

**SUBDIVISION AND DEVELOPMENT APPEAL BOARD****DECISION**

- Hearing held at: Calgary, Alberta
City Hall
Engineering Traditions Committee Room
- Dates of Hearing: November 27, 2007; December 11, 2007; January 08, 2008;
January 22, 2008; February 01, 2008; February 29, 2008;
March 07, 2008; March 14, 2008; and March 27, 2008.
- Members present: Chairman, Rick Grol
Mary Jane Amey
Sabine Goubau
Alderman Dale Hodges
Martina Jileckova
Bill Scott
- Basis of Appeal: This is an Appeal from an approval by the Approving Authority of a Development Permit made on the application of **Marshall Tittlemore Architects c/o Henry Schlichter** on behalf of **North West Value Partners Inc.** for an office building (phase 2) at 1201 Glenmore Trail SW.
- Appeals filed by: **Chris Beck;**
Chinook Park/Kelvin Grove/Eagle Ridge Community Association represented by Christopher S. Davis;
The Owners of Condominium Corporation No. 7911288 (F. Garrick Homer, Frank Kopitar, Edward and Donna Lazdowski, Debra McArthur, Janet Kerr-Hall, Hayden E. Smith) represented by Christopher S. Davis;
Micheal Flatters;
Randall Hall;
Intercare Corporate Group Inc. represented by R. Bruce Brander;
Don Homer;
bclMC Realty Corporation represented by David M. Wood; and
Beth Tzedec Congregation represented by Louis Bracey.

The Appeal was originally scheduled for October 25, 2007, but was adjourned to November 27, 2007 to allow for sufficient time to deal with the complicated preliminary matters, as well as allowing for additional time for all parties to prepare. On November 27, 2007, the Subdivision and Development Appeal Board ("Board") decided that this Appeal should be heard on two separate dates due to the complexity of the matter; December 11, 2007 in order to deal with the preliminary matters and January 08, 2008 to hear the merits of the Appeal. On December 11, 2007 the Appeal was further adjourned to January 08, 2008, as there was insufficient time to deal with and finish all the preliminary matters. On January 08, 2008 the Board continued with the preliminary matters and continued on January 22, 2008.

The Board began to hear the merits of the Appeal on February 01, 2008 but, as there was insufficient time to deal with all the merits, it was subsequently adjourned to February 29, 2008. On February 29, 2008 the Appeal hearing continued. It was further adjourned to March 07, 2008, as there was insufficient time to deal with all the issues. On March 07, 2008 the Appeal was adjourned to March 14, 2008 in order to allow the Board to conclude the hearing. As the Board needed more time to render a decision, on March 14, 2008 the Appeal was finally adjourned to March 27, 2008 in order to conclude the hearing. On March 27, 2008 the Board concluded the hearing and rendered its decision with respect to the Appeal.

Description of Application:

Appeal 2007-0169 before the Subdivision and Development Appeal Board dealt with the conditions of approval of the Development Authority for a Development Permit for an office building (phase 2) at 1201 Glenmore Trail SW. The property is located in the community of Kelvin Grove and has a land use designation of DC Direct Control District, pursuant to Bylaw 73Z2004.

Summary of Evidence:

The Board heard verbal submissions from the following:

Carol McClary, representing the Development Authority;
David May, representing the Development Authority;
Travis Gaede, representing The City of Calgary, Transportation Department;
Glen B. Scott, Q.C., of Brownlee LLP, legal counsel for North West Value Partners Inc., the Owner/Applicant, in opposition of the Appeal;
Timothy Bardsley, of Brownlee LLP, legal counsel for North West Value Partners Inc., the Owner/Applicant, in opposition of the Appeal;
Henry Schlichter, Architect of Marshall, Tittlemore Architects, in opposition of Appeal;
Bill Marshall, Architect Principal of Marshall, Tittlemore Architects, in opposition of the Appeal;
Robert Gibbard, of Urban Systems Ltd., in opposition of the Appeal;
Paul Dalla Lana, President of North West Value Partners Inc., in opposition of the Appeal;
Christopher S. Davis, of Municipal Counsellors, legal counsel for the Chinook Park/Kelvin Grove/Eagle Ridge Community Association and the Owners of Condominium Corporation No. 7911288, the Appellants, in favour of the Appeal;
Greg Vogeli, President of Chinook Park/Kelvin Grove/Eagle Ridge Community Association, in favour of the Appeal;
Gloria Gage, resident, in favour of the Appeal;
Randy Hall, resident, the Appellant, in favour of the Appeal;
Frank Kopitar, resident, the Appellant, in favour of the Appeal;
Susan Beck, resident, in favour of the Appeal;
Ed Lazdowski, resident, the Appellant, in favour of the Appeal;
Garrick Homer, resident, the Appellant, in favour of the Appeal;
R. Bruce Brander, of Burnet, Duckworth & Palmer LLP, legal counsel for Intercare Corporate Group Inc., the Appellant, in favour of the Appeal;
Bruce Nelligan, of D.A. Watt Consulting, in favour of Appeal;
Ian Woodcock, Vice President of Administration and Corporate Services for Intercare Corporate Group, the Appellant, in favour of the Appeal;
David M. Wood, from Stikeman Elliott LLP, legal counsel for bcIMC Realty Corporation, the Appellant, in favour of the Appeal;
David Jacobs, representing Beth Tzedec Synagogue, the Appellant, in favour of the Appeal;
Irene Bruzga, resident, in favour of the Appeal;
Oscar Fech, resident, in favour of the Appeal;
Lilly Stokes, resident, in favour of the Appeal;
Rob Milner, representing the Calgary Jewish Academy, in favour of the Appeal; and
Barb McCulloch, resident, in favour of the Appeal.

On December 11, 2007; January 08, 2008; January 22, 2008; February 01, 2008; February 29, 2008; March 07, 2008; March 14, 2008; and March 27, 2008 the Board held hearings of Appeal 2007-0169, regarding an Appeal by North West Value Partners Inc. ("North West") against conditions of approval of a Development Permit, in conjunction with Appeal 2007-0171 by Chris Beck, the Chinook Park/Kelvin Grove/Eagle Ridge ("CKE"), Community Association and the Owners of Condominium Corporation No. 7911288 ("Hetherington Estates"), Michael Flatters, Randall Hall, Intercare Corporate Group ("Intercare"), Don Homer, bcIMC Realty Corporation ("bcIMC Realty") and Beth Tzedec Congregation against the approval by the Development Authority of a Development Permit for an office building (phase 2) at 1201 Glenmore Trail SW.

The Development Authority:

For Appeals 2007-0169 and 2007-0171, the Development Authority entered as exhibits the report, photographs, location map and viewgraphs. This is an Appeal on the decision with respect to Development Permit 2006-4120, signed on September 13, 2007 with the conditions of approval which were sent out on September 13, 2007.

Carol McClary explained the location of the site and its surrounding context. This site is located at 1201 Glenmore Trail SW. It is along the northerly edge of the community of Kelvin Grove. Trinity Lodge, is a two storey building, located to the east of the subject property, it has a land use designation of DC 86Z99 with RM-5 guidelines. The subject site itself contains an existing six storey office building, branded as Bantrel. The lot to the west of the site is the Chinook Nursing Home; its land use is R-1. The other site to the west is called Hetherington Estates. The next site is the Jewish Academy and a Synagogue, a place of worship, designated R-1. Further to the west are semi-detached dwellings towards 14 Street.

To the east towards Elbow Drive there are several apartment buildings and a park. To the north of the site is a service road which parallels Glenmore Trail and can be accessed from 14 Street off of the Glenmore interchange from the west. The service road is a two-way street with access out to Elbow Drive. South is PE lands which is a park and further south are single-detached dwellings and the rest of the community of Kelvin Grove.

The land use for the site is Direct Control Bylaw 73Z2004 with C-3(27) guidelines which refer to the General Commercial Land Use District. A significant development guideline of the Bylaw is section 2(d) which reads "Density: A maximum of 11,000 square metres net floor area on the area that is subject to this Bylaw unless rationalization for more intense development can be provided with an updated traffic impact study to the satisfaction of the Manager of Transportation." This development guideline is a critical rule regarding development of this parcel.

The other development guidelines as outlined in the Direct Control Bylaw are standard. It was noted that for the site Development Permit 2005-3414 was approved for a building. In reviewing the Development Permit application the Development Authority based their evaluation of the application on three significant areas: firstly, being density, as per the provisions of the Direct Control Bylaw; secondly, being the land use; and thirdly, being building design.

In analyzing this project the Development Authority requested from the Applicant a Transportation Impact Assessment Report, this was subsequently submitted. The Development Authority determined there was a surplus capacity which would allow for an increase in density, being measured as gross floor area. It was determined that 11,570 square metres of gross floor area, which would be 10,523 square metres of net floor area, were available and would be appropriate for an increased density on the site. Several building designs were considered with various Detailed Team Review assessments on each one of them in the end the Development Authority decided upon a three-storey building which would have a southerly building face slightly higher, with a height of 13.5 metres and the building would be slightly wider by 9 metres. The proposed building would have a connection link with the existing building on the site. A rationale for negotiating the building height was based on the height equivalency of the adjacent land use districts. R-1 is the land use district to the west: the maximum height for development there is 10 metres and for the development to the east which is RM-5 which has a potential to be 12 metres to the eaveline. The Development Authority felt that the rationale for the 13.5 metres height was reasonable anticipation for the development, as it is a significant distance away from the low density residential district to the south.

The Development Authority approved an additional 11,570 square metres in density as it in their opinion was appropriate for the site based on the review of the Direct Control Bylaw. The building has 488 parking stalls, there is a surplus, and the approved use is offices. There is an additional prior to release condition of a pedestrian audit that is noted as a condition in the approval letter. It should be noted that this request was response to concerns expressed by nearby residents and throughout several meetings and a public meeting.

Upon questioning from the Board, the Development Authority submitted that 488 is the number of parking stalls designated for Phase II in accordance with the rules of the Land Use Bylaw 2P80, based on the calculations of 1 stall per 46 square meters of net floor area. As found in the drawings, 229 stalls is the minimum requirement for the proposed development under the Bylaw.

Upon questioning from the Board, Travis Gaede from the Transportation Department submitted with respect to the Traffic Impact Assessment ("TIA") for the proposed development that the TIA for the application looked at the existing uses. That was the basis for the consideration in the TIA, not the potential uses allowed in the land use districts for each of those sites.

