EDMONTON
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Subdivision & Development Appeal Board

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Date: June 21, 2019
Project Number: 307869831-002
File Number: SDAB-D-19-081

Notice of Decision

[1] On June 6, 2019, the Subdivision and Development Appeal Board (the "Board") heard an appeal that was filed on **May 6, 2019**. The appeal concerned the decision of the Development Authority, issued on May 1, 2019, to refuse the following development:

> **To install one (1) Fascia On-premises Sign (SERVUS CREDIT UNION).**

[2] The subject property is on Plan B3 Blk 3 Lot 246, located at 10303 - 107 Avenue NW, within the (CB1) Low Intensity Business Zone. The Main Streets Overlay and the Central McDougall / Queen Mary Park Area Redevelopment Plan apply to the subject property.

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

- A copy of the Development Permit application with attachments, proposed plans, and the refused Development Permit;
- The Development Officer's written submission;
- The Appellant's reasons for appeal and attachments.

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

- Exhibits A1 to A6 – Photographs submitted by the Appellant.

Preliminary Matters

[5] 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.

[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.

Summary of Hearing

i) Position of the Appellant, Blanchett Neon, represented by Mr. R. Odegard and Mr. D. Norris, representing Servus Credit Union:

[8] Servus Credit Union shares the same vision as the City to make 107 Avenue a vibrant main street that provides amenities for the neighbourhood.

[9] The proposed sign is in keeping with the General Purpose of the (CB1) Low Intensity Business Zone:

> To provide for low intensity commercial, office and service uses located along arterial roadways that border residential areas. Development shall be sensitive and in scale with existing development along the commercial street and any surrounding residential neighbourhood.

[10] Servus Credit Union is in the process of a brand change. The existing illuminated sign has been operating since 2007 without any known complaint and will be replaced with a new illuminated sign that is sensitive and in scale with existing development, including the adjacent residential neighbourhood.

[11] The sign is located on the corner of the building and is only visible to traffic travelling east on 107 Avenue. The apartment building to the west is setback approximately 30 metres from the subject building and is separated by a lane and a surface parking lot.

[12] The proposed sign is lower in height and width than the existing sign. The existing sign is 57,000 lumens and the proposed LED sign is 8,400 lumens. The existing sign is completely back lit while only the lettering on the new sign will be illuminated.

[13] The proposed sign will be located above the main entrance into the area where the ATM is located.

[14] Mr. Norris questioned why the proposed sign was refused because it is smaller and will incorporate new lighting that will reduce the brightness of the sign. The City has never advised them of any problems with the existing sign.

[15] Part of the new company branding includes updating their logo and signage and incorporating more efficient LED lighting. It is their intention to upgrade signage at all of their 104 branches in Alberta as part of the upgraded corporate image.

[16] It is important to maintain an illuminated sign at this location because their signage has been illuminated for the past 20 years. It was Mr. Norris' opinion that this creates vibrancy along the roadway and makes the location more distinguishable for motorists trying to find an ATM at night. If the sign is not allowed to be illuminated it does create a

hardship because their location could be missed and potential customers lost. Also if one sign is not lit, then it gives the impression that it is not working and reflects poorly on the business.

[17] The proposed sign is less intrusive and more energy efficient. The lettering will be blue during day time hours and white at night when it is illuminated.

[18] Mr. Odegard and Mr. Norris provided the following information in response to questions from the Board:

a) Security lighting is located on the west side of their building facing the apartment building that is much brighter than the illumination from the proposed sign.

b) It was their opinion that the proposed illuminated sign above the entrance to the ATM will improve security and will make customers feel safer.

c) The recommended conditions of the Development Officer have been reviewed and are acceptable.

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

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

Decision

[20] 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 proposed Fascia On-premises Sign shall comply with the approved plans submitted.

2. The intensity of exposed bulbs on a Sign, excluding Digital Signs, shall not exceed 1100 lumens. (Reference Section 59.2(4)).

[21] In granting the development, the following variance to the *Edmonton Zoning Bylaw* is allowed:

1. Schedule 59E.2(1)(a) is waived to allow a Fascia On-premises Sign on the (west) façade of the subject building as per the stamped approved plans.

Reasons for Decision

[22] A Fascia On-premises Sign is a Permitted Use in the (CB1) Low Intensity Business Zone ("CB1" Zone).

[23] Section 330.1 of the *Edmonton Zoning Bylaw* states that the General Purpose of the CB1 Zone is to:

> to provide for low intensity commercial, office and service uses located along arterial roadways that border residential areas. Development shall be sensitive and in scale with existing development along the commercial street and any surrounding residential neighbourhood.

[24] The proposed development complies with all of the regulations for Fascia On-premises Signs, pursuant to Schedule 59E.2(1) with the exception of Schedule 59E.2(1)(a) which states that Fascia On-premises Signs shall only face a public roadway other than a Lane.

