From: Raj Jeerh
To: Public Submissions

Subject: [EXT] Submission for LOC2019-0198 CPC2020-0628

Date: Monday, July 20, 2020 11:30:48 AM

Attachments: Huboil LOC2019-0198.pdf

2015cgysdab42(1).pdf

Hello,

Please find attached my submission for the above mentioned application. Also, I have attached the SDAB decision for the DP approved relating to this application.

Sincerely,

Raj Jeerh

July 20, 2020

Office of the City Clerk The City of Calgary 700 Macleod Trail SE PO Box 2100 Station 'M' Calgary, AB T2P 2M5

Via E-mail: PublicSubmissions@calgary.ca

Re; Land Use Amendment in Forest Lawn Industrial (Ward 9) at 5805 - 17 Avenue SE, LOC2019-0198

Dear Mayor Nenshi and Counselors,

My name is Raj Jeerh, I am the adjacent property owner to 5805 – 17 Avenue SE.

Upon review of the Planning and Development Report to Calgary Planning Commission dated June 18, 2020, and the applicants submission, I am NOT in support of the application and humbly request Council to not approve this application as-is for the following reasons:

- 1) I don't have any concerns with the applicant redesignating the subject property to I-B, but rather have concerns with the particular purpose of the redesignation. The sole purpose of this application is to allow for a particular use which is "Self-Storage Facility"
- 2) As per the Planning and Development Report, it states that a clay cap was constructed. A Development Permit application (DP2014-1919) was submitted by the land owner to construct the cap. In 2014, I spoke with Taryn Davis to review the applicant's plans, but ended up meeting Wilson Cartagena on June 4, 2014 to review the plans and discuss my concerns. Upon Wilson's request, I had emailed him and Susana Kormendi my concerns. I had a follow up meeting with Wilson on August 21, 2014 and Susana also attended along with a gentleman from Urban Development. At this meeting I expressed my concerns regarding the extreme grade change, storm drainage, overland flooding, and why Planning and Development is going to permit the clay cap to be developed above grade instead of at grade. I was shocked to hear from the gentleman from Urban that the reasoning is quite simple, it is more cost effective to develop the cap above grade - \$200,000 vs \$2,000,000. The Development Authority approved the application without any regard for my concerns and further so, approved the DP for the economic benefit of the applicant while infringing on the rights of individuals of the general public. The DA permitted this massive mountain of dirt to be next to a new development on a main street, with no requirements for screening or consideration of the possibility of overland flooding. I appealed the DA's approval which was partially allowed with key permanent conditions.

The SDAB made a decision on August 17, 2015 and added a permanent condition 3.4

Permanent Condition 3.4 The applicant or property owner shall make a development permit application for redevelopment of the subject parcel for use(s) other than "Stripping and Grading" within seven (7) years of the approval of this permit.

Board's reason 78 In addition a permanent condition is imposed requiring that the properly owner or applicant must make a development permit application for redevelopment of the site within seven years of the approval of the permit. This condition is imposed to ensure that the property owner or applicant pursue redevelopment with a reasonable timeframe. Further a permanent condition is imposed that all storm water must be contained on site and no drainage shall be allowed onto the appellant's property. The Board also imposes a permanent condition requiring a development completion permit to ensure that the development is completed in accordance with the approved plans.

The addition of the Self-Storage Facility is not based on planning merit but rather based on economics. According to the SDAB, should this permanent condition not be satisfied, the applicant/land owner shall remove the clay cap placed in the Development Permit application DP2014-1919. The 7 years will be coming up on August 17, 2022. The current grade of the subject property with the 1.2m clay cap is approximately 2.4m above adjacent properties. Any other development would require the 1.2m clay cap to be removed, or be developed at grade — which would be a substantial cost to the developer/land owner as per Urban Development. The landowner has made statements with regards to the clay cap staying as is if a Self-Storage Facility could be developed.

Permitting a Self-Storage Facility on the subject lands would allow the landowner to construct on-top of the clay cap which will circumvent the SDABs decision and permanent condition which was based on the existing DC land use designation.

3) The subject lands should be restricted under Direct Control and remove uses that would be permitted to be constructed on-top of the existing clay cap which is approximately 8' above adjacent properties unless the clay cap is compatible with adjacent properties.

I humbly request Council to not approve this application. Should Council approve the application based on planning merit, I would then request Council to ensure **Self-Storage Facility be a Discretionary Use, not a permitted use as per the Applicant's submission**.

Sincerely,			
Raj Jeerh			

Calgary Subdivision and Development Appeal Board P.O. Box 2100, Station M, #8110, Calgary, AB T2P 2M5 Email:sdab@calgary.ca



CALGARY SUBDIVISION AND DEVELOPMENT APPEAL BOARD

Citation: 2015 CGYSDAB 042

Case Name: SDAB2015-0042

File No: DP2014-1919

Appeal by: Rajit Jeerh represented by Municipal Counsellors

Appeal against: Development Authority of The City of Calgary

Hearing date: April 30, 2015; May 14, 2015; June 02, 2015 and June 25, 2015

Decision date: August 17, 2015

Board members: Rick Grol, Chairman

Jo Anne Atkins John Attrell Michelle Pink Robert Sipka

DECISION

Basis of appeal:

This is an appeal from an approval by the Development Authority for a development permit made on the application of **Riddell Kurczaba Architecture** for a **new: stripping and grading** at <u>5805 17 Avenue SE</u>.

Description of Application:

The appeal before the Subdivision and Development Appeal Board (Board) deals with an approval by the Development Authority of a development permit application for new stripping and grading at 5805 17 Avenue SE. The property is located in the community of Forest Lawn Industrial and has a land use designation of DC Direct Control District pursuant to Bylaw 97D2009 in conjunction with Land Use Bylaw 1P2007.

Adjournment:

This appeal was originally scheduled for April 30, 2015 but was adjourned to May 14, 2015 at the request of legal counsel of the appellant but with consent from all parties involved. The appeal was partially heard on May 14, 2015, and was then adjourned to June 02, 2015. On June 02, 2015, the Board further adjourned the matter to June 25, 2015 to allow the applicant to submit additional documentation to the Board.

Hearing:

The Board heard verbal submissions from:

Andy Orr, representing the Development Authority;

Ken Melanson, representing the Development Authority:

Lawrence Wong of The City of Calgary Development Engineering, Water Resources department;

Tyler Shandro of Municipal Counsellors, legal counsel for the appellant Rajit Jeerh, in favour of the appeal;

Rajit Jeerh, the appellant, in favour of the appeal;

Christopher S. Davis of Christopher Davis Law, legal counsel for the applicant and property owner, opposed to the appeal;

Peter Schulz of Riddell Kurczaba Architecture, the applicant, opposed to the appeal; and

Barrie Flood of Remedx Remediation Services Inc., opposed to the appeal.

Summary of Evidence:

The Board report forms part of the evidence presented to the Board. It contains the Development Authority's decision respecting the development permit application and

the materials submitted by the Development Authority that pertain to the application. The Board report further contains the notice of appeal and the documents, materials or written submissions of the appellant, applicant and any other party to the appeal.

Development Authority's Submission

The Development Authority's representative, Mr. Orr, presented exhibits including the report, maps, viewgraphs, power point presentation and photographs. Mr. Orr submitted the following [unedited]:

The item being presented is an appeal of the Development Authority's decision to approve an application for new stripping and grading located at 5805 17 Avenue SE in the Forest Lawn Industrial area of the city. The site is designated DC Direct Control District for the purposes of managing environmental risks with the site and to accommodate a range of industrial and business uses. The site is relatively flat and is abutted by industrial general uses to the east and south, Canadian National Railway (CNR) lands and tracks to the west, 17 Avenue to the north.

The application was made as a result of a complaint and under section 25(2)(g)(i) of the Land Use Bylaw based on the size of the stripping and grading area which is 1.65 hectare. The application requires a development permit.

The aerial photograph details the adjacent light industrial buildings to the east, 17 Avenue to the north, CNR tracks and endowment lands to the west and vacant industrial land to the south.