The TIA for this application was prepared in support of the Development Permit and that would be the Development Permit for phase 1, which is the tower that exists on the site. With the development that was approved at that time, it was established that there was a peak hour capacity remaining at the intersection of 68 Avenue and Elbow Drive SW. This was the basis for the Direct Control guidelines for the site, referring to the potential for increased density that would include a rationalization of the transportation impact as a requirement for another future application. The capacity was recognized at the time of the phase 1, for phase 2 the discussions with the Applicant focused on the requirements of the Bylaw under rationalization with a TIA and the question became what would be the total square footage that would be allowable based on the use of the capacity of the intersection?

The capacity of the intersection at 68 Avenue and Elbow Drive was reviewed by Urban Systems, the transportation consultant for the Applicant and Mr. Gaede. Eventually, Urban Systems and Mr. Gaede agreed what square footage and density could be supported based on the amount of spare capacity for movement at the said intersection. The rates from the original phase 1 TIA report (commonly referenced as the United Farmers of Alberta ("UFA") report) were used as it was still considered relevant and valid and the assumptions thereof built into that analysis.

Mr. Gaede submitted an email, dated January 28, 2008 from Alex Broda, Director of Transportation Planning, that Mr. Gaede had authorization to issue his approval of the file on behalf of Mr. Broda.

In Favour of the Appeal:

Mr. Vogeli on behalf of CKE Community Association referred to an executive summary of the position of the Community Association submitted in a binder and submitted that the Appeal of the Community Association is related to two issues. Firstly, it relates to the zoning under the Direct Control Bylaw and secondly, whether a second building on the site is even permitted, the later relates to typical Development Permit issues such as parking, traffic and building context. He stated that the community is of the view that the proposed development is too large and too intrusive. He was referring to the traffic infrastructure projects that are currently under way in the area for example the Glenmore Trail/Elbow Drive/5 Street ("GE5") Project, expansion of the Rockyview Hospital, changes at the intersections of Glenmore Trail and Elbow Drive and 14 Street as well as changes to access and egress to these roads.

When the Development Authority made its decision on the subject application, it should have considered long range planning principles not just for the subject property and the immediate adjacent properties but the broader community as the application will affect the entire community. If the Board would allow the proposed development to proceed than it would request that additional conditions be attached to Development Permit. Those conditions are referred to in the submitted executive summary.

The community had the understanding that when the property was rezoned back in 2004 by UFA from R-1 to Direct Control, that it would permit no more than a single building of a maximum size of 11,000 metres or 118,000 square feet.

The Community Association felt short changed by the developer's application for a second building, before the first building was even complete. In their opinion 68 Avenue was not intended to service the Glenmore strip. Shifting the access completely to 68 Avenue has changed traffic patterns which will affect the entire community. The Community Association would have expected the Glenmore strip to have had an Area Redevelopment Plan ("ARP"), but upon research it was discovered that it is the only area bordering Glenmore Trail that went through the GE5 Project without an ARP.

Therefore, in absence of an ARP, long range development of the entire Glenmore strip should have been taken into consideration when a proposed development on a property within that strip would have been approved. Within the context of interpreting the Direct Control Bylaw granting the proposed development would eliminate the opportunity for other parties within the Glenmore strip, such as the Hetherington Estates, the nursing home and Trinity Lodge to expand or redevelop their properties in the future.

The proposed development affects traffic, parking, building mass, context or the invasion of privacy, and the use and enjoyment and the character of the adjacent properties. In addition the main concerns of the community relate to the limited capacity of the intersection at 68 Avenue and Elbow Drive.

Medical use in phase 2 should not be allowed as 100 percent medical use has a higher parking ratio. The Community Association is of the understanding that the total number of proposed stalls for both buildings is 741 stalls; 100 percent medical use would require according to their calculation there would be 1040 stalls.

In conclusion, the Community Association requested to deny the proposed development or postpone consideration of a final decision on the Development Permit until an ARP is completed for the area; or send the matter of interpretation of the Direct Control Bylaw back to City Council to give direction on the long range planning for the affected area. Until then a proper traffic assessment needs to be done based on multiple layers of assumptions.

In addition, the community requested that the Board interpret the Direct Control Bylaw constrictively and allow only one building on the site. They submitted with reference to section 2(d) of the Direct Control Bylaw that the proper interpretation of the Direct Control Bylaw, is that only a single building not exceeding 11,000 metres is allowed. They emphasize the wording of the Bylaw: firstly, the phrase, "maximum of 11,000 square metres", which is 118,000 square feet; secondly, the word, "rationalization"; and thirdly, the phrase is "more intense development".

References were made that section 2(f) and 2(h) of the Bylaw speak about "the building".

The phrase “more intense development”, contemplates only minor changes, in the amount of 5 or 10 percent to a single building and not authority for a second building, double in size to the first. Further, it is inconceivable that City Council would have delegated what is effectively a zoning decision to the Transportation Department.

The word “rationalization”, in the Bylaw means that any development exceeding 11,000 square metres has to be both complimentary to the surrounding community and does not adversely affect the use and enjoyment of the neighbouring properties. In addition, the word “rationalization”, requires long range planning principles to be satisfied which consider the effect of the proposed development on the surrounding community and the future use and development of all properties in the Glenmore strip.

Simply granting Development Permits on a first come, first serve basis, without regard to the effect of limiting redevelopment of other properties in the community does adhere, in their view, would not adhere to sound long range planning policy. In support of this goal, City Council endorsed its desire for long range planning considerations for the Glenmore strip at its June 25, 2007 meeting of Council. City Council noted its desire for an ARP for the area and directed City Administration to consider redesignation to allocate appropriate density to address issues associated with transportation capacity in the Glenmore strip area.

Ms. Gage, on behalf of Hetherington Estates, submitted that phase 1 accommodates approximately 700 people and based on 125,000 square feet, divided by 200 people would result in additionally having 625 people proposed for phase 2.

In her opinion, increasing the density places hardship on the surrounding properties. The City concludes that 741 stalls are sufficient for both phases which will affect the parking in the area. The surrounding properties are already experiencing illegal parking along the service road, the back lanes and private properties before since phase 1 has been built.

She submitted that Hetherington Estates was one of the first condominium properties to be built in Calgary; it is comprised of 46 units with a recreational centre. In 1996, Council redesignated Hetherington Estates to Direct Control to accommodate the development of a recreation and administration building, a new one, and the addition of 12 residential units. If Glenmore phase 2 is approved, this expansion is no longer an option for Hetherington Estates and for any of the existing properties along this corridor. Hetherington Estates concurred that a study of development or redevelopment of the entire corridor would provide all interested parties an update plan before final approval of phase 2 is given.

And lastly, they feel that phase 2 will place a greater burden with regard to density and traffic to the surrounding properties of Kelvin Grove, Chinook Park, Kingsland and

Mayfair. Parking designated for the phase 2 building is totally inadequate for the amount of people using the building because people in Calgary love to drive.

Mr. Hall, resident of the community, submitted concerns about the massing of the proposed development. The rear yards in the area are being used for parking. The green space in the area provides a reasonable buffer to the adjacent single family residential area.

In November 2005, the community met with the developer and the developer confirmed that they were going to build a six-storey medical building and that the massing would be retained along Glenmore Trail. They had beautiful drawings showing the green space and buffer to the rear of their property adjacent to the existing parking lot. Within six months of the meeting the developer applied to build a second building eliminating the buffer between the commercial development and our residential area.

He showed photographs taken from the back lane behind his house showing the current phase 1 building. He feels that the phase 1 building is in his back yard. This building is occupied and lit 24 hours a day, seven days a week, glowing like an incandescent candle. He also expressed concerns with overlooking as views from the building can look into the backyard of the adjacent residents. In addition, he expressed concerns about light intrusion as well as noise pollution as the proposed building is only 60 metres from his bedroom window. The landscaping which is proposed is too low to make any difference, certainly nothing on the lighting and nothing on the overlooking.

In conclusion, on the massing, the phase 2 will significantly encroach on our single family residential homes. There is insufficient setback for this extreme proposed development. The proposed building is much taller than the existing Chinook Nursing Centre and Trinity Lodge.

Mr. Kopitar, resident of the community, showed photographs and raised concerns about traffic and regarding the traffic review that was undertaken. In his opinion, the traffic review was too limited in scope as it only covered the intersection of 68 Avenue and Elbow Drive and it overlooked four intersections to the north. No consideration was given to the impact on Elbow Drive southbound; Elbow Drive is already overloaded. Elbow Drive is not a major road, yet the City keeps adding onto it. In his opinion, no consideration was given to the residents of those communities trying to enter or exit their communities by using Elbow Drive. No consideration was given to the broader impact of the development and traffic flows of the surrounding communities of Kelvin Grove and Kingsland. The road network in his opinion cannot accommodate the proposed development as there is only one exit.

Traffic that will be redirected southbound on Elbow Drive will cut through 70 Avenue as they go and attempt to connect to 14 Street. The traffic report does not address any of

the cut-through traffic the report paints a best case scenario and its obvious assumptions and models were stretched to make the numbers work and to accommodate the proposed development. In support he referenced an email dated April 26, 2007 with respect to the traffic report.

The number of employees in phase 1 will be well over 700 and with phase 2, it will result in 1400 employees on site trying to get to and from work and the majority will be driving because of the inconvenience of public transit to this location. It is not in close proximity to a C-Train station. In conclusion, in his opinion there is a need for a further traffic study and a proper ARP, taking all the community's concerns into account.

Ms. Beck, resident of the community, presented photographs and submitted that she and her husband live at 7012 Kenosee Place, backing on to the proposed development. Currently there are parking restrictions on every street and cul-de-sac in Kelvin Grove as a result of phase 1. Parking in the community is a concern for example parking in the lanes. Construction of phase 2 will increase the parking issues. She also submitted concerns with the lighting of the building as it is currently lit 24 hours a day.

Mr. Lazdowski, resident of the community, presented photographs and submitted he is deeply concerned about the issuance of the Development Permit for Glenmore Professional phase 2 building. The community has substantially affected since the occupancy of Glenmore Professional 1 in September 2007, as there is increased traffic and parked cars in the residential area.

Furthermore, he submitted concerns about the number of occupants in the building; the building is structured to accommodate 700 workers in the existing building and 700 in the new phase 2 building resulting in a total of 1400 workers.

As the City approved a total of 742 parking stalls for the entire site, approximately 700 stalls are missing. Based on 70 percent of the workers using a car to commute on an individual basis, he concluded that there is approximately 1000 stalls required which is a deficiency of 350 parking stalls for both buildings.

An ARP with a comprehensive planning review is needed prior to exhausting traffic capacity on the Glenmore Trail and 68 Avenue service connectors.

