



**EDMONTON  
TRIBUNALS**

*Subdivision &  
Development  
Appeal Board*

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Date: November 22, 2018  
Project Number: 287613738-001  
File Number: SDAB-D-18-187

**Notice of Decision**

- [1] On November 7, 2018, the Subdivision and Development Appeal Board (the “Board”) heard an appeal that was filed on October 12, 2018. The appeal concerned the decision of the Development Authority, issued on October 1, 2018 to refuse the following development:

**To change the Use from Health Services to Cannabis Retail Sales.**

- [2] The subject property is on Plan F Lots 27-29, located at 10135 - 100A Street NW, within the CCA Core Commercial Arts Zone. The Special Area Downtown Overlay and Capital City Downtown Plan apply to the subject property.
- [3] The following documents were received prior to the hearing and form part of the record:
- Copy of the Development Permit application with attachments, proposed plans, and the refused Development Permit;
  - The Development Officer’s written submissions;
  - The Appellant’s written submissions; and
  - Two online responses, one in support and one neutral.
- [4] The following exhibits were presented during the hearing and form part of the record:
- Exhibit A – diagram of the location of the site.
  - Exhibit B – email from Edmonton Public Library
  - Exhibit C – Land Use Framework for Cannabis Legalization
  - Exhibit D – *Springfield Capital Inc. v Grande Prairie (SDAB)*, 2018 ABCA 203

**Preliminary Matters**

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

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

### Summary of Hearing

i) *Position of the Appellant, Mr. K. Wakefield, representing Dentons LLP and Mr. M. Anderson, representing Fire and Flower:*

- [8] The proposed development was refused because the Development Officer calculated that the site of the proposed Cannabis Retail Sales is located 84 metres from a public library (Stanley Milner Public Library) and does not comply with the minimum required Separation Distance of 200 metres.
- [9] City Council passed Bylaw 18387, an amendment to Bylaw 12800 to add Cannabis Retail Sales as a Permitted Use and to establish development regulations, including the minimum required separation distances and removing variance power for the Development Authority on June 12, 2018.
- [10] Section 70(2) established that 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.
- [11] The administrative report provided to City Council outlined those zones chosen to allow Cannabis Retail Sales aligned with public engagement feedback. Many stakeholders provided feedback that walkable commercial areas (main streets, downtown) are desirable locations for cannabis store locations.
- [12] The Gaming, Liquor and Cannabis Regulations require a minimum 100 metre separation distance from provincial health care facilities, schools and land that is designated as school reserve or municipal and school reserve but not from a site being used as a Public Library.
- [13] The proposed development exceeds all of the security regulations regarding the prohibition of minors and proof of age.
- [14] The variance power provided to the Development Officer in Section 11 of the *Edmonton Zoning Bylaw* has been abdicated by section 70(4) which does not allow the Development Officer to grant a variance to subsection 70(2) or 70(3).
- [15] Section 687(3)(d) of the *Municipal Government Act* provides authority for the Board to grant variances if it is determined that a proposed development will not unduly interfere with the amenities of the neighbourhood or materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land.

- [16] The subject site is located in the (CCA) Core Commercial Arts Zone. The General Purpose of the Zone is to:

Provide a Zone for a variety of high density and quality development that accommodates office, retail, service, institutional, residential, arts and entertainment Uses and meet the Use objectives for the Commercial Cultural Core. The intent is to further strengthen the Downtown's central area by providing continuous retail at ground level, enhancing arts and entertainment activities, accommodating Residential Uses and making the Core more pedestrian friendly.

- [17] Pursuant to section 910.2(f), Cannabis Retail Sales is a Permitted Use in the (CCA) Core Commercial Arts Zone.

- [18] The Capital City Downtown Plan identifies that while the Downtown is generally seen as a commercial centre it is an area of great diversity, with several very distinct character areas or neighbourhoods including the Commercial Core (Sub Area 1). The subject site is located in Sub Area 1. The Development Intent for Commercial Core (Sub Area 1) is that:

The Commercial Core is to be developed with a high standard of commercial office and retail development, supported by a range of service, institutional, residential, arts and entertainment uses and a high quality public realm. The intent is to provide a diversified shopping environment with continuous retail at-grade and pedestrian friendly streets, parks and open spaces.

- [19] A City of Edmonton plan illustrating Separation of Cannabis Stores from Sensitive Uses was referenced to illustrate that there are not a lot of potential areas for Cannabis Stores located in the downtown core when compared to the northwest or southeast portions of the city.

- [20] Another City of Edmonton map was referenced to illustrate that the separation buffer for the library cuts through the top portion of the lot on which the proposed Cannabis Retail Use is located which is closest to the parkade and not the building in which the store is located. The site of the proposed development is more than 200 metres away from the public library and is located on the edge of the separation distance buffer.

- [21] The map that was included with the report that was before City Council when the Bylaw was passed in June, 2018 identified more potential sites in the downtown than the more up to date map for Separation Cannabis Stores from Sensitive Uses.

- [22] An aerial Site Plan of Surrounding Businesses prepared by Stantec was referenced to illustrate the location of existing businesses along Rice Howard Way (a robust mix of commercial, retail, office and entertainment uses) and the separation distances from the Stanley Milner Library. A Site Plan and photographs were referenced to identify the site of the proposed Cannabis Retail Use, located on the west side of the parkade, immediately north of the Freshii Restaurant.

- [23] Several previous decisions in which the Board exercised its variance power were referenced. Paragraph [60] of SDAB-D-18-168 states:

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.

- [24] In parallel to that, the average citizen, not to mention some statements included in the Core Commercial Arts Zone, the Capital City Downtown Plan and the administrative report provided to City Council regarding walkability and lively pedestrian areas, most citizens would expect this area to be a prime candidate for a Cannabis Retail Store.

