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

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Project Number: 296169793-001
File Number: SDAB-D-19-029

Notice of Decision

[1] On March 13, 2019, the Subdivision and Development Appeal Board (the "Board" or "SDAB") 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:

Change the use from General Retail Stores to Cannabis Retail Sales.

[2] The subject property is on Plan B3 Blk 14 Lots 78-79, located at 11404 - Jasper Avenue NW, within the DC1 Direct Development Control Provision. The Oliver Area Redevelopment Plan applies to the subject property.

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

- Copy of the Development Permit application with attachments, proposed plans, and the approved Development Permit;
- The Development Officer's written submissions;
- The Appellant's written submissions;
- The Respondent's written submissions; and
- Online responses.

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

- Exhibit A – Extract from written submissions of Janice Agrios LLP re Item 9 Inc. (Court File Number 1803 19210)

Preliminary Matters

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

[6] The Presiding Officer referred all parties to Section 685(4) of the *Municipal Government Act*, RSA 2000, c M-26 (the "*MGA*") which outlines the Board's authority regarding appeals in Direct Control Districts. He also referred all parties to the following Court of Appeal Decision: *McCauley Community League* v. *Edmonton (City)*, 2012 ABCA 86.

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

[8] The appeal was filed on time, in accordance with Section 686 of the *MGA*.

Summary of Hearing

i) Position of the Appellant, Fire and Flower Inc.

[9] Mr. K. Wakefield of Dentons and Mr. M. Anderson of Fire and Flower spoke on behalf of the Appellant. Ms. L. Holmes of Fire and Flower was also present.

[10] Mr. Wakefield referred to an application that Janice Agrios (legal counsel for the Respondent in today's appeal) had made to the Court of Queen's Bench seeking mandamus regarding another Cannabis Retail Sales application that involved Fire and Flower. The mandamus application was made on behalf of her client, Item 9, who had submitted a fully compliant development permit application which was refused as they were behind Fire and Flower in the lottery system. Fire and Flower had received an approved permit but a variance had been granted in the separation distance from a school. The court decided that the SDAB was the appropriate forum for dealing with the matter and judicial review and prerogative writs were generally speaking not to be used in these circumstances. Mr. Wakefield therefore submits that the SDAB is the proper forum to decide on the legitimacy of the City's process in the case before it today.

[11] Three Development Permit applications are relevant to today's appeal:

a. Canndara Canada Inc. (11404 – Jasper Avenue) (today's Respondent)

b. Happy Buddha & Co. (11641 – Jasper Avenue)

c. Fire and Flower (11516 – Jasper Avenue) (today's Appellant)

[12] The Development Authority determined that Canndara Canada and Happy Buddha's applications were received first and second therefore approved permits were issued to them. As a result, Fire and Flower's permit application was refused due to a deficiency in the required separation distance from another Cannabis Retail Sales location. Fire and Flower's refusal is not before this Board today. While the Appellant had requested that all three appeals be heard together, the Happy Buddha and Fire and Flower Appeals will not come before the Board until April 11 due to scheduling availability of the parties.

[13] The Development Officer did not follow the directions of council by designing a flawed process for submitting, accepting and reviewing appeals. The midnight filing process

turned into a lottery without oversight and it was a City of Edmonton e-mail server that decided who filed first. Information obtained as a result of a FOIP request confirmed that Ms. Vander Hoek, a City of Edmonton planner, was aware that there would be multiple applications and that she had concerns about the proposed e-mail application filing system.

[14] In the summer of 2018, Fire and Flower submitted a re-zoning application for 11512 /14 Jasper Avenue to allow Cannabis Retail Sales in this Zone. It was not until September 17, 2018 that Ms. Vander Hoek advised them that City administration had decided to take the lead in re-zoning the Oliver Area 8 DC1 due to a significant number of interested parties. The proposed re-zoning application was to go for first and second readings at City Council on October 22, 2018, but would be referred to the Edmonton Metropolitan Region Board prior to the third and final reading. This could take an additional two to three months.

[15] On October 16, 2018, Fire and Flower was advised by Ms. Vander Hoek that the City had changed their position and that the re-zoning would pass third reading on October 22, 2018 and that applications for Cannabis Retail Sales Development Permits would be accepted the following day (October 23, 2019) starting at 12:00:01 (midnight) by email to cannabislegalization @edmonton.ca.

[16] On October 16, 2018, Fire and Flower sent a request to this e-mail address seeking clarification of the exact process and to ensure there were no technical glitches. A reply was received from Mr. C. Chan confirming that the information provided by Ms. Vander Hoek was correct but a different e-mail address was provided for submitting the Cannabis Retail Sales permit applications: cannabisdevelpmentpermitedmonton.ca. Fire and Flower was never informed that submissions to the original e-mail address provided, cannabislegalization@edmonton.ca would not be accepted. Due to the uncertainty, Fire and Flower sent their application to both email addresses to ensure compliance.