In his opinion, it is incumbent on the SDAB to exercise its discretionary powers and consider its responsibilities in particular section 687(3)(c) of the *Municipal Government Act*, (RSA 2000, c. M-26).

In reference to the preliminary hearings, he submitted that the representative of the City mentioned the term "misrepresentation" and "we were under pressure" of the developer with respect to the issuance of the Development Permit for the proposed development. The community and its residents are justified in having a lack of trust with respect to the process surrounding the Development Permit application of the proposed development.

In conclusion, he submitted the needs for an ARP before any further applications are considered for this area.

Mr. Homer, resident of the community, presented photographs and submitted that it is clear that the purpose of the Direct Control Bylaw was to change the zoning, to permit a commercial development on the site, namely the construction of an office building, with a maximum density of 11,000 square metres or approximately 120,000 square feet.

He referenced the history of the Direct Control Bylaw and pointed out that according to the Calgary Planning Commission ("CPC"), which was considered by Council September 2004, the purpose of the application was to enable the construction of a corporate office building.

During the first Development Permit application of North West in October 2005, there was no reference to a phase 1 building. The intention was the construction of a building. He referenced page 136 of the Board Report which contains a memorandum of Marshall Tittermore to Corporate Planning Applications Group ("CPAG") that states phase 2 is not initially contemplated.

After the issuance of the Development Permit for the original building, the developer changed his mind.

In common law, there are several principles of equity and natural justice which are settled and frequently applied by the Courts. One is the doctrine of "clean hands" otherwise known as the principle that one cannot profit by his own wrong. In his opinion, the principles of equity and natural justice apply in this circumstance. In his opinion, there is no doubt that there was representation made that at the time the Development Permit was issued and the appeal period expired the developer had not changed his mind yet. North West should have gone back to City Council and seek an amendment to the Direct Control Bylaw enabling them to carry out their intent for a second building that would have been the appropriate course of action given that the proposed development doubles the maximum contemplated density under the Bylaw. He emphasized that the total density contemplated by the Bylaw was 11,000 square metres which has been taken up by the 10,750 square metre building that exists.

Mr. Davis, legal counsel for CKE Community Association and Hetherington Estates referenced the Direct Control Bylaw and submitted that the sections of the Bylaw speak of the principle building. Furthermore, he addressed the issue of the wording of section 2(d) with respect to rationalization requiring the satisfaction of the Manager of Transportation Planning. He pointed out that Malcolm Brown was the Acting Director of Transportation Planning at the time the Development Authority made to the decision with respect to the approval of the subject Development Permit application.

He reviewed section 641(3) and (4)(b) of the *Municipal Government Act*, he submitted with reference to Professor Laux's textbook that the Board has all the discretionary

powers that it typically would have under section 687 of the *Municipal Government Act*, in matters where there are not specific directions in a Direct Control Bylaw. With respect to the issue of density the words in the Direct Control Bylaw have a meaning. In addition, he submitted that there is a distinction at law between what can be delegated by Council that is proper delegation and may not be proper delegation.

If the Bylaw is either incapable of interpretation or is not clear, then it is left to the Board to make a determination as to what meaning should be given to section 2(d) of the Direct Control Bylaw.

In his opinion, the word “maximum” is a key word and it is only modified by the balance. If Council had intended to double the density that is arguably exercising its legislative or judicial function, as opposed to a mere administrative function. Council can delegate an administrative function which is typically to be a valid and clear; delegation must be precise and have parameters. In reference he referred to the *Passutto Hotels (1984) Ltd. v. Red Deer (City of)*, 2006 ABQB 641. He submitted that in this case there is no delegation to make the decision on the Development Permit application as the authority to approve the application still rests with the Development Authority.

He submitted that in fact Council has given clear direction in the Bylaw and it was to the Manager of Transportation Planning. He pointed out that there was no evidence in any of the record or at the Board hearing that the Acting Director had anything to do with the decision on the Development Permit application. He pointed out that the Director of Transportation Planning was the equivalent as the Manager of Transportation Planning as referenced in section 2(d) of the Direct Control Bylaw.

From the evidence given by Mr. Gaede and by Ms. McClary, the application went through the normal routine CPAG process with communications exchanged between Urban Systems and Mr. Gaede. There is no report or evidence by Mr. Brown indicating satisfaction or rationalization.

The maximum of 11,000 square metres was intended by Council to have meaning and Council intended, in their submission that any adjustment of the maximum density should not amount to an almost doubling of Council’s mandated maximum density. In conclusion, there was no determination, no rationalization or proof of satisfaction to approve the Development Permit application by the Development Authority; therefore, the Development Authority did not follow the direction of Council.

Mr. Woodcock, on behalf of Intercare, submitted that Intercare is located on an adjacent site to the subject site. Intercare owns and operates close to 700 beds in four locations in north and south of Calgary. It has been operating in Calgary for 15 years and has been recognized by the Calgary Health Region as one of its two preferred providers of long-term care services.

In the Chinook Care Centre at 1261 Glenmore Trail, directly adjacent to the North West building, Intercare has 198 beds of long-term care and hospice beds. This centre is going through two phases of redevelopment and expansion which have been completed in adding 71,000 square feet of capacity to the centre. In addition, Intercare has developed plans for a third phase of development that would add 39 additional long term care beds to the facility. A pre-application meeting has been held with the Planning Department.

In the opinion of Intercare, North West's proposed development would negatively impact the planned redevelopment for their Chinook Care Centre as the remainder of the traffic capacity of the area will be taken up by the North West proposed development.

In addition, he submitted that the Chinook Care Centre has approximately 170 staff and that their staff is affected by the parking issues created by North West's current building.

Mr. Nelligan, the traffic consultant for Intercare made a submission with respect to the TIA conducted in 2004, and the revised TIA submitted in 2006 as well as the related correspondence between Mr. Gaede and the transportation consultant of North West.

He submitted that since phase 1 of the North West development matched the approved density under the Direct Control Bylaw of approximately 118,000 net square feet of density any second phase would need to be rationalized through a revised TIA. He mentioned that based on an analysis conducted by the City, the size of the building was reduced to 90,000 square feet from the initial proposal of approximately 100,000 square feet. Through negotiations between Mr. Gaede and the transportation consultant of North West, the size of phase 2 was increased to 124,000 square feet.

According to the Applicant's submission dated January 29, 2008, the TIA for phase 2 was negotiated and approved on a very conservative basis. Based on their review, they failed to see how the analysis that was presented to the Board could be considered conservative.

He pointed out that the TIA was slightly on the aggressive side as opposed to the conservative side. In addition, he stated that no ARP or other comprehensive investigation of development was completed in advance of the TIA. The need for an ARP was acknowledged in a 2006 TIA. He disagreed with the decision of the Development Authority to grant the applicant the 12.5 percent reduction in the traffic generation rates based on the provision of travel demand management ("TDM") measures such as bike lockers, showers and carpool parking stalls. Firstly, the site would be significantly over-parked or would be significantly over-parked by 272 stalls or 58 percent above what the Bylaw requires. Having an abundance of parking on-site will dilute the impact of the proposed TDM measures. Secondly, the 12.5 percent reduction is not warranted because of the location of the site and given the long distance between the proposed site and the nearest LRT station, which is approximately 1.8 kilometres, and the next bus stop on Elbow Drive is approximately at 600 metres.

In conclusion, without the 12.5 reduction in trip generated rates phase 2 would need to be limited to approximately 85,000 square feet in order to maintain acceptable operating conditions at the intersection of 68 Avenue and Elbow Drive.

Mr. Brander, legal counsel for Intercare submitted that it is their position that the Approving Authority did not comply with the Bylaw. The Bylaw says that expansion past 11,000 square metres is to be based on a rationalization acceptable to the Manager of Transportation Planning. He pointed out that he cannot find any references in the materials to the Manager of Transportation Planning that states that the Manager accepts the rationalization. It can be expected that the Manager would crunch all the numbers himself, the Bylaw is clear and says rationalization acceptable to the satisfaction of the Manager of Transportation Planning. The Bylaw could have said acceptable to the Transportation Department but it did not do that. In their submission the discretion of the Development Authority must be exercised in good faith and based on the facts that the Direct Control Bylaw requires a rationalization and there is no record of such.

He submitted that in the 2006 report of Urban Systems on page 4, it states "It would make sense to re-visit the traffic forecasts and redevelopment potential of other parcels within this sub-area of the community to ensure that future traffic conditions are as realistic as possible." Based on the records, he submitted there was no such assessment of traffic forecasts and redevelopment potential for Intercare or anyone else was done.

The Bylaw gives the discretion to the Manager of Transportation Planning not to North West. Under Direct Control Bylaw, it is their view that the proper planning merits have to be assessed. There is no evidence in the materials that the project was ever properly assessed on its merits. Obviously, the traffic work did not account for the redevelopment potential of other parcels, even though the Applicant's own experts thought that it should. The D.A. Watt report that Mr. Nelligan spoke to concurs with that recommendation. Proper planning requires consideration of all property owners.

In that regard, there is no evidence of the impacts on other parcels of using up all the road capacity. It is their submission, that this is further evidence that the Administration did not properly comply with the Bylaw requirement that the rationalization be to the satisfaction of the Manager of Transportation Planning Council would have wanted a Manager involved as he would be expected to look at the bigger picture and the overall issues.

In conclusion, they submitted that the Development Permit should be revoked and that the Applicant can reapply if they want and the process can then evolve to fully consider the impacts on the area and the other landowners.

Mr. Wood, legal counsel for bcIMC Realty, submitted that bcIMC Realty owns Trinity Lodge, which is immediately to the east of the subject property. Trinity Lodge is an assisted living facility where 224 senior citizens reside with a staff of 110.

He referred to the relevant sections of the *Municipal Government Act* in particular section 641(4)(b). The Direct Control Bylaw in this case, specifies that development on the site is limited to a maximum of 11,000 square metres unless rationalization for more intense development can be provided with an updated traffic impact study to the satisfaction of the Manager of Transportation Services.

Consequently, no more development is permitted on this site until rationalization can be provided with an updated traffic impact study to the satisfaction of the Manager of Transportation Services. In their submission, "rationalization" is more or less a synonym for justification with the added requirement that justification has to be rationale. It is a pre-condition for additional development on this subject site that there must be an updated traffic impact study, a full study, not just a review and that traffic impact study must justify on a rationale basis the level of additional development applied for.

