District Zone. Per Section 910.12(3)(1) of the Bylaw, Non-accessory Parking is a Discretionary Use in this Zone. The proposed development requires seven variances to the applicable development regulations.

[128] The subject Site is also governed by the Capital City Downtown Plan (the “Plan”).

[129] Currently, the subject Site contains the closed Baccarat Casino building which fronts 104 Avenue and a graveled parking area on the northern portion of subject Site behind the building.

[130] More than 20 years ago, a Casino and Other Gaming Establishment building was constructed on the southern portion of the subject Site (the Baccarat Casino). Neither party provided a copy of the original Development Permit for the Baccarat Casino.

[131] According to the Development Officer, on June 4, 1999, Development Permit 589023-006 was issued to expand the Baccarat Casino Use. Neither party provided a copy of that Development Permit.

- [132] On April 26, 2016, a parent (original) Development Permit 219152483-001 was issued as a Class A Development with respect to the subject Site to demolish the existing Baccarat Casino Building. This permit expired. A copy was not provided to the Board.
- [133] On September 7, 2017 Development Permit 260905159-001 was issued as a Class A Development with respect to the subject Site to demolish the existing Baccarat Casino building. A copy was not provided to the Board.
- [134] According to the Appellants, subsequent to the passage of the Plan and the AED Zone, the Baccarat Casino ceased to operate, and within weeks the same operators started the Grand Villa Casino in the Block K Building located 30 metres west of the subject Site. The Board was not provided with a copy of any Development Permits issued for the new Casino and Other Gaming Establishment Use authorizing the Grand Villa Casino Use at that location.
- [135] The City did submit a copy of Development Permit 161157061-001 issued February 23, 2015 for a five storey multi-use building (Block K) as an addition to an existing Spectator Sports Establishment (Arena) and Indoor participant Recreation Services (Community Rink) with underground parkade; three General Retail Stores and a professional Financial and Office Support Services Use on the fourth and fifth floors. The City also provided the Board with a portion of the technical review of this permit showing a variance to increase the maximum allowed number of parking spaces from 117 spaces to 265 spaces. The Grand Villa Casino Use is not mentioned in this permit. However, both parties indicated that these 260 parking spaces are to be for all uses of Block K including the Grand Villa Casino.
- [136] The decision of the Development Officer under appeal is the refusal of an application to “Construct and operate a temporary Non-accessory Parking lot (surface parking lot with 310 vehicular parking stalls) for three years from the date of issuance of the Development Permit.
- [137] When asked on page 1 at item C7 of the Development Permit Application to “Detail the proposed use of the new building/addition:” the Applicant/Appellant states: “Construct exterior alterations to develop an Non-Accessory vehicular parking lot on site currently occupied by the old Baccarat casino and its Accessory parking area. Refer to as Lot I/J”.
- [138] During the course of the hearing, the Appellants indicated that they intend for the proposed parking spaces to be available to the public for hire on an unrestricted basis. They anticipate that spaces may be rented by individuals working at the nearby establishments or construction sites, by users and employees of Block K, by patrons of the Grande Villa Casino and the Arena, and by any other visitors to the area. The Appellants noted that the existing parking spaces on the subject Site currently continue to be used in part by patrons of the Grand Villa Casino which replaced the Baccarat Casino and is 30 metres from the subject Site.

- [139] During the hearing, the Appellants described these parking spaces at times as “accessory parking” for the Grand Villa Casino, for other uses in Block K and for the Arena. In spite of some of their arguments about accessory Uses, grandfathering and Non-conforming Uses, the Appellants confirmed that the scope of the Development Permit is correct. They seek a Development Permit for a Non-accessory Parking Use in the form of a surface parking lot. They are not seeking a Development Permit for accessory parking for the Grand Villa Casino Use or for any other specific principal use.
- [140] Based on the submissions of the parties, the Board finds that the proposed Use falls within the Use class definition Non-accessory Parking found in Section 7.4(41) of the *Edmonton Zoning Bylaw*. It states:
- Non-accessory Parking means development providing vehicular parking which is not primarily intended for the Use of residents, employees or clients of a particular development. Typical uses include surface parking lots and parking structures located above or below Grade.
- [141] Surface parking lots are identified in the Use class definition as a typical category of Non-accessory Parking Use and distinguished from two other typical uses: above grade parking structures and below grade parking structures.
- [142] The Appellants argued that the proposed development should be approved in the same manner as two other surface parking lots with 685 stalls that were approved in 2016 in North area between 102 Street and 103 Street and between 105 Avenue and 106 Avenue. They noted that some of the Reasons for Refusal in the current application were dealt with as conditions of approval for that permit.
- [143] The Board notes that while the North Area is located in very close proximity, it is not subject to the same statutory plans, not subject to the same zoning and not in a comparable location. The Board must consider the application under appeal based on its own merit and unique set of circumstances.
- [144] The Appellants argued that the proposed Use, Non-accessory Parking, is grandfathered and the appeal should be allowed regardless of the Plan or the provisions in the AED Zone based on section 643 of the *Municipal Government Act* for several reasons:
- i) the development regulation in section 910.4(1)(f)(i) does not override grandfathering under section 643 of the Act;
  - ii) surface parking has been provided on the subject Site for a great many years to patrons of the Baccarat Casino and to other members of the public, it predates the passing of the AED zoning;

- iii)* the subject Site is within the allowable distance for off-site accessory parking in section 54.2(2)(b) of the Bylaw for the Arena and for Block K which holds the Grand Villa Casino, a community ice rink and the Appellants' administrative offices and parking spaces will be used by individuals connected to those businesses; and
- iv)* after a brief closure, the Baccarat Casino operations were continued at the Grand Villa Casino by the same management group on the adjacent lot to the west which is located within the allowable distance for off-site accessory parking under section 54.2(2)(b) of the Bylaw and some users of the parking lot might be patrons of the new Grand Villa Casino Use.

[145] Section 643(1) of the Act deals with Non-conforming uses. It enables the continuance of preexisting uses which do not conform to the provisions of subsequent revisions to the Bylaw, including section 910.4(1)(f)(i), if certain circumstances are satisfied:

If a development permit has been issued on or before the day on which a land use bylaw or 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.

[146] The Board was not provided with any Development Permits for the Baccarat Casino Use, nor for the Grand Villa Casino Use. Neither party presented the Board with a Development Permit of any sort authorizing the ongoing parking Use at the subject Site.

[147] The Development Officer stated four relevant Development Permits had been issued for the subject Site. Two for demolition of the Baccarat building and two authorizing the Baccarat Casino as the principle Use on the subject Site. The Development Officer believed that the existing parking spaces were most likely authorized pursuant to the two earlier Development Permits issued with respect to the subject Site as part and parcel of the parking requirements for the principle Use of the Site, the Baccarat Casino.

[148] The Appellants did not dispute the submissions of the Development Officer, they merely stated there was a Development Permit for the Baccarat Casino and it contemplated parking on the subject Site from 25 years ago to the present. The Board notes that in the Development Permit application, the Appellants asked "to develop a Non-Accessory vehicular parking lot on site currently occupied by the old Baccarat casino and its Accessory parking area."

[149] They did not produce their prior permit, but rather urged the Board to consider the practical situation. They noted that the existing parking spaces behind the Baccarat Casino building were in fact used for many years without restriction by patrons of the Baccarat Casino and by others.



- [150] Based on the submissions of the parties and the evidence before it, the Board finds that existing parking spaces on the subject Site were authorized as accessory parking in the normal course under the first Development Permit or 1999 Development Permit to fulfill the parking requirements associated with the Baccarat Casino, the principle Use on the subject Site.
- [151] In *Rogers v Buffalo*, 2014 ABCA 107, Justice Berger states “It is not arguable that extant uses of property qualified as “legal non-conforming uses” within the saving provision of section 643 of the MGA” (paragraph 19). Here, then the Appellant’s statement that the parking has been by Baccarat patrons and others is insufficient to establish a non-conforming Non-accessory Parking use.
- [152] The Board finds that section 643 does not apply in this case because the Appellant has not provided any evidence of an issued Development Permit authorizing a Non-accessory Parking Use at the subject Site. On this basis, the Board finds that grandfathering of a Non-accessory Parking Use as requested by the Appellant based on section 643 fails.
- [153] The Board considered the other arguments raised by the Appellant and notes:
- i) Section 643 crystallizes a permit holder’s rights in the event of a change in Bylaw. The saving provision does not apply if there is a change in Use. No authority was cited for the proposition that a Development Permit authorizing an accessory parking Use could create any legal entitlement to a Development Permit for a different Use, Non-accessory Parking.
  - ii) No authority was cited for the proposition that accessory parking previously approved for one principal Use (the closed Baccarat Casino) on a particular Site could migrate to become either Non-accessory Parking to multiple other nearby Uses or to become accessory parking to another development of the same Use class and run by the same operators on an another nearby Site (the Grand Villa Casino). Further, both parties agreed that the 260 underground spaces approved for Block K included parking for the Grand Villa Casino.
  - iii) Section 643 also does not apply if a Use is discontinued for six months or more. The Baccarat Casino Use ceased on the subject Site several months prior to the hearing. No authority was cited for the proposition that accessory parking to the original Principle Use for the Baccarat Casino survived the cessation of the Baccarat Casino Use in order to grandfather in a right to a Non-accessory Parking Development Permit based only on the proximity of the new Grand Villa Casino.
  - iv) The Development Permit application under appeal seeks to expand the number of parking spaces to cover the entire developable area on the subject Site by constructing 75 to 100 new spaces in the portion of the Site currently occupied by the Baccarat Casino building. Even if the existing parking use had been authorized, section 643(4) of the Act provides that a non-conforming use of part of a lot may not be extended or transferred in whole or in part to any other part of the lot.