[25] The Board grants a variance waiving Schedule 59E.2(1)(a) for the following reasons:

a) Based on the evidence provided by the Appellant, the proposed development is consistent with the General Purpose of the CB1 Zone and will add to the vibrancy of the street.

b) A Fascia On-premises Sign has existed on this building at this location without any known complaints since 2001.

c) The proposed Sign will replace an existing illuminated Fascia On-premises Sign that was previously approved on May 31, 2007. The proposed new Sign will be less impactful than the existing Fascia On-premises Sign for three reasons. First, the traditional lighting will be replaced with upgraded LED lighting and the existing fully illuminated backdrop will be replaced by a dark backdrop and illuminated channel letters. This will significantly reduce the illuminated area of the Sign. Second, the total lumens will decrease significantly from the currently approved level of 57,000 lumens to 8,400 lumens. Third, the size of the proposed Sign will be reduced in height and width.

d) The proposed Fascia On-premises Sign is located 27.5 metres away from the apartment building located west of the subject Site and the buildings are separated by a lane and parking areas on both the subject Site and the Site of the apartment building.

e) Based on a review of the photographic evidence, there is an existing security light on the west side of the subject building that faces the apartment building and lights up the parking area on the subject Site. As the security light is significantly brighter than the light that will be generated by the proposed Sign, the lit channel letters are unlikely to create a significant impact for the residential property to the west.

f) No objections were received and no one appeared in opposition to the proposed development.

[26] For the above reasons, it is the opinion of the Board that the proposed development 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.

Ms. K. Cherniawsky, Presiding Officer
Subdivision and Development Appeal Board

Board members in attendance: Mr. M. Young, Mr. R. Hachigian, Mr. A. Nagy, Ms. E. Solez

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

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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Date: June 21, 2019
Project Number: 257137431-001
File Number: SDAB-D-19-082

Notice of Decision

[1] On June 6, 2019, the Subdivision and Development Appeal Board (the "Board") heard an appeal that was filed on **May 10, 2019**. The appeal concerned the decision of the Development Compliance Officer to issue the following Order on April 25, 2019:

> **To cease the General Industrial Use and remove all related materials by May 22, 2019.**

[2] The subject property is on Plan 9525383 Blk 13 Lot 2, located at 18540 - 121 Avenue NW, within the DC2.369 Site Specific Development Control Provision. The Kinokamau Plains Area Structure Plan applies to the subject property.

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

- A copy of the Stop Order;
- The Development Compliance Officer's written submissions;
- The Appellant's written submissions including photographs; and
- One email in support of the Stop Order from a neighbour who resides outside of the 60-metre notification area.

[4] The following exhibit was presented during the hearing and forms part of the record:

- Exhibit A – A copy of the approved Development Permit for the detached Garage/Storage that was issued in November 1986 submitted by the Development Authority.

Preliminary Matters

[5] The Development Compliance Officer, Mr. J. Young advised the Board that he worked with Mr. R. Hachigian when he was employed by the City of Edmonton. Mr. Hachigian acknowledged that he did work with Mr. Young but he has not worked for the City of

Edmonton for six years and did not feel that this would affect his ability to provide a fair and unbiased hearing. No one objected to the 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.

Summary of Hearing

i) Position of the Appellant, Rumile Leasing Ltd., represented by Ms. K. Dziwenka & Mr. D. Kowaluk:

[8] Ms. Dziwenka and Mr. Kowaluk acknowledged that the subject site sometimes becomes unorganized and messy because they tend to take everything to this property from all of their other acreages and then sort, clean and dispose of the materials when they have time. They were in the process of cleaning up the site before the violation notices were received and they have continued to clean up the property as evidenced by the submitted photographs that were taken yesterday.

[9] They are not operating a business from the subject site. They operate a family owned business from another location. They and their family occupy six acres in the subdivision that surround the site on the northeast and northwest side of 121 Avenue. Each family member brings their company vehicle home at the end of the day and parks it on the subject site. They also park two Ford trucks with two trailers, one tandem truck with a pup trailer and one tandem tractor and trailer at the subject site. The two tandem trucks are parked in the shop and the two Ford trucks and trailers are parked outside. These vehicles have been parking on the subject site since the 1990s.

[10] Building material was being stored on the site from a house that they built in the subdivision.

[11] Photographs taken on June 5, 2019 were referenced to illustrate that the site has been cleaned up considerably since the photographs taken by the Development Compliance Officer on April 24, 2019. They want to work with the City because they have a vested interest in this subdivision. They currently own nine properties in this subdivision and are in the process of acquiring two more properties.

[12] There were no issues until 2017 when they were notified that the site was being operated as a General Industrial Use without an approved development permit. They had always been under the assumption that the site was grandfathered because a development permit was issued and the shop was built in 1986 prior to the rezoning to DC2 in the 1990s.

[13] They visited Development and Zoning Services twice in 2017. Following the first visit, they applied for a residential development and building permit based on the advice they received. They were subsequently told that permit was not required and that they should apply for a home-based business permit. An application for a home-based business was submitted but it could not be approved because there was no house on the site.

[14] The site was inspected again in December 2017. The Development Compliance Officer was pleased with the progress of the site cleanup and advised them that he would follow-up in the spring of 2018. The two Ford trucks, two trailers as well as two other trucks were parked on the site when this inspection was done. Based on this inspection they did not pursue a development permit application any further. They did not hear from the Development Compliance Officer in the spring of 2018 and assumed that the file had been closed. They did not have any further contact with Development Compliance until April 29, 2019 when they received a $1,000 violation ticket.