Furthermore, the Direct Control Bylaw specifies a very specific person who must review the traffic study and determine whether additional development can be justified. Council gave that role to the Manager of Transportation Services and cannot be done by any other person. It is a well established principle that authority delegated by legislation cannot be further delegated with express authority. There is no authority for further delegation in this case. The Manager can have staff perform analyses but he must demonstrate that he is satisfied with the rationalization for more intense development. Only if he is so satisfied, can the application go any further.

He pointed out that there is nothing on the record that suggests that the Manager of Transportation Services had anything to do with the approval of the Development Permit application. On that basis alone, in their submission, the Development Permit approval must be set aside as it clearly contravenes the clear and express terms of the Direct Control Bylaw.

There was no evidence that the Manager was involved and that he was satisfied with the rationalization for more intense development. The rationalization for this more intensive development and the updated traffic impact study required by the Direct Control Bylaw are critical considerations. The question is whether there is in fact an updated traffic impact study upon which the increased density can be rationalized.

In their opinion, the Urban Systems memorandum is simply a review of the traffic impacts and is not a full blown traffic study as required by the terms of the Direct Control Bylaw which is supported by the contents of the memorandum of Urban Systems.

The traffic review is based on the March 2004, UFA Traffic Impact Study which in the submission of the Appellant is an important document, but seems not to have been reviewed and considered and does not appear in the SDAB materials. The Urban

Systems traffic review simply adds a layer of assumptions and doubtful conclusions to the 2004 UFA report, in order to justify a floor area that accommodates the developer's plans. In their respectful submission, the Direct Control Bylaw requires rationalization, based on an updated traffic impact study, not a five page review of an old report that may provide some certainty. What is required is a rational basis for justifying a double of the presumptive maximum square footage of 11,000 square metres.

He pointed out that the assumptions in the traffic review are flawed and are simply speculations and estimations. Furthermore, he submitted that the developer's own consultant recommended additional traffic work as part of the Development Permit application for the second building and recommended revisiting traffic forecasts and the redevelopment potential. There is no evidence that this was ever done or even that the Approving Authority acknowledged this need for further work.

For all of these reasons, he submitted that the Urban Systems traffic review memorandum is not an updated traffic impact study that is capable on any reasonable analysis of rationalizing a density that is more than twice the presumptive maximum of 11,000 square feet referred to in the Direct Control Bylaw. The Urban Systems memorandum can hardly be considered a detailed TIA.

The question was raised, where does the 12.5 percent reduction for proposed TDM measures comes from? There is no objective assessment of whether it's appropriate in this case.

Mr. Gaede originally stated the maximum additional floor area allowable is approximately 90,000 square feet; however, in an April 25, 2007 email to Mr. Gibbard; Mr. Gaede increased the allowable floor space from 90,000 square feet, the maximum on April 18, 2007 to 105,000 square feet which resulted in a total of 239,742 square feet for the whole project. There is no additional information to be found on which basis this increase has been allowed. Yet, it seemed that it is based on a speculation and assumption from Urban Systems to a rationalization for the approval of increased density.

bcIMC also opposes the proposed development on the basis that it will use up all of the available density in the area having regard for the single point of exit and will effectively preclude further development in the area for other landowners.

In their submission, there is no evidence in the material before the Board that the Approving Authority adequately considered the impact that the proposed development would have on the seniors who live next to the development, including the impact of noise, traffic light and general disturbance.

There is no evidence on the material before the Board that the Authority had adequate regard for the impact that the proposed development would have on the use, enjoyment or value of neighbouring parcels. There is no evidence on the record before the Board

that the Approving Authority had adequate or any regard for the impact that the proposed development would have on surrounding roads.

David Jacobs, on behalf of the Beth Tzedec Synagogue, gave an overview of the location of the Beth Tzedec Synagogue and the Calgary Jewish Academy and the traffic patterns related to these two properties. The Synagogue is not a large traffic generator although there are certain times of the year when they can be very large. The Hebrew School using the Synagogue's parking lot generates traffic everyday like any other normal school.

The Appellant believes that the Approving Authority erred in the approval of this project, because they exceeded the land use density and that the transportation analysis is flawed and incomplete. In their opinion, an ARP should have been prepared prior to this approval. They agree with the arguments presented by the previous speakers especially with regards to the parking and access issues.

He submitted that there are no compelling arguments that anybody including the Manager of Transportation Planning would allow increased density in the amount of more than doubling the square footage. He further submitted that this may be the reason the Manager of Transportation Planning did not submit a letter that could support such an increase.

In addition, they believe that the TIA is flawed and that there is not enough current information on which to base a TIA as the construction and completion of the GE5 is still underway. Furthermore, he pointed out that Transit Oriented Design ("TOD") guidelines are not applicable as the Chinook LRT Station is a mile and a half away. In conclusion, the Approving Authority erred in their interpretation of the Land Use Bylaw in granting a density that more than exceeds 11,000 metres.

Ms. Bruzga, resident of the community, submitted that she resides at 1423 Klondike Avenue, SW about a block and a half southwest of the existing building and the proposed development.

She pointed out that she has seen many changes in the community that have greatly impacted the neighbourhood. Such as the expansion of the Rockyview Hospital, the widening of 14 Street, the widening of Glenmore Trail and now the construction of the proposed building, all this leads to an erosion of the quality of life of the residents.

In her opinion, the first building should have never been approved to that particular height. She further submitted that access to Elbow Drive is a problem and that parking in the community is a concern. As well, she is of the opinion that an ARP should have been done.

Ms. Stokes, resident of the community, presented photographs and submitted that the increased traffic on 68 Avenue SW is a great safety issue when she crosses the street.

A number of seniors from Glenmore Manor and Trinity Lodge take daily walks and have to cross 68 Avenue. The seniors have to cross 68 Avenue right here and then you have to cross the 9 Street because there is no sidewalk on this side. She supports all the concerns that have been brought forward by the previous speakers.

Rob Milner, representing the Calgary Jewish Academy, submitted that the Calgary Jewish Academy is in a unique location that is affected by this development. The only access to the Jewish Academy is from Kootenay Road and the Synagogue's parking lot. Due to the fact that the City plans to further restrict egress by barricading 75 Avenue westbound, the parents will be forced to use the Synagogue parking entry. Since the closure of two full accesses (entrance and exit) to Glenmore Trail it is apparent that the access to the service road corridor is inadequate to service the previous existing area's needs let alone service the needs of the planned first Glenmore Professional Centre. With the addition of another office building the problem will be compounded. The intersection at Elbow Drive and 68 Avenue will now be a major intersection and only exit, which parents with their children, will be required to pass through safety.

The first Glenmore Professional Centre has already had to secure some additional parking that we know of, at the Synagogue. This is the effect of one additional professional building. Unless they are required to provide sufficient underground parking for their tenants, workers and visitors; then there will be a parking shortage in the whole area. Parking control is not affected it is just a band-aid solution and would adversely affect the Academy on religious high holidays and special events.

Traffic around the school area will be increased with the existing developments and will affect the safety of children that walk to school from Kelvin Grove and Mayfair areas via the pedestrian bridge. The Calgary Jewish Academy has been supportive and has suffered through the challenges of Glenmore/Elbow construction, expansion of the Rockyview Hospital and the development of Glenmore Professional Centre phase 1. Consideration must be given to the impact that these developments have on the community before issuing additional Development Permits.

Without an updated traffic study and ARP it would see that there are already significant traffic/parking concerns arising from the issuance of the original Development Permit for Glenmore Professional Centre. The City should disallow any further development until the impact of recent changes to traffic/parking patterns can be evaluated and a City Area Redevelopment Plan can be conducted.

Barb McCulloch, resident of the community, presented photographs and submitted that she lives at 1111 70 Avenue, SW and that she supports the Appellants in the arguments raised by the previous speakers. She stated that she personally experienced parking problems and cut-through traffic issues. Her expectations are that with the addition of a new building, the restrictions will be increasingly ignored.

Opposed to the Appeal:

Mr. Bardsley, legal counsel representing the Appellant/Applicant/Owner, submitted that the Board is constrained by law in reviewing the Appeal and he referenced the *Municipal Government Act*, section 641(4)(b).

Firstly, he noted that the Notice of Appeals of the Appellants do not say anything, about objecting because the Manager of Transportation didn't do this or didn't do that. As this is a question that has been raised in the proceedings by the Appellants, he expected that the Development Authority would have an explanation in regard to that issue.

Secondly, he referenced Schedule "B" of the Bylaw and the development guidelines. The land use district is a Direct Control, but the rules are C3-27. The density provisions under C3-27 allow 3 floor area ratio ("FAR"), which basically means that a density of three times site coverage is allowed. If City Council had not dealt with density in this Direct Control Bylaw then under C3-27, a range of approximately 550,000 square feet would have been allowed.

He submitted that the counsels for the Appellants arguably are reading the Bylaw wrong. He submitted if you read the plain English here, the rationalization for more intense development is required to be provided. It is not required to be provided through only a traffic study, but that is how counsels for the Appellants want the Board to read it. He would prefer that the Board just read what is there. The TIA or the traffic study is part of this.

In his opinion, Council did not say it is 11,000 square metres, net floor area, plus adjustments. There is no limit in there in terms of square metre area; the mechanism to determine the limit is the Development Permit which includes the traffic study. He reminded that this is a C3-27 site and Council did not limit the development to just 11,000 square metres. It does not mean if the traffic study is approved then you have to get the density, or the Bylaw would have said that.

In terms of development rationalization and the comments of counsels for the Appellants, he responded that firstly, Council said that the site can support more than 11,000 square metres in density. Secondly, the general City policies for years have talked about decentralizing office buildings.

The arguments with respect to section 641(4) of the *Municipal Government Act*, seems to be resting on reading the way counsels for the Appellants want to read it, i.e. to say, that Council's directions were not followed is absolutely predicated on the Board accepting that either the Director of Transportation didn't do something, or alternatively, that the rationalization spoken of is only in the traffic study. In his opinion that is not what the Direct Control Bylaw says.

Mr. Gibbard, Transportation Engineer with Urban Systems, referenced the Urban Systems document dated November 21, 2007 and submitted that, as consultant engineers, they worked with the Development Authority or Transportation Department to provide the information that they need to reasonably make a decision on an application.

The direction they had at that time from the planner was that they could do an amended phase 1 Development Permit and as a result they met with Mr. Gaede to establish what was necessary in order to establish how large the expansion to the phase 1 Development Permit could be. That is what precipitated the information in the traffic review. In essence, this traffic review was completed in response to the Development Authority's questions about how large an expansion to a Development Permit could be and resulted in the last paragraph of the document, which states "Additional traffic work will be completed when the phase 2 Development Permit comes to you and here are some things you might want to consider."

