EDMONTON SUBDIVISION AND DEVELOPMENT APPEAL BOARD

Citation: Garage 104 v Development Authority of the City of Edmonton, 2019 ABESDAB 10182

Date:	December 5, 2019
Project Number:	325857215-001
File Number:	SDAB-D-19-182

Between:

Garage 104

and

The City of Edmonton, Development Authority

Board Members

Rohit Handa, Presiding Officer
Mark Young
Robert Hobson
Sara McCartney
James Wall

DECISION

[1] The Subdivision and Development Appeal Board (the "Board") at a hearing on October 30, 2019, made and passed the following motion:

> "That the appeal hearing be scheduled for November 20, 2019."

[2] On November 20, 2019, the Board made and passed the following motion:

> "That SDAB-D-19-182 be raised from the table."

[3] On November 20, 2019, the Subdivision and Development Appeal Board (the "Board") heard an appeal that was filed on September 20, 2019 for an application by AdMax Media/Garage 104. The appeal concerned the decision of the Development Authority, issued on September 5, 2019, to refuse the following development:

Install (1) Fascia Minor Digital On-premises Sign (6.29 metres by 3.57 metres facing North) (GARAGE 104)

[4] The subject property is on Plan 3553P Blk 32 Lots 1-4, located at 6528 - 104 Street NW, within the DC1 Direct Development Control Provision. The Strathcona Junction Area Redevelopment Plan applies to the subject property.

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

- Copy of the Development Permit application with attachments, proposed plans, and the refused Development Permit;
- The Development Officer's written submissions; and
- The Appellant's written submissions

Preliminary Matters

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

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

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

[9] Section 685(4)(b) of the *Municipal Government Act* states:

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

Summary of Hearing

i) Position of the Appellant, E. Powley, representing Garage 104 and R. Noce, Legal Counsel.

[10] This is an application to install an as-built Fascia Minor Digital On-premises Sign for Garage 104.

[11] Mr. Noce acted as Legal Counsel during the original application at the subject premises when the Board granted a development permit for the existing sign on February 21, 2013 (SDAB-D-13-019).

[12] The site is located in the Allendale neighbourhood, within the Strathcona Junction Area Redevelopment Plan, Business Area 1.

[13] The subject site is zoned DC1 (Charter Bylaw 18636). The purpose of this Provision is "to provide transition for the area to become a pedestrian-oriented, urban style commercial mixed use area, while respecting the character of 104 Street and Gateway Boulevard. This Provision enhances the pedestrian environment by incorporating pedestrian scaled architecture, amenities and landscaping. It allows for industrial, commercial and limited residential uses".

[14] Pursuant to section 3 of the DC1 Bylaw, Fascia On-premises Signs, Minor Digital On-premises Signs, Projecting On-premises Signs, Roof On-premises Signs and Temporary On-premises Signs, not including portable signs, are listed Uses.

[15] Section 7(a) requires the overall Site development to be in general accordance with the Strathcona Junction Area Redevelopment Plan, specifically that signs shall be provided with the intent to complement a pedestrian-oriented environment. Signs shall comply with the regulations found in Schedule 59E, except that the maximum Height of a Freestanding Sign shall be 6.0 metres; a Projecting Sign may be used to identify businesses that are located entirely at or above the second Storey level; and the top of a Projecting Sign on a building two Storeys or higher shall not extend more than 75 centimetres above the floor of the second or third Storey,

[16] These three specific regulations do not apply to this development permit application.

[17] The development permit application was refused for four reasons.

[18] Section 641(2) of the *Municipal Government Act* states that "if a direct control district is designated in a land use bylaw, the council may, subject to any applicable statutory plan, regulate and control the use or development of land or buildings in the district in any manner it considers necessary."

[19] Section 683 of the *Municipal Government Act* states that "except as otherwise provided in a land use bylaw, a person may not commence any development unless the person has been issued a development permit…".

[20] Section 685(4) of the *Municipal Government Act* states that "Despite subsections (1), (2) and (3), if a decision with respect to a development permit application in respect of and direct control district 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".

[21] Accordingly, the Board cannot interfere with the decision of the Development Authority unless it is satisfied that the directions of Council were not followed.

[22] Section 710.4(5) of the *Edmonton Zoning Bylaw* states that "all regulations in this Bylaw shall apply to development in the Direct Development Control Provision, unless such regulations are specifically excluded or modified in a Direct Development Control Provision". Section 7 of the DC Bylaw requires all signs to comply with the regulations contained in Schedule 59E. The DC1 modified 3 specific regulations that do not apply in this case. All of the regulations apply unless the DC1 modifies or excludes them.

