

EDMONTON SUBDIVISION AND DEVELOPMENT APPEAL BOARD

Citation: OUTFRONT Media v Development Authority of the City of Edmonton, 2019
ABESDAB 10176

Date: October 31, 2019
Project Number: 313539906-001
File Number: SDAB-D-19-176

Between:

OUTFRONT Media

and

The City of Edmonton, Development Authority

Board Members

Rohit Handa, Presiding Officer
Shari LaPerle
Allan Bolstad
Debby Kronewitt-Martin
Alex Nagy

DECISION

[1] On October 16, 2019, the Subdivision and Development Appeal Board (the “Board”) heard an appeal that was filed on August 16, 2019 for an application by Outfront Media Canada LP. The appeal concerned the decision of the Development Authority, issued on August 14, 2019, to refuse the following development:

To install a Minor Digital Off-premises Freestanding Sign (Facing East/West) (OUTFRONT | FAMILY MOTORS)

[2] The subject property is on Plan 0826005 Blk 1 Lot 1, located at 12518 - 97 Street NW, within the DC2 Site Specific Development Control Provision. The Yellowhead Corridor Area Structure Plan applies to the subject property.

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

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

Preliminary Matters

[4] 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.

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

[6] 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*").

[7] 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, J. Harding, representing Outfront Media and J. Agrios, Kennedy Agrios LLP, Legal Counsel:*

[8] The proposed application is to install a two sided Minor Digital Sign located at the northwest corner of 97 Street and Yellowhead Trail.

[9] The proposed development was refused because of deficiencies in the minimum required separation distance from other existing signs and the minimum required setback for a sign of this size and character.

[10] Outfront Media is prepared to relocate the sign to comply with the setback requirements. It was suggested that if it is the decision of the Board to approve the proposed sign, a condition can be imposed requiring the Applicant to submit a revised Site Plan to confirm that the Sign is now in compliance with the minimum required setback.

- [11] The subject site is zoned DC2.990 Site Specific Development Control Provision. Section DC2.990.3(oo) includes Minor Digital Signs as a listed Use.
- [12] DC2.990.1 states that the General Purpose of this zone is to “provide for a range of commercial and business uses on a site that maintains high visibility along 97 Street and Yellowhead Trail, and to establish site-specific development regulations to ensure that the Site is remediated to the extent necessary to accommodate the intended Uses”.
- [13] DC2.900.4(r) addresses the fact that the site contained some contamination as a result of a service station that previously operated from the site. The Applicant was required to remediate the Site and submit a Remediation Report to the satisfaction of the Development Officer.
- [14] DC2.990 was amended in March 2108 to include Minor Digital Signs as a listed Use.
- [15] DC2.990.4(m) states that “Signs shall comply with the Zoning Bylaw 59F”.
- [16] Schedule 59F.3(6)(e) states that “proposed Sign locations shall be separated from other Digital Signs greater than 8.0 square metres or Off-premises Signs by 200 metres if the proposed Sign Area is between 20 and 40 square metres”.
- [17] Section 720.3(3) of the *Edmonton Zoning Bylaw* states that “All regulations in the Zoning Bylaw shall apply to development in the Direct Control Provision, unless such Regulations are specifically excluded or modified in Direct Control Provision”.
- [18] Section 11.3 and 11.4 of the *Edmonton Zoning Bylaw* were referenced to 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.
- [19] Previous decisions of the Board and the Court of Appeal were referenced. The most relevant decisions are SDAB-D-18-150 and SDAB-D-18-151 regarding proposed signs in DC2.508 Site Specific Development Control Provision. In making a decision, the Board determined that the Development Officer did not follow the directions of Council because the variance powers provided in the land use bylaw were not considered.
- [20] There is no evidence that the Development Officer turned their mind to the fact that variance power was available before refusing this development permit application. Therefore, the Development Officer erred by failing to recognize that discretion could be used to grant a variance. The development permit application was refused because the proposed sign did not comply with the regulations without determining if variances could be granted pursuant to sections 11.4 and 11.5 of the *Edmonton Zoning Bylaw*.

