

EDMONTON SUBDIVISION AND DEVELOPMENT APPEAL BOARD

Citation CC Growth Corp. v Development Authority of the City of Edmonton, 2019 ABESDAB 10181

Date: December 11, 2019
Project Number: 339507277-001
File Number: SDAB-D-19-181

Between:

CC Growth Corp.

and

The City of Edmonton, Development Authority

Board Members

Rohit Handa, Presiding Officer
Winston Tuttle
Laura Delfs
Sarah McCartney
James Wall

DECISION

[1] The Subdivision and Development Appeal Board (the “SDAB” or “Board”) at a hearing on October 24, 2019, made and passed the following motion:

“That the appeal hearing be scheduled for November 27, 2019.”

[2] On November 27, 2019, the Board made and passed the following motion:

“That SDAB-D-19-181 be raised from the table.”

[3] On November 27, 2019, the Board heard an appeal that was filed on September 30, 2019 for an application by Planworks Architecture Inc. The appeal concerned the decision of the Development Authority, issued on September 26, 2019, to refuse the following development:

Change the use from General Retail Stores to Cannabis Retail Sales

- [4] The subject property is on Plan 1222211 Blk 8 Lot 46A, located at 10803 - Jasper Avenue NW, within the Jasper Avenue Main Street Commercial Zone. The Downtown Special Area Overlay and Capital City Downtown Area Redevelopment Plan apply to the subject property.
- [5] 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;
 - Written submissions from legal counsel of the Appellant;
 - Written submission and PowerPoint presentation from legal counsel of an affected Property Owner; and
 - One online response.

Preliminary Matters

- [6] 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.
- [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 *Municipal Government Act*, RSA 2000, c M-26 (the "*Municipal Government Act*" or "*MGA*").

Summary of Hearing

i) Position of the Appellant, CC Growth Corp.

- [9] K. Becker Brookes of Reynolds Mirth Richards & Fraser appeared as legal counsel on behalf of CC Growth Corp.
- [10] This appeal initially scheduled to be heard on October 24, 2019 was adjourned for more than a month at the request of 2150647 Alberta Ltd., only 6 days in advance of the scheduled hearing. Ms. Becker Brookes did not receive Ms. Anderson's 300 page brief until Friday and no expert's report was included. Ms. Anderson also provided a 60 page PowerPoint presentation first thing this morning. Despite such extensive submissions so close to the hearing, Ms. Becker Brookes is prepared to proceed today.
- [11] Ms. Becker Brookes noted the following corrections to her original submission:
- a. She confirmed that the entrances of the approved Cannabis Retail Sales and the proposed Cannabis Retail Sales are across the street from each other.

- b. The word “minor” should be removed from Paragraph 23 of her submission with respect to the variance. She is not suggesting it is a “minor” variance. The degree of variance in this case does not necessarily determine the degree of impact.
- [12] The proposed development is located in the Mayfair Building on the southeast corner of Jasper Avenue and 109 Street within the Jasper Avenue Main Street Commercial Zone (JAMSC). Cannabis Retail Sales is a Permitted Use in this zone.
- [13] The proposed development violates the required 200 metre separation distance from an approved Cannabis Retail Sales at 10105 – 109 Street as per Section 70.1 of the *Edmonton Zoning Bylaw*. A variance of 168.5 metres is required; however, Section 70.1.b only permits the Development Officer to grant a maximum variance of 20 metres. All other separation distances from sensitive uses and all Provincial Regulations have been complied with.
- [14] The requested variance is appropriate as there is a high volume of both vehicular and pedestrian traffic in this high density, busy commercial area. No evidence has been put forward by the City of Edmonton or the Respondent to support that there are increased negative impacts of having two Cannabis Retail Sales within close vicinity of each other. The concerns raised are speculative and there are serious questions as to whether they are based on factual or planning considerations or stigma.
- [15] While a significant variance is being requested, there is no risk of creating precedent because the Development Officer has limited variance powers. Anything beyond a minimal variance of 20 metres must come before the SDAB and the SDAB does not consider precedents. While previous SDAB decisions have been referred to they are only to show what factors were previously considered in granting variances to separation distances.
- [16] The entire Cannabis industry is heavily regulated, both federally and provincially, which minimizes the impact of two Cannabis Retail Sales in close proximity. The proposed conditions of the Development Officer also mitigate potential concerns.
- [17] In determining if it is appropriate to grant the requested variance, the Board requires evidence that the 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 as per Section 687(3)(d) of the *MGA*.
- [18] The Board is not required to find there will be NO impact. SOME impact is permitted; however it must be an impact that the Board is satisfied with and is not material or not undue. The Board’s decision must be based on evidence, not on speculation or unsupported concerns. Today’s particular set of facts meets the variance test. The Respondent’s concerns are in large part merely speculative with no evidentiary basis.
- [19] The reasons to refuse to grant the variance must focus on proper planning considerations. Stigma or concerns of health impacts cannot be considered. No evidence has been submitted that having two Cannabis Retail Sales too close together will increase crime.

