



**EDMONTON  
TRIBUNALS**

*Subdivision &  
Development  
Appeal Board*

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Date: October 5, 2018  
Project Number: 285825062-001  
File Number: SDAB-D-18-134

**Notice of Decision**

- [1] On September 20, 2018, the Subdivision and Development Appeal Board (the “Board”) heard an appeal that was filed on August 2, 2018. The appeal concerned the decision of the Development Authority, issued on July 20, 2018, to refuse the following development:

**To change the Use from a Health Service to a Cannabis Retail Sales**

- [2] The subject property is on Plan 9023127 Blk 61 Lot 8, located at 14915 - Stony Plain Road NW, within the CB1 Low Intensity Business Zone. The Main Streets Overlay and Jasper Place Area Redevelopment 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 submission and PowerPoint presentation;
  - An email of opposition from the West Jasper/Sherwood Community League; and
  - An email of opposition from the Grovenor Community League.
- [4] The following exhibits were presented during the hearing and form part of the record:
- Exhibit A – Photograph of the entrance to the ravine submitted by the Appellant
  - Exhibit B – Photograph of other potential locations, submitted by the Appellant
  - Exhibit C – City Council Selection Sheet dated September 18, 2 018 and a copy of Bylaw 18397, Public Places Bylaw Amendment No. 7.

**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 (the “*Municipal Government Act*”).

**Summary of Hearing**

- i) *Position of the Appellant, Mr. R. Noce, Miller Thomson and Ms. M. Kiziak, Alcanna Cannabis Stores Ltd.:*
- [8] Site is defined as an area of land consisting of one or more abutting lots and a Lot means “lot” as defined in Part 17 of the *Municipal Government Act*.
- [9] Section 70 of the *Edmonton Zoning Bylaw* sets out development regulations for Cannabis Retail Sales, including the minimum required 100 metre separation distance from public lands zoned A or AP, which in this case is the Mackinnon Ravine Park. Pursuant to section 70(4), notwithstanding section 11 of the *Edmonton Zoning Bylaw*, a Development Officer is not allowed to grant a variance to subsection 70(2) or 70(3), the minimum required separation distances.
- [10] Even if the Development Officer determined that this was an appropriate site for Cannabis Retail Sales, a variance could not be granted.
- [11] The regulations establish the mode of measurement to be used to calculate the separation distances. Section 70(3)(a) states that the 100 metre separation distance shall be measured from the closest point of the subject Site boundary to the closest point of another Site boundary, and shall not be measured from Zone boundaries or from the edges of structures. Section 70(5) contains regulations for design elements to ensure a safe urban environment.
- [12] This site is zoned CB1 Low Intensity Business Zone and Cannabis Retail Sales is a permitted use. The proposed Use at this location complies with all of the *Gaming, Liquor and Cannabis Regulations*.
- [13] Section 687(3) of the *Municipal Government Act* was recently amended to include subsection (a.4) that requires the Board to comply with the applicable requirements of the regulations under the *Gaming, Liquor and Cannabis Act* described in the Cannabis License and distances between those premises and other premises. There is no mention of public land in the provincial regulations.

- [14] The Subdivision and Development Appeal Board has the authority to vary any development regulation in the *Edmonton Zoning Bylaw* pursuant to section 687(3)(d) of the *Municipal Government Act* if it is determined that the proposed development will not unduly interfere with the amenities of the neighbourhood or materially affect the use, enjoyment or value of neighbouring properties.
- [15] The decision of *Thomas v Edmonton (City)*, 2016 ABCA 57 addressed the variance powers of the Board pursuant to Section 687(3)(d) of the *Municipal Government Act*. Paragraph [29] of the decision states that “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 section 687(3)(d) are met.”
- [16] The *Newcastle Centre GP Ltd. v Edmonton (City)*, 2014 ABCA 295 decision is helpful and explains at paragraph [6] and [7] that “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. 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 neighboring parcels of land.”
- [17] Ms. Kiziak referenced conceptual drawings of the proposed Cannabis Retail Sales and advised that it will be operated by Alcanna Cannabis Stores Limited Partnership. Its affiliated companies have been a liquor retailer in Alberta since privatization.
- [18] Alcanna is a first class and responsible retailer who is taking their experience and reputation into the cannabis space. They have a thriving and diverse workforce in the Edmonton area and have put five million dollars back into the community.
- [19] Their brand has been built on relationships and they take pride in working collaboratively with regulators. They go above and beyond the regulated requirements. The site has a specific security plan, including security cameras and key card access.
- [20] Large commercial developments are chosen in locations that will ensure security for customers and employees. Stores will be bright, safe and inviting. Product will be kept in a secure location until payment has been received.
- [21] The Development Officer refused to issue a development permit because he had no authority to approve the permit and therefore did not consider all of the arguments.
- [22] Photographs and maps were referenced to provide an overview of the site. The proposed Cannabis Retail Sales is located in the southeast corner of an inward facing shopping centre, between two other retail outlets. There is a Safeway store located across the parking lot to the west. A church and residential properties are located east of 149 Street across a six-lane arterial roadway.

- [23] Using the mode of measurement established in section 70(3) (from the closest point of the subject Site boundary to the closest point of another Site boundary), the separation distance is 38 metres. The distance from the edge of the building where the proposed Cannabis Retail Sales will be located to the tip of the public land (the ravine) is approximately 93 metres. The distance as the crow flies between the site of the proposed Cannabis Retail Sales and the paved entrance to the ravine is approximately 188 metres. Walking distance from the Cannabis Retail Sales to the ravine is approximately 300 metres. The proposed Cannabis Retail Store is approximately 450 metres of travel away from the paved entrance to the ravine. The ravine is generally unkempt with tall grass.
- [24] Photographs of the steeply sloped entrance to the ravine and an aerial photograph of 149 Street and Stony Plain Road, marked Exhibit A were submitted to illustrate the slope of the entrance and that the ravine is not visible from the site of the proposed development and the proposed development is not visible from the ravine.
- [25] The objection from the West Jasper/Sherwood Community League was acknowledged. However, while the photographs attached may be from some other part of the Mackinnon Ravine, they are not representative of the portion of the ravine that is close to the subject site. The Groat Bridge and the U of A are visible in several photographs and are located approximately 30 blocks from the subject site. The Appellants therefore asked the Board not to put any weight on the submitted photographs because details of the locations were not provided.
- [26] Based on the market demands and the number of applications, a Cannabis Retail Sales Use will be approved in this community. A photograph was referenced to show other possible locations along Stony Plain Road. These locations comply with the Bylaw and they have the potential to create more adverse impacts than the proposed site - an inward facing, well lit, busy shopping centre that cannot be seen from Stony Plain Road.
- [27] There are no public picnic tables or playgrounds in this part of the ravine. The zoning may encompass the entire ravine but the photographs submitted by the Community League are not representative of this part of the ravine.
- [28] The *Edmonton Zoning Bylaw* does not allow the Development Authority to vary any of the development regulations for this use but it is completely appropriate for the Board to use its variance powers.
- [29] To not allow this variance would disallow a cannabis store in a large, inward facing commercial development owned by a large, national, sophisticated and responsible landlord with international co-tenants like Starbucks and London Drugs.
- [30] The Board should exercise its variance power in this instance because:
- a) the proposed Cannabis Retail Store is a Permitted Use;