Aerial detailed view, photograph 4 is a detailed view of the parcel which is currently vacant.

The development permit was circulated to affected parties including the 17 Avenue Business Revitalization Zone (BRZ). An objection was received from a nearby property owner expressing concerns over the commencement of remediation of the site without proper permit approvals and regarding potential seepage of materials onto his property. The BRZ expressed concerns over grade changes effecting neighbouring properties and to the adjacent sidewalks.

The purpose of the DC land use associated with the parcel is in part to manage the environmental risk existing with the site and to allow for a limited range of industrial and business uses. The applicant is attempting to remediate the parcel with this stripping and grading application process. No new building development is being proposed at this time.

The applicant intends to cap the site with 1.2 metres of compacted clay and leave a narrow 0.1 metre layer of gravel on top. To help contain runoff on the site, the plan indicates there is a berm feature occurring on the south, east and west boundaries near these property lines. The site slopes modestly north towards 17 Avenue and indicates that storm water retention ponds will be located on the 17 Avenue SE frontage. This is part of a remediation process which is intended to clean up the site and contain and reduce the risk of future run off beyond the sites boundary.

A detail of the added on clay, gravel and berm, feature, taken at the south property line intended to contain run off on the parcel.

There are numerous permanent and advisory conditions of approval placed on the development permit by urban development to ensure the stripping and grading is contained. In addition, there is also a prior to release requirement number 2 from Urban Development that requires the applicant provide an indemnification letter saving The City and adjacent property owners harmless from any damages they may sustain as a result of storm water runoff, soil erosion, instability, sedimentation, loam stockpile dust and any other problem that may arise from the stripping and grading. This further requires the developer to take corrective action at his expense to rectify the problem in a timely manner to the satisfaction of the manager of Urban Development.

[Several photographs of the site were shown]

The application is as stated specifically for stripping and grading only and the applicant is required to adhere to a number of measures and conditions that comply with the DC land use for the parcel as well as conditions placed upon by Urban Development. The application was therefore approved with the conditions noted in the Board's report.

Upon questioning by the Board Mr. Orr and Lawrence Wong of The City of Calgary's Development Engineering, Water Resources, stated that the prior to release condition outlined on page 68 of the Board's report requiring the applicant to conform to the applicable related requirements outlined in the Alberta Environment Approval No. 9790-02-00 have been met and that this approval report was submitted to the Development Authority.

Mr. Wong stated they reviewed the subject application and his department is satisfied. There is no hard copy of the correspondence in the Board's report but the applicant submitted this documentation to The City of Calgary and it has also been reviewed by The City's Environmental department.

Mr. Wong further stated that dealing with storm water was not contemplated in this application as this is for an interim use. However, in accordance with the Drainage

Bylaw, storm water should be contained within the site and this Bylaw would apply to this application as well.

At the hearing date on June 25, 2015 the Development Authority's representative and Mr. Wong stated that The City could allow tree planting on the north property line but it would have to be subject to approval of a line assignment and have no conflict with a future line assignment.

Appellant's Submission

The appellant, who is the owner of the adjacent property to the east of the proposed development, submitted in the notice of appeal the following objections to the proposed development: (1) The approval is inconsistent with the purposes and goal of the Municipal Development Plan (MDP); (2) 17 Avenue SE has been designated by the MDP as a main street, and the storm water ponds facing 17 Avenue SE are inconsistent with the City of Calgary's Main Streets initiatives consideration of the future growth opportunities to future businesses and residents; (3) The increased elevation of the site does not respect or enhance the character of the neighbourhood and will cause a detriment to adjacent properties. Alberta Environment and Sustainable Resource Development (AESRD) have indicated that the elevation resulting from the remediation plan is not within its jurisdiction to determine and that the whole remediation plan is subject to the owner receiving a development permit from the City of Calgary; (4) The stripping and grading approval by the City does not provide sufficient protection for adjacent properties from overflow discharge of potentially contaminated water (the DP relates to the former Hub Oil site which, prior to the explosion and fire which terminated refining operations, had become contaminated as a result of the oil refining operations conducted on the site); and (5) The Alberta Environment and Sustainable Resources' approval provides for landscaping but there is no landscaping plan.

At the hearing the appellant elaborated on their concerns regarding the proposed development. The appellant referenced the documentation he submitted to the Board, the applicable policy plans and Bylaws. The appellant illustrated with numerous photographs that there is a grade difference between the subject site and their adjacent property of about two feet. The Development Authority stated that the proposed development is stripping and grading, however in the appellant's opinion the development is more than that; it is stockpiling. The appellant asserted that the capping of the site is stockpiling. Section 616 (b)(i) of the *Municipal Government Act* includes stockpiling as a "development". Stockpiling is not mentioned as a use in the list of discretionary and permitted uses of the Direct Control Bylaw.

The appellant asserted that the Development Authority erred in approving this development permit and reiterated they did not follow the direction of the Council as per the Direct Control Bylaw. Counsel referred to the recent case *Edmonton East (Capilano) Shopping Centres Limited v Edmonton (City)*, 2015 ABCA 85, which in his opinion has changed the administrative law regarding administrative tribunals. According to the appellant planning decisions are quasi–judicial in nature. The standard

of review for these planning decisions is now correctness and no longer reasonableness.

The appellant stated that if the Board disagrees with the appellant's assessment of the application, then he would request that if the Board would agree with the Development Authority's approval of the development that several conditions be added. appellant, among other things, requested that: (i) The applicant construct a fence and retaining wall adjacent to the appellant's property; (ii) There shall be landscaping, including grass and shrubs/trees on the sloped portions of the clay cap; (iii) Condition 21 be amended and the development permit shall be for a period of five years; (iv) A restrictive covenant shall be registered to the applicant's land for the benefit of the appellant's land such that the site shall be developed to the Design Guidelines for the Development Site Servicing Plans; (v) The applicant shall pump out the tanks on a regular basis; and (vi) The appellant be entitled to enter and register a lien and/ or easement as an encumbrance against the subject parcel that if the tanks or over flow, the appellant shall be entitled to enter upon the lands to pump out the tanks itself and for which any costs incurred are immediately due and payable. Alternatively the appellant suggested a condition that the applicant is required to provide a certificate under seal from an Engineer who is a member of the Association of Professional Engineers and Geoscientists (APEGA) to indicate that the development is built in accordance with AESRD's specifications and requiring the applicant to provide an insurance policy that indemnifies the appellant in case of damage to his property.

Applicant's Submission

The applicant submitted in its written submissions (pages 164-170 of the Board report), among other things, that the applicant has applied for, and secured, a "Stripping and Grading" development permit to remediate the site and also prepare the site for a potential future development. This is a "transitional" or "interim" use. Any future proposed development must be in alignment with the current zoning and bylaw requirements and will also comply with the Municipal Development Plan (MDP), all statutory plans, and any other requirements under law. In the applicant's opinion the appellant's concerns are premature because any future development will comply with all statutory plans and requirements under law. Moreover, for the purposes of this appeal, the appellant has merely alleged that the development permit approval is inconsistent with the MDP without explaining how a development permit for "Stripping and Grading" is actually inconsistent. The appellant stated that the approved permit does not impede the objectives of the City's MDP with one of its key implementation tools, "complete streets". The City's current "Main Streets" initiative appears to be related to the MDP's "complete streets", but with a focus on 24 "main streets" across Calgary.

In the applicant's opinion the proposed stripping and grading will not be detrimental to adjacent properties. Regarding the appellant's concern about storm water on the subject site not being adequately managed, the applicant stated that the development approved by the development permit will control sediment and drainage pertaining to the site. The majority of the site will drain from south to north (back to front). Two

sedimentation ponds are approved in the front of the site and are designed to provide in excess of a 1 in 25 (1:25) year storm event (within a 24 hour precipitation cycle) as stipulated in the Reclamation and Capping Plan approved in 2009 by AESRD following extensive consultation with The City of Calgary and Alberta Health Services.