- [20] While the approved Cannabis Retail Sales has a development permit, as far as the Appellant is aware, it does not yet have a licence from AGLC and is not yet operating.
- [21] Sections from *Laux* were referred to by the Respondent which address when variance power can be used. As per *Laux*, unlike other jurisdictions, Alberta has no requirement in its variance power to establish undue hardship. The only test the Board needs to consider today is 687(3)(d) of the *MGA*. There is no basis for the argument that there is an extra hurdle that the Appellant needs to overcome.
- [22] The situation here is a busy downtown location with pedestrian access, vehicular traffic running in all four directions, LRT access and high end residential rental space in the vicinity. The retail space available is of a higher quality than other areas in Edmonton.
- [23] Clustering is an issue if it creates an area where other retail businesses do not want to go. It would be a different set of circumstances if this were a lower rent retail corridor with Cannabis Retail Sales, liquor sales, a cash store and a pawn shop present such as what you find along 118 Avenue. The Mayfair is a relatively new building which still has spaces for lease and there are no other negative uses in the surrounding retail space. As indicated in the Respondent's submission, there is a large variety of retail in the immediate area including bars and restaurants. Ms. Becker Brookes does not believe that two Cannabis Retail Sales across the street from each other will prevent other retail opportunities from using this area of downtown.
- [24] Many municipalities within Alberta struggled with imposing separation distances regarding Cannabis Retail Sales and there are great differences from municipality to municipality ranging from 0 metres to 300 metres. Some of the municipalities made Cannabis Retail Sales a Discretionary Use rather than a Permitted Use.
- [25] The City of Edmonton's decision to go with a 200 metre separation distance was based on the public engagement results they received. Ms. Becker Brookes cautioned the Board from relying on public engagement as the results cannot be considered as actual evidence regarding the impacts of Cannabis Retail Sales.
- [26] The Respondent highlighted sections of the Capital City Downtown Plan which stipulates that there should be compatibility between the entertainment environment and other uses such as residential. This plan talks about limiting the concentration of Bars, Pubs and Nightclubs to prevent overcrowding and public disturbances in any one area. It also encourages a Retail Growth Strategy for the Downtown be adopted to achieve increased overall retail growth, to identify areas for greater retail identity and focus, and to foster clusters of retail businesses. Ms. Becker Brookes submits that the Downtown Plan suggests that retail stores should be clustered in certain areas.
- [27] While the Downtown Plan speaks to the compatibility of different uses it also encourages retail growth. Cannabis Retail Sales is a new and exciting retail business selling a legal product and is to be encouraged. This area prides itself in high end retail stores which target the residents of the higher end downtown residential areas.

- [28] While the Respondent provided crime statistics in this particular area that shows a higher number of assaults, there is no evidence before the Board that Cannabis Retail Sales has any impact on crime. It would be speculative to say that two Cannabis Retail Sales within 31.5 metre proximity would result in an increase in crime.
- [29] The Respondent provided an Alberta Health Services Report that contains recommendations regarding Cannabis regulations for Alberta municipalities. This report was intended to provide guidance and assistance prior to legalization. The Respondent highlighted sections of this report that deal with clustering, social and health impacts, and impacts on vulnerable populations. It is important to note that these were just recommendations and contain no evidence of potential impact. Alberta Health Services' mandate is to ensure regulations are in place to address public health concerns. The Board's concern is planning and development.
- [30] The variance being requested is based on facts and locations. While the Board does not have to rely on previous decisions, these decisions may be helpful because they demonstrate the previous planning concerns that were considered such as what are the amenities of the neighbourhood, how are the neighbours using and enjoying their parcels of land and how will granting this variance impact that.
- [31] Previous decisions supported granting a separation variance where similar circumstances were present as today. The two developments are in a very high density commercial and residential area and allowing them both to operate will not prevent other retail business from locating there. This is not a block of mainly residential or industrial development with a few retail spots available. Quite a few retail opportunities are still present.
- [32] The stores are located directly across the street from each other; however, the street in question is Jasper Avenue, one of the busiest streets in Edmonton with five lanes of traffic. A person would have to cross Jasper Avenue at the controlled intersection at Jasper Avenue and 109 Street; jaywalking is not easy. Traffic going east or west will have much easier access to one of the stores than the other; it is not possible to do U-turns at this location.
- [33] A variety of uses prevail in this area and Cannabis Retail Sales would support not only the high density residential development but also the other uses such as bars, restaurants and other retail establishments. One additional Cannabis Retail Sales will not undermine the desire for diversity in the area.
- [34] In the City of Edmonton, there is a real push towards increasing retail opportunities within access to LRT which the proposed development supports.
- [35] The magnitude of a variance is not always an indication of impact. Here we have a predominately commercial area at street level with a diversity of commercial uses and the two Cannabis Retail Sales are physically separated across a major street. 30 metres side by side is different than 30 metres across the street from each other.