- [21] All of the 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. In this case, sections 11.3 and 11.4 of the *Edmonton Zoning Bylaw* provide variance power.
- [22] A series of aerial photographs were referenced to illustrate that the subject site is located north of Yellowhead Trail and west of 97 Street. The CN rail yards are located north of the site, a cemetery is located south of the site across Yellowhead Trail and there numerous business and commercial uses located east of the subject site across 97 Street.
- [23] A Site Plan was referenced to illustrate the location of three Freestanding General Advertising signs. The two signs located closest to 97 Street have been removed and the remaining existing sign will be replaced with the proposed digital sign.
- [24] The two signs that were removed were located closer to 97 Street and were oriented north/south to target vehicles on 97 Street. The proposed sign will be sited as far west as possible on the site and will be oriented east/west to target vehicles on Yellowhead Trail.
- [25] The east face of the proposed sign will be 10 feet by 20 feet and will target vehicles travelling west on Yellowhead Trail. The west face of the sign is larger, 10 feet by 35 feet and will target vehicles travelling east on Yellowhead Trail. The west facing panel needs to be larger in order to make the sign visible to motorists travelling east at a higher rate of speed.
- [26] The proposed sign, with the revision to relocate the sign to comply with the setback requirements, complies will all of the development regulations with the exception of the minimum required separation distance.
- [27] An aerial photograph was referenced to illustrate the distances between the proposed sign and the other existing signs. It was noted that the three existing signs on 97 Street are oriented north/south towards the traffic on 97 Street.
- [28] A photograph taken from the intersection of 97 Street and Yellowhead Trail was referenced to illustrate the view that westbound traffic will have of the proposed 10 feet by 20 feet digital panel facing east and the location of two signs that have been removed from the site. Several photographs of the proposed 10 feet by 35 feet panel facing west were referenced to illustrate that traffic travelling east on Yellowhead Trail cannot see any of the existing signs on 97 Street when this panel comes into view.
- [29] Photographs were referenced to illustrate the location of the signs that have been removed from the site and the location of the proposed new sign.
- [30] The variance in the minimum required separation distance is justified because the proposed sign will replace three freestanding advertising signs on this site. The proposed sign complies with all of the other development regulations. The signs that fall within the 200 metre separation space are all oriented north/south to target traffic on 97 Street. The

signs along 97 Street and the proposed west panel of the sign are not visible at the same time. There were no objections raised by any of the adjacent businesses or commercial uses.

- [31] The Board must consider the variance power provided in sections 11.4 and 11.5 of the *Edmonton Zoning Bylaw* and consider hardship.
- [32] Even though this DC2 Zone was amended in 2018 to include digital signs, the proposed sign cannot be erected anywhere on the site to comply with the minimum required separation distance requirement. The two closest signs existed in March 2018 when the DC2 Bylaw was amended.
- [33] Ms. Agrios and Ms. Harding provided the following information in response to questions from the Board:
- a) It was acknowledged that there is nothing prohibiting a new development permit application for a sign on this site but it will be difficult to obtain because of the minimum separation distance requirements.
 - b) Approval of this sign will make it more difficult to replace the signs that were removed.
 - c) The notification map was referenced to identify which property owners received notice of the appeal. It was clarified that none of the sign companies who own the existing signs were notified.
 - d) The property owners advised that they applied for a development permit for a digital sign in 2010 but it was abandoned because that Use was not permitted on the site. The site was rezoned to allow digital signs.
 - e) The development permits for the two signs that have been removed from the site no longer exist. A new development permit application would be required in order to install additional signs on this site.
 - f) Two 10 feet by 20 feet signs could be installed on this site without a variance. The size of the proposed sign triggered the required variance in the minimum required separation distance.
 - g) The proposed size of the west facing panel is required in order to be visible to traffic travelling east on Yellowhead Trail. Traffic travelling east on Yellowhead Trail cannot see the existing signs on 97 Street until they are at the intersection because they are oriented north/south. The proposed 10 feet by 35 feet panel that faces west is not visible from 97 Street.