[17] Fire and Flower had made a request to synchronize their server clocks with those of the City and to have their application pre-cleared. These requests were refused and they were advised that the City's time clocks were simply synchronized to Google or Microsoft. Fire and Flower was requested not to inundate the City servers with multiple e-mail submissions.

[18] The Appellants referred to Tab 15 of their submission which contained server records from the City of Edmonton showing the incoming e-mails slightly before and after midnight on October 23, 2018. Submissions by Permit Experts on behalf of Fire and Flower received at 11:59:52 and 11:59:54 were rejected because they came in slightly before midnight and because they were sent to cannabislegalization@edmonton.ca, the original e-mail address provided. These e-mails should have been accepted in light of the refused request to synchronize server clocks – they would have been within the margin of error.

[19] The Canndara application came in one second after midnight. This application was accepted by the City of Edmonton under their process and resulted in a Development Permit being issued. Another application submitted by Fire and Flower was received by the City at six seconds after midnight; however, this one was not accepted because it was sent to the original e-mail address provided, cannabislegalization@edmonton.ca.

[20] Of all of the submissions received by the City within 30 minutes, 39 were submitted by the Respondent which suggests that some automated methods were used, impacting the fairness of the process. Fire and Flower respected the City's request not to inundate their inbox with messages and therefore submitted no more than a handful of applications. Either the Respondent had not received similar instructions or they were allowed to proceed with multiple submissions which increased their number of chances. Submitting such a large number of applications can clog up the server, affecting other applicants. This was not an appropriate application intake process in a hotly contested area.

[21] Five parties submitted Cannabis Retail Sales applications for locations along Jasper Avenue between 114 Street and 118 Street. The order of receipt of these applications is of paramount importance as that determines which applicants are entitled to receive a development permit due to required separation distances.

[22] Fire and Flower were advised via e-mail on January 23, 2019 that development permits would be issued to Canndara and Happy Buddha. Lisa Holmes of Fire and Flower subsequently filed appeals on the two approved permits as well as their own refused permit. Fire and Flower submits that Canndara's application, before us today, was improperly approved for the following reasons:

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;

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.

[23] Mr. Wakefield referenced legislation relevant to today's appeal from the *Edmonton Zoning Bylaw* and the *MGA*.

[24] Section 69 of the *Edmonton Zoning Bylaw* deals with Special Land Use Provisions and 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 requirement of the Zone, except where a Zone, Direct Control Provision or Overlay specifically excludes or modifies these provisions with respect to any Use.

[25] Section 710 of the *Edmonton Zoning Bylaw* is a Direct Development Control Provision and 710.5(1) states:

> In addition to the information normally required for a Development application under this Bylaw, the applicant shall submit all information specified in an applicable Area Redevelopment Plan or Area Structure Plan and a narrative explaining how the proposed Use or development would be consistent with the intent of the Provision.

[26] It is their understanding that the Respondent's application did not include the required narrative and therefore should not have been accepted. While they acknowledge that there is the ability to issue a waiver as per Section 11 of the Bylaw, there is no mention of such a waiver being issued on Canndara's approved development permit.

[27] Bylaw 18573 was the re-zoning of the area along Jasper Avenue between 110 Street NW and 121 Street NW (Oliver) and Bylaw 18572 added Cannabis Retail Sales as a listed Use to the Oliver Area Redevelopment Plan.

[28] Section 640 of the *MGA* directs municipalities regarding Land Use Bylaws.

> 640(1) A land use bylaw may prohibit or regulate and control the use and development of land and buildings in a municipality;
>
> …

> 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

[29] The key point is that City Council shall determine the processes for items (i) to (vii) in the *Edmonton Zoning Bylaw*. Items (ii) and (iii) are particularly relevant to today's appeal. What City Council did by giving the Development Officer broad discretion in 11.1.3 of the *Edmonton Zoning Bylaw* is not consistent with provincial regulations.

> 11.1(3) The Development Officer, shall determine the process for submitting, receiving, determining complete, and reviewing Development Permit Applications for Cannabis Retail Sales.

[30] The Town of Banff decided to implement a lottery system to choose applications until they reached the allowed annual quota of development permits. This method was upheld by the Court of Appeal as being a legitimate power of a municipality. That is not what we have here – Edmonton City Council did not say adopt a lottery system or adopt a race through e-mails. 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*, they washed their hands of it and told the Development Officer to figure something out and provided no direction he could legitimately follow.