- [36] There is no evidence that Cannabis stores or a proliferation of Cannabis stores increases crime, noise, consumption or use; reduces property values; prevents other business from locating there or that safety is reduced in the area.
- [37] Cannabis use in youth is always a concern but that does not apply here because the required setback from sensitive uses is met. Also the nearby residential area is not particularly family oriented.
- [38] The *Newcastle Centre GP Ltd v Edmonton (City)*, 2014 ABCA 295 (“Newcastle”) decision was referred to and Ms. Anderson included a recent SDAB decision in her material that was appealed to the Courts on the issue of how the SDAB should be guided by *Newcastle*. While the Court of Appeal has not yet issued a decision, *Newcastle* is still instructive to the Board in determining what evidence is required to determine that Section 687(3)(d) has been met. The Board does not have the onus to prove a negative effect. Participants must bring evidence forward which must be more than an expression of concern. The burden is on the Appellant to show there will be no undue impact. The Respondent is here today to give evidence as to why the test has not been met.
- [39] The facts today support the fact that impacts to the surrounding area will not be increased in any way as a result of the variance required between the two locations.
- [40] The Appellant provided the following responses to questions from the Board:
- a. No community consultation was done with neighbours. No support was sought and no negative impacts were received.
 - b. Her client has the support of the landlord who has granted a significant extension in the offer to lease.
- ii) *Position of the Development Officer, I. Welch*
- [41] Mr. Welch referred to Section 70.1(c) of the *Edmonton Zoning Bylaw* which states that if a variance is granted under Section 70.1(b) the Development Permit shall be issued as a Class B Discretionary Development. While the Appellant stated that Cannabis Retail Sales is a Permitted Use at this location, we are ultimately talking about a Discretionary Development.
- [42] The concerns Mr. Welch outlined in his written submission confirm that the proposed development would create a negative impact.
- [43] Regulatory systems are meant to minimize chances of harm which can come from a variety of different contexts. Clustering can be problematic for public health in the case of narcotic sales.
- [44] Mr. Welch submits that public engagement provides guidance as to what the broader community perceives to be undue negative impact. When drafting the regulations council relied on the public input for guidance. It is quite reasonable to bring up public

engagement to determine if an undue impact will be created in light of the significant variance being sought.

- [45] The Cannabis Retail Sales regulations have only been in effect for 19 months. Granting such large variance “creates an absurdity” and Mr. Welch finds this concerning. The 200 metres separation distance results in Cannabis Retail Sales being spaced about a block apart. Council, administration, and public engagement are all saying harm is being created by having them placed too closely together.
- [46] Should this application be granted, two corners of a prominent intersection will be occupied by Cannabis Retail Sales – this is a form of clustering. This is fundamentally bad planning practice and does not create the diversity of uses that the Downtown Plan aims for.
- [47] Mr. Welch provided the following responses to questions from the Board:
- a. He is not aware of any planning related concerns that have been submitted with regards to Cannabis Retail Sales; however, with the moratorium, many of the approved stores have not yet opened. While there is no reviewable evidence of the real harms associated with Cannabis Retail Sales, we have the various planning considerations meant to minimize potential harm.
 - b. No community consultation was done regarding this application. Many of the apartments in this area are rentals.
 - c. When you have clustering you have several stores of the same type that operate in similar ways with similar hours. This creates a fundamental change in the built-up environment of that area and can create a safety hazard as eyes are taken off the street at a set hour. If there are a variety of operating hours there are ongoing eyes on the street for longer periods of time.
 - d. Corner spaces of a major intersection tend to be prime property. It is problematic if two of these prime spaces are taken up by Cannabis Retail Sales. This harms economic diversity and creates a wave effect on the surrounding area. When you have a diverse area in terms of store types and use categories it generally benefits everyone as there is more variety, more shoppers and an increased value of the stores. If you start limiting the store types and uses you have the exact opposite.
 - e. The entrance and exit to the proposed Cannabis Retail Sales is directly beneath the main outdoor amenity area for the Mayfair building. Many people do not like the smell of Cannabis or have allergies. Part of the reason for setbacks and separation distances of stores and residential is because of this discomfort or harm that can come from the use of Cannabis.
 - f. Many people disregard the regulations as to where Cannabis can be smoked and the smell goes up into the residential area.

iii) Position of an Adjacent Property Owner, 2150647 Alberta Ltd.

- [48] B. Anderson of Bennett Jones LLP appeared as legal counsel on behalf of 2150647 Alberta Ltd. S. Bruce-Hayes representing 2150647 was also present. In addition to her law degree, Ms. Jones also has an urban planning architectural background. She presented a PowerPoint presentation to the Board.
- [49] Much of the urban environment is not tangible or measurable. It is taken in on a subjective basis. People are not really aware of why they like a certain area – they just congregate there.
- [50] This type of store has an impact on how an area is perceived and the harms or impacts are difficult to measure. You know when you feel good about a space but cannot articulate it. A lot of planning is not hard measurable evidence and is based on predictions and projecting into the future as to what might occur. While not all planning impacts are easily measurable it does not mean they are not important considerations.
- [51] The subject premise is on the southeast corner of a busy intersection.
- [52] In addition to Section 687(3), which outlines the Board's test, Section 11.4 of the *Edmonton Zoning Bylaw* suggests there should be a unique circumstance present when considering if a variance should be granted. In this case, there are no unique circumstances; yet a variance of 84 percent is being requested.
- [53] A suggestion was made that the Capital City Downtown Plan states there should be increased retail opportunities. This goal can be found in pretty much any Area Redevelopment Plan or Statutory Plan. However, not every Area Redevelopment Plan or Statutory Plan focuses so heavily on bars and nightclubs as the Downtown Plan (updated in 2017) which suggests that this is a sensitive environment. Care must be taken when adding additional sensitive uses such as Cannabis Retail Sales, especially if the impact is not known.
- [54] There are five subzones in the Downtown area and Jasper Avenue is the core that connects all of these sub-areas. This is an important core to get right as it is an important entrance point to the downtown area. The Statutory Plan already cautions as to what is appropriate to put in the area and it is important to get the right mix of nightclubs, bars and pubs.
- [55] There is a 200 metre separation distance rule in effect regarding locating Cannabis Retail Sales from each other which is generally about the length of a City Block. Here an 84 percent variance (168.5 metres) is required. In municipalities that have decided to have 0 metre setbacks between Cannabis Retail Sales, this type of use is Discretionary and is controlled that way rather than using a separation distance.
- [56] She disagrees with the Appellant that Alberta Health Services recommendations do not translate into planning impacts and the two are not linked. Section 7 of the *MGA* gives Council the authority to pass bylaws that are prospective in nature and allows Council to

put protections in place to ensure that not too many Development Permits are issued:

Part 2
Bylaws

Division 1
General Jurisdiction

General jurisdiction to pass bylaws

- 7 A council may pass bylaws for municipal purposes respecting the following matters:
- (a) the safety, health and welfare of people and the protection of people and property;
 - (b) people, activities and things in, on or near a public place or place that is open to the public;

Until you get a use on the ground and enough years have passed we do not know what the impacts of setback distances are. Health and safety are not separated from planning.

- [57] While it is correct that the material she submitted from Alberta Health Services are just recommendations, Alberta Health Services suggested 300 to 500 metre separation distances between Cannabis Retail Sales. Where other municipalities have imposed 0 or a minimal setback requirement, the use was left as Discretionary rather than Permitted.
- [58] Regarding public consultation, over 50 percent of respondents felt Cannabis Retail Sales should be 200 metres or more apart; 200 metres was the lower distance and 30 percent of respondents wanted Cannabis Retail Sales separated by 1 kilometer. While it is correct that these Respondents are not elected and have no particular specialty, Council is elected and makes decisions on behalf of these constituents that have expressed concerns. Council felt that 200 metres would be a balancing of these interests. When Cannabis Retail Sales came back before Council in February, 2019, Council chose not to revise this 200 metre setback.
- [59] The 200 metre separation distance is intended to ensure an equitable distribution of Cannabis stores, prevent clustering of Cannabis stores in one neighbourhood and to maintain the opportunity for a diversity of business in commercial areas. The Development Officer has been authorized to grant a maximum variance of 20 metres to deal with situations where Cannabis Retail Sales do not quite comply with the required 200 metre separation distance. This limit is not placed on the Development Officer for all uses; Council was obviously concerned about this use.
- [60] The following criteria were considered in prior SDAB decisions in determining whether a separation distance variance should be granted:
- Sightlines between two stores
 - Same street
 - Walking Distance
 - Diversity of Uses in area
 - Nature of Roadways

- Character of the Area

- [61] A series of slides was shown to provide context as to how the two Cannabis Retail Sales would be located in relation to each other, the lineal retail frontage they would take up along Jasper Avenue and 109 Street, and the large visual impact two adjacently located stores would have on pedestrians and motorists entering the area from different angles. 109 Street and Jasper Avenue operate differently; 109 Street is very wide with a boulevard separating the two directions of traffic while Jasper Avenue has no middle boulevard.
- [62] Ms. Anderson is not aware of any other situation where two Cannabis Retail Sales that are visible at the same time have been allowed at such a prominent corner.
- [63] It is important to look at the immediate context. While the building may be new and high end this is not necessarily the case for all of the surrounding area. There are many rentals and a transient population going west into Oliver. There is a high concentration of bars, pubs and places where people will consume alcohol within 150 metres of the proposed development.
- [64] Slide 21 (an overhead map) provides a summary of the location of the Approved and Proposed Cannabis Retail Sales in relation to nearby liquor stores, restaurants, bars, pubs and nightclubs. Two other approved Cannabis Retail Sales are also identified on this map.
- [65] This is quite a busy pedestrian environment and the Downtown Plan mentions making the area child friendly. When Ms. Anderson walked the area prior to this hearing, she did see some children walking in the area.
- [66] Ms. Anderson had difficulty getting numbers or evidence regarding crime statistics for this area although there did seem to be a number of assaults. No traffic study was available. The analysis today does not easily lead into quantitative measures.
- [67] Reference was made in the Appellant's submissions to two Cannabis Retail Sales that were approved across the street from each other on Whyte Avenue; however the circumstances found on Whyte Avenue are very different than what is before the Board today. The two Cannabis Retail Sales on Whyte Avenue are located mid-block, have a much smaller street frontage and can barely be seen by a person entering the area. There is also a dividing boulevard on Whyte Avenue and very large trees along both sides of the street which help mitigate the visual impact.
- [68] In Section 10.7(2)(e), *Laux* cautions about granting such a significant variance as is being sought today:

It is obvious that if a general rule is to be set aside in a given case, there should be some unusual circumstances to justify such an action, otherwise there is a danger that the use of the variance power can result in a *de facto* redrafting of the bylaw through the board exercising that power

Council intended for the 200 metre separation distance to be addressed in a meaningful manner. Had they wanted to decrease that separation distance they could have done so when the review of Cannabis Retail Sales was done in February of 2019.

