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Subdivision & Development Appeal Board

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Date: May 30, 2019
Project Number: 296171324-001
File Number: SDAB-D-19-030

Notice of Decision

[1] The Subdivision and Development Appeal Board (the "Board" or "SDAB") at a hearing on February 27, 2019, made and passed the following motion:

> "That the appeal hearing be scheduled for April 11, 2019 with the mutual agreement of all parties."

[2] On April 10, 2019, the Board made and passed the following motion:

> "That the appeal hearing be postponed to a date to be determined."

[3] On May 15, 2019, the Board made and passed the following motion:

> "That SDAB-D-19-030 be raised from the table."

[4] On May 15, 2019, the Board heard an appeal that was filed on February 12, 2019. The appeal concerned the decision of the Development Authority, issued on January 23, 2019, to approve the following development:

> To develop a Cannabis Retail Sales

[5] The subject property is on Plan 2671AN Blk 16 Lot 25, located at 11641 - Jasper Avenue NW, within the DC1 – Direct Development Control Provision. The Main Streets Overlay and Oliver Area Redevelopment Plan apply to the subject property.

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

- Copy of the Development Permit application with attachments, proposed plans, and the approved Development Permit;
- The Development Officer's written submissions;
- The Appellant's written submissions;
- The Respondent's written submissions; and
- Two Online responses opposing the development and one e-mail in support

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

- Exhibit A – Screen Shot of the City Website

Preliminary Matters

[8] 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.

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

[10] 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*" or "*MGA*" or "*Act*").

[11] A discussion took place as to the procedure that would be followed. SDAB-D-19-030 would be heard first and the Appellant for both appeals (SDAB-D-19-030 and SDAB-D-19-051) would submit all of his evidence that pertains to both appeals. Once all parties have made their arguments and the Appellant exercised his right of reply, the first hearing will be closed and the Appellant's evidence will be carried forward to SDAB-D-19-051. The second hearing will then be opened and the Appellant will have an opportunity to present additional evidence that pertains to SDAB-D-19-051 only.

Summary of Hearing

i) Position of the Appellant, Fire and Flower

[12] Mr. Wakefield of Dentons and Ms. V. Gereluk of Fire and Flower spoke on behalf of the Appellant.

[13] Mr. Wakefield referred the Board to the first six tabs of his written submission which contain copies of:

Tab 1: Happy Buddha's approved Development Permit and application documents

Tab 2: Mr. Chow's e-mail of January 23, 2019 advising development permits were approved for 11404 Jasper Avenue NW (Canndara) and 11641 Jasper Avenue (Happy Buddha)

Tab 3: The grounds for Fire and Flower's appeal regarding Happy Buddha.

Tab 4: The refused permit and intake documents for Fire and Flower's application at 11516 Jasper Avenue NW.

Tab 5: Mr. Welch's e-mail of January 25, 2019, advising Fire and Flower that their application had been refused.

Tab 6: Fire and Flower's grounds for appealing the refused permit.

[14] Ms. Gereluk continued with the presentation. E-mails dated August 9 and August 10 between Ms. H. Vander Hoek and Mr. Welch discuss the possibility of administration pursuing the re-zoning for the Oliver area along Jasper Avenue rather than allowing individual applicants to pursue these applications. An additional e-mail dated August 13, 2018, from H. Vander Hoek expresses concerns with the proposed e-mail filing process. (Tab 16).

[15] Tab 18 contains a series of e-mails between the City and Fire and Flower:

September 17, 2018:	H. Vander Hoek advised Ms. Gereluk that City administration had decided to take the lead in re-zoning the Oliver Area 8 DC1 but this re-zoning would be going to the Edmonton Metropolitan Region Board prior to final approval by City Council. This could take 2 to 3 months.
October 16, 2018:	H. Vander Hoek advised that the Oliver re-zoning would no longer be going to the Edmonton Metropolitan Region Board and would be going to City Council for third reading on October 22, 2019, with applications for development permits being accepted the following day (October 23, 2019) at 12:00:01 midnight by e-mail. This same e-mail advised that applications were to be sent to cannabislegalization@edmonton.ca.
October 19, 2018:	M. Anderson sent an e-mail to cannabislegalization@edmonton.ca requesting confirmation of the application process to be followed and received a reply the same day from Mr. Chan confirming that what H. Vander Hoek had indicated in her e-mail was correct. Mr. Chan directed them to the City's webpage and also provided a second e-mail address to submit applications: cannabisdevelopmentpermit@edmonton.ca.
October 22, 2018:	A series of e-mails are exchanged between M. Anderson of Fire and Flower and the City seeking information on how the Appellant could synchronize their computer clocks with those of the City's computers.

[16] M. Anderson of Fire and Flower sent a letter to C. Chan on November 9, 2018, (Tab 17) discussing the issues with the application filing process, especially:

a. The lack of clarity as to which e-mail address was to be used to submit applications. At no time was Fire and Flower ever advised that applications

submitted to the first address provided, cannabislegalization@edmonton.ca, would not be accepted.

b. Fire and Flower tried to work with the City to synchronize their computer clocks with those of the City but the City refused. Servers take a while to accept information, especially when they are hit with a lot of information. The Appellants had no way of knowing if they could make the application time of 12:00:01.

[17] Tab 19 of their submission contains server records from the City of Edmonton showing the incoming e-mails slightly before and after midnight on October 23, 2018.

[18] The City had told them they did not want to be inundated with multiple applications and Fire and Fire respected this request. One e-mail was set to be sent automatically at midnight to cannabislegalization@edmonton.ca. At midnight Ms. Gereluk manually submitted an application to the correct e-mail address – cannabisdevelopmentpermit@edmonton.ca which did not arrive at the City server until midnight and 34 seconds even though she hit send at 11:59:45. An application sent by her co-worker to cannabislegalization@edmonton.ca was received by the City server at midnight and 11 seconds.

[19] Tab 20 contains a chart showing the first five complete applications sent to cannabisdevelopmentpermit@edmonton.ca; the first three being Canndara, Happy Buddha and Fire and Flower in that order. The order of receipt for 2nd and 3rd place should be reversed. Canndara's application was received first at midnight and 3 seconds and Fire and Flower's application received by the City at midnight and 11 seconds sent to cannabislegalization@edmonton.ca should be considered as being received second.

[20] Mr. Wakefield reviewed Fire and Flower's Grounds for Appeal which relate primarily to the triage process. He confirmed that reasons for appeal Nos. 6 and 7 are no longer being pursued.

1. The triage process adopted by the Development Authority for the consideration of development permit applications was not authorized by law.

2. The triage process adopted by the Development Authority for the consideration of development permit applications was not reasonably and fairly implemented.

3. The triage process adopted by the Development Authority for the consideration of the development permit application was an improper exercise of the Development Authority's discretion.

4. The Development Authority misled the Appellant with respect to the proper email address to which development applications were to be sent.

5. The development application was wrongly considered by the Development Authority before the development application of the Appellant.

[21] The Development Officer did not have the authority to determine this triage system; it was not properly delegated as there was no guidance from City Council. The way the process was cobbled together and executed was not a fair system.

[22] This was not a true lottery process where everyone's name is put into a proverbial hat and the order of receipt is determined by the order that the names are drawn. Here the system was a first in by e-mail with everything unfolding only a few hours after Council passed the Oliver area re-zoning on October 22, 2018. No letter or notice was sent out nor was there any other engagement with the known interested parties.

[23] The triage process was not fair or reasonable. As shown by Ms. Gereluk, attempts to synchronize clocks with the City computer failed due to the lack of cooperation by the City. This resulted in a system that was not like a real lottery but a first past the post "by guess and by golly". There is no way of knowing how long it takes for an e-mail to arrive at the City's computer once sent even if clocks had been synchronized. The whole process was chaotic and last minute even though the City had started to consider the process in late August.

[24] As Ms. Gereluk mentioned in Item 3, Fire and Flower was misled with respect to e-mail addresses. As all of this was happening on the very day of the re-zoning approval the only thing that could be done was to send to both e-mail addresses. Mr. Wakefield disagrees with the previous panel's determination in SDAB-D-19-029 that Fire and Flower elected to use the cannabislegalization@edmonton.ca address. They tried to get clarification from the City and were advised that all information provided by H. Vander Hoek was correct and were also directed to visit the website which had a different e-mail address. They ended up diverting their efforts by sending to both e-mail addresses. Their application was actually received second if both e-mail addresses were allowed.

[25] It is not right to blame the victim, especially when Fire and Flower was told not to inundate the City with applications. They tried to play fair with the City and did not use an automatic sender.

[26] Mr. Wakefield then referred the Board to Tabs 9 and 10 which contain Bylaw Amendments 18573 and 18572 to allow Cannabis Retail Sales in the Oliver area (Area 8) and identify the properties affected. These amendments were given third reading on October 22, 2018.

[27] Tab 11 contains Bylaw 18387 passed on June 23, 2018, where City Council took steps to deal with the pending federal government legislation regarding the recreational use of cannabis by adding a new Special Land Use Provision – section 70 Cannabis Retail Sales. Section 70.1 deals with separation distances of a Cannabis Retail Sales from any other Cannabis Retail Sales and is relevant to both of today's appeals and that is why it is important to know who won the first past the post system.

70. Cannabis Retail Sales

1. Any Cannabis Retail Sales shall not be located less than 200 m from any other Cannabis Retail Sales. For the purposes of this subsection only:

   a. the 200 metres separation distance 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;

   b. A Development Officer shall not grant a variance to reduce the separation distance by more than 20 m in compliance with section 11; and

   c. The issuance of a Development Permit which contains a variance to separation distance as described in 70(1)(b) shall be issued as a Class B Discretionary Development.

[28] Sections 70.2 and 70.3 deal with separation distances from other types of land or facilities and are not relevant to today's appeals. Section 70.4 states that "notwithstanding section 11 of this Bylaw, a Development Officer shall not grant a variance to subsection 70(2) or 70(3)".

[29] As the Development Officer is unable to grant any variance under section 70 other than as stipulated in 70.1.b, the selection process is critical and may determine your fate. The City should have given more attention as to how the system is developed and communicated.

[30] The planning report from City administration to Council regarding the rezoning application for the Oliver area along Jasper Avenue between 110 Street and 121 Street is located under Tab 12.

[31] Tab 13 is an extract from the Oliver Area Redevelopment Plan DC1 district that shows Cannabis Retail Sales is now a listed Use at 3(e).

[32] Section 640 of the *MGA* directs municipalities regarding Land Use Bylaws and section 640(2)(c)(iii) is relevant to both appeals today.

> 640(2)(c) A land use bylaw must establish a method of making decisions on applications for development permits and issuing development permits for any development, including provision for
>
> …….
>
> (iii) processing an application for, or issuing, cancelling, suspending or refusing to issue, a development permit,

[33] Council delegated responsibility for receiving, processing and issuing permits with no guidelines to the Development Authority. The Development Authority picked a true

lottery system in June, 2018 and then changed it to an e-mail first past the post system in October, 2018. It is Mr. Wakefield's submission that the Development Authority did not have the authority to do this.

[34] Mr. Wakefield referred the Board to Tab 16 of his submission and quoted passages from various e-mails from City planning staff. He wanted to draw particular attention to H. Vander Hoek's statement in her August 13 e-mail: "I think that is the situation that I'm trying to avoid" meaning the first past the post system. There was also an e-mail from Mr. Welch dated August 10, 2018 stating that rezoning must be completed before any applications will be accepted and another e-mail dated October 22, 2018 (11:30 a.m.) from Mr. Chan confirming that if the rezoning is approved today applications will be accepted immediately after midnight.

These e-mails show that discussions regarding the process took place as early as August, 2018 and this process was implemented just hours after being given third reading by Council.

[35] Mr. Wakefield referred to the letter from Mr. Anderson of Fire and Flower to Mr. C. Chan of the City under Tab 17 which highlights the following quotes from the e-mails found under Tab 18:

September 24/25, 2018 – "Ms. Vander Hoek replied stating that "we will not be providing an official letter indicating the process that we are taking", "please consider my email as notice of the process that is happening".

October 16, 2018 – "Once passed third reading at the October 22nd council meeting, applications for development permits will be accepted the following day (October 23) at 12:00:01, midnight by email to cannabislegalization@edmonton.ca."

October 19, 2018 – "I emailed cannabislegalization@edmonton.ca to request confirmation of the process that will be followed" ……. "I included a copy of the instructions we had received from Ms. Vander Hoek. I then received a reply email from your address at 10:56 p.m. in which you indicated that "what M. Vander Hoek has indicated to you is correct." While you did reference submission of development permit applications to cannabisdevelopmentpermit@edmonton.ca, you did **not** indicate that any portion of Ms. Vander Hoek's email was incorrect, and you did **not** advise that email submissions to cannabislegalization@edmonton.ca would not be accepted".

October 22, 2018 - ……. "At no point were we advised that email submissions to cannabislegalization@edmonton.ca would not be accepted".

October 23, 2018 - …… "At your request to not inundate these addresses with applications" ……. Fire and Flower "did not rely on any automated techniques".

The spreadsheet under Tab 19 shows that the last statement cannot be said for all of the applicants. Some submitted large numbers of applications and used automated techniques.

November 2, 2018 - Mr. Anderson re-confirmed that Fire and Flower was advised to submit to cannabisleglization@edmonton.ca and at no time were they informed that this e-mail address was incorrect.

[36] This same letter outlines Mr. Anderson's concerns under the heading **Development Permit Review Process** with regards to the arbitrary nature of it, being outside the scope of the Development Officer's delegated authority and the refusal to consider relevant information (the synchronization of clocks).

Mr. Anderson states:

> "By implementing a race-to-file system for determining the review order for development permit applications submitted at midnight only a few hours following passage of Bylaw 18572 at third reading, the Development Officer chose to implement an unaudited lottery administered by the City of Edmonton's servers to select among applications submitted at the same time.
>
> Our records indicate that the time between initiation of an email submission and receipt by the City of Edmonton's servers varied between approximately 10-15 seconds, introducing a significant degree of randomness to the process."

He addresses the refusal to synchronize time clocks in the next paragraph and debunks the allegation that this could not be done.

[37] Mr. Wakefield referred to an application that Janice Agrios had made to the Court of Queen's Bench seeking mandamus regarding Item 9's application (her client) that involved Fire and Flower. Paragraph 36 of the City's Argument (Tab 21) states that to the City's knowledge it has been at least 40 years since the last time a mandamus order was granted and goes on to say: ".. the legislature has set up an exhaustive appeal mechanism that addresses virtually any conceivable situation, including the municipality's failure to act. The Alberta Court of Appeal has indicated that these mechanisms constitute an adequate alternative process, even where rights might be prejudiced due to the delay in utilizing the prescribed process."

[38] In Tab 22, at paragraph 17, Ms. Agrios referred to a lottery system that the Town of Banff had implemented to choose applications for development permits. In that case, the lottery system was implemented pursuant to a bylaw, which was in compliance with the *MGA*. That is not what we have before us today. Instead of establishing a process for receiving and processing Cannabis Retail Sales applications as they are mandated to do in section 640 of the *MGA*, the City washed their hands of it and gave carte blanche powers to the Development Officer and provided no direction he could legitimately follow.

[39] Tab 23 is Madame Justice Goss's decision on the mandamus application. On page 47 she states "I make no finding as to whether the powers outlined in section 640(1) of the *MGA*

and in section 11.1(3) of the *Edmonton Zoning Bylaw* provide the City with legal authority to create and utilize the random selection process….". She also outlined various obligations of the Development Authority and that that "Pursuant to section 685(1)(a) of the *MGA*, if a Development Authority fails or refuses to issue a Development Permit to a person, the person applying for the permit may appeal to the SDAB. The SDAB is a designated method of appeal". This is why he is in front of the SDAB today.

[40] Mr. Wakefield then referred to the Canndara case (SDAB-D-19-029). Paragraph 117 refers to section 11.1(3) of the *Edmonton Zoning Bylaw* that states the Development Officer shall determine the process for submitting, receiving, determining complete and reviewing Development Permit applications for Cannabis Retail Sales. As stated in Paragraph 119, Mr. Wakefield urged the Board to find that section 11.1(3) of the *Edmonton Zoning Bylaw* was an improper delegation of authority and requests the same for today's appeals. That panel determined it is not within the Board's purview to make a ruling on the validity of provisions in the *Edmonton Zoning Bylaw*; Mr. Wakefield respectfully submits that it is.

[41] Mr. Wakefield quoted Paragraph 127 from the Canndara decision:

> It is evident that some of the emails from the City referenced the incorrect email address for submitting applications. However, in at least two emails, the correct email address was referred to. The Board also notes that, despite any confusion contained in e-mails from the City, the City's website had the correct information regarding the appropriate e-mail address. Rather than seeking to clarify the obvious discrepancy, the Appellant elected to submit its application multiple times to both e-mail addresses. The Board is of the view that, by electing to proceed in this fashion, the Appellant decided to take the chance that some of its applications would be sent to the wrong e-mail address.

The Appellant begs to differ with the panel's conclusion. Fire and Flower was told that two e-mail addresses were correct. It is pretty clear when you read all of the e-mails between Fire and Flower and the City that Fire and Flower did seek clarification and was trying very hard to understand the process. The clarification they got was both e-mail addresses are right. For the City to turn around and say that Fire and Flower "elected" to submit to both address and for the Board to agree with this when the confusion was sewn by the City is blaming the victim.

[42] In summary, the process was not one that council authorized the Development Officer to implement in law, and even if he is wrong on that, the Development Officer could not have picked a worse way to try to bring about a fair intake of the expected multiple Development Permit applications. The actual implementation was very poor, given the conflicting information and not allowing synchronization of clocks. It was an irrational system and the end result is there was no rhyme or reason to the selection process.

[43] The selection should have been in the opposite order. Fire and Flower should have been before Happy Buddha and Happy Buddha should not have been granted a permit.

[44] The Appellants provided the following responses to questions from the Board:

a) The authority given to the Development Authority in section 11.1.3 of the *Edmonton Zoning Bylaw* has not been delegated correctly and is not consistent with the *MGA*. Council cannot delegate a plenary power to the Development Officer to do whatever he likes for the intake of Development Permit applications. Council must delegate some parameters. This Board has authority to call out the legal error.

b) Regarding server synching it is the City's obligation to ensure a fair process to all. The City did not satisfy that obligation in this case.

c) One of the other failings in this whole system is City Council did not adopt a process and made it the Development Officer's problem. There may have been other people who wanted to make an application on October 23 and did not know all of the information. Fire and Flower has been pro-active and engaged with the City. They thought they could rely on what they had been told by the City.

d) Mr. Wakefield is not here today to deal with Canndara but agrees that according to the City Canndara is No. 1.

e) Mr. Wakefield confirmed that all of Ms. Vander Hoek's correspondence referred to cannabislegalization@edmonton.ca as the correct e-mail address for the submission of applications.

f) The Appellant confirmed that they are not pursuing the original reasons for appeal that were numbered 6 and 7:

> 6. The development permit application was non-compliant and incomplete; in particular, it did not include the narrative required under section 710.5 of the *Edmonton Zoning Bylaw 12800*.
>
> 7. Development permit was deemed refused pursuant to section 684 of the *Municipal Government Act* by reason of the passage of more than 40 days from the development authority's Notice of Completeness dated October 26, 2018.

g) The remedy that Mr. Wakefield is seeking today is that the Board overturn Happy Buddha's approved development permit.

h) Mr. Wakefield is not asking the Board to knock down the bylaw but he is asking the Board interpret section 640(2)(iii) of the *MGA* as was advocated by Justice Goss in the Item 9 mandamus application saying the SDAB provides the full regime and we should not be running to Court.

i) The Development Officer did not have the power to adopt the regime that was laid out and the Board does not have the power to implement that regime either. Therefore

the development application basically failed from the start and that is what Mr. Wakefield would like this Board to find.

j) The panel hearing the Canndara appeal determined that their jurisdiction was triggered by the issuance of the Development Permit in January not between August and January when a decision on the process was made. The Appellant believes the process is amendable to review and it begins at the moment of the decision.

k) The Appellant confirmed that the process was illegal and therefore must be revoked and even if it was not illegal it has to be revoked in this instance because of the following abnormalities:

i. the City failed to adequately communicate the correct venue for sending the e-mails to

ii. the City wouldn't let you synchronize to its servers

iii. Fire and Flower was told not to do multiple mechanical submissions.

These issues meant it was an improper exercise of discretion and therefore the permit should be revoked.

l) Because Fire and Flower was misled they should be No. 2 and Happy Buddha's permit should be revoked.

m) The Canndara permission to appeal decision is returnable on June 19, 2019.

ii) Position of the Respondent, Happy Buddha

[45] The Respondent was represented by C. De Silva and M. Hundert.

C. De Silva

[46] Fire and Flower raised the following argument: "The direction of Council clearly laid out in several statutory plans, documents, and reports regarding development in the Oliver neighbourhood was not followed by the Development Officer in the refusal of Development Permit application # 296172505-001."

[47] This argument is irrelevant to the approved development permit and this complaint should be handled separately as it involves the City and Fire and Flower. She has followed the development permit process in its entirety and feels as though the City has been transparent regarding development in the Oliver Area. Based on her interactions with the Development Officer, she is satisfied the direction of City Council was executed throughout this process and directly coincides with the Jasper Avenue Revitalization Plan. In SDAB-D-19-029, the Board found that the Development Officer followed the directions of council in implementing the process and reviewing applications, which is relevant to this appeal.

[48] Fire and Flower raised the following argument: "The triage process adopted by the Development Authority for the consideration of development permit applications was not authorized by law." In SDAB-D-19-029, Mr. Wakefield stated that section 11.1(3) of the *Edmonton Zoning Bylaw* is outside of the authority granted by section 640 of the *MGA*. All of the applications for Cannabis Retail Sales have been evaluated pursuant to that section. If that section is illegal, then every single permit issued for Cannabis Retail Sales is illegal including those granted to Fire and Flower.

[49] If the process adopted by the Development Authority for the consideration of development permits was not initially authorized by law, then this should have been brought forth at the City Council hearing on June 12, 2018. This hearing held a unanimous vote to include Cannabis retail sales as a use classification in the *Edmonton Zoning Bylaw*. There was no objection or argument from any party pertaining to the process at this time. If this process was not authorized by law, then this objection should have been brought forth prior to August 28, 2018 when the City announced they would be accepting development permit applications for Cannabis Retail Sales on a first come, first served basis. Fire and Flower participated in this process and submitted several development permit applications without any objections stating this process was not authorized by law, despite having ample opportunity to raise any concerns prior to the acceptance of submissions.

[50] According to 685(4)(a) of the *Municipal Government Act*, Fire and Flower has no grounds for appeal. The development permit in question is fully compliant with the *Edmonton Zoning Bylaw*, and the Development Officer followed the direction of Council, this appeal should be dismissed.

[51] Fire and Flower raised the following arguments:

> "The triage process adopted by the Development Authority for the consideration of development permit applications was not reasonably and fairly implemented."
>
> "The triage process adopted by the Development Authority for the consideration of development permit applications was an improper exercise of the Development Authority's discretion."

