EDMONTON
TRIBUNALS
Subdivision & Development Appeal Board

10019 – 103 Avenue NW
Edmonton, AB T5J 0G9
P: 780-496-6079 F: 780-577-3537
sdab@edmonton.ca
edmontonsdab.ca

Date: June 7, 2019
Project Number: 141173722-279
File Number: SDAB-D-19-072

Notice of Decision

[1] On May 23, 2019, the Subdivision and Development Appeal Board (the "Board") heard an appeal that was filed on April 29, 2019. The appeal concerned the decision of the Development Authority, issued on April 15, 2019 to refuse the following development:

> **To construct exterior alterations (roof feature above Height) to an Apartment House building.**

[2] The subject property is on Plan 1422087 Blk 10 Lot 63, located at 2129 - Casselman Link SW and Condo Common Area (Plan 1722875), located at 2129C - Casselman Link SW, within the RA7 Low Rise Apartment Zone. The Callaghan Neighbourhood 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;
- The Appellant's written submissions; and
- Online responses.

Preliminary Matters

[4] At the outset of the appeal hearing, Mr. Laberge disclosed that he has consulted with Mr. Gooch on some development projects in the City but that this would not impact his ability to provide a fair and unbiased hearing. No one opposed the composition of the panel.

[5] The Chair 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*").

Summary of Hearing

i) Position of the Appellant, Mr. E. Gooch, representing EFG Architects:

[7] Mr. Gooch has worked as an Architect for 40 years and has built more than 300 apartment buildings in the City.

[8] He expressed some concern that the Development Authority is sending mixed messages because similar roof detail that exceeded the maximum allowable height has been included and approved in many of the apartment buildings that he has designed in the past.

[9] The Edmonton Design Committee is constantly trying to improve the visual aesthetic of buildings and asks that similar design features as those proposed be included. Eliminating the minor roof features only makes the building less attractive.

[10] Only a very small portion of the proposed roof features exceed the maximum allowable height requirement but will improve the visual aesthetics and provide the building sculpture.

[11] A drawing was referenced to illustrate the portion of the proposed roof that will exceed the maximum allowable height requirement.

[12] The development will proceed with or without the proposed roof feature.

[13] He acknowledged the concern of a neighbouring property owner about increased sun shadowing but indicated that the proposed change is less than 4 percent and will not have any impact on sun shadowing.

[14] Mr. Gooch provided the following information in response to questions from the Board:

a) The elevator shaft is located in the centre of the building and any shadowing as a result of the height will be cast on the building itself or the surrounding roadways not on any residential properties.

b) The closest residential properties are located across Casselman Link and 30 Avenue, both arterial roadways. Therefore, the highest part of the roof is separated from the nearest residential properties by four dwelling units on the west side of the proposed building and Casselman Link, an arterial roadway.

ii) Position of the Development Officer, Mr. K. Bacon:

[15] Mr. Bacon did not attend the hearing but provided a written submission that was considered by the Board.

Decision

[16] The appeal is **ALLOWED** and the decision of the Development Authority is **REVOKED**. The development is **GRANTED** as applied for to the Development Authority.

[17] In granting the development, the following variances to the *Edmonton Zoning Bylaw* are allowed:

1. The maximum allowable building Height of 16.0 metres as per Section 210.4(5) is varied to allow an excess of 0.9 metres, thereby increasing the maximum allowed to 16.9 metres.

2. The maximum allowable Height to ridge line of 17.5 metres as per section 52.2 is varied to allow an excess of 1.8 metres, thereby increasing the maximum allowable Height to ridge line to 19.3 metres.

Reasons for Decision

[18] Apartment Housing is a Permitted Use in the (RA7) Low Rise Apartment Zone.

[19] The proposed development complies with all of the development requirements for Low Rise Apartment Housing with the exception of the maximum allowable Height, pursuant to Section 210.4(5) and the maximum allowable ridge Height, pursuant to section 52.2(c).

[20] Section 210.4(5) states:

> The maximum Height shall not exceed 14.5 metres for flat, mansard and gambrel roofs, or 16.0 metres for a roof type with a pitch of 4/12 (18.4 degrees) or greater, in accordance with Section 52.

[21] Section 52.2(c) states:

> Where the maximum Height as determined by Section 52.1 is measured to the midpoint, the ridge line of the roof shall not extend more than 1.5 metres above the maximum permitted building Height of the Zone or overlay, or in the case of a Garden Suite the maximum permitted building Height in accordance with Section 87 of this Bylaw.

[22] The Board grants the required variances for the following reasons:

a) The proposed Apartment Building is a five storey structure that covers an entire city block and is 17.5 metres high when measured to the maximum allowable ridge Height.

b) The variance required is only for a very small portion of the total roof area, only 3.82 percent of the entire roof will exceed the maximum allowable Height requirement.

c) The variances in Height being sought are minimal in proportion to the Height and area of the proposed building.

d) Any potential sun shadowing affect caused by the excess in the maximum allowable Height requirements for a very small portion of the roof will either be unnoticeable or entirely contained on the subject site.

e) The closest residential properties are located across two arterial roadways.

