



**EDMONTON
TRIBUNALS**

*Subdivision &
Development
Appeal Board*

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Date: October 18, 2018
Project Number: 278508526-001
File Number: SDAB-D-18-129

Notice of Decision

- [1] The Subdivision and Development Appeal Board (the “Board”) at a hearing on August 29, 2018, made and passed the following motion:

“That SDAB-D-18-129 be TABLED to October 3 or 4, 2018, at the written request of legal counsel for the Appellant and with the consent of the Development Officer.”

- [2] On October 4, 2018, the Board made the following motion:

“That SDAB-D-18-129 be raised from the table.”

- [3] On October 4, 2018, the Board heard an appeal that was filed on **August 2, 2018**. The appeal concerned the decision of the Development Authority, issued on July 16, 2018, to refuse the following development:

To install (1) Minor Digital On-premises Off-premises Freestanding Sign (Edmonton Truck & Auto)

- [4] The subject property is on Plan 4577TR Lot 7A, located at 14211 - Mark Messier Trail NW, within the DC2.384 Site Specific Development Control Provision. The Rampart Industrial Area Structure Plan applies to the subject property.

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

- A copy of the Development Permit application with attachments, proposed plans, and the refused Development Permit;
- A Subdivision Planning memorandum;
- The Development Officer’s written submission; and
- The Appellant’s written submissions, including community consultation.

- [6] The following exhibit was presented during the hearing and forms part of the record:
- Exhibit A – Letter from the owner of 14215 Mark Messier Trail submitted by the Appellant.

Preliminary Matters

- [7] 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.
- [8] The Presiding Officer outlined how the hearing would be conducted, including the order of appearance of parties, and no opposition was noted.
- [9] The appeal was filed on time, in accordance with section 686 of the *Municipal Government Act*, RSA 2000, c M-26.
- [10] The Presiding Officer referenced section 685(4) of the *Municipal Government Act* (the *Act*), (formerly section 641) which limits the authority of the Board. The Appellant was asked to explain how the Development Officer did not follow the directions of Council in refusing this development permit application.

Summary of Hearing

i) Position of Mr. K. Grey representing the Appellant, Astral Out-of-Home and Mr. R. Noce, Legal Counsel for the Appellant and Mr. K. Grey:

- [11] Mr. Noce confirmed that his argument about section 685(4) was wrapped up with his arguments concerning the merits of the case and stated the issue of whether or not the Development Authority followed the directions of Council was not even relevant to this hearing.
- [12] Mr. Noce advised that he acted for ADQ Media, the applicant for this digital sign that was approved by the Board in 2013. That appeal addressed only one issue as the permit had been refused because the Development Authority took the position that signs were not allowed at all on this site which is located in a DC2 Site Specific Development Control Provision (the “DC2”).
- [13] Whether or not the proposed sign was allowed on this site at all was the single issue for which the Board had to determine whether or not the Development Officer had followed Council’s direction. The Board decided that the proposed sign was in fact allowed on this site and therefore the Development Officer failed to follow the directions of Council because he had decided it was not allowed at all.
- [14] Therefore, this hurdle does not need to be dealt with again at this appeal hearing. The zoning allows for these types of signs. The issue today before the Board is not whether or

not the Development Officer failed to follow the directions of Council, but rather whether or not the Development Officer exercised its discretion under the DC2 properly.

[15] This time the Development Officer did not refuse the application because the sign is not allowed at this location. The Development Officer conceded that the proposed sign is allowed so the issue of whether or not the direction of Council was followed is not at play in this hearing. The appeal of this refusal is all about the exercise of the Development Officer's discretion.

[16] The proposed sign was refused because the Development Officer failed to use the discretion provided in the DC2 to grant the required variances. The five issues that the Development Officer raised are within her discretion. The question today for the Board is did the Development Officer properly exercise her variance powers or did she fail to exercise them properly.

[17] He highlighted the relevant DC2 sections and their application to the appeal including DC2.384.4(p) which states:

the Development Officer may grant relaxations to Section 50 to 79, inclusive, of the Land Use Bylaw and the provisions of this District, if in his opinion, such a variance would be in keeping with the general purpose of this District and would not affect the amenities, use and enjoyment of neighbouring properties.

[18] This section provides discretionary power to the Development Officer with respect to section 79 which regulates signs. DC2.384.4(p) is similar to, albeit lighter, than the variance power provided to the Board in section 687(3)(d) of the *Act*.

[19] Section DC2.384.4(q) states:

Signs maybe allowed in this District in accordance with Schedule 79E and in accordance with Schedule 79E and in accordance with the general provisions of Section 79.1 to 79.9, inclusive, of the Land Use Bylaw.

[20] Section DC2.384.4(c) states:

A minimum building Setback of 14 m shall be provided adjacent to St. Albert Trail. At the discretion of the Development Officer, this minimum building Setback requirement may be reduced to the minimum applicable landscaped Yard requirement specified by this District where:

- i) The proposed development, or the proposed development in conjunction with any existing development, does not exceed a gross floor area of 1,000 square metres or 7 m in Height; or
- ii) Where the proposed development lies adjacent to an existing service road, provided that landscaping and building treatment minimize the perception of massing and create a high standard of building appearance.