- [25] Several online responses received from affected property owners in response to the appeal were referenced.

One response from a neighbour indicated that they neither supported nor opposed the development and stated “The access to Rice Howard Way is totally different than the access to the Main Public library. Rice Howard Way is being redesigned to accommodate more businesses and has more public space to walk and relax outdoors”.

The other response stated “Speaking as a resident of the neighbourhood, the refusal of this permit is puzzling from a logical standpoint. My understanding of the zoning bylaw is that public libraries are specifically exempt from liquor store setbacks, and are explicitly not treated in that section as community or educational institutions for children, but the rules for cannabis mysteriously incorporate libraries under a 200 metre limit..... The entrance to this shop appears to be easily more than 200 metres from the front of the library, facing away from and invisible to it, and the Rice Howard pedestrian area is quite secluded architecturally. Moreover, it does seem like rough justice for a library that will not serve the public until 2020 to be excluding legitimate trade from the neighbourhood in the meantime because of a dubious regulation. The address on the permit would be a perfectly suitable location for a cannabis store”.

These comments are similar to the Appellant’s assertion in their grounds for appeal that Rice Howard Way meets stated planning criteria, and therefore seems to be a perfect spot for a Cannabis Retail Sales Use.

- [26] A Plan prepared by Pals Geomatics shows the distance of Lots 27, 28 and 29 from the site of the Stanley Milner Library which is currently under construction. The distance, as the crow flies from Lot 29 to the south corner of the lot on which the library is located, is between 83 and 84 metres. The distance from Lot 27, the lot on which Fire and Flower will be located is 112.03 metres and the distance from the front door of the proposed Cannabis Store to the main entrance to the library located on 102 Avenue is 187.86

metres. The dotted line on the plan measures the walking distance from the site of the proposed Cannabis Store to the main entrance of the library to be 315 metres.

- [27] Definitions contained in the *Edmonton Zoning Bylaw* and the *Municipal Government Act* were referenced.

Section 6.1 defines Site as “an area of land consisting of one or more abutting Lots”.

Section 6.1 defines Abut or abutting as “immediately contiguous to or physically touching and when used with respect to a lot or Site, means that the lot or Site physically touches upon another lot, Site, or piece of land, and shares a property line or boundary line with it”. The diagram provided in the definition explains the narrative and illustrates that the site marked with an “X” has a common property line with those marked with a check mark.

Section 6.1 defines Lot as ‘lot’ as defined under Part 17 of the *Municipal Government Act*.

Section 616(m)(v) of the *MGA* defines a lot as “a part of a parcel of land described in a certificate of title if the boundaries of the part are described in a certificate of title by reference to a plan of subdivision”.

- [28] Two Land Titles were submitted, one in the name of Westcorp Inc. in which the Estate is described as a leasehold for a term of 99 and ½ years. The other Title is the Freehold Title in the name of Great-West Life Assurance Company. Those three lots, 27, 28 and 29, in Plan F are subdivided land. The freehold is owned by Great-West Life Assurance and the 99 ½ year leasehold is owned by Westcorp, the landlord for the proposed Cannabis Retail Use.
- [29] This is significant because the separation distance from the library was measured from the northeast corner of Lot 29 to comply with section 70(2)(a) of the *Edmonton Zoning Bylaw* that “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”. However, it was his opinion that the separation distance should have been measured from Lot 27 because Lot 27 is not part of the Site, it is not contiguous. He further notes that Lot 28 is contiguous to Lot 29 but Lot 27 is not abutting or contiguous. Therefore, the separation distance is 112.03 metres, not 83 or 84 metres.
- [30] The front door of the proposed Cannabis Retail Use is 187 metres from the front door of the Stanley Milner Library as the crow flies and the walking distance between the two sites is 315 metres.
- [31] Mr. Anderson referenced submitted materials and suggested that there are reasons why it would have been more appropriate to use an alternative mode of measurement and not the

bright-line test in this circumstance. The Board is entrusted to use discretion in order to ensure fairness in light of unique circumstances and it was his opinion that this is one of those situations.

- [32] He believed that a bright-line test may have been appropriate as a first screening process, but it is having perverse results in this neighbourhood that do not line up with the intent of the separation distance requirements.
- [33] The report that was provided to City Council at third reading of the Bylaw was referenced, specifically the Separation Distances From Sensitive Uses which states that “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 Bylaw has not incorporated a sight line test, but it is an important factor to consider when making a decision about whether or not to exercise discretion. If sight lines were the test, the proposed development would comply because the proposed development cannot be seen from the Stanley Milner Library.
- [34] Maps were referenced to illustrate the distance from the site as the crow flies. He reiterated that the separation distance was calculated from the northeast corner of the entire site and not the actual location of the proposed Cannabis Retail Use which unduly minimizes the separation distance.
- [35] A Google map was referenced (marked Exhibit A) to illustrate that in practical terms the walking distance from the proposed site to the main entrance of the library is 300 metres. This would include walking past numerous restaurants, bars and lounges located on Rice Howard Way and crossing a major intersection at 100 Street and 102 Avenue.
- [36] Children attending a program at the library would most likely access the library using public transit which is located along 102 Avenue, the subterranean LRT system or the subterranean parking lot which are not located anywhere near the subject site.
- [37] A City of Edmonton map was referenced to illustrate the mapping of available locations that are blocked or not blocked due to various Cannabis Separation distances. Nearly all of the area between Jasper Avenue to the south and Stony Plain Road to the north and 105 Street to the west and 97 Street to the east, including the subject site, are blocked out by separation distance requirements. This is in stark contrast to the information that was provided during the consultation process. Downtown was identified as an area where Cannabis Retail Sales would be appropriate. However, due to the application of the bright-line 200 metre separation test, there is effectively no area in the downtown core that would be allowed at all. The system has been structured to defer to the Board to exercise their variance power and grant variances where appropriate.
- [38] The three locations that are not blocked by separation distance requirements are located in the Bell Tower and City Centre East. However, there is no retail space available in the Bell Tower and the two sites available in City Centre Mall would not be allowed because

a separate shipping and receiving area is required by the AGLC regulations. Therefore, the entire downtown core is subject to the variance power of the Board.