- b) section 70 of the *Edmonton Zoning Bylaw* does not limit the Board's authority to approve the proposed development;
- c) the "public lands" site (Mackinnon Ravine) is a passive area because it is not used for community or recreation activities;
- d) there are no playing fields or an open-picnic area for the public to use;
- e) there is no active park or activity area in the ravine;
- f) the proposed cannabis retail store cannot be seen from the ravine;
- g) the ravine is separated from the proposed cannabis retail store by 149 Street, a six lane arterial roadway;
- h) the proposed cannabis retail store is approximately 450 metres of travel on foot away from the entrance to the ravine which is general unkempt with tall grass;
- i) there are no children or youth who gather or play in the ravine - this is not a park with a playground where minors gather or play;
- j) the entrance to the ravine is approximately 150 metres east of 149 Street and the closer portion is bush and forest on a steep incline; and,
- k) the building where the proposed cannabis retail store is to be located is approximately 188 metres from the nearest point of the ravine.

[31] A photograph, marked Exhibit B, was submitted to illustrate possible locations where Cannabis Retail Sales would most likely be permitted along Stony Plain Road that are in direct sight of the ravine and also closer to the ravine than the proposed location. Therefore, not to grant this variance would lead to the absurd result of preferring and allowing a cannabis retail use that is actually closer to, and more visible from the ravine. This result, if there were harm to neighbours, would ostensibly be worse.

[32] Both *Thomas v Edmonton (City)*, 2016 ABCA 57 and *Newcastle Centre GP Ltd v Edmonton (City)*, 2014 ABCA 295 determined that harm is not to be presumed. Therefore, it is not sufficient for the Development Authority to simply say that a variance should not be granted because the proposed Use is new and the long-term planning impacts are unknown. The Board cannot presume harm and must look at the evidence provided to determine whether a variance should be granted pursuant to section 687(3) of the *Municipal Government Act*.

[33] In this case, evidence has been provided that the proposed development is located on the best possible site in this community and will not unduly interfere with the amenities of the neighborhood or the use, enjoyment or value of neighbouring properties. No one other than the Community League has raised any opposition to the proposed development. No objections have been raised by the residents or the church located between the proposed development and the ravine.

[34] All of the recommended conditions suggested by the Development Authority are acceptable to the Appellant.

[35] Mr. Noce provided the following information in response to questions from the Board.

- a) It was his opinion that it would be helpful if the municipality and the provincial government used the same mode of measurement to calculate separation distances.
- b) For this type of large commercial site, it would be more reasonable to use a more flexible mode of measurement to calculate separation distances.
- c) It was his interpretation of the recently amended *Public Places Bylaw* that smoking is not permitted in the park.
- d) He reviewed the recent amendment to the *Public Places Bylaw* which was before City Council on September 18, 2018. He noted that the Bylaw has not yet been consolidated and it is difficult to determine with absolute certainty which changes were made and adopted. The City Council Selection Sheet dated September 18, 2018 and a copy of Bylaw 18397, *Public Places Bylaw Amendment No. 7* was marked Exhibit C.
- e) Section 11(g) of the *Public Places Bylaw* defines “parkland” as “a public place, whether developed or not, that is intended to be used by members of the public for recreation or general enjoyment and contains: (i) a playground; (ii) a sports field; (iii) a skate park or bicycle park; (iv) an outdoor theatre; (v) an outdoor pool or water spray park; (vi) a seasonal skating rink; or (vii) an off leash area”. None of these features are in place at the western end of MacKinnon Ravine.
- f) In his opinion the types of activities illustrated in the photographs submitted by the Community League may occur in part of the Mackinnon Ravine, but at a location much further east of the subject site where smoking may not be permitted.
- g) A photograph was referenced to illustrate where the staff parking and loading are located at the rear of the east wall of the building, just west of 149 Street facing in the direction of the ravine. There is no access to the premises from the rear and no customer parking in this area.
- h) The Appellant is not opposed to the imposition of a condition to disallow any On-premises Fascia Signs on the east and north elevations of the building. However, they would like the opportunity to advertise on the Shopping Centre pylon sign.

[36] The Presiding Officer informed the Appellants that an email was received from the Grovenor Community League during the hearing. The letter indicated that this Community League strongly opposed the required variance for the reasons given by the West Jasper/Sherwood Community League. Mr. Noce indicated that his response would be the same as addressed earlier in the hearing.

*ii) Position of the Development Officer, Mr. I. Welch:*

- [37] The Board determined in a previous decision concerning a Cannabis Retail Sales Use that the provincial and municipal regulations can co-exist. Although the proposed development complies with the provincial separation distance requirements, a variance is required to the municipal separation distance requirements.
- [38] The proposed development is a Permitted Use with conditions, pursuant to section 69 of the *Edmonton Zoning Bylaw*.
- [39] Even though the Applicant has been very good to work with, the Courts have determined that you have to regulate the Use and not the User.
- [40] This site is very close to a designated park even though it does not contain any sports fields or skating rinks and therefore the separation distance requirements apply.
- [41] In his opinion, even though the Court of Appeal in *Newcastle Centre GP Ltd v Edmonton (City)*, 2014 ABCA 295 determined the need for the Board to provide evidence based reasons, evidence cannot be provided that the proposed Cannabis Retail Sales Use will not create problems or a negative impact. Therefore, it is not appropriate to grant the required variance.
- [42] He would have considered the size of the shopping centre site and the mode of measurement used to calculate the separation distances if he had authority to grant a variance, but he would not have granted the required variance.
- [43] All of the regulations regarding the legalization of cannabis are very new and he could not confirm whether or not smoking will be permitted in the Mackinnon Ravine.
- [44] A Site is defined as one or more lots that are connected by some sort of joint access.
- [45] He acknowledged that it is difficult for the Board to consider granting a variance when the evidence provided by the Development Authority is that they do not know what the impact of the proposed development will be and have relied on the results of public consultation to formulate the development regulations.
- [46] In sum, it was his opinion that the Board should not grant a variance because evidence cannot be provided that there will not be any undue material harm.