[52] When Ms. Da Silva began this venture, she did so with the impression that the process to start a Cannabis Retail Business was equal for all entrepreneurs at different levels. Everyone had been anticipating what the process would look like for Cannabis retailers before legalization, and many were content to hear that the City's approach was to provide a fair opportunity for everyone (small business owners and larger corporations) to open and build a Cannabis retail brick and mortar. I feel as though the City has maintained the fair narrative they have implemented with respect to this process as their public communications and actions have remained consistent.

[53] Ms. Da Silva supplied several newspaper articles discussing the application process for Cannabis permits. This supports her contentious that Fire and Flower advocated for priority and the traditional first-come, first-served process which the City had adopted historically with neighboring industries. Since Fire and Flower was not successful with

obtaining a development permit for 11516 Jasper Avenue through the first-come, first-served triage that they initially advocated for, they are now arguing that the triage process adopted by the Development Authority for the consideration of development permit applications was not reasonably and fairly implemented. If this is genuinely Fire and Flower's position, then why did they advocate for the first-come, first-served process time and time again? Why was there no mention whatsoever of their opposition to the first-come, first-served process until their development application permit for 11516 Jasper Avenue was denied?

[54] Ms. Da Silva was not successful in submitting one application in the expression of interest random selection process as she was unable to secure a lease for various reasons. After a year of searching for a compliant location, she was relieved to have finally secured a reasonable lease agreement. She became aware that the City of Edmonton would begin accepting additional development permit applications for cannabis retail sales by email on a first-come, first-served basis, on Tuesday August 28, 2018 at 8:00 a.m.

[55] The lease she secured was located in the Oliver ARP DC1 (Area 8) division, 11639 Jasper Avenue Edmonton, Alberta. In the summer of 2018, she immediately visited the City of Edmonton development office to inquire about the first-come, first-served application process. She spoke with Development Services Planner, Stephen Chow, who advised that the subjected property was zoned DC1 (Area 8) which was not considered by council as a conventional zone to include Cannabis retail sales as a use opportunity. She was then advised that in order for them to apply for a Cannabis Sales Development Permit they needed to begin the rezoning process for this location to a CB3 zone, a process that could take anywhere up to 4-6 months for approval and in turn is very costly. After ensuring the proposed location complied with all AGLC premises policies, reviewing the budget, ensuring compliance with all municipal, provincial, and federal government guidelines, then confirming there were no other active applications to rezone this division they decided to pursue rezoning for the proposed location. They were obliged to recompose their lease with Mr. Howard Starkman (Building Owner of 11639 Jasper Ave) to comply with this stipulation and hired Mr. Hundert with MH Project Planning LTD to execute this action. Shortly after submitting the rezoning application for Oliver ARP DC1 (Area 8) division at the beginning of August 2018, they were advised that dues to a sudden influx of multiple inquiries and potential submission for reciting the Oliver Area, the City was now working on a strategy for rezoning and it would likely be taken on by administration.

[56] The City Council Public Hearing minutes on October 22, 2018 under section 3.12 show that C. McNary from Fire and Flower made a presentation where he did not voice any form of opposition to the process. In fact, Mr. McNary stated, he was "in support in proceeding through all three readings so the entire district could be freed up including Fire and Flower, which everyone knows has a location for proposed operations", and "they are wanting to move ahead as quickly as possible." Applications were being accepted that evening (or following business day rather) at 12:00:0 a.m. Ms. Da Silva was present at this hearing and there was no opposition at this time from Fire and Flower regarding anything with respect to their current arguments, nor were there any mention of

their arguments until the development permits were approved on January 23/2019. If process was of concern in this matter, why did Fire and Flower comply with the process by submitting their application on October 23, 2018? Why were these arguments not brought forth at the City Council Public Hearing on October 22nd?

[57] She cited two SDAB decisions as evidence to support her arguments of the contradictory statements made by Fire and Flower regarding industry fairness, support of small cannabis retailers, and complying with the rules and regulations enacted to ensure safety in our communities. In the first case, Fire and Flower was chosen ahead of a small cannabis retailer in the expression of interest draw. Fire and Flower had purchased the building across the street and was within 200 metres from this small retailer's location, which would mean this location would be sterilized as they were chosen behind Fire and Flower in the expression of interest. Fire and Flower's proposed location did not comply with the 200-metre distance stipulation; it was too close to Millcreek School. This small retailer did comply with the distance requirement, was above the 200-metre distance stipulation and a safe distance from Millcreek school. This small retailer ensured they complied with the City's rules and regulations prior to signing a lease. Although Fire and Flower plays a very vocal narrative to the public about education and ensuring Cannabis is kept out of the hands of minors, in this circumstance the safety of minors were no longer their primary concern as they appealed the 200-metre rule to operate their Cannabis store next to Millcreek school, and they won.

[58] In the second case, Fire and Flower's proposed location in Edmonton's downtown core did not meet the separation distance requirement as the proposed location was too close to a Public Library. This location stands 2.5 kilometers away from her proposed location on 11639 Jasper Avenue. This is a location many Cannabis Retailers did not seek to purchase or lease as it did not comply with the City's regulations and is a risk to minors in our community (evidently not viable factors for Fire and Flower when choosing potential Cannabis Retail locations). Again, the integrity of Fire and Flower's public statements around prohibiting consumption from minors and ensuring the safety of children in our communities is very contradictory to their appeal arguments before these tribunals. In the same respect, their arguments around fairness regarding process and support for small cannabis retailers are also contradictory in every sense. Their actions do not match their words, which should not be ignored. " Despite the public narrative Fire and Flower continued their appeal to operate a Cannabis retail store next to a public library. In this case, yet another exception was made, and Fire and Flower was successful in obtaining this location for Cannabis Retail sales through their appeal despite the City's and Community's recommendations. Fire and Flower has already secured a location near Jasper Avenue and are now appealing the approved development permits of Cannabis retailers in the downtown core to open yet another location in the Oliver area.

[59] Fire and Flower made a request to synchronize their server clocks with those of the City. In the event the City complied with this request from Fire and Flower, this would be providing them with significant advantage over other applicants when submitting their development permit application. The Board, in SDAB-D-19-029, found the Fire and Flower was an active participant in the Development's Officer's process, there was ample opportunity to raise concern about the process, and all parties were treated equally.

[60] With respect to fairness, Ms. Da Silva highlighted the fact that Fire and Flower has been publicly marketing their Cannabis location 11516 Jasper Avenue since last year and even before development applications were being accepted for the Oliver Area. They use concept stores to secure available locations for Cannabis retail, increase revenue, and create brand awareness while waiting for approval for the appropriate development permits and licenses to legally sell cannabis. At first glance, Fire and Flower's location located on 11512 Jasper Avenue, 11514 Jasper Avenue, or 11516 Jasper Avenue (they are marketing all 3 addresses publicly) is marketed as an accessory shop that is opening soon. However, it is evident the master plan for this location is not solely for the purpose of an accessory store, the development permit application submitted by Fire and Flower warrants that this company is planning to use this location for Cannabis retail. The Presiding Officer reminded Ms. Da. Silva that the Board has no jurisdiction issues concerning anti-competitive actions contrary to the federal *Competition Act*.

[61] Fire and Flower raised the following argument: "The Development Authority misled the Appellant with respect to the proper email address to which development applications were to be sent." Ms. Da Silva did not use robotic application in the submission of her applications. She browsed online to retrieve the correct information required for submitting an application and ensure she had the correct email address. There were no questions or statements surrounding the email address used to submit development permits from Fire and Flower during his presentation at this public hearing. There was ample opportunity to raise concerns. This is not Ms. Da Silva's problem, nor the City's.

[62] It is evident members of City Council, Administration, the Development Office, and the Rezoning Committee have genuinely maintained the "fair for all" narrative portrayed to the public. If it was not for City Council's fair approach for all entrepreneurs in the Cannabis Industry, she would not have pursued this venture. Despite the City's attempts to maintain fairness for all parties, large corporations like Fire and Flower continue to utilize their endless resources to undermine the City's approach through the appeal process to execute their aggressive growth strategy. Approving this appeal in favor of Fire and Flower and potentially denying her approved development permit when it has an approved location 2.5 kilometres away goes directly against the Jasper Avenue redevelopment plan for the downtown core, is most definitely not fair in any respect, and does not allow for diversity amongst Cannabis Retailers. They followed and continue to follow the municipal, provincial, and federal legislation in every respect including the 200 metres requirement.

[63] The downtown core and all of Edmonton will be clustered with Fire and Flower locations if these appeals continue to be considered valid and approved. If the triage process adopted by City Council is unfair then Fire and Flower should consider the entire process prior to legalization as unfair, and should expect all legal Cannabis retailers to have their development permits revoked which would include Fire and Flower's approved permits. This process cannot start all over again.

Mr. Hundert

[64] There is no dispute that this site is zoned DC1 to allow Cannabis Retail Sales which is a listed use.

[65] All parties went through same process prior to going to Council. Parties were going to do their own rezoning until administration took that on as an administrative task. They thought they would have a few months to prepare drawings and had to scramble when they found out that the re-zoning would not be going to the Edmonton Metropolitan Region Board.

[66] They relied on the City's web page though the whole process and found it to be fair. E-mail exchanges were limited and the website provided a step by step guide. The general process was not much different than any other Development Permit application they have been involved with other than ensuring that the special provisions in section 70 of the *Edmonton Zoning Bylaw* were complied with.

[67] They did not seek or receive any variances and are a fully compliant listed use and were granted a permit on that basis.

[68] He believes they received pretty much the same information as Canndara and Fire and Flower regarding filing procedures. They did not receive a decision until January and did not request a deemed refusal.

[69] They did not understand at any point that there was another e-mail address to apply to.

[70] Like the other applicants they were up at midnight trying to submit their application in time. They knew that if they clicked before midnight their application would not be accepted. He believes they made 6 or 7 filing attempts. He does not see the fairness of another applicant suddenly being bumped to third because of a quicker submission to the wrong address.

[71] Even if Fire and Flower's appeal were to be considered second, they would still be in violation of the required 200 metre separation distance from another Cannabis Retail Sales.

[72] They are asking the Board to uphold the approval.

[73] The Respondents provided the following responses to questions from the Board:

a. They initiated their own re-zoning application because originally Area 8 in this DC1 Direct Development Control Provision did not include Cannabis Retail Sales. They believe they may have been the first party to pursue a re-zoning application.

b. There was no confusion regarding e-mail addresses as far as they are concerned.

iii) Position of the Development Authority

[74] The Development Authority was represented by M. Gunther, Law Branch and I. Welch and S. Chow with the Development Authority.

[75] Mr. Gunther's perception is that no one is disputing the facts. The dispute is how to deal with this unique situation and how does the law apply.

[76] The reality is there are several Cannabis Retail Sales applications in a small area which each of which must have a 200 metre separation distance from all other Cannabis Retail Sales. The City has to figure out a way to be fair, transparent and to come up with a way to take in applications for this new use that treats everyone fairly.

[77] The Board who heard SDAB-D-19-029 in March found that the City acted fairly, within the bounds of the law. They found that the City's procedures resulted in a situation where no particular applicant was on a better or worse playing field than anyone else.

[78] Most of the argument today is regarding the intake process.

[79] In response to a question from the Presiding Officer, Mr. Gunther confirmed that for the purposes of today's appeal the intake process is wrapped up in the decision and the Board is properly hearing this appeal. Mr. Gunther confirmed he is adopting the reasoning the Board found in paragraphs 106 to 113 inclusive in the Canndara decision – consistency is the key.

[80] That leaves this Board with the issue of the intake process. While permission to appeal has been sought on the Canndara decision, it is a valid decision until a court says otherwise.

[81] There are a few points that are relevant in considering Mr. Wakefield's arguments and it comes down to three issues which can be found in Paragraph 125 of SDAB-D-19-029:

(1) The Board finds that the Development Officer had the discretion granted by Council to choose the process for submitting, receiving, determining complete and reviewing Development Permit applications for Cannabis Retail Sales.

(2) The Board finds that the Development Officer followed the directions of Council in implementing the process and reviewing the applications.

(3) The Board further finds that the decisions of the Development Officer were reasonable and fair.

The last point is the most important. Even if the Court were to blow away the *Bylaw* and find that the City was not compliant with the *MGA* (which is not the case), the Court would look at what is the fair process in all of the circumstances and did the process meet that standard of transparency, fairness and equality to all participants.

[82] Point number 1 deals with the *Bylaw* and the ability of the Development Officer to make the decision he did and the delegation of the Development Officer to make the decision he did. While Mr. Wakefield quoted from section 640.2(c):

> 640(2)(c) A land use bylaw must establish a method of making decisions on applications for development permits and issuing development permits for any development, including provision for
>
> …….

He did not address 640(2)(c)(vi) and (vii) which state:

> (vi) the discretion that the development authority may exercise with respect to development permits, and
>
> (vii) any other matters necessary to regulate and control the issue of development permits that to the council appear necessary;

[83] The Appellant is saying that under the *MGA*, City Council did not have the ability to make the *Bylaw* that prescribes authority to the Development Officers to exercise their own discretion. The *MGA* which is the overarching law that governs how a City does its work. Here the *MGA* allows for broad discretion for City Council to allow administration to do its work.

[84] The Supreme Court of Canada has instructed that municipal legislation be interpreted in a broad and purposive manner. Purposive means what is the purpose behind the legislation. In this particular case it is to allow discretion to the people who are dealing with these issues every day and understand the nuances, the intricacies and the challenges that something like a brand new use class brings when hundreds of applicants are trying to rush through the doors for a Development Permit.

[85] The *Edmonton Zoning Bylaw* allows for the Development Officer to exercise broad discretion to deal with the intake and permitting processes. The direction from City Council, based on the *MGA*, is to do what they see fit. What they see fit is not a boundless exercise of discretion and is not without some oversight. The oversight is that it is a public administrative process. The rules and the law of administrative law still apply and there has to be procedural fairness and the parties are entitled to the rules of natural justice. The Development Officer could not do anything that is completely out in left field because he has to act in good faith and in accordance with natural justice.

[86] This case goes to issue No. 3 and the Board's finding that the decisions of the Development Officer were reasonable and fair. The complaints are that there is no clarity around the process and wrapped into that was the issue of the e-mail addresses, some suggestion regarding the synchronization of clocks and concerns of how the process unfolded.

[87] Regarding the synchronization of clocks, no one consulted with Law Branch but Mr. Gunther is very grateful that the Development Officer made the right decision. You cannot allow one party to synchronize clocks to the exclusion of others; this would be a ground for appeal as one party would get an outcome that the other parties are not part of. Assuming that the synchronization of clocks were even possible, if you gave everyone this ability you would end up in the same situation we have currently with a flurry of e-mails and perhaps a tie and things could possibly be even more complicated. There is no merit to the argument that the failure to allow synchronization of clocks is something that is procedurally unfair to the Appellant.

[88] The second point is the e-mail address and which one is the correct one to use. We have heard evidence from Mr. Hundert regarding their viewing of the website. The City was transparent in that the correct e-mail address was posted on the website and the Appellant was aware of the website. Mr. Anderson's e-mail of Friday, Oct. 19 at 12:25 p.m. contained the following quote from H. Vander Hoek:

> "Once passed third reading at the regular council meeting, applications for development permits will be accepted the following day 5 12:0:01, midnight by email to cannabislegalization @edmonton.ca. For more information about this process or to talk about any concerns you might have please see Edmonton.ca/cannabislegalization or e-mail to cannabislegalization @edmonton.ca, as I am not an expert on this part of the process".

[89] By all accounts, the website mentioned is the one that contains the correct information. This planner adds a caveat saying she is not an expert on this part of the process. She goes on to say

> "Please ensure that you have all the details needed for your application to ensure that it is deemed complete."

[90] Mr. Chan's e-mail of October 19, 2018 (also a planner with City of Edmonton) stated:

> "The City's Webpage outlines the process for submitting a development permit application for cannabis retail sales. What Ms. Vander Hoek has indicated to you is correct" And that is the issue of contention here. "If the DC rezoning is approved by Council, you may submit your application the day after Council's decision, which would begin at 12:01 am. Development Permit applications must be sent by email to cannabisdevelopmentpermit@edmonton.ca (the correct e-mail address).

[91] There is conflicting information from Ms. Vander Hoek who indicates she is not an expert on the process as compared to the City's webpage and from Mr. Chan who is providing the most up-to-date information. The difficulty when looking at this pragmatically is twofold. If there is ambiguity or uncertainty on the part of the person submitting these development permit applications, why not just send it to both e-mail addresses. It has always been possible to send to multiple recipients.

[92] In light of the information available, and the fact that there was no follow-up made, it is perfectly reasonably for the Development Officer to choose the process, and that is to use the e-mail address that was the correct e-mail address.

[93] It is a bit of a red herring that the secondary email address even enters into the picture. We know that the Canndara application was by all accounts No. 1 regardless of what e-mail address was used. The very approval of Canndara means that Fire and Flower cannot meet the stipulated separation distances in section 70 of the *Edmonton Zoning Bylaw*. Fire and Flower cannot exist because it is in the middle of the strip. If the first application in is either Happy Buddha or Canndara, then they both can exist. If the winner is Fire and Flower they are the only one that can exist because of the setbacks to their neighbours to the east and to the west. If they are second or third, Fire and Flower cannot co-exist with Canndara who by all accounts is number 1.

[94] Because of that and the information available on the City's website there is nothing with respect to this e-mail address that invalidates or makes unfair the process.

[95] Mr. Welch then explained the process and what transpired on this intake process.

[96] After the "pot lottery" there was a very short moratorium on any further intake and it was made clear that any new applications for Cannabis Retail Sales were going to be on a first- come, first-served process. This is a long standing method of application intake in the City of Edmonton and other Alberta municipalities.

[97] There was some internal consideration of an alternate process for Cannabis Retail Sales applications in in the Oliver Area 8 DC1 zone because the Development Authority knew it would be a very popular area. However, in the end, it was decided to use the first-come, first-served method. One of the challenges in terms of intake was that the situation regarding cannabis sales evolved quite rapidly. The City has had to use its broader discretionary powers regarding process to make it fair to everyone and the process was communicated as best as possible to stakeholders.

[98] The Development Authority was aware of the parties who were likely to submit Cannabis Retail Sales applications in the Oliver DC1 Direct Development Control Provision. These parties were advised of the process and that applications would only be accepted by e-mail. The process was also published on the website.

[99] Quite a number of e-mail submissions were received and applications were reviewed by three Development Officers approximately a day after receipt. A collective decision was made as to which applications came in first and a formal announcement was made as to the order that they would be reviewed. Canndara's application was received first, Happy Buddha's second and Fire and Flower's third. Two other applications are on hold pending the outcome of these appeals.

[100] Mr. Gunther continued with the Development Authority's submission.

[101] In the interest of being transparent, computer generated server records were provided to the Appellant to show the order of receipt of all submissions. These records clearly show where applications were sent to, who submitted them and the time they were received. Anyone can see the order is consistent with today's presentation.

[102] The last item to address is the previous Canndara decision and what impact it should have on today's hearing. This is not a true issue estoppel, however, while the Candarra decision is under appeal, it is valid until a Court says otherwise.

[103] While precedent does not apply to an administrative tribunal there is a Court of Appeal decision (*Altus* vs. *Calgary* from 3 or 4 years ago) where the Court is essentially warning against directly conflicting decisions or directly conflicting interpretations of law in the context of a reasonable standard of review. If today's Board were to take a different route than what the previous Board has done in the Canndara case, it is incumbent on the Board to provide substantial explanation as to why and what is different in this circumstance. Mr. Gunther's submission is that regarding the intake process the legal and factual circumstances before the Board today are virtually identical as the Happy Buddha appeal other than the address and the location of the premises.

[104] The Development Authority provided the following responses to questions from the Board:

a) Completeness is not an issue for the two applications before the panel today or the previously heard application. To clarify, the applications for the purpose of review were complete, but that does not mean they all met the requirements.

b) A screen shot of the webpage was submitted as Exhibit A by Mr. Chan in response to a question to what was actually on the website. Mr. Chan confirmed that nothing on the webpage has changed. Mr. Wakefield had no objection to this exhibit being submitted. The screen shot clearly shows the correct e-mail address as: cannabisdevelopmentpermit@edmonton.ca.

c) Mr. Gunther confirmed that it appeared that the time was wrong in one of the e-mails from Mr. Chan (sent October 19, 2019, at 10:56 p.m.) as it gave the time as one minute after midnight rather than one second. However, this error did not materially impact the appeals before the Board today as everyone applied before 12:01.

d) The Development Authority confirmed there was an error on page two of the Development Officer's written submission. Paragraph two should read: The subject application was the ~~first~~ second application received in the queue, and was received by the City at 12:00:23. The word "first" is to be replaced by "second". M. Gunther asked that the Board make this change so it is clear in the record.

e) The point of issue estoppel is that the same litigant should not have multiple proverbial kicks at the can to argue the same thing over and over in the hope that one panel of an administrative tribunal reaches a different decision than a previous one.

Significant weight ought to be given to the reasons of the previous Board and the conclusions that it reached in SDAB-D-19-029.

f) The presiding officer referred Mr. Gunther to paragraph 128 of SDAB-D-19-029

> (128) In any event, one of its applications that was sent to the correct e-mail was received third in order behind those of the Respondent and Happy Buddha. To the extent that the misinformation provided by the City to the Appellant relates to this appeal, the Board concludes that the misinformation did not significantly impact the Appellant's chances of having its application received prior to the Respondent's application. The Board finds that the Development Officer followed the directions of Council when he decided to consider the Respondent's application ahead of the Appellant's.

Mr. Gunther interprets this as saying that the misinformation regarding the e-mail addresses does not significantly impact the Appellant's chances as they knew both e-mail addresses. And that is clear because both e-mail addresses received applications.

g) Even if there was a problem with the e-mail addresses, the outcome does not change. Even if Fire and Flower had been second it would still have an issue with separation requirements and the Development Officer could not issue an approved permit because he does not have variance power.

h) Mr. Gunther made a request on Ms. De Silva's behalf that her personal address be redacted from the record. While there is no specific provision for this in the *MGA*, it is Mr. Gunther's understanding that the ARB can seal documentation. Mr. Wakefield had no objection to this request and the Presiding Officer advised that the Board will take it into consideration.

iv) Rebuttal of the Appellant

[105] Ms. Da Silva mentioned small, medium and large scale players in cannabis legalization and made comments regarding the *Competition Act*. The Board should not take these comments into account as it is not within their jurisdiction.

[106] Fire and Flower's took the position that permit applications should be limited to applicants who had received prior AGLC permission to avoid sham operations with just a postal box address. They were concerned that some people would just try to get into the process and to sell these development permits later. In fact, after the New Year, some of these smaller operators did ask Fire and Flower to buy their applications.

[107] During the initial Expression of Interest process, some land and building owners were applying multiple times creating an advantage to themselves. This was not done by Fire and Flower and they brought this up to the City as a concern.