- [21] The Appellant agrees with the Development Officer that at the time of the creation of the subject DC2 site, the *City of Edmonton Land Use Bylaw 5996* (the *Land Use Bylaw*) was in effect. Therefore, pursuant to section 2.7 of the *Edmonton Zoning Bylaw* (the *Zoning Bylaw*), schedule 79E and the general provisions of section 79.1 to 79.9, inclusive, of that Bylaw apply to this development.
- [22] Pursuant to section 14.4 of the *Land Use Bylaw*, the proposed development is a Class C Discretionary Use as identified by the Board in 2013. Section DC2.384.4(q) indicates that signs are allowed in this district in accordance with Schedule 79E. Schedule 79E.2 contains the sign regulations contained in 79.1 to 79.9 that apply to the proposed sign and the reasons for refusal.
- [23] The subject site is along St. Albert Trail (Highway 2) north from 125 Avenue to the City limits. It is subject to the Special Regulations for Highway Entrance Routes and Limited Access Routes contained in section 79.5 of the *Land Use Bylaw*. All of the regulations contained in section 79.8(1) of the *Land Use Bylaw* apply to the proposed development.
- [24] Section DC2.384.4(p) allows the Development Officer to grant relaxations to section 79 as long as in her opinion a variance would not affect the amenities, use and enjoyment of neighbouring properties and was in keeping with the general purpose of the District. All the required variances are well within her discretion and well within the discretion of this Board.
- [25] When Council adopted this DC2 they decided not to make the rules with respect to signs prescriptive. They determined that the Development Officer and ultimately this Board has some discretion with respect to all the regulations applicable to signs.
- [26] Council directed that the Development Officers use their discretion and also directed that if the Development Officers do not do so properly, applicants will have an opportunity to appeal the decision before this Board. This means that all of the development regulations can be varied by this Board pursuant to section DC2.384.4(p) or section 687(3)(d) of the *Act* because the Development Officer did not exercise the discretion properly. So the Board is following Council's instructions here today in exercising the DC2 discretion.
- [27] In the Board's decision SDAB-D-13-052 dated April 18, 2013 the first issue before the Board was whether or not the Development Officer followed the directions of Council pursuant to section 641(4)(b) of the *Act* and not necessarily whether the Development Officer erred in making a decision.
- [28] Section 641(4)(b) was the first hurdle to overcome in the 2013 case because then the City did not want any signs on this site. The Development Officer determined that the proposed sign was not permitted at all in this DC2 and that was the only reason for refusal.
- [29] Paragraph No. 7 of the Board's decision regarding jurisdiction to hear the merits of the appeal is critical and it stated:

The Board concludes that the Development Authority did not follow the directions of City Council because the proposed combination Sign falls under the description of a Freestanding On-premise, Local Advertising Sign and Freestanding General Advertising Sign.

- [30] The Board made the determination in 2013 that signs are, in fact, allowed in this DC2. Paragraph Nos. 8-11 of the decision state:

The Board relies on the following in determining that the proposed Sign is a Freestanding On-premise Local Advertising Sign and Freestanding General Advertising Sign:

- a) It is an On-premises Sign since a portion portrays copy referring only to products or merchandise produced, offered for sale or obtainable at the premises on which the sign is displayed and which are related to the principal function of such premises, and local advertising has a similar meaning.
- b) It is also an Off-premises Sign which directs attention to a business, activity, product or services which are not provided on the subject site.

The Board understands that the provisions set out in the Direct Control District are established by Council and the authority to apply the provisions is delegated to the Development Authority. By taking a two-step approach to hear this matter and firstly determining if the Development Authority followed the directions of Council in refusing this application, the Board could better understand the reasons and interpretation in all regards to the decision making process to render the decision of refusal for the Sign application.

In rendering its decision the Board first considered the original decision of the Development Authority, which stated that the sign was not allowed in the Direct Control District. The Board took into consideration the evidence provided by the Development Authority up to this point of the hearing to the extent that such evidence clarified the Development Authority's decision making process without aggravating the original decision.

All information and additional issues raised by the Development Authority were considered at the second part of the hearing as in the Board's opinion, those issues were relative to the merits of the application and therefore did not pertain to the part of the hearing with respect to the jurisdiction of the Board to consider the appeal.

- [31] In 2013, the Board followed the two-prong approach. It first determined whether or not signs were even allowed on this site. If the Board had determined that the Development Officer did in fact follow the direction of Council and correctly said that there are no signs allowed on this site at all that would have ended the appeal. The Board would not then have gone on to hear the merits on the appeal.

- [32] However, in 2013 the Board held that the Development Officer did not follow Council's direction because signs are in fact an allowable use on this site. After determining it was an allowable use, the Board proceeded to hear the merits and review all of the regulations that applied to the sign.
- [33] Today the City is not arguing that the Board was wrong in 2013 or that this Board must re-determine if signs are an allowable use on this site. The issue today is not whether or not the directions of Council were followed because it has been conceded already and the directions of Council were followed.
- [34] As in 2013, the issue now before the Board is the merits of the Development Officer's exercise of her discretion. Today the Board's task is to work through the Development Officer's exercise of her discretion and whether or not the five points that she raised with respect to the refusal is in fact in line with what the Appellant has offered today.
- [35] In 2013, the Board allowed the appeal and granted the development permit with variances and conditions because section DC2.384.4(q) states that Signs may be allowed in this district in accordance with Schedule 79E and the general provisions of Section 79.1 to 79.9, inclusive, of the *Land Use Bylaw*.
- [36] As everyone agrees that Freestanding General Advertising and On-premises Local Advertising Signs are all allowed in the DC2.384 Zone we are already following Council's direction. No one is arguing or even suggesting we are not following Council's direction - the issue is not at play here today.
- [37] Based on the evidence before it in 2013, the Board followed the directions of Council and approved the development and granted the required variances pursuant to section 687(3) of the *Act* which is a higher threshold than the discretion delegated in the DC2. The Board should follow the same rationale for this appeal.
- [38] The Appellant reviewed the reasons given for the decision on the merits by the Board in 2013:
- a) The Board found that the proposed sign is consistent with Section DC2.384.4(p) as it was compatible with existing and surrounding commercial land uses and consistent with the intent of the Major Commercial Corridor Overlay by virtue of being visually attractive and giving consideration to traffic safety.
 - b) The Board noted that section DC2.384.4(p) gives the Development Officer variance powers to grant relaxations to Section 50 to 79, inclusive, of the *Land Use Bylaw* and the provisions of this District, if in his opinion, such a variance would be in keeping with the general purpose of this District and would not affect the amenities, use and enjoyment of neighbouring properties (Reasons No 4, 5 and 6).
 - c) It determined that the proposed sign complied with Section 79.8(1)(a) because: it displayed digital poster panels and nothing in the *Land Use Bylaw* prohibited this

type of use; it would display static images in 6-second intervals and did not contain any animation; and, it complied with section 79.8(1)(e) because it met the minimum industry standards regarding technology to provide for an automatic dimming feature to control brightness. The Appellant noted that the owner has since installed new lighting technology to control the brightness of the sign. As it had determined that the proposed sign was not a Billboard, the Board did not consider section 79.8(2)(c). The Appellant stated nothing has changed since 2013 other than the improved lighting technology.