[23] Sections 11.3 and 11.4 of the *Edmonton Zoning Bylaw* outline the variance powers provided to the Development Officer. This variance power applies to the proposed development because sections 11.3 and 11.4 were not excluded or modified in this Direct Control Provision.

[24] Section 11.3 states that "The Development Officer may approve an application for development that does not comply with this Bylaw where the proposed development would not, in their opinion, unduly interfere with the amenities of the neighbourhood; or materially interfere with or affect the use, enjoyment or value of neighbouring properties". This is similar to the variance power provided to the Board in section 687(3) of the *Municipal Government Act*.

[25] Section 11.4 provides some additional direction to the Development Authority, specifically that a variance shall be considered only in cases of unnecessary hardship or practical difficulties peculiar to the Use, character, or situation of land or a building, which are not generally common to other land in the same Zone.

[26] Section 12.3 of the *Edmonton Zoning Bylaw* states that "…Applications for Signs, Accessory functions and the occupancy of existing buildings on Sites regulated by a Direct Control Provision and conforming to that provision shall also be considered a Class A Permitted Development".

[27] In accordance with Court of Appeal decision, *Garneau Community League v Edmonton (City)*, 2017 ABCA 374 ("*Garneau*"), which is the law in Alberta, the Board is limited to the variance power provided to the Development Authority and not the general variance power provided in section 687 of the *Municipal Government Act*. Therefore, the Board is limited to the variance power provided to the Development Authority in sections 11.3 and 11.4 of the *Edmonton Zoning Bylaw*.

[28] The Appellant adopts the reasoning of the Board in SDAB-D-19-176 that was issued on October 31, 2019 which followed the *Garneau* decision. Based on the principles provided in that decision, the Development Officer did not follow the direction of Council in refusing this development permit application for the following reasons:

a) The variance powers provided in the *Edmonton Zoning Bylaw* were not even considered, reviewed or discussed.

b) There is no evidence that the Development Officer turned their mind to the fact that variance power was available before refusing this application.

c) The Development Officer therefore erred by failing to recognize that discretion could be used to grant a variance. The development permit application was refused because it did not comply with the regulations without determining if variances could be granted pursuant to sections 11.3 and 11.4 of the *Edmonton Zoning Bylaw*.

d) The *Garneau* Court of Appeal decision and previous decisions of the Board recognize that variances can be granted in both a DC1 and DC2 Zone based on the underlying authority provided to the Development Officer, specifically sections 11.3 and 11.4 of the *Edmonton Zoning Bylaw*.

e) Variance powers were not specifically excluded or modified in this Direct Control Provision and the Development Authority had every right, and even an obligation to consider their variance power found in the *Edmonton Zoning Bylaw*. In failing to turn their mind to this possibility, the Development Authority failed to follow the directions of Council.

f) If it is determined that the development authority did not follow the directions of Council, the Board is entitled to substitute its own decision. Specifically, the limitations on variance powers are restricted to situations of unnecessary hardship or practical difficulties peculiar to the Use, character, or situation of land or a building which are not generally common to other land in the same Zone.

[29] The Development Officer referenced SDAB-D-13-019, the original decision of the Board dated December 19, 2012. This is an error because the decision that granted the development permit for the existing sign was dated February 21, 2013.

[30] The first reason for refusal was that the sign does not comply with section 59E.3(4)(c) that the maximum Area shall be 10 square metres, to a maximum of 25 percent wall coverage for proposed Signs that are Fascia Signs.

[31] Based on their calculations, the maximum allowed Height is 8.0 metres and the actual height of the sign is 3.05 metres which complies with section 59E.3(4)(a). The maximum allowable width is 8.0 metres and the actual width of the sign is 6.10 metres which complies with section 59E.3(4)(b).

[32] The Development Officer only references section 59E.3(4)(c), the maximum area of the sign. The Development Officer erred by not referencing sub-sections (i) or (ii).

[33] The Development Officer did not properly indicate which sub-section was in breach when the development permit was refused.

[34] Section 59E.3(4)(c)(i) which was not identified properly by the Development Authority states that "the maximum Area shall be 10 square metres". Based on the calculations provided by the Development Officer, the sign represents 14.1 percent of the total wall which is less than the 25 percent wall coverage for proposed Signs that are Fascia Signs and therefore complies with this regulation.