Important is that this document is considering an expansion of 195,000 square feet in the end through discussions with the Development Authority it resulted in a density of 125,000 square feet, which they believe was a thorough and conservative process. What stands out is the traffic review, the mounds of documentation beyond that constitutes, in his opinion, a traffic study. With respect to the TDM measures a reductions of 12.5 percent was agreed upon by Mr. Gaede and himself and in his opinion this is conservative.

They found that the amount of trip rates is about 40 percent less than those trip generation rates that one would expect and therefore in his opinion the TDM measures are very effective.

With respect to the concerns of the intersection at 68 Avenue and Elbow Drive and to the service road, he submitted that they collected traffic data and traffic counts. He explained in detail the data that was collected and submitted that the current development is taking up the capacity at the intersection of 68 Avenue and Elbow Drive as it exists today.

As a result of phase 1, capacity was added to that intersection which ameliorated the impacts of the subject site. With phase 2 the traffic volumes do not require additional improvements to that intersection in order to meet the stringent City guidelines.

Any future development applications that will be made will need to do a traffic impact study and there is no other data out there to suggest that the 39 units that the Trinity Lodge wants to develop would cause problems at the intersection. There is the assumption that all the capacity is used up.

Bill Marshall, Architect Principal with Marshall Tittlemore Architects, presented photographs and gave a technical overview of the proposed development. He

discussed key planning and design features of the building, which features are integral to our planning and layout of the building form and massing. The proposed development is a result of interpreting the intent and purpose of the Bylaw and its specific requirements. The Direct Control Bylaw has been specifically crafted by Council as a framework for the proposed development of the site.

For the proposed development, consultations have taken place with the community and their interests were considered and resulted in a building and planning solutions that have taken into consideration the interest of the occupants, the neighbours, the community, and the City.

The proposed development supports the initiatives of the Calgary Plan, which amongst many things, has a major goal of locating jobs closer to where people live and in areas that attract people to support transit services, transit services that do evolve over time. In addition, it supports the initiative of encouraging appropriate new office developments to locate in transit supportive areas and which are in areas serviced by new infrastructure, such as the GE5. In addition, the planning of the building has been influenced by the City of Calgary's sustainable city planning team, a team formed to focus on development of a more sustainable city.

This resulted in the design and plan of a new phase 2 building addition that is balanced and considered a great development. The building has been designed and built to LEED standards including innovative mechanical systems, unusual floor systems, air systems, electrical systems, glazing systems, lighting systems, hanging ceiling systems and all other components. The building will provide ultimate flexibility to the tenant users with minimal disruption on an ongoing basis to tenancy as people are moved around the building. This building utilizes about 40 to 50 percent less lighting and less energy demands than a typical office building.

He pointed out that it was suggested, that the Direct Control Bylaw did not contemplate additional development. However, in his opinion the Bylaw is clear that it does allow for additional development with the maximum set by the development densities. How much could be allowed at any time, is actually set by the current capacity of the transportation infrastructure. Additional development was discussed with the community by both City representatives, Mr. Sasges and Mr. Gaede, at the community meetings in June 2007. The community was reminded that the Bylaw is to be interpreted with no uncertainty about additional development.

With respect to the concern raised by the Appellants concerning a cap on future development in the Glenmore strip area, he submitted that this will not create a cap. Future direct and indirect improvements to the 68 Avenue and Elbow Drive interchange will be brought forward over time by other applicants seeking a development. The procedures for this are set out in the Bylaw in the Development Permit application process. With respect to the concern of the community about the cut off of the Glenmore strip from other road networks, he pointed out that this has been taken into

consideration when Council adopted this Direct Control Bylaw and was taken into account by the Transportation Department in their review and approval process during the planning and Development Permit application process. The Direct Control Bylaw describes the extent of development that will be considered, which in his opinion is straightforward.

He addressed in detail concerns that are a result of the construction of the project: noise, traffic, parking, light pollution, etc. He further submitted that a dramatic lighting reduction is now in place after the phase 1 building has been completed. It exceeds even our own estimates for lighting level reductions. In addition, he pointed out that the Applicant is prepared to provide comprehensive landscape improvements to the adjacent park, including extensive tree planting and public amenities, to which offer the community has not responded. The park space is acting as further buffer and provides a separation between the four to five neighbours.

The Glenmore strip is separated from the adjacent residential communities to the south. The neighbourhood to the south turns it back on the Glenmore strip and the site and there are no frontages or shared main streets; therefore, there are no lanes or roads allowing commercial traffic to flow directly into the neighbourhood from the subject site.

With respect to sunlight and shadowing, he submitted that the entire residential neighbourhood is south of this development property and therefore, the development will not impact in any way on the benefits of sunlight penetration to the existing residents. Furthermore, there are no shadows cast onto the residential community to the south.

Further, he pointed out that the building will result in noise reduction emanating from the GE5. The new development will actually improve noise penetration into the community as a consequence of building a building.

With respect to setbacks, he mentioned that the proposed development is pulled away from Trinity Lodge on the east side and Chinook Care Centre on the west side to reduce impacts. This reduction or pulling back creates an open space buffer between the development and the institutional neighbours. The increased building setbacks are two to four times the Direct Control Bylaw requirements, which is significant. It results in increased daylight penetration, sunlight and improved privacy considerations for the neighbours to the east.

He addressed issues regarding height and visual impact on the community and pointed out that there is a significant separation distance from the building face to face of the residential properties, which is close to 220 feet; in his opinion this is an enormous distance.

He presented several photographs, cross-sections and diagrams concerning the visual impact of the building on the community. In addition, he pointed out that this is a very

large site, over 3 acres or 2.4 hectares. He showed diagrams to illustrate the amount of area that is represented by phase 1 and proposed phase 2 and diagrams which under typical conditions represent a C-3 development with a 27 metres site guideline would present. In fact, the proposed development is quite reasonable as it only represents 54 percent of the total development area that has been accorded to the site through the Land Use Bylaw 2P80.

Mr. Scott, Q.C., legal counsel representing the Appellant/Applicant/Owner, submitted that in reference to the Direct Control Bylaw and the reference to satisfaction of the Manager of Transportation Planning that the Bylaw does not say that this need to be in writing or that there needs to be a letter or a anything. He expected the Development Authority to address this issue.

Further he made some preliminary comments relative to arguments raised by counsels for the Appellants in particular to the fact that under Alberta law you take the Development Permit applications in the sequence they are received by the Development Authority. Applications that have not been received yet cannot be taken into consideration. In addition, he submitted that the Appellants did not say that the traffic study reviewed by Mr. Gaede was conducted inappropriately and did not say the intersection of 68 Avenue and Elbow Drive was not functioning right. Mr. Nelligan, the transportation consultant for Intercare was not sure how effective the 12.5 percent TDM measures were.

Firstly, he addressed section 641(4) of the *Municipal Government Act* relative to the Direct Control Bylaw in this regard, he referenced in detail the decision from the Court of Appeal, *Canadian Waste Services Inc. v. Edmonton (City) Subdivision & Development Appeal Board*, 9 M.P.L.R. (3d) 31, 255 A.R. 201, 220 W.A.C. 201, 2000 ABCA 35. Furthermore, he spoke to the content of the Direct Control Bylaw and the direction of Council with respect to allowable development on the site. He submitted a one page document that addresses the language in the Direct Control Bylaw concerning density; in particular he spoke to the rationalization and the role of the Manager of Transportation Planning. He stated that there was no issue with improper or illegal delegation of the decision making authority in respect of the matter to the Manager of Transportation Planning.

He pointed out that in the Bylaw under section 2(d) there is a separate thought between the words "rationalization for more intense development" can be provided and together with or with, "an updated traffic impact study to the satisfaction of the Manager of Transportation." The Bylaw is not giving the decision to approve a development or whether this development makes sense to the Manager of Transportation, it still has to go through the normal and intensive CPAG circulation and review process, which has been done in this case. He suggested that the rationalization is separate from the study. What the rationalization is in following the direction of Council is given by the further directions of the Direct Control Bylaw with respect to maximum setbacks and

heights under C-3(27) guidelines, that is the building envelop that Council said is a possibility. The result of the proposed Development Permit application is somewhat significantly less than if all of the Direct Control Bylaw maximums were in fact used. In support, he showed a diagram to illustrate his argument and he pointed out that the height is 30 percent lower, the side yard setbacks are a magnitude of over 300 percent on the west side, 150 percent on the east side, the front yard is 240 plus percent, the rear yard is 190 percent and the parking is greater than required. This is based on the Direct Control Bylaw and the approved plans, which have been approved by the Development Authority.

He submitted that North West when applying for the Development Permit for the proposed development followed the direction of the City departments. In his opinion, most of the concerns of the Appellants are unrelated to the Direct Control Bylaw. He addressed in detail these concerns. In addition, he spoke to the issue of the ARP as well as the issue whether the Direct Control Bylaw would allow only one building on the site as submitted by the Appellants; in this regard, he referenced the interpretation section in the Land Use Building, section 3.

He spoke to the transportation study and with respect to the intersection of 68 Avenue and Elbow Drive he pointed out that North West contributed moneys towards the upgrades to that intersection, as requested by the City. If the Board would uphold the Appeals of Intercare and bclMC Realty then North West would be paying for capacity at that intersection for them, which would be unfair.

Furthermore, he spoke to the motion of Alderman Erskine's, which was considered by Council, with respect to the ARP and the comments of the City Administration concerning that motion. He pointed out that the Administration stated there was no need for an ARP. He referenced the issue of "first past the post" principle and he referred in detail to *Love v. Flagstaff (County) Subdivision and Development Appeal Board* (2002) A.J. No. 1516, 2002 ABCA 292. In addition, he stated that there needs to be certainty and predictability with respect to Development Permit decisions. In conclusion, he submitted that Development Authority followed the directions of Council with respect to North West's Development Permit application.

Preliminary matters

Following is a summary of the facts:

- [1] On September 07, 2007 the Development Authority approved the application of North West for a Development Permit for an office building/medical building at 1201 Glenmore Trail SW and issued a Development Permit to North West for an office building/medical building at the subject property.

By letter, dated September 11, 2007, the Development Authority notified North West of its decision of the approval of a Development Permit for an office/medical building at the subject property. This approval was advertised in the local newspapers on September 13, 2007 with the description "1201 Glenmore Tr SW Office/medical building (phase 2)".