- h) The Development Officer erred by not considering the variance power provided in sections 11.4 and 11.5 of the *Edmonton Zoning Bylaw* which is also available to the Board.
- i) There is a hardship for the property owner because even though the DC2 was amended to allow digital signs as a listed Use, there is nowhere on the site that the proposed sign can be located to comply with the minimum required separation distance requirement.
- j) If the Board decides to approve this application, a condition can be imposed requiring the Applicant to submit a revised Site Plan to show the relocation of the sign to comply with the setback requirement. The recommended conditions provided by the Development Officer have been reviewed and are acceptable to the Applicant.

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

[34] Ms. Mercier did not attend the hearing but provided a written submission that was considered by the Board.

Decision

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

Reasons for Decision

[36] The appeal in 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 the variances being sought?

Issue 1: Jurisdiction in a Direct Control District

[37] 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*.

[38] The Board finds that the Development Officer did not follow the direction of Council because they did not turn their mind to the variance power provided in sections 11.3 and 11.4 of the *Edmonton Zoning Bylaw*.

- [39] The Board must rely on the information presented at the hearing. Regrettably, the development authority did not attend the hearing. The Board was therefore only left with a written submission, provided prior to the hearing, to consider the decision making process of the development authority.
- [40] Based on that submission, the Board finds that development authority did not consider their ability to vary development regulations found in 11.3 and 11.4 of the *Edmonton Zoning Bylaw*. On the face of the submission, it appears as though the development authority's decision was made once they identified non-compliance with Schedule 59F.
- [41] However, sections 11.3 and 11.4 were not excluded or modified in DC2.990 pursuant to section 720.3(3) of the *Edmonton Zoning Bylaw*. That section states:

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

- [42] The Board agrees with counsel for the Appellant that the regulations relating to variance powers were not specifically excluded or modified in a 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.
- [43] 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

- [44] 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.
- [45] 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.
- [46] 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*.

- [47] The Board is of the opinion that the variances being sought do not satisfy these criteria. The Board bases its decision on the variance relating to separation distances and does not feel it necessary to deal with the setback variance found in Schedule 59F.3(6)(j), including the possibility of accepting a revised site plan as a condition to the development.
- [48] With respect to the separation distances, the proposed Minor Digital Off-premises Sign is a listed Use in the DC2.990 Site Specific Development Control Provision, pursuant to section DC2.990.3.00.
- [49] Section DC2.990.4(m) states “Signs shall comply with the Zoning Bylaw Schedule 59F”. Schedule 59F.3(6)(e) states:
- Proposed Sign locations shall be separated from Signs with Digital Copy greater than 8.0 square metres or Off-premises Signs with a proposed Sign Area of between 20 and 40 square metres by a minimum of 200 metres.
- [50] The Board appreciates the Appellant’s argument that a sign of this size and character is not possible anywhere on the subject site by virtue of the sign regulations found in Schedule 59F.
- [51] However, the Appellant conceded that a smaller Off-premises digital sign is possible on the site without the need to trigger any variances. This is indicative that hardships and practical difficulties relating to the proposed development are self-inflicted. They are not attributable to the Use, character, or situation of land or a building as is the criteria laid out in the *Edmonton Zoning Bylaw*.

Conclusion

- [52] 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.
- [53] Based on the evidence provided, any hardship resulting from the proposed development is the result of the Applicant’s decision to develop a Minor Digital Off-premises Freestanding of a certain scale. This is not an appropriate circumstance to exercise the variance powers directed by council in passing the direct control district.

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

A handwritten signature in black ink, appearing to read 'R. Handa'. The signature is stylized with a large 'R' and a series of vertical lines for the 'H'.