- [69] Slide 51 of the PowerPoint presentation contains directions that were provided to the SDAB by the Development Authority prior to legalization but are still appropriate. Setbacks and public consultation went through a thorough analysis by legal planning and Council. A number of factors were at play when Council made the decision to impose the 200 metre separation distance.
- [70] We are at the infancy stage of Cannabis Retail Sales in the retail environment. A Development Permit is issued in perpetuity and you cannot roll it back. It is better to roll out slowly and watch for circumstances that occur in ensuing years and re-assess after that. Why is there a rush to approve something you may not want? A new application can be made in 6 months; that would allow an additional 6 months to see how existing stores interact.
- [71] 170 Cannabis Retail Sales have been approved in Edmonton and only 54 of those have been licensed by AGLC. Because of the moratorium most stores have been operational for only 6 to 12 months at best. On November 21, 2018, there were only 13 licensed retailers in Edmonton. There is not much data as to the impact of Cannabis Retail Sales as opposed to liquor.
- [72] Planning impacts of Cannabis Retail Sales are difficult to determine partially because a significant black market still exists. Also, edibles will be coming on stream soon, offering a wide range of new products.
- [73] Cannabis Retail Sales is a very new industry and there is a lot of learning to do with respect to Cannabis impacts on driving. It is difficult to compare what is happening in Canada to what is happening in the United States as per the following quote from a study done in July.
- Impacts of legalization on the use of cannabis in Canada remain uncertain because the *Cannabis Act* has been in place for less than a year and because Canada's framework for legalization makes comparisons to other jurisdictions difficult" (due to varying regional access, different provincial/territorial retail sales models, restrictions on potency. and product types).
- [74] Having two Cannabis Retail Sales at such a prominent location increases the likelihood of negative interactions regarding patrons and nearby alcohol uses.
- [75] A lead tenant in such a prominent location often determines how an area is viewed. In this case it can impact what businesses stay or move into the area. A negative perspective often leads to a negative reputation and less variety of businesses.

[76] As a Development Permit is issued in perpetuity it is important to move forward carefully. Approving a second Cannabis Retail Sales in this location will result in clustering and will elevate potential negative impacts because:

- This is a busy intersection entering the Downtown
- Two stores will occupy a large amount of highly visible street frontage
- They would be directly across the street from each other
- They would be easily visible at the same time
- It would be a short walking distance between stores
- The area is historically sensitive to safety issues, public disturbances, negative social interaction and perceptions
- There are a high number of bars, nightclubs and pubs in the vicinity.

Sean Bruce-Hayes (2150647 Alberta Ltd.)

[77] Mr. Bruce-Hayes has done over 75 licenses across Canada, predominately in BC and Alberta. He is currently working with companies to observe roll-outs in different municipalities. In Alberta, different municipalities have established different setbacks and he is now seeing how these setbacks impact the community and the bottom line of Cannabis Retail Sales.

[78] Reputation, perception and stigma are real harms. Stigma is very relevant and is one of the biggest hurdles they have had to overcome.

[79] Kamloops, B.C. took a fairly liberal approach towards Cannabis Retail Sales and this resulted in a negative stigma in the media. At the block level, anchor tenants dictate a complex. There are certain tenants and providers that do not want Cannabis and will decide to either to not move into a community or will decide to move out of that community due to the presence of a Cannabis Retail Sales. The presence of Cannabis Retail Sales also impacts if people will want to live in a community. Two stores clustered in one corner on prime anchor tenant real estate do have an impact on a community.

[80] The City of Medicine Hat did not establish setbacks for Cannabis Retail Sales and six are currently located in the downtown area. Now shoppers do not want to go downtown because of all the Cannabis and this is not helping other business located there either. Allowing too many businesses too close together in Medicine Hat is setting up businesses in the downtown area to fail as they will not all succeed.

[81] Nanton, B.C, with a population of 8,000 did not establish setback requirements for Cannabis Retail Sales and there are currently 7 approved Development Permits. There is no way all of these Cannabis Retail Sales can be sustained.

[82] Crime statistics take time but what leads crime statistic are insurance premiums. Both landlords and tenants are being hit with additional insurance premiums as insurance providers are seeing there has been an increase in break-ins relating to Cannabis Retail Sales.

[83] Ms. Anderson and Mr. Bruce-Hayes provided the following responses to questions from the Board:

- a. They are not suggesting that this area cannot sustain several retail stores. But the question that needs to be answered is what is the pedestrian experience coming in and what perceptions to they get from the environment?
- b. Ms. Anderson believes Cannabis Retail Sales are allowed to be open until 1:00 a.m. and would be busiest in the evening. These hours would align with pubs and bars.
- c. AGLC wants Cannabis Retail Sales to educate their patrons that the mixture of Cannabis and alcohol is very negative. Municipalities took this into account when they imposed separation distances.
- d. She is not aware of any negative concerns from existing Cannabis Retail Sales other than the increased break-ins mentioned by Mr. Bruce-Hayes. It will take years until there is a large enough body of data or experience to be able to quantify some of the negative impacts. Vancouver led Canada in Cannabis Retail Sales and has seen an increase in smoking, loitering and crime.
- e. Ms. Anderson agreed that the application of section 11.4 is not a mandated requirement but believes that the circumstances of the site are part of the overall criteria that the Board should look at. The Board should consider what is unique about the site to warrant granting such a large variance; otherwise, what is the point of a 200 metre required separation distance. There is plenty of other retail space available mid-block which would have much less of an impact.
- f. She agrees that the Newcastle decision says you cannot presume harm simply because a separation distance is provided in the bylaw. In this case, there is no easy way to present tangible, measurable harm. There are soft planning impacts and perceptions in play which are not so easy to measure but no less important.
- g. The Board can make a reasoned decision without having to wait and see. Ms. Anderson feels enough information has been presented to demonstrate that approving the permit will result in negative impacts.

iv) Rebuttal of the Appellant, Ms. Becker Brookes

[84] In response to a question from Ms. Becker Brookes, Ms. Anderson confirmed that her client's Cannabis Retail Sales is not yet operating.