- [2] On September 27, 2007 North West filed an Appeal against conditions of approval of the Development Permit for an office building/medical building.
- [3] On September 13, 2007 the Development Authority approved the application of North West for a Development Permit for the subject development and issued a Development Permit to North West for an office building at 1201 Glenmore Trail SW.
By letter, dated September 13, 2007, the Development Authority notified North West of the decision of the approval of the Development Permit for an office building at the subject property. This approval was advertised in the local newspapers on September 20, 2007 with the description "1201 Glenmore Tr SW Office building (phase 2)".
- [4] On October 04, 2007 North West filed an Appeal "without prejudice" against the approval of an office building at the subject property and the conditions of approval of the Development Permit, issued September 13, 2007.
- [5] On October 04, 2007 Chris Beck, the CKE Community Association, Hetherington Estates, Michael Flatters, Randall Hall, Intercare, Don Homer, bcIMC Realty and Beth Tzedec Congregation each filed an Appeal against the approval of a Development Permit for an office building at the subject property.
- [6] On December 21, 2007 North West filed an Appeal (2007-0243) with the Board against the cancellation of the Development Permit issued by the Development Authority on September 11, 2007.
- [7] All parties agreed to have the Board deal with all preliminary issues first, separately from the merits of the Appeals.

Preliminary matter No. 1

- [8] The CKE Community Association and Hetherington Estates submitted that The City of Calgary Law Department was conflicted in providing a solicitor to the Board on the basis of advice provided to the City's Development and Business Approvals division on the interpretation of the subject Direct Control Bylaw 73Z2004, a matter of substance in the subject appeals. North West, the respondent, stated that they saw nothing in the record that would indicate that the solicitor of the City's Law Department had done anything which constituted a conflict sufficient to have the solicitor removed from the hearing.

- [9] The Board decided to proceed with the hearing on the preliminary matters with a solicitor of the City's Law Department sitting as a solicitor to the Board. As a matter of procedure, the Board decided that this solicitor would not attend any in camera meetings of the Board. However, on the hearing of the merits of the Appeals, the Board agreed to retain independent counsel and did so.

Preliminary matter No. 2

- [10] At the start of the Board's hearing on November 27, 2007 the CKE Community Association and Hetherington Estates, two of the Appellants, requested that following a determination on the preliminary matters the Board adjourn the hearing on the merits of the Appeals to allow the Court of Queen's Bench to provide direction on the interpretation of the subject Direct Control Bylaw and rule on the application of the CKE Community Association respecting the validity of Direct Control Bylaw.
- [11] The Board rejected this request on the outset of the hearing. Firstly, it is a principle of law that the Board has to presume the legislative validity of the Direct Control Bylaw, unless otherwise determined by a higher authority. In addition, there was uncertainty as to when the Court of Queen's Bench would be able to render a decision. Therefore, having regard to the requirement under the *Municipal Government Act* for the Board to hear and render decisions expeditiously, the Board refused this request.

Preliminary matter No. 3

- [12] At the hearing on November 27, 2007 the CKE Community Association and Hetherington Estates, in addition, requested that the Board adjourn the matters for a period of time sufficient to allow the Development Authority to revoke the "first approval" pursuant to section 11(5) of the Land Use Bylaw 2P80.
- [13] The Board rejected this request and found that the Development Authority did not have the authority to do so while the Appeals were before the Board.

Preliminary matter No. 4

- [14] The Board dealt with the preliminary matter of the status of the approval and the issuance of the Development Permit by the Development Authority for the development on the subject property.

Submission by Development Authority

- [15] At the hearing on December 11, 2007 the Development Authority submitted that the original September 07, 2007 Development Permit was signed by a Development Officer

but was destroyed and replaced in the file with an unsigned copy. The Development Authority notified the representative of North West by email on September 11, 2007 at 5:19 p.m. that it had to “reissue a new document”.

The Development Authority submitted at the hearing that the original Development Permit was issued in error, as it was not the intention of the Development Authority to issue a Development Permit for an office/medical building but rather only for an office building since the Applicant did not specify, as requested, the proportionate allocation of space between medical and office use in the proposed building. In addition, the Development Authority discovered that some conditions were missing in the conditions of approval. As a result, the Development Authority on September 13, 2007 reissued a new Development Permit to North West for an office building only on the subject property with different/additional conditions of approval, including provisions for a pedestrian walkway which were not included in the September 07, 2007 Development Permit.

Submission by North West

- [16] North West submitted that on September 13, 2007 the Development Authority purported to issue a second approval for the Development Permit for an office use only and that the conditions of approval contained more, and different conditions, than had been set out in the September 07, 2007 Development Permit.

North West submitted that the Development Authority did not have the legal authority to issue two Development Permit approvals for the same site. North West submitted that once the first decision was made the Development Authority cannot remake it, or substantively change the approval and the terms and conditions thereof.

North West further submitted that the Development Authority was “*functus officio*” and could not issue a new approval with respect to the development on the subject site. In support of their arguments, North West cited case law regarding “*functus officio*”. North West submitted that the second approval and Development Permit was a nullity.

Submissions by CKE Community Association & Hetherington Estates, Intercare and bcIMC Realty

- [17] The CKE Community Association and Hetherington Estates, as well as Intercare, submitted in their briefs that the September 11, 2007 notification letter of the approval, and the Development Permit issued September 07, 2007, were both unsigned and therefore were not final.
- [18] Intercare and bcIMC Realty submitted that the September 11, 2007 approval and the September 07, 2007 issued Development Permit was cancelled pursuant to section 11(5) of the Land Use Bylaw 2P80, as the Development Permit was issued in error.
- [19] bcIMC Realty submitted that North West’s reliance on the common law principle of “*functus officio*” is unnecessary and irrelevant based on section 11(5) of the Land Use

Bylaw 2P80, which permits the Development Authority to cancel a Development Permit when issued in error.

- [20] In the submission of the CKE Community Association and Hetherington Estates, Intercare, and bclMC Realty the final decision of the Development Authority on the Development Permit application was the September 13, 2007 approval and the issuance of a Development Permit for said development.

Board's ruling with respect to preliminary matter No. 4

- [21] The Board noted that in the report submitted by the Development Authority, regarding the above-mentioned Appeals, the September 11, 2007 notification letter of the approval of the Development Permit indeed was unsigned; and that the Development Permit issued on September 07, 2007, was also unsigned. However, the notification letter of the approval, dated September 13, 2007 and the Development Permit also dated September 13, 2007 were both signed by a Development Officer.
- [22] The Board acknowledged the written and verbal submissions of North West regarding the principle of *functus officio*. However, the Board noted that the case law is not conclusive and that exceptions to this principle are acknowledged by the Courts. Such references can be found in Practice and Procedure before Administrative Tribunals (Macauley and Sprague, 2004) and Judicial Review of Administrative Action in Canada (Brown and Evans, 2007). Both Intercare and bclMC Realty in their submissions cited case law with respect to the exceptions.
- [23] Notwithstanding whether exceptions apply to the Development Authority's action in this particular case and the fact that some finality is expected with respect to decisions of the Development Authority, the Board took into consideration that section 11(5) of the Land Use Bylaw 2P80 specifically provides for the suspension and cancellation of a Development Permit.
- [24] Furthermore, the Board noted that the *Municipal Government Act* does not require that an approval of a Development Permit application must be signed. However, under section 11(2)(c) of the Land Use Bylaw 2P80, when a Development Permit application is approved, a Development Officer must sign the Development Permit as of the date of the decision.
- [25] Section 11(2)(c) of the Land Use Bylaw 2P80 states:

(2) DISCRETIONARY USES

(c) Notification of decision

- (i) When a development permit application is approved, a Development Officer shall sign the development permit as of the date of the decision but shall not, in

any circumstance, release the permit to the applicant before the 14-day advertising period referred in Section 12(1)(b) has expired.

[26] Therefore, based on the evidence presented, the Board concluded that on September 07, 2007 the Development Authority indeed approved a Development Permit for an office/medical building on the subject property and that the representative of the Applicant, North West, was notified of the issuance of this Development Permit, on September 11, 2007.

[27] The Board referred to Section 11(5) of the Land Use Bylaw 2P80, which states:

(5) SUSPENSION OR CANCELLATION OF A DEVELOPMENT PERMIT

If following the issuance of a development permit it is determined by the Development Officer that

- (a) the application contains a misrepresentation;
- (b) facts have not been disclosed which should have been at the time of consideration of the application for the development permit;
- (c) the development permit was issued in error; or
- (d) the provisions or conditions of the permit have not been complied with,

the Development Officer may suspend or cancel the development permit and shall give written notification of such suspension or cancellation to the applicant.

[28] Section 4(29) of the Land Use Bylaw 2P80, which states:

- (29) **Development Officer** means a person appointed as a development authority by bylaw of the City to exercise development powers and duties on behalf of the City but does not include the Calgary Planning Commission;

[29] The Board accepted the evidence of the Development Authority that the September 07, 2007 Development Permit was issued in error. In particular, the Board accepted the evidence of the Development Authority that it was not the intention of the Development Authority to issue a Development Permit for an office/medical building but rather, only for an office building since the applicant did not specify, as requested, the proportionate allocation of space between medical and office use in the proposed building.

[30] In the opinion of the Board, it was within the authority of the Development Authority, which includes a Development Officer pursuant to section 4(8) and 4(29) of the Land Use Bylaw 2P80, to make a determination, and ultimately a decision, with respect to the cancellation of the Development Permit.

- [31] Furthermore, the Board found that the wording of section 11(5) of the Land Use Bylaw 2P80 is clear and that this section does not require a specific form for a cancellation. It only requires written notice. The Board determined that the aforementioned email of September 11, 2007 to Henry Schlichter of Marshall Tittermore Architects, the Architect acting on behalf of North West, constituted the written notice in this regard.
- [32] The Board found that there was no evidence to support the conclusion that the Development Authority in fact, had reconsidered its original decision, as it was the manifest intent of the Development Authority to approve a Development Permit for an office building only.
- [33] In addition, the Board accepted the evidence of the Development Authority that due to newspaper deadlines it was too late to pull the September 13, 2007 advertisement of the approval of the September 07, 2007 Development Permit. The Board put no weight on the advertisement of the original approval, as it was meaningless due to the cancellation. This was supported by evidence that upon inquiries and phone calls by adjacent residents, the Development Authority advised these residents that the approval would be readvertised.
- [34] In conclusion, the Board accepted the evidence that pursuant to section 11(5) of the Land Use Bylaw 2P80 the Development Authority cancelled the Development Permit, because the Development Authority determined that the Development Permit had been issued in error.
- [35] Lastly, the Board found that the Development Authority subsequently on September 13, 2007 issued a new Development Permit to North West for an office building only, on the subject property.
- [36] The Board next considered whether the Development Authority had the authority to issue the second Development Permit signed on September 13, 2007.
- [37] With respect to the argument of North West that the Development Authority lacked the authority to reissue a new Development Permit without the process of a new application, the Board noted that, pursuant to section 11(5) of the Land Use Bylaw 2P80, the Development Authority had the authority to suspend or cancel a Development Permit.
- [38] The parties were in agreement that a suspended Development Permit could be reinstated by the Development Authority. It should follow, that a Development Permit cancelled due to an error, once corrected, can be reissued. The Board found that it was the intent of the Development Authority to issue a Development Permit and not to refuse a Development Permit for said development.