*iii) Rebuttal of the Appellant:*

- [47] There is no evidence that the proposed development will unduly affect the amenities of the neighbourhood or the use, enjoyment or value of neighbouring properties and the Board cannot manufacture evidence. The deficiency in the minimum required separation distance does not create the presumption of harm.

[48] The mode of measurement used by the Development Authority to calculate separation distances for a Cannabis Retail Use creates a hardship for large, commercial sites. As in *Thomas*, this is an appropriate case for a variance from the generally applicable rule.

### Decision

[49] 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**, reviewed by the Applicants:

1. No Fascia On-premises Sign shall be installed on the portion of the building facade highlighted in yellow as per the stamped approved plan (Enclosure 1).
2. The Cannabis Retail Sales shall not commence operations until such time as the non-medical sale and distribution of Cannabis is authorized by federal and provincial law.
3. The Cannabis Retail Sales must commence operations within nine (9) months of the date of issuance of this Development Permit.
4. Exterior lighting shall be developed to provide a safe lit environment in accordance with Sections 51 and 58 and to the satisfaction of the Development Officer.
5. Any outdoor lighting for any development shall be located and arranged so that no direct rays of light are directed at any adjoining properties, or interfere with the effectiveness of any traffic control devices. (Reference Section 51 of the *Edmonton Zoning Bylaw 12800*).

### NOTES:

1. An approved Development Permit means that the proposed development has been reviewed only against the provisions of the Edmonton Zoning Bylaw. It does not remove obligations to conform with other legislation, bylaws or land title instruments such as the *Municipal Government Act*, the ERCB Directive 079, the Edmonton Safety Codes Permit Bylaw or any caveats, covenants or easements that might be attached to the Site.
2. The Development Permit shall not be valid unless and until the conditions of approval, save those of a continuing nature, have been fulfilled; and no notice of appeal from such approval has been served on the Subdivision and Development Appeal Board within the time period specified in subsection 21.1 (Ref. Section 17.1).
3. Signs require separate Development Applications.



4. The City of Edmonton does not conduct independent environmental checks of land within the City. If you are concerned about the suitability of this property for any purpose, you should conduct your own tests and reviews. The City of Edmonton, in issuing this 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.
5. 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 for further information.
6. This Development Permit is not a Business Licence. A separate application must be made for a Business Licence.

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

- (a) The minimum required 100 metres separation distance between the Cannabis Retail Site and any Site being used as public lands zoned AP or A pursuant to Section 70(3) is reduced by 62 metres to permit a minimum allowed separation distance of 38 metres.

### **Reasons for Decision**

[51] In anticipation of the forthcoming legalization of recreational cannabis, Council has added a new Use Class, Cannabis Retail Sales, as a Permitted Use in certain zones within the *Edmonton Zoning Bylaw*.

[52] The proposed development is to change the Use from a Health Service to Cannabis Retail Sales. The subject site is located in the CB1 Low Intensity Business Zone. Pursuant to Section 330.2(3) of the *Bylaw*, Cannabis Retail Sales is a Permitted Use in this zone.

[53] The Board is mindful of Section 687(3)(a.4) of the *Municipal Government Act* (the *Act*). The section directs that in making this decision, the Board must comply with applicable requirements of the regulations under the *Gaming, Liquor, and Cannabis Act*, respecting the location of premises described in a cannabis license and distances between those premises and other premises. Based on the submissions of the parties, the Board finds that requirements of those regulations have been satisfied and this Board has met its obligation under section 687(3)(a.4) of the *Act*.

[54] Cannabis Retail Sales is subject to Special Land Use Provisions in section 70 of the *Bylaw*. Section 70(3) sets minimum separation distances applicable to Cannabis Retail Sales:

70(3) Any Site containing a Cannabis Retail Sales shall not be located less than 100 metres from any Site being used for Community Recreation Services Use, a community recreation facility, a provincial health care facility, as public lands, or any Site that is designated as school reserve or municipal and school reserve at the time of the application for the Development Permit for the Cannabis Retail Sales. For the purposes of this subsection only:

- a. the 100 metres separation distance shall be measured from the closest point of the subject Site boundary to the closest point of another Site boundary, and shall not be measured from Zone boundaries or from the edges of structures;
- b. the term “community recreation facilities” means indoor municipal facilities used primarily by members of the public to participate in recreational activities conducted at the facilities, as per the Municipal Government Act; and
- c. the term "public lands" is limited to Sites zoned AP, and Sites zoned A.

[55] The parties agreed that, using the method of the measurement specified in Section 70(3)(a), the subject site is located 38 metres from a site zoned A (MacKinnon Ravine – the ravine). Therefore, the Board finds a variance is required to section 70(3)(a).

[56] The Development Officer cannot grant the necessary variance to the required separation distance as section 70(4) provides: “Notwithstanding Section 11 of this Bylaw, a Development Officer shall not grant a variance to subsection 70(2) or 70(3)”.

[57] The Board’s authority to grant a variance to the minimum separation distance is different. It is found in section 687(3)(d) of the *Act*. Two Court of Appeal decisions cited to the Board by the Appellant and the Development Officer provide direction regarding this variance authority.

[58] The first case, *Newcastle Centre GP Ltd v. Edmonton (City)*, 2014 ABCA 295, involved the Board’s authority to grant a variance to the required separation distances between two liquor stores in a zone where that type of development was a Permitted Use. In that decision, the Court of Appeal ruled that it is an error for the Board to take the position that the Bylaw creates a presumption of harm to the public and that it cannot intervene and grant variances unless that presumption is rebutted by the applicant (at paras 6-7). The Court expands on the Board’s obligation to provide reasons and states (at paras 11-12):

[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.

[59] In the second case, *Thomas v Edmonton*, 2016 ABCA 57, the Court of Appeal was considering the Board's authority to waive the requirement for public consultation under the Mature Neighbourhood Overlay. In this decision, the Court of Appeal also addressed the power of the Board to vary development regulations more generally. The Court states (at para 29):

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.