[31] The whole process that was patched together in October, 2018 and implemented mere hours after Council gave third reading to the re-zoning application on October 22, 2018 is not compliant with the law and is void. Any permits granted pursuant to that process have no legal basis.

[32] Timelines were extremely tight. It was not until October 16, 2018, that Fire and Flower was advised, via e-mail, that the Oliver area re-zoning application would be passed on

October 22, 2018 not in mid-January as was originally indicated. At this same time, they were provided with the incorrect e-mail address for submitting applications. No official letter providing express application instructions was ever issued.

[33] Mr. Wakefield referred the Board to the numerous e-mails between the City and Fire and Flower contained in Tab 14 of their submission. These e-mails include:

a. Discussions regarding synchronizing the clocks;

b. An e-mail advising submissions to the wrong e-mail address would not be considered;

c. Various e-mails between the City and Fire and Flower as to the processes to be followed.

[34] Even if the clocks could have been synchronized, e-mail transmissions are subject to a lag time and can take from 15 seconds to 25 seconds to send. The volume of e-mails being received by a server could also affect the lag time.

[35] Any fair minded person would have great difficulty seeing how this "seat of the pants" system cobbled together and communicated at the last minute with no official letter is any kind of fair system. Nor is it fair to refuse to set clocks to a point where all parties submitting applications could synchronize the clocks on their computers to the same points. What you end up with is an unfair and arbitrary system contrary to the principles of natural justice.

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

a. They confirmed that Tab 15 of their submission contains all of the server records they received from the City.

b. It appears that not all of the potential applicants for a Cannabis Retail Sales permit received the same information prior to the application deadline.

c. The Board referred the Appellants to Section 684(3) of the *MGA*:

> If the Development authority does not make a decision referred to in subsection (1) within the time required under subsection (1) or (2), the application is, at the option of the applicant, deemed to be refused.

Flower and Fire's seventh reason for appeal was that the application should be deemed refused as a permit was not issued within 40 days. Upon reviewing the above section, Mr. Wakefield acknowledged that the application would not be deemed to be refused unless the applicant requested this.

ii) Position of the Respondent, Canndara Canada Inc.

[37] Ms. J. Agrios appeared on behalf of Canndara Canada Inc. She was accompanied by Mr. J. Radostits, CEO of Canndara.

[38] Mr. Radostits is one of the directors of Canndara and has a long business history in Edmonton. His family has been in the grocery business for over 79 years (IGA and Sobeys) and he is a founding partner with the Hudson's chain and Orange Theory Fitness. He and his business partner, a pharmacist, have extensive experience in terms of sales of a controlled substance.

[39] Canndara applied for and was granted a Development Permit for Cannabis Retail Sales. The subject site is located in the former Shopper's Drug Mart building on the northwest corner of Jasper Avenue and 114 Street. The site is located within Area 8 of the Oliver Area Redevelopment Plan and is zoned DC1. As a result of the rezoning on October 22, 2018 Cannabis Retail Sales became a listed Use in this DC1. A copy of the report that went to council in support of this re-zoning is found at Tab 14.

[40] Aerial photos of the site and surrounding area are found at Tab 5 and Tab 6 contains a street view of the site and surrounding area.

[41] The Canndara development fully complies with all applicable regulations in the *Edmonton Zoning Bylaw*, including all of the regulations of the DC1 Zone (set out in Section 15.9 of the Oliver ARP) and Section 70 of the *Edmonton Zoning Bylaw*. It is fully compliant with all required separation distances.

[42] Section 685(4) of the *MGA* provides that the appeal of a decision with respect to a development permit application in respect of a Direct Control district is limited to whether the development authority followed the directions of Council. In the present case, as the approved development is fully compliant with all requirements of the *Edmonton Zoning Bylaw*, the Development Officer followed the directions of Council and this appeal should be dismissed.

[43] Grounds 1 to 5 of the Appellant's reasons for appeal relate to the process followed by Development Officer regarding Canndara's development application. As per Section 11.1(3) of the *Edmonton Zoning Bylaw*, Council has delegated authority to set the process to the Development Officer. The process used by the Development Officer is outside the scope of what this Board can consider under Section 685(4)(b) of the *MGA*.

[44] Notwithstanding Section 685(4)(b) of the *MGA*, if this Board somehow has jurisdiction to consider the process, such an appeal is filed too late. The process took place on October 23, 2018 and an appeal was not filed until February 12, 2019, which is way outside of the 21-day appeal period. This Board has no jurisdiction to consider an appeal filed out of time.