- [39] The walking distance from one of the locations that is not blocked by separation distance requirements is actually closer to the library than the subject site.
- [40] As a result of this process, where city officials, industry and landlords were under tight time lines to pursue this new use before it was officially legalized, many of the commercial decisions had to be made before there was full clarity as to what the Bylaw restrictions would be. Fire and Flower exercised a high degree of diligence in identifying appropriate locations. In doing so, Fire and Flower ensured that the potential locations were in areas that included other adult uses. The area around the subject site and the library is comprised of numerous restaurants, bars, and lounges which are not inconsistent with the proposed Cannabis Retail Sales Use. The subject site is tucked away in a pedestrian corridor that is not exposed to a large number of youth and is an ideal location for a Cannabis store.
- [41] Mr. Wakefield and Mr. Anderson provided the following information in response to questions from the Board:
- a. Even if the lots are not separated, a variance will be required.
  - b. The definition contained in the *Edmonton Zoning Bylaw* is that a Site is two or more lots that abut one another. Every single abutting lot has a common boundary with the subject lot. In this case, the subject Lot 27 does not have a common boundary with Lot 29. The parkade does occupy all three lots, but according to the definition, Lot 27 although part of the parkade site, is not part of Lot 29, because it does not abut Lot 29.
  - c. All three lots are on title. Lot 27 abuts Lot 28, but not Lot 29.
  - d. Main streets and downtown were identified as appropriate locations for Cannabis Retail Sales when the Bylaw was passed by City Council. However, there are not as many sites downtown as originally intended because of the adoption of the bright-line rule which virtually eliminates all possible locations downtown. This also speaks to the reason as to why the Board may choose to exercise discretion. The intent was to allow for downtown uses in appropriate areas and the system has now deferred to the Board. It was not intended that the entire downtown would be sterilized.
  - e. This is one of the most appropriate locations for a Cannabis Retail Sales Use in the downtown core. If the Board does not grant the required variance, that effectively prohibits Cannabis Retail Sales in the entire downtown.
  - f. Downtown is considered by most citizens to be a meeting place and an appropriate location for a Cannabis Retail Store but for the separation distance requirements.

- g. If the Board's test in section 687(3) of the *Municipal Government Act* is met, the Board has the authority to exercise discretion and grant the required variance.
  - h. The subject site cannot be seen from the library because of many large buildings and the walking distance is approximately 300 metres and is longer than the walking distance from an identified permitted location. Pedestrians have to cross a significant barrier, 100 Street, so it is unlikely that youth attending the library will cross 100 Street to find the proposed location.
  - i. The coloured map was presented to City Council at third reading of the Bylaw in June, 2018. This was used to provide information to City Council. The other map was obtained from the City of Edmonton mapping site that was prepared at a later date.
  - j. The nature of the downtown and the greater density of buildings, residential and retail are creating the issue and sterilized the downtown. This use will provide diversity to people living downtown. Positive feedback has been received regarding the opening of cannabis stores in other locations. It would be ironic not to provide the full range of services downtown in accordance with the general purpose of the CCA Zone and the Capital Downtown Plan.
  - k. Other approved locations should be highlighted on the map, but they are not. The map only identifies other sensitive uses.
  - l. All of the recommended conditions provided by the Development Officer are acceptable.
  - m. It was acknowledged that section 687(3)(d) of the *Municipal Government Act* says "may" not "shall".
  - n. The proposed development will add to the amenities.
- ii) *Position of Affected Property Owners in Support of the Appellant, Ms. H. Vaughn and Mr. D. Geddes, representing Westcorp Inc.*
- [42] Ms. Vaughn advised the Board that Westcorp will be the landlord and supports the proposed development because it will be economically beneficial for them, their tenants and the neighbouring community.
- iii) *Position of the Development Officer, Mr. I. Welch and Mr. C. Kirsop:*
- [43] Mr. Welch submitted the proposed plans for the library renovation and a letter from the Urban Design Community.
- [44] All three lots, Lot 27, Lot 28 and Lot 29 were considered as one site. That is how they are recognized in the addressing system and one building occupies all three lots.