[108] Mr. Wakefield confirmed he attended the February 25, 2019, City Council meeting which was a public hearing regarding some re-zonings on this Jasper Avenue strip. One item he

dealt with at this hearing was the 9 month limitation issue; Fire and Flower had several permits subject to this. Mr. Wakefield pointed out to Council that the SDAB had already appeared to adopt a solution going forward; he was advocating a solution for other applicants who were already affected and were out of the Board's jurisdiction. He also brought to Council's attention the problems identified in several of the DC1 cases where variances were not being dealt with on the same basis as in conventional zones. Everyone received the same notice regarding these hearings and could have chosen to attend.

[109] It is not true that Fire and Flower objected to the first-come, first-served system. The first system out was the lottery system that was adopted after June 12, 2018. Then on October 22, 2018, first-come, first-served was adopted for the Jasper Avenue DC1. Fire and Flower did not disagree with the principle. It did disagree with the legal delegation and it also disagreed with the way it was actually implemented.

[110] As far as the re-zonings on Jasper Avenue go, he believes Fire and Flower was actually the first to ask for a rezoning, not Happy Buddha. Fire and Flower experienced the same frustration as Happy Buddha when City administration took over the re-zoning.

[111] The Appellants do not think it a concept store is unreasonable or unfair. It gives stakeholders and the public a chance to see what a store would look like. Other companies such as the Green Room have done concept stores and Aurora is putting one into West Edmonton Mall.

[112] Ms. Gereluk did not use the correct term when she mentioned that she had sent an automatic e-mail. Outlook has an option where you can draft an e-mail and it does not send from your server until the time you have entered. Ms. Gereluk had one scheduled to leave her server at midnight but that e-mail never actually left her outbox. The only one that left her outbox was the one shown in Tab 19.

[113] The initial adjournment was actually at the request of Happy Buddha, not Fire and Flower. Mr. Wakefield had asked that all three appeals be heard together on March 13; however Ms. Da Silva wanted the hearing delayed as her landlord was away. The end result was that only Canndara went ahead in March.

[114] Happy Buddha stated that they were under no illusions as to the correct process. Fire and Flower is not alleging any wrongdoing on the part of Happy Buddha. Fire and Flower was simply being proactive and tried to engage with the City to get clarification. At the end of the day they still got two e-mail addresses, one from H. Vander Hoek saying her e-mail can be considered as setting out the process. When clarification was sought, a reply was received saying that everything she said was correct but look at the website.

[115] While Mr. Gunther said Fire and Flower could have sent one e-mail to both e-mail addresses it is equally reasonable to have two different people each send separate e-mails to both addresses.

[116] Section 640.2(c)(iii) of the *MGA* deals with the intake and processing of applications and determining initial completeness. Section 640.2(c)(vi) deals with the actual determination as to whether it is a good application, whether it is a Class A, Class B, DC, etc.

[117] If you get past the legal problem of carte blanche delegation of power, the end result is still implementation and implementation was not done with any degree of clarity. Mr. Wakefield is not alleging bad faith on the part of the City Planners. He is just saying the intake process was not well managed due to poor implementation and misinformation. It may have been better to slow the process down a bit and not be so keen to get out of the gate at midnight as soon as the *Bylaw* was adopted.

[118] It was mentioned that hundreds of applicants were expected which is incorrect. Mr. Welch stated the Development Authority really knew who the players were and it was a manageable number, not hundreds. If there were hundreds of other applicants they were kept in the dark and would not have known to go to City's website to find out a new process on the very evening of the passage of the *Bylaw*.

[119] Fire and Flower was not suggesting it get special treatment by being permitted to synchronize its computer clocks. The City should have undertaken a process where anybody interested could have synchronized its clocks on its computers with those of City; no advantage was sought. What was sought was some sort of precision and not something that turned out to be random. Mr. Gunther's suggesting that synchronization could result in a tie should also not be a consideration.

[120] Mr. Gunther says Canndara and Fire and Flower cannot co-exist under section 70 of *Edmonton Zoning Bylaw*. This assumes the outcome of the second part of this hearing. The Appellants think the Board has the power and opportunity to grant the required variances allowing them both to co-exist. Also, if the Canndara decision is ultimately set aside you are not just dealing with items 2 and 3 in the random process of e-mails but you are back to square 1 with all three.

[121] While first-come, first-served is a tradition in planning applications that is true if you were going to go to the planning department to take your number in the queue; you get dealt with as you take your number. The problem is that the technological change makes things more complicated. Fire and Flower did not object to first-come, first-served per se but the particular implementation of it.

[122] While Mr. Welch said the City engaged with people and told them they could not send to any other e-mail address other than cannabisdevelopmentpermit@edmonton.ca, Fire and Flower categorically denies this. They did not have a source of information from the City advising you can only use one address and not the other.

[123] The Appellants agree that Mr. Gunther was transparent in providing the server records and these helped all parties.

[124] While Mr. Wakefield does not believe issue estoppel applies he does agree that SDAB-D-19-029 cannot be ignored and must be addressed. However, it is clear that today's panel

is not bound by this decision and can reach its own conclusions based on the evidence today. There are many other instances where conflicting decisions have been issued by the SDAB. In *Garneau Community League* v *Edmonton (City)*, 2017 ABCA 374 ("*Garneau*"), which went to the Court of Appeal, the issue was that there were three decisions on the same DC where different SDAB panels went in different directions as to whether their variance power was under their general variance power or under the Garneau Area Redevelopment Plan power. Completely opposite decisions were arrived at within a block or two of each other.

[125] Mr. Wakefield provided the following responses to questions from the Board:

a) October 22, 2019 was a public meeting where the bylaw received third reading. It is very unlikely that City Council would have provided a specific e-mail address for submitting applications at that meeting. Ms. Gereluk confirmed she did not attend this meeting.

b) Ms. Gereluk confirmed that Fire and Flower has submitted other development permit applications electronically since October 23 but these are not at issue as they now know the correct e-mail address.

c) All of the appeals Mr. Wakefield handled prior to October 22 were under the Expression of Interest regime. Ms. Gereluk confirmed that those applications could not be submitted electronically – you had to meet with a Development Officer.

Decision

[126] The appeal is DENIED and the decision of the Development Authority is CONFIRMED. The development is GRANTED as applied for to the Development Authority, subject to CONDITIONS.

Reasons for Decision

[127] These reasons are for SDAB D-18-030, the Appeal of the decision of the Development Authority to issue Development Permit 296171324-001 at 11641 Jasper Avenue. In this appeal, Fire and Flower (the Appellant) asks the Board to revoke the Development Authority's decision to approve Happy Buddha's application to change a Use from a General Retail Store to a Cannabis Retail Sale Use and to construct alterations.

[128] The subject site is located within a Direct Control District, the Oliver Area Redevelopment Plan ARP DC1 District – Area 8 DC1 (18573) (the Area 8 DC1). Cannabis Retail Sales is a listed use in section 3(e) of the DC1.

[129] The process for appeals to the Board is set out in sections 685 through 687 of the *Act*. Section 685 permits appeals on specific grounds and section 687(3)(d) states the Board may issue a development permit even though the proposed development does not comply

with the Bylaw if the tests set out in subsection (i) and (ii) are met. As noted in *Garneau* at para 20, when the appeal concerns property that is subject to direct control zoning (in this case the Area 8 DC1), section 685(4)(b) limits both the scope and role of the Board.

> Section 685(4) provides:
>
> (4) Despite subsections (1), (2) and (3), if a decision with respect to a development permit application in respect of a direct control district … (b) is made by a development authority, the appeal is limited to whether the development authority followed the directions of council, and if the subdivision and development appeal board finds that the development authority did not follow the directions it may, in accordance with the directions, substitute its decision for the development authority's decision.

[130] The development regulations for the Area 8 DC1 are found in section 4. There is no reference to Cannabis Retail Sales Use in the development regulations in section 4 of the Area 8 DC1.

Background

[131] In anticipation of the legalization of recreational cannabis by the federal government in the fall of 2018, the *Edmonton Zoning Bylaw* (the "*Bylaw*") was revised by adding Cannabis Retail Sales as a Permitted Use in a number of standard commercial zones. Development regulations specific to Cannabis Retail Sales Use added to the Special Land Use Provisions in section 70.

[132] The normal practice of the City is to evaluate applications for development permits in the order that completed applications are received (first-come, first-served). In anticipation of a large number of competing applications and as the separation distance requirements, could render subsequent applications non-compliant, the City used a lottery system to determine the sequence of evaluation. A lottery was determined to be preferable and deal most fairly with all competing applications than the usual first-come, first-served process.

[133] Area 8 DC1 was not included as part of these initial changes adding Cannabis Retail Sales as a Listed Use. The Development Authority received several rezoning applications within quick succession to rezone Area 8 DC1 to allow for Cannabis Retail Sales Use. Mindful of its obligation to be transparent and fair to all interested parties and that the successful applicant for rezoning might not be successful applicant at the development permit stage due to the separation distances in section 70, the City administration itself initiated an application for rezoning.

[134] Given the small geographical area of Area 8 DC1, the order of approval was key. The Development Authority considered retaining an outside agency to conduct a Site Selection Lottery but in the end, per section 11.1(3), the Development Authority elected to accept applications by email and evaluate them based in accordance with the ordinary first-come first-served process in lieu of a lottery.

[135] Interested applicants were made aware of the progress of the *Bylaw* amendment and the development application process through emails and also through the City webpage which stated "To submit a complete development permit application package for cannabis retail sales send it by email to cannabisdevelopmentpermit@edmonton .ca with the subject line…."

[136] The rezoning was approved by Council on October 22, 2018. The City began accepting Development Permit Applications for Area 8 DC1 by email at 12:00:01 October 23, 2018 on a first-come, first-served basis at the email address indicated on the website.

[137] Multiple applications from five applicants were received almost immediately after midnight. This appeal involves the applications from three competing applicants Canndara, Happy Buddha and the Appellant and section 70.1, the required separation distance between Cannabis Retail Sales developments.

[138] Canndara's Cannabis Retail Sales is located on the North side of Jasper Avenue and it is the furthest East. The Appellant's proposed development is 129 metres to West of Canndara and Happy Buddha's Cannabis Retail Sales Use is 153 metres West of the Appellant's proposed development. The Appellant and Canndara are both located on the North side of Jasper Avenue, and Happy Buddha is located on the South side of Jasper Avenue.

[139] The order of receipt and evaluation was critical given the proximity of the three proposed developments and the separation requirements. If the Appellant's application was received and evaluated first, then neither Canndara nor Happy Buddha would comply with the 200 minimum metre separation distance. If either Happy Buddha or Canndara were approved first, then the Appellant's proposed development would not comply with the 200 minimum metre separation.

[140] The Development Authority determined the order of review based on the applications received by email on the City's server at the website address indicated on the City webpage and made the following decisions:

a) Canndara's application was reviewed and found to be fully compliant with all the regulations in the Bylaw and approved.

b) Happy Buddha's application was reviewed and found to be fully compliant with all the regulations in the Byalw and approved.

c) Permit Experts on behalf of the Appellants' application was reviewed and found to be non-compliant with the minimum setback requirement in section 70.1 and beyond the 20 metre discretionary variance authority because it was 129 metres from the approved Canndara development (71 metres short of 200 metres) and 153 metres from the Happy Buddha development (47 metres short of 200 metres)

[141] The Appellant appealed all three decisions. Initially the three appeals were scheduled to be heard contemporaneously. Subsequently, the decision to issue the Canndara permit was heard in a separate hearing by another panel of the Board (the Canndara Decision, SDAB D-19-029). That Board denied the appeal and affirmed the Canndara permit. The Appellant has applied for leave to appeal the Canndara Decision and the application for permission to appeal will be heard in June, 2019.

[142] This Board was scheduled to hear the remaining two appeals in a combined hearing.

[143] The Appellant filed a single submission for both appeals and indicated that a significant portion of the evidence would be required for both appeals. The Respondent expressed concern that hearing the matters together would unnecessarily confuse arguments and complicate the issue, noting that Happy Buddha's permit was fully compliant while the Appellant's permit did not comply with the regulations.

[144] As a preliminary matter after hearing from the parties and the City, the Board advised it would hear the submissions and evidence from the Appellant which they determined relevant to both appeals following the Board's usual process, allowing them the final right of reply. Then the Board would close that portion of the joint hearing related to (SDAB-D-19-030) and proceed with the third appeal (SDAB-D-19-051), the refusal of the Appellant's application for a Development Permit). This would allow the Appellants to make their full case and separate the issues as far as practicable to address the concerns of Happy Buddha. No objections to this were received. The Board is issuing separate decisions which reflect this procedure. These reasons are for SDAB-D-18-030, the Appeal of the decision of the Development Authority to issue Development Permit 296171324-001 at 11639 Jasper Avenue to Happy Buddha & Co.

[145] All parties making submissions referred to the Canndara Decision in their presentations. The Board agrees that with the Canndara Decision under appeal, issue estoppel does not apply. While the Board is not strictly bound by precedent and it must consider each case on its own unique facts and based on the submissions and evidence, the Board is mindful of the significant overlap amongst the three appeals and that the Canndara Decision must be addressed in these reasons.

[146] During the hearing, the Board asked the Development Authority to comment on the issue considered by the panel in the Canndara Decision at paragraph 106 - whether the Board has authority with respect to decisions of the Development Authority concerning the process of determining order and reviewing development permits. The City said for the purposes of the two remaining appeals they would not be presenting arguments on that point and they were prepared to accept the reasons on this issue in paragraphs 106 through 113 of the Canndara Decision. The respondent agreed with the Canndara Decision overall and did not argue this jurisdictional point in particular.

[147] The Board agrees with the decision in Canndara on this point and adopts the reasons found in para 106-114 inclusive.

…

[106] The question is whether the decisions of the Development Authority with respect to the process are decisions that the Board has the authority to consider.

[107] In the decision of *McCauley Community League v. Edmonton (City)*, 2012 ABCA 86 (*McCauley*), the Court of Appeal had occasion to consider Section 685(2) of the *MGA*, which states that "…any person affected by an order, decision or development permit made or issued by a development authority may appeal to the subdivision and development board."

[108] The Court determined that the words "order, decision or development permit" should be given a wider meaning than decisions related just to applications for development permits, particularly where the affected person would be required to seek judicial review rather than appealing to this Board. The Court concluded that a proper interpretation of the scope of the Board's jurisdiction should give consideration to the administrative structure as a whole. [Paras. 23, 24 and 27]

[109] The Respondent argued that any decisions made by the Development Authority related to process are outside the jurisdiction of the Board or, alternatively, should be dealt with at the appeal regarding the Appellant's refused permit.

[110] The Board disagrees. If the Board does not have jurisdiction to consider the process, the Appellant would be required to seek judicial review, leading to the type of situation the Court in *McCauley* ruled should be avoided. As to the submission that the proper forum for an appeal regarding the process is the Appellant's appeal of its refused permit, the Board is of the view that, in this case, the allegations regarding the fairness of the decisions of the Development Authority with respect to the process have a bearing on whether the Respondent's Development Permit is valid. Accordingly, the Board concludes that, given the *McCauley* decision, it has the jurisdiction in this case to consider the decisions made with respect to process and that it is appropriate to deal with those decisions in the instant appeal.

[111] In dealing with those issues, the Board must bear in mind Section 685(4)(b), which states that "Despite subsections (1), (2) and (3)…" the Board's jurisdiction is limited to determining whether the Development Authority followed the directions of Council. This means that, in considering the Development Authority's decisions relating to process, the Board must restrict itself to deciding whether the Development Authority followed Council's directions.

[112] The Respondent also argues that the Development Authority's decisions with respect to process were made, at the latest, on October 23, 2018, when applicants were allowed to submit applications. Since the appeal was not filed until February 12, 2019, it is argued, it is outside the 21-day appeal period stipulated by Section 686(1)(b) of the *MGA*.

[113] The Board is of the view that the Appellant's appeal regarding the process raises issues not only with respect to decisions about what process to use, but also issues about how the process was applied to the various applicants. Issues

> regarding the application of the process were not apparent until after the Development Authority made its decisions as to which applications were successful. The Respondent's application was not approved until January 23, 2019. The Board finds that the appeal regarding process was filed within the 21-day appeal period.
>
> [114] The Respondent also argues that the Appellant acquiesced to the process and has, therefore, waived its right to appeal the process. That argument fails for the reason stated above: that issues with the process were not apparent until after decisions regarding the successful applications were made.
>
> …

[148] The Appellants confirmed they would be pursuing five grounds of Appeal in support of their request that the Board revoke the Happy Buddha Permit:

1. The triage process adopted by the Development Authority for the consideration of development permit applications was not authorized by law;

2. The triage process adopted by the Development Authority for the consideration of development permit applications was not reasonably and fairly implemented;

3. The triage process adopted by the Development Authority for the consideration of the development permit application was an improper exercise of the Development Authority's discretion;

4. The Development Authority misled the Appellant with respect to the proper email address to which development applications were to be sent;

5. The development application was wrongly considered by the Development Authority before the development application of the Appellant.

[149] Happy Buddha and Canndara argued that the Development Authority was authorized to select the process, selected a fair process and published the process. In their view all participants had equal opportunity under a standard City process. Happy Buddha maintained that the process was properly evaluated for order and pursuant, to the correct application of the published rules, their application is second in time. Happy Buddha followed that process, they submitted only two applications. If the Appellant had received information on synchronization it would have given them an unfair advantage. The Happy Buddha application was fully compliant and therefore they are entitled to a permit. Even if the Appellant's application were considered second after Canndara, it would not be compliant.

Should the Happy Buddha permit be revoked because the triage process adopted by Development Authority was not authorized by law?

[150] Section 640(2)(c) of the *MGA* states:

> 640(2)(c) A land use bylaw must establish a method of making decisions on applications for development permits and issuing development permits for any development, including provision for
>
> (i) the types of development permit that may be issued,
>
> (ii) applying for a development permit,
>
> (iii) processing an application for, or issuing, cancelling, suspending or refusing to issue, a development permit,
>
> (iv) the conditions that are to be attached, or that the development authority may attach, to a development permit, either generally or with respect to a specific type of permit,
>
> (v) how long any type of development permit remains in effect,
>
> (vi) the discretion that the development authority may exercise with respect to development permits, and
>
> (vii) any other matters necessary to regulate and control the issue of development permits that to the council appear necessary

[151] Section 11.1.3. of the Bylaw states: The Development Officer, shall determine the process for submitting, receiving, determining complete, and reviewing Development Permit Applications for Cannabis Retail Sales.

[152] The Appellant argued that the Development Officer did not have authority to select this triage first-come, first-served system. As per section 640(2)(c) of the *Act*, Council was required to establish a method to deal with the intake and procession of applications and to determine completeness. Section 11.1.3 is an illegal delegation because it is a carte blanche delegation of power to the Development Officer to select a method without any guidance. Therefore, the Development Authority was not authorized by law to decide that it would accept applications for Cannabis Retail Sales Use by email in accordance with the ordinary first-come first-served basis.

[153] The Development Authority argued this decision was authorized by section 11.2 of the Bylaw which in turn is authorized by section 640(2) and noted that section 640(2)(vii) is very broad and can apply.

[154] Upon reviewing the Canndara Decision and considering the arguments presented at this hearing, the Board agrees with the Development Authority and adopts the reasons of the Board in paragraphs 116-119 inclusive:

> [116] The Board finds that Section 640(2)(c) of the *MGA* gives Council the broad authority to specify in the *Edmonton Zoning Bylaw* how decisions on applications for Development Permits and issuing Development Permits will be handled. In particular, Section

640(2)(c)(vi) gives Council the authority to specify the discretion that the Development Authority may exercise with respect to Development Permits.

[117] Section 11.1(3) of the *Edmonton Zoning Bylaw* states that the Development Officer shall determine the process for submitting, receiving determining complete and reviewing Development Permit applications for Cannabis Retail Sales.

[118] The Board finds that the Development Officer did follow the directions of Council in determining the process to be used with respect to dealing with the Respondent's application and further finds that the process adopted by the Development Officer was authorized by law.

[119] The Appellant urged the Board to find that Section 11.1(3) of the *Edmonton Zoning Bylaw* was an improper delegation of authority. However, it is not within the Board's purview to make a ruling on the validity of provisions in the *Edmonton Zoning Bylaw*.

[155] This Board declines to revoke the Happy Buddha's Development Permit on the basis that section 11.1.3 of the Bylaw was not authorized.

Should the Board revoke the Happy Buddha permit because the adoption of a first-come first-served by email process was an improper exercise of the Development Authority's discretion under section 11.1.3?

[156] The Board considered the Development Officer's submissions about why the process in the webpage was selected:

a) The method of accepting permit applications on a first-come, first-served basis is the City's standard practice and a commonly accepted method in other municipalities in Alberta.

b) The legalization of cannabis presented many challenges to the Development Authority who tried to be as transparent and as fair as possible to all applicants for Retail Cannabis Sales Use permits. In response to the changes to several zones and one DC district, a lottery process to determine the order of receipt and processing was implemented in the summer of 2018 in anticipation of an unusually large influx of competing applications.

c) Later, the City returned to first-come, first-served with those areas.

d) The Development Authority considered retaining an outside agency to conduct another Site Selection Lottery to determine order of receipt and processing for Area 8 DC1. However, due to its small geographical area, first-come first-served

as of the day after rezoning was chosen as indicated on the webpage and all the parties were made aware of it.

e) The Development Authority felt that this method would ensure all potential applications were subject to the same rules and no one would be prejudiced.

[157] Based on the presented submissions and materials, the Board finds no evidence before it to conclude that the Development Authority improperly exercised their discretion when selecting a first-come, first-served by email method. Consequently, this Board concurs with the conclusion in the Canndara decision on this point at paragraph 120. This Board finds the Development Officers followed the Direction of Council by exercising their section 11.1.3 discretion properly.

Should the Board revoke the Happy Buddha Permit because the triage process adopted by the Development Authority for consideration of the Development Permit applications was not reasonably or fairly implemented?

[158] The Appellants raised two points under this ground of appeal: the Development Authority refused to allow the Appellants to synchronize their clocks with the City server and they told the Appellant not to send automated applications. The Appellant acknowledged that Happy Buddha had not sent automated applications, but stated that it appears other applicants did send automated applications based on the numbers received (this allegation was denied by Canndara).

[159] The Board considered the following exchanges on October 22, 2018 between the Appellants' various employees and the Development Authority:

a) The Appellants wrote the Development Authority expressing a strong belief that it was important to allow market participants to synchronize clocks and avoid inadvertently submitting an early or late application. They note clear rules and instructions are important to maintain an orderly process otherwise this method of filing becomes even more random and arbitrary than a lottery.

b) Mr. Chan responds indicating he is unsure if there is any technological capability to synchronize their time, he provides some details and he recommends that the Appellate review the information provided in the City application guide and their webpage about the City's application process to ensure that the Appellants are aware of all requirements for their application.

c) In response to a second request for a reference point against which the City server's time clock had been synchronized, Mr. Chan confirmed the City clocks are set by Google, that they do not really have influence over the timing and that even if it was possible the City does not manipulate any hardware that is not part of its network for any reason. Mr. Chan points out that it also would be unfair if some applicants have this option, but others did not. He concludes therefore this is not a consideration. This email also notes early applications will not be accepted and again cites the webpage

advising the Appellants to "Please review the City's webpage on opening a cannabis retail store for all other rules about the process."