[15] They have made several attempts to comply with the requests made by the City but are frustrated by the lack of guidance and recommendations that have been provided regarding the type of development permit that is required.

[16] A Development Officer contacted them last Friday to discuss the development permit process and the information that should be included with an application. They plan to meet with Development & Zoning Services following the hearing.

[17] Based on a review of the development compliance process provided by Development and Zoning Services, it was their opinion that the Development Compliance Officer did not adhere to this process. They were unable to obtain any clarification from the Issuing Officer and the violation ticket was issued unfairly. They plead not guilty to the Violation Notice and a court date has been set for August 8, 2019.

[18] They are not using the site for any of the activities contained in the definition of a General Industrial Use. They simply park company vehicles at the shop at the end of the day and walk to their respective residences. They have never operated a business from this site and have no plans to do so in the future.

[19] They do not own or operate any of the large trucks shown in the photographs that were submitted by their neighbour. There is traffic congestion in this subdivision due to the surrounding industrial uses and access issues to Anthony Henday Drive.

[20] Ms. Dziwenka and Mr. D. Kowoluk provided the following information in response to questions from the Board:

a) There is no house on the subject site. A development permit application to construct a house on the site was approved in 2005. However, the required servicing fee was excessive and not feasible so the house was never built.

b) Company vehicles are parked on the site but they are not repaired on the site. On occasion, personal vehicles are repaired and maintained in the shop on the site.

c) The site is used purely to park large company vehicles. However, it was their opinion that the parking of vehicles on the site does not constitute a General Industrial Use.

d) There has never been a house on this site but there are houses on both of the adjacent sites.

e) It was acknowledged that the site is not being used for any of the listed uses contained in DC2.369.

f) They operate their business from the Winterburn Industrial Park where the majority of their equipment is stored. The equipment is repaired and maintained from this site.

g) The late snowfall this spring delayed their annual site clean-up which had not taken place when the inspection was conducted and the photographs taken on April 24, 2019. The scrap metal is collected on the site and used for their hobby which is the construction of outdoor metal fireplaces. The water storage units are used to collect water that is used to water lawns and gardens at their residences because the sites are not serviced. The tires are a combination of winter and summer tires for their vehicles. The vehicle parts are for personal vehicles. The large and small mowers are used to cut the lawn at the nine residences that they own in the subdivision.

h) Other family members also use the site for storage purposes. Several recreational vehicles are also stored on the site.

i) A tandem gravel truck and a tractor are usually parked inside the shop. It was estimated that the weight of the truck is 39,000 kilograms.

ii) Position of Affected Property Owners in Opposition to the Appeal

Mr. S. Pederson

[21] He and his wife reside in the subdivision and are affected even though they live outside the 60-metre radius because of the excess traffic and noise the subject site generates.

[22] The only entrance and exit to the subdivision is located at 184 Street and 122 Avenue which makes it necessary for heavy tractor trailers loaded with excavators and other heavy equipment to travel along 122 Avenue in front of their residence to access 121 Avenue.

[23] The roadway is basically a very narrow country road with no drainage and is only capped with a light duty finishing material. During wet periods the roadway becomes soft and trucks with heavy loads sink into the soft areas. The roadway constantly requires repairs.

[24] The Mooncrest subdivision is comprised of 48 single family homes and one group home.

[25] There are no sidewalks or street lights in the subdivision. Children often ride their bicycles and play on the roadway which is a safety concern because of the heavy truck traffic.

[26] They agree with the City that this commercial business is negatively impacting the neighbourhood.

[27] It was their opinion that the existing shop exceeds the height restriction that was imposed on the development permit that was issued in 1986.

iii) Position of the Development Compliance Officer, Mr. J. Young:

[28] Mr. Young advised that he was appearing on behalf of Ms. R. Fraser, the Development Compliance Officer who issued the Stop Order and provided the written submission to the Board. Mr. Young provided the following information in response to questions from the Board:

a) He confirmed that the existing shop on the subject site was built in 1986. A development permit was issued for the construction of an accessory building but the development permit did not address the principal use of the site.

b) This approval occurred at the time these lands were being annexed from the County of Parkland. However, he could not confirm whether or not the previous zoning permitted an Industrial Use on the subject site or if a development permit was required.

[29] At this point, the Presiding Officer adjourned the hearing in order to allow Mr. Young some time to research the historic zoning and development requirements of the County of Parkland that were in place prior to this land being annexed by the City of Edmonton.