[23] Based on all of the above, the proposed exterior alterations (roof features) will not unduly interfere with the amenities of the neighbourhood, nor materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land.

Mr. I. Wachowicz, Chair
Subdivision and Development Appeal Board

Board members in attendance: Mr. V. Laberge, Mr. C. Buyze, Ms. L. Gibson, Mr. B. Gibson

Important Information for the Applicant/Appellant

1. This is not a Building Permit. A Building Permit must be obtained separately from the Sustainable Development Department, located on the 2nd Floor, Edmonton Tower, 10111 – 104 Avenue NW, Edmonton, AB T5J 0J4.

2. Obtaining a Development Permit does not relieve you from complying with:

    a) the requirements of the *Edmonton Zoning Bylaw*, insofar as those requirements have not been relaxed or varied by a decision of the Subdivision and Development Appeal Board,
    b) the requirements of the *Alberta Safety Codes Act*,
    c) the *Alberta Regulation 204/207 – Safety Codes Act – Permit Regulation*,
    d) the requirements of any other appropriate federal, provincial or municipal legislation,
    e) the conditions of any caveat, covenant, easement or other instrument affecting a building or land.

3. When an application for a Development Permit has been approved by the Subdivision and Development Appeal Board, it shall not be valid unless and until any conditions of approval, save those of a continuing nature, have been fulfilled.

4. A Development Permit will expire in accordance to the provisions of Section 22 of the *Edmonton Zoning Bylaw, Bylaw 12800*, as amended.

5. 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.

6. 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.

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P: 780-496-6079 F: 780-577-3537
sdab@edmonton.ca
edmontonsdab.ca

Date: June 7, 2019
Project Number: 224518430-032
File Number: SDAB-D-19-073

Notice of Decision

[1] On May 23, 2019, the Subdivision and Development Appeal Board (the "Board") heard an appeal that was filed on April 26, 2019. The appeal concerned the decision of the Development Authority, issued on April 23, 2019 to refuse the following development:

> **To change the Use from General Retail Stores to Child Care Services (36 Children).**

[2] The subject property is on Plan 1623424 Unit 2, located at 7610 - 167 Avenue NW, within the CNC Neighbourhood Convenience Commercial Zone. The Edmonton North Area Structure Plan and Schonsee Neighbourhood 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; and
- Online responses.

[4] The following exhibits were presented during the hearing and form part of the record:

- Exhibit A – Photographs of existing Child Care Services located on similar sites and the proposed Sound Wall as well as a list of suggested uses submitted by the Appellant.

Preliminary Matters

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

[6] The Chair 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 Appellants, M. Umarji and N. Umarji, representing Umarji Holdings Ltd.

[8] Mr. Umarji noted that page 13 of the agenda stated that the proposed number of children has been decreased from 78 to 32 children. He clarified that the proposed number of children has been decreased from 78 to 36 children.

[9] A drawing was referenced to illustrate that the proposed Child Care Service will be located in Building A, located in the northwest corner of a site that is bordered by single family residences. The building is located 63 feet away from the Rapid Drive-through Vehicles Services building.

[10] The proposed development meets or exceeds the development requirements contained in the *Edmonton Zoning Bylaw*.

[11] A diagram was referenced to illustrate the proposed view from residential properties located west of the site. The proposed Child Care Service will be screened by a landscape berm, including a 6 foot high wooden fence with a vinyl sound wall on the interior side of the fence. Residential properties to the north will also be screened by a landscape berm, 6 foot high fence with a vinyl sound wall on the interior side of the fence.

[12] The Development Officer refused the development because it was "adjacent" to the queuing spaces for the car wash and it would create a safety concern. However, it was his opinion that the proposed Child Care Service and outdoor play space are not located "adjacent" to the carwash.

[13] Photographs of precast panel and concrete filled steel bollards that will separate the queuing aisle, the proposed child care building and the drop off zones were referenced.

[14] A previous development permit was refused by the Board in June 2018 based on a concern regarding the location of the proposed drop off and pick up spaces. In response to that concern, the proposed number of children has been reduced by half, thereby reducing the required number of drop off and pick up spaces to 4. Five drop off and pick up spaces are proposed and they are located at the front entrance of the building. This removes the need for parents and children to travel across the queuing spaces for the car wash to access the front entrance of the building.

[15] Photographs of numerous other Child Care Facilities with play areas located next to queuing lanes for car washes, gas bars and fast food restaurants in the City were referenced.

[16] All five drop off spaces will abut the facility and will be further protected by steel bollards and are removed from the traffic generated by neighbouring vehicle uses.

[17] A sound wall will be erected between the Child Care Service and affected residential properties to eliminate noise effects. There is currently a five-foot berm and landscaping between the sites. A noise dampening material, a PVC reflective sound barrier will also be added to the existing wood fence panels.

[18] Neighbouring property owners did not object to the original proposal and the only change to this development permit application is a reduction in the proposed number of children.

[19] A list of suitable uses for the PVC reflective sound barrier wall system was submitted and marked as Exhibit A. A photograph of a sound wall that was erected between a highway corridor and a residential building was referenced.

