



**EDMONTON
TRIBUNALS**

*Subdivision &
Development
Appeal Board*

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Date: January 29, 2019
Project Number: 295264252-001
File Number: SDAB-D-19-007

Notice of Decision

- [1] On January 16, 2019, the Subdivision and Development Appeal Board (the “Board”) heard an appeal that was filed on **December 19, 2018**. The appeal concerned the decision of the Development Authority, issued on December 5, 2018, to refuse the following development:

Change the use from General Retail Stores and Restaurant to Cannabis Retail Sales

- [2] The subject property is on Plan 4800KS Blk 41, located at 5811 - 132 Avenue NW, within the (CB1) Low Intensity Business Zone. The Major Commercial Corridors Overlay and the Main Streets Overlay as well as the Belvedere Station Area Redevelopment Plan apply.
- [3] The following documents were received prior to the hearing and form part of the record:
- Copy of the Development Permit application with attachments, proposed plans, and the refused Development Permit;
 - The Development Officer’s written submission;
 - The Appellant’s written submission;
 - A written submission from the applicant’s representative; and,
 - Two online responses: one in favour and one in opposition.

Preliminary Matters

- [4] At the outset of the appeal hearing, the Presiding Officer confirmed with the parties in attendance that there was no opposition to the composition of the panel.
- [5] The Presiding Officer outlined how the hearing would be conducted, including the order of appearance of parties, and no opposition was noted.

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

Summary of Hearing

i) Position of the Appellant, Ogilvie LLP

- [7] Mr. K. Haldane appeared to represent the landlord of the subject Site. He was accompanied by his clients, R. Sethi, M. Boychuk and J. Weinkauf.
- [8] Cannabis Retail Sales is a Permitted Use in the (CB1) Low Intensity Business Zone.
- [9] The proposed development is located at least 200 metres from any other Cannabis Retail Sales as per Section 70.1 of the *Edmonton Zoning Bylaw* (the “Bylaw”). It also meets the 100 metre separation requirements from Community Recreation Service Use, community recreation facilities, a provincial health care facility, and public lands as per Section 70.3 of the *Bylaw*. The only difficulty is it is located, as the crow flies, 197 metres from a public education facility (Belvedere Elementary School) rather than the required 200 metres as per Section 70.2 of the *Bylaw*.
- [10] Section 70.4 of the *Bylaw* stipulates that a Development Officer shall not grant a variance to the required separation distance between Cannabis Retail Sales and a school. The Development Officer must refuse the application no matter how small the required variance is.
- [11] Mr. Haldane referred the Board to Tab 4 of his submission, which contained several aerial photos to provide context as to the location of the subject Site and the School. While the School Site is almost rectangular, it juts out slightly at the southeast corner, resulting in the 3-metre setback deficiency. The aerial photos confirm that it is a long walk from the southeast corner of the School Site to the actual School. It is approximately 125 metres to the nearest point of the playground and 200 metres to the nearest point of the School from this Site boundary.
- [12] Tab 5 of Mr. Haldane’s submission contained a series of photographs taken from various angles of the immediate neighbourhood. These photographs show that the subject Site and the School are not visible to each other. Also included under this Tab is a photograph of the major road separating the two Sites (132 Avenue).
- [13] Tab 6 is an excerpt from the public engagement summary regarding cannabis. This document indicates that it is more important that Cannabis Retail Sales be separated from Junior and Senior High Schools as there is more of a draw to cannabis use for teenagers than for elementary students. Mr. Haldane referred to a previous SDAB decision, *SDAB-D-18-194*, where the Board found that it would be highly unlikely that elementary students would be allowed into a Cannabis Retail Sales location to purchase cannabis. If they were, it would not be a planning failure but a failure of the operator of the Cannabis Retail Sales.

- [14] The final tab of Mr. Haldane's submission contains a report presented to Council when Section 70 of the *Edmonton Zoning Bylaw* was enacted. This report states: "A 200-metre separation distance between cannabis stores and schools and libraries will, in most cases, move potential cannabis stores out of sight of a school building or public library".
- [15] The Appellant referred to *Newcastle Centre GP Ltd v Edmonton (City)*, 2014 ABCA 295 (the "*Newcastle Decision*") and questioned what impact a deficiency of 3 metres would have on the required separation distance based on the evidence presented.
- [16] The Appellant also noted that the only submission in opposition is a complaint about the Use, which is in itself permitted. No reference was made to the required variance in that complaint.
- [17] The Appellant requested that the Board amend the condition of the Development Authority requiring that operations commence within nine (9) months of the date of issuance of the Development Permit. Alberta Gaming Liquor and Cannabis Commission ("AGLC") has currently suspended the issuance of cannabis licences due to supply issues. The Appellants would like this condition to state that they have nine (9) months to commence operations from when the AGLC lifts its freeze.
- [18] In response to a question from the Board, the Appellant confirmed that their building will be constructed by the end of this year.