- [45] In their view the definition of Site contained in the *Edmonton Zoning Bylaw* that a Site is one or more abutting lots provides discretion for the Development Officer to determine what the Site is. In this case, it was determined that the three Lots comprised one Site.
- [46] SLIM maps are the more precise version of the mapping system. The map will create buffers for both approved and pending cannabis applications. However, there are two versions of SLIM web maps, an internal version and an external version. The external maps will only show the approved development permits for cannabis. The internal version that is available to Development Officers shows both. In any case, SLIM will create buffers for both even if it will not show you the precise location. There are three or four pending development permit applications for sites located a few blocks west of 104 Street.
- [47] Mr. Kirsop explained that after the City Council public information maps were prepared, it became obvious that two school sites, Boyle Street Community Resources School and Centre High, had been omitted from the circulated map. When these two schools were added to the map, the exclusion area became broader.
- [48] It was his opinion that there is no sterilization, and the discrepancies were just a matter of available information.
- [49] The approved plans for the library identify other entrances to the library in addition to the “main” entrance and the map obtained from the Edmonton Public Library website also shows the location of a children’s library and entrance located on the southeast portion of the site. Therefore, it will be easy for adults and children to use entrances to the library that are much closer to the site of the proposed development.
- [50] Based on rough estimate of the submitted materials, the Development Officer estimates that the walking distance to the Cannabis Retail Sales Use from the nearest entrance of the library is 147 metres.
- [51] The proposed drawings were revised to address several concerns identified by the Edmonton Design Committee, including that “the other three corners, excluding the north-west, will not encourage pedestrian access and participation in the public realm adjacent to the library”. The southern two entrances were added to animate Centennial Square by providing more uses for children of all ages.
- [52] City Council established the separation distance requirements to ensure separation of Cannabis Retail Sales from impressionable children. The Edmonton Public Library has expressed concern regarding the proximity of a Cannabis Retail Sales Use because approximately 200 minor children access the services of a typical library on a daily basis. The Stanley Milner Library will be one of the largest libraries in the City once it opens next year.
- [53] Mr. Kirsop, is a Senior Planner, who managed the *Edmonton Zoning Bylaw* preparations for cannabis legalization in Edmonton.

- [54] He was generally informed by a high level principle endorsed by the Urban Planning Committee on May 7, 2018, entitled “Drug, Alcohol and Tobacco Free Youth” that the City of Edmonton would endeavor to restrict youth access to cannabis through changes made to the *Edmonton Zoning Bylaw*.
- [55] A 200 metre separation distance was established because schools and public libraries are key areas where minors can be found and this aligns with the Drug, Alcohol and Tobacco Free Youth Principle as well as a second Principle regarding Public Health and Safety.
- [56] During the public engagement process regarding public libraries and schools, correspondence was received from the CEO of the Edmonton Public Library, marked Exhibit B, expressing their concerns because over 200 children attend a library on any given day, larger locations more and small locations less. This information was considered when the 200 metre separation distance was established.
- [57] It was acknowledged that the nature of public library use is different in an urban area than in the suburbs. However, it was his opinion that it is not appropriate to approve a Cannabis Retail Use so close to a library based on the fact that narcotics and drugs are often consumed in public spaces at the temporary library location in Enterprise Square and it may be the same in the new Stanley Milner Library once it is reopened.
- [58] It was Mr. Welch’s opinion that the test for variance has not been met in this case because children and other vulnerable individuals will be exposed to cannabis and he urged the Board to consider upholding the refusal.
- [59] Mr. Welch and Mr. Kirsop provided the following information in response to questions from the Board:
- a. Although cannabis is legal, it is a substance that is subject to numerous restrictions.
  - b. The 200 metre separation distance requirement is quite small and therefore it should not be too difficult for Applicants to comply.
  - c. The Stanley Milner Library is relatively connected to the concept of density because the number of visits will be high and there is a new emphasis on attracting more children by developing a dedicated entry way and offering more programming for children. This will result in the more children attending the library than in the past.
  - d. The 200 metre separation distance was established based on a blend of information, the strongest from Alberta Health Services regarding the health impacts of cannabis on all users. The 200 metre distance was established in alignment with schools because the population of minors attending libraries is similar to the population of minors at any given elementary school.

- e. The City is revising development regulations as they apply to liquor stores. However, there is a desire to have a more child friendly downtown. A certain number of family dwelling units are now required in new developments. The recent changes to provincial regulations that restrict the ability of a Condominium Board to impose age restrictions will result in more dwelling units being occupied by families.
- f. Resources will be available at the Stanley Milner Library that are not available at other locations, including a video gaming area. Therefore, the library will be a destination for young families and teenagers, who were considered by City Council when establishing the separation distance requirement.
- g. Seattle, Washington and San Diego, California have both established a 300 metres separation distance from libraries.
- h. It was acknowledged that the subject site cannot be seen from the library, but cannabis can be legally consumed outdoors which could result in the consumption of cannabis in close proximity to the library. Even though the entrance to the proposed store is located around the corner, there may be more foot traffic along Rice Howard Way because of the proposed new entrances to the library.
- i. Cannabis Retail Sales is a Permitted Use with conditions. This is different than a General Retail Store which does not have any restrictions as long as it is a Permitted Use. There are development regulations including locational requirements that have to be followed. It was conceded that the subject site would be an appropriate location if it were not for the location of the library.
- j. The submitted email from Edmonton Public Library addressed concerns regarding the approval of a Cannabis Retail Sales Use at this location.
- k. A 200 metre separation distance will ensure that a Cannabis Retail Sales Use will be located further away from places where youth and vulnerable individuals congregate. The 200 metre separation distance was established for schools and libraries because children are not under constant supervision. A separation distance was not established for a Child Care Service because children associated with that Use are under constant supervision.
- l. Establishing this mode of measurement was the fairest and clearest way to measure the distance.
- m. There will be two public transit routes at Churchill Square, a central LRT stop on Rice Howard Way and a bus stop at 100 Street.
- n. Access from the LRT is currently sub-terranean and a diagram was used to illustrate how you could exit the LRT to access the library. There are a variety of entrances and exits to the LRT that could be used, including one on Jasper Avenue by the Cambridge Lofts and another entrance to Rice Howard Way from Jasper Avenue.