[20] After installation of the sound wall was proposed, the Development Officer removed the portion of his refusal which stated "at the Development Officer's discretion, require that these potential impacts be minimized or negated".

[21] The main reason of refusal by the Development Officer was based on an interpretation of section 80.2(a)(v). It was his opinion that the proposed child care service is not adjacent to the carwash and he disagrees with the interpretation of this section by the Development Officer.

[22] The proposed Child Care Service is in keeping with the intent of the CNC Zone, to provide day-do-day commercial and personal services to the residents of this neighbourhood.

[23] The proposed Child Care Service will provide a service to the neighbourhood and will not materially interfere with or affect the use, enjoyment of value of neighbouring parcels of land.

[24] If the Board disagrees with his interpretation of section 80.2(a)(v) and agrees with the interpretation of the Development Officer, he asked that the required variances be granted.

[25] Mr. Umarji provided the following information in response to questions from the Board:

a) The mechanical room is fully enclosed and there are no windows or doors on the east façade of the building.

b) The proposed sound wall will be the same height as the existing wooden fence.

c) The entire play area is enclosed and steel bollards will be installed at the corner.

d) The entire site is currently being developed and the approved landscaping plan will be incorporated.

e) The proposed Child Care Service is compatible with the entire neighbourhood. The proposed Child Care Service is located in a building that is isolated from the other uses on the site.

f) Parents dropping off their children will not have to cross over queuing aisles to the car wash and are isolated from other vehicle movement on the site. The sharing of entrances and exits to the site would be the only interaction of the uses on this site.

g) The outdoor lay area can only be accessed through the building itself. The emergency exit to access the play area is on the west side of the building. There are no emergency exits on the east side of the building.

h) Attempts were made to solicit feedback from property owners to the north without success.

i) They are currently developing three other buildings on this site.

ii) Position of the Development Officer, Mr. C. Kennedy:

[26] Mr. Kennedy did not attend the hearing but provided a written submission that was considered by the Board.

Decision

[27] The appeal is **ALLOWED** and the decision of the Development Authority is **REVOKED**. The development is **GRANTED** as applied for to the Development Authority, subject to the following **CONDITIONS**:

1. The development shall comply with the performance standards for the Neighbourhood Convenience Commercial (CNC) Zone in accordance to Section 57 of the *Edmonton Zoning Bylaw*.

2. All required parking and loading facilities shall only be used for the purpose of accommodating the vehicles of clients, customers, employees, members, residents or visitors in connection with the building or Use for which the parking and loading facilities are provided, and the parking and loading facilities shall not be used for driveways, access or egress, commercial repair work, display, sale or storage of goods of any kind. (Reference Section 54.1(1)(c)).

3. Parking spaces for the disabled shall: be provided in accordance with the Alberta Building Code in effect at the time of the Development Permit application, for which no discretion exists; be included, by the Development Officer, in the calculation of the applicable minimum parking requirement; and be identified as parking spaces for the disabled through the use of appropriate signage, in accordance with Provincial standards. (Reference Section 54.1(3)).

4. All access locations and curb crossings shall require the approval of Transportation Services. (Reference Section 53(1)).

Reasons for Decision

[28] A Child Care Service is a Discretionary Use in the (CNC) Convenience Commercial Zone.

[29] The Board finds that the proposed development complies with all of the development regulations pursuant to the *Edmonton Zoning Bylaw*.

[30] The Board must determine whether or not the proposed Discretionary Use is compatible with surrounding land uses and should be allowed at this location.

[31] The Board agrees with the finding of the Development Authority that no portion of the proposed Child Care Service is adjacent to the bay of the Rapid Drive-through Vehicle Services building pursuant to section 80.2(a)(v) of the *Edmonton Zoning Bylaw*.

[32] The proposed Child Care Service is adjacent to the drive aisle for the queuing spaces for the Rapid Drive-through Vehicle Services building.

[33] The Board finds that this development permit application will minimize the potential incompatibilities to the satisfaction of the Board.

[34] A previous development permit application, Project Number 224518430-025 was refused by the Subdivision and Development Appeal Board in April, 2018. However, this development permit application has been changed substantially because the number of children has been reduced from 78 to 36. This change is significant because it has reduced the minimum required number of pick-up and drop-off spaces to four. Five spaces will be provided immediately adjacent to the front of the building that will house the proposed Child Care Service. The drop off spaces for the previously refused application had to be located further away from the Child Care Services building which required children and their parents to walk across the queuing lane for the Rapid Drive-through Vehicle Service Use which raised safety concerns and material concerns of incompatibility. This concern has been removed from this development permit application.

[35] The other potential point of incompatibility arises because there is a residential zone located immediately north of the outdoor play area for the proposed Child Care Service. Based on evidence provided by the Applicant, noise from children playing outside will be minimized both through the incorporation of landscaping which is included in the overall site plan as well as the installation of sound fencing which will be installed around the entire outdoor play area. When these factors are combined with the fact that the Child Care Service will not be operating in the evening or on weekends, the proposed outdoor play area is reasonably compatible even though it abuts a residential zone to the north.