[160] In the Board's opinion the Development Authority acted appropriately. The Board agrees with the Development Authority, Canndara and Happy Buddha who all argued that to provide the Appellant with a means to synchronize their clocks with the city server when that was not done for other applicants would be unfair to the Appellant's competitors. Enabling synchronization for one applicant would have given that applicant an unfair advantage.

[161] The Board agrees with the conclusion in the Canndara Decision. With respect to synchronization, all the potential applicants were treated equally and fairly as they had the same chance to have an application received first after 12:00:00 on October 23, 2018 on the City server.

[162] The Appellants also argued the process was unfair because the Development Authority had told them they did not want to be inundated with multiple applications and they had respected this request.

[163] Again, the Board reviewed the submitted email correspondence on October 22, 2018 and the information posted on the webpage:

a) The Appellants ask for information: " [t]o make sure we understand the process – any email received on or after 12:00:00 is fine. If it's received before it will need to be resubmitted. Is there any issue if we have a couple people send the same application in at midnight to ensure it gets received on time, and then the City would take the time stamp of the first received?"

b) Mr. Chan replies "While we would prefer that our email not be inundated with multiple email application submissions for the same location, if we do receive multiple submissions for the same location, we will consider the application with the earliest timestamp." Then he cites the webpage and quotes the rule for reviewing applications found on the webpage.

c) The webpage states only one development permit application can be submitted per email and also that multiple applications in one email will not be accepted. The webpage has no prohibition on multiple submissions; it is silent with respect to the number of times that the same application can be submitted.

[164] Based on Ms. Gereluk's submissions, the Board finds that the Appellants did not send in an automated response, but they did have several individuals submit several applications. The Board also accepts the statement made by Happy Buddha, that it made only two applications. While the Appellants argued that Canndara had used some sort of automated system to submit its emails in the Canndara hearing, that Board found no basis to support that conclusion (para. 123). In any event, in this Board's opinion whether or

not Canndara had used some sort of automated system is not a material consideration in this appeal where the Appellant is asking the Board to revoke the Happy Buddha Permit.

[165] The Development Officer acted fairly and reasonably to the request to synchronize servers and to the inquiry about multiple applications from multiple senders. He stated a preference and a process for determining the order of review in the event that more than one email were to be received for a single application. The Appellant and the other applicants did in fact submit multiple emails for the same application and as indicated by Mr. Chan, the order of review was determined based on receipt of the first of the pool of applications from each of the five competing proposed developments just as Mr. Chan had explained.

[166] The Board finds no basis to allow the appeal on this ground of appeal. The Board finds that the Development Authority acted reasonably and fairly in implementing its chosen first-in first-served method. In particular, the Development Officer acted fairly and reasonably in responding to the Appellants' inquiries about synchronization and multiple requests for a single application.

Did the Development Authority wrongly consider the Happy Buddah application before the Appellant's application?

[167] The Development Authority adopted a first-come, first-served by email approach per section 11.1(3) of the Bylaw.

[168] The details of this first-come, first-served by email process were published for all interested applicants on the City webpage.

[169] Under the heading "Applying for a permit", all applicants were instructed "To submit a complete development permit application package for cannabis retail sales, send it by email to cannabisdevelomentpermit@edmonton.ca..." The webpage also indicated "If your proposed location is approved for cannabis retail sales through a rezoning application, your development permit application will only be accepted starting the day after Council approves the rezoning." (Exhibit A)

[170] Several emails with applications for Cannabis Retail Sales were received within the first few minutes after 12:00:00 on October 23, 2018 (the day after Council approved the rezoning).

[171] Approximately one day later, three Development Officers determined collectively, based on the time that the applications were received at cannabisdevelomentpermit@edmonton.ca, that the order of receipt and processing would be Canndara, Happy Buddha, the Appellants' and two subsequent applicants.

[172] The Board reviewed the server printout submitted by the Appellants. It confirms that the order of receipt at the email address listed on the City webpage

(cannabisdevelopmentpermit@edmonton.ca) was Canndara, Happy Buddha and then the Appellants.

[173] Based on this information, the Board finds that the Development Authority followed the correct process by ranking the applications in the order that they were received at cannabisdevelopmentpermit@edmonton.ca in accordance with the method selected by the Development Authority and stated on the City webpage.

[174] The Board finds it would have been an error for the Development Authority to depart from the method published in the webpage and available to all potential applicants and consider the email received from the Appellants at a different email address communicated by inadvertent error to one applicant.

Should the Board revoke the Happy Buddha Permit because the Development Authority misled the Appellants with respect to the proper email address to which development permit applications were to be sent?

[175] The City of Edmonton Development Application webpage is clear that the address for submitting applications is cannibisdevelopmentpermit@edmonton.ca.

[176] The Board carefully reviewed the emails provided by the Appellant between its various employees and various City employees and considered the following:

a) By e-mail on August 14, 2018 Ms. Vander Hoek provided the Appellants with accurate information. She indicated that the details were still being worked out and would be updated on the cannabis legalization web page and stated:
"Applications for development permit as a result of rezoning will only be accepted starting the day after the rezoning is approved by Council. Applications will only be accepted by email to cannabisdevelomentpermits@edmonton.ca." [sic]. She indicated further information could be obtained by contacting cannabislegalization@edmonton.ca."

b) By email on date Sept 17, 2018, Ms. Vander Hoek stated:
"Once past third reading at the regular council meeting, applications for development permit will be accepted the following day at 12:00:01, midnight by email to cannabislegalization@edmonton.ca. For more information about this process or to talk about any concerns you might have please see edmonton.ca/cannabislegalization, or email cannabislegalization@edmonton.ca, as I am not an expert on this part of the process. Please ensure that you have all the details needed for your application to ensure that it is deemed complete. Please let me know if you have any questions about the rezoning part of this process"

c) This paragraph contains an error, cannabislegalization@edmonton.ca is not the address listed on the cited webpage for development applications.

d) In September, the Appellant asked Ms. Vander Hoek to provide an official statement a process timeline. By email dated September 25, 2018 she responded "we will not be providing an official letter indicating the process that we are taking. Please consider my email as a notice of the process that is happening."

e) By email on October 16, 2018 Ms. Vander Hoek provided the following information which also contained an incorrect email address:

> "Again, once past third reading at the October 22nd council meeting, Applications for development permits will be accepted the following day (October 23) at 12:00:01, midnight by email to cannabislegalization@edmonton.ca. For more information about this process or to talk about any concerns you might have please see edmonton.ca/cannabislegalization, or email cannabislegalization@edmonton.ca, as I am not an expert on this part of the process. Please insure that you have all the details needed for your application to ensure that it is deemed complete."

f) On October 19, 2018 the Appellant sent an email to the address indicated by Ms. Vander Hoek asking "Would you please confirm the process that will be followed for submitting and accepting development permit applications in the Oliver Area 8 DC1 following re-zoning as anticipated on October 22, 2018. The email then states "We have received the following information from Heather Vander Hoek" and quotes the information immediately above.

g) Mr. Chen of the development Authority responds on the same day stating:

> "The City's webpage outlines the process for submitting a development permit application for cannabis retail sales. What Ms. Vander Hoek has indicated to you is correct. If the DC rezoning is approved by Council, you may submit your application the day after Council's decision, which would begin at 12:01 AM. Development Permit applications must be sent by email to cannabisdevelopmentpermit@edmonton.ca. I would reaffirm that we will screen applications in the order that these are received but will only review applications that are deemed a complete. If an application is "first" but incomplete, and another application is "second" but it is complete, the second application will be considered for review first."

h) This email contained two errors: first it stated the information provided by Ms. Vander Hoek was correct and second it indicated that submissions would begin to be received at 12:01 AM the day after Council's decision. The Appellants sought clarification about the time and it was confirmed that the earliest accepted time stamp would be following 12:00:00.

i) In other contemporaneous emails concerning synchronization, Mr. Chan repeatedly refers the Appellants to the City's webpage "our City's webpage outlines specifically how applications should be submitted and will be considered by staff and in

accordance with the Zoning Bylaw" and states the City website should be consulted for all other process.

j) October 22, 2018 Mr. Chan states "as I've again, indicated in previous emails, our city webpage outline specifically how applications should be submitted and will be considered by staff in accordance with the Zoning Bylaw."

k) Asked by another of the Appellants' employees to confirm that any email received on or after 12:00:00 is fine and whether there would be any issues if a couple people sent the same application to ensure it would be received on time and whether the City would take the time stamp of the first received, Mr. Chan again referred to the webpage.

[177] The Board took note that the Development Authority agreed that it had given inaccurate information concerning the email address for applications and that the Development Officer repeatedly also indicated that the Appellants should consult the City's webpage which contained the proper address and also cited the proper address as part of those communications.

[178] The Board also took note that the Appellant agreed that there was no intent on the part of the City to mislead it or to provide false information.

[179] The Board finds that an incorrect email address was provided to the Appellants along with references to the webpage which contained the correct information including the correct email address in two emails from Ms. Vander Hoek. Further, when presented with an accurate copy of the paragraph containing the incorrect email address, the Development Authority incorrectly stated that the information indicated in that paragraph was correct, but also provided the correct address and referred the Appellants to the webpage which contained clear direction to submit to the correct email.

[180] Based on the evidence before it, the Board is not satisfied that, but for the incorrect information provided by the City:

a) the Appellant would not have directed its efforts towards sending an email to the incorrect address (cannabislegalization@edmonton.ca), and instead would have sent that email to the email listed on the webpage (cannabis developmentpermit@edmonton.ca); or,

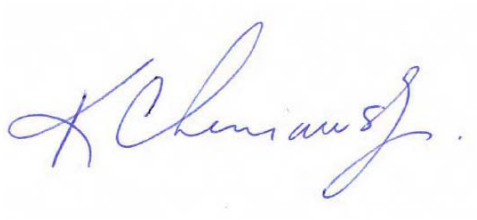
b) that the email would have been received along with the other emails from the other applications at exactly the same time it had been sent to and received at the incorrect address,

with the result that in accordance with the process adopted by the Development Authority it would have been the second application to be received and considered.

[181] In any event, in this proceeding, the Appellants argued that they should be considered second in the queue. As noted by Happy Buddha, even if the Appellants' application had been sent to the correct email address and even if it had been received second, it would not comply with the 200 metre minimum separation distance from Canndara. Unlike Canndara, the Appellants would not have a development that fully compliant with all of the regulations in the Bylaw. Therefore it could not be said that the Appellants' would be entitled of right to an approval and that the issuance of the Appellants' permit would guarantee that Happy Buddha's development would be turned down.

[182] In summary, even if it could be said that the misinformation in the circumstances constituted an error by the Development Authority to follow the directions of Council, the Board would not allow this appeal and revoke the Happy Buddha Permit.

[183] For all the reasons above, the Board finds that the Development Authority followed the direction of Council. The Board finds no reason based on the grounds cited by the Appellant to allow the appeal and revoke the Happy Buddha Application.



Kathy Cherniawsky, Presiding Officer
Subdivision and Development Appeal Board

Board Members in Attendance:
Mr. L. Laberge, Mr. L. Pratt, Mr. A. Nagy, Ms. L. Delfs

cc: Dentons
Fire & Flower Inc.
Happy Buddha
Mr. M. Hundert
City of Edmonton Law Branch – M. Gunther
Development & Zoning Services – I. Welch / S. Chow / 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.

EDMONTON
TRIBUNALS
Subdivision & Development Appeal Board

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

Date: May 30, 2019
Project Number: 296172505-001
File Number: SDAB-D-19-051

Notice of Decision

[1] The Subdivision and Development Appeal Board (the "Board" or "SDAB") at a hearing on February 27, 2019, made and passed the following motion:

> "That the appeal hearing be scheduled for April 11, 2019 with the mutual agreement of all parties."

[2] On April 10, 2019, the Board made and passed the following motion:

> "That the appeal hearing be postponed to a date to be determined."

[3] On May 15, 2019, the Board made and passed the following motion:

> "That SDAB-D-19-051 be raised from the table."

[4] On May 15, 2019, the Board heard an appeal that was filed on February 15, 2019. The appeal concerned the decision of the Development Authority, issued on January 25, 2019, to refuse the following development:

> Change the use from Health Services (Cannabis Counselling) to Cannabis Retail Sales

[5] The subject property is on Plan B3 Blk 15 Lot 79, located at 11516 - Jasper Avenue NW, within the DC1 – Direct Control Provision Zone. The Main Streets Overlay and Oliver Area Redevelopment Plan apply to the subject property.

[6] 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
- One online response in opposition and one e-mail in opposition

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

- Exhibit A – Copy of City Website (carried forward from SDAB-D-19-030)

Preliminary Matters

[8] 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.

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

[10] 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*" or "*MGA*" or "*Act*").

Summary of Hearing

i) Position of the Appellant, Fire and Flower

[11] Mr. Wakefield requested that all evidence and argument led by the Appellant in the previous hearing (SDAB-D-19-030) apply to SDAB-D-19-051 as well. (SDAB-D-19-030 is attached)

[12] Mr. Wakefield referred the Board to the following tabs of his written submission which contain copies of:

Tab 4: Fire and Flower's refused Development Permit and application documents (submitted by Permit Experts). The reasons for refusal are shown including the deficiency in separation distance from Canndara and Happy Buddha.

Tab 5: The notice of refusal from Mr. Welch and notice of the right to appeal.

Tab 6: Fire and Flower's grounds for appealing the refused permit.

[13] Mr. Wakefield referred the Board to the following sections of the *Edmonton Zoning Bylaw*:

> Section 69 Special Land Use Provisions
>
> Section 69.1 Applicability The Special Land Use Provisions apply to the Uses listed in any Zone or Direct Control Provision in which they are located.
>
> Section 70.1 Any Cannabis Retail Sales shall not be located less than 200 m from any other Cannabis Retail Sales. For the purposes of this subsection only:

> Section 70.1(b) A Development Officer shall not grant a variance to reduce the separation distance by more than 20 m **in compliance with section 11**;

The rest of section 70 deals with other separation distances not relevant to this appeal.

> Section 70.5 Notwithstanding section 11 of this Bylaw, a Development Officer shall not grant a variance to subsection 70(2), 70(3)(a) or 70(4).

The one that applies to today's appeal is 70.1, not 2, 3 or 4.

Section 11.1 of the *Edmonton Zoning Bylaw* deals with the responsibilities of the Development Officer with respect to Development Applications

> Section 11.1(f) may relax a regulation in a Zone or other section of this Bylaw in accordance with the regulations contained in that Zone or section, or may relax regulations in accordance with sections 11.3 and 11.4, and in such case, the development applied for shall be a Class B Discretionary Development;
>
> Section 11.1.3 The Development Officer, shall determine the process for submitting, receiving, determining complete, and reviewing Development Permit Applications for Cannabis Retail Sales.
>
> Section 11.3 Variance to Regulations
>
> 1. The Development Officer may approve, with or without conditions as a Class B Discretionary Development, an application for development that does not comply with this Bylaw where:
>
> a. the proposed development would not, in their opinion:
>
> i. unduly interfere with the amenities of the neighbourhood; or
>
> ii. materially interfere with or affect the use, enjoyment or value of neighbouring properties.
>
> b. the proposed development would, in their opinion, conform with the Use prescribed for that land or building in this Bylaw.
>
> Section 11.4 Limitation of Variance
>
> 1. In approving a Development Permit Application pursuant to section 11.3, the Development Officer shall adhere to the following:
>
> a. a variance shall be considered only in cases of unnecessary hardship or practical difficulties peculiar to the Use, character, or situation of land or a building, which are not generally common to other land in the same Zone; (in this case DC1)

…….

> d. there shall be no variance to the General Purpose of the appropriate Zone or Overlay.

[14] The 20 metre variance power in 70.1(b) is to be in compliance with section 11. This includes subsections 11.3 and 11.4. In other words, it is 20 metres but section 11.3 gives a more generous right subject to the limitations as to when that right can be exercised in section 11.4. Apart from section 11.4, the variance is the standard one that the Board has in section 687(3)(d) which is no undue interference with the amenities and material interference with the use, enjoyment or value of neighbouring properties as long as the use is correct.

[15] Mr. Wakefield referred the Board to the following parts of his submission:

Tab 9: The re-zoning on Jasper Avenue

Tab 10: The Oliver Area Redevelopment Plan amendment

Tab 11: Bylaw 18387 which gave rise to section 70 and other Cannabis Retail Sales provisions

Tab 12: The Planning Report that relates to the Area Redevelopment Plan and zoning changes to allow, among other things, Cannabis Retail Sales in that Jasper Avenue corridor Area 8.

Tab 13: The Area Redevelopment Plan as amended. Paragraph 1 describes the Area of Application. The Rationale is in paragraph 2 which states:

> To provide for a range of uses, with the objective of promoting the continuing development of a pedestrian oriented commercial strip in terms of land use activities and design elements. The district also provides opportunity for the inclusion of residential uses above the ground floor level.

[16] Mr. Wakefield then referred the Board to the following section of the *MGA*.

> 641(3) In respect of a direct control district, the council may decide on a development permit application or may delegate the decision to a development authority with directions that it considers appropriate.

There are two types of development control. As per Laux, the first kind is pure direct control and second is delegated direct control. It is Mr. Wakefield's submission that we are in the latter category and that has implications for what the Board's powers are.

[17] The Board was directed to the following areas of section 710 of the *Edmonton Zoning Bylaw* which deals with (DC1) Direct Development Control Provision.

> **710.1 General Purpose**
>
> The purpose of this Provision is to provide for detailed, sensitive control of the Use, development, siting and design of buildings and disturbance of land where this is necessary to establish, preserve or enhance:

a. areas of unique character or special environmental concern, as identified and specified in an Area Structure Plan or Area Redevelopment Plan; or

710.2 Application

1. This Provision shall only be applied:

    a. where specified by an Area Structure Plan or Area Redevelopment Plan; or

710.4 Development Regulations

1. All developments shall comply with the development regulations contained in an approved Area Redevelopment Plan or Area Structure Plan, except that any regulations or conditions applying as a result of designation of a historical resource under the Historical Resources Act, shall take precedence.

……

3. A development may also be evaluated with respect to its compliance with:

    a. the objectives and policies of an applicable Statutory Plan;

    b. the General Regulations and Special Land Use Provisions of this Bylaw; and

    c. the regulations of abutting Zones.

…….

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

[18] Mr. Wakefield referred the Board to *Planning Law and Practice in Alberta* (Fourth Edition) Frederick A. Laux, Q.C, and Gwendolyn Stewart-Palmer. Section 6.2(2)(c)(i) deals with Pure Direct Control. This is where Council takes full control of a particular zone designated Direct Control. Council says what is allowed and what is not allowed and is responsible for approving individual Development Permits. In some municipalities, no specific uses are set out; they just say "to be determined by Council". You make your application and try to persuade Council both as to the Use and the particulars.

[19] Mr. Wakefield quoted the following sections from Laux:

> 6.2(2)(c)(ii) Delegated Direct Control.
>
> *"Another model of the direct control district is one that delegates permit application decision-making power to the development authority and which provides that the uses and development standards for the district are those set out in an adopted area structure plan or area redevelopment plan."*

The above statement applies to today's appeal. Cannabis Retail Sales is one of the listed uses in the Oliver Area Redevelopment Plan.

"An example of this type of direct control district is the City of Edmonton DC1 district. The bylaw text of Edmonton's DC1 district provides that the district is to be applied only to areas of "unique character or special environmental concern" as identified in an area structure plan or an area redevelopment plan, and to areas designated under the Alberta Historical Resources Act. It also states that "a permit may be issued for those uses prescribed for the land in an approved area structure plan or area redevelopment plan or those uses consistent with its designation under the Alberta Historical Resources Act", and that developments "shall comply" with the development standards set out in such plans. In addition, a development "may also be evaluated", having regard to the stated objectives of an applicable statutory plan, the general regulations and special land use provisions of the Land Use Bylaw and the regulations applicable in abutting land use districts. The statutory plan, in turn, contains a detailed list of "authorized uses" together with development standards that "shall apply".

The result of all this is to provide a conventional district, although labelled DC1, in which the uses prescribed amount to discretionary uses, In other words, the City has employed the direct control provisions of the Act to create a unique district with tailor-made uses and development standards to accommodate the special character of the area to which the district is applied. Given that s.641 of the Act permits a council to regulate and control developments in a direct control district "in any manner it considers necessary," there is probably nothing legally objectionable about the DC1 district, but it is not true direct control.

6.2(2)(e) The Role of a Subdivision and Development Appeal Board in Direct Control

"Where a development permit is issued in a conventional land use district; certain rights of appeal to a subdivision and development appeal board arise for the benefit of the applicant and other affected persons or entities. However, because of a council's unique role in direct control districts; rights of appear in respect of developments, as distinct from subdivisions, differ. In a case where a municipal council makes the decision on a development permit application for land in a direct control district, there is no right of appeal to the subdivision and development appeal board. At first blush this proposition appears at once startling and unfair; but a closer analysis suggests otherwise. In a normal case, an appeal is provided in respect of development permits to ensure that the development authority complies with the parameters of powers council has delegated to it in a land use bylaw. If council itself exercises the power, there is no possibility of error on the part of the development authority"

…….

"As mentioned above, in many types of direct control districts in Alberta, an application for a development permit must be filed with the development authority. In such a case the Act affords a right of appeal, but the appeal is limited to the question of whether the development authority properly followed the direction council may have given to it when council dealt with the subject land using the direct control mechanism. If the appeal body finds that council's directions have not been complied with, it should set aside the decision to the extent of the-non-compliance and substitute terms that do comply.

> *Unfortunately, s.641 is somewhat unclear in that it fails to adequately address the cases where a development permit application is decided by a development authority, but the directions of council in the direct control bylaw or resolution are incomplete, ambiguous or, as in many cases, confer discretion on the development authority in respect of one or more elements of a development project." ……..…..*
>
> *"Where council has exercised less than complete direct Control over a Specific site that is the subject of a permit application, either because it has remained silent on some material particulars or because it has left the development authority with a discretion, a literal interpretation of s 641(4)(b) (now 685(4)(b) following the passage of the Modernized Municipal Government Act) might suggest there is no right of appeal. However, a purposive approach to interpreting Pt. 17 of the Municipal, Government. Act leads to the conclusion that a right of appeal on the merits of the development does exist. Where, council has left gaps or conferred a discretion, it in fact has not exercised direct control over that element. Consequently, the rules pertaining to appeals in non-direct control districts should apply to the extent that true direct control has not been utilized. It follows that in those circumstances the panoply of appeal rights and powers set forth in ss. 684 to 687 should apply.*

[20] SDAB-D-18-149 (the Jupiter case) is under Tab 26; this is the first DC1 case the Board considered. The Jupiter case is in Old Strathcona which is comparable to the Jasper Avenue strip. Old Strathcona was rezoned on June 12, 2018, the same day that City Council adopted the Cannabis Retail provisions for conventional zones. When the Development Authority considered permit applications under the Expression of Interest intake process it found in most cases that it could not give any variances to the separation distances set out in section 70 of the *Edmonton Zoning Bylaw* because of 685(4) of the *Municipal Government Act* which basically limits the appeal to whether the directions of council were followed.