[35] The drafting creates confusion because it says 10 square metres to a maximum of 25 percent of the wall coverage. These are two different numbers. The regulation should say 10 square metres or to a maximum of 25 percent whichever is less.

[36] Section 59E.3(4)(c)(i) provides two different numbers, 10 square metres to a maximum of 25 percent of the wall coverage. It is more confusing because if an application is made for a sign at the maximum allowable height and width, 8 metres by 8 metres, that is 64 square metres. Therefore section 59E.3(4)(a) and (b) appear to conflict with (c)(i). The drafter should have combined all of these sections which would make the maximum allowable height and width clear and regardless of those numbers the sign cannot exceed the number set for the maximum allowable sign area.

[37] Section 59E.3(4)(c)(i) appears to suggest that the maximum area can be 10 square metres and 25 percent of the wall coverage, which are two different numbers.

[38] Regardless of which measurements are used, the proposed sign does not exceed the maximum allowable 25 percent wall coverage and fully complies with the height, width and area requirements.

[39] If there is any confusion with this section, then the preferred meaning should be the one that works against the interests of the party who drafted the provision which is the City of Edmonton because they have the power and the tools to amend and clarify the regulation.

[40] In the alternative, if the Board determines that the existing sign exceeds the maximum allowed Area, then a variance is requested.

[41] In SDAB-D-19-180, an application for a Minor Digital On-premises Off-premises Freestanding Sign that was issued on November 1, 2019, the Board granted a variance in the maximum allowable sign area. The decision references the *Garneau* decision and the ability of the Board to use variance powers provided in the *Edmonton Zoning Bylaw*.

[42] Section 59E.3(5)(c)(i) which deals with Minor Digital On-premises Off premises Signs allows a maximum allowable Height of 8.0 metres and a maximum allowable width of 8.0 metres which is the same as section 59E.3(4)(c)(i) but the maximum allowable Area is 20 square metres instead of 10 square metres. The only difference between these two sections is that off-premises signage is allowed. Council is obviously not that concerned about size but the language contained in the regulation also results in two different numbers.

[43] The application was also refused because it does not comply with section 59E(4)(e) because the sign extends 60 centimeters above the building roof instead of the maximum allowable 30 centimeters.

[44] A photograph was referenced to illustrate that the existing sign cannot be lowered because of the location of the man door. There are no businesses or residents to the north, south, east or west of the exiting sign that are impacted by the excess of 30 centimeters. Given the difficulties peculiar to this building, a variance of 30 centimeters is requested.

[45] The existing Fascia Sign was also refused because it does not comply with section 59E.3(4)(g) because it extends 46 centimeters out from the wall instead of the maximum allowed 40 centimeters. Digital signs require adequate ventilation behind the display to operate safely. Providing this clearance and accommodating the finished cabinet size of the display results in the 46 centimeter clearance and a variance of 6 centimeters is requested. The additional 6 centimeters is impossible to see from 104 Street and has no impact on neighbouring businesses or pedestrians and vehicles travelling along 104 Street.

[46] The existing sign was also refused because it was the opinion of the Development Officer that it does not comply with Section 3.1.10 of the Strathcona Junction Area Redevelopment Plan which states that Signs will respect the character of an urban area.

[47] However, this is not an urban area based on the General Purpose of the DC1 Direct Development Control Provision which is to provide industrial and commercial uses with limited residential uses.

[48] Section 3.1.10 of the Strathcona Junction Area Redevelopment Plan also states that Billboards will not be allowed. However, the term "billboard" is not defined in the *Edmonton Zoning Bylaw* or the Strathcona Junction Area Redevelopment Plan.

[49] This is another example of bad drafting. Because "billboard" is not a defined term, the Development Officer applied the ordinary meaning to this word pursuant to section 3.5(2) of the *Edmonton Zoning Bylaw*. The application submitted showed a large outdoor board intended to display advertisements and would commonly be described and characterized as a billboard.

[50] This is not an urban area and the term "billboard" is not defined in the Area Redevelopment Plan or the *Edmonton Zoning Bylaw*. The Development Officer is interpreting the Area Redevelopment Plan instead of the *Edmonton Zoning Bylaw*. The Strathcona Junction Area Redevelopment Plan is not part of the *Edmonton Zoning Bylaw* and the Development Officer is using an interpretation method that only applies to the *Edmonton Zoning Bylaw*. Section 3.5(2) cannot be used to provide the power to interpret other Acts, Bylaws or Plans. This Board has dealt with this issue previously and advised the Development Authority that it is not correct.