[36] For the above reasons, the Board finds that the proposed development is reasonably compatible with the surrounding area and there are no valid planning reasons to deny the application.

Mr. I. Wachowicz, Chair
Subdivision and Development Appeal Board

Board members in attendance: Mr. V. Laberge, Mr. C. Buyze, Ms. L. Gibson, Mr. B. Gibson

Important Information for the Applicant/Appellant

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    a) the requirements of the *Edmonton Zoning Bylaw*, insofar as those requirements have not been relaxed or varied by a decision of the Subdivision and Development Appeal Board,
    b) the requirements of the *Alberta Safety Codes Act*,
    c) the *Alberta Regulation 204/207 – Safety Codes Act – Permit Regulation*,
    d) the requirements of any other appropriate federal, provincial or municipal legislation,
    e) the conditions of any caveat, covenant, easement or other instrument affecting a building or land.

3. When an application for a Development Permit has been approved by the Subdivision and Development Appeal Board, it shall not be valid unless and until any conditions of approval, save those of a continuing nature, have been fulfilled.

4. A Development Permit will expire in accordance to the provisions of Section 22 of the *Edmonton Zoning Bylaw, Bylaw 12800*, as amended.

5. 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.

6. 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.

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Edmonton, AB T5J 0G9
P: 780-496-6079 F: 780-577-3537
sdab@edmonton.ca
edmontonsdab.ca

Date: June 7, 2019
Project Number: 293187436-001
File Number: SDAB-D-19-074

Notice of Decision

[1] The Subdivision and Development Appeal Board (the "Board") at a hearing on April 24, 2019, made and passed the following motion:

"That the appeal hearing be postponed to May 22 or May 23, 2019."

[2] On May 23, 2019, the Board made and passed the following motion:

"That SDAB-D-19-074 be raised from the table."

[3] On May 23, 2019, the Board heard an appeal that was filed on April 18, 2019. The appeal concerned the decision of the Development Authority, issued on March 26, 2019 to approve the following development:

To construct a Duplex House with an Unenclosed Front Porch

[4] The subject property is on Plan I23A Blk 161 Lot 3, located at 11012 - 84 Avenue NW, within the DC1 Development Control Provision. The Garneau 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 approved Development Permit;
- The Development Officer's written submissions; and
- The Appellant's written submissions.

[6] The following exhibits were presented during the hearing and form part of the record:

- Exhibit A – Excerpts from the *Land Use Bylaw 5996* submitted by the Appellant

Preliminary Matters

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

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

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

[10] Section 685(4) of the *Municipal Government Act*, Chapter M-26 states that 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, Ms. V. Jones, representing the Garneau Community League:

[11] The issue in this appeal is whether the Development Officer properly applied the directions of Council when approving this development permit.

[12] The Garneau Community League Planning Committee submits that the Development Officer did not properly apply the directions of Council because the development permit application was approved based on development regulations contained in *Edmonton Zoning Bylaw 12800* instead of those contained in *Land Use Bylaw 5996.*

[13] The Development Criteria contained in the Garneau Area Redevelopment Plan ("GARP") make it clear that the general regulations of the *Land Use Bylaw* must be used when determining whether a proposed development in the DC1 area is to be approved or not. GARP makes specific reference to the *Land Use Bylaw 5996* as it existed in 1982 when this Plan was passed. This is specific incorporation by reference in GARP. Instead of reproducing the RF3 regulations from the 1982 *Land Use Bylaw*, it incorporates the RF3 regulations by an express reference to the *Land Use Bylaw* and its Special Land Use Provisions.

[14] The *Land Use Bylaw 5996* was replaced with the *Edmonton Zoning Bylaw 12800* in April 2001. However, direct control districts were continued in full force and effect and were incorporated into the *Edmonton Zoning Bylaw*. Section 2.7 states that:

> Unless there is an explicit statement to the contrary in a Direct Control District of Provisions, *any reference* in a Direct Control District or Direct Control Provision to a land use bylaw shall be *deemed to be a reference* to the land use bylaw that was in effect at the time of the creation of the Direct Control District of Provisions.

[15] It is noted that "a land use bylaw" is not capitalized in section 2.7, therefore it is considered a general catch all and not as a specific noun as it is referenced in GARP.

[16] The Alberta Court of Appeal considered the issue of which bylaw applies in direct control districts in *Parkdale-Cromdale Community League Association v Edmonton*, 2007 ABCA 309. The Court held that section 2.7 of the *Edmonton Zoning Bylaw* deals with situations where a Direct Control bylaw was passed before 2001 and it contains an express cross-reference to a provision of an old land use bylaw, Paragraph [4] states:

> Such cross-reference might not, of course, be directly transferable to the provisions of the new Zoning Bylaw, and section 2.7 was required to ensure that such express references remained meaningful, and faithful to the original intent of the Bylaw.

[17] The Court of Appeal further confirmed in this decision at Paragraph [5] that the development regulations contained in section 140.1 of the *Edmonton Land Use Bylaw 5996* applied to property zoned Direct Control District 1 (DC1). This decision dealt with a lot located directly behind the subject lot in the same Direct Control District.