[85] While Section 70.1(c) of the *Edmonton Zoning Bylaw* provides that if the Development Officer grants a variance the development will be considered a Discretionary Development, this is a Permitted Use for which the SDAB would be granting a variance.

[86] The Development Officer stated that considering a variance of this significance would be an absurdity and it is expected that the SDAB should respect the will of City Council.

The SDAB does not owe any deference to Council as long as the Board is complying with the variance test under Section 687 of the MGA.

- [87] It was stated that it is bad planning to have two of the same type of businesses on two corners of the same intersection. This all goes back to the stigma associated with Cannabis Retail Sales and would not be considered as bad planning if we were talking about two shoe stores or if you could see two shoe stores at the same time.
- [88] Ms. Anderson stated she is not aware of any complaints regarding the operation of Cannabis Retail Sales currently in operation. This demonstrates the lack of concrete evidence pertaining to required separation distances. The legal brief states that the City does not yet know the impacts but “thinks” that these are what they will be.
- [89] There are no comments about currently operating stores to support these speculative concerns and no one appeared today to oppose the proposed development other than Ms. Anderson and her client. Notice would have been provided to all affected parties within a 60 metres radius. While some properties would be rented, the owners of the buildings would also have received notice. The owner of the Mayfair supports this appeal and would be answerable to all of her tenants.
- [90] If there was not a Cannabis Retail Sales across the street this would be a Permitted Use and would have been granted a permit as of right. The exact same concerns would exist of someone stepping outside and smoking within the Mayfair’s amenity area. That has to do with consumption rules and has nothing to do with separation distances.
- [91] It is true that it is often difficult to provide measurable statistics. Sometimes evidence is measurable such as a sun shadow study. Sometimes it is anecdotal such as a person being worried that a neighbour is looking down at them in their back yard. That is all evidence. However, the Board cannot rely on evidence that is merely a speculation of concern.
- [92] Ms. Anderson spent quite a bit of time on the fact that the two stores are visible at the same time and that they take up a lot of retail space on that particular corner. How does the visibility of those two stores at same time create an undue impact or materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land other than the stigma attached to Cannabis Retail Sales? Stigma is not evidence and cannot be used as a proper planning consideration to find that some negative impact will occur.
- [93] A mockup of the proposed store depicts a relatively high end store intended to target a high end, professional market. Provincial regulations regarding signage; screening so you cannot see into stores; and proposed conditions requiring design elements which promote a safe urban environment and outdoor lighting all address concerns regarding the impact of having two stores. Any harm from the visibility perspective will be mitigated quite substantially by the imposition of these conditions.
- [94] The Board cannot take Section 11.4 of the *Edmonton Zoning Bylaw* into account. The Board’s only test is outlined in section 687(3)(d) of the *MGA* and to add additional hurdles would be an error.

- [95] Regarding the quote from Laux presented on Slide 50 it is important to also read the footnote that is referenced (²⁹⁷) which gets you into the authority as to grant or deny the variance.
- [96] Much time was spent talking about the various bars and restaurants in the area. These are Permitted Uses and are intended to be in an area where there is a proliferation of these types of businesses.
- [97] This is an area where there is commercial on the main floor and residential above which contributes to a vibrant area. That is a major distinction between Whyte Avenue and Jasper Avenue and the two areas have a very different look and feel.
- [98] As there is currently no Cannabis Retail Sales operating in the area, the crime statistics presented by Ms. Anderson cannot be attributed to Cannabis Retail Sales and can only be attributed to existing uses which include many restaurants and bars.
- [99] Business competition is part of what is underlying today's appeal. This is supported by Mr. Bruce-Hayes comments regarding the impacts of a lack of separation distances on the bottom line of a business.
- [100] A lot of qualitative and speculative concerns have been raised but there is no evidence regarding potential impacts. The City has not been able to point to any complaints and no evidence has been presented to support the speculative concerns raised by the public engagement process or the recommendations set out in the Alberta Health Services Report.
- [101] There was a lot of discussion regarding visual impacts but many regulations and conditions are in place to mitigate the impact of the store frontages.
- [102] Ms. Becker Brookes provided the following response to a question from the Board:
- a. Cannabis Retail Sales are permitted to operate between 10:00 a.m. and 11:00 p.m. There is a significant difference between these hours and the hours of bars and restaurants. If one of these spaces were to be occupied by a shoe store it would most likely close by 6:00 p.m. leaving an even larger gap of time when there are no "eyes on the street".

Decision

- [103] 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 shall include design elements that readily allow for natural surveillance to promote a safe urban environment, where applicable and to the satisfaction of the Development Officer, including the following requirements:

- customer access to the store is limited to a storefront that is visible from the street other than a Lane, or a shopping centre parking lot, or mall access that allows visibility from the interior of the mall into the store;
 - the exterior of all stores shall have ample transparency from the street;
 - Any outdoor lighting shall be designed to ensure a well-lit environment for pedestrians and illumination of the property; and
 - Landscaping shall be low-growing shrubs or deciduous trees with a high canopy at maturity to maintain natural surveillance.
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.