[21] In Jupiter, there were very few sites in the Old Strathcona historical commercial area that were the required 100 or 200 metres from one of the specified separation locations. Only 3 sites on the south side of Whyte Avenue between 104 and 105 Streets met the criteria so there was very little opportunity for anyone to actually open a Cannabis Retail Store on Whyte Avenue. Notwithstanding that the whole area had been rezoned DC1 on June 12, 2018, the Board nevertheless found it did not have jurisdiction to grant a variance and that is where that case ended.

[22] SDAB-D-18-168 (the Green Room case) can be found at Tab 27. This appeal deals with a site that was built as a concept store to show people what a Cannabis Retail Store might look like in anticipation of pending legalization and has operated as such for several years. Once legalization became fact, the Green Room applied for a Development Permit for Cannabis Retail Sales. They were refused because they were too close to a school which was barely within the 200 metres separation requirement although in a conventional zone this would not necessarily be a problem (Mr. Wakefield referenced Fire and Flower's application where a 1 metre variance was granted by the Board from Mill Creek School). In the Green Room Case, there was also a park across street which is not much of a park (a patch of green between the Iron Horse Bar and Whyte Avenue)

with a few trees and benches. The Green Room was turned down and at paragraph 60 of this case the Board said:

> *"That said, the parties discussed the well-known Lord Denning allusion to the "Man on the Clapham Omnibus", and all parties agreed that the common citizen of Edmonton would likely expect Cannabis Retail Sales in the Whyte Avenue area. Quite simply, this Board has considerable sympathy for the Appellant, but greater deference to the aforementioned Garneau decision of the Court of Appeal of Alberta."*

[23] The Court of Appeal granted the application for permission to appeal regarding the Green Room Case and this decision can be found under Tab 28 of the Appellant's submission. Mr. Wakefield quoted Paragraph 31 of that decision:

> *"I find that the Green Room's application meets the test for permission to appeal, and permission is granted to appeal on the following question as proposed by the Green Room:*
>
> *Did the SDAB err in law or jurisdiction in holding that (a) it lacked the authority to grant a variance to the separation distances provided in s 70 of the City of Edmonton Zoning Bylaw 12800; and (b) the development officer who had refused tile applicant's development permits application had followed tile directions of Edmonton City Council."*

[24] The grounds of the appeal go to the Board's jurisdiction. Paragraph 17 of the leave decision reads:

> *The appeal really turns on an interpretation of s 710.4(3) of the Bylaw which states:*
>
> *A development may also be evaluated with respect to its compliance with:*
>
> *a. the objectives and policies of an applicable Statutory Plan;*
>
> *b. the General Regulations and Special Land Use Provisions of this Bylaw; and*
>
> *c. the regulations of abutting Zones. (emphasis added)*
>
> *Specifically, the Green Room argues that the SDAB erred in law or jurisdiction by failing to find that s 710.4(3) of the Zoning Bylaw is a separate grant of discretion to the development officer which, when read with the Strathcona ARP, could have been exercised to vary the separation distances in s 70 of the Zoning Bylaw.*

Mr. Wakefield plans to argue that *Garneau Community League* v *Edmonton (City)*, 2017 ABCA 374 ("*Garneau*") properly makes a distinction between the section 11 variance power and the DC1 variance power.

[25] SDAB-D-17-071 (the Glenora Liquor case) is under Tab 29 of the Appellant's submission. This involved a DC2 not a DC1so it is site specific and not covering a larger area like a DC1. Mr. Wakefield quoted from this decision:

> *[40] Based on the plain wording of DC2.919, the Board finds that Council contemplated the development of either a single Minor or Major Alcohol Sales Use within this Site Specific Development Control Zone.*
>
> *[41] Therefore, the Board finds a direct conflict between the directions of Council contained in DC2.919 and the development regulations contained in section 85.4 and 85.5 of the Bylaw that are generally applicable to Minor and Major Alcohol Sales Uses.*

[26] As the Board is aware, the Cannabis Retail Sales regime has borrowed almost entirely from the City's Major and Minor Alcohol Sales regime which is set out in section 85. section 85 and section 70 of the *Edmonton Zoning Bylaw* are virtually identical although some of the actual separation distances are quite different.

[27] In SDAB-D-17-071, the Board is saying on the one hand you can have alcohol sales but the separation distance was not met. The Board concluded from that at Paragraph 43:

> *[43] The Board finds that DC2.919 has specifically excluded or modified the locational criteria pursuant to section 85.4 of the Bylaw. Therefore, pursuant to section 720.3(3) of the Bylaw, the Development Officer failed to follow the directions of Council by refusing the application based on the development regulations contained in section 85.4 and 85.5 of the Bylaw.*

[28] SDAB-D-19-050 (First Capital Asset Management) is a very recent decision of this Board under Tab 30 of the Appellant's submission. Mr. Murphy was legal counsel and Mr. Wakefield adopts Mr. Murphy's arguments for the current appeal. Mr. Wakefield quoted extensively from Mr. Murphy's arguments:

> *[13] Land use regulations that are contained in the Direct Control Provision are beyond the Board's ability to vary because Council has set those in stone. They can only be relaxed in accordance with the additional instructions, if any, that Council provides in the DC Zone. On the other hand, land use regulations appearing outside of the DC Provision remain subject to the variance power of the Board, under section 687(3)(d) of the Municipal Government Act and that is so because they are separate and distinct from the Direct Control Provision itself.*

[29] This is identical to Mr. Wakefield's position in today's appeal. Mr. Murphy continues by discussing the confusion about applying section 685(4) to these hybrid or not pure Direct Control zones.

> *[14] The confusion results because of the reference in the Bylaw to the fact that the general regulations of the Bylaw apply to Direct Control Districts and they do. They apply to every Zone, every District and every development in the City but they are not part of the Zones and they are not part of the Direct Control District. Most importantly, they are not part of the direction of Council unless Council specifically restates them in the DC1 Direct Development Control Provision.*

[30] The last sentence of the above quote is key. What is in the DC1 is in the DC1 and basically untouchable as far as variance powers. What is in the general bylaw is not part of the Direct Control Zone and falls within the normal rules relating to both the Development Officer's and the SDAB's powers. That is the key concept in both Mr. Murphy's submission in SDAB-D-19-050 as well as today's submission.

> *[15] Section 685(4) of the Municipal Government Act refers only to decisions with respect to development permit applications in a Direct Control District. Section 685(4) does not suggest that the directions of Council are to be sought anywhere but in the Direct Control District itself. Specifically, section 685(4) does not say that you can seek the direction of Council in those parts of the Bylaw other than in the Direct Control District in question.*
>
> *[20] It does not seem reasonable that the City would have gone to all of the trouble to create the 104 Avenue Corridor Area Redevelopment Plan, to rezone all of this land and to make Alcohol Sales and several other Uses, Permitted Uses in the Zone in the face of these problems. …….*

[31] The above paragraphs refer to section 85 of the Bylaw. The same argument can be made in today's appeal because of the special character of the area which is referenced in the City's report and in the ARP for Oliver Area 8. Mr. Wakefield urged the Board to read the SDAB's entire decision regarding SDAB-D-19-050 but wanted to especially emphasize paragraphs 31 to 33 He quoted paragraphs 32 and 33:

> *[32] Section 685(4) states that despite your right to appeal "if a decision with respect to a development permit application in respect of a direct control district" is made by a Development Authority then the jurisdiction is limited to whether the directions of Council were followed.*
>
> *[33] This section reflects the argument that was provided earlier in this hearing. If these directions from Council appear in a Direct Control Provision, section 685(4) applies. However, this appeal is not in respect to the Direct Control Provision, it is in respect to lands that are zoned Direct Control but the problem is not the directions of Council, it is the development regulations contained in section 85 of the Bylaw.*

Mr. Wakefield's submission today is identical other than substituting the regulations contained in section 85 with those contained in section 70.

[32] The Appellants summarized Paragraphs 36 and 37 saying that section 40 of the Bylaw states that the general development regulations shall apply to all developments on all Sites and section 69 of the Bylaw states that the Special Land Use Provisions apply to all of those. He continued to quote from SDAB-D-19-050:

> *[38] In order for these provisions to be applied in addition to the requirements of the Zone or Direct Control Provision, they cannot be part of the Zone. They have a separate identity and will be applied to the Zone in addition. ……*

[39] Section 710 of the Bylaw has thrown all discussions with respect to Direct Control Provisions into a tail spin. This is the language that unless, read properly, drives the Board to determine that the variances of the Bylaw cannot be considered.

[43] The term 'may also be evaluated' in this section shows that the regulations of general application are different from the Direct Control. If these rules of general application were already part of the Direct Control District that would render this statement redundant.

[44] Section 710.5 states:

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

[45] This section does not say that these regulations are part of the District; it says they shall apply in the District. That is the split between these two things.

[50] The Direct Control Provision that applies to this site lists Major and Minor Alcohol Sales as Uses but it does not incorporate the development regulations of section 85 into this Zone. The regulations still apply and can be reviewed outside the Direct Control Provision. However, it is not part of the Direct Control Provision, but rather a regulation of general application.

[33] Mr. Murphy, in SDAB-D-19-050, refers to the Direct Control District and the remainder of the *Bylaw* as "two separate creatures" (paragraph 53) and referenced the *Parkdale-Cromdale decision.* In the McCann decision, Mr. Murphy cites that those regulations ran alongside the direct control (paragraph 54). Mr. Murphy then cites *Garneau* (paragraph 55) and notes that *Garneau* actually found there were two variance powers, one inside and one outside of the Direct Control. Mr. Murphy goes on to quote extracts from Laux and Stewart Palmer (Paragraph 56) *"There is an en masse delegation that is provided in section 11 of the Bylaw. This means that delegation does not have to be repeated in each and every bylaw"*.

[34] This case is important because it highlights the parallel tracks which run in the Land Use Bylaw and Direct Control Provisions on the one hand, and general provisions and general provisions of the bylaw on the other.

[35] Mr. Wakefield quoted from 60(b) of SDAB-D19-050 *"This appeal is not related to the decision made by the Development Officer pursuant to the DC1. The appeal relates to the development regulations contained in section 85"*. Mr. Wakefield asked the Board to substitute "section 70" for "section 85" in today's case.

[36] Mr. Wakefield then quoted from 60(c) of SDAB-D-19-050: *"……If there was no difference between the Direct Control provisions and the general regulations why would*

section 710 state that all developments shall comply with the development regulations contained in an approved Area Redevelopment Plan or Area Structure Plan.……"

[37] SDAB-D-19-50 was a case where an existing alcohol sales store was going to be shut down and moved a block or so away. The appeal was allowed by the SDAB.

[38] Mr. Wakefield moved on to the reasons of the panel with regards to SDAB-D-19-50:

> *[67] This DC1 is silent with respect to the Special Land Use provisions for Major Alcohol and Minor Alcohol Sales.*

[39] The Board in SDAB-D-19-50 then quotes 710.4(3) of the *Bylaw* saying it clearly states that a development may be evaluated with respect to the Special Land Use Provisions such as section 85. Mr. Wakefield suggests to the panel that they substitute section 70 here. In paragraph 70 the panel goes on to say: *as the provision is permissive, it allows the Development Authority to exercise its discretion in applying the Special Land Use Provisions in section 85* (section 70 in today's appeal). Paragraph 71 states "*The Board finds that the Development Authority applied section 85 rigidly……..*".

> *[73] Therefore, based on the above, the Board finds that the Development Authority did not follow the directions of Council.*

[40] At paragraph 79 of SDAB-D-19-50 " …..*the Board notes that the subject DC is a large and diverse, high traffic commercial area that extends from 121 Street to 112 Street."* This is similar in range to today's appeal from 110 Street to 121 Street along Jasper Avenue.

[41] The following paragraphs from SDAB-D-19-50 were quoted:

> *[80] Closing the ……. existing Alcohol Sales Use and opening the new Alcohol Sales Use 50 metres away will not change the character …..*
>
> *[81] The proposed development meets the general purpose of the DC1 which is to "facilitate development of a pedestrian friendly and transit-supportive area that is characterized by its strong mix of retail, office, entertainment, and residential uses and its accessibility, open spaces, and sensitive interface between developments.……..…."*

[42] In summary, the Board hearing SDAB-D-19-50 granted the appeal and allowed the appeal to go forward notwithstanding section 85. The Jasper Avenue Corridor, if anything, is more built up, more intense, has more uses, and is more walkable. It has a similar general rationale clause and also fits within the general purpose clause at section 710 of the zoning bylaw.

[43] SDAB-D-14-246 (Wilson) at Tab 31 was referenced. The Board first held an extensive voir dire to determine if it had jurisdiction on a historic DC1. The Board then went on to

consider the merits of the case which involved a garage and whether or not it should be dealt with on the basis of the provisions in the Area Redevelopment Plan or the general provisions of the Bylaw which were referred to in the Area Redevelopment Plan. The reasons for the Board assuming jurisdiction are found in Mr. Wakefield's arguments on pages 2 to 4 of SDAB-D-14-246. These arguments are very similar to what Laux says in the third edition of *Planning Law and Practice in Alberta* and what Mr. Murphy has argued in SDAB-D-19-050.

[44] The Board's reasons for its decision in SDAB-D-14-246 include:

> *The Board finds the following:*
>
> 1. *The land on which the proposed development is located is within a DC1 Direct Development Control Provision Zone, the provisions of which are set out in section 11.17 of the Stadium Station Area Redevelopment Plan. The Development Authority reviewed the application for the Development Permit, and refused it. It was refused, not because it violated any of the provisions of section 11.17 of the Stadium Station Area Redevelopment Plan, but because if violated three general development regulations, not in the DC1 provisions, but found in sections 61.3(2) and 61.3(4)(e) of the Land Use Bylaw ……."*
>
> 3. *What is immediately apparent is that every one of the regulations set out by the DC1 provisions have been satisfied by the proposed development. The Development Permit was refused because of the fact that the proposed development did not meet the Height, number of Storeys, and Setback requirements for an Accessory structure that are located in the general provisions of the old Land Use Bylaw¸5996. By rigidly following these general regulations, was the development authority following the directions set by City Council in the DC1 provisions?*
>
> 4. *This Board finds that the answer is no. The key section to look at is section 11.17.4. ……*
>
> The Board deals with the development criteria under 710.4 and in particular 710.4(3)(b) and then looks at the provisions of the Area Redevelopment Plan in reasons 7 and 10:
>
> 7. *…… "section 710.4 is a permissive section, allowing the Development Authority to, in its discretion, apply the general regulations of the Land Use Bylaw to proposed developments in a DC1 zone". However, the development authority must not apply those rigidly, but only in accordance with the applicable DC1 provisions when read as a whole, and with particular attention given to the purpose of the DC1 district ……*
>
> 10. *In the alternative, there is an argument forwarded by Professor Laux in his text Planning Law and Practice in Alberta, Third Edition, (March 2013), that holds that because the DC1 provisions are silent as to Height, Storey number, and rear Setback requirements, those three aspects of the development are not in fact under direct control as per section 641 of the Municipal Government Act, and therefore,*

with repsect to those 3 aspects of development regulation, this Board's normal variance power at s. 687(3) still apply at page 6-45.

11. According to that theory, this Board has its usual jurisdiction.

12. The Board concludes, therefore, that is has jurisdiction to hear this appeal on its merits.

[45] Mr. Wakefield then summarized where all of his arguments lead to. He suggested that the Board start with the *Act* which refers to Direct Control. All the case law referred to makes the distinction between the general provisions of the zoning bylaw and the Direct Control Provisions of the bylaw and identify specific variance powers that go with each side. Decisions like Jupiter and the Green Room at the SDAB level are not buying into that argument. However, Mr. Wakefield completely agrees with Mr. Murphy that the proper view is that the cases cited apply distinctions between what is in the direct control and what is in general provisions of bylaw.

[46] In this case, the Development Officer erred by strictly applying the separation distances and not granting a variance.

[47] Section 70(1) of the *Edmonton Zoning Bylaw* treats separation distances between Cannabis Retail Stores a little differently than it does between parks and health facilities and schools because it gives a 20 metre discretion to the Development Officer. The Development Officer erred because this section further says “in compliance with section 11” and the Development Officer failed to apply “in compliance with section 11”. He should have asked himself if the proposed development adversely affects amenities or neighbouring property values and he should have answered in the negative.

[48] Under 11.4 the Development Officer should have determined if there is *unnecessary hardship or practical difficulties peculiar to the Use, character, or situation of land or a building, which are not generally common to other land in the same Zone.* The zone is DC1 Direct Development Control Provision. There all kinds of DC1 zones throughout the City two of which are the Old Strathcona commercial area and on the Jasper Avenue Strip between 110 Street and 121 Street. The City has singled out those two areas for general DC1 re-zonings to allow cannabis retail sales and that does not apply to any of the other DC1 zones. Secondly, as the Board hearing the Green Room observed, there are certain places you would expect to find Cannabis Retail Sales. The Board was sympathetic to the Green Room because they found the extremely limited scope for Cannabis Retail Sales in the Old Strathcona commercial area to be not what the common citizen of Edmonton would expect. The same rationale should apply to the Jasper Avenue strip. Oliver is the densest community in the City of Edmonton and is also one of the densest single areas of any Canadian City. That commercial strip along there has many things going on and new developments continue to be being built. As much as Old Strathcona, this is an area you would expect to find Cannabis Retail Sales.

[49] The Rationale for Area 8 of the Oliver Area Redevelopment Plan (Tab 13) is *"To provide for a range of uses, with the objective of promoting the continuing development of a pedestrian oriented commercial strip in terms of land use activities and design elements. The district also provides opportunity for the inclusion of residential uses above the ground floor level".*

[50] The following excerpts from the City Planning Report regarding the Oliver Rezoning Plan Amendment (Tab 12) were referred to:

> ***RECOMMENDATION AND JUSTIFICATION***
>
> *City Planning is in **SUPPORT** of this application because:*
> - *Jasper Avenue is a pedestrian oriented commercial corridor, and the additional commercial sues are suitable for this corridor*
> - *Both Breweries, Wineries and Distilleries and Cannabis Retail Sales are subject to special land use provisions to maximize compatibility' and*
> - *The additional uses are compatible with the surrounding land uses and objectives of the Oliver Area Redevelopment Plan.*
>
> ***PLANNING ANALYSIS***
>
> ***LAND USE COMPATIBILITY***
> *……..Cannabis Retail Sales and Breweries, Wineries and Distilleries will have a similar land use impact as existing uses permitted within the provision; such as convenience retail stores, minor alcohol sales, bars and neighbourhood pubs, restaurants etc. The scale of these types of uses is well suited for Jasper Avenue, as it is a pedestrian oriented commercial corridor and adding the uses will allow a wider range of commercial opportunities to add vibrancy to the area.*

[51] The Oliver area is well suited to walkability and the Grandin LRT station and another transit station on 108 Street and Jasper Avenue are located within it. There are high rises on both sides of Jasper Avenue as well as some single family homes and multifamily homes (high, low and medium rises). There is also a broad mix of other uses in addition to residential. You can walk to Jasper Ave (the commercial hub of this area) very quickly from a few blocks north or south of the Avenue.

[52] Ms. Da Silva in SDAB-D-19-030 referenced one development which she said was right next to a public library (SDAB-D-18-187). The proposed site was not right next to a library; it was within 84 to 85 metres as the crow flies but Board gave a variance and a permit.

[53] In SDAB-D-18-180 at 12205 - 107 Avenue there was a 78 metre deficiency in terms of the separation requirement from another Cannabis Retail Sales. This was in a

conventional district and the SDAB was persuaded that there was no clustering in that area and it was appropriate to grant a variance.

[54] Tab 5 of Mr. Wakefield's submissions contains a map showing the separation distances between Fire and Flower and Canndara to the east (129 metres) and between Fire and Flower and Happy Buddha to the west and on the other side of Jasper Avenue (153 metres). There are no other breaches of required separation distances. Given the nature of the Oliver strip, allowing all three Cannabis Retail Sales is not likely to cause any problems in terms of adversely affecting anyone or their property values and will make some degree of competition more likely.

[55] Mr. Wakefield recommends that the Board adopt the approach used in the Wilson case, in Laux and in SDAB-D-19-050 (First Capital Asset Management), apply it to section 70 and also take note of section 11 together with section 70.1. For either or both of these reasons, the panel should use its general power under 687(d) and grant Fire and Flower a variance of the required separation distances from the other two Cannabis Retail Sales already permitted. (Canndara and Happy Buddha).

[56] The Appellants provided the following responses to questions from the Board:

a) Mr. Wakefield disagrees with two submissions opposed to the proposed development from members of the public suggesting that approving Fire and Flower would result in clustering for the reasons already stated in Item 54. Allowing these three Cannabis Retail Sales (Fire and Flower, Happy Buddha and Canndara) is no more of a clustering than what was permitted on 107 Avenue (SDAB-D-18-180). The variance granted in that appeal was greater than what is being sought today.

b) Like *Garneau* there are two levels of variance power. One of them is pursuant to sections 11.3 and 11.4 because of the way section 70(1) is qualified by "pursuant to section 11". The other one is that as per 710.4.3:

> *3. A development may also be evaluated with respect to its compliance with:*
>
> *a. the objectives and policies of an applicable Statutory Plan;*
>
> *b. the General Regulations and Special Land Use Provisions of this Bylaw; and*
>
> *c. the regulations of abutting Zones.*

c) Laux says that the above makes it not pure direct control and a discretion is given to the Development Officer. Further to (b) above section 70 is a Special Land Use Provision.

d) Whatever is in the *zoning bylaw* will apply to all zones both direct control or conventional. It is not part of the direction of council; it is a separate track and distinct from what is specified in the direct control district, otherwise section 710.4 makes no sense.

e) Section 710.4.5 states that: *"All regulations in this Bylaw shall apply to development in the Direct Development Control Provision, unless such regulations are specifically excluded or modified in a Direct Development Control Provision"*. In today's case the Direct Control is silent. Whenever the Direct Control is silent the Board has full discretion to review the decision and the way the Development Officer decided to exercise discretion. This is separate from saying the Development Officer misinterpreted the section.

f) There is no difference from what the Planning Department is saying in its report and when the General Provision on June 12, 2018, was done or even the Liquor Provisions were done. They refer to separation distances and council understands that in conventional zones those are appealable and many variances have been given throughout the City, especially regarding separation distances regarding liquor stores. Simply because the Planning Department refers to separation distances in its report there is no guarantee that a person will be able to get a permit and you do have to grapple with these distances. The question is: are you out of court before you get there (as per section 685.4 of the *MGA*) or is Mr. Murphy's reasoning in SDAB-D-19-050 and the reasoning used in SDAB-D-14-246 (*Wilson)* correct.

g) The G*arneau* case was referenced. At that time, subsection 11.6 was found in the bylaw which no longer exists. It said something to the effect that if you have jurisdiction under the Area Redevelopment Plan (ARP) or under the Direct Control then you do not have your section 11 jurisdiction or variance power. There were two parts to *Garneau*. The first part was whether or not the Development Officer had applied Council's direction and the other part was whether he used the right variance power. The Court found he used the wrong variance power and cited that fact that he should have gone with the one in the ARP not the one in section 11.6 In that case section 11.6 specifically said use one and not the other.

h) Mr. Wakefield confirmed that he had no objections to any of the conditions proposed by the Development Officer should this appeal be granted.

i) As per Laux previously referenced, the Board has full jurisdiction or variance power under 684 through to 687. If you are dealing with something outside the Direct Control (section 70 for example or section 85) you are no longer dealing with 685(4). You are now dealing with 687(3)(d).

j) Mr. Wakefield confirmed that it is a fair assessment to say that what Laux has to say is an opinion that is taken in high regard but is ultimately not tied to the *MGA* or the *Edmonton Zoning Bylaw*. It is a document unto itself that is used for an argument and from time to time the Court of Appeal has disagreed with its contents. It is not binding authority except where he cites a case or a statute.

ii) Position of the Development Authority

[57] Mr. Gunther, Law Branch, and Mr. I. Welch, Development Officer, appeared on behalf of the Development Authority.