[30] When the hearing resumed Mr. Young continued and provided the following information:

a) When the development permit for the Accessory Building was approved in November 1986, the lands were being annexed from the County of Parkland and the development regulations contained in the County of Parkland Bylaw were used because the *Land Use Bylaw 5996* had not yet been adopted. However, the County of Parkland could not immediately provide any information about the 1986 Bylaw or the uses allowed in the AA(IC) Zone but indicated they would research the matter

further. A copy of the approved Development Permit for the Accessory Building/Storage on the subject site was submitted and marked as *Exhibit A*.

b) Mr. Young acknowledged that the accessory building on the subject site has an approved development permit. However, the Stop Order pertains to the use of the site and not to the existing accessory building.

c) It was his position that the accessory building can be used for storage purposes but the surrounding land cannot be used to store materials that constitute a General Industrial Use.

d) Approval of the Kinokamau Plains Area Structure Plan has a complicated history. Originally, Council intended this area to be industrial but in the process decided to designate this subdivision as residential. During the time that the area was zoned for industrial uses, development applications for industrial uses were approved and grandfathered in. The decision was made to change the zoning to residential, and Direct Control Zones were applied to the rest of what was left of the residential uses. There are a couple of spot zones that allow industrial uses but the rest of the land is zoned rural residential. It is a very complicated land use situation.

iv) Rebuttal of the Appellants

[31] They questioned why their property was not grandfathered in as an industrial use. They only became aware that it had not been grandfathered after a discussion with a Development Officer in 2017.

[32] They agreed that traffic has increased but reiterated that it can be attributed to their close proximity to several industrial parks and poor signage. None of their vehicles use 122 Avenue to access their site. When they enter the subdivision from 184 Street they make an immediate left turn and use that road to access 121 Avenue. Residents who live on 121 Avenue use the most direct access because the roads in the area are rough and narrow.

[33] Excavators are not brought to the shop because they cannot be parked inside. Excavators have been brought into the subdivision when required to complete work for basement excavations for new houses being built. Every time any equipment comes into the subdivision, residents assume it belongs to them.

[34] Their family owns 18410, 18430, 18450, 18520 and 18560 on 121 Avenue as well as several sites on 122 Avenue. The site zoned DC2.371 that was grandfathered in is located directly north of their site on 122 Avenue.

Decision

[35] The appeal is **DENIED** and the Stop Order is **UPHELD**.

Reasons for Decision

[36] This is an appeal by the property owners of a Stop Order issued in respect of their property on April 25, 2019 to "Cease the General Industrial Use and remove all related materials by May 22, 2019".

[37] Based on the materials before it, the Board is satisfied that the Stop Order was issued pursuant to section 645(1) of the *Municipal Government Act* by a duly authorized Development Compliance Officer and in compliance with the procedural requirements of the *Municipal Government Act*.

[38] The subject Site is zoned DC2.369 Site Specific Development Control Provision. The listed Uses are found in DC2.369.3. They are residential in nature and include Single Detached Housing, Limited Group Homes, Minor Home Occupations, Major Home Occupations, Foster Homes and daytime Child Care Services. General Industrial Use is not a listed Use.

[39] DC2.369 was adopted prior to the enactment of the *Edmonton Zoning Bylaw 12800*. The Board notes that the definition of a General Industrial Use is virtually the same in both the *Land Use Bylaw 5996* and *Edmonton Zoning Bylaw 12800*. Section 10.4(1)(d) of the *Land Use Bylaw 5996* and section 7.5(3)(d) of the *Edmonton Zoning Bylaw 12800* define a General Industrial Use to include:

> Development used principally for one or more of the following activities:
>
> …….
>
> d) the storage or transshipping of materials, goods and equipment.

[40] During the hearing, the Development Authority submitted a copy of a Development Permit, to construct an Accessory Building – detached Garage/Storage that was approved for the subject Site in November 1986. The Development Authority confirmed that vehicles and equipment can be parked and stored inside the building and that these activities are not covered by the Stop Order.

[41] The issue before the Board is whether or not the remainder of the subject Site is being used as a General Industrial Use.

[42] The Board considered one written objection received from a resident of the Mooncrest subdivision and the oral evidence provided by another resident who resides on 122 Avenue who attended the hearing. They both raised concerns regarding the amount of heavy truck traffic in the subdivision; however, evidence was not provided to allow the Board to conclude that the problem was attributable to the subject Site. Based on the evidence provided by the Appellants, their vehicles enter the subdivision and use the most direct route to access the subject Site. Their vehicles do not pass 122 Avenue and could not be the source of the concerns raised by the opposing parties.

[43] The Board considered the photographic evidence provided by the Development Authority on the day the Stop Order was issued as well as the Appellants' oral submissions and subsequent photographic evidence.

[44] The Board also considered:

a) A Single Detached House was never built on the Site despite the issuance of a development permit.

b) The Site is used to store heavy equipment, tires, water storage units, vehicle parts, scrap metal, construction material and landscaping supplies. According to the Appellants, the Site is used purely to park two large vehicles and two regular sized vehicles used for their business. The two larger vehicles are parked inside the Accessory Building (shop) and the two smaller vehicles are parked outside. Trailers used in conjunction with these vehicles and at least two recreational vehicles are also regularly parked outside at the Site.

c) The Site is also used for storage by family members who reside close by. Items such as fencing, landscaping materials and building products are often stored on the Site.

d) Tires have been temporarily stored on the Site as well as excavating equipment and backhoes.

e) Personal vehicles are maintained and repaired inside the shop, but company vehicles are not repaired on the Site.

[45] Based on all of these factors, the Board finds that a General Industrial Use as defined in section 10.4(1)(d) of the *Land Use Bylaw 5996* and section 7.5(3)(d) of the *Edmonton Zoning Bylaw 12800* is occurring on the subject Site. As a General Industrial Use is not a listed Use in DC2.369, the Stop Order was properly issued. Therefore, the appeal is denied and the Stop Order is upheld. The Board notes that the Order does not apply to any items stored or parked within the Accessory Building that was approved in November 1986.