NOTES:

1. An approved Development Permit means that the proposed development has been reviewed only against the provisions of the *Edmonton Zoning Bylaw*. It does not remove obligations to conform with other legislation, bylaws or land title instruments such as the *Municipal Government Act*, the ERCB Directive 079, the *Edmonton Safety Codes Permit Bylaw* or any caveats, covenants or easements that might be attached to the Site.
2. The Development Permit shall not be valid unless and until the conditions of approval, save those of a continuing nature, have been fulfilled.
3. Signs require separate Development Applications.
4. The City of Edmonton does not conduct independent environmental checks of land within the City. If you are concerned about the suitability of this property for any purpose, you should conduct your own tests and reviews. The City of Edmonton, in issuing this Development Permit, makes no representations and offers no warranties as to the suitability of the property for any purpose or as to the presence or absence of any environmental contaminants on the property.
5. A Building Permit is required for any construction or change in use of a building. For a building permit, and prior to the Plans Examination review, you require construction drawings and the payment of fees. Please contact the 311 Call Centre for further information.
6. This Development Permit is not a Business Licence. A separate application must be made for a Business Licence.

[104] In granting the development, Section 70.1(a) of the *Edmonton Zoning Bylaw* is varied in this instance as follows:

1. The minimum required separation distance from another Cannabis Retail Sales of 200 metres is varied to 31.5 metres.

Reasons for Decision

[105] Cannabis Retail Sales is a Permitted Use in the (JAMSC) Jasper Avenue Main Street Commercial Zone.

[106] The Appellant is seeking a variance to one of the regulations in the *Edmonton Zoning Bylaw* (the “Bylaw”) that relates to the separation distance between Cannabis Retail Sales.

[107] The Board heard evidence on the factors that should be considered when considering the variance. Those factors included the Development Authority’s test in Section 11.4 of the *Bylaw* and several factors that related specifically to the Use. The Board was also directed to an excerpt from Professor Laux’s Planning Text requiring “unusual circumstances” as a consideration.

[108] With respect to the submissions relating to the Use, the Board finds that these are an immaterial and improper consideration before the Board, and therefore, cannot be given weight. The Use is a Permitted Use in the Zone. Council has made it abundantly clear that the Use in its own right is suitable for the proposed location. Any impacts directed solely at the Use, and not at the separation distance, must be disregarded.

[109] Moreover, with respect to the factors found in Section 11.4 of the *Bylaw*, the Board believes it would be an error of law to consider those factors in determining the suitability of a variance.

[110] In coming to this conclusion, the Board relies on the Alberta Court of Appeal leave decision in *Tymchak v. Edmonton (Subdivision and Development Appeal Board)*, 2012 ABCA 22. In that decision, the Court stated [**emphasis added**]:

[19] Counsel for the applicant Tymchaks suggests that the Subdivision and Development Appeal Board erred in law by failing to discuss the tests for a variance in s 11.4(1) of the bylaw. They are fairly narrow, and require unnecessary hardship, or practical difficulties peculiar to that lot.

[20] **I see no error.** That section expressly gives the tests for relaxation by the development officer. **The Subdivision and Development Appeal Board is subject to different tests, set by s 687(3)(d) of the Municipal Government Act (RSA 2000, c M-26).** They are laxer: no undue or material interference to neighbors’ land or the neighborhood. So **I cannot see why the Subdivision and Development Appeal Board could or should use the tests in the bylaw.**

...

[21] **A bylaw cannot validly contradict an “enactment” of the Province: s 13, *Municipal Government Act*.**

- [111] Similarly, the words “unusual circumstances” are found nowhere in the *Municipal Government Act* (the “MGA”) test. Notwithstanding the Board’s recognition of Laux as a leading authority in Planning Law, the Board does not agree that this is a prerequisite, or a proper consideration, to granting a variance. The only test is that found in Section 687(3)(d) of the MGA.
- [112] Therefore, in considering the Appeal, the only issue before the Board is whether the requested variance to the separation distances would unduly interfere with the amenities of the neighbourhood, or materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land.
- [113] The Board finds that proposed development would not offend either prong of this test.
- [114] The Board heard evidence that the separation distances are fundamentally introduced to address the adverse impacts of clustering specified Uses. When imposed, these distances are intended to promote economic diversity while also protecting against adverse impacts that may result when certain regulated uses are closely located.
- [115] However, the Board cannot presume harm simply because a separation distance exists (*Newcastle Centre GP Ltd v Edmonton (City)*, 2014 ABCA 295, at para 6). The Board must rely on the evidence presented during the hearing to determine how a relaxation to the separation distances offends this Board’s test in the MGA. The evidence presented during the Appeal does not meet the threshold contained in that test.
- [116] The Board agrees with the Appellant’s submission that some interference is not enough to satisfy the test. The interference must be “undue” or “material”.
- [117] As previously stated, one of the primary purposes of separation distances is to promote economic diversity. The Board heard evidence that there is already a diversity of Uses in the area and that the addition of this second Cannabis Retail Sales Use would not unduly impact that diversity.
- [118] The Board accepts this evidence. The addition of this second Cannabis Retail Sales Use will not sterilize or disincentivize development in the area. Based on the photographic evidence and submissions of the Appellant, there is an abundance of diverse Uses in the area. A second Cannabis Retail Sales location will not materially impact that aspect of the area.
- [119] Moreover, the Board finds that the proposed development will not detract from the objectives found in the *Capital City Downtown Plan* relating to safety, positive social interaction, overcrowding, and public disturbances which could result from a clustering of Uses.