Further, the applicant stated that it should be noted that the site will be entirely capped by a clay cap with a gravel cover (clean imported clay materials with washed gravel overlay). Site surface drainage will be directed to and collected in the sedimentation ponds. In accordance with the AESRD approval, there is zero tolerance for breach from the underlying soils. The sedimentation ponds are designed to contain site surface drainage and to collect solutes, if any, from the gravel cover. If rainwater runoff exceeds the capacity of the ponds, any excess water will spill onto 17 Avenue SE. There is also a drainage swale incorporated along the west, south and east perimeter of the site, as shown on the approved plans, to prevent the water from encroaching onto the neighbouring parcels. A site overland drainage flow plan was approved by the City of Calgary and the proposed sediment and drainage controls comply with this plan. Contrary to concerns raised by the appellant the perimeter drainage swales are designed to efficiently channel surface drainage to the sedimentation ponds.

The applicant submitted that following site stripping and re-grading the final elevations of the development site will match those of the adjacent lands. A fence will not be necessary to shore up the completed site as suggested by the appellant.

In the applicant's opinion the appellant's environmental concerns are unfounded. The installation of a cap is necessary for sealing of the site. AESRD was concerned with the "thickness" of the prepared cap to limit precipitation percolation and provide a barrier for any fugitive off-gassing. The cap and remediation plan complies with the AESRD approval.

The AESRD approval contained landscaping conditions that limited landscaping to flora that would not negatively breach the clay cap. Therefore the landscaping objectives of the ARP should be tempered by the condition of protecting the clay cap. The intent of the stripping and grading plan and, ultimately, the remediation of the brownfield site is to prepare the site for a future redevelopment. This is consistent with Council's intent for the subject DC Bylaw 97D2009. The owner will comply with all conditions of the development permit DP2014-1919, including weed protection. The compacted gravel on top of the cap is temporary or interim condition. The "ultimate" site development will follow the next planning exercise that will lead to further development (and building) permit applications and compliance with all landscape requirements as per the current Land Use Bylaw.

The applicant stated that, apart from protecting the clay cap, it is not reasonable to require detailed landscaping requirements at this stage in development. There are several reasons for this. Firstly, as this is an interim development use. Secondly, the likely location for any landscape improvements lies within the City of Calgary road right-of-way. Thirdly, future design changes could alter the existing boundary condition.

Should the City determine that its final requirements for 17 Avenue SE do not require the existing setback, this additional land could be purchased by the site owner and efficiently incorporated into the ultimate design and landscaped. Fourthly, the north perimeter of the site is currently identified as the location for the sedimentation ponds. Although these ponds will be fenced, the applicant believes it is inappropriate to encourage routine travel adjacent to these interim use ponds.

The applicant submitted that Rockmount Financial Corporation (through its affiliate Hub Oil Company Ltd.) requested in 2009 that Calgary City Council approve the redesignation of the Hub Oil site on 17 Avenue SE to allow Industrial-Business uses. The site has been vacant since the explosion in 1999 during which time Rockmount has been planning and implementing site remediation programs with the City, surrounding communities and Alberta Environment. In 2009 Rockmount secured an approval from Alberta Environment that allows for the managing of any contamination by the construction of a clay cap on the site. Reclamation and Capping Plan was submitted to the regulatory authorities for review. This plan outlined the details for the cap, the conditions for future risk management and conditions for future development of the site. The original Alberta Environment approval occurred on April 28, 2008 and the detailed capping plan design approval was approved in 2009.

Further the applicant states that ultimately Rockmount hopes to develop a high quality business facility of a design quality high enough to contribute to the Southeast 17 Corridor Study undertaken by The City. In discussions with the City, Rockmount decided to seek the DC designation based on Industrial- Business rules and allowing 4 storeys and up to 1.0 floor area ratio. A number of uses will not be allowed on the site in recognition of the 300 metre setback from the East Calgary landfill site and the remediation program ongoing on the site. Alberta Environment has approved a long term site management/remediation program which Rockmount will be implementing.

At the hearing the applicant's team in detail elaborated on the application and subject development permit approval.

The applicant asserted that requiring a restrictive covenant, as suggested by the appellant, is outside of the Board's jurisdiction. The applicant has its own general liability insurance that would cover the risks involved and it is not appropriate to impose a condition that the appellant/adjacent land owner be a beneficiary if an event should happen. The recommendation to have an APEGA certification as an additional condition is already consistent with the work the applicant is doing under AESRD's approval.

Furthermore, in the applicant's opinion the Development Site Servicing Plan (DSSP) does not apply to the subject application, contrary to the appellant's assertion. DSSP is to address servicing and geodetic levels for service connections of a full development.

The applicant submitted that the subject development is an interim use that is consistent with what Council has contemplated in the DC Bylaw.

August 11, 2015

On August 11, 2015, after the conclusion of the hearing, the appellant requested the Board to reopen the hearing to consider new evidence. The applicant by email, dated August 14, 2015, advised that they oppose the appellant's request.

Decision:

In determining this appeal, the Board:

- Complied with the provincial legislation and land use policies, applicable statutory plans and, subject to variation by the Board, The City of Calgary Land Use Bylaw 1P2007, as amended, and all other relevant City of Calgary Bylaws;
- Had regard to the subdivision and development regulations;
- Considered all the relevant planning evidence presented at the hearing and the arguments made; and
- Considered the circumstances and merits of the application.
- 1. The appeal is allowed in part and the decision of the Development Authority is varied.
- 2. The development permit shall be issued as approved by the Development Authority subject to the following amendments/additions to the condition of approval

Prior to release conditions

- Prior to release condition number one is deleted in its entirety and replaced as follows:
 - 1. The applicant shall, to satisfaction of the Development Authority, submit a total of four (4) complete sets of amended plans (file folded and collated) to the Planning Generalist that comprehensively address the changes submitted in the pdf to Urban Development on December 23, 2014 and is in accordance with Subdivision and Development Appeal Board's decision SDAB2015-0042.

The amended plans shall be under seal from a Professional Engineer of APEGA and shall include all changes contained in the updated amended plans presented to the Subdivision and Development Appeal Board at the hearing on June 25, 2015.

In addition, the amended plans shall, to the satisfaction of the Development Authority, include the following further amendments/revisions:

- (i) Indicate a solid, maintenance free, fence with a height of 2.4 metres along the entire easterly property line; and
- (ii) Show the planting of a row of shrubs or bushes (with a minimum height of 2 metres at the time of planting) on the City Boulevard/Property along the front property line of the subject parcel on either side of the access point to the site. These plantings shall be identified as subject to a Line Assignment approval of The City of Calgary.

In order to expedite the review of the amended plans, please include the following in your submission:

- (a) Four (4) of the plan set(s) shall highlight all of the amendments; and
- (b) Four (4) detailed written response(s) to the conditions of approval document that provides a point by point explanation as to how each of the prior to release conditions were addressed and/or resolved.

Please ensure that all plans affected by the revisions are amended accordingly.

Permanent conditions

- Permanent condition numbers 4 and 21 are deleted in their entirety.
- The following permanent conditions are added:
 - 3.1 No changes to the approved plans shall take place unless authorized by the Development Authority.
 - 3.2 Subject to approval from the relevant department of The City of Calgary, the applicant shall plant a row of shrubs (with a minimum height of 2 metres at the time of planting) on the City Boulevard/Property along the front property line of the subject parcel on either side of the access point to the site.

- 3.3 If no approval as referenced in permanent condition number 3.2 is obtained, the permit shall have a term of five (5) years and expires accordingly five (5) years after the date of approval of the permit.
- 3.4 The applicant or property owner shall make a development permit application for redevelopment of the subject parcel for use(s) other than "Stripping and Grading" within seven (7) years of the approval of this permit.
- 21.1 All storm water shall be contained on site.
- 21.2 No drainage is allowed to the adjacent property to the east.
- 21.3 A development completion permit shall be applied for, and approval obtained. Call the Development Inspection Group at 403-268-5311 to request that a Development Inspector conduct a site inspection and sign the development completion permit.