[51] SDAB-D-13-030 specifically addressed the meaning of the word billboard and included a reason which stated:

> The Board accepts that the meaning of the word "billboard" is unclear given "billboard" is not defined in the current *Edmonton Zoning Bylaw* or the Strathcona Junction ARP. The Board is unable to give "billboard" a meaning which would eliminate the proposed development since Minor Digital Signs are listed as Discretionary Uses in the CB2 General Business Zone.

[52] SDAB-D-18-048 included the following reason:

> The *Edmonton Zoning Bylaw* differentiates between types of Signs such as Digital, On-premises, Off-premises or a combination of the two latter Signs and directs where they may be placed. Billboards are not covered under any of these definitions.

[53] It is therefore requested that the Board adopt this same reasoning to determine that section 3.1.10 does not apply in this matter.

[54] Garage 104 is a one-stop vehicle repair shop that employs 20 people. It is estimated that the existing sign on 104 Street generates up to 20 customer calls per day. This is a small business and the owner cannot afford to pay for advertising on a commercial sign of a third party. The existing sign provides business exposure 24 hours per day, 7 days per week and name recognition is essential for the success of the business.

[55] The cost to remove the existing sign and re-install a smaller sign would be approximately $40,000 which the owner cannot afford. The cost to remove the sign entirely is between $4,000 and $5,000.

[56] Photographs were referenced to provide an overview of the subject site and the surrounding area. There is a wide sidewalk and parking lot adjacent to the building and big box stores located across the street. A pedestrian walking south on 104 Street can barely see the sign and it does not protrude onto the sidewalk or 104 Street.

[57] Recent photographs of 25 properties that are currently listed for sale or lease within the Strathcona Area Redevelopment Plan were referenced to illustrate that 8 years after the Area Redevelopment Plan was adopted by Council, many buildings are vacant and lots undeveloped. The vision of Council to provide a welcoming entrance into the city has still not been achieved.

[58] Photographs of existing billboards, including the NAIT Campus, United Cycle and one on the corner of Gateway Boulevard and 104 Street were referenced. These signs were erected after the adoption of the Area Redevelopment Plan in 2012.

[59] This sign does not conflict with any other Use or user and it is appropriate for the Board to grant the variances required.

[60] Mr. Powley advised the Board that he relies on the sign to advertise his products and services which is essential in this difficult economy. It allows him to pay his employees and his property tax bill which is $50,000/year. He does not profit from advertising revenue even though there are other businesses with signage located in the same Area Redevelopment Plan that profit from advertising revenue generated by their signage. The existing sign only provides advertising for his business. He has been at this location for over 20 years and there are currently more than 20 businesses vacant, for lease or for sale. It gets worse every day and he may be the next business forced to close if he is forced to remove the sign. His property taxes continue to increase every year. It is frustrating to see much larger third party advertising signs be approved in the Area Redevelopment Plan

when he is just trying to obtain approval for this sign that provides critical advertising for his business. He questioned why the City is trying to shut his small business down when the sign has existed for many years without complaint. All of the neighbouring business owners received notice of the appeal and none of them provided a written objection or attended the hearing.

[61] Transportation Services indicated that there are no transportation related concerns because the sign as currently installed is outside the TAC cone of vision. The existing sign is sensitive and in scale with surrounding development. It is located on the corner of a building and is only visible to traffic travelling south on 104 Street. This is not a pedestrian friendly corridor and the annual average weekday traffic count is 20,000 vehicles per day.

[62] If the sign is not allowed, it will create hardship to the Appellant because their location could be missed by drivers and potential customers lost. There are practical difficulties peculiar to the site and building. The sign has existed on this building at this location without any known or detailed complaints since 2013. Based on the photographic evidence provided, there is a variety of digital and billboard signs of varying sizes located along 104 Street and the existing sign is therefore compatible in this area.

[63] A series of photographs was referenced to illustrate that nothing of great significance has changed near or around this site over the past nine years.

[64] Approval for a period of a further five years will provide an opportunity for all parties to review the subject sign at that time and make changes based on the progress of the goals of the Area Redevelopment Plan at that time.

[65] The location of the sign is the most advantageous for the Appellant's business, no part of the sign projects beyond the property lines, the sign is compatible in this area, no objections were received and no one appeared in opposition to the proposed development.

[66] The recommended conditions of the Development Officer have been reviewed and are acceptable.