Ms. K. Cherniawsky, Presiding Officer
Subdivision and Development Appeal Board

Board members in attendance: Mr. M. Young, Mr. R. Hachigian, Mr. A. Nagy, Ms. E. Solez

c.c. City of Edmonton, Development Compliance Branch, Ms. R. Fraser, Mr. J. Young, Ms. K. Lamont, Mr. A. Jabs

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.

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.

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Date: June 21, 2019
Project Number: 310942980-001
File Number: SDAB-D-19-083

Notice of Decision

[1] On June 6, 2019, the Subdivision and Development Appeal Board (the "Board") heard an appeal that was filed on May 14, 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 a General Retail use to a Cannabis Retail Sales and to construct interior and exterior alterations (two new doors).**

[2] The subject property is on Plan RN22 Blk 20 Lots 3-6, located at 10235 - 124 Street NW, within the (CB1) Low Intensity Business Zone. The Main Streets Overlay and Oliver Area Redevelopment Plan apply to the subject property.

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

- A copy of the Development Permit application with attachments, proposed plans, and the refused Development Permit;
- The Development Officer's written submissions including supporting materials;
- The Appellant's written submissions including supporting materials;
- Correspondence in opposition to the proposed development from an affected property owner; and
- One online response in opposition to the proposed development.

[4] The following exhibit was presented during the hearing and forms part of the record:

- Exhibit A – Google Maps screenshot of the proposed development location, submitted by Affected Property Owner.

Preliminary Matters

[5] 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.

[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.

Summary of Hearing

i) Position of the Appellant, Numo Cannabis Corporation

[8] Mr. E. Kirker of Parlee McLaws appeared to represent Numo Cannabis Corporation ("Numo"). He was accompanied by Mr. D. Nguyen, owner of Numo.

[9] The proposed development will be located just north of Jasper Avenue on 124 Street near the High Street Shopping Centre. It was refused by the Development Officer because it is located too close to an approved Cannabis Retail Sales (not yet in operation).

[10] Per section 70(1) of the *Edmonton Zoning Bylaw 12800* (the "*Bylaw*"), Cannabis Retail Sales must be separated from any other Cannabis Retail Sales by at least 200 metres. In this case the Development Officer measured the separation distance as 168 metres which is a deficiency of 32 metres or 16 percent. The Development Officer only has the discretion to grant a variance of up to 20 metres, or 10 percent, per section 70(1)(b) of the *Bylaw*.

[11] It is appropriate for the Board to use its discretion to grant the required variance as the proposed Cannabis Retail Sales will benefit the local community.

[12] Mr. Nguyen provided a short overview of Numo's operations. Numo was one of the only cannabis retailers open since the first day of legalization. Numo focuses on ensuring safe and quality cannabis products, and their security systems exceed requirements.

[13] Numo is committed to the community and recently held a free community BBQ attended by over 400 people from the neighbourhood. They believe that creating relationships with neighbours is the only way to grow as a business. The increase of traffic to their existing business from outside of the neighbourhood has benefited other surrounding businesses.

[14] A rendering of the proposed store showed a centre bar where customers receive information about different products and complete their orders. Customers then proceed to the pick-up desk. The controller and team lead carefully manage products to prevent loss or theft.

[15] Mr. Kirker referenced section 687(3)(d) of the *Municipal Government Act*, RSA 2000, c M-26 (the "*MGA*"), which gives this Board the jurisdiction to grant a variance to the required separation distance. Section 687(3)(d) of the *MGA* states:

> In determining an appeal, the subdivision and development appeal board may make an order or decision or issue or confirm the issue of a development permit even though the proposed development does not comply with the land use bylaw if, in its opinion,
>
> (i) the proposed development would not
>
> (A) unduly interfere with the amenities of the neighbourhood, or
>
> (B) materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land,
>
> and
>
> (ii) the proposed development conforms with the use prescribed for that land or building in the land use bylaw.

[16] In this case, the proposed development would 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.

[17] Mr. Kirker referred to *Newcastle Centre G.P. Ltd. v Edmonton*, 2014 ABCA 295 [*Newcastle*], a decision of the Alberta Court of Appeal which dealt with separation distances between liquor stores. At paragraphs 6 to 7, the Court rejected the Board's interpretation of its variance powers:

> [6] An attempt to try to reconcile the Reasons' internal conflicts would be to interpret the Reasons as follows. We, the Board, have a power to grant variances, but the bylaw creates a presumption of harm to the public, and we the Board cannot intervene unless that presumption is rebutted by the applicant. That is an error.
>
> [7] The legal test for such waivers is in the *Municipal Government Act*, and is clear. Section 687(3)(d) mandates this test:
>
> > the proposed development . . . would not (A) unduly interfere with the amenities of the neighbourhood, or (B) materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land . . .