[45] Even if the appeal had been filed in time, it is not open for the Board to consider the process followed by the Development Officer. The Board dealt with this issue in another

matter involving Fire and Flower (SDAB-D-18-171). Item 9 was a competing applicant and raised an objection to the Board granting a variance to Fire and Flower. Part of the objection was the process the Development Authority was using to deal with Cannabis Retail Sales permits. Item 9 had a fully compliant application but because Fire and Flower's application was being dealt with before Item 9's application granting a variance to Fire and Flower would make Item 9's application non-compliant. Item 9 tried to get an order to compel the court to issue it a development permit. The Court said no, go to the SDAB and raise this issue on the appeal of your own development permit, not on the context of Fire and Flower's development permit.

[46] If you follow the reasoning of the Board in that decision, the task of today's appeal is to decide if the Development Authority followed the directions of Council as per 685(4)(b) in issuing the Canndara permit. Fire and Flower has appealed the refusal of its own Development Permit and arguments related to the handling of Fire and Flower's application will be addressed at the April 11 hearing.

[47] When the Court of Queen's Bench said that the arguments that were raised should be before the SDAB, the Court was saying that they were to be raised in the applicant's development permit appeal, not a competing applicant's appeal.

[48] The *McCauley* case was not a Direct Control, it was a conventional zoning. What the court ruled was that based on Section 685(2), the SDAB does have jurisdiction to deal with other decisions made by Development Officers. One could argue that another decision of a Development Officer is to determine what process to use. However, since today's case is in a Direct Control, we must look at section 685(4) and the very opening words say "despite subsections 1, 2 and 3". Therefore, when dealing with a Direct Control zone section 685(4) governs despite what is set out in 685(2).

[49] Fire and Flower was an active participant in the Development Officer's process. They did not raise any objection to the process until the process did not work out as they wanted. Everyone was in same boat. No one knew if the re-zoning would go to third reading on October 22, 2018, and no one else was able to have their clocks synchronized with the City clocks. They have waived their right to raise an objection.

[50] Fire and Flower incorrectly stated that Canndara sent automated messages which is not true. Even if Canndara had used automated messages, there is nothing in the directions of Council saying they cannot.

[51] 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.

[52] This is a collateral attack on that section. This Board does not have jurisdiction to strike down a section of the *Edmonton Zoning Bylaw*; there would have to be a direct challenge to this section at the Court of Queen's Bench.

[53] With respect to paragraph 6 of the grounds of appeal:

a. Section 13.1(1)(b)(ii) of the *Edmonton Zoning Bylaw* provides that an application for a development permit is not complete until the applicant has "submitted any information specifically required pursuant to the regulations of the applicable Zone or any other Section of this Bylaw...". However, Section 13.1(2) of the *Edmonton Zoning Bylaw* provides that "notwithstanding subsection 13.1(1)(b) … the Development Officer may consider an application if the development is of such a nature as to enable a decision to be made on the application without all the information required in this Section".

b. As the approved development is a listed use in the DC1 Zone and fully complies with all regulations of the DC1 Zone and otherwise in the *Edmonton Zoning Bylaw*, pursuant to Section 642(1) of the *MGA*, the Development Officer had no discretion to refuse it. In the absence of any discretion to refuse the Respondent's development permit application, a narrative serves no purpose.

c. A detailed report, dated October 22, 2018, was presented to City Council in support of the amendment to the DC1 Zone to add Cannabis Retail Sales as an allowable use. The report specifically addressed the suitability of Cannabis Retail Sales within this DC1 Zone. To require the Respondent to provide a further narrative would simply duplicate the report already prepared by the City.

d. To the extent that a narrative is required (which is not acknowledged), the Respondent adopts the contents of the City's report as its narrative under Section 710.5(1) of the *Edmonton Zoning Bylaw*.

e. Notably, the Appellant has not argued that Cannabis Retail Sales is an inappropriate use for this DC1 Zone, given that the Appellant is seeking to develop Cannabis Retail Sales within this same DC1 Zone.

[54] With respect to paragraph 7 of the grounds of appeal, Section 684(3) of the *MGA* provided the Respondent with the option to have its application deemed refused. The Respondent did not exercise this option. Therefore, its application was not deemed refused.

[55] In summary, the Board's jurisdiction in Direct Control zones is set out in Section 685(4)(b) of the *MGA* and is limited to determining if the Development Officer followed Council's direction. Cannabis Retail Sales is a listed Use and the proposed development is fully compliant with all of the regulations in the Direct Control Zone and all sections of the *Edmonton Zoning Bylaw*, specifically Section 70. Because the Development Officer followed Council's directions, this appeal must be dismissed.

iii) Position of the Development Authority

[56] Mr. M. Gunther, Law Branch, appeared to represent the Development Authority. He was accompanied by Development Officer Mr. I. Welch. He stated he was here to defend the intake process that was used, not to support one applicant over the other.