[18] She questioned why the City Law Branch would support the Development Officer's interpretation that if a DC Zone references the RF3 *District* (District means Zone in the *Edmonton Zoning Bylaw 12800*) of the *Land Use Bylaw* and that the Development Authority would then refer to the current RF3 Zone in the *Edmonton Zoning B*ylaw 12800. Only when the DC Zone references a specific section number, would the Development Officer reference the *Land Use Bylaw* that was in effect at the time of approval of the DC Zone.

[19] The direction of Council is contained in GARP which requires the Development Officer to apply the RF3 regulations of the *Land Use Bylaw 5996* as they existed in 1982. The Development Officer applied the RF3 regulations contained in the *Edmonton Zoning Bylaw 12800* instead of the RF3 regulations contained in the *Land Use Bylaw* 5996 and therefore did not follow Council's direction when approving this development permit application.

[20] Ms. Jones provided the following information in response to questions from the Board:

a) The area of application for this DC1 is located north of 83 Avenue between 111 Street and 109 Street.

b) GARP states that the General Regulations and Special Land Use Provisions of the *Land Use Bylaw* apply to developments within this District.

c) The Development Criteria contained in GARP states that the following criteria apply to developments within this District pursuant to section 710.4 of the *Land Use Bylaw*. Clause 1 states that "The General Regulations and Special Land Use Provisions of the Land Use Bylaw apply".

d) Clause 2 states "The development regulations of the RF3 (Low Density Redevelopment) District apply, provided that the Development Officer may relax these regulations for individual applications, where such relaxations would assist in the achievement of the development criteria in Clauses 3, 4 and 5.

e) Clause 4 does not apply to this development.

f) Direct incorporations are provided in Clause 1 and 2 of the Development Criteria contained in GARP.

g) Clause 2 of GARP incorporates the development regulations of the RF3 Zone, section 140 of the *Land Use Bylaw*. It does not specify a specific section but rather specifies that whole zoning chunk.

h) A copy of section 140 of the *Land Use Bylaw 5996* was submitted as Exhibit A. It was acknowledged that the Bylaw was changed over the years. Section 140.3 of *Land Use Bylaw* 5996, Low Density Redevelopment District, Discretionary Uses includes Duplexes and the last amendment date is 1994.

i) The difference between using the regulations of the *Land Use Bylaw* versus the *Edmonton Zoning Bylaw* is that section 140.4 of the *Land Use Bylaw* requires a minimum site area of 300 square metres for each Semi-detached or Duplex dwelling, a minimum site width of 15 metres and a minimum 2.0 metres side yard. The proposed site area is 404 square metres, a deficiency by 48.5 percent. The proposed development complies with the RF3 regulations contained in the *Edmonton Zoning Bylaw* that were applied by the Development Officer.

j) The woman who wrote GARP included Low Density Redevelopment District in the Development Criteria because that was the title of the RF3 Zone at that time. The title of the RF3 Zone in the *Edmonton Zoning Bylaw* is Small Scale Infill Development Zone. It could not be confirmed whether or not the RF3 Zone had the same title as the *Land Use Bylaw* when the *Edmonton Zoning Bylaw* was adopted.

k) The *Parkdale-Cromdale* Court of Appeal decision did not require an explicit reference, it requires a reference. This is a reference and when you undertake statutory interpretation you look at the general context. It is clear that GARP is discussing the *Land Use Bylaw*. That is the zoning that they incorporated in by way

of this reference. Instead of reproducing section 140 of the *Land Use Bylaw*, it was incorporated by reference.

l) In addition to a deficiency in the site area, the proposed development is also deficient in site width, the minimum side yard requirement and is possibly over height although that could not be confirmed. It is also possible that the detached garage does not comply with the minimum required side yards.

m) Duplexes in GARP are a considered Use. The Board may substitute its decision but is not required to do so. The development could simply be refused and sent back to the drawing board.

n) The heart of the Community League's concern is that the Development Authority must use the correct Bylaw when evaluating all development permit applications in this DC1 District. The Court of Appeal has directed the Development Authority to use the development regulations contained in the *Land Use Bylaw 5996* and that is not being done. Therefore, the Community League will appeal every development permit approval that is not correctly reviewed according to the development regulations contained in that Bylaw. Development Officers can grant variances that achieve the development criteria contained in GARP.

o) Site Width pursuant 140.2(4)(b) of the *Land Use Bylaw* requires 7.5 metres for each semi-detached or duplex dwelling, 15 metres for the proposed development. Proposed is 10.058 metres, a deficiency of 49 percent.

p) Side yards are required to be a minimum of 2.0 metres pursuant to section 140.4(8)(a) Site width is 10.05 metres, 20 percent of 10 metres is 2.0 metres. The proposed side yards are 1.526 metres, a deficiency of 30 percent.

q) These are the three main deficiencies under the *Land Use Bylaw*.