- o. It was acknowledged that you may never pass the subject site depending on your route, but they believed that the proposed development will be a well-known location in terms of destination.
- p. Discussions are ongoing regarding turning Centennial Square into a children's space, but that has not been confirmed. It is meant to be a more active space for people of all ages.
- q. There is a concern that individuals can smoke cannabis close to the library then enter the building high on the drug giving children access to cannabis and exposing them to second hand smoke. All of which are public health concerns.
- r. The feedback provided by Alberta Health Services focused on the influence on young and curious minds. City Council has allowed public consumption and as a result there may be locations close to the entrances of the library where cannabis can be consumed. There is a concern that this could have an impact on developing young brains and lead to more mental health problems.
- s. Land use planning deals with many considerations, including the promotion of public health and safety as well as commercial growth. In this case, the promotion of public health and safety and the discouragement of public disorder were the public policy goals related to planning. Alberta Health Services included a number of references that focused on outlet density or market access. The two studies determined that there is a relationship between the number of outlets and the propensity for users to use the substance. The studies focused on the impact of cannabis premises density and youth access to alcohol and cannabis.
- t. California and Washington have legalized recreational cannabis use but public consumption is not allowed.

At this point the Presiding Officer noted that the City submitted the same generic written information at all of the recent appeal hearings for a Cannabis Retail Sales Use. Neither the written submission from the City Solicitor or the Development Officer address the variance required. The Board has asked for an evidence based approach so that the Board can make a decision rationally, in fairness to all of the parties and in accordance with judicial direction from the Court of Appeal. A significant concern was expressed regarding the citation of select portions ostensibly from background documents that have not been submitted to the Board, nor provided in full context to the Applicant/Appellant. The Presiding Office asked the Appellant to consider this matter.

- u. Mr. Kirsop indicated that his attendance was only to serve as a resource and he acknowledged the request from the Board to receive more customized information. Mr. Welch apologized for the discomfort created for the Board, but indicated the submitted materials were the result of ongoing circumstances.

- v. They have information but not evidence because there has not been enough time to gather evidence. *Newcastle* did not close the door on making use of broader planning and public policy within a municipality. There is very little peer review evidence because this is such a new Use.
- w. Mr. Kirsop indicated that he would submit the information that was referenced in their submission, including the Urban Planning Committee report and attachments. The materials were subsequently submitted as Exhibit C and the Appellants were provided an opportunity to review them.
- x. The decision was made to use the methodology within the Alcohol Sales Use to formulate development regulations for Cannabis Retail Sales. It is clear that it will have to be revisited and Council is cognizant that revisions will be required.
- y. Centennial Plaza is located immediately south of the library.

iv) *Rebuttal of the Appellant:*

- [60] Section 70(2) of the *Edmonton Zoning Bylaw*, states any Site with a capital “S”, this is an amendment to the *Edmonton Zoning Bylaw*. Therefore, the parkade area is a Site because it is a defined term in the Bylaw.
- [61] Mr. Wakefield often walks by the library on his way to and from Court and has witnessed homeless individuals and other people smoking in front of the library. He then passes by the many bars and lounges along Rice Howard Way. Anyone who is old enough to walk west from the library on Rice Howard Way will be exposed to all of these adult type uses. Even if you could see the subject site, the windows are frosted, minors are not allowed and anyone under the age of 25 will have to produce identification and there will be two points of contact before you can enter the active part of the store. It was therefore his opinion that the required variance will not impact anyone using the library when it reopens in 2020.
- [62] A Court of Appeal decision, *Springfield Capital Inc. v Grande Prairie (Subdivision and Development Appeal Board)*, marked Exhibit D, was referenced, specifically paragraphs [18] ad [21] dealing with ‘bootstrapping’ by Development Officers. The Court indicated that it is important for the Development Officers to be neutral.
- [63] The Board was advised by the Development Officer that the closest station to the library from the main LRT line was at Jasper Avenue when in fact the closest station is Churchill Station that runs from 102 Avenue to 103 Avenue and there are multiple entry points, including one at the south which leads underground to the library parkade and path to the library. When the Valley line south is completed in 2020 there will be a station outside the library on 102 Avenue between 99 and 100 Streets that is positioned to provide easy transition from the Valley line to the Capital line. Therefore, the Development Officer was inaccurate. Westcorp has also advised him that the City is circulating proposals to

remove the entry to Central Station located at Rice Howard Way and Jasper Avenue by 2020.

[64] A rationale person would not get off Churchill Station, not the Central Station to go to the library.

[65] The Appellant then reviewed the materials submitted by Mr. Kirsop and made several rebuttal observations:

- a. The materials include data from other jurisdictions regarding library separation distance. However, only some of the information was provided. It was noted that some jurisdictions which had not been cited to the Board do not require any separation distances from libraries.
- b. The Text Amendment to Zoning Bylaw 12800, Land Use Framework for Cannabis Legalization, marked Exhibit C, was referenced. Specifically, “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”. No one has suggested that the public library is not out of sight of the proposed location. So this objective has been achieved because of the configuration of the streets and avenues at Rice Howard Way.
- c. Table 4 – Zoning Bylaw Alignment with the Provincial Government was referenced. Section 105.3 of the *Alberta Gaming, Liquor and Cannabis Regulation* was included. It was noted that the province did not require a separation distance from a library.
- d. The online survey indicated that 45.5 percent of the respondents indicated that appropriate locations for cannabis retail sales are downtown or close to major LRT stations which apply to this site.
- e. Four stakeholder comments were referenced. None of them addressed the necessity for separation distance from a library. One response had been received that the separation distances should be consistent with alcohol sales.
- f. The Alberta Health Services submission indicated that a 200 metre separation distance would be consistent with provincial requirements and limit access to children and youth. It was noted that provincial legislation does not require a separation distance from a library and that youth will not have access to the store and cannot see inside the store. It is therefore speculative to conclude that there will be a problem just because the store is there.
- g. A 300 to 500 metre separation distance was recommended by Alberta Health Services between tobacco and liquor stores but nothing in respect to libraries.