- [154] The Board finds no basis to approve the requested Non-accessory Parking Use under section 643 of the Act.
- [155] Next the Board considered several factors in deciding whether a temporary three-year Development Permit to construct a Non-accessory Parking Use in the form of a surface parking lot with 310 parking spaces at the northwest corner of the intersection of 101 Street and 104 Avenue should be issued, including: the Capital City Downtown Plan; the *Edmonton Zoning Bylaw* provisions applicable to the Downtown Special Area and to the AED Zone; the compatibility of the proposed development; and the type, character and intensity of the proposed use, including the limited term of the proposed development.
- [156] The Court of Appeal in *Rossdale Community League (1974) v Edmonton (Subdivision and Development appeal Board)* 2009 ABCA 261 provided guidance to the Board in deciding whether a Discretionary Use should be allowed (at para 14): “The object and purpose of a discretionary use is to allow development authority to assess the particular type and character of the use involved, including its intensity and its compatibility with adjacent uses.”
- [157] As part of this determination, the Board considered whether the proposed Use is reasonably compatible with the surroundings given the nature and character of current adjacent Uses.
- [158] The Appellants argued that the proposed Use is compatible as the subject Site is surrounded by commercial uses. They noted that previously, surface parking lots were located at all three of the other corners of this intersection. While one of the surface lots has been replaced with a large commercial building, two surface lots remain at the southeast and northeast corners of the intersection of 104 Avenue and 101 Street. The Appellant also indicated that compatibility is not an issue as they own many nearby properties and they favour the development as do other nearby business owners.
- [159] Counsel for the City did not have evidence and did not take issue with compatibility of the development with surrounding Uses in the context of the test for a variance, rather he took issue with compatibility given the legislative provisions in the Plan and Bylaw.
- [160] The Board agrees that the proposed development is compatible in the sense that it is surrounded by commercial uses including two nearby surface parking lots Uses at 104 Avenue and 101 Street. The North Area surface parking lot with 685 vehicular stalls is also located in close proximity across 105 Avenue to the north and northeast of the subject Site. No objections or letters of support were received and no interested parties appeared at the hearing.
- [161] However, the Board notes that the proposed development is not similar to the other new developments such as Edmonton Tower, Block Kand the Arena. In addition, a component of this compatibility is that surrounding developments are surface parking lots, the very type of Non-accessory Parking Use which is discouraged and prohibited under the Plan.

In this respect, compatibility with adjacent Uses is in part an indicator that the proposed discretionary should not be approved. In addition, the two nearest surface parking lots fall within other downtown zones and the Board received no information about their legal status. The surface Parking Lots in the North Area were approved in March 2017 and are Direct Control Districts where Council has exercised more control.

[162] The Board has taken these aspects of compatibility into account in determining whether or not to approve the proposed Discretionary Use.

[163] Section 687(3) of the Act also provides direction to the Board in making this decision:

687(3) In determining an appeal, the subdivision and development appeal board  
(a.1) must comply with the land use policies and statutory plans and subject to clause (d), the land use bylaw in effect.

[164] The Board considered whether the issuance of a temporary 3 year Development Permit to construct a Non-accessory Parking use in the form of a graveled surface parking lot at the north west corner of the intersection of 101 Street and 104 Avenue was within the intention of City Council as expressed in the applicable statutory plan, the Capital City Downtown Plan.

[165] The Capital City Downtown Plan was adopted by Council in April 2010. The Plan divides the Downtown Special Area into several core areas and then again into smaller sub areas at which level the planning is focused. The subject Site falls within Sub Area 3b of the Station Lands which are located in the Commercial-Cultural Core of the Downtown Area just east of the Arena and Block K. Sub Area 3b includes three blocks of land located between 101 Street and 104 Street and between 104 Avenue and 105 Avenue containing the Arena, Block K and the subject Site.

[166] The Plan lists the general goals and vision for the Commercial-Cultural Core and then sets out provisions specific to the Station Lands Sub Area 3 at pages 163 - 165. The Development Intent for Sub Area 3 is stated at page 163:

The Station Lands Area is to be developed as a neighbourhood with mixed-use, high-density commercial, residential, institutional and major potential sports and entertainment neighbourhood uses. Redevelopment will be compatible with development in adjacent neighbourhoods, contribute to a high quality public environment and be supportive of existing and future transit developments.

[167] The Board again recognizes that the proposed development is in part compatible with existing neighbouring uses, and also that part of this compatibility comes from the fact that many of the nearby developments are surface parking lots, not permanently redeveloped properties. The Board finds that the proposed Non-accessory Parking Use is contrary to the development intent of this area as it will not contribute to a high quality public environment, nor support existing and future transit developments.

[168] The Land Use and Development Policies for the Station Lands are set out at page 164/165:

### **CC 3.1 Intensification of Land Uses in the Station Lands**

Encourage the intensification of land uses in the Station Lands Area in the form of mixed-use developments. The primary focus of development will be on commercial office space and entertainment uses supported by street level retail and services.

### **CC 3.2 Mixed-use High Density Uses (Area ‘A’)**

Encourage the redevelopment of Station Lands “Area A” to focus on quality high density mixed-use development, comprised primarily of high intensity office, major entertainment, cultural and institutional uses and pedestrian-oriented commercial uses along abutting arterials.

### **CC 3.3 Transit Supportive, Medium to High Density uses (Area ‘B’)**

Encourage and support transit supportive developments reflecting a mix of medium to high density commercial, institutional and residential uses in Station Lands “Area B”. Provide for a transition of development from high to medium density.

### **CC 3.4 Station Lands Site Planning and Design**

To further strengthen the urban character, quality and development concepts for the Station Lands, site planning and design shall ensure that:

- o Streetwalls will be highly transparent and articulated at ground level and the 2nd storey to reflect a high level of pedestrian interaction.
- o No surface parking or above grade parkades will be allowed to front onto adjacent streets and avenues.
- o The north-south view corridors shall be maintained to reflect the Downtown grid street pattern. This may be provided in the form of a street, linear park or pedestrian walkway.
- o Development adjacent to 105 Avenue shall complement and be compatible with the design of the Downtown North Edge area.

### **CC 3.5 Potential for a Sports and Entertainment District**

Support the development of a Sports and Entertainment District in the Downtown located on lands within the Station Lands Area (Sub Area 3b), and on part of the Commercial Core (Sub Area 1) north of 103 Avenue and west of 102 Street. Work with applicants to ensure the overall impact of a large facility on the public realm is positive. Apply the following planning and urban design principles in the review and approval process for proposed development within the Sports and Entertainment District:

## **Planning and Urban Design Principles for a Sports and Entertainment District**

- 1. Design**

The design of development within this district should be of outstanding merit, and make a significant contribution to the cityscape as landmark buildings, and could include animated lighting and signage.
- 2. Open Space**

A significant, publicly accessible exterior open space should be provided at grade level as part of the development to provide a vibrant focal point in the precinct.
- 3. Pedestrian Routes**

Development should be designed to maximize pedestrian activity on the streets. Direct and safe pedestrian routes should be provided from buildings to major destinations in surrounding areas, including public transit facilities. Pedestrian connections should be provided at grade across and through development located south of 104 Avenue.
- 4. Design for Edmonton's Climate**

Development should be designed to minimize adverse environmental impacts on open spaces and adjacent streets, create positive exterior microclimates, and provide weather protection.
- 5. Parking and Loading**

The majority of parking should be provided underground. Some parking may be provided in above ground structures if screened at upper levels and wrapped with active space at ground level. Loading areas should be fully screened or enclosed. Building service and vehicular access should be located to minimize conflicts with pedestrian traffic and sized to minimize discontinuity of street walls.
- 6. Retail and Restaurants**

Retail, restaurant, and entertainment uses should be focused along 102 and 103 Streets and should address the street with primary entrances.
- 7. Major Streets**

The design of development should support the existing and planned street network and Public Realm Plan and reinforce the prominence of 101 Street as a major Gateway and 104 Avenue as a Grand Boulevard.

**8. Streetscape**

Development frontages should have a high level of visual and functional permeability, and a human scale at street level. Massive blank walls are to be avoided.

**9. Sustainable Design**

Development should strive to achieve a high standard of sustainability as promoted through such programs as LEED®, Built Green, and BOMA Best.

[169] The Board finds that the proposed surface parking lot located in the centre of the downtown AED Zone in close proximity to an LRT station and bus routes is not a transit supportive development as described in CC 3.3.

[170] Section CC 3.4 prohibits surface parking and above ground parkades which front onto adjacent streets and avenues. The Appellant argued that the prohibition in CC 3.4 did not apply as the Planning Achievement Award Submission he submitted, states that the Plan only forbids “new surface parking lots” and the proposed development is not new, it simply adds between 75 to 100 new parking spaces resulting in a new total of 310 spaces which is de minimus.