Reasons:

1 The Board considered the written, verbal, and photographic evidence submitted, and notes that the appeal pertains to the Development Authority's approval of a development permit for new stripping and grading at 5805 17 Avenue SE. The property is located in the community of Forest Lawn Industrial and has a land use designation of DC Direct Control District pursuant to Bylaw 97D2009 in conjunction with Land Use Bylaw 1P2007.

Application

2 The application is for a development permit for, according to the Development Authority, stripping and grading of the subject parcel. According to the Development Authority under Land Use Bylaw 1P2007 the subject development requires a development permit.

Legislative Framework

3 The Board has particular regard to the following sections of the *Municipal Government Act*, RSA 2000, c M-26, as amended, among others:

Section 617 states:

Purpose of this Part

617 The purpose of this Part and the regulations and bylaws under this Part is to provide means whereby plans and related matters may be prepared and adopted

- (a) to achieve the orderly, economical and beneficial development, use of land and patterns of human settlement, and
- (b) to maintain and improve the quality of the physical environment within which patterns of human settlement are situated in Alberta,

without infringing on the rights of individuals for any public interest except to the extent that is necessary for the overall greater public interest.

Section 616 states, in part:

Definitions

616 In this Part,

- (b) "development" means
 - (i) an excavation or stockpile and the creation of either of them,
 - (ii) a building or an addition to or replacement or repair of a building and the construction or placing of any of them on, in, over or under land,
 - (iii) a change of use of land or a building or an act done in relation to land or a building that results in or is likely to result in a change in the use of the land or building, or
 - (iv) a change in the intensity of use of land or a building or an act done in relation to land or a building that results in or is likely to result in a change in the intensity of use of the land or building;

Section 640(1) states:

Land use bylaw

640(1) A land use bylaw may prohibit or regulate and control the use and development of land and buildings in a municipality.

Section 641(4) states:

- (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, 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.

Section 683 states:

Permit

683 Except as otherwise provided in a land use bylaw, a person may not commence any development unless the person has been issued a development permit in respect of it pursuant to the land use bylaw.

4 The Board has regard to the following sections of Land Use Bylaw 1P2007, among others:

Section 13(52) states:

- (52) "development" means:
 - (a) an excavation or stockpile and the creation of either of them;
 - (b) a *building* or an addition to or replacement or repair of a *building*, and the construction or placing of any of them on, in, over or under land:
 - (c) a change of **use** of land or a **building** or an act done in relation to land or a **building** that results in or is likely to result in a change in the **use** of the land or **building**; or
 - (d) a change in the intensity of **use** of land or a **building** or an act done in relation to land or a **building** that results in or is likely to result in a change in the intensity of **use** of the land or **building**.

Section 13(138) states ""use" means a permitted or discretionary use."

Section 22 states:

Reference to Other Bylaws in Direct Control Bylaws

- **22 (1)** Where a *parcel* is designated with a Direct Control District:
 - (a) pursuant to this Bylaw, a reference to a section of Part of this Bylaw within the Direct Control Bylaw is deemed to be a reference to the section on June 8, 2014, unless the Direct Control District referred to Part 10 of this Bylaw as of the effective date of the Direct Control District Bylaw;
 - (b) pursuant to this Bylaw, a reference to a section of any Part other than Part 10 of this Bylaw within the Direct Control Bylaw is deemed to be a reference to the section as

- amended from time to time, unless a contrary intent is stated in the Direct Control Bylaw; and
- (c) pursuant to a previous land use bylaw and such designation is continued pursuant to this Bylaw, the Direct Control Bylaw, as approved by *Council* at the time such designation was made, will continue to apply, unless a contrary intent is set out in the Bylaw designating the *parcel* Direct Control.
- (2) Direct Control Bylaws that were passed pursuant to previous land use bylaws and are denoted on the Land Use District Maps:
 - (a) are hereby incorporated into and form part of this Bylaw as if repeated herein at length; and
 - (b) notwithstanding the definitions contained in this Bylaw, each Direct Control Bylaw must assume only those meanings for the terms contained therein that were intended at the date of the original passage.

Section 23 states:

Requirement for a Development Permit

A **development permit** is required for every **development** unless it is otherwise exempted in this division.

Section 24 states:

Conditions for Development Permit Exemptions

- A **development** listed in section 25 will only be exempt from the requirement to obtain a **development permit** if it:
 - (a) complies with the rules of this Bylaw;

Section 25(2) states:

Exempt Developments

25 (1) The following *developments* do not require a *development permit* if the conditions of section 24 are met:

(a)
$$-(1)[...]$$

(m) stockpiling on the same *parcel* undergoing excavation, grading or stripping;

- (n) (r) [...]
- (2) The following *developments* do not require a *development* permit if they are not located in the flood fringe or overland flow areas and the conditions of section 24 are met:
 - (a) (f) [...]
 - (g) excavation, grading or stripping provided:
 - (i) the area of land to be excavated, stripped or graded is less than 1000.0 square metres;
 - (ii) it is part of a **development** for which a **development permit** has been released; or
 - (iii) the person carrying out the excavation, stripping or grading has signed a Development Agreement with the *City* for the area to be excavated, stripped or graded and that Development Agreement contemplates excavating, stripping or grading;

$$(h) - (n) [...]$$

Section 35 states:

Discretionary Use Development Permit Application

- When making a decision on a **development permit** for a **discretionary use** the **Development Authority** must take into account:
 - (a) any plans and policies affecting the *parcel*;
 - (b) the purpose statements in the applicable land use district;
 - (c) the appropriateness of the location and *parcel* for the proposed *development*;
 - (d) the compatibility and impact of the proposed development with respect to adjacent development and the neighbourhood;
 - (e) the merits of the proposed **development**;
 - (f) the servicing requirements;
 - (g) access and transportation requirements;
 - (h) vehicle and pedestrian circulation within the *parcel*;
 - (i) the impact on the public transit system; and

(j) sound planning principles.

Section 37(1) states:

Development Authority's Decision

37 (1) The *Development Authority* may approve, either permanently or for a limited period of time, a *development permit* application for a *discretionary use*, and may impose the conditions enumerated in section 38 of this Part.

Section 130(5) states:

(5) Where a **development** is capable of being more than one **use**, the **use** under which the **development** more clearly fits must govern.

Section 134(2) states:

- (2) The following *uses* are *discretionary uses* in all Districts, regardless of whether they are listed in the District:
 - (a) Excavation, Stripping and Grading; and
 - (b) Recyclable Construction Material Collection Depot (temporary).
- 5 The Board has particular regard to Direct Control Bylaw 97D2009 (DC Bylaw), which states the following:

Purpose

- 1 This Direct Control District is intended to:
 - (a) Manage environmental risks associated with the lands through a limited range of uses;
 - (b) accommodate a range of industrial and business uses.

Compliance with Bylaw 1P2007

2 Unless otherwise specified, the rules and provisions of Parts 1, 2, 3 and 4 of Bylaw 1P2007 apply to this Direct Control District.

Reference with Bylaw 1P2007

Within this Direct Control District, a reference to a section of Bylaw 1P2007 is deemed to be a reference to the section as amended from time to time

Permitted Uses

4 [...]

Discretionary Uses

5 [...]

Bylaw 1P2007 District Rules

6 Unless otherwise specified, the rules of the I-B industrial-Business District of Bylaw 1P2007 apply in this Direct Control District.