- [66] Public access is not allowed from the rear door of a Cannabis Retail Store. Some of the other provincial licensing regulations practically prohibit a Cannabis Retail Store from operating from within the City Centre Mall identified as a potential location in the City maps.
- [67] Section 687(3)(d) of the *Municipal Government Act* states “the Board may make an order or decision or issue or confirm the issue of a development permit even though the proposed development does not comply with the land use bylaw if, in its opinion, the proposed development would not unduly interfere with the amenities of the neighbourhood or materially interfere with or affect the use, enjoyment or value of neighboring parcels of land”.
- [68] No evidence has been provided that the proposed development would have an adverse effect. Two supportive responses were received. No evidence has been provided that there would be an effect on the value of adjacent land. It was his opinion that there is nothing in the evidence provided to suggest that the site of the proposed development would materially interfere with the use of the library or the enjoyment of the library.
- [69] He acknowledged some of the health concerns. However, many teenagers are already aware of cannabis and its use. They will not be able to access the store or purchase products and therefore there is no practical impact and the store will be located where most people think it should be located.
- [70] Mr. Anderson clarified that it was his understanding that the SLIM map does not reflect proposed locations and buffers around proposed locations. If that was the case there would be a buffer around their proposed location and there is not. SLIM maps show buffer zones from sensitive uses and approved cannabis locations only. Once a development permit has been issued, a buffer zone is imposed. To his knowledge there are no approved locations in this area. The reason for the distinction between this map and the map that was originally presented to City Council, is the inclusion of the buffers that effectively shut down development in this area as a result of the Boyle Education Centre and a park.
- [71] As a result of the known sensitive Uses, there are only three parcels that would be available for cannabis use before any other approvals are issued but they are not suitable sites because of practical reasons.
- [72] From a planning perspective, the proposed development is a Cannabis Retail Sales Use and not a Consumption Lounge. It was his opinion that the concerns regarding exposure to second hand smoke and some of the other health concerns would be more appropriate when and if that type of Use is approved. Customers purchase products from the store and take them home or off site to be consumed.

- [73] It was noted that other jurisdictions have different legal frameworks that need to be considered. Other municipalities have chosen different methods of calculating distance, including path to travel, which is walking distance. However, whatever method is chosen should be supported by a certified surveyor's report. Some of the distances calculated by the Development Officer at the hearing are only estimates.
- [74] The walking distance was included on their Site Plan which calculates the distance to be 315 metres.
- [75] They have received unsolicited support from members of the community. The letter of support from the Edmonton Public Library is dated February 16, 2018 which is prior to the passing of the Bylaw and it is not specific to this location. They have not seen a public objection from the library so it is difficult to respond.

v) *Mr. Welch*

- [76] Mr. Welch referenced the Court of Appeal decision, *Springfield Capital Inc. v Grande Prairie (Subdivision and Development Appeal Board)* and made the following comments:
- a. This seems to be an objection to his conduct as the Development Authority for this hearing. In terms of information provided regarding the location of the LRT stations, there was no attempt to mislead the Board. He was simply responding to questions on the fly and it was not a matter of withholding information or acting improperly.
  - b. Paragraph [19] states "The development authority is primarily there to explain the planning considerations underlying the decision, and should not actively advocate the result". Paragraph [20] states that the reasons are generally short and participation in development appeals is influenced by that. "An appropriate explanation of the reasons behind the granting of the permit is not objectionable... There is a significant public policy element in planning decisions, and the development officer is entitled to make representations to the SDAB on the impact that any particular development will have on the community".
  - c. He is legally required to uphold the planning process and the *Edmonton Zoning Bylaw* and if the Appellant is questioning his conduct or neutrality, he must object.

## Decision

- [77] 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 Cannabis Retail Sales must commence operations within nine (9) months of the date of issuance of this Development Permit;



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*).

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

- a) The minimum required 200 metres separation distance between the Cannabis Retail Sales Site and a Public Library (Stanley A. Milner Edmonton Public Library) pursuant to Section 70(2) is reduced by 116.0 metres to permit a minimum allowed separation distance of 84.0 metres.

### **Reasons for Decision**

[79] The proposed development is to change the Use from Health Services to Cannabis Retail Sales. The Subject Site is located in the CCA Core Commercial Arts Zone. Pursuant to Section 910.5(2)(f) of the *Edmonton Zoning Bylaw*, Cannabis Retail Sales is a Permitted Use in this zone.

[80] Cannabis Retail Sales is subject to Special Land Use Provisions in section 70 of the *Bylaw*. Section 70(2) provides:

70(2) Any Site containing a Cannabis Retail Sales shall not be located less than 200 m 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 m separation distance shall be measured from the closest point of the subject Site boundary to the closest point of another Site boundary, and shall not be measured from Zone boundaries or from the edges of structures;
- b. the term “public library” is limited to the collection of literary, artistic, musical and similar reference materials in the form of books, manuscripts, recordings and films for public use, and does not include private libraries, museums or art galleries; and
- c. the term "public or private education" is limited to elementary through to high schools inclusive only, and does not include dance schools, driving schools or other Commercial Schools.

- [81] The parties agreed that the proposed development is less than 200 metres from the Site where Stanley Milner Library is to be located (the Library Site). A new building to house the library is currently under construction.
- [82] The Appellants disagreed with the Development Officer's calculation of 84 metres as the separation distance between the Library Site and the Subject Site.
- [83] The Development Officer determined that the Cannabis Retail Sales Use Site was comprised of three Lots numbered 27, 28 and 29 and measured the distance accordingly.
- [84] The Appellant argued that while Lot 27 and Lot 29 both abut Lot 28, Lot 27 does not abut Lot 29, therefore the Subject Site is only Lot 27 and the separation distance is greater. In their view, including Lot 27 with Lot 29 is contrary to the definition of Site in section 6.1 of the *Bylaw*.
- [85] The Board considered provisions from the *Bylaw* and the *Municipal Government Act* cited by the parties:

Section 6.1 defines Site as "an area of land consisting of one or more abutting Lots".