[18] In effect, the Court held that separation distance requirements in the *Bylaw* are not, in and of themselves, evidence of harm. The onus is on other parties to prove harm, and in this instance, the only information before this Board with respect to harm is a submission from a neighbouring property owner, and contrary to those submissions, it was the Appellant's view that the proposed development will actually benefit the community.

[19] Upon questioning by the Board on the issue of onus, Mr. Kirker clarified that onus should not be on the Appellant to disprove any possibility of harm, or for the Appellant to prove a negative.

[20] In response to the online comment from a neighbouring property owner that boards and tribunals are relied on to uphold bylaws, the Appellant submitted that granting this variance would in fact uphold the *Bylaw* by contributing to the amenities of the neighbourhood.

[21] The Appellant reviewed the photographs and maps from their supporting materials to provide context. The materials showed the following:

i) There is plenty of parking along 124 Street as well as additional parking along the side of the building.

ii) The separate entrance will be located on the side road.

iii) There is a large diversity of uses in this high density commercial shopping corridor. The proposed development will be complementary to these uses and will not be in competition with them.

iv) An aerial photo shows the 168-metre separation distance between the approved Cannabis Retail Sales and the proposed development. From a straight reading of the *Bylaw*, it was unclear to the Appellant how separation distances between Cannabis Retail Sales uses are measured, and the Appellant assumed that the 168 metres measurement represented a site-to-site measurement.

v) Section 70 of the *Bylaw* provides multiple methods of measurement in different scenarios. For example, section 70(4)(b) specifies that when measuring between a Cannabis Retail Sales and a public or private education facility, "separation distances shall be measured from the closest point of the subject Site boundary to the closest point of another Site boundary". In comparison, section 70(1) simply states that the 200-metre separation distance between Cannabis Retail Sales Uses "shall be measured from the closest point of the Cannabis Retail Sales Use to the closest point of any other approved Cannabis Retail Sales Use". It is unclear as to what this "closest point" entails.

vi) The Appellant noted that City Council added the clarification to the measurement methodology governing public or private education, provincial health care facilities, and school reserves or municipal and school reserves separation distances under section 70(4) on February 25, 2019. Council could have amended section 70(1) at that same time but chose not to do so, which shows they intended some discretion in measuring separation distances between Cannabis Retail Sales locations.

vii) The shortest door-to-door walking distance between the two Cannabis Retail Sales using a controlled intersection is 202 metres. The two stores are separated by 124 Street which is an arterial road of four to five lanes of traffic with a centre median for much of the distance. Having a Cannabis Retail Sales on either side of 124 Street would discourage jaywalking.

viii) Neither Cannabis Retail Sales is visible from the other.

[22] In summary, the proposed location along this commercial corridor is an ideal site for Cannabis Retail Sales. The area is well lit and has ample parking. The area is zoned (CB1) Low Intensity Business Zone and Cannabis Retail Sales is a Permitted Use in this zone. Other than the deficiency in the required separation distance the proposed development meets all federal, provincial and municipal regulations and will meet or exceed all security requirements.

[23] The Appellant reviewed the suggested conditions of the Development Officer and had no objections to the conditions.

[24] The letter of opposition from Michael Calvin Property Group stated that the proposed development would create adverse effects to an existing cannabis accessory store across the street. The Appellant submitted that cannabis accessories account for less than one percent of the total sales in their currently operating stores. They would view the cannabis accessory store across the street as a complementary retailer rather than a competitor.

[25] The Appellant provided the following responses to questions from the Board:

a) They spoke to some of the other tenants in the building, but not to other surrounding businesses.

b) The entrance to the Cannabis Retail Sales will be from the access road at the side of the building, not from 124 Street.

c) They confirmed that they do not contest the Development Officer's calculation of the separation distance, but they are requesting that the Board grant a variance of 32 metres to the required 200-metre separation distance.

d) Separation distances in the *Bylaw* apply to all areas of the City and should be upheld in most instances. In this particular case, the proposed development is along a commercial corridor, is surrounded by high density residential, and there are more people in the area. These factors should be taken into consideration by the Board when deciding whether a variance can be granted or not. The Development Officer did not have the ability to consider these factors.

e) They do not believe there is a clustering of Cannabis Retail Sales in this area. There is only one other approved Cannabis Retail Sales across the street which is not yet in operation. They are not aware of the locations of other approved Cannabis Retail Sales in the vicinity; they believe there are some further along Jasper Avenue.

ii) Position of the Development Officer, Mr. S. Chow

[26] Mr. Chow provided the following responses to questions from the Board.

a) He could not speak to the harm that would be caused by granting the required variance. Separation distances in the *Bylaw* were enacted by Council and were based on public consultation.

b) The Development Authority did not receive any concerns from surrounding businesses or members of the public specific to this project.

c) The Cannabis Retail Sales Use map was accurate on the day it was created. The next closest Cannabis Retail Sales locations other than the two shown on the map are five or six blocks away.

d) Separation distances between Cannabis Retail Sales are measured from the interior walls.

v) Position of an Affected Property Owner

[27] Mr. M. Podmoroff appeared in opposition to the proposed development. Mr. Podmoroff's company owns property directly to the west across 124 Street.

[28] One of his long-term tenants sells vaping equipment and cannabis accessories. Granting the requested variance could result in a clustering of similar businesses and the closure of his tenant's business. The resulting costs would directly and materially affect the use and value of his property.