[171] The Board notes that CC 3.4 of the Plan does not include the word “new,” and finds that the prohibition is not necessarily restricted to new surface parking lots. Further, even if it were so restricted, the Board finds that the proposed development is a new surface parking lot because:

- i)* The scope of application specifies this proposed development is not merely a request for continuation of the existing parking area - 75 to 100 new parking spaces out of a total of 310 spaces are proposed to be added immediately adjacent to 101 street and 104 Avenue replacing an existing building, this is a material increase and a significant proportion of the total number of spaces.
- ii)* As the Baccarat Casino will be demolished, the proposed surface parking lot will become the new principal Use of the subject Site and occupy the entire developable portion of the Site area. There will no longer be any buildings on the subject Site. The surface parking lot will come as close as allowed to the adjacent streets along portions of the front and side lot lines where parking spaces did not previously exist.
- iii)* The development will change the streetscape. Currently the Baccarat Casino Building fronts onto 104 Avenue and flanks a portion of 101 Street providing separation and screening of the parking area from the two Grand Avenues, with the proposed development this will be lost and the parking lot and the North Area parking lot will be more visible.
- iv)* According to Transportation, with this added capacity new entrances must be constructed for the parking lot connecting it with 102 Street and 105 Avenue.

- v) As the Board was presented with no evidence of an existing Development Permit for a Non-accessory Parking Use, the application involves a change in Use on the Site.

[172] The Board finds that the proposed Non-accessory Parking Use, a surface parking lot located adjacent to both 104 Avenue and 101 Street, is expressly prohibited by CC 3.4 based on the planning consideration of further strengthening the urban character, quality and development concepts of the Station Lands. According to this policy, this specific typical type of Non-accessory Parking Use (surface parking lot) is not allowed at this exact location.

[173] In CC 3.5, the Plan directs that specified planning and urban design principles are to be applied in the review and approval process for proposed development within the Sports and Entertainment District. This supports the Development Authority's contention that the Plan should be applied permit by permit as the redevelopment takes shape. The Board finds that the proposed development is not consistent with CC 3.5, nor will it promote the specified principles for: 1. Design, 2. Open Spaces, 5. Parking and Loading; or 7. Major Streets.

[174] The prohibition in CC 3.4 on surface parking lots is reinforced in CC 3.5 Principle 5: Parking and Loading. The proposed development is not consistent with CC 3.5 because it is not underground, nor is it in an above ground structure (the two other typical Non-accessory Parking Uses identified in section 7.4(41)). The stamped refused plans also fail to identify loading areas, screening or enclosures. The surface parking lot does meet all required setbacks. It does not meet the minimum required number of trees or other landscaping requirements which provide screening, nor is it wrapped with active space as required. The Board notes that the Appellants also sought a waiver of the requirements in the Bylaw that setbacks improve the public realm and may include, among other amenities, appropriate seating areas, distinctive paving materials, fountains or public art.

[175] The subject Site fronts onto 104 Avenue and is adjacent to 101 Street. Both of these roadways are identified as Grand Avenues in Figure 27 of the Plan. The Vision for Grand Avenues is discussed throughout the Plan. At page 104, the Plan states in part that Grand Avenues are to be tree lined and associated with sidewalks and amenities and with buildings that address the street with formal entrances and support activities that add animation. The Board notes that per the stamped refused plans, the development incorporates some trees, but does little else consistent with the vision for Grand Avenues. Contrary to this general vision, the graveled surface parking lot requires variances to development regulations concerning hardsurfacing, landscaping, landscaping islands, and lacks any amenities in the required building setbacks such as public furniture or fountains (a requirement which the Board notes has also been specifically included in the AED Zone regulations to achieve this objective of the Plan).

[176] Similarly, Policy 9.3 at page 97 of the Plan calls for excellence in street, park and open space design and public realm plans for Grand Avenues. The proposed development is contrary to this objective.

[177] Several sections of the Plan deal with parking in the Downtown Area and surface parking lots in particular:

- i)* At page 20, the Plan notes that within the Warehouse Campus Neighbourhood, “a large number of vacant properties and surface parking lots together represent a tremendous potential for development.”
- ii)* Under the heading Challenges at page 31, the Plan states: “A great downtown cannot be auto-dominated. Edmonton is moving the right direction but more needs to be done. Centrally located surface parking is abundant...”
- iii)* At page 32 under the heading “Land Speculation” the Plan elaborates:

Several potential development sites have been lying vacant, or used as graveled surface parking lot for up to 30 years, since the first of Alberta’s economic downturns in the early 1980s. Many of the sites have been used as “holding properties”, with owners holding onto expectations, or speculating that they will eventually be able to build a major high-rise project.

Since the 1980s, the City has tried to stimulate development through maintaining very high densities throughout the Downtown and minimizing barriers to development. In the late 1990’s, the city sponsored a housing incentive program and this helped stimulate a surge in residential growth in all areas of the Downtown.

Despite very high-density zoning, or perhaps because of this favourable zoning, surface parking lots are the dominant presence in large portions of the Warehouse Campus Neighbourhood. The abundance of these lots breaks up the urban fabric and seriously detracts from the vibrancy of this western portion of the Downtown.

This plan suggests a number of initiatives that will make development more attractive to property owners than land speculation.

[178] While the proposed graveled surface parking lot is not located in the Warehouse Campus area, the rationale is still relevant. Removing the only building on the subject Site and adding 75-100 stalls to construct a 310 stall surface parking lot on the subject Site located in between the two surface lots at the intersection of 104 Avenue and 101 Street and 685 space surface lot in the North Area, is contrary to the intent of the Plan. According to the Plan, surface lots like the proposed development break up the urban fabric and seriously take away from vibrancy which is a key component of the AED Zone and of Grand Avenues. In this sense, the proposed development is contrary to the Plan. The Board also



notes that this portion of the Plan also identifies a planning reason also cited by Counsel for the City about why both vacant lots and gravel surface lots Uses are not desired – speculation may deter or delay development in alignment with the Plan.

[179] Other policies which address parking more generally and also the goal of managing the supply of parking in the Downtown are set out in the Plan at page 152:

- i)* Policy 18.3 proposes Reduced Parking Provisions and Maximum Parking Limits. It states:” “Enhance the livability of the Downtown and the viability of alternative travel modes by reducing the supply of off-street parking spaces required by the Zoning Bylaw for both residential and commercial developments, and by setting maximum limits of the supply of parking spaces. Additionally, ensure that Zoning Bylaw required parking provisions are a mixture of long-term (up to all-day) and short-term(two hour) parking.”
- ii)* Policy 18.4 advocates for innovative solutions including shared parking and off site parking, cash in lieu, and reduction of minimum parking requirements. Policy18.4 does not go so far as to prohibit Non-accessory Parking.
- iii)* Policy 18.6 calls for the establishment of high quality, pedestrian–scale street wall facades for new parking structures, improved signage, lighting and pedestrian features in and around parkades.

[180] The proposed development adds to the supply of off-street parking spaces. It is not a structure, it is a graveled surface lot. The proposed development is contrary to these policies.

[181] Policy 14.2 of the Plan supports development that encourages the use of alternative travel modes that connect the Downtown to other parts of the City. As previously noted, the proposed development is not transit supportive and it is contrary to this policy.

[182] A timeline for the implementation of the various components of the Plan is also provided. The Board notes that in the implementation portion of the Plan (at page 210) key actions for downtown parking are intended to begin immediately (within 1-2 years) including Policy 18.3 for Reduced Parking Provisions and Policy 18.6 for Parking Facility Design, the Plan states they are to be implemented by regulation. The Board notes these objectives were achieved by regulations added to sections 54 and 910 of the Bylaw in 2011.

[183] In sum, the Board finds that the proposed Non-accessory Parking Use, in the form of a graveled surface parking lot, is prohibited at the proposed location adjacent to 104 Avenue and 101 Street by CC 3.4 of the applicable statutory plan. Several other sections of the Plan indicate that surface parking lots like the proposed development are inconsistent and do not comply with many of the other stated objectives and goals with respect to parking, design, parking facility design, public spaces, transit and Grand Avenues. The proposed surface parking lot is not part of the vibrant downtown redevelopment envisioned for the subject Site.

[184] The Board has taken account of this finding in determining whether or not to approve the proposed Discretionary Use.

[185] This is not a situation where an area redevelopment plan has been developed and applied to standard pre-existing zones. The Plan and the applicable provisions of the Bylaw are very current. The provisions of the Downtown Special Areas and the AED Zone were passed in 2010 and 2011 in concert with the Plan and drafted specifically to implement and reinforce the goals and policies of the Plan.

[186] The General Purpose of the AED Zone is found in Section 910.12(1):

The purpose of this Zone is to provide for a vibrant mixed-Use district that will accommodate a multi-purpose sports and entertainment complex complemented by a variety of entertainment, retail, service, office, institutional and Residential Uses that will strengthen the Downtown Core as a regional destination point. The area will be characterized by an accessible, pedestrian-friendly street environment, innovative signage, iconic architecture and exceptional urban design to create a strong sense of place in the Downtown Core and an exciting new image for Edmonton.

[187] The Board finds that a gravel surface parking lot is not consistent with this general purpose.

[188] Non-accessory Parking is listed as a Discretionary Use in section 910.12(3)(1) of the AED Zone.

[189] Section 910.4(1) applies across all sub areas within the Downtown Special Area and it states in part:

(f)Surface Parking Lots:

(i) No surface parking shall be allowed, other than accessory parking that is located at the rear of a building and is accessed from the abutting alley;.....