Section 6.1 defines Abut or abutting as "immediately contiguous to or physically touching and when used with respect to a lot or Site, means that the lot or Site physically touches upon another lot, Site, or piece of land, and shares a property line or boundary line with it". The diagram provided in the definition explains the narrative and illustrates that the site marked with an "X" has a common property line with those marked with a check mark.

Section 6.1 defines Lot as 'lot' as defined under Part 17 of the *Municipal Government Act*.

Section 616(m)(v) of the *MGA* defines a lot as "a part of a parcel of land described in a certificate of title if the boundaries of the part are described in a certificate of title by reference to a plan of subdivision".

- [86] The Board finds that the Subject Site is comprised of Lot 27, 28 and 29 for the following reasons:
- a. The definition of Site in section 6.1 is capable of two meanings. A Site could be either a series of Lots where each Lot abuts at least one other Lot in the series; or, a number of Lots, each of which share a common property line with all the other Lots (in other words a number of mutually abutting Lots). The Appellant supported the latter definition, while the City and used the former and also took a functional approach.

- b. The Board prefers the position of the Development Officer.
- c. The Board finds that Appellant's interpretation overly restrictive and inconsistent with other definitions in the *Bylaw*.
- d. The wider interpretation is supported by the definitions and accompanying diagrams for the terms Interior Site and Corner Site also found in section 6.1 of the *Bylaw*. The Board notes that the diagrams included in these two definitions depict a series of abutting Lots in a configuration identical to the Subject Site chosen by the Development Officer.
- e. Further, Lots 27, 28 and 29 appear on a single title and a single building which includes an above ground parking structure and street level commercial uses spans all three Lots to form a single contiguous functional unit. Given that these three Lots function as one and that Lot 27 abuts Lot 28 which abuts Lot 29, the Board finds that these three Lots comprise the Subject Site.

[87] Accordingly, the Board finds that separation distance per section 70(2)(a) of the *Bylaw* between the proposed Cannabis Retail Sales Use Site and the Library Site is 84 metres and a variance of 116 metres is required if the development is to be approved.

[88] Section 70(4) precludes the Development Officer from granting this variance. However, the Board has discretion to do so per section 687(3)(d) of the *Act*. The Board considered two Court of Appeal decisions cited by the Development Officer which provide direction regarding this variance authority.

[89] *Newcastle Centre GP Ltd v. Edmonton (City)*, 2014 ABCA 295 involved the Board's authority to grant a variance to the required separation distance between two liquor stores which were Permitted Uses in the relevant zone. The Court of Appeal ruled that it is an error for the Board to assume, without evidence, that the *Bylaw* creates a presumption of harm to the public and that it cannot grant variances unless that presumption is rebutted by the applicant. Furthermore, the Court stated that the Board must explain in its reasons if there is any interference with neighbourhood amenities, or with use, enjoyment, or value of other land parcels. A mere conclusory statement does not suffice.

[90] More recently in *Thomas v Edmonton*, 2016 ABCA 57, the Court of Appeal commented more generally upon the power of the Board to vary development regulations. The Board notes that the Court of Appeal recognized the notion of common standards and the need for variances to "bright-line measurements" as described by the Appellants in appropriate circumstances (at para 29):

What then is the rationale for this exception? Statutory plans and land use bylaws set out general development standards that are common to all lands in a specific area. These standards are typically defined with precision so that everyone understands what a particular site can be used for, and what can be constructed thereon. But as with all line-drawing, it is recognized that there will be cases in which a strict application of the set standards could lead to an unreasonable result.

To relieve against hardship, the Legislature has conferred on subdivision and development appeal boards the authority to relax – that is vary, dispense with or waive – development standards in the applicable land use bylaw providing certain conditions as set out in s 687(3)(d) are met.

- [91] However as noted by the counsel for the Development Authority in its written submission, the Court of Appeal also cautions the Board against over-extending its authority to allow variances:

Section 687(3)(d) constitutes an exception to the general rule requiring that the SDAB comply with the *Zoning Bylaw*. While the specific overtakes the general, as is usually the case with exceptions, the exception under s 687(3)(d) of the *Act* should not be interpreted so as to defeat the SDAB's general obligation under s 687(3)(a.1) to comply with the *Zoning Bylaw* which the exception modifies. An exception may pre-empt the general theme of the law. Indeed, that is its purpose. But logically it should only do so as precisely as the legislators intended. (at para 16)

- [92] The legal brief and written report submitted by the Development Officer states: Cannabis Retail Sales is a Permitted Use; variances can be granted when reasonable; and, the impacts of Cannabis Retail Sales Use are currently unknown. These submissions also emphasize a public interest in separating cannabis from youth and advise the Board to proceed cautiously and deny the requested variance because a denial would be consistent with the results of public consultation which Council received and carried forward in section 70.