[29] There is nothing unique about the subject property that would require a variance by the Board. He reviewed a map included in his materials that shows possible alternative locations that would not require a variance to the required separation distance.

[30] The Appellant stated that the proposed development would bring an increase of traffic to the neighbourhood. Parking in this area is already limited and an increase in traffic would negatively impact other businesses.

[31] Contrary to the Appellant's submissions, there is no centre median along 124 Street directly in front of the proposed development. An inference that the proposed Cannabis Retail Sales and the cannabis accessory store across the street would complement each other would point to an increase in jaywalking.

[32] In response to questioning from the Board, Mr. Podmoroff acknowledged that some of the other possible locations he indicated that would meet the 200-metre separation distance would still put the proposed development near his tenant.

vi) Rebuttal of the Appellant

[33] Mr. Podmoroff indicated several locations directly to the south of their proposed location as appropriate for a Cannabis Retail Sales. The Appellant cannot see how moving the

proposed Cannabis Retail Sales 50 metres to the south would change the impact on Mr. Podmoroff's tenant.

[34] The Appellant referred the Board to a map depicting the location of the medians. The Appellant does not submit that there is a median directly in front of the proposed development; however, there is a median in front of the approved Cannabis Retail Sales as well as further to the south. They are merely suggesting that these medians would deter jaywalking across 124 Street.

[35] The Appellant disputes Mr. Podmoroff's submission that the proposed development would create an influx of vehicle traffic to the area resulting in parking issues. This location is already a high traffic area and they are expecting mostly foot traffic. People do not spend much time in the store and if driving, they would not be parked for any length of time.

Decision

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

1. There shall be no parking, loading, storage, trash collection, outdoor service or display area permitted within the required 4.5m (14.76 ft.) setback. (Reference Section 340.4(3) & (5).)

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. Cannabis Retail Sales shall include design elements that readily allow for natural surveillance to promote a safe urban environment, where applicable and to the satisfaction of the Development Officer, including the following requirements:

    a. customer access to the store is limited to a storefront that is visible from the street other than a Lane, or a shopping centre parking lot, or mall access that allows visibility from the interior of the mall into the store;

    b. the exterior of all stores shall have ample transparency from the street;

    c. Any outdoor lighting shall be designed to ensure a well-lit environment for pedestrians and illumination of the property; and

d. Landscaping shall be low-growing shrubs or deciduous trees with a high canopy at maturity to maintain natural surveillance.

4. Signs require separate Development Applications.

ADVISEMENTS:

a. This Development Permit is NOT a Business Licence. A separate application must be made for a Business Licence. Please contact the 311 Call Centre (780-442-5311) for further information.

b. A building permit is required for any construction or change in Use of a building. For a building permit, and prior to the plans examination review, you require construction drawings and the payment of fees. Please contact the 311 Call Centre (780-442-5311) for further information.

c. Unless otherwise stated, all above references to section numbers refer to the authority under the Edmonton Zoning Bylaw 12800 as amended.

d. With future changes of use for this site, Subdivision Planning will require the applicant to provide parking justification and conduct observations on site to establish if parking continues to be sufficient for the site.

[37] In granting the development, the following variance to the *Edmonton Zoning Bylaw* is allowed:

a) The minimum required 200-metre separation distance of any Cannabis Retail Sales from any other Cannabis Retail Sales pursuant to section 70(1) is reduced by 32 metres to permit a separation distance of 168 metres.

Reasons for Decision

[38] The proposed development is to change the Use from a General Retail Use to a Cannabis Retail Sales and to construct interior and exterior alterations (two new doors).

[39] The subject Site is located within the Oliver Area Redevelopment Plan and the (CB1) Low Intensity Business Zone. Pursuant to section 330.2(3) of the *Edmonton Zoning Bylaw*, Cannabis Retail Sales is a Permitted Use in this Zone.

[40] Cannabis Retail Sales are subject to the Special Land Use Provisions in section 70 of the *Bylaw*. Section 70(1) provides that any Cannabis Retail Sales shall not be located less than 200 metres from any other Cannabis Retail Sales. The Development Officer determined that the proposed development was located 168 metres from the next nearest Cannabis Retail Sales using the method of measurement in section 70(1)(a) and would therefore require a variance to section 70(1) of 32 metres. Under section 70(1)(b), the

Development Officer is precluded from granting a variance over 20 metres. Accordingly, the Development Officer refused the application.

[41] The Board's authority to grant a variance for this Permitted Use is found in section 687(3)(d) of the *Municipal Government Act*, RSA 2000, c M-26 (the "*MGA*"). As pointed out by the Appellant, two cases of the Alberta Court of Appeal provide guidance for the Board concerning the exercise of this variance authority: *Thomas v. Edmonton*, 2016 ABCA 57 [*Thomas*], and *Newcastle Centre G.P. Ltd. v Edmonton*, 2014 ABCA 295 [*Newcastle*].