[60] Here, the Development Officer argued that the Board should proceed with caution and deny the requested variance because a denial would be consistent with the results of public consultation which Council received and carried forward in the form of section 70. However, the Development Officer also stated that Cannabis Retail Sales is a Permitted Use, the general impact of Cannabis Retail Sales is currently unknown, and the impact of deficiencies in the required minimum separation distance for this development is also unknown. He cautioned the Board that in the face of this uncertainty, variances should not be granted. These sentiments were echoed in the legal brief submitted by the City of Edmonton Law Branch who did not attend the hearing.

[61] By contrast, the Appellants argued that this was an appropriate case for a variance for several reasons specific to this appeal. They provided aerial maps and photographs of the subject site (a large shopping centre), the site zoned A (the Ravine) and the immediate surroundings to support their position. This evidence provides context for the appeal, including the impact of different modes to measure separation, the condition of the nearby portions of Mackinnon Ravine, the points of access to the ravine, the orientation of the proposed development, sightlines between the ravine and the proposed development and other potential locations for a similar development.

[62] The Appellants also argued that they are first class, responsible retailers and will bring this good reputation to the cannabis space. The Board did not take this factor into

consideration as the development permit will be attached to the land and not restricted to the Appellants or any other individual operator.

- [63] The Board considered the merits of this appeal. Based on the submissions and evidence provided by the parties, and mindful of its obligation to explain how a variance would interfere with the amenities of the neighborhood or with the use, enjoyment and value of neighbouring properties, the Board grants a variance to section 70(3) for the reasons which follow.
- [64] Cannabis Retail Sales is a Permitted Use and the Development Officer provided no evidence of a negative impact. He acknowledged that the impacts of this Permitted Use are unknown at this point.
- [65] The proposed setback is 38 metres based on the separation distance measured per section 70(3)(a) from the closest point of the subject site boundary to the closest point of the site zoned A. However, based on the evidence provided by the Appellant, there are factors in this case which mitigate the potential for impact attributable to the requested variance to the separation distance measured in this manner:
- a. The subject site is a large, commercial shopping centre. The northeast corner of the subject site is the point closest to the site zoned A, the ravine. The proposed Cannabis Retail Sales is to be located in the southeast corner of the commercial shopping centre site in a bay of a large commercial building.
  - b. The commercial shopping centre is separated from the site zoned A by a six lane major arterial roadway (149 Street).
  - c. The physical distance between the closest point of the ravine and the premises is approximately 188 metres.
  - d. The front entrance of the proposed development faces west toward the interior parking lot for the entire site and away from the ravine. There are no customer exits or customer parking located on the east side of the building facing the ravine. With this configuration, the building itself separates the proposed Cannabis Retail Sales Use from the ravine.
  - e. Pedestrians must travel 300 metres to reach the nearest point at the western edge of ravine. The portion of the ravine furthest to the west toward the proposed development has no amenities. In this area the ravine is wooded with a steep grade. It has no playing fields, nor open picnic areas for public use. It is not an active park. There are no amenities in this portion of the ravine which would be likely to attract children or youth.
  - f. Pedestrians must travel 450 metres to reach the nearest paved entrance to the ravine.

- g. The ravine is not within sight of the customer exit for the proposed development. The proposed development cannot be viewed from either the paved entrance to the ravine, nor from the western edge of the ravine.
- h. The building which contains a bay for the proposed development can be seen, from the perimeter of the ravine; however, the Appellants have agreed to the imposition of a condition prohibiting the installation of any On-premises Fascia Signs which face toward the ravine (as indicated on the approved plans).
- i. There are other potential locations which would meet all the separation distances in section 70 that are north of Stony Plain Road which would be physically closer to the ravine and in more direct view of the ravine and therefore may have equal or arguably greater potential impact for the ravine than the proposed development.
- j. No letters of objection were received from any of the owners of property within the 60 metre notification zone, including none from the Church or residents of homes located between the ravine and the proposed development who would be most affected by the proximity of the proposed development and the site zoned A. No one appeared at the hearing to object to the proposed development.
- k. The Board considered the letters of objection received from the West Jasper/Sherwood Community League and the Grovenor Community League. While the photographs submitted show families and young children using the ravine, the Board finds that these photographs had to have been taken approximately 30 blocks or 2 kilometres from the subject site based on the location of Groat Road Bridge and the University of Alberta in the background. MacKinnon Ravine is a large ravine which extends for many kilometres along the river valley going east from 149 Street. The Board further notes that both Community Leagues acknowledge that this is a new Use and the effect on neighbourhoods is not yet known.

[66] For these reasons, the Board finds 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

Enclosure

Board members in attendance: Mr. R. Handa, Ms. G. Harris, Ms. S. LaPerle, Mr. L. Pratt

**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: October 5, 2018  
Project Number: 286513877-001  
File Number: SDAB-D-18-152

**Notice of Decision**

- [1] On September 20, 2018, the Subdivision and Development Appeal Board (the “Board”) heard an appeal that was filed on August 22, 2018. The appeal concerned the decision of the Development Authority, issued on August 14, 2018, to refuse the following development:

To change the Use from Public Libraries and Cultural Exhibits to a Cannabis Retail Sales.

- [2] The subject property is on Plan RN22 Blk 32 Lot 17, located at 10332 - 124 Street NW, within the CB1 Low Intensity Business Zone. The Main Streets Overlay 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 response.

**Preliminary Matters**

- [4] At the outset of the appeal hearing, the Presiding Officer confirmed with the parties in attendance that there was no opposition to the composition of the panel.
- [5] The Presiding Officer outlined how the hearing would be conducted, including the order of appearance of parties, and no opposition was noted.
- [6] The appeal was filed on time, in accordance with Section 686 of the *Municipal Government Act*, RSA 2000, c M-26 (the “*Municipal Government Act*”).