Mr. R. Handa, Presiding Officer
Subdivision and Development Appeal Board

c.c. City of Edmonton, Development & Zoning Services, Attn: Ms. K. Mercier/Mr. H. Luke

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

Citation: Zona Developments v Development Authority of the City of Edmonton, 2019
ABESDAB 10177

Date: October 31, 2019
Project Number: 339993833-002
File Number: SDAB-D-19-177

Between:

Zona Developments

and

The City of Edmonton, Development Authority

Board Members

Rohit Handa, Presiding Officer
Shari LaPerle
Allan Bolstad
Debby Kronewitt-Martin
Alex Nagy

DECISION

- [1] On October 16, 2019, the Subdivision and Development Appeal Board (the “Board”) heard an appeal that was filed on September 24, 2019 for an application by Zona Developments. The appeal concerned the decision of the Development Authority, issued on September 23, 2019, to refuse the following development:

To change the Use from a General Retail Store to a Child Care Service (Maximum 42 children) and to construct interior and exterior alterations (amend landscaping, new outdoor play space)

- [2] The subject property is on Plan 1523990 Unit 2, located at 5010 - 162 Avenue NW and Condo Common Area (Plan 1523990), located at 5004C - 162 Avenue NW, within the (CNC) Neighbourhood Convenience Commercial Zone. The Hollick Kenyon Neighbourhood Structure Plan and Pilot Sound Area Structure Plan apply to the subject property.

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

- Copy of the Development Permit application with attachments, proposed plans, and the refused Development Permit;
- The Development Officer's written submissions;
- The Appellant's written submissions;
- Photographs submitted by the Appellant prior to the hearing starting; and
- An email in opposition from a neighbouring property owner.

Preliminary Matters

[4] At the outset of the appeal hearing, the Presiding Officer asked whether the Appellant was concerned with the composition of the panel, specifically if any of the members of that panel may have a conflict of interest or were otherwise unable to provide him with a fair or unbiased hearing. The Appellant indicated that some of the Board Members sat at previous appeal hearings relating to a similar application to the one before the Board.

[5] However, the Appellant confirmed that he did not have a conflict with those Board Members sitting on the current appeal hearing. There was no opposition to the remaining composition of the panel.

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

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

Summary of Hearing

i) Position of the Appellant, Mr. M. Umarji, representing Zona Developments

[8] Mr. Umarji referred to the refused Site Plan.

[9] There are residential developments west of the subject Site.

[10] There are multi-family developments to the north and a portion of a property to the north is parking for that area.

[11] There is a medical clinic and car wash south on the subject Site.

[12] The proposed Child Care Service is on the north side of the property.

[13] The proposed Child Care Service will add to the neighbourhood and will not decrease property values.

[14] He referred to the reasons for the refused Development Permit.

[15] Refusal No. 1 states no portion of a Child Care Services Use, including the building bay and on bay with an approved development permit for Rapid Drive (Reference Section 80(2)(a)(v)). The Child Care Service and outdoor play space is proposed directly abutting a Rapid Drive Section 80(2)(a)(v).

-Site outdoor

-through Veh

-through Veh

[16] The proposed childcare play space does not directly abut the Rapid Drive Vehicle Services which in this instance is a car wash.

-Through

[17] As per the definition of the *Edmonton Zoning Bylaw*:

Abut or abutting means immediately contiguous to or physically touching, and when used with respect to a lot or Site, means that the lot or Site physically touches upon another lot, Site, or piece of land, and shares a property line or boundary line with it.

[18] The outdoor play space will be situated at the rear along 51st and is separated from the car wash by a 10” concrete precast panel. No portion of the play area is touching the car wash.

[19] He referred to TAB 3 showing photographs of pre-cast panel, steel concrete filled bollards, steel “I” beams.

[20] The portion of the proposed childcare, which will be closest to the carwash, will not be occupied by the children of the childcare service but rather be used for a staff kitchen, janitorial room, laundry, and staff washroom. A 10” precast concrete panel also separates this area as well.

[21] The heating and ventilation from the carwash will not interfere with the Child Care.

[22] Pick up and drop off stalls will be located along 51 Street. Three stalls will be marked and designated as passenger loading stalls which have been approved by the City of Edmonton Transportation.

[23] There is a public sidewalk leading to the main entrance of the building limiting any impacts from vehicles or the safety of children.