[57] City Council has delegated the authority for intake to the Development Officer. The City owes a duty of procedural fairness to anyone who wants to take part in this process and that was the aim of a first come, first served process. This small stretch of Jasper Avenue was not included in the original lottery process as Cannabis Retail Sales was not a listed Use in this area at that time.

[58] All parties were in the same position regardless of whether or not they could synchronize with the City's clocks. A number of parties were looking to hit send and have their e-mail received as closely after midnight as possible. This is a random process similar to a lottery and no party is in a better position than others. This first come, first served process generates records and the City was forthcoming as to what the process resulted in and provided technical records of computer servers to show the order of receipt of the applications.

[59] The discussion of two e-mail addresses is a red herring as the first application to any e-mail address is that of the approved permit which is before the Board today.

[60] Up until the time that the process played out, the City received no questions or concerns from any applicant other than the request to synchronize e-mail servers from Fire and Flower. There are no records to suggest or to allege that this was an unfair or procedurally improper process.

[61] In patent law, someone who is licensing a product is presumed to be relying on that license and cannot challenge the validity of the patent. Also there are doctrines in public law regarding burden and benefit. If you are relying on the benefit of something, then you have to take the corresponding burden. In this case, no one had suggested to the Development Officer until the outcome of the process that there was anything unfair about it.

[62] One of the Board members stated that in this particular situation there was a condensed time line and the decision to raise an objection would have to be made very quickly. However, documents submitted by Fire and Flower confirm that discussions were taking place as early as September as to process. Application information was posted to the City of Edmonton's website and the process and correct e-mail address were provided on the website. There was ample opportunity to raise concerns.

[63] Even if the validity of the Bylaw giving discretion to the Development Officer were challenged in court, it would not really leave the parties in any different position. Applications would be taken on a first come, first served basis as per the City's general practice.

[64] The Board is being asked to strike down a municipal enactment in reaching a decision. Only the Court of Queen's Bench can do this.

[65] The *McCauley* case seems to suggest a broad authority on the part of this Board to review a decision of the Development Officer. The Development Officer decided to use this process in October. If the Appellant is challenging the first come, first served process and

had issues with the intake process, an appeal would have to have been filed 21 days after Fire and Flower was advised of the outcome (a few days after October 23, 2018).

[66] The issue before the Board today is whether the Development Officer followed the directions of Council.

[67] The missing narrative was an issue raised by Fire and Flower. Mr. Gunther confirmed that a narrative was not received from any of the applicants in this proceeding with the exception of a document received by Development Officer after the decision was made and already appealed to this Board. A Development Officer cannot take a narrative into account that was submitted after he made his decision.

[68] It was not necessary for a narrative to be submitted in this case. There is nothing that could be said in a narrative in this application process that would change the Development Officer's decision as Cannabis Retail Sales is a listed Use.

[69] The City's position is that the Development Authority considered all of the applications at the proper time using the proper information.

[70] Mr. I Welch, the Development Officer in charge of all Cannabis Retail Sales applications, provided further information to the Board.

[71] The City's general principle was that they would try to advise stakeholders of the application intake and review procedures and to allow applicants as much time to prepare as possible. This proved to be tricky as things moved so rapidly with the legalization of cannabis.

[72] It was made very clear that, after the lottery process was dealt with, any future applications would be taken on a first come, first served basis. This is a very common and accepted process among Alberta municipalities.

[73] The Development Authority did their best to ensure that all potential applicants had the correct information. Public notifications were made as to application procedures. Information and the application e-mail address were posted on the City's website. The Appellant had engaged in communications with the re-zoning planners. Mr. Chan corrected an error in an e-mail that a colleague had made.

[74] The deadline for the cannabis retail sales applications in this area was October 23, 2018, at midnight. The next morning, Mr. Welch and Mr. Chow reviewed the e-mails and decided who had submitted valid applications from the large number of e-mails received. This is no different than taking applications manually. Five applications were received. Two approved permits and one refused permit are the subject of appeals. The other two applications are on hold pending the outcome of these appeals.

[75] All five applicants were formally notified of the order of review. Fire and Flower's location on Jasper Avenue was the third in line. Quite strong objections were received from Flower and Fire once this notification went out.

[76] The Development Authority first reviewed Canndara's application and a setback map was created. They then issued a permit as per the directions of Council and continued by reviewing Happy Buddha's application, which was the next in line.

[77] At this point Ms. Agrios provided the citation to *Tymchak* vs. *Edmonton* 2012 ABCA 22 (para 12) with regards to the doctrine of waiver, which she said stands for the proposition that, if you do not object in a timely matter, you lose that right. She also cited *Coffman* v. *Ponoka* 1998 ABCA 269 as authority that the SDAB does not have the jurisdiction to rule on the validity of a bylaw.

iv) Rebuttal of the Appellant

[78] Mr. Wakefield is not asking the Board to decide between the Canndara and Fire and Flower applications. The only thing before the Board today is the Canndara permit. He is simply saying that the process resulting in that permit was not legal.