Floor Area Ratio

7 The maximum *floor area ratio* is 1.0.

Building Height

8 The maximum *building height* is 16.0 metres

[Emphasis in original]

6 The Board has regard to the Municipal Development Plan (MDP).

7 The Board has regard to the Forest Lawn-Forest Heights/Hubalta Area Redevelopment Plan (ARP). It states in section 3.3.1.2:

3.3.1.2 Objectives

To revitalize this business/industrial area by:

- establishing a residential/industrial boundary that would discourage industrial intrusions into the residential area;
- b. correcting inconsistencies between existing land uses and land use designations;
- improving the visual appearance of the study area by encouraging improved property maintenance, tree planting, the construction of sidewalks, and landscaping;
- d. deleted

On page 46 it states, in part:

3.3.1.3.1 Land Use

- a. The shaded area on Map 6 should be recognized as a mixeduse business/industrial park. A special DC District permitting a broad range of Commercial and Industrial uses is appropriate (Map 6).
- b. i [...]
 - ii Uses that cannot meet the landscaping and screening guidelines should only be given temporary permits for two years. Site improvements should meet the minimum bylaw requirements within three years of their first-use approval.
- c. [...]

3.3.1.3.2 Development Guidelines

- a. Landscaping
 - i. All boulevard and front yards for new developments should be landscaped.
 - ii. [...]

b. – c. [...]

Section 3.3.2 states, in part:

3.3.2 5805 - 17 Avenue S.E.

3.3.2.1 Context

The ARP includes the site at 5805 – 17 Avenue S.E. formerly utilized by Hub Oil Ltd. for its oil recycling plant. All operations have now ceased. Reclamation of the property is ongoing.

3.3.2.2 Objectives

To amend the land use designation to allow 5805 – 17 Avenue S.E. to transition from heavy industrial uses to industrial – business uses that are compatible with nearby residential communities.

3.3.2.3 Policies

 Rehabilitation of the former Hub Oil Ltd. oil recycling plant site is ongoing. The site is to be redesignated for selective industrial – business development.

- b. All development must be consistent with the requirements outlined in the Alberta Environment Approval for 5805 17 Avenue S.E.
- c. All development on the site shall address the interface between the north border of the site and 17 Avenue S.E. in a manner satisfactory to the Development Authority that provides for pedestrian compatibility and to improve compatibility with surrounding neighbourhoods. The design of the interface along the north border of the site and 17 Avenue S.E. should be a soft landscaped.
- d. The site should be designed and landscaped in a manner that supports the pedestrian environment.
- e. Development along the north border of the site should take into consideration the potential for future pedestrian linkages to adjacent residential areas.
- f. All buildings on the site should front onto 17 Avenue S.E. and should contribute to the creation of a pedestrian-oriented street front.
- g. Parking should be located on the south portion of the site and parking visibility from 17 Avenue S.E. should be minimized.

Facts

- 8 The application is for the former Hub Oil Used Oil Refinery site that has been vacant since an industrial calamity, an explosion, occurred in 1999. The site is contaminated with hydrocarbons and heavy metals in both the soil and groundwater.
- 9 On April 28, 2008, pursuant to the *Environment Protection and Enhancement Act*, RSA, 2000 c E-12, the Minister of Environment of Alberta granted Approval No. 979-02-00 (the Ministerial Approval) for reclamation of the Hub Oil facility site for the processing of hazardous recyclable (page 353 of the Board report). This approval expires on April 27, 2018. Pursuant to section 4.2 of the Ministerial Approval the approval holder (i.e. property owner) is required to submit a Reclamation and Capping Plan to the Minister on or before September 1, 2008. Subsequently the property owner submitted to the Minister of Environment a Reclamation and Capping Plan for the site (Reclamation and Capping Plan Former Hub Oil Used Refinery" Wolsey Parsons, 2009).
- 10 The Reclamation and Capping Plan provides for capping of the site with a 1.2 metre clay cap across the majority of the site. The groundwater contamination is being mitigated through a water containment system on site.
- 11 On September 14, 2009, City Council established Direct Control Bylaw 97D2009 (DC Bylaw) for the subject site after the final approval by the Minister of the Reclamation and Capping Plan. The CPC report for the land use bylaw amendment

specifically references the approval of the Reclamation and Capping Plan (pages 25-34 of the Board report).

- 12 The Board accepts the aforementioned facts for the purpose of the appeal and application.
- 13 The Board places neither positive nor negative weight on the fact that, without the benefit of a development permit, the property owner of the subject lands proceeded with undertakings on the site.

Board's Jurisdiction

14 In terms of the Board's jurisdiction respecting to section 641(4)(b) of the *Municipal Government Act*, the Board notes the following.

15 The Board reviewed the textbook: Frederick A. Laux, Q.C., *Planning Law and Practice in Alberta* (3rd ed., looseleaf), (Edmonton: Juriliber, 2002), regarding the Board's jurisdiction respecting a direct control district, which states at pages 6-44 to 6-45:

Unfortunately, s.641 is somewhat unclear in that it fails to adequately address the cases where a development permit application is decided by a development authority, but the directions of council in the direct control bylaw or resolution are incomplete, ambiguous or, as in many cases, confer discretion on the development authority in respect of one or more elements of a development project. In the writer's view there exists a right of appeal on the part of either the developer or other affected persons, including objecting neighbours, and the appeal board has the power to substitute what it believes to be the appropriate decision having regard to the merits of the case, but only in respect of those matters that council has not clearly addressed. If the case involves an ambiguous direction of council, it neatly fits into s. 641(4)(b) since there is a live issue of whether council's directions have been followed. Thus, for example, if the appeal board finds that council meant Y and not X, as the development authority had ruled, the board is entitled to vary the decision accordingly.

Where council has exercised less than complete direct control over a specific site that is the subject of a permit application, either because it has remained silent on some material particulars or because it has left the development authority with a discretion, a literal interpretation of s. 641(4)(b) might suggest there is no right of appeal. However, a purposive approach to interpreting Pt. 17 of the *Municipal Government Act* leads to the conclusion that a right of appeal on the permits of the development does exist. Where council has left gaps or conferred a discretion, it in fact has not exercised direct control over that element. Consequently, the rules pertaining to appeals in non-direct control districts should apply to the extent that true direct control has not been utilized. It follows that in those circumstances the panoply of appeal rights and powers set forth in ss. 684 to 687 should apply. 175

And later at page 10-42:

The Act authorizes a subdivision and development appeal board to confirm, revoke or vary any decision of a development authority, any development permit or any condition attached to either, or to make or substitute any decision or permit of its own. Thus, where an appeal is properly before it, a board has the same plenary power over the matter as did the planning authority whose decision is under appeal. [...]

16 In rendering its decision, the Board takes into consideration the purposive and contextual approach to the interpretation of the Bylaw. The Board reviewed the purpose of the Bylaw and used a broad and purposive approach to interpreting the Bylaw consistent with the Supreme Court of Canada's approach to statutory interpretation as confirmed in United Taxi v. Calgary, [2004] 1 SCR 485, 2004 SCC 19, at paras 6-8, and Bell Express Vu Limited Partnership v. Rex, [2002] 2 SCR 559, 2002 SCC 42, at para. 26, and R. ex rel Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771, [2005] 3 SCR 425, 2005 SCC 70 (SCC.), at para 18, which latter cases emphasizes that the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. The contextual approach requires that the words chosen must be assessed in the entire context in which they have been used. The words must be given their plain and ordinary meaning as the context requires. The Alberta Court of Appeal has adopted this approach in many cases: Love v. Flagstaff (County of) Subdivision and Development Appeal Board. 2002 ABCA 292, at paras 19-21 and Desaulniers v. Clearwater (County), 2007 ABCA 71, at para 52. This approach is also consistent with section 10 of the *Interpretation Act*. RSA 2000, c I-8, which provides that every provincial enactment shall be given a fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

17 In addition, the Board takes into account the express wording of the DC Bylaw and Land Use Bylaw 1P2007 itself. Pursuant to section 10(1)(c) of Land Use Bylaw 1P2007 the words must be given their plain and ordinary meaning as the context requires. For the determination of the plain and ordinary meaning of the words used in the Bylaw the Board further considered generally accepted dictionaries.

18 Pursuant to Land Use Bylaw 1P2007, Direct Control Districts are part of Land Use Bylaw 1P2007.

19 DC Bylaws of The City of Calgary are typically a hybrid between complete development control over a site in the Direct Control District and the rules of the Land Use Bylaw. The DC Bylaws often provide that the Development Authority is given discretion either with respect to the discretionary uses of a proposed development or with respect to development standards, or both, except where expressly stipulated otherwise. Generally DC Bylaws of The City of Calgary Council do not dictate complete

control over a specific site that is the subject of a development permit application and generally the Development Authority is granted discretion.