[42] In *Thomas* the Court of Appeal cautioned that the Board should not defeat its general obligation under section 687(3)(a.1) to comply with the *Bylaw* when authorizing exceptions under section 687(3)(d). At paragraph 29, the Court made more general obiter observations about the Board's authority under section 687(3)(d):

> What then is the rationale for this exception? Statutory plans and land use bylaws set out general development standards that are common to all lands in a specific area. These standards are typically defined with precision so that everyone understands what a particular site can be used for, and what can be constructed thereon. But as with all line-drawing, it is recognized that there will be cases in which a strict application of the set standards could lead to an unreasonable result. To relieve against hardship, the Legislature has conferred on subdivision and development appeal boards the authority to relax – that is vary, dispense with or waive – development standards in the applicable land use bylaw providing certain conditions as set out in s 687(3)(d) are met.

[43] *Newcastle* predates *Thomas* and dealt specifically with the issue of separation distances within the context of two liquor stores in a zone where they were Permitted Uses. In *Newcastle*, the Court held that it is an error for the Board to assume, without any evidence, that the *Bylaw* creates a presumption of harm to the public and that the Board cannot intervene and grant variances unless that presumption is rebutted by an applicant.

[44] The Court in *Newcastle* also discussed the Board's obligation to provide reasons when it denies variances:

> [11] Were the Board's Reasons adequate? Was the result of applying the proper tests in s 687(3)(d) so obvious as to require no explanation in the Reasons? No. It is not self-evident that or how two liquor stores within 500 meters would interfere with neighbourhood amenities, nor that or how they interfere with or affect use, enjoyment, or value of neighbouring pieces of land. This is not a boiler factory in a residential neighbourhood. The problem only arises because there would be two liquor stores in the area. One alone is a permitted use.
>
> [12] Therefore, if there is any interference with neighbourhood amenities, or with use, enjoyment, or value of other land parcels, the Board had a duty to explain that in its Reasons, and it did not. A mere conclusory statement does not suffice, and that is all that paragraph 10 is.

[45] Bearing these cases in mind, the Board considered the following factors in determining whether or not to grant the variance required for the proposed development.

[46] First, the Board was provided with no specific rationale as to how granting the necessary 32-metre variance would create a substantive harm. Instead, the Development Officer indicated that he denied this application because the distances in section 70 were set after public consultation and he lacked any authority to grant the required variance.

[47] Second, while a 32-metre variance in the separation distance is required when using the method of calculation per section 70(1)(a), the Board received evidence that a pedestrian walking from entrance to entrance would traverse at least 202 metres if crossing the road legally.

[48] Third, the proposed development and the approved Cannabis Retail Sales are separated by a major arterial road with four to five lanes of traffic and intermittent centre medians which further separate the two Cannabis Retail Sales.

[49] Fourth, based on pictorial evidence provided at the hearing, neither location is visible from the other. The two developments are oriented in different directions, and obstructed by intervening buildings.

[50] Fifth, the Board considered the issues raised by the parties opposed to the development.

a. The first submission in opposition requested that the Board uphold the 200-metre separation distance because it is a development regulation. The Board has addressed this issue in its discussion of the variance authority found in section 687(3)(d) of the *MGA* and the Court of Appeal directions from *Newcastle* and *Thomas*.

b. The owner of a property across the street from the subject Site appeared in person to object for three reasons:

i. *The proposed development would have financial consequences for one of his tenants, a cannabis accessory supplier.* The Board did not find this objection persuasive. The Board notes that the Appellant indicated that accessory sales represent less than one percent of their business and in their view the two developments – Cannabis Retail Sales and cannabis accessory sales – are complementary. Further, this issue relates more to business competition than to planning issues in section 687(3)(d), particularly as the Board received no evidence that there would be a material drop in property values and in fact, the neighbouring property owner himself recognized that several nearby locations would be compliant even within the same block.

ii. *The proposed development would create a clustering of this Use.* According to the map submitted by the Development Officer and the party's submissions, the next nearest approved Cannabis Retail Sales is 364 metres away, east of 126 Street on the north side of Jasper Avenue and the closest locations to the north are five to six blocks from the proposed development. Given this information, the high

density of this area and the existing commercial diversity, the Board finds that approving the proposed development will not create an adverse impact in terms of clustering.

iii. *The proposed development will contribute to existing parking constraints.* The Board notes that the proposed development does not require any parking variances. Furthermore, the proposed development is located in the Main Streets Overlay. Section 819.1 of the *Bylaw* states in part that the General Purpose of this Overlay "is to encourage and strengthen the pedestrian-oriented character of Edmonton's main street commercial areas". Locating a Cannabis Retail Sales store across the street from a cannabis accessories supplies store will strengthen the pedestrian-oriented character of this commercial corridor.

[51] After weighing all of these factors, it is the opinion of the Board that allowing this development would 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. The proposed Cannabis Retail Sales is approved.

Ms. K. Cherniawsky, Presiding Officer
Subdivision and Development Appeal Board

Board members in attendance:
Mr. M. Young, Mr. R. Hachigian, Mr. A. Nagy, Ms. E. Solez

c.c. Parlee McLaws LLP
City of Edmonton, Development & Zoning Services - Mr. S. Chow / Mr. H. Luke
City of Edmonton, Law Branch - : Mr. M. Gunther
Michael Calvin Property Group – Mr. M. Podmoroff

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.