- [24] The additional stalls will be dedicated closest to the east entrance of the child facility, eliminating any interactions with the queuing lane of the rapid drive through use. (Similar to this Board approval SDAB-D childcare facility will only service the childcare facility and no other user. This will be enforced with signage. -19- 073 Tab
- [25] The majority of pick-up and drop-off spaces will be along 51 Street, as 14 stalls abut the property. The entry way referenced by the Development officer into the shared vestibule is an emergency only exit. The farthest stall along 51 Street from the main entrance of the facility is 54 metres, which is within the 100 metre requirement of the *Edmonton Zoning Bylaw*.
- [26] TAB 11 is a letter from the Director of the Child Care Service. Based on their operational experience, the pick-up and drop-off will occur along 51 Street. Based on the pre-registration, 33 of the 42 children are within walking distance to the facility. The out of school care program, offers pick up from the neighboring school by bus. Pick up times will be staggered which makes the dedicated stalls along 51 Street sufficient for the Child Care Service.
- [27] The proposed play area exceed both Alberta Licensing and Alberta Health services requirements, and only a max of 13 children will be within the area at one time.
- [28] TAB 4 is an aerial photograph showing the area that surrounds the Child Care Service.
- [29] Refusal No. 2 states no portion of a Child Care Services Use, including the building, building bay and on metres of a Major Service Station, a Minor Service Station or a Gas Bar. This distance shall be measured from the closest pump island, fill pipes, vent pipes, or service station or gas bar building, to the Child Care Services Use. (Reference Section 80(2)(c)). The Child Care Service is proposed within 50 metres of the closest gas bar building, the Gas Bar is located on the same Site, contrary to Section 80(2)(c). Site outdoor play
- [30] The measurement calculated by the Development Officer does not take into account the mitigating measures the Appellant has installed to limit the impact of the neighboring Gas Bar. The distance calculated to the nearest single gas pump at 47.2 metres as shown on the Site plan in TAB 2.
- [31] The Development Officer stated that the fumes from the gas bar come from the vent pipes, which give off fumes when the underground tanks are being filled. This distance is approximately 72 metres (236.4 feet) from the building bay and located directly opposite of the proposed childcare facility.

- [32] The play area is located at the rear of the Child Care facility along 51 Street, which is closer to 85 metres and fumes/vapor will need to climb an additional height of 8 metres to reach the play area. The distance used in the calculation by the Development Officer was to “one” gas pump.
- [33] The underground tanks are equipped with a bladder system, which is tested bi -annually for any leaks. Any soil exposure to the children within daycare would be within the play area, which is 83 metres away from the gas station underground tanks.
- [34] The closest portion of the gas station is “one” gas pump equipped with an auto shut off for any leaks, or fires to prevent any explosions. The gas station was developed in 2007, and equipped with the most up to date safety components.
- [35] The Child Care play area is located at the rear of building bay and separated by 3, 10” concrete panels.
- [36] He referred to TAB 8 showing examples of the Child Care facilities neighbouring a gas bar facility less than 50 metres, including the Board’s decision approving a Child Care facility that is 38.5 metres away from the proposed childcare with the play area located at the rear of the building as proposed in the subject application.
- [37] Refusal No. 3 states where Site conditions exist which may negatively impact the Child Care Services Use, including but not limited to trash collection areas, large parking lots, loading docks, rail lines, or arterial public roadways, the applicant shall design the building, entrances, play spaces, landscaping, and Fencing, or similar, to mitigate these conditions to the satisfaction of the Development Officer. (Reference Section 80(2)(d)).
- [38] It was the opinion of the Development Officer that the location of the existing Rapid Drive through Service with 9 service bays Child Care Service, would compound and create a dangerous and negative impact on the Child Care Service, contrary to Section 80(20)(d).
- [39] In his opinion, this is a continuation of reason for refusal No. 1.
- [40] He provided the Board with a video showing how the precast panel holds up with the impact of a vehicle moving at 62 kilometres per hour.
- [41] He referred to TAB 6 showing an example of a Child Care facility that is in close proximity to a carwash.
- [42] He referred to a photograph showing the inside of the play area.
- [43] He referred to photographs showing Child Care facilities that are abutting a rear lane.