- 20 Pursuant to section 1 of the DC Bylaw unless otherwise specified in this Bylaw, the rules and provisions of Parts 1, 2, 3 and 4 of Bylaw 1P2007 apply to the subject Direct Control District that governs the subject parcel.
- 21 In this case, the express directions of The City of Calgary Council in the DC Bylaw regarding development standards are limited to: (a) specifying the permitted and discretionary uses in the subject Direct Control District; (b) floor area ratio (section 7); and (c) building height (section 8).
- 22 To the extent that Council did not provide directions to the Development Authority in the subject DC Bylaw, the provisions of Parts 1-4 and the I-B Industrial-Business District of Land Use Bylaw 1P2007 apply. This is expressly specified in sections 2 and 6 of the DC Bylaw.
- 23 The Board notes that the development is a discretionary use pursuant to section 134(2) of Land Use Bylaw 1P2007. Council has conferred a discretion on the Development Authority over the use. Therefore, the development permit application can either be granted or refused on the basis of sound planning considerations.
- 24 Where the DC Bylaw and Land Use Bylaw 1P2007 have given discretion to the Development Authority, the Board upon appeal re-exercises the same discretion. In this regard the Board agrees with Laux, as quoted above. This is in accordance with how the Board consistently exercises its powers pursuant to section 687(3) and 641(4) of the *Municipal Government Act*.
- 25 The Board's role under section 641(4) of the Act is to determine whether the Development Authority followed the directions of Council, and if not, to substitute its decision for the Development Authority's decision. In order to fulfill its obligations, the Board must first determine what the intention of Council was in passing the DC Bylaw. Then, having determined the intention of Council, the Board will review the Development Authority's decision to determine if it followed the intentions of Council as set out in the DC Bylaw. If the Board determines that the Development Authority has followed the directions of Council, the matter is at an end. If the Board concludes that the Development Authority has not followed the directions of Council, it may exercise the discretion to produce a decision in accordance with the directions of Council as per the DC Bylaw.
- 26 Based on purposive and contextual interpretation of the DC Bylaw and the plain and ordinary meaning of the words in this Bylaw, and having regard to the aforementioned factors, the Board finds that, in this case, it has jurisdiction to deal with all the merits of the appeal and the development permit application insofar they are relevant and based on sound planning considerations. Therefore, the factors set out in section 35 of Land Use Bylaw 1P2007 are appropriate considerations for the Board. Moreover, when

determining an appeal the Board pursuant to section 687(3)(a.1) of the *Municipal Government Act* must comply with statutory plans and, subject to the Board's relaxation authority pursuant to section 687(3)(d), the land use bylaw in effect.

Council's Intent

- 27 Pursuant to section 1 of the DC Bylaw the Direct Control District, as per Council direction, is intended to: (a) Manage environmental risks associated with the lands through a limited range of uses; (b) Accommodate a range of industrial and business uses.
- 28 The Board notes that the subject DC Bylaw only sets two development standards, one for floor area ratio and one for building height. For all other development standards for development of the site, the rules of Land Use Bylaw 1P2007 apply.
- 29 Having regard to the content and purposive intent of the DC Bylaw, the Board finds that the DC Bylaw is geared towards a complete redevelopment of the subject site for any of the uses specifically stipulated in the DC Bylaw more so than an application for the subject development as proposed.

Analysis

- 30 The Board acknowledges the written and oral submissions of all parties, including but not limited to the appellant/applicant, Development Authority and interested/affected parties, as well as letters and correspondence received regarding the application and appeal. The Board considered all arguments in favour of and against the proposed development.
- 31 The Board reviewed the context of the proposed development having regard, among other things, to the applicable legislation, plans and policies, sound planning considerations, the merits of the application, the circumstances of the case, and the evidence presented.

Main Issue of the Appeal

32 There is no dispute between the parties that a development permit is required for the proposed development. However, there is a disagreement between the appellant and applicant about the characterization of the subject development application and the extent of the activities and work conducted on site, and the impact thereof on the appellant's property. The appellant submitted that the development is more than stripping and grading. The applicant submitted that all activities and work on the site and the proposed development, as per the development permit application, is in accordance with the Ministerial Approval and Reclamation and Capping Plan. The main concerns of the appellant is that the proposed development, the capping and raising of the grade and associated activities on the site, have a negative impact on his adjacent property.

- 33 The term "development" in section 616 (Part 17) of the *Municipal Government Act*, which is the same term as "development" in section 13(52) of the Land Use Bylaw, is very broad.
- 34 The Board, based on the evidence finds that the subject activities and work on the site qualify as a "development" pursuant to section 616(b) of the *Municipal Government Act* and section 13(52) of the Land Use Bylaw. Therefore pursuant to section 23 and 25 of the Land Use Bylaw a development permit is required for the proposed activities and work on the site, irrespective of how the proposed development is described or classified.
- 35 The Development Authority determined that under the Land Use Bylaw a development permit is required for the proposed activities and work conducted on the site. It classified the proposed development as "stripping and grading". The appellant argued that the proposed development is more than stripping and grading; in his opinion it also includes stockpiling. In addition, the appellant more or less argued that the proposed development is a not a "use" listed under the permitted and discretionary allowed pursuant to the DC Bylaw. In the Board's views nothing turns on these arguments for the following reasons.
- 36 The Board notes that the subject development, the activities and undertakings on the subject parcel encompasses of raising the grade of the parcel with a permanent clay cap of 1.2 metres and a gravel topping, sedimentation ponds, and a hydraulic containment system. The intent of the subject application is to legalize these activities with a development permit in accordance with the Land Use Bylaw.
- 37 The Board notes that typically stripping and grading is associated with proposed developments and uses that are either permitted or discretionary uses and for which under the Land Use Bylaw a development permit is required. In other words stripping and grading is the precursor for a proposed development for which a development permit is or will be issued by the Development Authority. The subject development is not associated with a proposed comprehensive development of the parcel.
- 38 The Board, in weighing the evidence, finds that capping the site with a permanent clay cap of 1.2 metres and a gravel topping, sedimentation ponds, hydraulic containment system and associated undertakings in accordance with the Ministerial Approval and Reclamation and Capping Plan is a "development" under the Land Use Bylaw. Having regard to the scheme of the *Municipal Government Act* and Land Use Bylaw 1P2007, and based on a purposive and contextual interpretation of sections 616(b) of the Act and section 13(52) of the Land Use Bylaw, it is in and of itself amounts to a change of use, or intensity of the use, of the subject lands.
- 39 Based on all of the evidence, the Board finds that the subject development permit application is actually for development of the site in accordance with all the requirements of the Ministerial Approval and Reclamation and Capping Plan.