- d) The Board granted a variance to the required setback in section 79.5(1)(b). As the Board determined that the sign was an allowable use in the district, it did not consider the Development Officer's references to the *Zoning Bylaw* with respect to safety issues and additional studies. The Board was not satisfied that the proximity of the proposed sign to Mark Messier Trail was a valid concern because the proposed sign was separated by a service road. The Appellant noted that the service road still exists as illustrated in the submitted photographs. (Reason No. 9).
 - e) The Board determined that the proposed sign exceeded the maximum allowable sign area because it was located adjacent to Mark Messier Trail. The Board granted a variance because in their opinion the proposed combination sign was preferable to erecting two separate signs at this location and the variance would be mitigated because the subject site is adjacent to a service road. The Appellant noted that the facts are the same today, nothing has changed.
 - f) The Board mentions that the approved sign replaced an existing sign that had previously been in place with no known complaints and no objections were received from any of the adjacent property owners at that time. The Appellant noted that today there was no opposition to the proposed sign (not even from neighbouring sign companies) and the Appellant provided five letters of support received from neighbouring property owners who will be looking at the sign.
- [39] All of the conditions identified in the Development Officer's written submission are completely acceptable to the Appellant. These conditions and the five-year limit will provide ample assurance that the sign is not impacting any of the adjacent property owners. One of the conditions requires that any complaints be dealt with within 30 days.
- [40] The variance power given to the Development Officer in DC2.384.4(p) contains similar language to section 687(3)(d) of the *Act*. The threshold is even lower in the DC2 because it does not address the value of neighbouring properties or material interference. However, both of the Board's tests under DC2.384.4(p) and under section 687(3)(d) of the *Act* for granting variances are met for this proposed development.
- [41] Alberta Court of Appeal decisions, *Thomas v Edmonton (City)*, 2016 ABCA 57 and *Newcastle Centre GP Ltd. v Edmonton (City)*, 2014 ABCA 295 make it clear that the Board has to relieve against hardship when the Development Authority exercises their discretion incorrectly.

- [42] Mr. Grey, Real Estate Manager for Astral Out-of-Home, advised that the company only builds digital signs. Ten advertisers can be accommodated on one sign. They focus on key locations to reduce the number of signs. Astral Out-of-Home is the only outdoor advertising company in partnership with the Government of Alberta to display Amber Alert messages, which brings a public service element to the operation of the digital signs.
- [43] In response to a relatively small number of brightness complaints, a technician visited the site and measured the nits. The technician saw that the sign was not operating exactly as it should so new light sensing equipment was installed in March of this year which has proven to mitigate the concerns to date. They believe that they will not have any more challenges in that respect.
- [44] Photographs were referenced for context and to address the specific issues raised by the Development Officer in the reasons for refusal.
- [45] With respect to the first reason, they question how the Development Officer could have come to the opinion that the existing sign will continue to negatively impact surrounding properties. They acknowledge that the Development Officer exercised the discretion which Council gave her for the site; however, the Appellant takes the position that the Development Officer did not exercise the discretion properly.
- [46] The property immediately to the south operates as a dock manufacturing company and landscape supply yard. The property to the north is currently undeveloped. There are several existing freestanding third party signs located west, north and south of the subject site. It is therefore unclear from the Development Officer's position how the subject sign (which has been in existence for five years) somehow negatively impacts the surrounding properties.
- [47] They argue that what existed in 2013 exists today. Developments on the west side of Mark Messier Trail show that the sign has not impacted the ability of land to the west to develop. Nothing before the Board in the Development Officer's report or the photos suggests that the sign is somehow negatively impacting the surrounding properties.
- [48] In the second reason for refusal, the Development Officer took the position that the sign adversely impacts the surrounding amenities and remarked that there were two complaints regarding its brightness. The Appellant submitted: the sign has been approved and in existence for just under 2000 days; two complaints represents less than .001 percent; the complaints related to brightness and evidence has been provided to the Board that the sensors have been changed to adjust the brightness. The Appellant agrees that brightness is an important issue, but two complaints are insignificant and they have been addressed. Further, the Appellant agrees to a condition requiring them to deal with brightness complaints within 30 days.