- [44] Refusal No. 4 states on-site parking shall comply with Section 54.2, Schedule 1 of the Zoning Bylaw. Required: 49 spaces and 6 pick-up and drop off spaces; Proposed: 32 spaces + 3 pick-up/drop-off on street; Deficient by: 17 parking spaces and 3 pick-up and drop-off stalls.
- [45] The proposed change of use will require 6 drop off stalls and three staff stalls, they propose three dedicated drop off stalls on 51 street approved by City of Edmonton Sustainable Development, and the remaining three -drop off stal
second entrance of the childcare facility.
- [46] The proposed Child Care facility is designed to service the neighborhood. There are more than 240 apartments units within 3 blocks of the proposed facility all connected with a public sidewalk without even the need of crossing the street. Parents will use the street space for only five to ten minutes within certain time periods, so cars will not be parked throughout the day along 51 Street. From a land use perspective, this is an efficient use of space and land and is in line with City Council's direction about removing barriers to allow Child Care services in residential areas.
- [47] TAB 5 is the Development Officers submission allocating 21 stalls for the carwash. In his opinion, the cars will be inside the carwash or in the queuing lane.
- [48] TAB 5 is the letter from Transportation stating that the proposed 2 storey General Retail addition to the car wash building requires 13 parking stalls and the proposal includes 14 stalls resulting in a parking deficiency for the overall site (both buildings) of 20 parking stalls.
- [49] Transportation Planning and Engineering has no objection to the parking deficiency for the proposed addition, as the construction of this building and the provision of parking for it is isolated from the Site.
- [50] TAB 10 is an SDAB approved decision that states that the proposed development did not provide the required pick-up/drop-off parking onsite. In the opinion of the Development Officer, and with the agreement of Transportation Services, there was sufficient on-street parking immediately adjacent to the site, as evidence by the photographs provided by the Respondent.
- [51] The previous SDAB Decision states that parents will use a space for only five to ten minutes within certain time frames so cars will not be parked throughout the day.
- [52] Reason No. 5 states no outdoor service or display area shall be permitted within a Setback. (Reference Section 310.4(7)). The proposed outdoor play space (an outdoor service area) is located within the 4.5 metre setback from the public roadway (51 Street).

- [53] The Development Officer cited the following portion of the *Edmonton Zoning Bylaw*. No parking, loading, storage, trash collection, outdoor service or display area shall be permitted within a Setback. Loading, storage and trash collection areas shall be located to the rear or sides of the principal building and shall be screened from view from any adjacent Sites, public roadways or a LRT line in accordance with the provisions of Section 55.5 of this Bylaw. If the rear or sides of a Site are used for parking, an outdoor service display area or both, and abut a Residential Zone or a Lane serving a Residential Zone, such areas shall be screened in accordance with the provisions of subsection 55.4 of this Bylaw.
- [54] As per section 80(3)(a), “Where outdoor play space is provided at ground level it shall be allowed in any Yard”
- [55] Yard is defined in the Zoning bylaw as: Yard means the part of a Site unoccupied by any portion of a building or structure 1.0 metres or more above Grade, unless otherwise permitted in this Bylaw. A Yard is not a Setback, Amenity Area of Separation Space.
- [56] The proposed play area, which will be enclosed on all sides will be within the set back of an area which is approximately 15 feet away (5 foot sidewalk and 6” curb) from a neighborhood road way and a parking lot to the north. The *Edmonton Zoning Bylaw* does not define service area and that the proposed play area, does NOT serve as a service area but rather a “play area”. A play area, according to the zoning bylaw can be any Yard.
- [57] The play area will be fenced in similar to a front yard of a resident. The Bylaw is in place to prevent any hardship to neighbors by permitting parking, trash collection to be set into a setback.
- [58] The subject Site is surrounded by a neighborhood road way, and a parking lot to the north. The neighboring yards to the west are 58 feet away, and will only be exposed to a 6 foot high fence along with a sound wall which will prevent any sound of children playing during business hours. There is no evening or weekend use of the play area.
- [59] The play area offers approximately 600 square feet of play space area, and never fully occupied by all 42 children at once, but rather staggered times. It exceeds the space requirement for both Alberta Health Services and Childcare Licensing.
- [60] The proposed childcare facility meets the intent of the CNC zoning, to provide day -to- day commercial and personal services to the residents of the neighborhood. It is designed to service the surrounding neighborhood, and is compatible with the surrounding development, as the childcare pick-up and drop-off area are limited to 51 Street. There is no interaction with the neighboring gas bar, as the proposed outdoor play

space is located at the rear of the facility, protected by distance and neighboring buildings. The proposed childcare facility is protected from the neighboring rapid drive through which is encased in 10” precast concrete, steel “T” beams and concrete filled steel bollards. From the main entrance of the proposed daycare, one would not even be aware that there is a 7 y.11 or car wash neighboring the facilit