[190] This regulation effectively prohibits one typical type of Non-accessory Parking Use throughout the AED Zone: Non-Accessory surface parking lots.

[191] This regulation also restricts accessory surface parking lots. The Board notes that even if the Appellants had applied for off-site accessory parking, the proposed parking lot on the subject Site would be prohibited as it is not located at the rear of a building, nor is it accessed from the abutting alley according to the stamped refused plans.

- [192] This development regulation complements and reinforces the prohibition in the Plan which states “No surface parking or above grade parkades will be allowed to front onto adjacent streets and avenues.”
- [193] The Board recognizes that the Plan and Bylaw should be read in context, purposively and where possible, harmoniously. This is particularly appropriate where the zoning has been contemporaneously customized for an area within the Plan. As noted by both parties, the Court of Appeal in *McCauley* has indicated that in true cases of direct conflict, the Bylaw as the operative regulatory document may override the Plan. While Board’s discretion about whether to approve the Discretionary Use cannot be unilaterally ousted by a prohibition in the Plan, the intent of Council as stated in the Plan remains very relevant to the determination about whether or not to allow a Discretionary Use.
- [194] The Board finds that the provisions of the Plan and the Bylaw can be read harmoniously. In this instance, there is no conflict. Neither the Bylaw, nor the Plan prohibits all forms of Non-accessory Parking. Both the Bylaw and the Plan prohibit surface parking lot developments in particular.
- [195] The proposed development is prohibited by the Plan because it is a surface lot and it is located adjacent to two Grand Avenues, 104 Avenue and 101 Street. The proposed development is prohibited by the Bylaw because it is not an accessory Parking Use, it is not located at the rear of a building and it is not accessed from the abutting alley. The proposed surface lot runs afoul of the prohibitions in both the applicable land use bylaw and the statutory plan.
- [196] The Appellants pointed out section 910.4(1) of the Bylaw is a development regulation which can be waived pursuant to the variance powers in Section 687(3)(d). They argue that a variance is appropriate here because neighbouring property owners are supportive of the proposed development and it is temporary, does not change historical use of the property, improves the Site, and is compatible with surrounding uses.
- [197] Again, on this point, Counsel for the City does not take issue with compatibility of the development with surrounding commercial uses in the context of the test for a variance under section 687(3)(d). Their objection is that this is not an appropriate use for the subject Site period. They argued the decision about considering the Discretionary Use in the first place turns on the Bylaw, the Plan and the Board’s residual discretion to apply general planning principles all of which in this case demonstrate that this particular Discretionary Use should not be approved at this particular location.
- [198] While the proposed Use is compatible with surrounding commercial uses, a significant component of that compatibility is that four surrounding developments are themselves surface parking lots. Surface parking lots are the specific built form of Non-accessory Parking Use which the Plan prohibits at this particular location. As noted in the Plan, surface parking lots break up the urban fabric and seriously detract from the vibrancy of the downtown area.

With the demolition of the Baccarat building, four distinct visually connected surface parking lots will exist in the centre of this downtown area. Further the proposed development is not compatible in any visual sense with the new permanent redevelopments which also surround the Site to the east, south and west. In this case, compatibility with adjacent Uses is in part an indicator that the proposed Discretionary Use should not be approved.

- [199] The Board has taken these findings concerning the applicable provisions of the Bylaw and the Plan into account in making its determination about whether or not to approve the proposed Discretionary Use.
- [200] Finally, the Board considered whether the appeal should be allowed given that the proposed development is temporary – more specifically because the approval is being sought for a three year term from the date of issuance and is expected to terminate in early 2021.
- [201] While the parties strongly disagreed on this issue, neither party provided supportive material for their position.
- [202] The Appellant advanced several arguments to support the issuance of the Development Permit on the basis that the Non-accessory Parking Use was limited to three years.
- [203] First, the Appellant argued that while a permanent Non-accessory Parking Use would be inconsistent with or prohibited by the Plan, the proposed temporary Non-accessory Parking Use should be allowed because the wording employed throughout the Plan shows it is aspirational, future oriented, phased and flexible. The Plan is meant to be achieved by 2025, Council intended that its policies address the completion of permanent redevelopment, the policies are not meant to apply to temporary interim uses such as the proposed development during the course of wider construction.
- [204] Counsel for the City disagreed, arguing that the Plan speaks from the present, not the future, it is implemented one Development Permit decision at a time. Each time an application is received after the Plan is passed, the City must consider whether it furthers the objectives of the Plan or diverges from them.
- [205] The Board agrees the policies are aspirational; however, the Board disagrees with the Appellants about the applicability of the policies in the Plan. Absent contrary direction, Plans begin to take effect on and must be considered from the time they are passed.
- [206] One purpose of the plan is to “Provide up-to-date policies and competitive strategies for a stronger Downtown, to guide development for the next 10 to 15 years.” (at page 1)
- [207] Similarly, CC 3.5 of the Plan applies to developments in the AED Zone and lists principles to be applied “in the review and approval process for proposed development within the Sports and Entertainment District”.

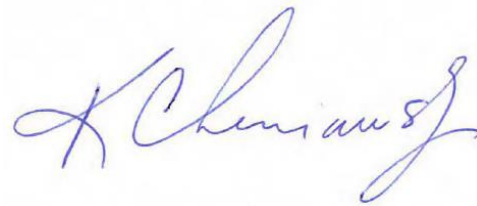
- [208] Section 910.12(4) of the Bylaw is also of note, it states that “The Development Officer shall ensure that new developments and major renovations reflect the Urban Design Policies of the Capital City Downtown Plan and the following Regulations. Where a conflict arises, the AED zoning regulations shall prevail.”
- [209] There is no suggestion in these provisions that they do not apply to applications for temporary Uses that cease prior to 2025. The Board finds that the three year term of the Development Permit does not alone operate to exempt the development from scrutiny pursuant to the policies and prohibitions in the Plan in determining whether a Development Permit for a Non-accessory Parking Use should be approved.
- [210] While the three year term does not in and of itself create an exemption to the Plan, the temporary nature of the development remains an important factor to consider deciding whether the proposed Discretionary Use should be allowed.
- [211] The Appellants argued that City Council adopted a Plan and a Bylaw that restricts surface parking only if allowing it means that there is no incentive to redevelop the land. Here they argued a temporary three year permit should be issued because as the developer responsible for many of the permanent redevelopments in the area, the Appellants believe a higher use will be found for their Site and they do not intend for it to become a perpetual temporary surface parking lot.
- [212] The Board has not given significant weight to this argument because the Appellants also candidly stated that: currently no higher Use exists; it is unknown when one will arise; and the Appellants cannot guarantee a timeline, nor that they will not apply to extend the term of the permit in three years time. In addition, the Board notes that like all Development Permits, this one if issued will run with the land. Therefore, the Board has focused more on the evidence about whether the particular temporary development under appeal is likely to hinder or help achieve the objectives of this specific Plan than the stated intentions of or other projects undertaken by the Appellant.
- [213] The Appellants argued that as the surface parking lot will be used in part by workers constructing nearby permanent redevelopments, it helps to meet interim parking pressures and therefore facilitates the goals of the Plan.
- [214] The Appellants gave a brief general outline of some of the major projects that are currently underway or anticipated to begin shortly as well as the approved parking spaces on the North Area. No evidence was presented by either party about the impact of 310 parking spaces on the construction schedule for approved permanent developments within the Plan area.
- [215] While the Appellants indicated that their primary drivers were the accommodation of workers during the construction and financial considerations, they nonetheless sought an unfettered public access Non-accessory Parking Use to allow anyone to use the lot during all hours, including for Arena events.

The Appellants were not amenable to the imposition of any conditions limiting access to the proposed development to construction workers or limiting the hours of operation. They recognize the spaces will be in demand by patrons and employees of nearby developments and arena attendees.

- [216] The Board recognizes that approving the Non-accessory Parking Use, a surface lot with 310 stalls for unrestricted public use with no conditions on hours of operation, may have a positive impact in terms of providing convenient parking to construction workers. In this sense, the development may further the goals of the Plan. Without restrictions on access, the Board also notes that the workers and the public will compete and pay for these spaces thereby reducing the positive impacts cited by the Appellants.
- [217] The Board also notes that revenue will fulfill the Appellants' goal of recouping costs and making a profit, but this aspect also gives rise to the very planning problem identified by the City at the hearing and in the Plan. In this sense, approving the development will reduce the incentive to redevelop the subject Site in a manner consistent with the Plan for the next three years and also potentially for a longer term.
- [218] In the absence of evidence about the likely impact of 310 potentially available stalls on construction or about the relative significance of total revenue generated by the surface parking use, it is difficult for the Board to assess whether the availability of 310 stalls which are open to construction workers will make a material impact with respect to the subject Site and whether this impact will be offset by the disincentive created by the income from public parking unrelated to the redevelopment effort.
- [219] The Appellants argued that approving the Permit for the proposed surface parking lot is preferable to a vacant lot or leaving the empty Baccarat building on the subject Site for the next three years as it is an aesthetic improvement and provides revenue. Even if this were true, the Board cannot ignore the intentions of Council as stated in the Plan and the Bylaw.
- [220] The City argued that refusing the Permit and leaving the Appellants with an empty lot which does not generate income is preferable because refusal increases incentive to bring the subject Site closer to the vision of the Plan as soon as possible. Issuance will certainly delay the vision by the 3 year period during which the gravel surface lot development in the centre of the AED zone can generate significant income thereby reducing the incentive to undertake permanent redevelopments in compliance with the Plan during the term and thereafter.
- [221] The parties disagreed about whether a three year permit would generate sufficient income to be a material disincentive to development in the longer term. The Appellant said no, the City said yes. Neither party provided evidence. In the absence of evidence, it is difficult to quantify the impact of allowing the development and whether or not the revenue received from the lot will delay or discourage development as contemplated by the Plan.