- 40 The appellant argued that the proposed development does not qualify as any of the permitted and discretionary uses listed as prescribed use in the subject DC District. The applicant described the proposed development as an interim use.
- 41 Pursuant to section 134(2) of the Land Use Bylaw, "Excavation, Stripping and Grading" is a discretionary use in all land use districts. Therefore it is a discretionary use in the subject Direct Control District as well. Therefore, the development permit application for stripping and grading can either be granted or refused on the basis of sound planning considerations.
- 42 Pursuant to section 130(5) of the Land Use Bylaw, the use which best describes a development under the scheme of the Bylaw is the definition under which it falls. The subject application is best described as stripping and grading.
- 43 The site is more than 1000 square metres in size. It is about 12,000 square metres (1.2 hectares). Therefore, pursuant to section 23 of the Bylaw a development permit is required for stripping and grading of the parcel.
- 44 The Board finds that the subject development is stripping and grading of the parcel and associated stockpiling. The Board finds that this is a discretionary use of the subject parcel pursuant to sections 134(2) of the Land Use Bylaw.
- 45 The next issue that flows from this is whether the applicable statutory plans and policies apply to the subject development permit application.
- 46 The Board notes that neither the Development Authority nor, on appeal, the Board has jurisdiction regarding the environmental issues and contamination of the subject property. This falls under the *Environment Protection and Enhancement Act*. Whether or not the site has been sufficiently remediated in accordance with the Ministerial Order is not to the purview of the Development Authority or, on appeal, the Board.
- 47 The environmental issues pertaining to the site can have legitimate planning impacts and considerations for the site and surrounding properties. However, the appeal and development permit application is limited to the scope of the proposed development, having regard to the Land Use Bylaw, applicable statutory plans and policies. The appellant conceded that he has no concerns about the environmental issues related to the site insofar as they fall under the jurisdiction of the *Environment Protection and Enhancement Act*.
- 48 Pursuant to section 35 of the Land Use Bylaw, when making a decision on a development permit application for a discretionary use the Development Authority must take into account the things listed in subsections (a) through (j). Subsection (a) of this section lists the plans and policies affecting the parcel. Therefore, the MDP, ARP and other applicable policies must be taken into account by the Development Authority. In addition, the compatibility and impact of the proposed development with respect to

adjacent development and the neighbourhood as well as the merits of the proposed development access, transportation requirements, vehicle and pedestrian circulation within the parcel, and sound planning principles, among other things, must be taken into account.

- 49 Pursuant to section 687(3)(a.1) of the *Municipal Government Act*, RSA 2000, c. M-26, as amended, the Board in determining an appeal must comply with statutory plans. The MDP and ARP are statutory plans.
- 50 The main issue before the Board is whether the proposed development as applied for, is appropriate for the subject parcel from planning perspective.
- 51 In this case section 35 of the Land Use Bylaw is the main governing provision for the Development Authority for the review of the subject development permit application. As this is a discretionary use development, pursuant to section 35(a) of the Bylaw the Development Authority is obliged to take into account any plans and policies that affect the parcel. In determining an appeal pursuant to section 687(3) of the Act, and having regard to the scheme of the *Municipal Government Act* and a land use bylaw, the Board steps into the shoes of the Development Authority. As a result, the Board must take into account the policies of the MDP and ARP. The applicable ARP in this case specifically gives direction and guidance for any development on the Hub Oil site.
- 52 In this decision the Board reviewed the applicant's application, taking into consideration the factors set out in section 35 of the Land Use Bylaw, having regard to the applicable Land Use Bylaw provisions, applicable plans and policies, sound planning considerations, the merits of the application and circumstances of the case, and the evidence presented, as stated above.
- 53 The Board notes that the development standards set in the DC Bylaw are not an issue pertaining to the application as the proposed development encompasses no buildings or building of other permanent structures on the site. Thus the development standards set out in the DC Bylaw are not determinative for the outcome of the appeal in this instance.
- 54 The Board agrees with the applicant that the Design Guidelines for Development Site Servicing Plans (DSSP) of The City of Calgary do not apply to the subject application. According to section 1 of these Design Guidelines the building permit approval system with The City of Calgary requires a review of a DSSP for all where the existing water services, metering or onsite sewers will be changed. These guidelines apply when a new development encompasses new buildings. The Board accepts the Development Authority and applicant's evidence that the DSSP guidelines do not apply in this case. Consequently the Development Authority also recommended that permanent condition number 4 be deleted. The Board accepts this evidence as well.
- 55 During the hearing the Board noted that the decision rendered plans had some inaccuracies. The applicant confirmed these inaccuracies which pertained to the clay

cap, sedimentation ponds and swales, and associated the cross sections on the plans. The applicant stated the plans in this regard would be updated.

56 The Board requested that the applicant update the plans accordingly. In addition the Board requested that the applicant provide all documentation regarding the Ministerial Approval and Remediation and Capping Plan in order to ensure that the development approval of the subject application and any of the conditions to be imposed on the development permit would not be in conflict with the Ministerial Approval and the Remediation and Capping Plan. Subsequently the applicant submitted updated plans and the aforementioned documentation to the Board, and the Board continued the hearing and heard from all parties regarding the submitted documentation. The updated plans indicate that the berms shown on the plans have increased in height.

57 The appellant requested that landscaping be provided on the site. The Board notes that the Ministerial Approval and the Reclamation and Recapping Plan do not allow for landscaping which roots would penetrate the clay cap. The approved clay cap is impermeable. Therefore, there is limited ability to provide landscaping in the form of trees or other forms of mature or substantial landscaping.

58 At the hearing date of June 15, 2015, the applicant submitted it would be amenable to have some landscaping and screening insofar as such would be in alignment with the environmental report.

59 With respect to the ARP, the Board notes the following. Even though the ARP is a policy document and does not have the same status as a land use bylaw, which is a regulatory document, it provides guidance for new development. The words "should" in the relevant ARP sections indicate that the ARP policies outlined in these sections are directive. It does not use words "must or "shall" which are compulsory. Therefore the Development Authority, and by extension the Board, has discretion how to implement those ARP policies where the ARP does not use mandatory but directive language.

60 The Board places weight on the fact that the subject development is a permanent cap to the site. It may not be the ultimate future use and development for the site, physically it is permanent to the lands in question. The Board notes that the applicant argued that the proposed development is interim, although the applicant was opposed to making this development permit subject to a limited term.

61 The ARP contains specific policies and development guidelines for the subject site. It states in section 3.3.3.2 under b: "All development must be consistent with the requirements outlined in the Alberta Environment Approval for 5805 – 17 Avenue S.E." This section under c states: "All development on the site shall address the interface between the north border of the site and 17 Avenue S.E. in a manner satisfactory to the Development Authority that provides for pedestrian compatibility and to improve compatibility with surrounding neighbourhoods. The design of the interface along the north border of the site and 17 Avenue S.E. should be soft landscaped." In section 3.3.3.2 (d) it states: "The site should be designed and landscaped in a manner that

supports the pedestrian environment." In the Board's view the ARP provides clear direction in this case: a balance must be struck between the Alberta Environment Approval and the landscaping of the site.

62 The Board notes that section 3.3.1 refers to the area generally, whereas 3.3.2 is particular to the subject site. The Board notes that both apply, but in the event of any discrepancies, section 3.3.2 would take priority as the more specific provision dealing with this particular application.

63 The Board finds it significant that the intent of the ARP is that the north border of the site along 17 Avenue SE be landscaped.

64 In the Board's opinion, the subject development has a negative visual impact on 17 Avenue SE and the appellant's adjacent property which some years ago has been redeveloped with a commercial development. The development currently is a blemish on the surrounding area. Having regarding to sound planning principles, the Board finds that it is appropriate that the impact of the subject development be mitigated as much as possible, which can be achieved by imposing some addition conditions. In the Board's view a site with a chain link fence with barbed wire on top, as alluded to by the applicant, would be visually unpleasant and have a negative effect on its surrounding environment.

65 In the Board's opinion it is in the interest of an orderly, economical and beneficial development on the subject land and the quality of the physical environment in the immediate area, that the reclamation and rehabilitation of the site proceeds as soon as possible in order that the site can be redeveloped in accordance with the DC Bylaw. This is also in the interest of the appellant.

66 However, the Board concludes from the applicant's testimonial evidence at the hearing that it could be several years before the site will be redeveloped for uses allowed under the DC Bylaw. Given this uncertain time frame and that under the scheme of the *Municipal Government Act*, Land Use Bylaw 1P2007 and DC Bylaw there is no obligation for the property owner to redevelop the site further or within a certain timeframe, the Board, having regard to sound planning considerations, finds it appropriate that some landscaping be provided along the northerly property line as per the objectives and policies of the ARP. This would mitigate the negative visual impacts of the subject development.