- [49] The Appellant reiterated that the five letters of support filed with the Board come from the owners of newly developed properties immediately southwest of the subject site that did not exist in 2013. They have no issue with the approval of this sign at this location. Therefore, the Appellant submits that the evidence does not support the concerns that this sign will somehow impact the surrounding amenities.
- [50] The Appellant noted that reason for refusal number three cites a concern with the “Station Sign” also located on the site. The Appellant suggested that this concern could be addressed by the Board if it adds a condition that the Station Sign be removed as a condition of approval. A letter from the landlord who owns the Station Sign was submitted to confirm that he is agreeable to removing the sign if the proposed sign is approved. (Exhibit A)
- [51] The Appellant argued that the Board could make an absolute improvement to the area if it chose to approve the sign subject to the proposed condition as there will be one less sign along Mark Messier Trail. Adding this condition would also address the other two issues that the Development Officer identified as specifically impacting the amenities of the neighbouring parcels of land.
- [52] Reason for refusal number four dealt with the setback. The location of the sign has not changed and the service road in the photos existed in 2013. The distance between the sign and Mark Messier Trail is approximately 18.6 metres as in 2013. Therefore, the subject sign maintains the 18 metres setback. Moving it further east would make the sign difficult to see and may, in fact, create concern as it would require a longer glance duration to read. The current setback is consistent with the other freestanding signs located along this roadway. Increasing the setback would make the sign appear out of place relative to the other signs.
- [53] The applicability of DC2.384.4(c) was not debated in 2013. The section requires a minimum “building” setback of 14 metres adjacent to St. Albert Trail. The Appellant noted that the language used says “building” and not the generic term “development”. In his opinion, the regulation applies to buildings and not signs. However, even if the Board finds that this section applies, Council has provided discretion to the Development Officer and to the Board to vary this regulation. In 2013 the Board exercised their discretion and said the location was perfectly fine and does not cause a concern.
- [54] An aerial photograph shows the location of the other existing signs along Mark Messier Trail that also existed in 2013. The Development Officer raised these signs as an issue. No complaints have been received regarding the number of signs in this location. The two complaints were related to brightness, not to the number of signs. None of the other sign companies have raised any opposition. The Appellant opined that the competitors are not here because they feel there is no impact to their signs or to their ability to do business. The sign has been in place 5 years. No evidence has been provided that there are any conflicts or traffic concerns.

- [55] In sum, it is well within the Board's authority to authorize a variance. The Appellant asked the Board to exercise its variance powers as the evidence clearly shows that the development does not interfere with the amenities of the neighbourhood or interfere with the use enjoyment or value of neighbouring parcels. It is appropriate for the Board to allow the sign to remain at its location. The development permit should be issued with all of the recommended conditions as well as an additional condition to remove the Station Sign if that is the wish of the Board.
- [56] Mr. Noce and Mr. Grey provided the following information in response to questions from the Board.
- [57] If the Board finds that the proposed sign is a building pursuant to section 616(a.1) of the *Act* or if per section 79.5(1)(b) the setback applies, then the Appellant argues that a variance is warranted and the Board should exercise its variance power appropriately by granting a variance in the setback requirement.
- [58] There is some heavy equipment on the site located immediately north, but it has been sitting idle for some time. Attempts were made to contact the property owner without success. They are unable to comment on development on that site.
- [59] The Appellant was asked to comment on the Development Officer's discretion to either say yes or to say no for each of the identified variances. The Appellant replied that the Development Officer had subjectively determined that somehow this sign will affect the amenities of this area with no backing of that subjective conclusion. He explained that she could have easily identified one of the five reasons and refused the sign and that could end the matter. Instead she came up with five reasons.
- [60] The Appellant argued that he has addressed each of the five reasons for refusal and has given the Board some evidence to exercise its variance power differently than the Development Officer. He provided an analogy to explain –
- If a Development Authority refused an application for a Restaurant because it was deficient on parking by 20 stalls, the decision can be appealed to the Board. The Appellant can argue that the variance should be allowed due to staggered hours of operation. If an Appellant brings some evidence to suggest why the Board should exercise its discretion either properly or differently than the Development Authority, they have discharged their job to allow the Board to say that the Development Authority's analysis does not make any sense and the Board may then exercise the discretion to vary the regulations.
- [61] In this case, taking account of the letters of support and the lack of complaints, the Board must apply *Newcastle*. The Development Officer cannot simply say it will impact others, she must say how the development will impact others and she has not done so.
- [62] The Appellant confirmed their position that the Development Officer acted improperly because she did not give reasons for her discretionary pronouncements. A Development

Authority cannot simply say the sign will affect surrounding amenities or properties without evidence. The obligation on the Development Officer to provide evidence would be met if there were evidence of several complaints or of 38 nearby traffic accidents caused by the sign. Simply saying something does not make it so. It is no longer enough for the Development Officer to simply say there will be harm. There must be some basis – here her statement is based on nothing and that is where the Development Officer failed to exercise her discretion properly. The Appellant does not have to prove a negative.

- [63] The Development Officer did not provide any evidence to support the refusal of the required variances and therefore did not exercise discretion properly. Here the Appellant came with evidence to show why the Development Officer is wrong, the Appellant could not have come to the Board if he had no evidence. He has offered the Board a solution which will remove one of the signs along the road and allow positives to flow from this appeal.
- [64] The Appellant noted many of the new business owners in the area have expressed interest in purchasing advertising on the sign. Mr. Grey reached out actively to all of the property owners to get feedback regarding the sign.
- [65] Given that this is a direct control district where the direction of Council must be considered, the Appellant was asked where the concept of discretion begins and ends and whether he objects to the way the discretion was handled or to the determination. He replied that the exercise of discretion has to be based on something, a Development Officer cannot simply say that it is her opinion that the sign will continue to negatively impact surrounding properties.
- [66] In response to the Board's observation that the Development Officer had referenced some complaints in her refusal, the Appellant replied that there had only been two complaints in five years regarding the brightness. Also, the Appellant provided evidence to the Board that these complaints were addressed by installing new light sensors and the Appellant agrees to a recommended condition that complaints of this nature be dealt with within 30 days. For this issue, it is important that the Board recognize that this is a different Appellant than the Appellant in 2013.
- [67] The development permit application was refused because variances were required to five development regulations. The Development Officer could have granted them. The appeal was filed because the Development Officer exercised her discretion a certain way and refused the application. In his opinion she did not exercise the variance power provided in the DC2 properly. The Board must consider the Appellant's reply because the Appellant has given a sufficient basis for the Board to say the Development Officer was wrong and to exercise its own variance powers. The threshold hurdle, section 685(4) (formerly section 641(4)), does not have to be met.
- [68] *Garneau Community League v Edmonton (City)*, 2017 ABCA 374 (*Garneau*) is distinguishable from this appeal because the Bylaw in that appeal was a DC1 Direct Development Control Provision. Also, nothing in that Direct Control gave discretion to

the Development Officer. Therefore, the general provisions under section 11.5 and 11.6(3) of the *Zoning Bylaw* applied and were considered to determine the variance powers of the Development Officer. (Paragraphs 5 and 15-17).