[58] Mr. Gunther quoted the following passage from 6.2(2)(e) page 6-53 in the new version of Laux *"It follows that in those circumstances the panoply of appeal rights and powers set forth in ss. 684 to 687 should apply"*. This paragraph is out of the previous edition of Laux and that is where this section ended.

[59] This is the paragraph that was cited as authority in the *Garneau* case. The Court of Appeal said that this argument is not only incorrect it is unreasonable. In the updated version of Laux the next paragraph was added which says "*The Court of Appeal has criticized the conclusion ……"*

[60] There are two big problems with Mr. Murphy's argument in SDAB-D-19-050. The first problem is that it is directly contradictory to *Garneau*. It is based on a proposition that where there is an ambiguity in the legislation the Board has the panoply of appeal rights or the ability to step in with the variance power that is found in section 687. This is not the case according to the Court of Appeal in *Garneau*. The Court has said in *Garneau* that as per section 685(4)(b):

> *(4) if a decision with respect to a development permit application in respect of a direct control district*
>
> *b. is made by a development authority, the appeal is limited to whether the development authority followed the directions of council, and if the subdivision and development appeal board finds that the development authority did not follow the directions it may, in accordance with the directions, substitute its decision for the development authority's decision.*

[61] The second problem is that Mr. Murphy in SDAB-D-19-050 has artificially distinguished the directions of council as being limited to what is actually in the direct control zone. Nowhere in the *MGA* does it say that. In fact we know from the Court of Appeal (*Rossdale Community League* from 2017) that municipal legislation is to be read harmoniously and with an intention to glean what the intentions of Council were. Justice Khullar in the Green Room Permission to Appeal case at paragraph 28 states *Municipal legislation should be interpreted "to give effect to the intention of the Municipal Council as expressed in the bylaw upon a reasonable basis that will accomplish that purpose"*.

[62] The importance of that statement is that it unreasonably parsing the bylaw to suggest that only what is found in the DC zone itself is the direction of council. If we were to give the bylaw that narrow interpretation it results in an absurdity. That absurdity with regard to DC1 zones is that you have these DC1 zones where there is very little information in section 710. There is not an intention to capture the gamut of the regulations within section 710 or the DC1. If you look at the other sections, in particular section 69 of the *Edmonton Zoning Bylaw* it is clear what the intention is. Section 69 of the *Edmonton*

Zoning Bylaw refers to the special land use provision of which section 70 is one. Section 69.1 states:

> *The Special Land Use Provisions apply to the Uses listed in any Zone or Direct Control Provision in which they are located. They **shall** take precedence and be applied in addition to the requirements of the Zone, except where a Zone, Direct Control Provision or Overlay specifically excludes or modifies these provisions with respect to any Use.*

[63] The effect of Mr. Murphy's argument is to say that to the extent that City Council has prescribed in section 69 that the Special Land Use Provisions are to be a part of a Direct Control provision that somehow that is less than an instruction or a direction of Council. This does not make sense and is an absurd and circular argument.

[64] Section 70.1.b is the provision that deals with variances in the context of Cannabis Retail Sales and reads:

> *A Development Officer **shall** not grant a variance to reduce the separation distance by more than 20 m in compliance with Section 11;*

The reference to section 11 here has to be read harmoniously with this section. If you simply look at section 11 and apply the tests in section 11 and that is the reason to grant a variance then there is no meaningful reason why there would be an express reference to 20 metres in 70.1.b. This is an express limit. The door only opens to this 20 metres variance power when the circumstances set out in section 11 are in place, i.e. there is no material interference to the amenities of the neighbourhood, etc. The Development Officer only has 20 metres to work with if the test in section 11 has been met.

[65] A couple of points have been made regarding section 710 of the *Edmonton Zoning Bylaw*. The first is that section 710.4.3 creates its own effective variance power. The difficulty with this proposition is that nowhere does 710.4.3 grant a power of variances; it prescribes factors for consideration. These listed factors are things that may be taken into account where there is an exercise of discretion on the part of the Development Officer. For example, in the Strathcona DC1 area all of the specific uses you would find in the Strathcona ARP are listed but there is also a catchall provision at the end that says something like "any other uses that are in character with the neighbourhood". In that case the Development Officer has discretion; this is where the Development Officer goes to make a determination as to whether granting a Development Permit follows the directions of Council. Section 710.4.3 does not actually create a variance power. There is nothing in there like in section 11 or a specific variance power like in the *Garneau* case that actually says how a variance should be granted, whether a variance can be granted or actually giving a specific variance power to what is otherwise the law of Edmonton. The Development Authority maintains that section 710.4.3 does not create an independent variance power.

[66] Section 710.4.5 previously referred to is in some respects the reciprocal to what is in section 69 and reads as follows:

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

The word "regulations" as used here is in lower case so we are not talking about Land Use or special regulations but all regulations in the bylaw. A plain reading of this section goes hand in hand as the other side of the coin of what is found in section 69. Section 710.4.5 gives extra confirmation within the context of section 710 that section 70 as a regulation in the general sense is applicable and is part of the direction of Council.

[67] In the City Planning Report to Council regarding the Oliver re-zoning there is an express reference to the Special Land Use Provisions in section 70 being in place to manage off-site impacts, require separation distances from sensitive uses and maximize the compatibility of the development with the surrounding area.

[68] This is the information upon which City Council makes their decision. It is where the City Planning Department has recommended that City Council approve the application on the basis of the preceding considerations. Council was under the impression when they passed this DC1 that the section 70 Special Land Use Provisions were going to be in place including the required separation distances.

[69] The Green Room Permission to Appeal application does not provide much guidance or help to anyone. Justice Khullar simply goes through all of the information that has been presented and simply says the test for permission to appeal has been met. It may be that Justice Khullar felt that this was an issue of public importance and it should go ahead to a full panel. While permission to appeal has been granted, it does not mean that the Green Room decision is wrong.

[70] Mr. Gunther submits that both the Green Room and Jupiter decisions, both of which are in DC zones are correct, reasonable decisions. They do apply the conventional understanding that is consistent with *Garneau* as to how Direct Control works. Mr. Gunther does not believe the outcome of Mr. Murphy's appeal (SDAB-D-19-050) is a reasonable outcome in light of *Garneau*. Unfortunately there was no representation from the Development Authority or Law Branch at this hearing and it was not a matter that was fully argued.

[71] Mr. Welch explained that the second ground of refusal has to do with the various screening regulations required for Cannabis Retail Sales. There are requirements that you are able to see the inside of the store as you are passing outside. A set of decals has been placed on the windows of the store and these are also proposed as a part of the permit. By placing those decals you cannot actually see the inside of store. This is in general breach of the design requirements and also raises some concerns based on the general direct control regulations for that area. Many stores have been using decals to completely screen their windows by the use of decals due to the AGLC regulations regarding people seeing products from outside the store. The proposed design is not acceptable as per the regulations in section 70.6 and the additional regulations within the Oliver DC1 for

pedestrian orientated design. The broader issue for that reason for refusal is that all designs have to adhere to CPTED for pedestrian orientated areas such as Oliver.

[72] Mr. Gunther confirmed that the primary reason for refusal is the separation distance; however, should the board decide that the Development Permit will be issued, the City requests that compliance with this provision of the special regulations be implemented as a condition. This has not been specifically listed as a proposed condition but it is the law.

[73] The Development Authority provided the following responses to questions from the Board.

a) In a direct control district, only a variance of under 20 metres can be considered by the Development Officer and then the Development Officer would have to go to section 11. Because the required separation distances in this case were over 20 metres, the Development Officer had to refuse the permit. 20 metres is express and the directions of City Council cannot be any clearer. Where you have a specific provision it overrides the general.

b) Even if this Board were to step in and find it had jurisdiction the only way it could make a different decision would be to find that the Development Officer failed to follow the directions of council and it would have to take section 70 as broader as per Mr. Wakefield's argument.

c) When the re-zoning for direct control was done in the first place, Council was explicitly advised that depending on who applied and where, there may only be a couple of stores or there could be several. There was an opportunity for council to create additional flexibility but they chose not to.

iii) Position of Canndara

[74] Mr. J. Radostits spoke on behalf of Canndara.

[75] Canndara understood the rules of the game, they entered the game and they won the game. The Development Officer ruled in their favour and the Board upheld this decision.

[76] Based on the approved permit they signed their lease, entered into contracts with designers and construction companies and incurred some substantial costs.

[77] This morning was about Happy Buddha. They also understood the process and obtained an approved permit and the Board should uphold this permit.

[78] Fire and Flower claimed they did not understand the competition and were unsuccessful yet the process didn't seem that confusing to either Canndara or Happy Buddha.

[79] Mr. Radostits submits that the process was fair and appropriate, that the Development Officer had jurisdiction and made the right choices and he asks the Board to uphold the decision of the Development Officer to refuse Fire and Flower's permit.

[80] Mr. Radostits does not know the exact definition of clustering but feels if the Fire and Flower permit were approved there would be three stores in a very tight space. If Council felt this area could support more Cannabis Retail Sales, it would have been contemplated in the rules. He referred to the City of Saskatoon who stepped back from allocating different rules in higher density areas.

iv) Position of Happy Buddha

[81] Ms. De Silva supports the 200 metre separation distance requirements between Cannabis Retail Sales and gave some history as to how these distances were arrived at.

[82] Ms. De Silva requests that the Board uphold the decision of refusal.

v) Rebuttal of the Appellant

[83] 124 Street can also be considered a pedestrian oriented corridor and Canna Cabana was approved to operate between 108 and 109 Avenue on 124 Street and they also have window decals that protect the inside of the store from pedestrians walking by. However, if a condition of them receiving a permit is compliance with Mr. Welch's request, they are more than willing to do so as long as they are compliant with the AGLC.

[84] Regarding the passage dealing with Garneau on page 6-53 in the new version of Laux and Mr. Gunther's suggestion that the Court of Appeal said the following passage was bad law: *"It follows that in those circumstances the panoply of appeal rights and powers set forth in ss. 684 to 687 should apply";* in *Garneau* that was true. In law you are always dealing with shifting sands and in this case what shifted was section 11.6 was deleted from the *Bylaw*.

[85] If you are told in the *Bylaw* that you have to choose between the variance power granted under the direct control or that granted under section 11 then it is fair to say that because of 11.6 the proper one is the one granted under the *Garneau* ARP and the Board must apply whatever the test is that is set out there. However, section 11.6 is now history. If you have two variance powers granted to you, one under the direct control and one under section 11 the Court of Appeal would find differently because it would not be dealing with section 11.6. This puts you on the side of the zoning bylaw that is dealing with some of these general provisions included in section 70; therefore section 687 would apply. It is not part of Council's direction.

[86] There is actually no reason in principle why direct controls should operate any differently in terms of variance powers than conventional zones. In conventional zones, the Development Officer may be directed not to grant variances but that does not impede the Board. Nothing you have heard suggests it should be any different in any of these larger areas where a DC has been adopted by council. You keep hearing about things said to Council or things in the reports to council that would allow for managing the incidents of cannabis stores. These statements by the planning department were made in the context

of both the conventional zone adoption on June 12, 2018 and the DC1 adoption. There was no distinction made in the various reports to council. City Council did not anticipate that the DC1 areas that they zoned concurrently with conventional zones would operate any differently from the conventional zones with respect to the variance powers for the separation requirements.

[87] All those meetings and focus groups and reports have been before this Board many times often put in by Mr. Welch when he has opposed to the variance power in respect of conventional zones. There is no reason why that should affect you any differently because this is a DC zone and not a conventional zone.

[88] In the Green Room Permission to Appeal (Paragraphs 27 and 28), Justice Khullar is simply referring to the City's argument. She says first that the City argues that section 710.4.3 cannot authorize variances and secondly the City argues that even if it does it cannot override Council's express directions. She refers to the *Society of Fort Langley* decision and then concludes that she has heard enough to consider this a triable issue with a reasonable prospect of success. She specifically refers to the City's arguments but does not reject them. She acts as triage person and she thought the argument of sufficient merit to go forward. None of this binds the Board at this point. Justice Khullar clearly considered what Mr. Gunther had to say but did not think it warranted denying permission to appeal.

[89] Mr. Murphy is pretty clear he is not ignoring sections 69 and 710.6.5. He simply says he thinks that these things do not apply to direct control. They are actually out there on another sphere so to speak. They apply to all developments but the question is are they direct control requirements or general requirements that apply to conventional zones or direct control zones. Our submission is they are not part of the direction; they are part of the general bylaw and subject to section 687.

[90] Mr. Welch said council was informed there would only be a few stores. In all appearances he has made before the SDAB on these cannabis cases that has never been stated. Mr. Wakefield has have never seen or heard of such a statement before. There is absolutely nothing in writing where an assurance was made to council that there would only be a few properties that would be able to have Cannabis Sales as a Use.

[91] In Old Strathcona, the DC1 re-zoning was concurrent with the general conventional zone re-zoning to add Cannabis Retail Sales. There was no differentiation made in the reports that one would operate differently than the other.

[92] Moving on to the more recent Jasper Avenue commercial re-zoning, Mr. Wakefield has seen nothing in that report that backs up what Mr. Welch says. It is unsubstantiated and should not be given any weight.

[93] Canndara's owner said he signed a lease right after the SDAB decision came out. Canndara was represented by extremely capable counsel in these matters. She would not tell him that all was clear after the SDAB decision was issued as AGLC permission must also be obtained. Some operators have their AGLC permission and are awaiting their

Development Permit but some are in the reverse situation; Mr. Wakefield is not aware of Canndara's position. We all know that AGLC currently has a suspension because of supply problems. Anyone who builds does so at their own risk because no one knows how long this suspension will last.

[94] Regarding Mr. Gunther's submission that you have to read sections 11 and 70.1 harmoniously. No one has advanced there is any lack of harmony between simply having a ledger with two sides to it; one side having the general provisions of the zoning bylaw and the other having direct control and simply confining direct control where it belongs which is to say where Council itself specifies. Council can control everything right down to the Development Permit if they want. They can include or exclude things. If they choose not to include things then it falls on the other side of the ledger. There is no disharmony. You just have to look at both things.

[95] The same thing applies to section 69 which is, according to Mr. Gunther the counterpart to section 710.5.

Decision

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

Reasons for Decision

[97] These are reasons for SDAB D-19-051, an appeal of the Development Authority's decision to refuse Fire and Flower's application for a change of Use from Health Service (Cannabis Counselling) to Cannabis Retail Sales. Fire and Flower asks the Board to revoke the Development Authority's refusal and issue the Development Permit.

[98] The subject site is located within a Direct Control District, the Oliver Area Redevelopment Plan ARP DC1 District – Area 8 DC1 (18573) (the Area 8 DC1). Cannabis Retail Sales is a listed use in section 3(e) of the DC1.

[99] The process for appeals to the Board is set out in sections 685 through 687 of the *Act*. Section 685 permits appeals on specific grounds and section 687(3)(d) states the Board may issue a development permit even though the proposed development does not comply with the Bylaw if the tests set out in subsection (i) and (ii) are met. As noted in *Garneau Community League* v *Edmonton (City)*, 2017 ABCA 374 (*"Garneau")* at para 20, when the appeal concerns property that is subject to direct control zoning (in this case the Area 8 DC1), section 685(4)(b) limits both the scope and role of the Board.

Section 685(4) provides:

> Despite subsections (1), (2) and (3), if a decision with respect to a development permit application in respect of a direct control district … (b) is made by a development authority, the appeal is limited to whether the development authority followed the directions of council, and if the subdivision and development appeal board finds that the development authority did not follow the directions it may, in accordance with the directions, substitute its decision for the development authority's decision.

[100] The development regulations for the Area 8 DC1 are found in section 4. There is no reference to Cannabis Retail Sales Use in the development regulations in section 4 of the Area 8 DC1.

Background

[101] In anticipation of the legalization of recreational cannabis by the federal government in the fall of 2018, the *Edmonton Zoning Bylaw* (the "*Bylaw*") was revised by adding Cannabis Retail Sales as a Permitted Use in a number of standard commercial zones. Development regulations specific to Cannabis Retail Sales Use were added to the Special Land Use Provisions in section 70.

[102] The normal practice of the City is to evaluate applications for development permits in the order that completed applications are received (first-come, first-served). In anticipation of a large number of competing applications and, as the separation distance requirements, could render subsequent applications non-compliant, the City used a lottery system to determine sequence of evaluation. A lottery was determined to be preferable and deal most fairly with all competing applications than the usual first-come, first-served process.

[103] Area 8 DC1 was not included as part of these initial changes adding Cannabis Retail Sales as a Listed Use. The Development Authority received several rezoning applications within quick succession to rezone Area 8 DC1 to allow for Cannabis Retail Sales Use. Mindful of its obligation to be transparent and fair to all interested parties and that the successful applicant for rezoning might not be the successful applicant at the development permit stage due to the separation distances in section 70, the City administration itself initiated an application for rezoning.

[104] Given the small geographical area of Area 8 DC1, the order of approval was key. The Development Authority considered retaining an outside agency to conduct a Site Selection Lottery but in the end, per section 11.1(3), the Development Authority elected to accept applications by email and evaluate them based in accordance with the ordinary first-come, first-served process in lieu of a lottery.

[105] Interested applicants were made aware of the progress of the *Bylaw* amendment and the development application process through emails and also through the City webpage which stated "To submit a complete development permit application package for cannabis retail sales send it by email to cannabisdevelopmentpermit@edmonton.ca with the subject line…."

[106] The rezoning was approved by Council on October 22, 2018. The City began accepting Development Permit Applications for Area 8 DC1 by email at 12:00:01 October 23, 2018 on a first-come, first-served basis at the email address indicated on the webpage.

[107] Multiple applications from five applicants were received almost immediately after midnight. This appeal involves the applications from three competing applicants Canndara, Happy Buddha and the Appellant and section 70.1, the required separation distance between Cannabis Retail Sales developments.

[108] Canndara's Cannabis Retail Sales is located on the North side of Jasper Avenue and it is the furthest East. The Appellant's proposed development is 129 metres to the West of Canndara and Happy Buddha's Cannabis Retail Sales Use is 153 metres West of the Appellant's proposed development. The Appellant and Canndara are both located on the North side of Jasper Avenue, and Happy Buddha is located on the South side of Jasper Avenue.

[109] The order of receipt and evaluation was critical given the proximity of the three proposed developments and the separation requirements. If the Appellant's application was received and evaluated first, then neither Canndara nor Happy Buddha would comply with the 200 minimum metre separation distance. If either Happy Buddha or Canndara were approved first, then the Appellant's proposed development would not comply with the minimum 200 metre separation.

[110] The Development Authority determined the order of review based on the applications received by email on the City's server at the website address indicated on the City webpage and made the following decisions:

a) Canndara's application was reviewed and found to be fully compliant with all the regulations in the Bylaw and approved.

b) Happy Buddha's application was reviewed and found to be fully compliant with all the regulations in the Bylaw and approved.

c) Permit Experts on behalf of the Appellant's application was reviewed and found to be non-compliant with the minimum setback requirement in section 70.1 and beyond the 20 metre discretionary variance authority because it was 129 metres from the approved Canndara development (71 metres short of 200 metres) and 153 metres from the Happy Buddha development (47 metres short of 200 metres)

[111] The Appellants appealed all three decisions. Initially the three appeals were scheduled to be heard contemporaneously. Subsequently, the decision to issue the Canndara permit was heard in a separate hearing by another panel of the Board (the Canndara Decision, SDAB D-19-029). That Board denied the appeal and affirmed the Canndara permit. The Appellant has applied for leave to appeal the Canndara Decision and the application for permission to appeal will be heard in June, 2019.

[112] This Board was scheduled to hear the remaining two appeals in a combined hearing.

[113] The Appellants filed a single submission for both appeals and indicated that a significant portion of the evidence would be required for both appeals. Happy Buddha expressed concern that hearing the matters together would unnecessarily confuse arguments and complicate the issue, noting that Happy Buddha's permit was fully compliant while the Appellants' permit did not comply with the regulations.

[114] As a preliminary matter after hearing from the parties and the City, the Board advised it would hear the submissions and evidence from the Appellants which they determined relevant to both appeals following the Board's usual process, allowing them the final right of reply. Then the Board would close that portion of the joint hearing related to (SDAB-D-19-030) and proceed with the third appeal (SDAB-D-19-051), the refusal of the Appellants' application for a Development Permit). This would allow the Appellants to make their full case and separate the issues as far as practicable to address the concerns of Happy Buddha. No objections to this were received. The Board is issuing separate decisions which reflect this procedure.

[115] All parties making submissions referred to the Canndara Decision in their presentations. The Board agrees that with the Canndara Decision under appeal, issue estoppel does not apply. While the Board is not strictly bound by precedent and it must consider each case on its own unique facts and based on the submissions and evidence, the Board is mindful of the significant overlap amongst the three appeals and that the Canndara Decision must be addressed in these reasons.

[116] During the hearing, the Board asked the Development Authority to comment on the issue considered by the panel in the Canndara Decision at paragraph 106 - whether the Board has authority with respect to decisions of the Development Authority concerning the process of determining order and reviewing development permits. The City said for the purposes of the two remaining appeals they would not be presenting arguments on that point and they were prepared to accept the reasons on this issue in paragraphs 106 through 113 of the Canndara Decision. In SDAB-D-19-030 Happy Buddha agreed with the Canndara Decision overall and did not argue this jurisdictional point in particular.

[117] The Board agrees with the decision in Canndara on this point and adopts the reasons found in para 106-114 inclusive.

> …
>
> [106] The question is whether the decisions of the Development Authority with respect to the process are decisions that the Board has the authority to consider.
>
> [107] In the decision of *McCauley Community League v. Edmonton (City)*, 2012 ABCA 86 (*McCauley*), the Court of Appeal had occasion to consider section 685(2) of the *MGA*, which states that "…any person affected by an order,

decision or development permit made or issued by a development authority may appeal to the subdivision and development board."

[108] The Court determined that the words "order, decision or development permit" should be given a wider meaning than decisions related just to applications for development permits, particularly where the affected person would be required to seek judicial review rather than appealing to this Board. The Court concluded that a proper interpretation of the scope of the Board's jurisdiction should give consideration to the administrative structure as a whole. [Paras. 23, 24 and 27]

[109] The Respondent argued that any decisions made by the Development Authority related to process are outside the jurisdiction of the Board or, alternatively, should be dealt with at the appeal regarding the Appellant's refused permit.