[67] If one of the large sign companies loose an appeal they simply find another location. However, there is no second chance for this small business owner who depends on this sign for his livelihood.

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

a) Section 710.5 refers to all regulations, including general development regulations and administrative clauses pursuant to the *Edmonton Zoning Bylaw* this reasoning was applied by the Board in SDAB-D-19-176.

b) The Court of Appeal in *Garneau* did not make that distinction. It was determined that the regulations unless varied can be varied by the Development Authority or the

Board pursuant to the power of the Development Authority. The Court of Appeal did not say that section 11.3 and 11.4 do not apply.

c) Neither the Court of Appeal nor the Board in previous decisions has made that distinction. It would be inconsistent with how the Court of Appeal has interpreted Direct Control Zones and how variance power is applied.

d) The Board approved the sign in 2013 but did not specify an exact location in the written decision. The Board would have approved the sign based on the plans that were provided by the Applicant. The property owner then retained a third party to install the sign at this location and it has never been moved.

e) Crystal Glass has a permitted sign that generates revenue. The NAIT sign is twice as large as this sign, is closer to the road and contains digital advertising video. The Save On sign is bigger and runs digital images even though it is not permitted. Icewerx was hired to obtain a development permit for this sign and it was erected to target vehicles travelling south on 104 Street. He was told that all of the other signs for surrounding businesses were grandfathered in when the Area Redevelopment Plan was adopted.

f) Mr. Powley hired Admax to apply for a new development permit for the sign at this location and was told by his Councilor and other City representatives that it would be approved.

g) The City has issued numerous tickets and a Stop Order to this property owner which has resulted in exorbitant legal fees and thousands of dollars in fines. He questioned why the City has chosen to "take a hammer to a mosquito" and destroy a small business owner in the process.

h) This sign has existed since 2013. Mr. Powley hired Icewerx and paid them $140,000 to obtain a development permit and erect the sign. Icewerx advised him that the sign at this location was approved by the Board.

i) The previous approval was for a period of five years. This is a new development permit application for the sign as it exists.

j) Mr. Powley comes with clean hands because he relied on a third party to obtain the development permit and erect the sign. He cannot be punished for something done by a third party that he paid for and relied upon. The hardship now is real to him and that has to be dealt with.

k) It was his opinion that you do not have to prove both unnecessary hardship and practical difficulties. These ae two separate concepts because of the use of the word "or" in the regulation. Unnecessary hardship is broad and there is no limitation. If a sign causes unnecessary hardship to the user it is a factor that can be considered by the Board.

l) It was acknowledged that the Surveyor drawing provided with the application is most accurate. There is no bylaw infraction with respect to the location of the sign. The size of the sign is the concern. The sign cannot be lowered because of the location of the door but if the sign was moved to another location on the building it would be outside the TAC cone of vision and would not be effective.

m) One of the variances being sought is the maximum allowed projection from the building. In order for a Minor Digital On-premises Sign to be this Use, it must be either a Fascia or Freestanding sign.

n) Section 6.2 defines a Fascia Sign as a Sign that is painted on or attached to an exterior building wall, or any other permitted structure, on which a two dimensional representation may be placed. Fascia Signs do not extend more than 40 centimeters out from the building wall or structure. Fascia Signs include banners or any other two dimensional medium. If the sign extends more than 40 centimeters it is defined as a Projecting Sign.

o) Section 6.2 defines a Projecting Sign as a Sign that is attached to an exterior building wall, or any other structure, or suspended below the ceiling of a canopy, awning, or other structure. Projecting Signs extend more than 40 centimeters out from the building wall or structure.

p) Based on these definitions and the *Grewal* Court of Appeal decision (2017 ABCA 140), how should these Sign Use definitions be interpreted based on the fact that the Board does not have the authority to vary Use. How does the proposed sign still qualify as a Fascia Sign?

q) The proposed sign does not fit the definition of a Projecting Sign. It was his opinion that this is a Fascia Sign. The Development Authority has always classified the sign as a Fascia Sign and not as a Projecting Sign. It was acknowledged that the Board cannot vary a definition that is included in the Use definition.

r) If the Board finds that the proposed sign is a Projecting Sign and not a Fascia Sign, the Appellant should be provided more time to make further arguments on that issue. The appeal was based on the reasoning of the Development Authority which did not raise the Use Class definitions as an issue. The Development Authority may also want more time to revisit the application. Therefore it would be procedurally unfair for the Board to proceed without providing an opportunity for both parties to provide further comments.