Garneau says that the general rules apply in the absence of anything specific. Here the DC2 has specific language with respect to variance powers and the provisions in section 11 do not apply to this appeal.

- [69] Given the parties agree that the use class is allowed and the 2013 failure which triggered a review on the merits has not occurred, the Board asked the Appellant to comment on how the directions of Council were not followed for the permit under appeal. The Appellant explained he is not arguing that the Development Officer failed to follow the directions of Council or she lacked authority to exercise discretion. He is arguing that the Development Officer did not exercise her discretion correctly.
- [70] His prior example of a DC zone where Restaurant is an allowed Use, but Alcohol Sales is not allowed illustrates his point. If he applied for a Restaurant and the Development Officer refuses to use an available variance power to grant a variance to the required number of parking stalls, then he could appeal the refusal. At that appeal he could bring the Board evidence of shared parking agreements he had obtained to show a variance should be allowed and ask the Board to grant it. If he was seeking a permit for Alcohol Sales and was refused, he could not appeal it because Council's direction was no Alcohol Sales, and he cannot get a variance. Section 685(4) applies to the appeal concerning the use, but not to the appeal concerning the decision to grant the parking variance.
- [71] *Garneau* does not address the application of threshold the issue either way when a Development Officer's exercises delegated discretion and makes a decision within the range of options. He has not found a case one way or the other on the point.
- [72] Here Council directed that the Development Officer has discretion, yet has not provided direction on how it must be exercised. Because there is no direction on how it must be exercised, the Appellant can argue that that the Development Officer failed to exercise discretion properly. Here the decision cannot be upheld because the evidence does not support the conclusion and the basis of the refusal cannot withstand a challenge.
- [73] The usual appeal process is open to the Appellant once Council provides discretion to the Development Officer. Council could have written the Bylaw to exclude discretion but they chose not to. To suggest that section 685(4) means that the other appeal process is not available to an Applicant is contrary to the direction of Council.
- [74] Section DC2.384.4(p) grants the Development Officer variance powers for sections 50 to 79. Providing this discretion also gives the Applicant the ability to appeal the exercise of the discretion. If the Board fails to provide the Applicant the ability to appeal, it is basically allowing the Development Officer to do whatever they want - that was not the direction of Council. Even if the decision of the Development Officer is not unreasonable, it can be challenged to seek a different result.

- [75] The five reasons for refusal were addressed by the Appellant to provide the Board with a basis as to why the decision of the Development Officer could be changed. It was his opinion that the first reason for refusal was incorrect because there was no basis on which to reach that conclusion. The Development Officer was not aware that new light sensing equipment was installed on the sign.
- [76] The Development Officer made her decision based on the information that she was provided. The decision may have been different if the Development Officer was aware of the installation of new light sensors and the five letters of support. In this appeal the Board can exercise discretion differently than the Development Officer did based on the information that has been provided at the hearing.
- [77] The Appellant reviewed paragraphs 26 through 29 of *Garneau* which deal with sections 641(3) and section 641(4)(b) (the current section 685(4)(b)). *Garneau* centered on a decision regarding whether or not the proposed development followed the direction of Council and an ability to vary limited by the planning documents that were before the Board and the Court of Appeal.
- [78] Paragraph 27 of *Garneau* is not helpful because the language contained in this DC2 actually speaks of the variance powers and is different than what was before the Court in *Garneau*. The variance power provided in this DC2 is broader and closer to the discretion provided in section 687(3) of the *Act*.
- [79] Section 641(3) applies to this appeal and states:
- In respect of a direct control district, the council may decide on a development permit application or may delegate the decision to a development authority with directions that it considers appropriate.
- [80] Section 641(3) is a critical section. It is referenced in paragraph 29 of *Garneau* in terms of saying that the Legislature recognizes that certain decision making processes can be delegated to the Development Authority.

Paragraph [29] states:

[...] To the extent that council's directions gave a development authority the ability to consider "the merits of the development", the subdivision and development appeal board has similar authority. However, there is no basis for a subdivision and development appeal board to have broader powers on appeal than the development authority with respect to land in a direct control district.

This is the key point. The Board has the same broad authority as the Development Authority in this DC2. *Garneau* says the Board has the discretion that was provided to the Development Authority. He agrees with the Court of Appeal when they reject the suggestion by Professor Laux that the discretion of the Board can be larger than the discretion of the Development Officer. In this DC2, Council gave the Development Officer very broad discretion that is somewhat lighter than the variance power provided

in section 687(3) of the *Act*. According to *Garneau*, the Board has the same discretionary power that was provided to the Development Officer in this DC2. Therefore section 685(4)(b) does not apply to this appeal.