- [222] In the absence of persuasive evidence, the Board looked to the Plan for guidance. The Board notes that the Plan identifies both vacant lots and a surface parking lots as undesirable. Both detract from vibrancy and both break the fabric of the surroundings. According to the Plan, surface parking lots also create disincentives to development as demonstrated by past experience they can and have led to speculative land holding.
- [223] The Plan was passed in April 2010, the Downtown Special Areas regulations were passed in December 2010 and the provisions of the AED Zone were passed in January 2011. The Bylaw provisions were created in conjunction with the Plan to guide development for the next ten to fifteen years and implement the ambitious vision within an ambitious timeframe.
- [224] The three year permit application is being made late in 2017, seven years into the Plan. As noted by the Appellant, under the terms of the Plan, redevelopment was envisioned to have occurred and created a vibrant downtown area, particularly in the AED Zone, by 2025.
- [225] The Board finds that while the proposed Development Permit is for a three year term, approving it at this stage of the Plan based on the refused submitted Plans will authorize a development contrary to the goals of the Plan in the short term and may also create a disincentive to development and thereby may delay permanent redevelopment efforts beyond the timeframe intended by City Council.
- [226] Finally, the Board has also considered that the temporary nature of the proposed development is the very characteristic which has been cited as the specific rationale by the City and the Appellants to waive and vary other development regulations which were enacted to achieve the planning objectives and vision of the plan for this Site.
- [227] The stamped refused plans show that the surface lot: is deficient by 21 trees; graveled, not hard surfaced; does not identify storm water drainage and storage facilities; provides no disabled parking spaces; and, provides no landscaped islands. The stamped refused plans also fail to provide any structures in the building setback contrary to Section 910.12(5)(c)(ii) which requires that building setbacks areas in the AED Zone shall improve the public realm and may include, among other amenities, appropriate seating areas, distinctive materials, fountains or public art.
- [228] The Board notes again the strong interconnectedness and significance of the Plan because in considering this variance, the Development Officer is specifically directed in Section 910.12(4) of the Bylaw to “ensure that new developments and major renovations reflect the Urban Design Policies of the Capital City Downtown Plan and the following Regulations. Where a conflict arises, the AED zoning regulations shall prevail.”

- [229] In this respect the fact that the proposed development is for only for a three year term represents a further step back from achieving the goals of the Plan in a most prominent location in the AED Zone at the intersection of two Grande Avenues beside the centerpiece Arena.
- [230] In summary, the Board is unable to conclude that the three year limited term of the development alleviates the planning reasons set out in the Plan and carried into the Bylaw which suggests this is not an appropriate Discretionary Use.
- [231] The Board has taken this into consideration in determining whether or not to approve the proposed Discretionary Use
- [232] In conclusion, the Board finds that the proposed development was not within the intentions of Council for the subject Site and will not further the objectives of the Capital City Downton Plan. The Board finds that there are valid planning reasons articulated in the Plan and reinforced by the complementary provisions of the *Edmonton Zoning Bylaw* to refuse this application and deny this particular type of Non-accessory Parking Use in the built form of a 310 space, graveled surface parking lot at this particular location abutting two Grand Avenues in the centre of the AED Zone for a three year term.
- [233] For the reasons above after considering the provisions of the Plan and Bylaw, the nature, intensity, character compatibility and location of the development and the temporary 3 year term of the permit, the Board declines to approve this Discretionary Use.



Ms. K. Cherniawsky, Presiding Officer  
Subdivision and Development Appeal Board

Board Members in Attendance

Mr. P. Jones; Ms. S. LaPerle; Mr. R. Hachigian; Ms. M. McCallum

CC: City of Edmonton, Sustainable Development, Attn: Ms. C. Louie / Mr. H. Luke / Mr. J. Young / Mr. C. Fremmerlid / Mr. S. Lee  
Dentons Canada LLP, Attn: Mr. K. Wakefield  
Katz Group, Attn: Mr. N. Dubois  
Katz Group, Attn: Mr. G. Armstrong  
City of Edmonton Law Branch, Attn: Mr. M. Gunther



**Important Information for the Applicant/Appellant**

1. This decision may be appealed to the Alberta Court of Appeal on a question of law or jurisdiction under Section 688 of the *Municipal Government Act*, RSA 2000, c M-26. If the Subdivision and Development Appeal Board is served with notice of an application for leave to appeal its decision, such notice shall operate to suspend the Development Permit.
2. When a decision on a Development Permit application has been rendered by the Subdivision and Development Appeal Board, the enforcement of that decision is carried out by the Sustainable Development Department, located on the 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.*



**EDMONTON  
TRIBUNALS**

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Date: November 23, 2017  
Project Number: 258883492-001  
File Number: SDAB-D-17-209

**Notice of Decision**

- [1] On November 8, 2017, the Subdivision and Development Appeal Board (the “Board”) heard an appeal that was filed on **October 13, 2017**. The appeal concerned the decision of the Development Authority, issued on October 11, 2017, to refuse the following development:

**Construct a Health Services and Convenience Retail building and to demolish existing 2 houses and 1 detached garage**

- [2] The subject property is on Plan 1307P Blk 3 Lots 1-2, located at 11809 - 68 Street NW and Plan 1307P Blk 3 Lots 2-3, located at 11809 - 68 Street NW, within the RA7 Low Rise Apartment Zone. The Medium Scale Residential Infill Overlay and the Montrose / Santa Rosa Area Redevelopment Plan apply to the subject property.
- [3] The following documents were received prior to the hearing and form part of the record:
- Copy of the Development Permit application with attachments, proposed plans, and the refused Development Permit;
  - The Development Officer’s written submissions; and
  - The Appellant’s written submissions.
- [4] The following exhibits were presented during the hearing and form part of the record:
- Exhibit A – Photographs of the area submitted by the Appellant.
  - Exhibit B – Copy of a revised Landscaped Plan submitted by the Appellant.

**Preliminary Matters**

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

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

### **Summary of Hearing**

*i) Position of the Appellant, Mr. Murphy, who was accompanied by Mr. Haldane*

- [8] The Applicant is a doctor with a connection to the community who would like to build a much needed facility in this area.
- [9] Individuals will not want to live in a building that fronts onto 118 Avenue, which is a business street and next door to a public library. No one will want to develop the type of building that the City envisions on this site. This belief is confirmed as the site has been an eyesore for several years.
- [10] By contrast to the current situation, the proposed development will complement the new library located across the lane.
- [11] A variance is required to Section 210.5(1) as the building will not contain a residential unit. The Board has the authority to grant the variance. Granting a variance will not affect the use, enjoyment or value of neighbouring parcels of land or interfere with the amenities of the neighbourhood.
- [12] This variance can be avoided if one or two dwelling units are developed on top of the pharmacy. However, this would not be a safe option. A certain level of security is needed for a pharmacy and a medical facility. Adding one or two dwellings to these types of uses is not compatible with these security needs.
- [13] The Montrose / Santa Rosa Area Redevelopment Plan is an older plan which contains errors that have not been corrected but does not prohibit what they want to do. The proposed development will benefit the neighbourhood.
- [14] The first listed Reason for Refusal is that the proposed development does not meet the General Purpose of the RA7 Low Rise Apartment Zone, which is to provide a Zone for Low Rise Apartments. In Mr. Murphy’s opinion, that is not a reason for refusing the proposed development. The purpose is to not exclusively accommodate Low Rise Apartment developments. Discretionary Uses in the RA7 Low Rise Apartment Zone include Child Care Services, Convenience Retail Stores, and Professional, Financial and Office Support Services.
- [15] Reason for Refusal number two is correct. The proposed development does not contain a residential component, contrary to 210.5(1)(b).
- [16] The Appellants have revised the plans and are willing to plant the required amount of trees pursuant to Section 55.3.1(b) in order to remedy the third Reason for Refusal, deficient landscaping.