[79] Fire and Flower is an affected person in regards to Canndara's application.

[80] It is his submission that the SDAB, per the *McCauley* case, has jurisdiction to consider if the decision the Development Officer made as to the process was legal.

[81] He disputes that Fire and Flower simply participated in the process and did not object. He quoted from an e-mail from Matt Anderson of Fire and Flower to Calvin Chan on October 22, 2018 at 9:42 a.m.

> "*I strongly believe that it is important to allow market participants to synchronize how clocks. How else are we to know that we are not inadvertently submitting early or late due to a clock error? Also, how will early applications be treated? Will they disqualify subsequent applications? Having clear rules and instructions is important to maintain an orderly process. Otherwise this method of filing becomes even more random and arbitrary than a lottery*."

Mr. Wakefield quoted another e-mail from Mr. Anderson to Mr. Chan on October 22 at 12:15 p.m.

> "*Respectfully, it cannot be correct that your clocks are set by "Google, Microsoft, etc." All computer systems synchronize their time clock against a reference point. Differences may arise depending on when the system was last synchronized and against which source. A system can be synchronized against multiple sources – it is not true that both Google and Microsoft set the time clock for the relevant system. Using "similar devices" is not an assurance of synchronized time Clocks.*
>
> *Would you kindly confirm the reference point against which the relevant server's time clock has been synchronized?*

> *With respect to the disclaimer of liability, I note that the Land Use Bylaw has delegated authority to the Development Officer to determine the process for accepting development permit applications for Cannabis Retail Sales. As with any delegation of authority, principles of administrative law apply, including the requirement that the exercise of such authority be done in a non-arbitrary fashion and in accordance with principles of fundamental justice".*

To say no objection was made beforehand is not consistent with the facts. He is not quite sure what steps should have been taken between noon and midnight on October 22, 2018 to object to the process.

[82] Regarding the comments on automated submissions, the City had said do not inundate us with submissions. Fire and Flower tried to oblige and Canndara did not.

[83] It is not true that all parties were in the same position. No other party was told that the correct e-mail address was cannabislegalization@edmonton.ca. Although Mr. Chow introduced a second e-mail address, he said everything in Ms. Vander Hoek's e-mail was correct and did not say the first e-mail address provided was not valid. Mr. Gunther says the issue of two e-mail addresses is a red herring; it is not. This was not a fair fight as other parties were not given this misinformation.

[84] Mr. Wakefield submitted Exhibit A, an excerpt from Ms. Agrios' written submissions in the Item 9 mandamus application and quoted Paragraph 17 from this document:

> The City has argued that it is entitled to implement a lottery system based on 698114 Alberta Ltd. V Banff (Town of), 2000 ABCA 237. In that case, the lottery system was implemented pursuant to a bylaw, which was in compliance with the *MGA*. In the present case, however, the lottery system is not part of the Zoning Bylaw, and in any event, is contrary to Section 642(1) of the *MGA*.

Apart from the fact that Ms. Agrios cited Section 642 of the *MGA* and Mr. Wakefield cited section 640 and she cited a lottery system and he cited a post-midnight e-mail race, their positions are the same.

[85] Mr. Wakefield is not suggesting that this Board strike down a bylaw, simply that it interpret legislation. The Board is used to interpreting the act as well as bylaws.

[86] Regarding the notion of plenary delegation, section 13.1(2) of the *Edmonton Zoning Bylaw* is an example of where Council delegates authority with some parameters to the Development Authority.

[87] Mr. Gunther referred to section 640(6) of the *MGA* which provides the Development Authority with essentially the same powers as section 687(3)(d) provides to the Board. These are valid delegations because they give parameters. That is totally different from

what happened in this case where City Council simply told the Development Officer to figure out how to deal with permit applications.

[88] Mr. Anderson commented that they heard as early as August, 2018 that a first to file system was going to be implemented. Then new information came to light – that being re-zoning in the DC1. This created another competitive situation of multiple people filing at the same time. The core problem here is that the Development Officer failed to take this new information of multiple people filing into account and whether a first come, first served filing was still appropriate.

[89] Mr. Gunther stated that first come, first served was no different than a lottery. If it was to be used as a lottery, it should have been done in a fair and not in an arbitrary fashion. Instead the process was not clearly communicated, was not fair, and was ultimately administrated by e-mail servers on an unequal basis.

[90] While the decision regarding the process was made more than 21 days before they filed, they were simply trying to follow the direction provided in the Item 9 case, which simply said appeal the permit to the SDAB.