[39] The Board reviewed section 10(3) of the Land Use Bylaw 2P80, which states:

(3) WAIVER OF INFORMATION REQUIREMENTS

The Approving Authority may deal with an application and make its decision without all of the information required by Section 10(1), if of the opinion that a decision on the application can be properly made without such information.

[40] By analogy, if the Development Authority, pursuant to section 10(3) of the Land Use Bylaw 2P80, can approve a Development Permit application without all of information required by section 10(1), then the Development Authority in this case, had the ability to reissue a Development Permit having regard to the fact that all the information required by section 10(1) was already available to them.

[41] In the Board's opinion, it seems logical under the *Municipal Government Act* and Land Use Bylaw that the Development Authority has the discretion to reissue a development permit issued in error without requiring an Applicant to reapply.

[42] If, in the opinion of the Development Authority, there are reasonable grounds to exercise its discretion respecting the (re)issuing of a Development Permit on the same application in accordance with the Land Use Bylaw, then the Board saw no rationale why this authority should be denied. Certainly there is no basis in the *Municipal Government Act* to conclude that the Development Authority lacks any authority with respect of reissuing a Development Permit.

In conclusion, the Board found that the Development Authority had the authority to reissue a Development Permit without requiring an applicant to resubmit a new application.

Appeal against the Cancellation

[43] On December 21, 2007 North West subsequently appealed the cancellation of the Development Permit to the Board (Appeal 2007-0243). On January 22, 2008 the Board heard this Appeal at a hearing within the combined hearing with respect to Appeals 2007-0171 and 2007-0169. The Board struck Appeal 2007-0243, as it found that this Appeal was filed outside the statutory time for filing an appeal. The Board issued a separate, written decision with respect to that Appeal.

Preliminary matter No. 5

Submissions by CKE Community Association and Hetherington Estates, Intercare, and bclMC Realty

[44] The CKE Community Association and Hetherington Estates submitted that the Appeal of North West filed on September 27, 2007 against conditions of approval of the

Development Permit for an office/medical building was filed late and therefore was a nullity.

In addition, they submitted that the Appeal, filed on October 04, 2007 “without prejudice” against the approval of an office building on the subject property and the conditions of approval of the Development Permit, issued September 13, 2007, was filed late and was a nullity.

These Appellants submitted that the latter Appeal was either: a) in response to the notification of September 11, 2007 and, being filed 18 days later, was beyond the 14 day appeal deadline; or b) in response to the notification of September 13, 2007, and being filed 16 days later, was also beyond the 14 day appeal deadline.

Submission by Intercare

- [45] Intercare submitted that having been provided notice of the September 07, 2007 Development Permit on September 11, 2007, North West’s Appeal filed on September 27, 2007 was filed late. Further, Intercare submitted that the issuance of the September 13, 2007 Development Permit, having been communicated to the representative of North West, North West’s Appeal filed on October 04, 2007 with respect to the September 13, 2007 Development Permit was filed outside of the 14 day appeal period and therefore was filed late.

Submission by bcIMC Realty

- [46] bcIMC Realty submitted that on September 11, 2007 North West was given notice of the September 07, 2007 approval, which was unsigned. Thus, the 14 day statutory time within which to file a Notice of Appeal ran from September 12 to September 25, 2007. Under section 11(5) of the Land Use Bylaw the unsigned September 11, 2007 draft Approval was duly cancelled by the Development Authority and replaced by the September 13, 2007 approval. North West was notified by facsimile of the September 13, 2007 approval on September 17, 2007. Accordingly the 14 day statutory period within which to file a Notice of Appeal with respect to the September 13 approval began to run on September 18, and not on September 20, 2007 (the day the approval was advertised); and therefore North West’s Notice of Appeal filed on October 04, 2007 was filed outside the 14 day statutory limitation period.

Submission by North West

- [47] North West in response submitted that their appeals were filed in a timely matter and were within the statutory 14 day period for filing an Appeal.

Board’s ruling with respect to preliminary matter No. 5

- [48] The Board determined that on September 27, 2007 North West filed a Notice of Appeal against the conditions of Development Permit approval DP2006-4120. The Board ruled previously above that the Development Authority, on September 13, 2007, issued a new

Development Permit DP2006-4120 to North West for an office building on the subject property. The Board noted that on September 13, 2007 the representative of North West verbally was notified of the issuance of this Development Permit.

- [49] Pursuant to section 686(1)(a) of the *Municipal Government Act*, the Board found that North West's Appeal was filed within the statutory 14-day period. Irrespective that the September 07, 2007 issued Development Permit was cancelled, it was the clear intent of North West to file an appeal against the conditions of approval of Development Permit DP2006-4120 as evidenced by the content and wording of its Notice of Appeal.
- [50] Although it is somewhat unclear from the evidence on what exact day the representative of North West received the notification letter dated September 13, 2007, Mr. Schlichter testified that he received the notification letter from Mark Sasges on September 13, 2007 at 16:08 a.m. and on September 14, 2007 at 9:39 a.m. The report submitted by the Development Authority contains a copy of a fax message, dated September 17, 2007 from Mr. Sasges to Mr. Schlichter, the representative of North West. Either the appeal period for North West commenced on September 14, 15 or 18, 2007 and subsequently expired on either September 28, 29, or October 02, 2007.
- [51] In any event, the Board determined that the Appeal of North West was within the statutory 14 day period for filing an appeal, as its Notice of Appeal was filed on September 27, 2007.
- [52] On February 01, 2007 the Board finalized any further outstanding preliminary matters with the parties and proceeded with hearing the merits of the Appeal.

Decision:

- [53] In determining this Appeal, the Board:
- Considered the *Municipal Government Act*, land use policies, applicable statutory plans and The City of Calgary Bylaw 73Z2004 and Land Use Bylaw 2P80;
 - Had regard to the subdivision and development regulations; and
 - Considered all the relevant planning evidence presented at the hearing, the arguments made and the circumstances and merits of the application.
- [54] **1. Appeal 2007-0171 was allowed and the decision of the Development Authority was overturned.**
- [55] **2. Development Permit DP2006-4120, issued by the Development Authority, is null and void.**

Reasons:

- [56] The Board considered all written, verbal and photographic evidence presented at the hearing. The Appeal pertains to the approval by the Development Authority of a Development Permit for an office building at 1201 Glenmore Trail SW. The property has a land use designation of DC Direct Control District, pursuant to Bylaw 73Z2004. The site in question contains a recently constructed six storey office building comprising 11,021 net square metres (118,586 net square feet) of office space.
- [57] The subject approved Development Permit allows for the addition of a density of 10,523 net square meters (113, 227 net square feet) of office space on the site. The approval by the Development Authority was for a three storey office building with a four storey connection link to the existing building.
- [58] The jurisdiction of the Board with respect to the subject Appeal is set out in section 641 (4) of the *Municipal Government Act*, which states:

Designation of direct control districts

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, 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.

- [59] The Board noted that the directions of Council are set out in Bylaw 73Z2004 in conjunction with the rules of the Land Use Bylaw 2P80.
- [60] Pursuant to Bylaw 73Z2004, offices are a discretionary use. Section 2 of this Bylaw contains the Development Guidelines for the Direct Control District and it states, in part:

The General Rules for Commercial Districts contained in Section 33 of Bylaw 2P80 shall apply to all uses and the Permitted Use rules of the C-3(27) General Commercial District shall apply to Permitted Uses and the discretionary Use Rules of the C-3(27) Commercial District shall apply to Discretionary Uses, unless otherwise noted below:

- (a) ... (j) ...

[61] Section 2(d), of the Bylaw states:

(d) Density

A maximum of 11,000 square meters net floor area on the area that is subject to this bylaw unless rationalization for more intense development can be provided with an updated traffic impact study to the satisfaction of the Manager of Transportation Planning.

[62] The main issue before the Board was whether the approval and issuance of a Development Permit to North West for an office building on the subject property was in accordance with the provisions of the Direct Control Bylaw 73Z2004; i.e. did the Development Authority in its decision to issue a Development Permit to North West follow the directions of Council.

[63] The Board took into consideration the purposive and contextual approach to the interpretation of the Bylaw. The purpose of the Bylaw is clear: it is to provide specific development guidelines for the land within this Direct Control District. The contextual approach requires that the words chosen must be assessed in the entire context in which they have been used.

[64] For the purposive approach the Board took into account Council's intent when drafting the density guideline provisions of the Bylaw. In this regard the Board noted that the Calgary Planning Commission ("CPC") report, which Council considered at the time the Bylaw was passed, provided background information on the rationale for the land use designation DC Direct Control District for the lands within the District. The intent was to provide for a redesignation of the lands to DC Direct Control District with C-3(27) guidelines from R-1 Residential Single-Detached District.

[65] The purpose of the redesignation is stated on page 1 of CPC report CPC2004-092, dated September 13, 2004, under the heading Investigation as follows "The purpose of this redesignation is to accommodate offices and related commercial uses on a site that currently is occupied by a church". It further states "The proposal responds to the efficiency and intensification principles of the Calgary plan." The CPC report further indicates in Appendix 1 that the redesignation was based on plans of United Farmers of Alberta ("UFA") to build a new corporate support office on the site of up to 11,000 square metres.

[66] The Board determined that the purpose of the Bylaw was clear in this respect: it sets a maximum density of 11,000 square meters net floor area, unless otherwise determined. However, the purpose of the Bylaw is also to allow for intensification of development on the site under certain conditions as set out in the latter part of the density guideline.

[67] Further the Board looked at the express wording of the Bylaw itself as well as the context within which the words are used. For the determination of the plain meaning of the words used in the Bylaw the Board referenced generally accepted dictionaries. With

respect to the density guideline provided in section 2 (d) of the Bylaw, the Board looked at the meaning of the following words: “rationalization”, “rationalize”, “intense”, “updated”, “satisfaction” and “satisfy”.