[69] Projecting On-premises Signs are a listed Use in this Direct Development Control Provision. Section 7 requires Signs to comply with the regulations found in Schedule 59E, except that (i) the maximum Height of a Freestanding Sign shall be 6.0 metres; (ii) a Projecting Sign may be used to identify businesses that are located entirely at or above the second Storey level; and (iii) the top of a Projecting Sign on a building two Storeys or higher shall not extend more than 75 centimetres above the floor of the second or third Storey, nor higher than the windowsill level of the second or third

[70] Section 59E.2(2) does not include any width, height or area restrictions for Projecting On-premises Signs.

[71] The development requirements for Projecting Signs are different and the issue would be that this would be a Projecting Digital On-premises Sign. He questioned why the Development Authority did not identify the Use definition as an issue.

[72] The building is 24 feet high. There is a mezzanine that is used for storage.

ii) Position of the Development Officer, B. Noorman:

[73] A copy of the original decision of Board, SDAB-D-13-019 and the stamped drawings are included in the written submission. It is clear that the sign as installed is not consistent with that decision. One of the reasons provided for approving the development was that the sign is setback significantly from the pedestrian travel route along 104 Street and therefore will not detract from the pedestrian friendliness of the street.

[74] Applications are reviewed based on the site, location, height and all of the other parameters of the *Edmonton Zoning Bylaw*. The location of the sign is based on the drawings provided by the Applicant and it is reviewed in that context.

[75] A Development Officer must comply with the Strathcona Junction Area Redevelopment as part of an application review and therefore section 3.1.0 applies. Even the Appellant has referred to billboards in the vicinity of the prosed sign. Billboard is a common term. Section 3.5(2) directs the Development Officer to apply the plain and ordinary meaning when a term is not defined in the *Edmonton Zoning Byla*w which was done in this case.

[76] The decision was based on a review of the survey that was submitted because there were inconsistencies between the survey and the drawings submitted by the Applicant.

[77] It was her opinion that the variance power provided in section 11.3 and 11.4 does not apply in a Direct Control Zone but it is open for interpretation.

[78] It was her opinion that hardship relates to the use of the land and building and not the user. The user and their hardships are not considered as part of the review.

[79] It was determined during a review that was initiated by a public complaint regarding the brightness of the sign that the sign had not been erected in accordance with the initial approval of the Board and that it contained third party advertising. The development permit that was issued was for a sign that is approximately three times smaller than what exists and it was setback further from the public sidewalk and 104 Street. It was noted that one of the reasons that the Board provided for approving the sign was that it was setback further from the public sidewalk and adjacent roadway.

[80] A Projecting Sign cannot be a Digital Sign and the proposed sign does not fit that definition. However, the sign does not comply with the definition of a Fascia Sign either.

A decision had to be made on what she felt was the Use that made the most sense and that was classifying the sign as a Minor Digital On-premises Fascia Sign.

[81] If this sign is considered to be a Projecting On-premises Sign it would be refused. It is ultimately the decision of the Board but it was her opinion that postponing the hearing will not make any difference.

iii) Rebuttal of the Appellant:

[82] There is a problem with the definition for a Projecting Sign On-premises Sign because section 59E does not allow Digital Signs. That is why the sign company applied for a development permit for a Fascia Sign. A Projecting Sign can be illuminated but it cannot be digital.

[83] It was acknowledged that the Board does not have the ability to vary a Use definition. Therefore, Mr. Powley will take the necessary steps to comply with the maximum allowable 40 centimetres projection in accordance with the Use class definition. He is prepared to incur the costs to correct this issue if the other required variances are granted.

[84] The term "billboard" has been addressed by the Board in previous decisions. It was determined that it is not a defined term in either the Area Redevelopment Plan or the *Edmonton Zoning Bylaw* and that the *Edmonton Zoning Bylaw* cannot be used to interpret the Area Redevelopment Plan.

[85] Variances are required for the maximum allowable Height and the area of the Sign.

[86] The location of the sign is not an issue here because this is a new development permit application. What exists is the reality of what the Sign Company did in 2013.

[87] The focus is the Use of land in land use planning. However, because it is such a broad statement, the User can be considered in the process. It is not mandatory that the Development Authority consider it but it is available.

[88] Mr. Powley reiterated that he is simply asking for a level playing field and the ability to advertise his business in the same way that the City has allowed for neighbouring businesses. The existing sign is working for his business.