- [81] Council determined that signs are an allowable use in this DC2 and pursuant to section 641(3), Council also delegated certain decision making processes respecting signs to the Development Officer, including the ability to vary any of the sign regulations in the Bylaw as long as it is in keeping with the general purpose of the District and will not negatively affect the amenities and use of any surrounding properties.
- [82] Section 641(3) and section 685(4)(b) (formerly 641(4)(b)) must be read in conjunction. Council delegated discretion, including language as to the scope of the discretion and that is why 685(4)(b) of the *Act* does not apply to this appeal. Therefore, the Appellant is allowed to make the same arguments that they would make in a typical appeal in any other typical zone about why a variance should be allowed.
- [83] Asked if section 685(4)(b) ever applies if discretion is delegated to the Development Officer, the Appellant stated that it might apply if the Development Officer just refused the application and did not exercise any discretion at all. In that case the Development Officer would have failed to follow the direction of Council. Here the Appellant acknowledged that the Development Officer used the discretion delegated to her by section 641(3) in accordance with the direction of Council and came up with a decision with reasons. The appeal would also be very different if the DC2 had been silent.
- [84] The Appellant asks the Board to exercise the variance power that was delegated to the Development Officer even though no one is arguing that the Development Officer failed to follow the directions of Council. Per *Garneau*, the Board can exercise the same variance power that Council put in the DC2. *Newcastle* is relevant only because the wording of this variance power is similar, albeit broader than section 687(3)(d). The hurdle in section 685(4)(b) simply does not apply.

ii) *Position of the Development Officer, Ms. K. Mercier:*

- [85] Ms. Mercier provided the following information in response to questions from the Board:
- a) Asked to explain how she used her discretion, the Development Officer answered that she looked at the property in the DC2 and at the surrounding zoning which had similar regulations. In her view, she exercised her discretion properly. This development was reviewed under the old *Land Use Bylaw* as a Discretionary Use, not just a Permitted Use.
 - b) The Development Officer reviewed her written submissions with the Board. As with any review the zoning and uses of surrounding properties were reviewed and considered. It was her opinion that the two complaints received show that the lighting

of the proposed sign adversely impacts the surrounding amenities. The issue is broad, but she could not just ignore the complaints.

- c) She was not aware that new light sensors had been installed on the sign in March 2018. Although she is now aware of the new sensors, she could not indicate if this would change her decision without a thorough review and she would consider the neighbours' opinions. Lighting is not reviewed by the Development Officer unless specific information is submitted with the development permit application. She reviews the drawings as submitted by the Appellant so she assumes it is the same sign. A standard condition regarding lighting is imposed on all approved development permits as there is more governance on that issue now.
- d) The issue of other signs and their setbacks was raised. The Development Officer indicated that On-premises Signs do not have setback requirements. She was aware of the Board's earlier variance and she took the service road into consideration, but noted that the setback must be from the property line. When looking at the setback of other signs her decision would depend as setback requirements are not the same for different signs.
- e) She explained that the separation distances required between signs are different between the old and new Bylaws because the old *Land Use Bylaw* does not have Digital Signs. She reviewed the application under the old *Land Use Bylaw*.
- f) She could not offer an opinion on whether or not her variance power could be challenged in this DC2 without first seeking legal advice.
- g) She confirmed that she exercised some discretion. She reviewed it based on the materials she was given and decided not to grant the required variances - if the sign had been smaller or the setbacks different she might have considered it. Here the size was significant. She considered the surroundings and the surrounding zoning. The regulations and uses would be different for other signs and she could not comment without reviewing the file. She did not decide just because it did not comply with one zone. She considered the existing service road and also noted that landscaping was not provided so that was not a consideration.
- h) She confirmed that City Transportation has no concerns with the location of the proposed sign and with the imposition of recommended conditions.
- i) It was her opinion that the setback requirement for buildings in the DC2 was applicable per section 79.5(1) which says signs must comply with setback regulations for buildings.
- j) She confirmed that there are no other signs in the area under other zones with similar setbacks. Some of the other Freestanding On-premises Signs, including the one that the Appellant is willing to remove, just have to be behind the property line. Based on her review, she was aware that there were other general advertising signs in the area

which would now be considered Freestanding Off-premises Signs. She confirmed that they exist with permits, but she could not confirm whether or not variances were granted for any of those signs. It could be that other General Advertising Signs are the same distance from St. Albert Trail. However, the other signs do not front onto a service road so the setback would be measured from the front property line. The subject sign may possibly line up with the setbacks of the other signs as they are setback from their property lines.

- k) She agreed that if variances were allowed, it might be helpful to the amenities to impose a condition to have the Station Sign removed.

iii) Rebuttal of the Appellant

[86] A photograph was referenced to illustrate that the Outfront Media Sign is located behind the service road and that the three other signs located east of the service road appear to line up visually. They do not have a survey, but they look consistent.

[87] The Development Officer had not been aware that new light sensors had been installed on the sign in March or whether the neighbouring property owners were aware of the change. The identities of the complainants are unknown. The Board does know five letters of support have been submitted from neighbouring property owners and that there were no letters of opposition nor anyone in attendance at the hearing in opposition to the existing sign so that should answer the Development Officer's issue.

[88] City Transportation has not raised any objection regarding the location of the sign.

[89] Mr. Noce and Mr. Grey provided the following information in response to questions from the Board:

- a) Mark Messier Trail curves to the northwest and the existing signs all line up along the curve. They estimate that the setbacks of the existing signs are within a few feet of each other. Some look like they may not be compliant and they might have a variance but these facts are unknown. The Station Sign was approved by the Subdivision and Development Appeal Board in 1996 with an unlimited term.
- b) The Appellant was asked whether he had any additional comments after hearing the Development Officer's oral submissions, in the event the Board were to take the view that section 685(4)(b) applies. He indicated that based on her oral submissions, the Board may decide that the Development Officer did not exercise any discretion as she did not provide the basis for her exercise of discretion. He interprets her remarks to mean that she simply looked at the regulations, determined that the sign did not comply and said no. However, Council did not set the regulations in stone and provided discretion for Development Officers to vary the regulations. Therefore, in his view the Development Officer did not follow Council's direction as she did not exercise discretion.

- c) Nonetheless, he reiterated his main argument that section 685(4)(b) does not apply and the Board is free in this appeal to exercise the full discretion delegated to the Development Officer in the DC2 to allow the appeal and grant the variances.