ii) *Position of the Applicant's Representative, Mediated Solutions*

- [19] Mr. Dack, a planner with Mediated Solutions, appeared to represent the Applicant, Planworks Architecture Inc. for New Leaf Cannabis.
- [20] The actual separation distance from the School to the proposed development is considerably more than 200 metres. The walking distance from the southeastern boundary of the School yard to the Cannabis Retail Sales Use Site is 265 metres. It is another 30 metres across the shopping mall property before you reach the building where the Cannabis Retail Sales is located.
- [21] The Applicants chose this location because of its proximity to Fort Road, which will provide access to a regional market. The development will be more vehicular centric rather than pedestrian oriented. They do not expect much traffic from the residential neighbourhood and their location will have no negative impact on any neighbours or on the community.
- [22] Mr. Dack explained to the Board that different jurisdictions have been trying to adjudicate appropriate setback distances between schools and cannabis stores. The province has set the separation distance at 100 metres and the City of Calgary has set it at 150 metres. The City of Edmonton has been more cautious about the impact of cannabis on children and has one of the largest separation distances at 200 metres.

[23] In response to a question from the Board, Mr. Dack deferred to Mr. Haldane for the answer. Mr. Haldane confirmed that the proposed development complies with all provincial regulations.

iii) Position of the Development Officer, I. Welch

[24] The Development Authority did not attend the hearing and the Board relied on Mr. Welch's written submission.

Decision

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

1. The development must commence within nine (9) months of the date after which Alberta Gaming Liquor and Cannabis Commission ("AGLC") removes its temporary suspension for accepting and issuing applications for Cannabis Retail licensing.
2. Exterior lighting shall be developed to provide a safe lit environment in accordance with Sections 51 and 58 and to the satisfaction of the Development Officer.
3. Any outdoor lighting for any development shall be located and arranged so that no direct rays of light are directed at any adjoining properties, or interfere with the effectiveness of any traffic control devices. (Reference Section 51 of the *Edmonton Zoning Bylaw* 12800).

NOTES:

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

4. The City of Edmonton does not conduct independent environmental checks of land within the City. If you are concerned about the suitability of this property for any purpose, you should conduct your own tests and reviews. The City of Edmonton, in issuing this Development Permit, makes no representations and offers no warranties as to the suitability of the property for any purpose or as to the presence or absence of any environmental contaminants on the property.
5. A Building Permit is required for any construction or change in use of a building. For a building permit, and prior to the Plans Examination review, you require construction drawings and the payment of fees. Please contact 311 Call Centre for further information.
6. This Development Permit is not a Business Licence. A separate application must be made for a Business Licence.

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

1. The minimum required 200-metre separation distance between the Cannabis Retail Sales Site and the School Site (Belvedere Public) pursuant to Section 70.2(a) is reduced by 3 metres to permit a minimum allowable separation distance of 197 metres.

Reasons for Decision

[27] The proposed development is to change the Use from General Retail Stores and Restaurant to Cannabis Retail Sales. The subject Site is located in the (CB1) Low Intensity Business Zone. Pursuant to Section 330.2(3) of the *Edmonton Zoning Bylaw* (the “*Bylaw*”), Cannabis Retail Sales is a Permitted Use in this Zone.

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

[29] The proposed Cannabis Retail Sales conforms to all of the development regulations contained in the *Bylaw* with the exception of Section 70.2(a).

[30] Section 70.2(a) of the *Bylaw* states that:

Any Site containing a Cannabis Retail Sales shall not be located less than 200 metres from any Site being used for a public library, or for public or private education at the time of the application for the Development Permit for the Cannabis Retail Sales. For the purposes of this subsection only:

- a. the 200 metre separation distance shall be measured from the closest point of the subject Site boundary to the closest point of another Site boundary, and shall not be measured from Zone boundaries or from the edges of structures.