[89] If the Board denies the entire application without dealing with the other required variances, a new development permit application to eliminate the variance required for the 40 centimeter projection will probably still be refused and require another appeal.

[90] It was acknowledged that the sign has been erected in a different location than was approved by the Board. However, this is a new development permit application seeking approval for the existing sign at this location.

[91] No details have ever been provided regarding the nature of the complaint and it was noted that the Board did not receive any written objections and no one has appeared in opposition to the proposed development.

Decision

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

Reasons for Decision

[93] The appeal triggers two main issues before the Board:

a. What is the Board's jurisdiction in a Direct Control District?
b. How does the Board's variance power apply to each of the variances being sought?

Issue 1: Jurisdiction in a Direct Control District

[94] The development is proposed on a parcel of land that is designated a Direct Control District. Pursuant to Section 685(4)(b) of the *Municipal Government Act* (the "*MGA"*), the appeal before this Board *is limited to whether the development authority followed the directions of council.*

[95] The Board finds that the Development Officer did not follow the directions of Council because she did not turn her mind to the variance power provided in sections 11.3 and 11.4 of the *Edmonton Zoning Bylaw*.

[96] Moreover, the Development Authority stated during her presentation that she did not believe she had a variance power under those sections and did not consider this possibility.

[97] The Board finds that this is an error and a failure to follow the directions of Council. The Development Authority has the ability to consider variances to development regulations under sections 11.3 and 11.4 of the *Edmonton Zoning Bylaw.*

[98] Sections 11.3 and 11.4 were not excluded or modified in DC1 Direct Development Control Provision (Charter Bylaw 18636). Moreover, there is no general prohibition on the Development Authority's ability to consider variances in the Provision. Therefore, those provisions remain in effect pursuant to section 710.4(5) of the *Edmonton Zoning Bylaw*. That section states:

> *All regulations in this Bylaw shall apply to development in the Direct Control Provision, unless such Regulations are specifically excluded or modified in a Direct Control Provision.*

[99] The Board adopts the reasoning of this Board in SDAB-D-19-176 and agrees with the Appellant on application to the facts in this Appeal.

[100] As in SDAB-D-19-176, regulations relating to variance powers were not specifically excluded or modified in this Direct Control Provision. Therefore, the Development Authority had every right, and also the obligation, to consider their variance power found

in the Bylaw. In failing to turn their mind to this possibility, the Board finds that the directions of Council were not followed.

[101] This is not to suggest that the Development Authority was obligated to grant the variance, but simply needed to consider the application of those variance power sections of the *Edmonton Zoning Bylaw.*

Issue 2: The Board's Variance Power

[102] Given that the Board finds that the Development Authority did not follow the directions of Council, the Board is then entitled to substitute its own decision in accordance with those directions.

[103] The Court of Appeal in *Garneau Community League v Edmonton (City)*, 2017 ABCA 374, has clarified that this is not the Board's ordinary variance power under section 687(3)(d) of the *MGA* but is instead the same variance power that was available to the Development Authority.

[104] As outlined above, those variance powers are laid out in sections 11.3 and 11.4 of the *Edmonton Zoning Bylaw*. Specifically, the limitations on variance powers are restricted to situations of *unnecessary hardship or practical difficulties peculiar to the Use, character, or situation of land or a building, which are not generally common to other land in the same Zone.*

[105] The Board is of the opinion that the variances being sought do not satisfy these criteria. Moreover, the Board is not persuaded by the Appellant's submission that the unnecessary hardship is broad enough to encompass personal hardship when considering the application of variance power to a development.

[106] The Board finds that the more appropriate interpretation of these sections is that the hardship must relate to the Use, character, or situation of land or a building, which are not generally common to other land or buildings in the same Zone.

[107] The first ground of refusal and variance being sought was in relation to the maximum Area of the Sign (Section 59E.3(4)(c)). The Board heard evidence that this regulation was ambiguous in that it provided two different numbers for maximum Area - one which the development complies with and one which it did not.

[108] The Board disagrees that an ambiguity exists in this provision and finds no complication in interpreting the provision. The section states that the maximum Area shall be 10.0 square metres to a maximum of 25% wall coverage. The correct interpretation of the section is that the Sign can be up to 10.0 square metres provided that it does not exceed 25% wall coverage. The proposed development clearly offends this section of the *Bylaw* because it is greater than 10.0 square metres in Area. The Board finds there is no unnecessary hardship or practical difficulty in relation to meeting this provision.