[110] The Board disagrees. If the Board does not have jurisdiction to consider the process, the Appellant would be required to seek judicial review, leading to the type of situation the Court in *McCauley* ruled should be avoided. As to the submission that the proper forum for an appeal regarding the process is the Appellant's appeal of its refused permit, the Board is of the view that, in this case, the allegations regarding the fairness of the decisions of the Development Authority with respect to the process have a bearing on whether the Respondent's Development Permit is valid. Accordingly, the Board concludes that, given the *McCauley* decision, it has the jurisdiction in this case to consider the decisions made with respect to process and that it is appropriate to deal with those decisions in the instant appeal.

[111] In dealing with those issues, the Board must bear in mind section 685(4)(b), which states that "Despite subsections (1), (2) and (3)…" the Board's jurisdiction is limited to determining whether the Development Authority followed the directions of Council. This means that, in considering the Development Authority's decisions relating to process, the Board must restrict itself to deciding whether the Development Authority followed Council's directions.

[112] The Respondent also argues that the Development Authority's decisions with respect to process were made, at the latest, on October 23, 2018, when applicants were allowed to submit applications. Since the appeal was not filed until February 12, 2019, it is argued, it is outside the 21-day appeal period stipulated by section 686(1)(b) of the *MGA*.

[113] The Board is of the view that the Appellant's appeal regarding the process raises issues not only with respect to decisions about what process to use, but also issues about how the process was applied to the various applicants. Issues regarding the application of the process were not apparent until after the Development Authority made its decisions as to which applications were successful. The Respondent's application was not approved until January 23, 2019. The Board finds that the appeal regarding process was filed within the 21-day appeal period.

[114] The Respondent also argues that the Appellant acquiesced to the process and has, therefore, waived its right to appeal the process. That argument fails for the

> reason stated above: that issues with the process were not apparent until after decisions regarding the successful applications were made.
>
> …

[118] The Appellants initially provided nine reasons for this appeal:

1. The direction of Council clearly laid out in several statutory plans, documents, and reports regarding development in the Oliver neighbourhood was not followed by the Development Officer in the refusal of the Development Permit application #296172505-001.

2. The triage process adopted by the Development Authority for the consideration of development permit applications was not authorized by law.

3. The triage process adopted by the Development Authority for the consideration of development permit applications was not reasonably and fairly implemented.

4. The triage process adopted by the Development Authority for the consideration of the development permit application was an improper exercise of the Development Authority's discretion.

5. The Development Authority misled the Appellant with respect to the proper email address to which development applications were to be sent.

6. The Development Authority deemed the development application for 11516 Jasper Avenue complete, even though it did not include all the required information listed in the (DC1) Direct Development Control Provision 710.5.

7. The Appellant's application was submitted prior to either or both of the development permit applications for 11404 Jasper Avenue, Edmonton, AB and 11641 Jasper Avenue, Edmonton, AB.

8. The Development Authority erred in failing to exercise or consider the exercise of the discretion found in section 710.4.3.a of the Zoning Bylaw.

9. The privacy glazing proposed by the Appellant is similar to that approved by the Development Authority or the Subdivision and Development Appeal Board on previous development permit applications submitted by the Appellant for other sites.

[119] At the outset of the hearing, the Appellants indicated they were dropping ground 6: The Development Authority deemed the development application for 11516 Jasper Avenue complete, even though it did not include all the required information listed in the (DC1) Direct Development Control Provision 710.5.

[120] With respect to Grounds 2, 3, 4, 5 and 7, Happy Buddha and Canndara argued that the Development Authority was authorized to select the process, selected a fair process and

published the process. In their view, all participants had equal opportunity under a standard City process. Happy Buddha maintained that the process was properly evaluated for order and, pursuant to the correct application of the published rules, their application is second in time. Happy Buddha followed that process, they submitted only two applications. If the Appellant had received information on synchronization it would have given them an unfair advantage. The Happy Buddha application was fully compliant and therefore they are entitled to a permit. Even if the Appellants' application were considered second after Canndara, it would not be compliant.

[121] For the reasons given in SDAB D-19-030 (attached), in paragraphs 150 – 183, the Board declines to revoke the decision of the Development Officer to refuse the Appellants' permit on the basis of Grounds 2,3,4,5 or 7.

[122] During the portion of the hearing dealing solely with SDAB-D-19-051, the Appellants made the following arguments:

a. the Development Authority incorrectly determined that they lacked discretion to issue variances greater than 20 metres under section 70.1(b);

b. section 685(4) of the *Act* which limits the Board's usual scope of appellate authority does not apply to this appeal either: because it involves variances to Special Land Use Provisions which are not "directions of Council"; or, because Council has not exercised full control over this Direct Control District;

c. the Development Authority wrongly failed to apply or even consider their discretionary authority under section 710.4(3); and,

d. their permit ought to be issued by the Board pursuant to its discretion in section 710.4(3)(b) of the Bylaw or in section 687(3)(d) of the *Act*.

[123] With respect to the arguments raised about whether the Appellants should be issued a permit, Canndara and Happy Buddha argued that:

a. The Development Authority followed Council's instructions;

b. While they did not know the exact definition of clustering, these parties believed that if the Appellants' permit were approved, there would be three stores in a very tight space;

c. The Development Officer had jurisdiction and made the right choice by refusing the Appellants' application;

d. The development regulations in the *Bylaw* setting the 200 metres separation distance should be upheld and the City of Saskatoon has stepped back from allocating different rules in higher density areas;

e. Council intended separation distances to apply as shown in the report to Council on the day that Council voted to rezone the DC1 and add Cannabis Retail Sales Use; and

f. if Council felt this area could support more Cannabis Retail Sales, it would have been contemplated in the rules of the Direct Control District on rezoning.

[124] The Development Authority refused the Appellant's application for three reasons:

1. The Cannabis Retail Sales is located 129 metres from the approved Canndara development. This distance does not comply with the minimum 200 metres separation distance required in section 70.1 and per section 70.1(b) the Development Authority is prohibited from granting a variance to the minimum separation distance to allow for the proposed Cannabis Retail Sales.

2. The Cannabis Retail Sales is located 153 meters from the approved Happy Buddha development. This distance does not comply with the minimum 200 metres separation distance required in section 70.1 and per section 70.1(b) the Development Authority is prohibited from granting a variance to the minimum separation distance to allow for the proposed Cannabis Retail Sales.

3. The proposed privacy glazing does not provide ample transparency for the street contrary to section 70.5

[125] Area 8 DC1 does not contain development regulations for Cannabis Retail sales. The Cannabis Retail Sales Use, is subject to a development regulation within section 70 of the Special Land Use Provisions in the Bylaw which provides in part:

70. Cannabis Retail Sales

1. Any Cannabis Retail Sales shall not be located less than 200 metres from any other Cannabis Retail Sales. For the purposes of this subsection only:

   a. the 200 metres separation distance 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;

   b. A Development Officer shall not grant a variance to reduce the separation distance by more than 20 metres in compliance with Section 11; and …

<u>Does the Development Authority have discretionary authority to allow a variance reducing the minimum 200 metres separation distance required in section 70.1 by 71 metres to 129 metres from the approved Canndara development or by 47 metres to 153 metres from the approved Happy Buddha development?</u>

[126] The proposed Cannabis Retail Sales is located 129 metres from the approved Canndara development and 153 metres from the approved Happy Buddha development. A variance of 71 metres is required with respect to the Canndara development and a variance of 47 metres with respect to the Happy Buddha development.

[127] The Appellants first argued that the Development Authority failed to follow the directions of Council by incorrectly interpreting section 70.1(b) to mean that they had no authority to grant either variance.

[128] The parties disagreed about the scope of the Development Authority's variance power in section 70.1(b). The Appellants argued that the correct interpretation of section 70.1(b) is that the Development Authority can grant variances greater than 20 metres if they otherwise comply with section 11 and in this case they do. According to the Appellants, the phrase "in compliance with section 11" must have some meaning. Variances must always meet section 11, but section 11 may be broader than 20 metres. For variances greater than 20 metres, the Development Authority must turn their minds to section 11, including restrictions on the Development Authority's discretion to grant variances in sections 11.3 and 11.4.

[129] The Development Authority argued that the correct interpretation of section 70.1 is that the Development Authority may only grant variances of up to 20 metres which are in compliance with section 11. The phrase "in compliance with section 11" must be read harmoniously with balance of this section. "20 metres" is an express limit, if they simply applied the tests in section 11 to evaluate this variance, then there is no meaningful reason for the express reference to 20 metres in 70.1(b).

[130] The Board agrees with the Development Authority's interpretation. Section 70.1(b) grants authority to the Development Authority to allow variances of up to 20 metres provided section 11 is met and prohibits the Development Authority from granting variances greater than 20 metres under any circumstances.

[131] The Board concludes that the Development Authority is prohibited from authorizing either of the two required variances. Therefore, the Board finds that the Development Authority correctly interpreted the limits of their variance authority and they followed the directions of Council by refusing the application on the basis that the variance to the required separation distance from the Canndara Cannabis Retail Sales is greater than 20 metres and on the basis that the variance to the required separation distance from the Happy Buddha Cannabis Retail Sales is greater than 20 metres.

[132] The Board notes that practically, even if the Appellants were found to be second in the order of receipt and review by the Development Authority, their application would nonetheless have to be turned down by the Development Authority based on its proximity to the Canndara Cannabis Retail Sales Use.

<u>Does the Board have the discretion to allow a variance reducing the minimum separation distance of 200 metres required in section 70.1 by 71 metres to 129 metres from the approved</u>

Canndara development or by 47 metres to 153 metres from the approved Happy Buddha development?

[133] As part of the first ground of appeal, the Appellants asked the Board to consider the merits of its application and to exercise its discretion differently than the Development Authority by granting the required variances to separation distance per section 687(3)(d) of the *Act*. They argue that the proposed development furthers the objectives of applicable plans, that there is no more clustering than in other cases decided by the Board and that this area is unique. It is very densely developed, pedestrian oriented and adult oriented. Finally, the variance will have no negative impacts on neighbouring properties or the neighbouring area.

[134] The Board's appellate authority in this appeal depends upon the application of section 685(4)(b) of the *Act*. According to the Court of Appeal in *Garneau* at paras 19-20, the process for appeals to the Board are set out in sections 685 through 687 of the *Act*. Section 685 permits appeals on specific grounds and section 687(3)(d) states the Board may issue a development permit even though the proposed development does not comply with the Bylaw if the tests set out in subsection i and ii are met. When the appeal concerns property that is subject to Direct Ccontrol zoning (in this case Area 8 DC1), section 685(4)(b) limits both the scope and role of the Board. Section 685(4) provides:

> (4) Despite subsections (1), (2) and (3), if a decision with respect to a development permit application in respect of a direct control district … (b) is made by a development authority, the appeal is limited to whether the development authority followed the directions of council, and if the subdivision and development appeal board finds that the development authority did not follow the directions it may, in accordance with the directions, substitute its decision for the development authority's decision.

[135] The Appellant gave two alternative reasons why section 685(4) does not apply and the Board need not find that the Development Authority failed to follow the directions of Council before it is entitled to substitute its own decision on the merits as it would in a standard zone. First, the term "directions of council" in section 685(4)(b) of the *Act* refers only to express provisions in Area 8 DC1. In other words, section 685(4) does not apply because section 70 is a Special Land Use Provision of the *Bylaw*. Second, section 685(4) does not apply when Council does not exercise full direct control over a matter. Section 685(4) does not apply because there are no development regulations for the use in Area 8 DC1 and Council has delegated discretion to allow variances to the Development Authority under section 70 and section 11 of the *Bylaw*.

Does section 685(4) apply given that the appeal involves a section of the Bylaw not enumerated in Area 8 DC1?

[136] The Appellants submitted that the full appellate authority in sections 685 through 687 of the *Act*, including section 687(3)(d) is available as in an appeal of a development within a

standard zone because this appeal does not involve a regulation stated expressly within the Area 8 DC1.

[137] The Appellants urged this Board to follow arguments presented by another counsel in a recent appeal, First Capital Asset Management LP (SDAB-D-19-050) ("First Capital"). There the Development Authority refused a Major Alcohol Sales Use located within a DC1 Direct Development Control Provision because it was not in compliance with the minimum separation distance required in section 85.1 of the Special Land Use Provisions which could not be varied by the Development Authority.

[138] According to the summary of the case, Counsel for that appellant argued the following:

a. The phrase "directions of council" in section 685(4) has been too broadly interpreted. It does not suggest that the directions of council are to be sought anywhere but in the Direct Control District itself. It does not say that you can seek "directions of council" in any part of the Bylaw other than in the direct control district in question.

b. The confusion came about because the Bylaw provides that the regulations **apply** to every Direct Control District. This means they are **not part** of every Direct Control District. The General Regulations and Special Land Use provisions **apply** to every Zone including Direct control Districts. They run **parallel** and **apply in addition** to the Direct Control Provisions as shown by the wording of sections 69.1, 710.4(3)(b) and 710.4(5) of the Bylaw.

c. Regulations are not part of the Direct Control Provision itself unless Council specifically restates them in the Direct Control Provision. The directions of council in a Direct Control Provision are unique.

d. Land use regulations appearing in the Direct Control Provision can only be relaxed in accordance with additional instructions council provides in the Direct Control Provision itself.

e. Land use regulations located outside of the Direct Control Provision remain subject to this Board's variance power in section 687(3)(d) of the *Act* because they are separate and distinct from the Direct Control Provision itself.

f. In sum, section 685(4) applies to appeals in respect of **a Direct Control District**. Section 685(4) does not apply to appeals in respect of **land in a Direct Control District**.

[139] In this case, the Appellants argue that although the subject site is located in Area 8 DC1, the variance at issue involves section 70.1. Therefore, the Board need not ask itself whether the directions of Council were followed prior to assessing the merits because the intent in section 685(4) is to limit the phrase "directions of council" to express regulations in Area 8 DC1. Further, this appeal does not engage an explicit regulation

enunciated in Area 8 DC1 so section 685(4) does not apply and the Board may grant the two required variances (of 71 metres and 47 metres) pursuant to its usual section 687(3)(d) authority.

[140] The Development Authority argued that limiting the phrase "directions of council" in section 685(4) of the *Act* to express provisions found in Area 8 DC1 contradicts the Court of Appeal *Garneau* and other cases which direct the Board that municipal legislation is to be read harmoniously and to glean the intentions of Council. For example, in the *CFPM Management Services Ltd.* v. *Edmonton (City)*, 2019 ABCA 3 ("*CFPM Management Services Ltd."* or the *Green Room* Leave Decision*)*, Justice Khullar, at paragraph 28, states "municipal legislation should be interpreted to give effect to the intention of the Municipal Council as expressed in the bylaw upon a reasonable basis that will accomplish that purpose". The Appellants propose an artificial distinction not found in the *Act* that ignores other sections of the Bylaw. It is unreasonable to conclude Council's prescription in section 69.1 that the Special Land Use Provisions shall apply in all Direct Control provisions is somehow not a direction of Council. The same is true for section 710.4(5).

[141] This Board finds that the application of section 685(4) is not restricted to appeals that deal with explicit development regulations enunciated in Area 8 DC1 for several reasons.

[142] First, in *Garneau* the Court of Appeal states, "The discretion to grant variances otherwise available to a subdivision and development appeal board pursuant to section 687(3)(d), is not available where the appeal relates to **land in a direct control district.**" (para. 26) This statement directly contradicts the arguments put forward by Counsel in First Capital.

[143] Second, in *Garneau*, the Court of Appeal found that the Development Officer failed to follow the directions of Council because he had not considered a specific variance power found in the Garneau Area Redevelopment Plan (the GARP). The Court then states that because the Board found the Development Officer failed to follow Council's direction it was entitled to substitute its own decision per section 685(4) "in accordance with the directions" of Council. According to the Court at paragraphs 31, 39 and 40, the Board also failed to follow the "directions of Council" in the GARP and the Bylaw. It was an error for the Board to take into account the general variance power of in section 11.5 of the Bylaw without also considering the clear prohibition in section 11.6(3) of the Bylaw.

[144] Third, the Board notes that none of the cited decisions adopted the view that section 685(4) applies to restrict the Board's usual appellate authority only if the appeal involves express provisions within the applicable DC1.

[145] Fourth, the Board in First Capital did not accept this argument in the reasons for its decision and in fact applied the section 685(4) (see paragraphs 64, 69 and 73). That Board found that section 710.4 is "directly incorporated by reference to the provisions of a (DC1) Direct Development Control Zone." That Board then found that the Development Officer did not follow the directions of Council with respect to section

710.4(3)(b) before embarking on its own decision on the merits. (This Board deals with that issue in the reasons below)

[146] The Appellants are suggesting that the Board should read the words "as specified in the Direct Control District" into section 685(4) when no such restriction is warranted. In the Board's opinion, once listed Uses are inserted by Council into direct control districts, the Special Land Use Provisions that apply to those Uses follow and are incorporated as directions of Council per section 69 and section 710.4(5). Special Land Use Provisions are part and parcel of the directions of Council. The Board agrees with the Development Authority that the distinction proposed by the Appellants is without merit.

Does section 685(4) of the Act apply as Council has not exercised full control concerning separation distances?

[147] The Appellants argue that because Council did not exercise full control of separation distances in Area 8 DC1 and instead delegated discretion to the Development Authority the Board has access to its full appellate authority in sections 685 through 687, including section 687(3)(d) as it does in an appeal of a development within a standard zone. In support, the Appellants quoted extensively from *Planning Law and Practice in Alberta* (Fourth Edition) Frederick A. Laux, Q.C, and Gwendolyn Stewart-Palmer where the authors put forward the following opinion, which the Board summarized as follows:

a. There are two types of direct control, true direct control districts where Council itself issues development permits; and, delegated direct control districts where Council sets the Uses and delegates the power to the Development Authority to issue permits.
b. In true a direct control district, there is no right of appeal because Council itself chooses whether or not to issue a permit.
c. In conventional districts, the Board has powers per sections 684-687 of the *Act* to substitute what it believes to be the appropriate decision having regard to the merits. This includes the variance power in section 687(3)(d).
d. Section 641 of the *Act* is unclear. It fails to adequately address the Board's powers in delegated direct control districts where a development permit application is decided by a development authority and the directions of council in the direct control bylaw are silent or confer discretion on the development authority in respect of one or more elements of a development. According to the authors:

> "Where council has exercised less than complete direct Control over a Specific site that is the subject of a permit application, either because it has remained silent on some material particulars or because it has left the development authority with a discretion, a literal interpretation of s 641(4)(b) (now 685(4)(b) following the passage of the *Modernized Municipal Government Act*) might suggest there is no right of appeal. However, a purposive approach to interpreting Pt. 17 of the *Municipal Government Act* leads to the conclusion that a right of appeal on the merits of the development does exist. Where, council has left gaps or conferred a discretion, it in fact has not exercised direct control over that element. Consequently, the rules pertaining to appeals in non-direct control districts should

apply to the extent that true direct control has not been utilized. It follows that in those circumstances the panoply of appeal rights and powers set forth in ss. 684 to 687 should apply."

e. The Authors argue that *Garneau* can be distinguished as it really turned on a particular provision in section 11(6) of the Bylaw which referred back to the GARP and that even after *Garneau*, the question of whether a Board should be able to exercise the rights in sections 684-687(3)(d) when discretion is delegated remains outstanding absent section 11(6).

[148] According to the Appellants, Area 8 DC1 is not a true direct control district. It is a delegated direct control district and the Board should therefore have its section 687(3)(d) variance power. Council added Cannabis Retail Sales and delegated permit application decision-making power to the development authority. Council is silent with respect to Cannabis Retail Sales in Area 8 DC1. Section 70 grants discretion to the Development Authority to issue variances. The Board should take the purposive, rather than a literal interpretation of section 687(4) advocated by Laux and Stewart-Palmer and deal with this appeal in the same manner as a conventional district.

[149] The Development Authority disagrees. They argue:

a. The Appellant's position is directly contrary to *Garneau*. There the Court of Appeal rejected a proposition that where there is an ambiguity in the legislation the Board has the panoply of appeal rights or the ability to step in with the section 687(3)(d) variance power. Instead, the Court in *Garneau* applied the plain wording of section 685(4) which indicates if a decision about a development permit application in respect of a direct control district is made by a development authority, the appeal is limited to whether the development authority followed the directions of council, and only if the Board finds that the development authority did not follow the directions it may, in accordance with the directions of council substitute its decision for the develop authority's decision.

b. They point out that a portion of the excerpt cited by the Appellants was the passage that was cited to and rejected by the Court in *Garneau* as incorrect and unreasonable. In the updated version of the text, the authors note that the Court of Appeal has criticized their proposition.

c. Finally, even the Authors recognize an exception to the quoted passage. They state "But not including, of course, the variance over conferred in s. 687(3) in so far as council has prescribed a development standard." The noted exception applies here as based on the Development Authority's interpretation of section 70, the separation standard is prescribed. The Development Authority has no discretion to authorize a variance above 20 metres and neither does the Board.

[150] After considering these arguments, the Board declines to allow the appeal insofar as the Appellant is asking for a variance to section 70.1(b) based on section 687(3)(d) of the *Act* for the following reasons:

a. This Board has found above that on a proper reading of the *Bylaw*, the directions of Council are that the Development Authority is prohibited from to allowing either of the two required variances because they are greater than 20 metres.

b. The Development Officer followed the directions of Council by refusing the application.

c. As the Board has noted previously in the "Hiku" (SDAB-D-18-143), "Jupiter" (SDAB-D-18-149) and "Green Room" (SDAB-D-18-168) decisions, pursuant to *Garneau* when this Board makes its own decision on the merits in an appeal in a Direct Development Control district it cannot exercise any variance power that is not given to the Development Authority by the directions of Council.

d. Even if the Board were entitled to substitute its decision on the merits, it is also bound by the directions of Council and, like the Development Authority, the Board is prohibited by section 70.1(b) from granting the variances because they are greater than 20 metres.

<u>Did the Development Authority err by automatically applying section 70 to deny the Appellants Permit and failing to exercise or even consider exercising the separate discretionary regime in section 710.4(3)?</u>

[151] Section 710 of the DC1 Direct Development Control Provision applies to all DC1 provisions. Section 710.4 deals with development regulations and provides in part:

710.4 Development Regulations

1. All developments shall comply with the development regulations contained in an approved Area Redevelopment Plan or Area Structure Plan, except that any regulations or conditions applying as a result of designation of a historical resource under the Historical Resources Act, shall take precedence.
2.
3. ….
4. A development may also be evaluated with respect to its compliance with:
    a. the objectives and policies of an applicable Statutory Plan;
    b. the General Regulations and Special Land Use Provisions of this Bylaw; and
    c. the regulations of abutting Zones.
5. Signs shall comply with the regulations found in Schedule 59H.

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

[152] Sections 40 and 69 of the *Bylaw* state:

> 40. The General Development Regulations shall apply to all developments on all Sites, and shall take precedence except where the regulations of a Zone, Overlay or Development Control Provision specifically exclude or modify these provisions with respect to any Use.
>
> 69.1 The Special Land Use Provisions apply to the Uses listed in any Zone or Direct Control Provision in which they are located. They shall take precedence and be applied in addition to the requirements of the Zone, except where a Zone, Direct Control Provision or Overlay specifically excludes or modifies these provisions with respect to any Use.