**Summary of Hearing**

- i) *Position of the Appellant, Mr. P. Haughian, Legal Counsel for Herbal Headquarters Inc., Mr. D. Robinson and Ms. M. Lavoie, business owners and Mr. A. Udell, landlord:*

- [7] The proposed development requires two variances, one to the minimum required setback from A and AP-zoned public lands and another because the proposed Cannabis Retail Sales does not have direct customer access to the store from a store front that is visible from the street other than a Lane.
- [8] The proposed development complies with all of the requirements of the *Gaming, Liquor, and Cannabis Regulations*, AR 143/96.
- [9] The proposed development is located in the CB1 Low Intensity Business Zone and Cannabis Retail Sales is a Permitted Use. The site is located on 124 Street amongst art galleries, cafes and shops in a high density urban neighbourhood.
- [10] Almost 65 percent of the respondents to the poll cited by the City in its materials identified “main streets with a mix of commercial uses and access to transit” as the best fit for Cannabis Retail Sales, and specifically identified 124 Street as an example of a best fit.
- [11] Outside of the two reasons for refusal identified by the Development Authority, this is a Permitted Use in a preferred area of the city for cannabis retail sales.
- [12] Section 70(3) of the *Edmonton Zoning Bylaw* states that any Site containing a Cannabis Retail Sales shall not be located less than 100 metres from any Site being used for Community Recreation Services Use, a community recreation facility, a provincial health care facility, as public lands, or any Site that is designated as school reserve or municipal and school reserve at the time of the application for the Development Permit for the Cannabis Retail Sales. “Public lands” is limited to Sites zoned AP, and sites zoned A.
- [13] It was acknowledged that the Board is not bound by previous decisions, but it was Mr. Haughian’s opinion that it is helpful to review the decisions and analysis of previous Boards. SDAB-D-16-088 issued in April 2016 dealt with a liquor store, a use that is somewhat similar to Cannabis Retail Sales and is somewhat relevant to this appeal. In that decision, the Board looked at whether or not a variance should be granted to the minimum required 500 metre separation distance.
- [14] In paragraph 19 of that decision, the Board states it is required to evaluate each development on its own merits to determine whether it will unduly interfere with the amenities of the neighbourhood, or materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land. The Board continues, to note that, it cannot assume negative impacts will arise every time two liquor stores are located within 500 metres of one another.

- [15] The Appellants argued that the Board should take the same approach in this appeal and examine the intent of the 100 metre separation distance requirement. The assumption cannot be made that just because the minimum separation distance is not met that negative impacts will result.
- [16] The Court of Appeal in *Thomas v Edmonton*, 2016 ABCA 57 (“*Thomas*”) found that 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.
- [17] This is the exact type of appeal that this Board was designed to address because of the unreasonable result of applying the strict set of development regulations.
- [18] City Council intentionally established a 100 metre separation space between cannabis stores and public lands zoned A and AP to manage the incompatibility of cannabis stores and key places where minors gather based on public feedback.
- [19] The concerns of the Development Authority regarding the unknown land use impacts of legalized cannabis sales were noted. However, the assumption cannot be made that every time a Cannabis Retail Sales is located within 100 metres of a site zoned A or AP, it will result in a negative impact. The sites identified as A and AP in this appeal are not places where children play or youth typically gather.
- [20] The AP zoned site is located northwest of the subject site and the separation distance was determined to be 31 metres. Numerous photographs and videos of the site were referenced. The Appellants spent a considerable amount of time in the area over several weeks on different days of the week and at different times of the day to document the use of the AP site. Based on the photographic evidence gathered, this is a shared pathway, not a park. It is signed as a shared pathway through heavy trees and foliage with one or two benches located on the side of the pathway. Several coffee can ashtrays can be seen in the photographs. They appear to be used by employees who work at the businesses in this area. During the four weeks that the area was visited, no children were ever observed and there are no children’s amenities observed in this area.
- [21] It was his opinion that this is not the type of public land that City Council or the public intended to separate from a Cannabis Retail Store but the site is zoned AP and therefore has been caught by the development regulations contained in section 70(3) of the *Edmonton Zoning Bylaw*.
- [22] The A zoned site is located 77 metres west of the subject site. Numerous photographs and videos taken by the Appellant over several weeks on different days of the week and at different times of the day were referenced. They illustrate that this site is a forested

pathway, not a park. There are no children's amenities present. It is a path through a heavily wooded area where employees of the businesses in the area also go to smoke. The site did not appear passable or usable at the time of the application. Again, this is not a site that City Council and the public considered when Section 70(3) of the *Edmonton Zoning Bylaw* was established.

- [23] On September 18, 2018, City Council passed Bylaw 18397, an amendment to the *Public Places Bylaw* to address, in part, where cannabis can be smoked. It prohibits parking in parkland. Section 11(g) defines parkland as any public place, whether developed or not, that is intended to be used by members of the public for recreation or general enjoyment and contains: (i) a playground; (ii) a sports field; (iii) a skate park or bicycle park; (iv) an outdoor theatre; (v) an outdoor pool or water spray park, (vi) a seasonal skating rink; or (vii) an off leash area. These attributes were selected because they create places where children and youth typically gather.
- [24] The two sites at issue do not fit the definition of parkland. The result is that these two sites are places where people can smoke cannabis. The Bylaw also restricts smoking cannabis within 10 metres of a bus stop or the doorway, window or air intake of a building or patio. These two sites are set back from the businesses along 124 Street and the smoking of cannabis would be permitted. The result of Bylaw 18397 is that the two sites zoned A and AP at issue in this appeal will become areas where smoking cannabis is permitted because neither contains playgrounds, sports fields, skate/bicycle parks, outdoor theatres, pools or spray parks, skating rinks, or off-leash areas.
- [25] Even though section 70(3) requires a 100 metre separation distance from these sites, the *Public Places Bylaw 18397*, defines both sites as places where children and youth will not typically gather and permits the smoking of cannabis on both sites.
- [26] This is further evidence that the City expressly does not consider these two areas places where children and youth typically gather. Therefore, the imposition of the separation requirement leads to an illogical and unreasonable result for the Applicant, and precisely the type of hardship that the Board should consider pursuant to *Thomas*.
- [27] The distance between the subject site and the sites zoned A and AP are more than 100 metres away if measured as a pedestrian would walk from the front door, north along 124 Street.
- [28] Section 70(5) of the Bylaw requires Cannabis Retail Sales to 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. The regulation includes a requirement that customer access to the store is to be limited to a store front that is visible from the street other than a Lane, or a shopping centre parking lot, or a mall access that allows visibility from the interior of the mall into the store.
- [29] Their photographs illustrate that the current entrance design contains a glass vestibule that is directly accessible and fully visible from the street with ample lighting. There are

security cameras mounted just outside the vestibule and within the vestibule. The proposed Cannabis Retail Sales is located on the right side and the entrance to an Art Gallery is on the left side. The proposed design has been approved by the Alberta Gaming and Liquor Commission.