- [17] He believes that the main issue for the Board to consider is whether allowing the two Uses to exist in a stand alone building without dwellings will be a risk for the use and enjoyment of neighbouring properties.
- [18] The aerial photograph in TAB 2 of his submission shows the subject Site and the library east of the Site. Both properties share the rear lane.
- [19] Google photographs in TAB 3 of his submission show the subject Site and land to the west of it. The buildings on the Site will be demolished. In his opinion, it is unlikely that an Apartment Building will be developed on the subject Site.
- [20] The Site Plan in TAB 4 of his submission shows parking for the development. Transportation suggested that angled parking would be more suitable for the Site; however, they will lose a parking space if parking is at an angle.
- [21] He provided a new, compliant Landscaping Plan (Exhibit B). It shows that there is a corner cut on this lot which belongs to the City and if bushes are planted in this area, it will be difficult to maintain the boulevard on the Site. In his opinion, the Landscaping Plan should be approved except for this corner cut portion of the Site as the Board has no authority over the City property.
- [22] According to the elevations, the proposed development will have a pitched roof so it will not look like a commercial development.
- [23] This built form will resemble other small Apartment Buildings in the area as shown in several photographs of other buildings (Exhibit A).
- [24] The proposed development was designed to fit in with the RA7 Low Rise Apartment Zone and will not be built like an office on a corner. If the building is designed to accommodate two suites, it will look like a box. By not adding the suites, they are able to achieve the built form.
- [25] The requirement for dwelling units is a regulation not a Use class issue. Section 210.5 of the Bylaw contains additional regulations for Discretionary Uses.
- [26] Other sections of the *Edmonton Zoning Bylaw*, read together, let you know they are regulations.
- [27] Section 3.4 – Headings and Titles states that: Notwithstanding any other provision of this Bylaw or any other Bylaw passed by City Council to the contrary, headings and titles within the Bylaw shall be deemed to form a part of the text of this Bylaw.
- [28] Section 11.1(f) states that the Development Officer may relax a regulation in a Zone or other Section of this Bylaw in accordance with the regulations contained in that Zone or Section, or may relax regulations in accordance with Sections 11.2 and 11.3. They are dealing with a regulation which can be relaxed and waived.

- [29] Section 11.2 – Variance to Regulations states that the Development Officer may approve, with or without conditions as a Class B Discretionary Development, an application for development that does not comply with this Bylaw. In his opinion, the Board has the same authority.
- [30] Mr. Murphy provided the Board with a copy of the RF6 Medium Density Multiple Family Zone from the *Edmonton Zoning Bylaw* as it existed in 2012. There was a provision in the RF6 District in the Use Class listing Permitted and Discretionary Uses such as Personal Service Shops and Convenience Retail Stores, when designed as an integral and secondary component of a residential development consisting of 150 Dwellings or more.
- [31] He provided the Board with a previous SDAB Decision (SDAB-D-12-278) noting that one of the reasons for refusal in that decision was that “if City Council intended the preconditions on a Discretionary Use to be a Development Standard, they could have included the Development Standard in Section 170.5, Additional Development Regulations for Discretionary Uses, rather than Section 170.3(7), Discretionary Uses, in the *Edmonton Zoning Bylaw*.” In his opinion, that is what the city has done here.
- [32] This is an application for a Discretionary Use that with a variance should be permitted to go ahead. There are no planning reasons to refuse the proposed development. The Use is allowed in the neighborhood and will have less of an impact on the neighbourhood than an Apartment Building would.
- [33] The Appellants received a letter in support from the Montrose Community League, included in TAB 8 of his submission.
- [34] The subject Site is 0.12 hectares in size and the maximum allowable is 25 units per hectare. They could develop a 15 suite building on the subject Site. In his opinion, a commercial development will have less of an impact on neighbouring properties.
- [35] The Montrose/Santa Rosa Area Redevelopment Plan, Policy Number 1.11, Plan Component: Land Use: Residential states:

It is the Policy of Council that: THE PROPERTIES ALONG 118 AVENUE AND 66 STREET AS SHOWN ON SCHEDULE "D" BE DEVELOPED IN THE FORM OF LOW RISE APARTMENTS; PROPERTIES ALONG THE EAST SIDE OF 66 STREET BETWEEN THE EXISTING COMMERCIAL SITE AND 119 AVENUE MAY BE DEVELOPED FOR INSTITUTIONAL USES OR LOW RISE APARTMENTS.

- [36] The Montrose/Santa Rosa Area Redevelopment Plan, Policy Number 1.18, Plan Component: Land Use: Commercial states:

It is the Policy of Council that: THE PROPERTIES ALONG 118 AVENUE IN THE AREA BETWEEN 64 STREET TO 67 STREET AS SHOWN ON SCHEDULE "H" WILL REMAIN A LOW INTENSITY COMMERCIAL AREA WITH USES COMPATIBLE WITH THE CHARACTER OF ADJACENT RESIDENTIAL USES.

- [37] In Mr. Murphy's opinion, the maps in this Plan were not drawn correctly. The subject property is included in both the Residential and Commercial Component Area maps. While it is uncertain, he believes that the written text should probably take precedence. However, it is unusual that a Site adjacent to the Library would be placed in the Residential Component.
- [38] Even if the subject Site falls within the Residential Component, that does not affect the Board's ability to make a decision and grant a variance for the proposed development.
- [39] The Development Officer referenced the Court of Appeal Decision *Rossdale Community League v Edmonton (City)*, 2017 ABCA 90 in her written submission to the Board. In that case, the Court did not say as the Development Officer suggested that the written text is always paramount over maps. He agreed that the Court confirmed that where a map does not match the text of a Statutory Plan, the Development Officer and the Board must attempt to ascertain the intention of City Council, but noted that the Court also stated that a number of reasonable conclusions are possible.
- [40] The Court of Appeal Decision *McCauley Community League v. Edmonton (City)*, 2012 ABCA 24 is instructive. It references an older decision of the Court of Appeal *Bridgeland Riverside Community Assn. v Calgary (City)*, 1982 ABCA 138. These cases discuss situations involving a conflict between an Area Structure Plan and the Zoning. In this case he believes there is no conflict.
- [41] Plan Component: Land Use: Residential states that the property along 118 Avenue (which includes the subject Site) can be developed in the form of Low Rise Apartments. The clause does not speak to Land Use. The next clause does deal with Land Use. It states the area "will remain a low intensity commercial area with uses compatible with the character of adjacent residential uses." The two phases use different words so they must have different meanings.
- [42] The proposed development is in the form of Low Rise Apartment and so it is in accordance with Policy Number 1.11 of the Plan.
- [43] In response to questions by the Board, he stated that the Board has the discretion to look past the General Purpose provision to the types of Permitted and Discretionary Uses. The Development Officer does not have the authority, but the Board does. The issue in the General Purpose is whether anything is prohibited. In his view, it is not.
- [44] The Appellants are agreeable to all the conditions suggested by the Development Officer, except for the comments concerning angled parking for the proposed development as this will eliminate one parking space and reduce access to the parking as well as maneuverability on the parking area. He noted that angled parking is not a requirement, but only a suggestion from Transportation.

*ii) Position of the Sustainable Development Supervisor, Mr. Luke, who was in attendance for the Development Officer, Ms. Buccino*

- [45] Mr. Luke reiterated the Reasons for the refused Development Permit.
- [46] Mr. Luke noted that the proposed development is for Health Service and Convenience Retail Store Uses which have nothing to do with the General Purpose of the RA7 Low Rise Apartment Zone outlined Section 210.1: To provide a Zone for Low Rise Apartments. The Development Officer has no authority to grant a variance to the purpose of the zone.
- [47] The second Reason for Refusal is based on the regulation in section 210.5(1)(b). It is clear: a Personal Service Shop, Convenience Retail Store, and Health Services require a Residential component. They must be part and parcel of a mixed use development.
- [48] Further, the proposed Uses are Discretionary. The Development Officer can grant a variance for those regulations, but they have to be reviewed in detail, a process which involves looking at Statutory Plans to see if they can support this type of application.
- [49] They consulted with the Area Planner who provided comments and agreed with the Development Officer that the subject Site is part of the residential component and should be rezoned. The letter of support from the Montrose Community League was received after the decision was made on the proposed development.
- [50] They are not saying that the development is good or bad. The Development Officer is bound by the regulations and Statutory Plans for the subject Site. The Plan has some ambiguities and errors. It is older and probably a candidate for updating. Regardless of community support though, the Site really needs to be rezoned.
- [51] They recognize the discrepancy in the two maps. The Development Officer interpreted the Area Redevelopment Plan. They follow the direction set out in section 13 of the *Edmonton Zoning Bylaw* and take the position that the written description should take precedence over the maps in interpreting area redevelopment plans.
- [52] The Area Planner is responsible to make amendments to the Area Redevelopment Plan. The Site is a suited for CB1 Low Intensity Business Zone. If this Site was rezoned to CB1, then the Mainstreet Commercial Overlay and other regulations would apply which would affect their preferred design for the building. They would want changes to the plan to create a better pedestrian interface including doorways and entrances oriented toward 118 Avenue with less setback.
- [53] The proposed development will have a pitched roof and that is compatible with and similar too some of the other residential developments, but the orientation of the building with the parking facing 118 Avenue is not an ideal situation.

- [54] Under the current regulations and overlays, the Development Officer did not have the authority to grant the variance.
- [55] In response to questions, he stated that the Montrose/Santa Rose Area Redevelopment Plan is old and should be updated. The process is initiated by the Area Planner. Standard open houses are set to provide feedback to the Area Planner. They look at Statutory Plans and prepare a report for City Council. This process to write a new policy can take over a year.
- [56] When asked whether the Development Officer took an overly narrow view of the General Purpose of the RA7 Low Rise Apartment Zone, he responded that all Permitted Uses are residential and residential-related.
- [57] If the subject Site was rezoned, it would give the Development Officer more clarity when making the decision. The City suggested to the proponents of the development that the City could support rezoning the site to CB1 Low Intensity Business Zone. Before a site can be rezoned, the Area Planner would need to ask for an amendment. There are several aspects to property rezoning which are dealt with by City Council.
- [58] He recognizes that there are a limited number of other residential Uses in the Zone, this is because the purpose is to build up the density through Apartment Housing.
- [59] In his opinion, 26 trees proposed are excessive because 118 Avenue is pedestrian friendly and the trees will block the building. They would consider a variance if there is a reasonable Landscape Plan.