r) Variance power is provided in order to enable the design to work within the neighbourhood, not just to make a development fit. A previous decision of the Board was referenced for a property located in close proximity to the subject site. The intent of that decision was to ensure compatibility with design, texture, and material utilized in construction parallel to that used in 1920. The Board needs to consider Policy 1.1 of the Special Character Residential Area contained in GARP if the decision is made to grant the required variances.

s) The Court of Appeal reviewed the zoning and determined that the development regulations contained in *the Land Use Bylaw* apply to this DC1 Development Zone.

t) Maximum height shall not exceed 10 metres, pursuant to section 140.4(4) of the *Land Use Byla*w. The Front setback shall be 6.0 metres pursuant to section 140.4(6) and proposed is 6.001. The proposed height is 10.02 metres and exceeds the maximum allowable 10.0 metres.

u) The Development Authority can grant relaxations to the development criteria contained in GARP if they are in keeping with the direction of Clauses 3, 4 and 5.

ii) Position of the Development Officer, Mr. K. Yeung:

[21] Mr. Yeung did not attend the hearing but provided a written submission that was considered by the Board.

iii) Position of the Respondent, Ms. B. Sihota:

[22] There are several similar new developments on this block that have been built using the development regulations contained in the *Land Use Bylaw* and others using the development regulations contained in the *Edmonton Zoning Bylaw*. She questioned why Development Officers are not required to use the same development criteria and follow the direction of the Court of Appeal.

[23] There are two new developments located across the street in the middle of the block, two on the same side of the street in the middle of the block and one at the end of the block that were all granted variances. It seems that variances are granted based on the approach taken by the Development Officer. However, if City Council has provided development regulations in GARP, Development Officers should be applying this direction to every development permit application.

[24] They are simply seeking direction as to how to develop property in this area which is not being consistently provided by the Development Authority. Therefore, the Board should grant any variances that are required for the proposed development.

[25] It was her opinion that the same rules should be applied to should be applied to all development in the DC1 Direct Control Provision.

[26] It is impossible to know the intention of the individual who wrote the Garneau Area Redevelopment Plan.

[27] The City Law Branch and the Development Officer should have been in attendance to provide their interpretation of GARP.

[28] The appeal should not be allowed because the Development Officer made the appropriate decision based on the guidance that was provided. It is not clear in GARP as to which regulations should be followed and this uncertainty results in extra costs and delays for developers.

[29] In this case, the Development Officer was correct in following the RF3 regulations contained in the *Edmonton Zoning Bylaw* based on his interpretation of GARP. GARP

does not specifically direct you back to the old *Land Use Bylaw*. It is not clear to the average person reading GARP or the Development Officer that there is a direct reference to the development regulations contained in the old *Land Use Bylaw*.

[30] Infill developments are currently proceeding based on new development regulations which are constantly being amended by City Council. She questioned why this new infill project should be reviewed based on the development guidelines contained in the old *Land Use Bylaw*. It was her opinion that GARP should be rewritten to provide clear direction.

[31] A meeting was held with the Development Officer prior to submitting a development permit application to determine what could be built on this site and which development regulations would apply. It was the original plan to build a single family house with a secondary suite. However, they were advised by the Development Officer that was not allowed but that they could build a duplex on this lot and they proceeded based on this advice. The Development Officer advised that the development regulations contained in the RF3 Zone applied but he did not tell them that these were the RF3 regulations contained in the old *Land Use Bylaw*.

[32] It was her opinion that the Board should grant any variances required because the proposed development furthers the goals established in Clauses 3 and 5 of GARP. Several other developments on this block have been approved with variances granted by the Board.

[33] The recommendations of the Heritage Officer have been followed and are included in the written submission provided by the Development Officer.

[34] In response to a question, it was her opinion that a specific section number has to be referenced in GARP before it has to be referenced by the Development Officer. The other sub-areas contained in GARP are much clearer than the development guidelines contained in this sub-area. The wording needs to be changed to provide direction for both developers and the Development Authority when considering new development in this DC1 Development Control Provision.

iv) Rebuttal of the Appellant

[35] Anne de Villars wrote GARP and was the Chair of the Planning Committee for 40 years.

[36] The question before the Board is whether or not the Development Officer followed the directions of Council not whether or not the developer did. She understands the Respondent's desire to have one Bylaw apply to the DC1 Development Control Provision. It was noted that the Court of Appeal found that GARP was clear enough to determine that the *Land Use Bylaw* applies to this DC1 Development Control Provision.

[37] The Garneau Community League appeals every development in this DC1 that is approved using the development regulations contained in the *Edmonton Zoning Bylaw*. The developments referenced by the Respondent, including the tri-plexes were all approved based on the development regulations contained in the *Land use Bylaw 5996*. The over height development was constructed without an approved development permit.