[91] The decision by the Development Officer was not one he had the legal authority to make. His decision was made by virtue of the plenary discretion given by City Council, which it did not have the authority under Section 640 to give; therefore, there is nothing legal to challenge.

[92] If the Appellant had come to this Board prior to a Development Permit decision having been made (within 21 days of Oct 22, 2018), it would have been advised that this is premature. The Appellant is appealing the permit as it has been directed by the Court of Queen's Bench and the jurisdiction this Board has to review a permit. Also, the decision to use the first come, first served process dated back as far as August, 2018 and the process continued to evolve until the application deadline. To pin a limitation period on the October 22 date misconstrues the authority of this Board.

Decision

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

Reasons for Decision

[94] The subject property falls within DC1 Direct Development Control Provision Area 8, (the "DC1") of the Oliver Area Redevelopment Plan. Cannabis Retail Sales is a listed Use in the DC1. The Respondent was issued a Development Permit for Cannabis Retail Sales in the DC1. The Appellant wants to open its own Cannabis Retail Sales in the DC1 less than 200 metres from the Respondent's premises. If the Respondent's Development Permit

stands, the Appellant's location will be non-compliant with the 200-metre separation distance required by the *Edmonton Zoning Bylaw* regulations.

[95] Originally this DC1 did not have Cannabis Retail Sales as a listed Use. A number of parties were interested in operating Cannabis Retail Sales in the Zone and made applications for re-zoning to include that Use in the Zone.

[96] Given the interest in re-zoning the DC1, City administration made the decision to submit the re-zoning application to Council itself to include Cannabis Retail Sales as a listed Use. That re-zoning was approved by Council on October 22, 2018.

[97] Due to the small geographical area of this DC1 area, the Development Authority elected to accept applications on a first received, first evaluated basis as opposed to retaining an outside agency to conduct a site selection lottery. Handling Development Permit applications on a first received first evaluated basis is the normal way Development Permit applications are dealt with at the City.

[98] The City began accepting Development Permit applications at 12:00:01 a.m. on October 23, 2018. Several applications were received immediately after 12:00 a.m. The determination of the order of receipt was determined by the City's e-mail server and was overseen by staff members in the Development & Zoning Services Department.

[99] Determining the order of receipt was critical. Because of the small area of the DC1 and the required 200-metre separation distance between Cannabis Retail Sales Uses, the first successful applications were very likely to result in refusals to those applications received later.

[100] The Respondent's application was the first received. It was approved. An application from an organization called Happy Buddha was the next received and it was also approved. The Appellant's was the third application received. The location of the Appellant's premises is located between those of the Respondent and Happy Buddha and is within 200 metres of each of them. Because of the separation distance issue, the Appellant's application was rejected. In addition to appealing the Development Permit issued to the Respondent, the appeal that is before the Board today, the Appellant is also appealing the refusal of its permit application as well as the approved Development Permit issued to Happy Buddha. Those appeals will be dealt with by the Board at a later date.

[101] Section 685(4)(b) of the *Municipal Government Act* (the "*MGA"*) states:

> 685(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.

[102] To determine the directions of Council, the Board notes that the DC1 does not contain any regulations with respect to Cannabis Retail Sales. However, Section 69.1(1) of the *Edmonton Zoning Bylaw* 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.

[103] Included in the Special Land Use Provisions is Section 70 Cannabis Retail Sales. The Board finds that Section 70 contains the directions of Council with respect to Cannabis Retail Sales in the DC1.

[104] The Development Officer concluded that the Respondent's application met all the requirements set out in the DC1 and in Section 70. It is not disputed by the Appellant that the Respondent's Development Permit does not require variances.

[105] The Appellant's grounds for appeal 1, 2, 3 and 5 relate to the process used by the Development Authority to accept and evaluate Cannabis Retail Sales applications in the DC1 (what the Appellant refers to as the "triage process").

[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.

[115] Turning now to the merits of the appeal related to process, the first ground of appeal is that the triage process adopted by the Development Authority for the consideration of Development Permit applications was not authorized by law. 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

[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*.

[120] The third ground for appeal is that the triage process adopted by the Development Authority for the consideration of the Development Permit applications was an improper exercise of the Development Authority's discretion. Due to the small geographical area of the DC1 area, the Development Authority elected to accept applications in accordance with ordinary practices on a first received, first evaluated basis rather than using a lottery system. The Board is of the view that, because the Development Officer elected to accept applications in accordance with ordinary practices, albeit by way of email as opposed to filing in person, there is no basis to conclude there was an improper exercise of the Development Authority's discretion or that he did not follow the directions of Council.