[109] This is most clearly demonstrated in this Board's decision SDAB-D-13-019. In that decision, the Board granted a development permit for the subject property for a Minor

Digital Sign that complied with all the regulations, including the maximum Area regulation found in Section 59E.3(4)(c). The Sign that was constructed violated several regulations which are the subject of this appeal. Any personal hardship that exists now, financial or otherwise, is self-inflicted and is a result of installing a Sign that did not comply with that earlier development permit. As alluded to in this decision, those personal hardships are not the types of hardship to consider under the variance powers in Section 11.4 of the *Bylaw*.

[110] The second ground of refusal and variance being sought is in relation to the top extension of the Sign above the parapet (Section 59E.3(4)(e)). The Appellant cited a hardship in relation to being unable to lower the sign due to a conflicting doorway.

[111] The Board again finds that this hardship is self-inflicted for the same reasons as the first ground for refusal. The Board relies on the previous development permit which demonstrates that compliance with this regulation is possible by locating the Sign on a different part of the building.

[112] The third ground of refusal and variance being sought is in relation to the projection of the Sign from the building by more than 40 centimetres (Section 59E.3(4)(g)). However, the Appellant conceded that this is not a variance that could be considered by the Board given that this dimension is contained in the definition of a Fascia Sign (Section 6.2).

[113] The Board agrees. The Court of Appeal decision in *Edmonton (City) v Edmonton (Subdivision and Development Appeal Board)*, 2017 ABCA 140 ("*Grewal*") states that the Board cannot vary fundamental requirements of Use Class definitions. The Use Class definition of Minor Digital On-premises Signs found in Section 7.9(8) states that they are Freestanding or Fascia Signs. Because a Fascia Sign is defined as one that does not extend out more than 40 centimetres from a building wall, 40 centimetres is a "fundamental requirement" of the Minor Digital On-premises Signs Use. The regulation in Section 59E.3(4)(g) simply reinforces this notion in the same way contemplated in *Grewal*. Therefore, the Board has no jurisdiction to consider a variance to this regulation.

[114] The Appellant suggested that they would be willing to accept, and comply with, a condition to reduce this dimension so that the proposed development could be properly characterized as a Minor Digital On-premises Sign. However, the Board did not need to consider this possibility given its findings on the first two grounds for refusal.

[115] The fourth ground of refusal related to Section 3.1.10 of the Strathcona Junction Area Redevelopment Plan (ARP). The Development Authority found that the Minor Digital Sign constitutes a "billboard" for the purposes of applying the ARP. The Board disagrees for the same reasons articulated in SDAB-D-13-030 and SDAB-D-18-048 presented by the Appellant. This Board finds that specificity of the Direct Control District, passed by Council, must override the general provision found in the ARP. Minor Digital Signs are a listed Use in this District. To override this express authorization through the use of a general and undefined term in a general aspirational document is inconsistent with the spirit of the Direct Control District and the intention of Council.

Conclusion

[116] In conclusion, notwithstanding the finding that the Development Authority failed to follow the direction of Council by not exercising the variance power provided in sections 11.3 and 11.4 of the *Edmonton Zoning Bylaw*, the Board is not persuaded that this would be an appropriate exercise of the variance provisions that govern this Board in the case of this Direct Control District.

[117] Based on the evidence provided, any personal hardship resulting from the proposed development is the result of constructing a Minor Digital On-premises Fascia Sign of a certain scale and at a particular location on the building that did not comply with the previous development permit. The previous decision of this Board demonstrates that a fully compliant Minor Digital On-Premises Sign is possible on this site. It cannot then be said that any unnecessary hardship or practical difficulties exist as contemplated in the *Bylaw*. Therefore, this is not an appropriate circumstance to exercise the variance powers directed by Council in passing the Direct Control District.

[118] The appeal is denied and the development is refused.

Rohit Handa, Presiding Officer
Subdivision and Development Appeal Board

Important Information for the Applicant/Appellant

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

2. When a decision on a Development Permit application has been rendered by the Subdivision and Development Appeal Board, the enforcement of that decision is carried out by the Sustainable Development Department, located on the 2nd Floor, Edmonton Tower, 10111 – 104 Avenue NW, Edmonton, AB T5J 0J4.

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

EDMONTON SUBDIVISION AND DEVELOPMENT APPEAL BOARD

SDAB-D-19-201

Project Number 169981523-013

Citation: Crestwood Condominiums Inc. v Development Authority of the City of Edmonton, 2019 ABESDAB 10201 was **WITHDRAWN**