The Board took into account that the density guideline is one sentence. Based on the connection through the word “unless”, the Board determined that the sentence needs to be read in its entirety in a conjunctive way.

Further, the Board took into account that the wording of the Bylaw is very specific and that Council gave express purposive delegation to a specific authorized person, the Manager of Transportation Planning.

- [68] The Board determined that the density guideline statement in the Bylaw is equivalent to the following statement “an updated traffic impact study to the satisfaction of the Manager of Transportation Planning is a necessary condition for the Development Authority to rationalize an increase in density greater than the maximum density of 11,000 square meters net floor area”.
- [69] Without an updated traffic impact study to the satisfaction of the Manager of Transportation Planning, more intense development cannot be rationalized and therefore, the maximum allowable density for the site is 11,000 square metres net floor area.
- [70] The Board determined that the Bylaw does not say that with an updated traffic impact study to the satisfaction of the Manager of Transportation the restriction of maximum allowable density of 11,000 square metres net floor area for the site is necessarily lifted. There still must be a rationalization for higher density based on proper planning principles and having regard to the other provisions in the Bylaw. The wording and context of the Bylaw suggest that a specific process must be followed before higher density on the site is allowed. If this requirement is not met, then the maximum density of 11,000 square net floor area remains.
- [71] From the evidence submitted by the Development Authority at the hearing, the Board found that the Development Authority processed the Development Permit application of North West as a normal application through the regular so-called CPAG process. The CPAG process is a collaboration of the various City of Calgary departments to process Development Permit applications. A Transportation Engineer of the City’s Transportation Department, in this case Mr. Gaede, was part of the CPAG team. The Board found that no special process was followed with respect to the subject application to meet the requirement of the Bylaw.
- [72] The Board noted that the position of Manager of Transportation Planning did not exist at the time North West’s application was approved. This position was equivalent to the position of Director of Transportation Services. During the application process Alex Broda held this position until August 2007, after which time Malcolm Brown became the Acting Director of Transportation Planning.

- [73] Urban Systems was retained by North West to review the traffic impacts associated with an office expansion for their site. Urban Systems prepared a traffic review based on the March 2004 UFA traffic impact study final report and submitted the review to the Development Authority in furtherance of the Development Permit application.
- [74] In its covering letter to the City of Calgary to the attention of Mr. Gaede, dated November 21, 2006, Urban Systems stated “the proposed development on the site is for an office building of 330,000 ft² gross floor area (GFA). This includes the building that is currently under construction at approximately 140,000 ft² and a building expansion that approximately doubles the development on the site”. It further stated “The road network can accommodate the 330,000 ft² development by applying TDM measures such as providing bike lockers, shower facilities and carpool parking. The model split for the development traffic was assumed to follow the model split for the zone based on the City’s future horizon transportation model”.
- [75] Subsequently, through the application process and after numerous meetings and correspondence between Mr. Gaede and Mr. Gibbard of Urban Systems, having regard to the Urban Systems traffic study review, it was negotiated and decided that the site could accommodate a density of 250.000 net square feet of office space including the existing building.
- [76] The Appellants provided evidence that questioned the scope and nature of the review, the currency of the review, the review assumptions, the traffic modeling used in the review, traffic patterns forecasts and source material. They further evidenced that the review did not take into consideration all the changes in the road infrastructure network in the surrounding area. There is no evidence that the Manager of Transportation Planning considered such factors or whether they were applicable.
- [77] It was Mr. Gaede’s evidence that he became familiar with the land use involved and the special density considerations. He discussed the application with his supervisor Mr. Brown. He proceeded to work on the file to the point where he had a preliminary decision on whether to proceed with the application and what constraints might be placed on it, specifically with respect to density. At that point he met with Mr. Broda and reviewed the application and history, and all other things that Mr. Gaede felt was important for Mr. Broda to understand in order that Mr. Broda could consider the position that Mr. Gaede’s was proposing to take forward on behalf of the Transportation Department. Mr. Gaede was not prepared to meet with Mr. Broda before Mr. Gaede determined what the density should be. Mr. Gaede stated that at that point he “basically got a go or no go” from Mr. Broda.
- [78] In support of his evidence, Mr. Gaede produced an email from Mr. Broda to Mr. Gaede, dated January 28, 2008. The email stated that “...with good engineering judgement [he] agreed to the approval of this file” and that Mr. Gaede “had the authorization to issue this approval as agent on my behalf”.

- [79] The Board noted that Mr. Broda's subject email was prepared and produced several months after the fact and well into the appeal process. Neither Mr. Broda nor Mr. Brown provided direct evidence at the hearing.
- [80] The Board cannot find any definitive statement by Mr. Broda, Director of Transportation Planning, or Mr. Brown as Acting Director of Transportation Planning, that the Director was satisfied by an updated traffic impact study that the maximum allowable density for the site set out in the Bylaw could be increased.
- [81] The Board appreciated that it was not necessary for Mr. Broda to actually prepare an updated traffic impact study. It is reasonable to delegate to other personnel in his department the task of obtaining the background information for consideration and review.
The Board, however, was of the opinion that the Director must be actively involved in and evaluate all elements of the updated traffic impact study in order to meet the requirements of the Bylaw. It is not sufficient for Mr. Broda or Mr. Brown to act in an advisory or consultative capacity only and ultimately make a decision with respect to whether or not, having regard to the traffic impact study, the maximum density for the site could be increased.
- [82] The Bylaw has a mandatory requirement that the Manager of Transportation Planning must be satisfied with an updated traffic impact study. There is no authority in the Bylaw to delegate the authority of the Manager of Transportation Planning to any other person. It is not sufficient to meet the requirements of the Bylaw for Mr. Gaede to be satisfied with the traffic study review prepared by Urban Systems.
- [83] The traffic review prepared by Urban Systems remained fragmented throughout the Development Permit application process, evidenced by the traffic review as set out in the November 21, 2006 review letter from Mr. Gibbard, a string of emails that involved negotiations between Mr. Gaede and Mr. Gibbard as to an increased density and verbal communications between Mr. Gaede and Mr. Brown and Mr. Gaede and Mr. Broda. It is unclear as to what documentation and information was provided by Mr. Gaede to Mr. Broda or Mr. Brown, and to what extent the documentation and information was critically reviewed and considered. There is no evidence as to what, if any, concerns or comments were made by Mr. Broda or Mr. Brown regarding the sufficiency, or lack thereof, of the traffic review.
- [84] Having regard to all of the evidence presented by the parties at the hearing of the Appeal, the Board concluded that the Urban Systems traffic review was not the equivalent of an "updated traffic impact study" required by the Bylaw. Further the Board found that no comprehensive document was presented that could have indicated that Mr. Broda or Mr. Brown agreed with the Urban Systems traffic study review.
- [85] Furthermore, the Board found that there was no direct evidence that either Mr. Broda or Mr. Brown stated that, based upon an updated traffic impact study, he was satisfied that

the maximum allowable density for the site could be increased. The Board also found that, given the wording of the Bylaw, there was a positive obligation on the Manager of Transportation Planning to make a clear and unambiguous statement or decision as to whether or not he was satisfied as required by the Bylaw. Had such a statement or decision been made, it would then have been appropriate for the Development Authority to proceed to consider the other requirements of the Bylaw together with proper planning principles to rationalize any increase in the site density.

- [86] It was a necessary condition to the exercise of the Development Authority's discretion to approve the subject application that an updated traffic impact study, satisfactory to the Manager of Transportation Planning, supported an increase in site density. Failing a clear and unambiguous statement by the Manager of Transportation Planning to that effect, the Development Authority could not proceed to rationalize any increase in the site density.
- [87] The Board determined that under the rules of the Bylaw the rationalization for density greater than 11,000 square meters net floor area is a necessary condition to the exercise by the Development Authority of their discretion to approve the subject application.
- [88] Based on all of the evidence, the Board found that the Development Authority could not rationalize an increase in density on the site and therefore lacked the authority to approve the subject application.
- [89] Accordingly, pursuant to section 641(4)(b) of the *Municipal Government Act*, the Board found that the directions of Council set forth in the Bylaw were not followed.
- [90] Therefore, the Appeal was allowed, the decision of the Development Authority was overturned and Development Permit 2006-4120, issued by the Development Authority, is null and void.
- [91] The Board determined that there was insufficient evidence upon which to rely to substitute its decision for the Development Authority's decision and therefore declined to do so.

(SIGNED)

Rick Grol, Chairman
Subdivision and Development Appeal Board

Issued on this 11th day of April, 2008

APPENDIX

DOCUMENTS RECEIVED PRIOR TO AND AT THE HEARING AND CONSIDERED BY
THE SUBDIVISION AND DEVELOPMENT APPEAL BOARD

No.	Items
1	Agendas
2	Board Report (SDAB2007-0171)

Submissions from North West Value Partners, Inc., counsels Glen B. Scott, QC and
Timothy Bardsley:

Exhibit A1	Brief and Authorities filed on behalf of North West Value Partners, Inc., relating to the preliminary issue of the validity of the approval of DP2006-4120 dated September 13, 2007 and advertised September 20, 2007
Exhibit A2	Additional Documents
Exhibit A3	Urban Systems, dated November 21, 2007, entitled "Glenmore Professional Centre Traffic History"
Exhibit A4	Additional Brief and Authorities filed on North West Value Partners, Inc., addressing the preliminary issues raised by Chris Davis in his letter of November 26, 2007
Exhibit A5	Rebuttal argument procedural issues submitted by NWVP January 8, 2008
Exhibit A6	Materials filed on behalf of North West Value Partners, Inc.

Submissions from Chinook Park/Kelvin Grove/Eagle Ridge Community Association and
the Owners of Condominium Corporation No. 7911288, counsel Christopher S. Davis:

Exhibit B1	Brief of the Appellants – Preliminary issues (Dec. 11, 2007)
Exhibit B2	Presentation materials
Exhibit B3	Power Point presentation, Glenmore Professional II

Submissions from Intercare Corporate Group Inc., counsel R. Bruce Brander:

- Exhibit C1 Preliminary issues of jurisdiction, December 11, 2007
- Exhibit C2 D.A. Watt Consulting, dated January 29, 2008, entitled
"Glenmore Professional Centre – Confirmation of Medical Office
Trip Rates"

Submissions from bcIMC Realty Corporation, counsel David M. Wood:

- Exhibit D1 Brief of bcIMC Realty Corporation for a hearing at 1:00 p.m. on
Tuesday, December 11, 2007