[121] The second and fifth grounds are related. The second ground of appeal is that the triage process adopted by the Development Authority for the consideration of Development Permit applications was not fairly implemented. The fifth ground of appeal is that the

Respondent's Development Permit application was wrongly considered by the Development Authority before the Development Permit application of the Appellant.

[122] The Appellant points to the fact that the Development Authority refused to give it information to allow the Appellant to synchronize its server with that of the City. However, the result was that all applicants were in the same situation and that the City's e-mail server determined the order in which applications were received.

[123] The Appellant alleges that the Respondent used an automated process to submit multiple applications and points to the fact that some 39 applications from the Respondent were received, more than from any other applicant. The Board finds that there is no basis to conclude that an automated process was used by any of the applicants. Further, the Board concludes that there is nothing improper in the fact that the Respondent submitted more applications than the others. Notwithstanding the Development Authority's hope that it would not be swamped with applications, there was nothing preventing applicants from submitting as many applications as they chose to.

[124] The Board finds that all of the parties interested in Cannabis Retail Sales in the DC1 were treated equally. Each of them had the same chance of having their e-mail applications received by the Development Authority sooner than the other applicants. There is no basis for concluding that the process adopted by the Development Authority was not reasonably or fairly implemented or that the Respondent's application was wrongly considered by the Development Authority before the application of the Appellant.

[125] In conclusion with respect to process, 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. The Board finds that the Development Officer followed the directions of Council in implementing the process and reviewing the applications. The Board further finds that the decisions of the Development Officer were reasonable and fair.

[126] Turning now to the grounds of appeal not related to process, the fourth ground of appeal is that the Development Authority misled the Appellant with respect to the proper e-mail address to which the Development Permit applications were to be sent. This ground of appeal does not relate directly to the Respondent's Development Permit but rather to the Appellant's Development Permit refusal. However, the Appellant essentially argues that, but for the misinformation it received regarding the proper e-mail address, its application would have been received before that of the Respondent.

[127] 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.

[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.

[129] The sixth ground of appeal is that the Development Permit application was non-compliant and incomplete and in particular it did not include the narrative required under section 710.5 of the *Edmonton Zoning Bylaw*. Section 710.5(1) states:

> In addition to the information normally required for a Development application under this Bylaw, the applicant shall submit all information specified in an applicable Area Redevelopment Plan or Area Structure Plan and a narrative explaining how the proposed Use or development would be consistent with the intent of the Provision.

[130] Section 13.1(1)(b)(ii) of the *Edmonton Zoning Bylaw* states that an application is not complete until the Applicant has submitted any information specifically required pursuant to the regulations of any zone or any other section of the *Edmonton Zoning Bylaw*. However, Section 13.1(2) authorizes the Development Officer to "consider an application if the development is of such a nature as to enable the decision to be made on the application without all of the information required in this section".

[131] The Development Officer elected to treat the application as complete without the narrative required by Section 710.5(1). The rationale for doing so was that the application was wholly compliant with all municipal regulations and that Cannabis Retail Sales is an expressly listed Use. Therefore, submission of the narrative would serve no meaningful purpose.

[132] As well, a full narrative regarding the justification for listing Cannabis Retail Sales as a Use within the DC1 had been provided to Council the day before applicants were allowed to submit their e-mail applications. Given this, the Development Officer felt it was unnecessary for the Respondent to submit the narrative required by 710.5(1).

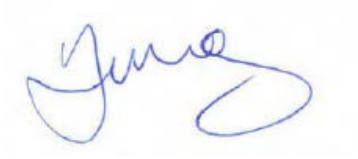
[133] The Board agrees with this rationale and concludes that the Development Officer complied with the directions of Council in exercising the discretion he was given in Section 13.1.2 to not require the narrative required by Section 710.5(1).

[134] The seventh ground of appeal is that the Development Permit was deemed refused pursuant to Section 684 of the *MGA* by reason of the passage of more than 40 days from the Development Authority's notice of completion dated October 26, 2018. At the hearing, counsel for the Appellant acknowledged that Section 684(3) of the *MGA* states that it is only at the option of the applicant that the permit is deemed to be refused.

[135] Accordingly, since this option was never exercised, the Board does not need to deal with this ground of appeal.

[136] It is to be noted that at no time did the Appellant allege that the Development Officer made any errors in concluding that the application of the Respondent fully complied with all of the applicable regulations. The Board finds that the Respondent's application for a Development Permit is fully compliant with all of the regulations in the *Edmonton Zoning Bylaw* and that the Development Officer followed the directions of Council when issuing the Development Permit.

[137] For all of the above reasons the appeal is dismissed.



Mark Young, Presiding Officer
Subdivision and Development Appeal Board

Board Members in Attendance:
R. Handa, G. Harris, E. Solez, R. Hachigian

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.