- [30] Several other “indirect” customer accesses are referenced in the Development Authority’s submission as allowable. These include: access using a reserved staircase from a main floor common area or the street and a development located on the main floor of a building that shares a common vestibule with multiple storefronts. It was his opinion that the proposed access is very similar and that there is no rationale to distinguish the proposed access in light of the requirement to promote natural surveillance and a safe urban environment.
- [31] The intent of the Bylaw is to avoid entrances to Cannabis Retail Sales that have the potential to allow crime such as back alley or shadowed entrances. This is a very public, front facing, well lit, surveilled entrance that absolutely complies with the requirements of section 70(5).
- [32] The facts of this appeal are quite clear. They present an appropriate opportunity for the Board to exercise their discretionary power to relieve the Appellant of a hardship which is an unreasonable result in this situation.
- [33] Mr. Haughian and Ms. Lavoie provided the following information in response to questions from the Board:
- a) A map was referenced to address the objection of one property owner. It was noted that the A and AP sites in question are located quite a distance north of that neighbour’s property. Based on the description in the letter, neither the A zoned site, nor the AP site can be the site complained of in the objection. The A and AP sites are far from this neighbour and cannot be seen from his property.
  - b) The only way to access the A and AP sites is from 104 Avenue and 124 Street. They cannot be accessed through the properties located west of 124 Street.
  - c) The Bylaw amendment that restricts smoking tobacco or cannabis within 10 metres of a bus stop or the doorway, window or air intake of a building or patio has a significant impact on areas like Whyte Avenue and 124 Street because the businesses are located so close together. However, these sites would be available for smoking.
  - d) The recommended conditions of the Development Authority are acceptable to the Appellant.
  - e) The amendments to the *Public Places Bylaw* were made to prevent smoking in or close to areas where children and youth gather. Based on the photographs that were taken, these two sites are not sites where children and youth typically gather.

However, it will be difficult to control the use of these sites by people who want to smoke cannabis.

- f) He acknowledged that the *Edmonton Zoning Bylaw* and the *Public Places Bylaw* are different. In particular, the definition of a Public Park in Section 7.8(3) of the *Edmonton Zoning Bylaw* includes pedestrian trails and paths and does not contain any restriction limiting it to places where children and youth are likely to gather. However, he believes that this was the true objective for the separation distances from A and AP zones. This limited objective supported by the City's public consultation and by its Bylaw Markup.
- g) The proposed location will not create the negative impact that the City is attempting to prevent and the results of applying the Bylaw requirements are unreasonable in this case.
- h) It was acknowledged that a majority of the public consulted also wanted cannabis stores to be more than 200 metres from schools, community centres, parks and playgrounds because they were concerned about the impacts of the proposed new use. The list was not limited with reference to places where children and youth are likely to gather.
- i) It was his opinion that the use of cannabis and alcohol are quite different because alcohol cannot be legally consumed in public.
- j) The Appellant has been put in an unreasonable position because the City has chosen not to allow any variances until the impacts of Cannabis Retail Sales are known.
- k) The proposed development is a Permitted Use in this zone and would be approved if it was not located within 100 metres of the sites zoned A and AP.
- l) He reiterated that the walking distances from the front door of the proposed Cannabis Retail Sales is approximately 172 metres to the site zoned A and 129.6 metres to the site zoned AP.
- m) Ms. Lavoie advised that she and others visited both sites two or three times a day during the last two weeks of August to take photographs and has regularly observed the area. She never once saw any children in either area. She witnessed adults using the path but never saw any children.
- n) She spoke to several business owners in the area who did not consider either of these sites to be a park. Their landlord also spoke to several people in the area who were not opposed to the proposed development.

ii) *Position of the Development Officer, Mr. I. Welch:*

- [34] While 124 Street has been identified as a good location for this use, it is not without limits. City Council determined that even in an acceptable area, there are setback requirements that have to be met. Children and youth can get into all sorts of unusual situations in unusual places, that is why the City is stringent about the public lands setback requirements. It was his opinion that the regulations were established to promote public safety.
- [35] Section 70(5)(a) gives a degree of implied discretion to the Development Authority in its interpretation, but the use of the word “direct” by the Development Authority in the reasons for refusal is intended to act primarily as a descriptor of the intent of this clause, and not necessarily an additional requirement for the Development Permit.
- [36] Based on the submitted Bylaw Markup, the intent of this clause is to ensure that the development creates a safe environment. The clause has been read by Development Authorities as allowing for an “indirect” entrance if the development is inside a mall, accessed using a reserved staircase from a main floor common area or the street or is located on the main floor of a building and shares a common vestibule with multiple storefronts.
- [37] However, in his opinion the proposed entrance method, being the entrance into a main floor vestibule and then to a communal stairway to the second floor, does not meet these criteria and therefore the issue was noted as a reason for refusal.
- [38] The Court in *Thomas* determined that the Board should be hesitant about the overextension of their variance power. It was known during Council hearings and the drafting of section 70 that by restricting the power of the Development Authority to grant variances, an otherwise acceptable site could be refused if located too close to public land. In this case, a refusal is reasonable because the Use is so new and the municipality is within its right to impose more stringent requirements.
- [39] Although he sympathizes with the Applicant, a variance should not be granted at this time because of the newness of this Use Class and because the required variance is approximately 70 percent of the setback requirement.
- [40] Mr. Welch provided the following information in response to questions from the Board:
- a) Although the store front is visible from the street, customer access to the proposed development is on an upper floor without a dedicated staircase.
  - b) A photograph of the entrance was referenced to illustrate that the proposed development is not on the main floor, it is from a common vestibule and it is not

- possible to see who is entering the art gallery and who is entering the proposed Cannabis Retail Sales which is a security requirement.
- c) He would not be persuaded to grant a variance by the arguments of the Appellant because public land space is used by all sorts of people. It is standard city practice to measure distance as “the crow flies” and not walking distances.
  - d) There are more adults than children in this area, but there are some children. A Child Care Service was recently approved in the area and many of the families have older children. Youth are still present even if not always visible.
  - e) The legalization of cannabis is very new and the impacts are therefore not known.
  - f) Although there is evidence about the planning impact of Cannabis Retail Sales available from foreign jurisdictions, those jurisdictions operate under completely different regimes and he would be uncomfortable providing that evidence to the Board. The Court of Appeal in the *Newcastle Centre GP Ltd v Edmonton (City)*, 2014 ABCA 295 decision considered alcohol sales which is a long established Use and the impacts of that use are known. However, there is no comparable body of evidence available for Cannabis Retail Sales.
  - g) Although this is a Permitted Use, conditions were established by City Council and those conditions have to be respected by the Development Authority.
  - h) There were at least several hundred responses to the public consultation taken into consideration in drafting the regulations. These responses received from a wide variety of stake holders including Community Leagues, potential cannabis retailers, EPS, Emergency Services, and members of the community at large.