- [61] The Child Care facility will not be used during the evening or the weekend.
- [62] The proposed childcare facility adds to the neighborhood and will not materially interfere with or affect the use, enjoyment or value of the neighboring parcels.
- [63] Mr. Umarji provided the following information in response to questions by the Board:
- a. There was a change in the *Edmonton Zoning Bylaw* which necessitates the need for a variance.
 - b. There is a need for the Child Care Service in the neighbourhood which is within walking distance to the residential neighbourhood.
 - c. He confirmed the location of the entrances for the Child Care Service.
 - d. He confirmed the location of the second entrance where parents and children will access the Child Care Centre.
 - e. The majority of drop-off and pick-ups will be along 51 Street. There will be signs dedicating the drop-off and pick-up of spaces.
 - f. He did not speak to the resident that submitted a letter in opposition to the proposed development. In his opinion, there will not be an increase of on-street traffic.
 - g. He confirmed that the outdoor play area will be fully enclosed with a six foot fence.
 - h. With regard to parking, there will be dedicated parking for the Child Care Service. The out of school children will be bused to the subject Site.
 - i. The entrance is locked after children are dropped-off and times are booked with the parents for children to be picked-up.
 - j. The primary entrance will be through the outdoor play area.
 - k. Times for drop-off and pick-up will be from 7:00 a.m. to 9:00 a.m. and 3:30 p.m. to 6:30 p.m.

- l. He read Section 7.4(44) of the *Edmonton Zoning Bylaw* that states: Rapid Drive-through Vehicle Services means development providing rapid cleaning, lubrication, maintenance or repair services to motor vehicles, where the customer typically remains within their vehicle or waits on the premises. Typical Uses include automatic or coin operated car washes (including self-service car wash), rapid lubrication shops, or specialty repair establishments. This Use does not include automated teller machines.
- m. With regard to the photographs of other Child Care Centres, he stated that one facility is new and is located next to a queuing lane with a gas station, and the rest of the facilities are older.
- n. One change from the previous development permit application is the location of the Child Care Centre moving from the upper level to the main level of the building.
- o. He referred to the aerial photograph and confirmed where children will be dropped off and picked up on the west side of the building. Parents can park on 51 Street and walk to the building.
- p. He confirmed that the majority of children are within walking distance.
- q. He is willing to install a barricade to separate the queuing lane of the car wash from the play area.
- r. He confirmed that the play area is landscaped.
- s. The upper floor of the building is currently vacant. Access to the upper floor will not impact the Child Care Centre.
- t. Ventilation from the car wash will not impact the Child Care Centre.

ii) *Position of the Development Officer, Mr. P. Adams*

[64] The Development Authority did not appear at the hearing and the Board relied on Mr. P. Adam's written submission.