[38] Ms. Jones provided the following information in response to questions from the Board:

a) Reference to a specific section is not required. The Court of Appeal did not require reference to a specific section in *Garneau Community League v Edmonton (City)*, 2017 ABCA 374. The DC1 references the RF3 regulations from the *Land Use Bylaw* and that is what needs to be used in this DC1 Development Control District.

b) In *Garneau Community League v Edmonton (City)*, 2017 ABCA 374, the Court applied the old *Land Use Bylaw*. It was acknowledged that although this was accepted by the Court of Appeal, a specific reason was not provided. The Court of Appeal decision specifically addressed the variance power of the Board. The Board will have to determine how specific reference to the old *Land Use Bylaw* needs to be in GARP.

c) GARP directly references the RF3 development regulations contained in the *Land Use Bylaw* which applied at the time that it was written. She disagreed that even if the parties agreed on the zoning in *Garneau Community League v Edmonton (City)*, 2017 ABCA 374, it is not binding on the Board. She agreed that the Court of Appeal was silent on this issue.

d) Ms. Jones agreed with the Board's interpretation of Paragraph [17] of *Garneau Community League v Edmonton (City)*, 2017 ABCA 374, regarding section 11.6 of the *Land Use Bylaw*. The main issue in this decision was in respect to variance powers and the doubling up that was done by the Board.

[39] Ms. Sihota indicated that she was not familiar with this provision and declined any specific comment.

Decision

[40] The appeal is **DENIED** and the decision of the Development Authority is **CONFIRMED**. The development is **GRANTED** as approved by the Development Authority.

Reasons for Decision

[41] The subject site falls within DC1 Direct Development Control Provision, (Bylaw 6221 – Sub-Area 1) of the Garneau Area Redevelopment Plan ("GARP").

[42] The proposed development is to construct a Duplex House with an Unenclosed Front Porch.

[43] Duplex Housing, where the side lot line of the site abuts a site in an Industrial, Commercial, Row Housing, or Apartment District, or is not separated from it by a public roadway more than 10 metres (32.8 feet) wide, is a Listed Use.

[44] Section 685(4) of the *Municipal Government Act*, Chapter M-26 states that:

> 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.

[45] The Appellant, the Garneau Community League, argued that the Development Officer erred by applying the development regulations contained in the RF3 Small Scale Infill Development Zone contained in *Edmonton Zoning Bylaw* 12800.

[46] The Appellant argued that the Court of Appeal, in *Parkdale-Cromdale Community League Association v. Edmonton (City)*, 2007 ABCA 309, interpreted section 2.7 of the *Edmonton Zoning Bylaw* to mean that the Development Authority is required to apply development criteria contained in the RF3 Zone as set out in the *Land Use Bylaw 5996*.

[47] Section 2.4 of the *Edmonton Zoning Bylaw* states:

> Subject only to the provisions in the *Municipal Government Act* respecting non-conforming Uses and notwithstanding the effect it may have on rights, vested or otherwise, the provisions of this Bylaw govern from the effective date onward. In particular, no Development Permit Application shall be evaluated under the procedural or substantive provisions of a previous land use bylaw after the effective date, even if the application was received before the effective date.

[48] Section 2.7 of the *Edmonton Zoning Bylaw* states:

> Unless there is an explicit statement to the contrary in a Direct Control District or Provision, any specific reference in a Direct Control District or Direct Control Provision to a land use bylaw shall be deemed to be a reference to the land use bylaw that was in effect at the time of the creation of the Direct Control District or Provision.

[49] Paragraphs [4] and [5] of *Parkdale-Cromdale Community League Association v. Edmonton (City)*, 2007 ABCA 309 states:

> [4] On its correct interpretation, section 2.7 does not override section 2.4. Section 2.7 is only intended to deal with a situation where a Direct Control bylaw passed before 2001 contained an 2007 ABCA 309 (CanLII) Page: 3 express cross-reference to a provision of the old Land Use Bylaw. Such cross-references might not, of course, be directly transferable to the provisions of the new Zoning Bylaw, and section 2.7 was required to ensure that such express references remained meaningful, and faithful to the original intent of the Bylaw. There is, however, no relevant cross-reference in Bylaw 12011 to the old Land Use Bylaw. Section 2.4 of the new Zoning Bylaw therefore provides that it applies to Direct Control Bylaw 12011, and section 2.6 confirms that Direct Control Bylaw 12011 is "hereby incorporated" into the new Zoning Bylaw.
>
> [5] The SDAB was therefore in error in concluding that section 98 of the old Land Use Bylaw applied. The application for the permit was covered by section 85 of the new Zoning Bylaw.

[50] The question is whether or not GARP contains "an express cross-reference to a provision of the old *Land Use Bylaw 5996*?"

[51] This proves to be a difficult analysis. It was the position of the Development Authority as set out in the written submission provided that the "cross reference to a provision" means reference to a specific section of the *Land Use Bylaw 5996* and not the Bylaw in general. Using that interpretation, the Development Authority did follow the direction of Council by using the *Edmonton Zoning Bylaw 12800* to approve this development permit application.

[52] The Appellant makes a contrary submission. The Community League points to Clause 1 of the GARP which states that "the General Regulations and Special Land Use Provisions of the *Land Use Bylaw*", shall apply to developments within this District, pursuant to section 710.4 of the *Land Use Bylaw.* The Appellant argues that this reference to the General Regulations and Special Land Use Provisions of the *Land Use Bylaw* constitutes a reference to "a provision of the old *Land Use Bylaw*" which the Court of Appeal required to be made in order to apply the provisions of *the Land Use Bylaw 5996*.