[153] The Appellants argued section 710.4(3) creates a separate DC1 discretionary variance power to apply section 70 flexibly and the Development Officer failed to consider this discretionary power. They referred the Board to the arguments of the appellants set out by Justice Khullar in *CFPM Management Services Ltd.* (the "Green Room Leave Decision") and the Board decision in First Capital. Upon reviewing those sources and the Appellants submissions, the Board interprets the Appellants argument as follows.

[154] Applying the Appellants arguments as summarized in *CFPM Management Services Ltd.* to the context of this case:

a. Section 710.4(3) confers a discretion on the development officer to also evaluate development permit applications for a site within Area 8 DC1 with respect to its compliance with the objectives and policies of an applicable Statutory Plan and section 710.4(3)(b) refers to General Regulations and Special Land Use Provisions of the Bylaw which encompasses the provisions under section 70.
b. When section 710.4(3) is read in conjunction with the Oliver plan there is an express grant to the development officer of the discretion as to how to apply the provisions in section 70. Therefore, the Development Officer possesses the power to vary separation distances if such a variance would comply with the objectives and policies of the area redevelopment plan following section 710.4(3)(a).
c. In section 710.4(5) the phrase "all regulations in this Bylaw" does not include Special Land Use Provisions so there is no conflict between section 710.4(3)(b) and section 710.4(5).

[155] The sections of the First Capital decision that apply to section 710.4 are found at para 70-72:

[70] Section 710.4(3)(b) clearly states that a development in a DC1 Zone **may** be evaluated with respect to the Special Land Use Provisions in the *Edmonton Zoning Bylaw*, such as section 85. It does not require that those provisions be applied. As the provision is permissive, it allows the Development Authority to exercise its discretion in applying the Special Land Use Provisions like section 85.

[71] The Board finds that the Development Authority applied section 85 rigidly to this development without regard for the DC1 provisions as a whole given the nature of the Development Permit application, the general purpose of this particular DC1, and without providing any rationale for exercising discretion to apply for section 85 to this DC1.

[72] The Development Authority did not provide reasons in her refusal or her written submission that warranted her to apply section 710.4(3)(b) and enforce section 85 for this DC1 given the discretion she was provided. Further, the Development Authority was not present at the hearing to explain how discretion was applied in the (DC1) Direct Development Control Provision regulations of section 710.

[156] The Development Authority argued that section 710.4(3) does not delegate a separate additional discretion to disregard otherwise applicable regulations in the Bylaw. They encouraged the Board to follow Hiku, Jupiter and Green Room on this point. Upon review of those sources and the Development Authority's submissions, the Board interprets their argument as follows:

a. The Appellants' position is contrary to section 69.1 and section 710.4(5) of the *Bylaw*. The phrase "all regulations" in this *Bylaw* in section 710.4(5) includes Special Land Use Provisions which in turn includes section 70.

b. Section 710.4(3) does not, and cannot, authorize variances to separation distances as section 11 is the only provision that gives a development officer the power to grant the variances.

c. The only logical conclusion is that section 710.4(3) is a set of instructions about how to exercise discretion when an open ended or ambiguous discretion is expressly delegated to the Development Authority within a particular DC1.

d. For example, the Strathcona Area Redevelopment Plan lists 35 permissible Uses as well as a broad Use category in section 4(jj): "[u]ses consistent with the rationale of this provision." This where section 710.4(3) comes into play. Section 710.4(3) directs the Development Officer back to three items that he may apply to determine whether or not a proposed use is "consistent with the rationale of this provision,": the objectives and policies of an applicable Statutory Plan, the General Regulations and Special Land Use Provisions of the Bylaw, and the regulations of abutting Zones.

e. Even if section 710.4(3) does create a variance power, that power cannot override Council's express directions on Cannabis Retail Sales separation distances because in section 69.1 Council has directed that section 70 as a Special Land Use provision of the Bylaw "Shall take precedence and be applied in addition to the requirements of the Zone, except where a Zone, Direct Control Provision or Overlay specifically excludes or modifies these provisions with respect to any Use."

f. The Board should interpret these sections reasonably and harmoniously to give effect to the intention of Council as expressed in the Bylaw in a manner that will accomplish Council's purpose in section 69.1 and 70 and give effect to Council's intention to impose separation distances with only minimal variances of up to 20 metres for this particular Use.

g. The Appellants' interpretation is absurd and unreasonable. A finding that all regulations in the Bylaw are optional would create a free-for-all in Direct Development Control Provisions and significantly impact the ability of the City to use direct control zoning to prescribe its will.

[157] The Board considered the prior Board decisions cited by the parties. The Board notes it is not bound by precedent. Each case is unique and to be decided on its own merits and the materials presented to that panel. However, the Board is also aware of an overarching duty of fairness to all parties which includes consistency in like cases. In any event, the prior cases are mixed with respect to the meaning of section 710.4(3).

[158] Three recent decisions involve direct control districts and deal with the portion of section 70 which, notwithstanding section 11, completely prohibits variances in the separation distances between Cannabis Retail Sales and certain types of Uses: Hiku, Jupiter and Green Room. All three decisions conclude that the Development Authority followed the directions of Council in section 70 by refusing to grant variances and that the Board was similarly precluded from approving variances with respect to land in a direct control district per *Garneau*.

[159] Section 710 is not mentioned in Hiku. Section 710.4(5) is applied in Jupiter and the Green Room. Jupiter is the only decision to explicitly address the meaning of section 710.4(3). It adopts the Development Authority's position. Green Room has been appealed to the Court of Appeal and leave has been granted for the following questions: "Did the SDAB err in law or jurisdiction in holding that (a) it lacked the authority to grant a variance to the separation distances provided in s.70 of the City of Edmonton Zoning Bylaw 12800; and (b) the development officer who had refused to grant the applicant's development permits application had followed the directions of Edmonton City Council" para 31.

[160] Two other Board decisions dealing with section 710.4(3) come to the opposite conclusion.

[161] Wilson, (SDAB D-14-246) is the earliest, it predates *Garneau*. There the Board applied the two part test pursuant to the predecessor of section 685(4)(b) of the *Act* and determined during the jurisdictional phase that the Development Authority failed to follow the directions of Council by rigidly following the directions in the old *Land Use Bylaw 5595* because the Direct Control Provision itself included the explicit instruction: "The following development criteria shall apply to the prescribed uses pursuant to section 710.4." The first three subsections of the current section 710.4 are reproduced, but no mention is made of section 710.4(5) in reasons for this decision. Of note, that Board found alternative authority to hear the appeal on the merits based on the argument put forward by Laux in the excerpt which was subsequently rejected by the Court of Appeal in *Garneau*. In the decision on the merits, the Board applied section 710.4(3) and allowed the variances based on the wording of the test set out in section 687(3)(d) of the *Act*.

[162] First Capital was decided by the Board in 2019. As noted above, that Board concluded that section 710.4(3)(b) is permissive and grants discretion to the Development Authority to determine whether or not Special Land Use provisions ought to be applied. They concluded that the Development Authority erred as she applied section 85 rigidly without regard to the Plan and did not provide reasons or rationale to the Board about why the application of a Special Land Use Provision setting separation distances was warranted.

[163] The Board is mindful that it must read the Bylaw in its entire context, in its grammatical and ordinary sense and in harmony with the overall scheme and the intent of Council to determine whether section 710.4(3) is a separate grant of discretion to apply section 70 flexibly or a list of criteria that may be applied to guide the Development Authority as they are exercising a discretion found within the Direct Control Provision.

[164] On a plain reading, section 69.1 is mandatory. It directs Special Land Use Provisions (such as section 70) shall apply to Cannabis Retail Sales (a Use listed in DC1 Area 8) and they shall take precedence and be applied in addition to the requirements of the Zone, except where Area 8 DC1 specifically excludes or modifies them with respect to Cannabis Retail Sales. Section 40 provides a parallel direction with respect to General Development Regulations.

[165] On plain reading, section 710.4(5) of the Bylaw is also clear. It directs that all regulations in this Bylaw shall apply to development in the Direct Development Control Provision, unless such regulations are specifically excluded or modified in a Direct Development Control. In the Board's view because the word "regulation" in the phrase "all regulations in the Bylaw" is not capitalized, it is meant to be broad and to include Special Land Use Provisions. Therefore, section 70 is a regulation in the Bylaw.

[166] Area 8 DC1 has no regulations with respect to Cannabis Retail Sales. The Board finds that section 70 is not specifically excluded or modified in Area 8 DC1. The Board was pointed to nothing in section 710 suggesting that section 710.4(3) takes precedence over section 710.4(5). On a plain reading, the Board finds that the Appellants' interpretation of section 710.4(3) is in conflict with sections 40, 69.1 and 710.4(5).

[167] This Board agrees with Counsel in First Capital that sections 40, 69 and 710.4(5) were enacted so that all regulations in the *Bylaw* (including Development Regulations and Special Land Use Provisions) would apply to all Direct Control DC1 Districts (including Area 8 DC1). The purpose of sections 40, 69.1 and 710.4(5) is to allow an en masse application of large portions of the *Bylaw* so they need not be repeated in each and every direct control district. This also means the provisions are not frozen should the *Edmonton Zoning Bylaw* be replaced, unless Council expresses that specific intention.

[168] The submissions of the parties show that Council was live to the issue of separation distances as it enacted provisions to deal with Cannabis Retail Sales through the spring and summer of 2018. The Report to Council accompanying the rezoning was to apply to this specific strip of the Oliver area and specifically to introduce Cannabis Retails Sales Use. The Report is clear that separation distances between these Uses were the very reason that the City took up the application for this area and section 70 was mentioned as applying to the Use in Area 8 DC1. In the Board's view, given this background if Council had believed that the regulations in the Bylaw imported by default into a direct control district by operation of sections 40, 69.1 and 710.4(5) were not appropriate, it need only insert an explicit provision into the direct control district to express this intention and it would have prevailed per section 710.4(5). Council previously did exactly that with respect to Signs in Area 8 DC1. Signs are subject to multiple schedules of regulations in section 59. Section 710.4(4) resolves the ambiguity by setting Schedule 59H as a default. In this case Council elected a different set of rules, per Area 8 DC1 section 4.0 Schedule 59F applies to Signs. Council could have done the same and provided an express rule in Area 8 DC1 specifically excluding or modifying the section 70 separation distances between Cannabis Retail Sales Uses if that had been its intention.

[169] The Board also compared the different results when the two interpretations are applied in this case:

a. If the Development Authority's interpretation is correct, the sections read harmoniously. There is no contradiction. Sections 69.1 and 710.4(5) direct that section 70 shall apply. There is no ambiguity and no express regulation delegating discretion with respect to Cannabis Retail Sales in the DC1, section 710.4(3) is not engaged. Section 70 prohibits the variances and the application must be refused.

b. If the Appellants' interpretation of section 710.4(3)(b) is correct, then the Development Authority has contradictory obligations:

    i. First, per section 710.4(3)(b), the Development Authority must consider this discretionary alternate regime and may apply section 70 only after considering whether or not there is a good reason to do so in view of the DC1 provisions as a whole, given the nature of the development permit application, and the general purpose of this particular DC1, and then must provide a rationale for exercising discretion for applying section 70 to deny the application based on

the prohibition on variances greater than 20 metres to the separation distances imposed by section 70.

ii. Second, at the same time per sections 710.4(5) and 69.1, the Development Authority **must** apply section 70 to the proposed Cannabis Retail Sales and in accordance with section 70.1(b) must refuse the permit for that Use.

[170] The Appellants interpretation if correct leads to other unreasonable results.

a. On a plain reading section 710.4(3) simply lists three potential standards against which the Development Officer may evaluate compliance.

b. According to the First Capital Decision, section 710.4(3)(b) means the Development Authority must assess whether potentially applicable General Regulations and Special Land Use Provisions in the Bylaw should be disregarded or applied and must provide a rationale for exercising discretion to apply the minimum separation distance required by the Bylaw.

c. Applying this same interpretation to section 710.4.3(a) means that the Development Authority must assess whether "the objectives and policies of an applicable Statutory Plan" should be applied or disregarded and provide a rationale for exercising discretion to apply them. In the Board's opinion, this conclusion is contrary to the intent of the Bylaw and the *Act* as well as the Appellants own argument. Section 687(3) of the *Act* directs that subject to section 637, this Board must comply with any applicable statutory plans.

d. According to the Appellants' arguments described by Justice Khullar in the Green Room Leave Decision, when section 710.4(3) is read in conjunction with the first item in the list ((a) objectives and policies in of applicable Statutory Plans) there is an express grant of discretion to the development officer as to how to apply the second item in the list (b) Special Land Use Provisions like section 70). However, the Board does not read section 710.4(3) in this manner. On its face Section 710.4(3) is a list of three potentially applicable measures of compliance. It provides no explicit indication of the basis upon which this discretion to apply items in subsections (a), (b) or (c) could be exercised or direction that subsection (a) directs or determines whether or not the items in subsection (b) should be applied to the development

[171] The Board agrees with the Development Authority that the Appellants' interpretation raises several questions and uncertainties. For example:

a. If the Development Authority determines that the 200 metre requirement in section 70 should be disregarded, can they substitute some other number? On what basis? If the Development Authority determines that the section 70 should be disregarded for the

Appellant, does that have fairness implications for the next two unsuccessful applicants who were also seeking development permits on October 23, 2018? Could compliance with section 70 be considered and applied to subsequent applicants, if it is not applied to the Appellants?

b. With respect to 710.4(3)(b), could the Development Authority exercise discretion to apply some regulations, but not others and on what basis? Could the Development Authority impose stricter development regulations than those in the Bylaw and on what basis? Could stricter regulations from an abutting zone be substituted in place of regulations pursuant to section 710.4(3)(c)?

[172] The Board finds that section 710.4(3), when read purposively and in context with the remainder of 710.4 and the intent of the Bylaw, provides criteria that may be applied to guide the Development Authority in the event there is an ambiguous or open-ended discretion contained within a Direct Control provision such as Area 8 DC1. The Board finds the Development Authority's interpretation is in line with the plain wording of section 710 and more harmonious with section 710.4(5) and with the intent of Council contained in sections 40 and 69.1. The Board finds that the Appellant's interpretation would inject a level of uncertainty with respect to the applicability of General Regulations and Special Land Control Provisions to developments within direct control districts that was not intended by Council and is contrary to Council's plain intention expressed in sections 40, 69.1, and 710.4(5) of the Bylaw. The Board finds in addition that the interpretation of section 710.4(3)(b) from First Capital does not make sense when applied to section 710.4(3)(a).

[173] Therefore, the Board finds it is the direction of Council per sections 69.1 and 710.4(5) that the Development Authority apply the Special Land Use Provision applicable to Cannabis Retail Sales found in section 70 as this provision has not been specifically excluded or modified in Area 8 DC1.

[174] The Board finds that the Development Authority followed the direction of Council by applying section 70 and denying the Appellants' application. As the Board indicated above, if section 70 is applied, the Development Officer is prohibited from granting variances greater than 20 metres.

<u>If the Board has erred with respect to section 710.4(3)(b), should it exercise discretion to apply section 70 in this case?</u>

[175] In the event that the Board is incorrect and section 710.4(3)(b) creates a separate discretion to overlook or vary section 70 which the Development Authority failed to consider, the Board (following the First Capital Decision), has considered whether there is a rationale to apply the separation distance in section 70 to the Appellants' development.

[176] In this case, the Appellants argue that the Development Authority should exercise its additional DC1 discretion in section 710.4(3)(b) and approve the permit without compliance with section 70 for the following reasons:

a. The directions of Council clearly laid out in several statutory plans and documents were not followed when the Development officer refused the permit. The refusal is contrary to the direction of Council in the Capital City Downtown Plan which includes an objective to strategically increase retail opportunities and attract a diversity of retail and services to meet the needs of the growing residential community and to attract exciting new businesses.

b. There are no other breaches of required separation distances.

c. Given the nature of the Oliver strip, allowing three Cannabis Retail Sales is not likely to cause any problems in terms of adversely affecting anyone or their property values and will make some degree of competition more likely.

d. Area 8 DC1 is one of the places in the City where citizens would expect to find Cannabis Retail Sales and the citizens would not expect the scope of this Use to be so limited in this area given its density and the many things going on.

e. Oliver and the abutting neighbourhood to the east have the highest density in the City and the area is becoming more adult oriented as there are less children.

f. A higher number of residents in Oliver than in other parts of the City use public transit as their main method of transport. A dramatically higher number of Oliver residents than the City average walk.

g. Oliver is special and unique so the direction of Council to create a DC1 is fair and appropriate. According to the Appellants, it is the direction of Council that development applications for the Oliver area be reviewed through the lens of being in an area of unique character:

> "It is our belief that applying the setback requirements set out in section 70 for all areas of the City of Edmonton is not consistent with Council's direction but communities such as Oliver are to be viewed as unique and should be assessed using different criteria. The high population, high density, and pedestrian orientation of the Oliver area, and Jasper Avenue specifically, should be considered. Edmonton City Council has clearly laid out their vision for the area and it is our belief that allowing a variance in the setback requirements at the 11516 Jasper Avenue location would align with Councils direction and would not impede the quality of life for those that live and work in this unique neighborhood."

[177] The Board considered that the proposed development is to be located in a very dense area, between two approved Cannabis Retail Sales. All three front on to Jasper Avenue within easy walking distance of one another.

[178] The Board received two written objections to the issuance of the permit (one came from the landlord for Happy Buddha). Representatives from Canndara and Happy Buddha and Happy Buddha's landlord appeared to oppose the permit based on clustering concerns. They expressed general concerns about three stores in close proximity, but provided no evidence to support their views.

[179] The Board agrees with the Appellants that it was the intention of Council that Cannabis Retail Sales should be added to the list of available Uses in Area 8 DC1. The City Planning Report submitted to Council with the rezoning application for Area 8 DC1 indicates that rezoning is supported by the Oliver Area Redevelopment Plan which identifies this corridor as suitable for mixed-use commercial development and calls for a variety of pedestrian oriented commercial uses to attract both local and citywide clientele. The Report states that Cannabis Retail Sales are compatible with surrounding land Uses, suitable in scale, and will contribute to the range of pedestrian oriented uses along Jasper Avenue encouraging a more vibrant streetscape.

[180] However, the Board also agrees with the Development Authority, Canndara and Happy Buddha that the report presented to Council with the recommendation to add Cannabis Retail Sales is clear that City Administration also intended the separation distances in section 70 would apply. The report references separation distances twice:

a. At page 2 it is acknowledged that City administration brought forward the rezoning application to add Cannabis Retail Sales in the interests of fairness because, due to "separation distance regulations", there would be no guarantee that the applicant for subdivision would also be the successful applicant at the development permit stage.

b. At page 3 under the heading Cannabis Retail Sales Use the Report states:

> "The federal government has a target legalization of the sale and consumption of cannabis for October 17, 2018. Following Council's amendment of the Zoning Bylaw to permit Cannabis Retail Sales in a range of standard commercial zones, this application proposes to expand the area that allows the use by adding it to an existing (DC1) Direct Development Control Provision. There are special land use provisions in section 70 of the Zoning Bylaw to manage off site impacts, require separation distances from sensitive uses and maximize the compatibility of the development with the surrounding area."

[181] In Board's opinion, the report indicates the City's recommendation was to expand the opportunity for Cannabis Retail Sales by making the Use available in Area 8 DC1 and it was also contemplated that the development regulations in section 70 and the planning purposes that they serve would also be taken into consideration and applied to proposed developments.

[182] As noted above, the Special Land Use provisions for Cannabis Retail Sales Use in section 70 had been approved by Council only months earlier after extensive input from administration, stakeholders and the public. They were mentioned in the report to Council. In the Board's opinion, if based on the unique attributes of Area 8 DC1 which prompted Council to add this Use (extreme density, vibrancy, variety of uses, adult demographic, pedestrian orientation and citizen expectations), Council also intended any of the regulations in section 70 including the separation distances to be excluded or modified, then they would have expressed that intention by inserting a unique direction in DC1 Area 8 as they did by expressly overriding the default Sign Schedule in section 710.4(4).

[183] Further, the objectives of the applicable plan can be interpreted in two ways. The objectives of creating a vibrant mix of Uses adding new Uses are achieved by approving Cannabis Retail Sales. Arguably, that they are also achieved by separation distances which promote diversity and prevent the clustering of a single type of Use which could change the character of an area. This also demonstrates the uncertainties of creating the Appellant's interpretation of section 710.4(3)(b) that Special Land Use Provisions are optional.

[184] The Appellants correctly point out in that pursuant to section 687(3)(d), this Board has granted variances to separation distances between Cannabis Retail Sales developments in conventional zones which had been refused by the Development Authority. Some greater than the two required variances, some less. The Board has also refused to grant a variance to separation distance between Cannabis Retail Sales developments in conventional zones where the applicable plan also stressed the need for vibrancy and diversity of uses. The Board has found that variance would reduce diversity of businesses contrary to the goals of the plan. These prior cases merely emphasize that each case must be determined on its own merits and based on the presentations of the parties.

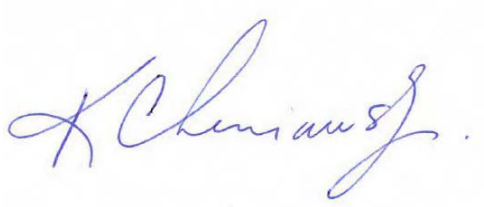
[185] The Appellants argue that section 70 should not be applied or should be varied because doing so would not impede the quality of life for those that live and work in this unique neighborhood or affect the property values for neighbouring properties. The Appellants are asking the Board to use this discretionary regime in section 710.4(3) and not consider section 70 on the same basis that they are asking the Board to exercise its variance in section 687(3)(d) of the *Act* as was done in the Wilson decision. If the factors in section 687(3)(d) form the basis to exercise a discretion in section 710.4(3) not to apply section 70, then the Board has concerns that this may well circumvent the Court of Appeal directions in *Garneau* that in a Direct Control Provision, the Board has no access to section 687(3)(d) and greater authority than the Development Officer.

[186] In these circumstances, the Board finds there are good reasons to evaluate the proposed development with respect to its compliance with section 70.

[187] As the Board indicated above, if section 70 is applied the Development Authority is prohibited from granting variances greater than 20 metres and accordingly so is this Board.

[188] Given the Board's reasons with respect to the first two reasons for refusal, it has not provided reasons with respect to the third reason for refusal concerning privacy glazing.

[189] For all of the above reasons, the Board finds that the Development Authority followed the directions of council and dismisses the Appeal.



Kathy Cherniawsky, Presiding Officer
Subdivision and Development Appeal Board

Board Members in Attendance:
Mr. L. Laberge, Mr. L. Pratt, Mr. A. Nagy, Ms. L. Delfs

cc: K. Wakefield, Dentons
Development and Zoning Services – I. Welch / H., Luke
City of Edmonton Law Branch – M. Gunther

Important Information for the Applicant/Appellant

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

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

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