Decision

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

Reasons for Decision

- [66] The application before the Board is similar in scope to two previous decisions of the Board. Those decisions, SDAB-D-17-044 and SDAB-D-18-020, are not binding on this Board.
- [67] However, in the interest of fairness, this Board should strive for consistency in determining appeals. This approach has been confirmed by the Court of Appeal.
- [68] In the circumstances of this application, the Board finds that many of the reasons for refusal from those prior decisions continue to be live issues in the application at hand. The steps taken by the Applicant do not adequately address the reasons for refusal in the last two instances.
- [69] In addition, there have not been any material changes to the governing regulations presented to the Board which would substantiate a demarcation from those previous decisions. The Use continues to be a Discretionary Use and the regulations relating to proximity to other relevant Uses remain in place.
- [70] In arriving at its decision, the Board finds that many of the steps proposed by the Appellant are speculative and operational solutions that cannot be assured through the issuance of the Development Permit.
- [71] The primary purpose of the variances in question relate to safety. Specifically, the provisions are in place to ensure for the safety of children who are arguably most vulnerable. The Board puts significant weight on this aspect in arriving at its decision.
- [72] The primary measure taken by the Appellant to address the concern of the Board in previous decisions was the relocation of the primary entrance from the East end of the building at the parking lot to the West end along 51 Street. The Appellant provided evidence that 3 dedicated on street Drop-off spots would be provided for the development along 51 Street.
- [73] The Board is not persuaded that this configuration will adequately address the safety concerns associated with the development. While previous Boards found the original Drop-off location in the parking lot unsafe due to the proximity to the Rapid Drive-through Vehicle Service, the Board is not convinced that this revised proposal would result in adequate safety for patrons of the development. The problem is simply being shifted to another part of the site and the Board finds that previous safety concerns in the parking lot will persist.

[74] The Board arrives at this conclusion for the following reasons:

- i)* Children will now be subject to Drop-off on a through-street with arguably higher speed limits than existed in the previously proposed Drop-off location in the parking lot;
- ii)* Congestion and safety concerns around the parking area have been moved to this through-street and will be exacerbated given that the Appellant anticipates that school age children will be arriving at the Child Care Service by bus or on foot after school;
- iii)* Drop-off stalls will be entirely taken up at times by the bus that is dropping off or picking up school age children leaving only the parking lot to serve the development;
- iv)* There is a strong likelihood that several children will continue to be dropped off in the parking lot given the enrollment capacity and the availability of only 3 Drop-off spots; and
- v)* The proposed development continues to be located adjacent to the Rapid Drive-through Vehicle Service and Gas Bar which, as indicated above, has the strong likelihood of having children present near those Uses and leaves open the possibility that children could be negatively impacted by those Uses.

[75] In addition, the Board confirms the following findings from previous Board decisions and is not satisfied that sufficient steps have been taken to overcome those issues:

- i)* The single vehicular entrance to the Rapid Drive-through Vehicle Service is located at the northeast corner of the car wash and there are five queuing spaces extending to the east from that entrance. This entrance is in close proximity to where children will conceivably be dropped off, congregate, or otherwise interact with the site;
- ii)* Attempts to separate the queuing aisle from the secondary Child Care entrance and parking are insufficient to address the safety concerns given the proximity of the two Uses and the limited space;
- iii)* Safety concerns relating to the Gas Bar remain and continue to serve as an indicator that the proposed development, a Discretionary Use, may not be appropriate at this location; and
- iv)* The proposed Child Care Service is not an appropriate Discretionary Use at this location.

- [76] As in previous appeals, the Appellant provided evidence of other existing Child Care Service developments that appeared to be in contravention similar development regulations to those the Appellant is seeking variances. However, similar to those previous appeals, there was again no evidence before the Board concerning the legality or scale of those developments, the underlying Zoning or applicable development regulations in place at the time of the issuance of Development Permit approvals for those developments. The Board is not persuaded by those other developments.
- [77] Moreover, as the Board indicated above, it is not bound by precedent but should strive for fairness through consistency. While the Board could look to those other developments and other previous SDAB decisions provided by the Appellant as persuasive authorities to grant variances, the most persuasive authorities before this Board are those that dealt specifically with prior applications at this exact location under largely the same circumstances. Those conditions have not changed enough in the opinion of the Board to reverse those prior decisions.
- [78] Given the Board's findings on the discretionary nature of the development, the proximity to the Rapid Drive-through Vehicle Service, and the proximity to the Gas Bar, it sees no reason to determine the suitability of the variances relating to parking or the playspace located within the Setback.
- [79] Those considerations would only be relevant if the Board found that the proposed development was reasonably compatible with surrounding Uses.
- [80] However, the appeal fails on this first issue and the Board therefore denies the appeal.



Mr. R. Handa, Presiding Officer
Subdivision and Development Appeal Board

c.c. City of Edmonton, Development & Zoning Services, Attn: Mr. P. Adams / Mr. H. Luke

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 Development & Zoning Services, 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.