- [31] The Board considered that two online responses were received; one in support of the development and one opposed to cannabis Use in general.
- [32] The issue before the Board is whether a variance of 3 metres could be granted in respect of the regulations in Section 70.2(a) of the *Bylaw*. This Section requires a 200-metre separation distance between the Site of a Cannabis Retail Sales and any Site being used for public education (the “School”).
- [33] The Development Authority refused the development permit application because it was determined that the subject Site of the proposed Cannabis Retail Sales is located 197 metres from the Site being used for public education. The Appellant conceded that as calculated by Section 70.2, the separation distance was deficient by 3 metres.
- [34] Based on the evidence provided by the Appellant, the Board found multiple factors that mitigate the potential likelihood of a material impact attributable to the requested variance to the separation distance between the two Sites. Therefore, the requested variance is granted for the following reasons:
1. The Board acknowledges that due to the extensive development between the School and the proposed Cannabis Retail Sales, it would take someone walking 265 metres to get from the closest point of the School Site to the Cannabis Retail Sales Site.
 2. Both the School and the Cannabis Retail Sales are located on the far ends of their respective Sites, making each as far away as possible from one another.
 3. The Board acknowledges that evidence was provided illustrating that the School building to its Site boundary is approximately 200 metres, School Site to Cannabis Retail Sales Site is 197 metres, and the Site boundary of the proposed development to the store front is approximately 30 metres. From this evidence, the Board notes that the Cannabis Retail Sales to the School, door to door, is approximately 427 metres as the crow flies.
 4. The Board heard evidence that the school Site is shaped irregularly and juts out to the southeast of the Site, which is closest to the Cannabis Retail Sales. The Board accepts that without this irregularity, these two Sites would not violate the *Bylaw’s* stipulated separation distance.
 5. 132 Avenue and other significant development including residential housing act as buffers between the Sites, blocking the sight lines to the proposed Cannabis Retail Sales from the School.

6. Specifically, the Board notes that the School Site contains a large sports field, is not visible from the retail location, and is not on the same Avenue. Due to these factors, it is unlikely that patrons of the Cannabis Retail Sales would cross a Collector Roadway (132 Avenue) to go to the sports field to consume cannabis.
7. The Board concludes that it is also unlikely that any children from the School would leave the School Site and cross this same Collector Roadway (132 Avenue) to go to the Cannabis Retail Sales location.
8. The Appellant submitted into evidence a document at Tab 7 of his written submission providing a report which outlines the intentions behind the cannabis regulations. At page 3 of 5 of the document it states: “A 200-metre separation distance between cannabis stores and schools and libraries will, in most cases, move potential cannabis stores out of sight of a school building or public library”. The Board notes that the intention of the regulation, to reduce sight lines between Schools and Cannabis Retail Sales, has been met in this circumstance.
9. The Appellant submitted into evidence the results of a public consultation process which led the City to create a 200-metre buffer zone between Schools and Cannabis Retail Sales. At page 14 of that document it states: “It is more important to be separated from junior and senior high schools as there is more of a draw for teenagers than from elementary schools or daycares where they are not allowed to leave the grounds anyway”. The Board heard evidence that the current school is an Elementary School.
10. This School was notified of the proposed development and provided no response.

[35] Section 70.6 obliges the Development Officer to impose a two part condition for a Cannabis Retail Sales. Section 70.6 states:

The Development Officer shall impose a condition on any Development Permit issued for Cannabis Retail Sales requiring that the development:

- a. shall not commence until authorized by and compliant with superior legislation; and
- b. must commence within nine (9) months of the date of approval of the Development Permit.

For the purposes of Section 70.6, development commences when the Cannabis Retail Sales Use is established or begins operation.

[36] On November 21, 2018, AGLC placed a temporary suspension on all new applications due to a supply shortage of legal cannabis. As a result, there is a potential of Section 70.6 to create a hardship situation. To relieve a possible hardship, the Board varied the requirement to: *development must commence within nine (9) months of the date when Alberta Gaming Liquor and Cannabis Commission (“AGLC”) removes its temporary*

suspension for accepting and issuing applications for Cannabis Retail licensing. (See above; Paragraph [25])

- [37] For the above reasons, the Board finds that granting the separation distance variance and the conditions imposed will not unduly interfere with the amenities of the neighbourhood, nor materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land.



Mr. B. Gibson, Presiding Officer
Subdivision and Development Appeal Board

Board Members in Attendance:

Mr. R. Handa; Ms. M. McCallum; Mr. A. Peterson; Mr. M. Young

cc: City of Edmonton, Development & Zoning Services, Attn: Mr. Welch / Mr. Luke

Important Information for the Applicant/Appellant

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

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