Decision

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

Reasons for Decision

- [91] This is an appeal of a decision of the Development Officer refusing an application for a Freestanding General Advertising and On-premises Local Advertising Sign (Minor Digital On-premises Off-premises Sign) located within a direct control district, DC2-Site Specific Development Control Provision DC2.384.
- [92] At the time of the creation of DC2(384), the *City of Edmonton Land Use Bylaw 5996* (the *Land Use Bylaw*) was in effect. Pursuant to section 2.7 of the *Edmonton Zoning Bylaw* (the *Zoning Bylaw*), schedule 79E and the general provisions of section 79.1 to 79.9, inclusive, of the *Land Use Bylaw* apply to the proposed development.
- [93] The proposed development was the subject of an earlier decision of the Board, SDAB-D-13-052.
- [94] In 2013, the Development Authority refused to issue a permit for the proposed development because they decided it was not an allowed Use in DC2(384). The refusal was appealed to the Board. In SDAB D-13-052, the Board first considered section 641(4) and determined that the Development Authority had failed to follow the directions of Council in refusing the permit because the proposed development was in fact allowed on the site as listed as a Discretionary Use (Class C) per DC2.384. and section 14.4 of the *Land Use Bylaw*.
- [95] After making that determination, the Board then considered the merits of the appeal, approved the proposed development, granted the required variances and issued a development permit subject to conditions for a 5-year term. The term expired and the Appellant applied for a new permit on April 3, 2018.
- [96] On July 16, 2018 the Development Officer issued a decision refusing the current application for five reasons. She noted the proposed development is a Discretionary Use (Class C) per section 14.4, made a determination on that and then cited the following sections of the *Land Use Bylaw*: section 79.8(1)(e) which deals with illumination; section 79E.2(1)(c) which sets the maximum sign area of 24 square metres; section DC2.384.4(c) which requires a building Setback of 14 metres and section 79.5(1)(c) which sets the

minimum radial distance allowed between general advertising signs facing the same traffic direction.

[97] The Appellant appealed the refusal to the Board.

[98] As the proposed development is located within a direct control district, the Board considered section 641(3) and section 685 including subsection 685(4)(b) (formerly section 641(4)(b)) of the *Municipal Government Act* (the *Act*).

[99] Section 641(3) states:

In respect of a direct control district, the council may decide on a development permit application or may delegate the decision to a development authority with directions that it considers appropriate.

[100] Section 685 sets out the grounds for appeal to the Board, the persons who can appeal and the circumstances under which an appeal lies. Section 685(4) states:

Despite subsections (1), (2) and (3), if a decision with respect to a development permit application in respect of a direct control district

(a) is made by a council, there is no appeal to the subdivision and development appeal board, or

(b) is made by a development authority, the appeal is limited to whether the development authority followed the directions of council, and if the subdivision and development appeal board finds that the development authority did not follow the directions it may, in accordance with the directions, substitute its decision for the development authority's decision.

[101] The Board also considered provisions in DC2.384:

DC2.384.4(q) which states:

Signs maybe allowed in this District in accordance with Schedule 79E and in accordance with Schedule 79E and in accordance with the general provisions of Section 79.1 to 79.9, inclusive, of the Land Use Bylaw.

DC2.384.4(p) which delegates discretion to the Development Officer to allow variances:

the Development Officer may grant relaxations to Section 50 to 79, inclusive, of the Land Use Bylaw and the provisions of this District, if in his opinion, such a variance would be in keeping with the general purpose of this District and would not affect the amenities, use and enjoyment of neighbouring properties.

[102] The Appellant repeatedly stated that the Development Officer had followed the directions of Council in exercising the discretion delegated to her in DC2.384.4. He had come to the Board to argue as he would in a typical zone that the Development Officer had not

properly or correctly exercised her discretion. It was open to the Appellant to challenge the decision even if it was not unreasonable precisely because Council had delegated discretion to the Development Officer.

[103] Therefore, the Appellant made submissions and brought evidence to show that there was no basis for her refusal and that it was appropriate for the Board to exercise the discretion delegated to the Development Officer in DC2.384.4 differently by approving the proposed development and granting the required variances.

[104] The Appellant made the following arguments about the section 685(4)(b) threshold issue:

1. First, section 685(4)(b) of the *Act* does not apply to this appeal and the Board need not find that the Development Officer failed to follow the directions of Council before considering the merits of the case and substituting its own decision because:
 - i) Council had determined that signs are an allowable Use in this DC2; and,
 - ii) Pursuant to section 641(3), Council also delegated broad discretionary decision making authority respecting signs to the Development Officer. In particular, DC2.384.4(p) delegated the ability to vary any of the sign regulations in the *Land Use Bylaw* as long as it is in keeping with the general purpose of the District and will not negatively affect the amenities, use and enjoyment of neighbouring properties.
2. Second, when a Council delegates discretion to a development authority per section 641(3) it intends that there will be a full appeal and that the Board will not be restricted by the limit in section 685(4)(b) to cases where the Development Officer failed to follow the directions of Council.
3. Third, this intention is even more evident with DC2.384.4(p) because the delegated discretion is extremely broad – it is similar to, but broader than, the Board’s usual variance powers in section 687(3) of the *Act*.

[105] The Appellant did provide one proviso - section 685(4)(b) would be engaged and apply in the event that a development authority completely failed to exercise a discretion delegated to it by a council as that would constitute a failure to follow the directions of a council.

[106] The Appellant could not find any rulings directly on this point.

[107] The Board considered the Court of Appeal decision in *Garneau Community League v Edmonton (City)*, 2017 ABCA 374 (*Garneau*). It deals with this Board’s authority on appeals in respect of direct control districts. In paragraph 20, the Court comments on the Board’s limited authority in such appeals:

However, when the appeal concerns property that is subject to direct control zoning section 641(4) limits both the scope of the appeal and the role of the subdivision and development appeal Board. It provides with emphasis added:

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

(a) Is made by a council....