- [93] The Board reviewed the materials submitted by the parties, including the additional materials submitted by the Development Authority at the hearing that were used by City Council in the formulation of section 70 and notes the following:

- a. There was significant agreement that separation distances might be required to protect minors and other vulnerable individuals. There was also acknowledgement that many of the mechanisms used to keep cannabis away from youths are found in other legislation which is not dependent on a physical separation between the two Uses, including AGLC Regulations concerning security, loading, and customer identification.
- b. The materials also recognize an interest in ensuring that the separation distances provide enough appropriate locations so that cannabis stores will be accessible to adults and be distributed across the City.
- c. In the report to City Council, it appears that the major concern was keeping Cannabis Retail Sales “out of sight” of sensitive locations including libraries. In this case, the parties agree that the proposed Cannabis Retail Sales is out of sight because it is not visible from the library. The proposed development faces west and is tucked around the corner from the Library Site along 101 A Street.

- d. The Board reviewed the Stakeholder Comments regarding separation distances provided in the materials submitted at the hearing. According to the Development Authority, these comments formed part of the Cannabis Land use Framework. Most of the comments addressed separation distances from schools. The only response regarding separation distances from a library was that they be removed to be consistent with the approach used for alcohol sales uses.
- e. The Board found no universal agreement in the submitted materials about separation distances generally and certainly none with respect to libraries. The public feedback with respect to library separation distances was more equivocal than the feedback for other uses. Representatives for Edmonton Public Libraries indicated they would prefer a 200 metres buffer as they estimate 200 children visit individual libraries each day and are not always accompanied by adults.
- f. The Board notes that different jurisdictions have taken different approaches when considering a separation distance from a library. As the Development Officer noted, some have adopted greater separation distances. As the Appellants noted, several other jurisdictions did not choose to enact any separation distance requirements between a library and a Cannabis Retail Sales. Furthermore, comparison is difficult as the variance powers associated with the regulatory separation distances are unknown. The *Alberta, Gaming, Liquor and Cannabis Regulations* do not require a separation distance from a library.

[94] Based on the submitted materials, and mindful that it should both refrain from automatic assumptions of harm or overextensions of its variance authority so as to defeat section 687(3)(a.1), the Board considered the following factors in deciding whether to grant a variance to section 70(2):

- a. According to materials provided by both parties, the separation distance was set in the *Bylaw* to ensure that a Cannabis Retail Sales Use would not be visible from a library. In this case, the parties agree that the proposed Cannabis Retail Sales cannot be seen from the library due to intervening buildings and its orientation on the Subject Site. The premises becomes partially visible only after a pedestrian leaves the Library Site and travels approximately 125 metres to the corner of 101A Avenue and 100A Street and turns to face south.
- b. The shortest path to travel which a pedestrian would walk from the public access on the west face of the Cannabis Retail Sales Use to the proposed public entrances to the new Library will be between 315 metres to the initially proposed main public entrance and approximately 147 metres (as roughly estimated by the Development Officer) to the nearest proposed public entrance according to the most current plans provided by the City at the oral hearing.
- c. This is not a direct route. The pedestrian must: exit the premises; immediately turn right and pass the other commercial uses on 101A Street; turn right again and pass the commercial and residential uses which include bars and pubs along 101A Avenue (Rice Howard Way); cross 101 Street (a major arterial roadway with controlled

- pedestrian crosswalk); and, traverse the Library Site to the main entrance on the north elevation or to the nearest entrance on the south elevation.
- d. The Board also notes that the entrance to the proposed Cannabis Retail Sales Use is on the west elevation facing 101A Street. This street is a minor roadway connecting Jasper Avenue and 102 Avenue; it is not a significant transportation thoroughfare.
  - e. The Board considered the most likely modes of transportation and paths of access for patrons coming to the library:
    - i. Patrons arriving by private vehicle are most likely to use public underground parking and therefore will not see the proposed Cannabis Retail Sales Use. As 101A Street is not a thoroughfare, they are unlikely to even pass the Cannabis Retail Sales prior to parking.
    - ii. Patrons arriving by underground transit (LRT) to the existing stations will not pass or view the proposed Cannabis Retail Sales Use if they use the most direct routes to the library building.
    - iii. Patrons travelling on foot or using public surface transit from the north and east will never see the proposed development. Patrons accessing from the west, using public transit along 102 Avenue or Jasper Avenue will not see the proposed development.
    - iv. In addition, once the new at grade LRT stations are operational and the library reopens in 2020, the proposed Cannabis Retail Sales Use will not be visible for patrons of the library arriving by LRT.
    - v. The main bus stop will be reconstructed along 102 Avenue immediately to the north of the main entrance, patrons using this bus stop will be 300 metres walking distance to the Cannabis Retail Sales and unable to see it.
  - f. The proposed development is a Permitted Use and is also in keeping with the General Purpose of the CCA Zone and the policies of the Downtown Capital Plan as it will add to the variety of adult oriented uses and amenities located in this pedestrian oriented portion of the downtown area because according to the submitted evidence it is located more than 400 metres east of the next nearest Cannabis Retail Sales Use.
  - g. The Board did not receive any negative feedback in response to notice of the appeal. Two online responses were received which, based on their content, support approval of the proposed development for many of the reasons noted above including its out of the way secluded location which is described as invisible to the library.
  - h. It was noted that the Development Authority submitted evidence that the Edmonton Public Library expressed concern about the proposed location, but no specific details were provided about their concerns. The written material submitted the Development

Authority was a general email prepared in February 2018, prior to the enactment of section 70 endorsing a generally applicable separation distance in principle.

- [95] Weighing all these factors, the Board finds that the proposed development with the required variance 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.

A handwritten signature in blue ink, appearing to read "K. Cherniawsky".

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

Board members in attendance: Mr. V. Laberge, Ms. L. Delfs, Mr. A. Nagy, Ms. S. McCartney

**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**

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**SDAB-D-18-188**

**Application No. 287278928-001**

An appeal to develop a Cannabis Retail Sales Use located at 10125 - 104 Street NW was **TABLED** to November 29, 2018.