[53] The Board finds that both positions appear to have merit. The Court of Appeal did not provide specific guidance as to what was meant by "a provision of the old *Land Use Bylaw*". Did the Court of Appeal mean that a special section number had to be referenced as was argued by the Development Authority? Or did the Court of Appeal mean that reference to a large portion of the *Land Use Bylaw*, was sufficient as argued by the Appellant?

[54] It is noted that previous decisions of the Subdivision and Development Appeal Board have relied on both of these interpretations.

[55] However, it is not necessary for the Board to make a definitive decision on this point. If the Development Authority and the City Law Branch are correct and "an express cross reference to a specific provision of the *Land Use Bylaw*" means reference to a specific section contained in the *Land Use Bylaw 5996*, then the Development Authority applied the correct legislation and followed the direction of Council. Therefore, in accordance with section 685 of the *Municipal Government Act*, the appeal must be dismissed.

[56] Even if the Board determined that the Appellant's interpretation is correct, the result is the same.

[57] The Board finds that the development criteria contained in Clauses 2 to 5 of the Garneau Area Redevelopment Plan are relevant. Clauses 2 to 5 state the following:

> 2. The development regulations of the RF3 (Low Density Redevelopment) District, provided that the Development Officer may relax these regulations for individual applications, where such relaxations would assist in the achievement of the development criteria in Clauses 3, 4 and 5 below.
>
> 3. New developments or additions to existing buildings shall be compatible with the scale, massing and siting of adjacent buildings along the same street frontage.
>
> 4. The rehabilitation and renovation of existing buildings shall retain the original details of rooflines, doors and windows, trim, exterior finishing materials and similar architectural features to the greatest extent practical.
>
> 5. The design and appearance of new developments shall incorporate building details and finishing materials which are common to the domestic architecture of the turn of the century and early 1920's detached housing in the area.

[58] If the development regulations for the RF3 District are taken from the old *Land Use Bylaw 5996*, the proposed development would be deficient in the minimum required Site Area, Site Width, Side Yards and would exceed the maximum allowable Height requirement.

[59] Clause 2 of the Development Criteria provides a very specific variance power and allows the Development Officer to relax the development regulations of the RF3 District for individual applications if the relaxations would assist in the achievement of the development criteria in Clauses 3, 4 and 5.

[60] The response of the Heritage Planner contained in the written submission of the Development Officer states:

> The design is generally consistent with the requirement that new developments shall incorporate building details and finishing materials which are common to the domestic architecture of the turn of the century and early 1920's detached housing

in the area. It includes clapboard and shake cladding, trim work, and vertically proportioned windows. While the design is larger in terms of scale and massing than the adjacent 1 and ½ storey properties on the same frontage, it appears to be consistent with height and site coverage requirements and is compatible in terms of height, scale and siting.

[61] The Appellant did not provide any evidence or argument regarding the applicability of granting variances pursuant to the above noted provision.

[62] The Board finds that granting the relaxations contemplated in Clause 2 of the Development Criteria are in keeping with the objectives of Clauses 3 and 5 of the Development Criteria contained in the DC1 Development Control Provision. Therefore, if the Development Authority erred by applying the RF3 development regulations contained in the *Edmonton Zoning Bylaw 12800*, the Board would substitute its decision for that of the Development Authority and grant the development as sought, by granting the relaxations contemplated in Clause 2 of the Development Criteria for this DC1 Development Control Provision, pursuant to section 710.4 of the *Land Use Bylaw*.

[63] Therefore the appeal is denied and the development is granted.

Mr. I. Wachowicz, Chair
Subdivision and Development Appeal Board

Board members in attendance: Mr. V. Laberge, Mr. C. Buyze, Mr. B. Gibson, Ms. L. Gibson

Important Information for the Applicant/Appellant

1. This is not a Building Permit. A Building Permit must be obtained separately from the Sustainable Development Department, located on the 2nd Floor, Edmonton Tower, 10111 – 104 Avenue NW, Edmonton, AB T5J 0J4.

2. Obtaining a Development Permit does not relieve you from complying with:

    a) the requirements of the *Edmonton Zoning Bylaw*, insofar as those requirements have not been relaxed or varied by a decision of the Subdivision and Development Appeal Board,
    b) the requirements of the *Alberta Safety Codes Act*,
    c) the *Alberta Regulation 204/207 – Safety Codes Act – Permit Regulation*,
    d) the requirements of any other appropriate federal, provincial or municipal legislation,
    e) the conditions of any caveat, covenant, easement or other instrument affecting a building or land.

3. When an application for a Development Permit has been approved by the Subdivision and Development Appeal Board, it shall not be valid unless and until any conditions of approval, save those of a continuing nature, have been fulfilled.

4. A Development Permit will expire in accordance to the provisions of Section 22 of the *Edmonton Zoning Bylaw, Bylaw 12800*, as amended.

5. 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.

6. 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.