- [120] The provisions in that Plan largely relate to the impacts of Bars, Pubs, and Nightclubs. As indicated in the Respondent's submission, this document was updated in 2017 when the legalization of Recreational Cannabis was in sight. At that time, Council could have added concerns to the Plan relating to Cannabis Retail Sales. They chose not to.
- [121] Instead, Council chose to make Cannabis Retail Sales a Permitted Use. As previously stated, the Board cannot presume harm would arise simply as a result of the separation distances existing. This is especially so in the context of Permitted Uses.
- [122] Much of the evidence presented in opposition to the variance related to the current state of the area and not specifically to how Cannabis Retail Sales will negatively impact or exacerbate that current state. The evidence relating to crime and the submissions that there would be an increase in consumption of Cannabis in the area are not persuasive.
- [123] Crime currently exists in the area while there are no Cannabis Retail Sales Uses operating. To conclude that the proposed development would *de facto* increase crime, without supporting evidence, would be an error. Further, when questioned by the Board, neither the City nor Respondent could provide evidence from other Cannabis Retail Sales where those impacts were realized.
- [124] Moreover, the permit being sought is for the sale of Cannabis and not for consumption. Submissions that the development will increase consumption of Cannabis in the area are speculative. In addition, the consumption of Cannabis is already, and more appropriately, regulated outside of planning regulations.
- [125] The Respondent conceded that there simply is not enough evidence available to support the adverse impacts of closely located Cannabis Retail Sales. She correctly pointed out that it is difficult to prove an adverse impact at this point of legalization in Canada. However, this Board cannot adopt a "wait and see" approach. A decision must be made on the best evidence available at the time of the application.
- [126] The Board prefers the evidence of the Appellant in this instance and is not satisfied that these two Cannabis Retail Sales locations will cause an economic impact at this location. This is the main relevant argument available when considering a variance to the separation distance in this context and it falls short in this circumstance in amounting to an "undue" or "material" interference, given the diversity of adjacent Uses and the sheer density of the area.
- [127] The remaining submissions related to the Use, which is a Permitted one. They relied on the stigma still associated with the Use and preconceptions that are unsupported by tangible evidence. This is not sufficient evidence as contemplated in the *Newcastle* decision.
- [128] The only objection to the development was put forward by a potentially competing business. No other opposition was noted, and no one else appeared in opposition at the appeal despite the large number of residents who would have been notified in the area.

This bolsters the finding that the proposed development would not materially interfere with the use, enjoyment, or value of neighbouring parcels of land.

[129] Moreover, the proposed development has the full support of the landlord who is also the landlord of the residential tower above. Any impact to the amenities of the neighbourhood as a result of granting the variance would be felt most by the landlord and its tenants. This, together with the fact that no other neighbourhood opposition was noted, is suggestive that the interference caused by the proposed development will not amount to “undue” interference necessary to preclude allowing the development at the proposed location.

[130] Therefore, the Board finds that a variance to the separation distance in these specified circumstances is appropriate.

A handwritten signature in black ink, appearing to read 'Rohit Handa', with a stylized flourish at the end.

Rohit Handa, Presiding Officer
Subdivision and Development Appeal Board

cc: Development & Zoning Services – I. Welch / H. Luke

Important Information for the Applicant/Appellant

1. This is not a Building Permit. A Building Permit must be obtained separately from the Sustainable Development Department, located on the 2nd Floor, Edmonton Tower, 10111 – 104 Avenue NW, Edmonton, AB T5J 0J4.
2. Obtaining a Development Permit does not relieve you from complying with:
 - a) the requirements of the *Edmonton Zoning Bylaw*, insofar as those requirements have not been relaxed or varied by a decision of the Subdivision and Development Appeal Board,
 - b) the requirements of the *Alberta Safety Codes Act*,
 - c) the *Alberta Regulation 204/207 – Safety Codes Act – Permit Regulation*,
 - d) the requirements of any other appropriate federal, provincial or municipal legislation,
 - e) the conditions of any caveat, covenant, easement or other instrument affecting a building or land.
3. When an application for a Development Permit has been approved by the Subdivision and Development Appeal Board, it shall not be valid unless and until any conditions of approval, save those of a continuing nature, have been fulfilled.
4. A Development Permit will expire in accordance to the provisions of Section 22 of the *Edmonton Zoning Bylaw, Bylaw 12800*, as amended.
5. This decision may be appealed to the Alberta Court of Appeal on a question of law or jurisdiction under Section 688 of the *Municipal Government Act*, RSA 2000, c M-26. If the Subdivision and Development Appeal Board is served with notice of an application for leave to appeal its decision, such notice shall operate to suspend the Development Permit.
6. When a decision on a Development Permit application has been rendered by the Subdivision and Development Appeal Board, the enforcement of that decision is carried out by the Sustainable Development Department, located on the 2nd Floor, Edmonton Tower, 10111 – 104 Avenue NW, Edmonton, AB T5J 0J4.

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