*iii) Rebuttal of the Appellant:*

- [41] Mr. Haughian referenced arguments presented in a previous decision of the Subdivision and Development Appeal Board, SDAB-D-18-133. In his opinion the situation in this appeal is very similar. It is not appropriate to freeze and not do anything based on the presumption that there will be a negative impact. In this case, granting the required variance for a Permitted Use will not result in any negative impacts.
- [42] He reiterated his opinion that the entrance for the proposed development complies with the requirements of section 70(5) of the *Edmonton Zoning Bylaw*.
- [43] In response to a question, it is Mr. Haughian’s opinion that there is a more logical way to measure the distance from this site to the sites zoned A and AP. The Development Authority measured the distance from closest point to closest point. It would be more practical and realistic to measure the distance as people would walk to access the A and AP sites from the subject premises. Here, they could leave only by the front entrance and

walk to 104 avenue and then turn west along the path. He acknowledged that the AGLC measures distance from exterior wall of the premises to the site boundary, but he could not confirm that distance in this case. The AGLC does not require separation distance between the development and either the A site or the AP site.

## Decision

[44] 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** as proposed in writing by the Development Authority and reviewed by the Appellants:

1. The Cannabis Retail Sales shall not commence operations until such time as the non-medical sale and distribution of Cannabis is authorized by federal and provincial law.
2. The Cannabis Retail Sales must commence operations within nine (9) months of the date of issuance of this Development Permit.
3. Exterior lighting shall be developed to provide a safe lit environment in accordance with Sections 51 and 58 and to the satisfaction of the Development Officer.
4. Any outdoor lighting for any development shall be located and arranged so that no direct rays of light are directed at any adjoining properties, or interfere with the effectiveness of any traffic control devices. (Reference Section 51 of the *Edmonton Zoning Bylaw 12800*).

## NOTES:

1. An approved Development Permit means that the proposed development has been reviewed only against the provisions of the *Edmonton Zoning Bylaw*. It does not remove obligations to conform with other legislation, bylaws or land title instruments such as the *Municipal Government Act*, the ERCB Directive 079, the *Edmonton Safety Codes Permit Bylaw* or any caveats, covenants or easements that might be attached to the Site.
2. The Development Permit shall not be valid unless and until the conditions of approval, save those of a continuing nature, have been fulfilled; and no notice of appeal from such approval has been served on the Subdivision and Development Appeal Board within the time period specified in subsection 21.1 (Ref. Section 17.1).
3. Signs require separate Development Applications.
4. The City of Edmonton does not conduct independent environmental checks of land within the City. If you are concerned about the suitability of this property for any purpose, you should conduct your own tests and reviews. The City of Edmonton, in issuing this 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.

5. 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 for further information.
6. This Development Permit is not a Business Licence. A separate application must be made for Business.

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

- (a) The minimum required 100 metres separation distance between the Cannabis Retail Site and any Site being used as public lands zoned AP or A pursuant to Section 70(3) is reduced by 69 metres to permit a minimum allowed separation distance of 31metres.

### **Reasons for Decision**

[46] The proposed development is to change the Use from Public Libraries and Cultural Exhibits to Cannabis Retail Sales.

[47] The Use Class Cannabis Retail Sales was previously unknown to the Bylaw. This is not surprising as in the past the retail sale of recreational cannabis was prohibited by federal criminal law. Those laws are now in transition. Within weeks of the hearing, the sale of cannabis will be legal in Canada. In anticipation of this change Council has added a new Use Class, Cannabis Retail Sales, as a Permitted Use in certain zones per the *Edmonton Zoning Bylaw*.

[48] The subject site is located in the CB1 Low Intensity Business Zone. Pursuant to Section 330.2(3) of the *Bylaw*, Cannabis Retail Sales is a Permitted Use in this zone.

[49] Cannabis Retail Sales is also subject to certain Special Land Use Provisions in section 70 of the *Bylaw*. Section 70(3) is one of these provisions. It sets minimum separation distances applicable to Cannabis Retail Sales:

70(3) Any Site containing a Cannabis Retail Sales shall not be located less than 100 metres from any Site being used for Community Recreation Services Use, a community recreation facility, a provincial health care facility, as public lands, or any Site that is designated as school reserve or municipal and school reserve at the time of the application for the Development Permit for the Cannabis Retail Sales. For the purposes of this subsection only:

d. the 100 metres separation distance shall be measured from the closest point of the subject Site boundary to the closest point of another Site boundary, and shall not be measured from Zone boundaries or from the edges of structures;

e. the term “community recreation facilities” means indoor municipal facilities used primarily by members of the public to participate in recreational activities conducted at the facilities, as per the Municipal Government Act; and

f. the term "public lands" is limited to Sites zoned AP, and Sites zoned A.

[50] Based on the evidence, using the method the measurement in Section 70(3)(a), the subject site is located 31 metres from a site zoned AP and 77 metres from a site zoned A. Therefore, the Board finds a variance is required to section 70(3)(a).

[51] Per section 70(4), the Development Officer cannot grant the necessary variance to the required separation distance. Section 70(4) provides: “Notwithstanding Section 11 of this Bylaw, a Development Officer shall not grant a variance to subsection 70(2) or 70(3).”

[52] The Development Officer gave two reasons for refusal:

- a. First, the proposed development did not comply with the minimum setback required in section 70(3) and per sections 70(1)(b) and section 70(4) the Development Officer is prohibited from granting the required variance to section 70(3).
- b. Second, the proposed Cannabis Retail Sales does not have direct customer access to the store from a store front that is visible from the street other than a Lane. Section 70(5)(a) is referenced regarding this reason for refusal.

[53] For the reasons which follow, the Board finds that only one variance is required.

[54] The Board’s authority to grant variances in this case is found in section 687(3)(d) of the *Municipal Government Act* (the Act). Two Court of Appeal decisions cited to the Board provide direction regarding the variance authority of the Board under section 687(3)(d).

[55] *Thomas v Edmonton*, 2016 ABCA 57 dealt with the Board’s authority to waive the requirement for public consultation under the Mature Neighbourhood Overlay, but the Court of Appeal also addressed the power of the Board to vary development regulations. Paragraph 29 of that decision states:

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.