67 The Board finds it is significant that it is unknown when the subject site will be further redeveloped in accordance with the DC Bylaw. Further the Board notes that the Ministerial Approval expires in April 2018. It is unclear what the status of the reclamation of the site is after that date. The Board finds that, on the basis of the applicant's submissions that future development is intended for the site which will better achieve the City's goals for the area, it is appropriate to establish a timeline for such redevelopment. Even with the changes and conditions required by the Board, the proposed development is not ideal. Therefore, the Board, based on sound planning

rationale, finds it appropriate to require the applicant to continue to more toward the ultimate development of the site by imposing a condition that an application be made within 7 years of the subject development permit.

68 The Board finds it is inappropriate to require a restrictive covenant regarding the subject parcel to the benefit of the appellant as requested by the appellant. In the Board's opinion such condition would not be in the furtherance of sound planning principles or the appropriate performance of the use of the parcel, as referenced in section 38(1) of the Land Use Bylaw. In the Board's view this is foremost a civil matter between adjoining property owners and it is inappropriate to require a condition to this effect in a development permit. The same applies to a condition requiring a caveat, easement or lien to be registered on the property title. Neither the Development Authority nor the Board, on appeal, have jurisdiction to deal with potential liabilities between neighbours.

69 Furthermore, in the Board's opinion, there is also no need to require an insurance policy that would indemnify the appellant. Prior to release requirement number two of the development permit, which was not challenged by the applicant, deals with this matter. This condition requires the applicant to provide to the Development Authority an indemnification letter under corporate seal indemnifying The City of Calgary and owners of adjacent property or other affected parties from any losses or damages as a result of storm water runoff, soil erosion, soil instability, sedimentation, loam stock pile, dust and any other problem that may arise from the stripping and rough grading of the Lands. In addition the conditions states that the developer, at its sole expense, shall take corrective action(s) deemed necessary to rectify the problem(s) and to do so in a timely manner to the satisfaction of the Manager of Urban Development.

70 The Board notes that there are some ambiguities about permanent condition number 21. The Development Authority recommended that this condition be deleted. The Board accepts this recommendation.

71 Based on the evidence and aforementioned factors, the Board therefore finds it a necessary requirement of the permit to provide additional screening by way of shrubs or bushes planted along the northern property line of the site in order to provide more adequate screening between the property and the pedestrian interface along 17 Avenue SE in order to align with the ARP. However, the Board notes that resulting from the Ministerial Approval and Reclamation and Capping Plan there is limited room along the north property line to plant landscaping due to the location of sedimentation ponds and chain link fencing, and that compliance with that Plan is also required by the ARP. The Development Authority stated that it could allow landscaping planting to the immediate north of the parcel on City land but it would have to be subject to approval of a line assignment. The Board accepts this evidence and places weight on it..

72 In addition, the Board finds it appropriate from a planning perspective that a fence be placed along the property line with the appellant's property. This would ensure that the subject development would be more compatible with the appellant's property, the

subject development be better screened and the negative visual impacts of the development on the appellant's property are lessened as much as possible. Accordingly, a solid, maintenance free, fence with a height of 2.4 metres must be erected along the easterly property line. The Board notes that section 904(2) allows for such fences in all industrial districts, including the I-B district as referenced in the DC Bylaw.

73 The appellant is further concerned about drainage onto his property. The applicant stated that the swale should be sufficient to contain storm water runoff and prevent drainage onto the appellant's property. In the Board's opinion this issue can be satisfactory addressed by the imposition of an additional condition in the permit that no drainage is allowed onto the appellant's property and that all storm water be retained on site. The Board notes that the proposed development includes is a swale with a berm along the easterly property line that would funnel any storm water runoff to the sedimentation ponds. In the Board this would appropriately prevent overland flooding as much as possible. A solid, maintenance free, fence along the easterly property line, as required by the Board, would assist as well.

74 In the Board's opinion some of the appellant's concerns regarding the subject development are in essence enforcement or compliance issues related to the conditions of the development permit and Ministerial Approval, and Reclamation and Capping Plan. The Board notes that conditions in the development permit deal with soil erosion. In addition, the Ministerial Approval and the Reclamation and Recapping Plan include conditions that to some extent deal with soil erosion and storm water overflow. If the property owner would not comply with those conditions, the appellant has the remedy to request the Development Authority or Minster of Environment to take appropriate enforcement action.

75 The Board also notes that, regardless of the other conditions of development, condition 21.1, imposed by the Board, requires all storm water to be contained on site.

76 In reviewing and weighing all the evidence, and having regard to section 35 of the Land Use Bylaw, the Board finds that the proposed development is appropriate from a planning perspective, subject to some additional specific conditions of approval.

77 Having regard to sound planning considerations, the Board imposes the following other conditions: A prior to release condition requiring the applicant to submit amended plans that are in accordance with the updated plans as presented at the hearing. A permanent condition is imposed requiring the applicant to apply for a line assignment approval for the planting of shrubs or bushes (with a height of two metres at the time of planting) on City property along the front property line on either side of the access point to the site. If the applicant is unable to obtain such approval from The City of Calgary, the permit shall have a term of five years and expire five years from the date of approval of the permit. This would allow the Development Authority time to review the appropriateness of the subject development from a planning perspective again, taking into account the applicable policies of the ARP as the Board finds screening of the

development site a pivotal factor. Further the Board deletes permanent conditions 4 and 21 as they are not necessary.

78 In addition a permanent condition is imposed requiring that the properly owner or applicant must make a development permit application for redevelopment of the site within seven years of the approval of the permit. This condition is imposed to ensure that the property owner or applicant pursue redevelopment with a reasonable timeframe. Further a permanent condition is imposed that all storm water must be contained on site and no drainage shall be allowed onto the appellant's property. The Board also imposes a permanent condition requiring a development completion permit to ensure that the development is completed in accordance with the approved plans.

79 Having regard to Council's direction set forth in the DC Bylaw and based on all of the evidence and aforementioned factors, the Board in accordance with section 641 of the *Municipal Government Act* finds that, in approving the subject use and development, the Development Authority did follow the directions of Council where Council gave directions, but where Council provided discretion to the Development Authority, the Development Authority failed to exercise its discretion appropriately in the imposition of conditions.

80 In reviewing and weighing all of the evidence, the Board finds that the proposed development warrants approval subject to varying the conditions of approval.

Reopening Hearing

81 On August 11, 2015, after the public hearing of the appeal but prior to rendering the written decision by this Board, the appellant requested reopening of the hearing to allow for admission of new evidence. The applicant opposed this request. The Board considered the appellant's request but found the appellant's arguments neither persuasive nor compelling.

82 The threshold for admission of new evidence on appeal is as outlined by the Supreme Court in *R. v. Palmer*, [1980] 1SCR 759 at paras 24-27, 106 DLR (3d) 212. The Alberta Court of Appeal adopted this test in *R. v. Carr*, 2010 ABCA 386. While these are criminal cases, the Board finds these cases helpful. The Alberta Court of Appeal adopted this test for civil matters in *Xerex Exploration Ltd v. Petro-Canada*, 2005 ABCA 224, at para 116. The Board adopts this as the established case law in Alberta on this matter.

83 The Board therefore considered the following factors in determining whether to allow new evidence:

1. The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases,

- 2. The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial,
- 3. The evidence must be credible in the sense that it is reasonably capable of belief, and
- 4. It must be such that if believed it could reasonably, when taken with other evidence adduced at trial, be expected to have affected the result.

84 The Board finds that the first factor of this four-part test was not met. The Board finds that this evidence is similar to other evidence presented to the Board during the hearing dates. Further, the Board finds that the new evidence would have not affected the result of the appeal, again because it is similar to other evidence presented to the Board. The Board makes no findings regarding the credibility of the evidence.

85 The Board considered the appellant's requests. The hearing was concluded and the Board found there were insufficient grounds to allow new evidence or to reopen the hearing generally. There has to be some finality to the hearing.

Conclusion

86 For the above reasons the Board allows the appeal in part and varies the decision of the Development Authority.

87 The development permit shall be issued as approved by the Development Authority subject to the above listed amendments/additions to the conditions of approval.

Rick Grol, Chairman Subdivision and Development Appeal Board

Issued on this 17th day of August, 2015