*iii) Rebuttal of the Appellant, Mr. Murphy and Mr. Haldane*

- [60] Mr. Murphy agreed that the Appellants could chose to apply to rezone the property and change the Area Redevelopment Plan at their expense, but that is irrelevant to this appeal. They proceeded with this Development Permit application instead because they believe the Bylaw is fulsome enough to proceed. They have designed the development to make it residentially compatible and in the built form of an Apartment Building.
- [61] The proposed development was designed to fit on the site.
- [62] No letters were received in opposition to the proposed development and no one appeared in opposition at the hearing.



**Decision**

[63] 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. The proposed Development shall be constructed in accordance with the stamped approved drawings.
2. PRIOR TO THE RELEASE OF DRAWINGS FOR BUILDING PERMIT REVIEW: the applicant or property owner shall pay a Sanitary Sewer Trunk Charge fee of \$919.48. All assessments are based upon information currently available to the City. The SSTC charges are quoted for the calendar year in which the development permit is granted. The final applicable rate is subject to change based on the year in which the payment is collected by the City of Edmonton.
3. All required parking and loading facilities shall only be used for the purpose of accommodating the vehicles of clients, customers, employees, members, residents or visitors in connection with the building or Use for which the parking and loading facilities are provided, and the parking and loading facilities shall not be used for driveways, access or egress, commercial repair work, display, sale or storage of goods of any kind. (Section 54.1.1.c).
4. All required parking and loading facilities shall be clearly demarcated, have adequate storm water drainage and storage facilities, and be Hardsurfaced (Section 54.6.1.a.i).
5. In situations where lighting of off-street parking and loading facilities is to be provided, the lighting shall be arranged, installed and maintained to deflect, shade and focus light away from any adjacent land Uses. (Section 54.6.1.a.iii).
6. The proposed most northerly 5 metres one-way inbound access and most southerly 5 metres one-way outbound access to the alley are acceptable to Subdivision Planning, as shown on Enclosure I. Commercial crossing permits are not required for alley access. The proposed one-way directional accesses must be properly signed indicating the operation of the access. All signage must be provided on private property.
7. The area between the site and the paved alley driving surface from the back of sidewalk to the north property line must be paved to the satisfaction of Subdivision Planning, as shown on Enclosure I. The applicant must contact Gary Kerr (780-944-7683) of Development Inspections a minimum of 48 hours prior to construction, to arrange for inspection.
8. The proposed connector sidewalks, as shown on Enclosure I, are acceptable to Subdivision Planning.
9. A barrier must be placed between the parking stalls and the alley to avoid overhanging of vehicles on road right-of-way, as shown on Enclosure I.
10. Permanent objects must NOT encroach into or over/under road right-of-way, as shown on Enclosures I and II.
11. All required landscaping for the development must be provided on site, as shown on Enclosure II.

12. The access area in front of the loading area located on site must be signed no parking, as shown on Enclosure I. All signage must be provided on private property.
13. There are existing power poles along 118 Avenue and the north/south alley east of the site. Should relocation of the pole/guy-wire be required, all costs associated with relocation must be borne by the owner/applicant. The applicant should contact Ron Hewitt (780-412-3128) of EPCOR Customer Engineering for more information.
14. There may be utilities within road right-of-way not specified that must be considered during construction. The owner/applicant is responsible for the location of all underground and above ground utilities and maintaining required clearances as specified by the utility companies. Alberta One-Call (1-800-242-3447) and Shaw Cable (1-866-344-7429; [www.digshaw.ca](http://www.digshaw.ca)) should be contacted. At least two removals shall be at the expense of the owner/applicant.
15. There are existing boulevard trees adjacent to the site that must be protected during construction. Prior to construction, the owner/applicant must arrange for hoarding and/or root cutting. All costs shall be borne by the owner/applicant. Please contact Bonnie Fermanuik at City Operations, Parks and Roads Services (780-496-4960).
16. Garbage enclosures must be located entirely within private property and gates and/or doors of the garbage enclosure must not open or encroach into road right-of-way. Garbage bins must also be located so that all turning maneuvers for the waste management vehicles are accommodated on site.
17. Any hoarding or construction taking place on road right-of-way requires an OSCAM (On-Street Construction and Maintenance) permit. OSCAM permit applications require Transportation Management Plan (TMP) information. The TMP must include:
  - the start/finish date of project;
  - accommodation of pedestrians and vehicles during construction;
  - confirmation of lay down area within legal road right of way if required;
  - and to confirm if crossing the sidewalk and/or boulevard is required to temporarily access the site.

It should be noted that the hoarding must not damage boulevard trees. The owner or Prime Contractor must apply for an OSCAM online at:

[http://www.edmonton.ca/transportation/on\\_your\\_streets/on-street-construction-maintenance-permit.aspx](http://www.edmonton.ca/transportation/on_your_streets/on-street-construction-maintenance-permit.aspx)

18. Any alley, sidewalk or boulevard damage occurring as a result of construction traffic must be restored to the satisfaction of Development Inspections, as per Section 15.5(f) of the *Edmonton Zoning Bylaw*. The alley, sidewalks and boulevard will be inspected by Development Inspections prior to construction, and again once construction is complete. All expenses incurred for repair are to be borne by the owner.

#### ADVISEMENTS:

1. This Development Permit is not a Business Licence. A separate application must be made for a Business Licence.
2. Signs require separate Development Applications.

3. A Building Permit is required for any construction or change in use of a building. For a building permit, and prior to the Plans Examination review, you require construction drawings and the payment of fees. Please contact the 311 Call Centre for further information.
4. The City of Edmonton does not conduct independent environmental checks of land within the City. If you are concerned about the suitability of this property for any purpose, you should conduct your own tests and reviews. The City of Edmonton, in issuing this 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.
5. An approved Development Permit means that the proposed development has been reviewed only against the provisions of the Edmonton Zoning Bylaw. It does not remove obligations to conform with other legislation, bylaws or land title instruments such as the *Municipal Government Act*, the ERCB Directive 079, the Edmonton Safety Codes Permit Bylaw or any caveats, covenants or easements that might be attached to the Site
6. Building Great Neighbourhoods is currently conducting neighbourhood renewal in Montrose for the 2017/2018 construction season which includes reconstruction of sidewalks, curb and gutter, paving of roadways, and streetlight replacement. The owner/applicant should contact Jason Caudron of Building Great Neighbourhoods (780-944-0266) for more information.
7. Vehicular and bicycle parking should meet the requirements of the *Edmonton Zoning Bylaw*.
8. There is timed restricted on-street parking available along 68 Street. There are bus routes available on 118 Avenue.

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

1. Section 210.5(1)(b) is waived, which states Personal Service Shops, Convenience Retail Stores and Health Services shall not be permitted in any freestanding structure separate from a structure containing Residential Uses. Their principal entrance shall be a separate, outside entrance.
2. The minimum allowable number of trees of 26, pursuant to Section 55.3(1)(b), is varied to allow a deficiency of 16 trees, thereby decreasing the minimum allowed to 10 trees.

### **Reasons for Decision**

[65] This is an appeal of a refused Development Permit to construct a Health Services and Convenience Retail building and to demolish existing 2 houses and 1 detached garage.

[66] The subject Site is comprised of two abutting lots which front onto 68 Street. The south corner lot is also adjacent to 118 Avenue.

- [67] The subject Site is located in the RA7 Low Rise Apartment Zone. Health Services and Convenience Retail Stores are listed as Discretionary Uses in this Zone.
- [68] The Medium Scale Residential Infill Overlay and the Montrose/Santa Rosa Area Redevelopment Plan also apply to the subject Site.
- [69] In determining whether there are any planning reasons to deny the application, the Board is mindful of Section 687(3)(a.1) of the *Municipal Government Act* which directs that the Board must comply with the applicable plans in determining this appeal. The Board must interpret the *Bylaw* and the Plans harmoniously where possible and with a view to determining Council's intent.
- [70] The Montrose/Santa Rosa Area Redevelopment Plan contains errors concerning the subject Site. It identified both lots as being located within two mutually exclusive portions of the plan as shown in Schedule D and Schedule H.
- [71] Plan Component: Land use: Residential Policy Number 1.11 provides: "It is the policy of Council that: THE PROPERTIES ALONG 118 AVENUE AND 66 STREET AS SHOWN ON SCHEDULE "D" BE DEVELOPED IN THE FORM OF LOW RISE APARTMENTS; PROPERTIES ALONG THE EAST SIDE OF 66 STREET BETWEEN THE EXISTING COMMERCIAL SITE AND 119 AVENUE MAY BE DEVELOPED FOR INSTITUTIONAL USES OR LOW RISE APARTMENTS."
- [72] Both lots are included in the map of this sub area shown as Schedule D. They also appear to fall within the written description of this sub area, although the description is somewhat general and vague.
- [73] Plan Component: Land use: Commercial Policy Number 1.18 provides: "It is the policy of Council that: THE PROPERTIES ALONG 118 IN THE AREA BETWEEN 64 STREET TO 67 STREET AS SHOWN ON SCHEDULE "H" WILL REMAIN A LOW INTENSITY COMMERCIAL AREA WITH USES COMPATIBLE WITH THE CHARACTER OF ADJACENT RESIDENTIAL USES."
- [74] The two lots which comprise the subject Site are included in the map of this sub area as shown in Schedule H, but they do not fall within the remainder of the written description. The Board notes that the four lots directly to the south across 118 Avenue are also shown in Schedule H and do not fall within the written description, but they were clearly intended to be commercial and are commercially zoned.
- [75] All parties acknowledged that the Montrose/Santa Rosa Area Redevelopment Plan is a good candidate for updating and includes a long standing ambiguity or error in need of clarification.