[56] *Newcastle Centre GP Ltd v. Edmonton (City)*, 2014 ABCA 295, involved the Board's authority to grant a variance to the required separation distances between two alcohol sales in a zone where that type of development was a Permitted Use. In that decision, the Court of Appeal ruled that it is an error for the Board to take the position that the Bylaw creates a presumption of harm to the public and that it cannot intervene and grant variances unless that presumption is rebutted by the applicant (paras 6-7). The Court expands on the Board's obligation to provide reasons and states:

[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.

[57] Based on the submissions and evidence provided by the parties in this appeal, and being mindful of the obligation placed on the Board to explain how a variance would interfere with the amenities of the neighborhood or with the use, enjoyment and value of neighbouring properties, the Board grants a variance to section 70(3) for the reasons which follow.

[58] The Development Officer and the Solicitor for the City both urged the Board to proceed with caution and deny the requested variances. They argue that denying variances is consistent with the results of public consultation which Council received and has carried forward in the form of section 70. However, they also state that the Cannabis Retail Sales is a Permitted Use, the general impact of the Cannabis Retail Sales is currently unknown, and the impact of deficiencies in the required minimum separation is also unknown.

[59] The Development Officer argued that the required variance (69 metres) is approximately 70 percent of the required separation distance and should be denied on that basis. The Board agrees that the variance appears significant when calculated by the mode of measurement specified in section 70(3)(a). However, magnitude is not always determinative of impact. Based on the evidence before it, the Board finds that there are

factors in this case which mitigate any potential future adverse impacts of a variance to the minimum allowed separation distance:

- a. The site boundary to site boundary measurement of separation distance used in section 70 may generally identify sites where potential adverse impacts should be considered, but it may not always provide an accurate picture of the impact given a particular context.
- b. The proposed development is oriented to the east and may only be entered from that direction. The A and AP sites are located to the northwest, they cannot be seen from the entrance to the proposed development. The boundaries of the A and AP sites would most likely be observed only after passing intervening commercial uses between the subject site and the end of the blockface at the corner of 104 Avenue and 127 Street.
- c. In this case, individuals wanting to access the A and AP sites must do so on foot or by car. Based on the Appellant's evidence, the most direct access for pedestrians is from the only allowed exit at the front of the building on the east side of the site facing 124 street. From this point, it is 176.2 metres to the A site and 129.26 metres to the AP site.
- d. The Appellants spent considerable time in the area observing the A and AP sites over several weeks. They documented the conditions and typical uses currently occurring on the A and AP sites. They submitted two videos and more than 40 photographs of the A and AP sites taken between August 11, 2018 and September 7, 2018 at various times of the day.
- e. Their evidence shows:
  - i. The AP site consists of a hard-surfaced area and pathway with benches and improvised cigarette butt containers. It is surrounded by trees and bushes.
  - ii. The A site consists of a grassy overgrown pathway with heavy foliage that leads down to Groat Ravine with one bench and improvised cigarette butt containers.
  - iii. There are no playgrounds, no sports fields, no skate/bicycle parks, no outdoor theaters, no pools, no spray parks, no skating rinks and no off-leash areas.
  - iv. There are no other children's amenities in these areas and they never observed any children in the areas.
  - v. The sites are typically used as pathways for commuting and by employees from nearby businesses for smoke breaks.
  - vi. No one appeared at the hearing to object to the proposed development.
- f. The Board also considered the one written response in opposition. It was sent by an individual who owns two properties within the 60 metre notification zone. This neighbour stated that enough people already smoke pot every day in the park in front of his house while his children play. The Board presumes that this neighbour is concerned that the proposed development will exacerbate this issue. Based on a review of the aerial photographs and maps of the area, it appears there may be a public space between Wadhurst Road and 125 Street at 103 Avenue near this neighbour's properties. However, this area is not zoned A or AP. No separation distance is required from this area. The AP site is located further to the north and the

A site runs south from 104 avenue behind the homes on Wadhurst Road. The A site cannot be accessed directly from Wadhurst Road. The two lots owned by the neighbour do not have a direct sight line to either the site zoned A or the site zoned AP, for which the variance is required. Based on the evidence before it, the Board notes that it is possible for a Cannabis Retail Sales Use to be located on sites further south on 124 Street without any variances. Those potential locations are closer to this neighbour's properties than the proposed location and could be approved of right per section 642(1) of the Act as a Permitted Uses which fully comply with the Bylaw.

[60] After considering all of these factors and weighing the currently available evidence from the Development Officer and the Appellants, the Board cannot conclude that the required variance would create any adverse impacts and therefore grants the variance to section 70(3).

[61] Next the Board considered Section 70(5)(a) of the *Edmonton Zoning Bylaw* which states:

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 store front that is visible from the street other than a Lane, or a shopping centre parking lot, or a mall access that allow visibility from the interior of the mall into the store.

[62] The Board finds that upon plain reading of this section, the Development Officer inappropriately read the word "direct" into the regulation. Customer access is limited to a store front that is visible from a street other than a lane. Based on the plans and photographs, the proposed development complies with this regulation.

[63] In the event that the Board is incorrect and a variance to section 70(5)(a) is required, it would have been granted for the following reasons:

- a) The proposed design complies with all of the requirements of *the Gaming, Liquor and Cannabis Regulations*, AR 143/96, including those related to security.
- b) Based on the evidence provided, security cameras will be positioned both inside and outside the vestibule which will identify which customers are entering the proposed development and effectively mitigate the specific security concerns identified by the Development Authority.

[64] Finally, the Board has been mindful of Section 687(3)(a.4) of the Act which provides that in making this decision, it must comply with applicable requirements of the regulations under the *Gaming, Liquor, and Cannabis Act*, respecting the location of premises described in a cannabis license and distances between those premises and other premises. Based on the submissions of the parties, the Board finds that requirements of those

regulations are satisfied and this Board has met its obligation under section 687(3)(a.4) of the Act.

- [65] For these reasons, the Board finds 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. R. Handa, Ms. G. Harris, Mr. S. LaPerle, Mr. L. Pratt

**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:
  - f) 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,
  - g) the requirements of the *Alberta Safety Codes Act*,
  - h) the *Alberta Regulation 204/207 – Safety Codes Act – Permit Regulation*,
  - i) the requirements of any other appropriate federal, provincial or municipal legislation,
  - j) 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.*