(b) Is made by a development authority, the appeal is limited to whether the development authority followed the directions of council, and if the subdivision and development appeal board finds the development authority did not follow the directions it may, in accordance with the directions, substitute its decision for the development authority's decision.

[108] While *Garneau* focuses mainly on the latter highlighted portion of section 641(4)(b), the Court employed the two-stage analysis of section 641(4)(b) in its entirety to deal with an appeal concerning property subject to direct control zoning.

[109] In the first stage, the Court asked if there had been a failure on the part of the Development Officer to follow the directions of Council within the terms of section 641(4)(b).

[110] On this issue, the Court decided that the Board correctly concluded that the Development Officer failed to follow Council's direction within the terms of section 641(4)(b) because he had only considered the general variance power in section 11.5 and not the specific variance power in paragraph 2 of the Development Criteria of the GARP (the authorization to relax the RF3 regulations for individual applications, where such relaxations would assist in the achievement of development criteria in Clauses 3, 4, and 5). (at paragraphs 23 and 25)

[111] Given this conclusion, the Court did not consider the other ways in which the Board felt the Development Officer may have failed to follow the directions of Council. The Board carried on to the second issue.

[112] In the second stage, the Court indicated that after the Board correctly found a failure in terms of section 641(4)(b), the Board was entitled to substitute its own decision, provided that it too followed the directions of Council.

[113] In the remainder of the decision, the Court considers the ambit of the Board's legislative variance powers when it substitutes its own decision. The Court found the Board must also follow the direction of Council and consequently the Board has authority to exercise the same discretion as the Development Officer, but no more. In other words, the more specific section 641(4)(b) limits the general section 687(3)(d).

[114] *Garneau* is clear - the first task that the Board must engage in when dealing with an appeal with respect to a development in a direct control district is to determine whether Development Officer followed Council's directions. That includes determining whether

the Development Officer exercised the discretion granted to her by Council and only that discretion. In this case that includes the specific direction with respect to variances found in section DC2.384.4(p).

- [115] Only after finding that the Development Officer failed to follow the directions of Council in accordance with the first portion of section 641(1)(b) does the Court in *Garneau* go on to discuss the final portion of section 641(4)(b) which deals with the ambit of the Board's authority to consider the merits of the appeal. There is no indication in the decision that the delegation of any broad or narrow discretion in the DC2 would mean that the Board could disregard the first portion of section 641(4)(b) and proceed with an appeal on the merits and review the Development Officer's exercise of her authority.
- [116] The Appellant argued that the correct interpretation of section 685(4)(b) in this appeal where the Development Officer followed the direction of Council and exercised the discretionary authority delegated to her by Council is as follows:
1. The final portion of section 685(4)(b) applies (if the Board substitutes its own decision, the Board is limited to the very same discretion delegated to the Development Officer),
 2. but, the earlier portion of section 685(4)(b) does not apply (the Board may disregard the direction that the appeal is limited to whether the Development Officer followed the directions of council and that only if the Board finds that the Development Officer did not follow the directions of council may it substitute its own decision).
- [117] The Board finds the Appellant's interpretation that the final portion of section 685(4)(b) applies while the initial portion does not apply is difficult to reconcile with the plain wording of the section or with the approach taken in the *Garneau* decision.
- [118] The Appellant also argues that whenever Council uses section 641(3) and delegates discretion in a direct control district, an Applicant's full appeal rights are triggered and section 685(4)(b) is not relevant.
- [119] Section 641(3) provides: "In respect of a direct control district, the council may decide on a development permit application or may delegate the decision to a development authority with directions that it considers appropriate."
- [120] The Board notes that that any time Council does not itself make a decision with respect to a development permit application within a direct control district, there is some element of delegated discretion per section 641(3). Using the Appellant's interpretation, the first portion of section 685(4)(b) would never apply to limit appeals in direct control districts. This interpretation would effectively render the section meaningless.
- [121] For these reasons, the Board finds that section 685(4)(b) of the *Act* does apply in this case. Only after finding that the Development Officer failed to follow the directions of

Council in accordance with the first portion of section 685(4)(b) does the Board have authority, at its discretion, to substitute its own decision based on the merits and in accordance with the balance of section 685(4)(b).

- [122] That does not end the matter in this case.
- [123] While maintaining his original position that section 685(4)(b) did not apply, the Appellant raised an alternative argument at the close of the hearing. After hearing the Development Officer's oral submissions, the Appellant argued that the Board could conclude that the Development Officer in fact failed to follow the directions of Council because she failed to exercise any discretion at all - she simply identified the variances and denied them.
- [124] The Board considered whether the Development Officer failed to exercise the discretion with respect to variances delegated to her by Council.
- [125] The Board was not persuaded by the Development Officer's oral submissions that she failed to follow the directions of Council.
- [126] The Board considered her oral submissions and took note that she did emphasize that variances were required when asked to describe how she had exercised her discretion. The Board also took note of the balance of her responses, the reasons in her written report and in the written refusal.
- [127] Overall based on the material in front of it, the Board finds that the Development Officer was aware of the relevant regulations and of the extent of her discretionary authority to grant variances. She recognized that the Use was considered discretionary and that she had discretion to vary the applicable regulations. She took relevant matters into consideration and exercised her discretion based on some evidence and refused the application.
- [128] Therefore, the Board finds that the Development Officer followed the directions of Council, in accordance with section 685(4)(b) the Board has no authority to substitute its decision for the Development Officer's decision.



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

Board members in attendance: Ms. P. Jones, Ms. M. McCallum, Mr. L. Pratt, Ms. K. Thind

Important Information for the Applicant/Appellant

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



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SDAB-D-18-160

Project Number: 286892371-001

An appeal to change the Use from a General Retail Store to Cannabis Retail Sales was
WITHDRAWN