- [76] The Development Officer indicated that per the recent Court of Appeal leave decision of *Rossdale Community League v Edmonton (City)*, 2017 ABCA 90, the Board should defer to the written text and find that the subject Site falls within the Residential Component in Policy 1.11.
- [77] In *Rossdale*, a panel of this Board adopted written text over a related map in another area redevelopment plan. That choice was affirmed by the Court of Appeal in a request for leave decision. However, the Board reads the overall direction from the Court of Appeal in the case more broadly than the Development Officer.
- [78] At paragraph 16, the Court affirmed that a range of reasonable choices are open to the Board: "... there is no legal provision specifying the hierarchy between the text of a plan, and any related maps. The Board could have concluded that the map should prevail over the text, rather than the text prevailing over the map. Alternatively, the Board could have decided that unless the ARP clearly prohibited something that was permitted by the Zoning Bylaw, there was no absolute impediment to the development. Yet another option would be for the Board to conclude that, given the ambiguity, the development should not be approved. The interpretation adopted by the Board is one that was reasonably available on the facts and the law, and is one way of achieving a harmonious interpretation of the planning documents..."
- [79] Given the ambiguities in the Montrose/Santa Rosa Area Redevelopment Plan (including inconsistencies in written descriptions and accompanying maps), the location of the subject Site at 67 Street and along 118 Avenue adjacent to Commercial Uses to the south and the large Urban Services library across the lane to the east, the Board finds it more likely than not that the subject Site was intended to fall within the Commercial Component, Policy 1.18 as shown in Schedule H.
- [80] Therefore, the Board finds that the proposed development is consistent with the applicable provisions in the Plan, specifically with Commercial Component Policy 1.18.
- [81] In any event, the Board notes that this classification decision is not determinative of its ultimate decision about the appropriateness of the proposed Discretionary Uses. This is because, even if the Board is wrong and Council's intent was that the proposed development fall in the Residential Component, Policy 1.1, the Board finds it is not incompatible with that policy for the following reasons.
- [82] Policy 1.11 indicates that the properties along 118 Avenue must be developed **in the form of Low Rise Apartments**. By contrast the properties along the east side of 66 Street between the existing commercial site and 119 Avenue may be developed for **institutional uses or low rise apartments**.
- [83] The Appellant argued that the first clause must be distinguished from the second and attributed different meanings. As a general rule of statutory interpretation, the Board assumes that every word has been deliberately chosen, as two different phases are employed in Policy 1.11, it follows that they must have different meanings.

- [84] Also of note is that Policy 1.18 also explicitly refers to low intensity commercial uses and residential uses rather than built forms to describe acceptable redevelopment in that sub area.
- [85] Therefore, the Board accepts the Appellant's argument that in Policy 1.11, the former phrase (which applies to the subject Site) turns on the criterion of the built form of Apartment Buildings while the later phrase (which does not apply to the subject Site) turns on the Use, Apartment Housing.
- [86] Low rise Apartment Housing may take diverse built forms. Based on photographic evidence, the Board finds that the built form of the proposed development is similar to many other Low Rise Apartments in the surrounding area. Therefore, even if the Board determined that the proposed development falls within Plan Component: Land Use Residential Policy 1.1, the Board finds that the proposed development is not incompatible with the Area Redevelopment Plan.
- [87] In sum, regardless of whether the lots fall within the Commercial Component or the Residential Component, the Board finds the proposed Uses are not in conflict with the applicable Area Redevelopment Plan.
- [88] The Board also finds that the proposed Discretionary Uses, Health Services and Convenience Retail Store, are reasonably compatible with current adjacent Uses for the following reasons:
- i)* The proposed commercial development will be located along 118 Avenue, a busy arterial roadway.
  - ii)* There are existing commercial developments to the south across 118 Avenue.
  - iii)* There is a large library located on the adjacent US Urban Services Zone lot across the lane to the east.
  - iv)* In reaching this conclusion, the Board also notes that the Development Officer indicated that rezoning this property to CB1 Low Intensity Business Zone is the most appropriate and that a Commercial Use in this location would be most appropriate.
  - v)* Given the low intensity of the proposed development and its scale and built form with a pitched roof, the Board finds that it is also reasonably compatible with adjacent residential Uses located to the north and west.
  - vi)* There was strong support from the Montrose Community League who indicated that the proposed Uses (without a residential component) would boost the community economy, enhance the community and offer needed services to residents of the community.

- [89] As the Board was not presented with any other planning reason for refusal, it finds the proposed Discretionary Uses are appropriate at this location.
- [90] The Development Officer denied the application as she determined it was contrary to Section 210.1 which provides that the General Purpose of the RA7 Zone is “[t]o provide a zone for Low Rise Apartments.” In her view, the development did not meet the basic intent of providing any Apartment or residential-related Uses.
- [91] The Board agrees that the General Purpose enunciated in Section 210.1 clearly encourages Apartment Housing, but not as the Development Officer suggested to the exclusion of other Uses.
- [92] There is no direct prohibition of other types of freestanding developments. There are other listed residential-related and non-residential Uses which are not subject to the requirement of being located within Apartment Housing or in conjunction with residential Uses. Non residential-related Uses are available in the Zone in freestanding structures for Child Care Services, Churches and Professional Financial and Office Support Services and Signs without a residential component.
- [93] The Board concludes that the Development officer’s interpretation of the General Purpose in Section 210.1 to be overly restrictive and not a valid reason for refusal.
- [94] Based on a plain reading of the *Bylaw*, the Board finds that section 210.5(1)(b), which prohibits Convenience Retail Stores and Health Services in any freestanding structure separate from a structure containing Residential Uses, is a development regulation.
- [95] Council could have, but did not, include this requirement in either of the proposed Use classes in subsections 210.3(2) and (9). The requirement is found after the more general development regulations for Permitted and Discretionary Uses in section 210.5 under the heading “Additional Development Regulations for Discretionary Uses.”
- [96] Therefore, the Board applied the test for variances set out in section 687(3)(d) of the *Municipal Government Act* and waives the requirement for the proposed Uses to be located in a freestanding structure containing Residential Uses for the following reasons:
- i) The proposed built form is similar to other small Apartments typical of the area and therefore will blend in with the neighbourhood.
  - ii) The nearest and most affected neighbours including neighbours from residential Uses located to the north and west did not object to the proposed development and no letters were received in opposition to the proposed development.
  - iii) The Montrose Community League provided a letter in support of the proposed development noting the proposed Use, without a residential component, will add to the amenities of the area and replace properties which have fallen into disrepair.

- iv)* The proposed development increases the amenities and the livability of the area and will increase revitalization.
- v)* The Board notes that the addition of a single dwelling unit to the building would negate the need for this variance. The Board received no evidence that allowing a freestanding development without one or two dwellings would be detrimental to the neighbourhood generally nor more specifically create a material adverse impact regarding availability of housing in the area.
- vi)* Other Permitted or Discretionary Uses could be developed on the subject Site such as Apartment Housing, Daycares or Churches with similar or greater impact than the proposed development.

[97] The Board allows a variance to reduce the number of required trees by 16 and approves the Landscaped Plan as reviewed and included in Enclosure II for the following reasons:

- i)* The proposed plan includes substantial landscaping to buffer the proposed development from the abutting residential Uses to the north and to screen it from the adjacent residential Uses across 68 Street to the west.
- ii)* The proposed plan also provides sufficient screening to provide visual relief from the surface parking at the rear of the subject Site.
- iii)* The Board notes that there are no residential developments located immediately to the east. A large library is located across the lane from the subject Site in this direction and screens it from view by residents located further to the east and north east along 67 Street.
- iv)* The Development Officer indicated that the number of required trees is likely excessive in this situation.
- v)* Overall, with the reduced number of trees there is ample landscaping to the west along 68 Street while ensuring there are adequate site lines for safety given the proposed Convenience Retail Store will include a pharmacy.

[98] The Board notes that the Appellants indicated they are amenable to the conditions and advisements suggested in the Development Officer's written materials except for the advisement for the angled parking along the east edge of the building. They requested approval for perpendicular parking stalls as outlined on the stamped plans to maximize the number of parking spaces and for better vehicular access and maneuverability. The Board notes that the comment about angled parking is an advisement and not a condition and was not included in the permit as approved by the Board.

[99] The Board has included all of the remaining conditions and advisements as suggested by the Development Officer.



[100] Based on the above, it is the opinion of the Board that: the proposed development is reasonably compatible with its surroundings; it 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; and, the proposed development conforms with the prescribed Uses in the *Edmonton Zoning Bylaw*.

Ms. K. Cherniawsky, Presiding Officer  
Subdivision and Development Appeal Board

Board Members in Attendance

Mr. P. Jones; Ms. S. LaPerle; Mr. R. Hachigian; Ms. M. McCallum

**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 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.*