



**EDMONTON
TRIBUNALS**

*Subdivision &
Development
Appeal Board*

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Date: October 23, 2018
Project Number: 286329359-001
File Number: SDAB-D-18-165

Notice of Decision

- [1] On October 11, 2018, the Subdivision and Development Appeal Board (the “Board”) heard an appeal that was filed on August 28, 2018. The appeal concerned the decision of the Development Authority, issued on August 14, 2018 to refuse the following development:

Change the use from General Retail to a Cannabis Retail Sales

- [2] The subject property is on Plan 9022549 Blk A, located at 100 - Mayfield Common NW, within the CSC-Shopping Centre Zone. The Major Commercial Corridors Overlay and Jasper Place Area Redevelopment 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
 - One e-mail in opposition

Preliminary Matters

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

Summary of Hearing

i) *Position of the Appellant, Mr. R. Noce, Miller Thomson and Ms. M. Kiziak, Alcanna Cannabis Stores Ltd.:*

- [7] Mr. Noce provided an overview of the key legislation and definitions relevant to Cannabis Retail Sales.
- [8] Site is defined as an area of land consisting of one or more abutting lots in the *Edmonton Zoning Bylaw* and a Lot means “lot” as defined in Part 17 of the *Municipal Government Act*.
- [9] Section 70(3) of the *Edmonton Zoning Bylaw* sets out the minimum required 100 metres separation distance from Cannabis Retail Sales Use to public lands zoned A or AP, which in this case is Gordan Drynan Park. Pursuant to section 70(4), notwithstanding section 11 of the *Edmonton Zoning Bylaw*, a Development Officer is not allowed to grant a variance to subsection 70(2) or 70(3), the minimum required separation distances.
- [10] Section 687(3)(d) of the *Municipal Government Act* provides the Subdivision and Development Appeal Board the authority to vary any development regulation in the zoning 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 neighbouring parcels of land.
- [11] This site is zoned (CSC) Shopping Centre Zone and Cannabis Retail Sales is a Permitted Use in this zone. The proposed Use at this location complies with all of the *Gaming, Liquor and Cannabis Regulations*.
- [12] The decision of *Thomas v Edmonton (City)*, 2016 ABCA 57 addressed the variance powers of the Board pursuant to Section 687(3)(d) of the *Municipal Government Act*. Paragraph [29] of the decision states that “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 section 687(3)(d) are met.”
- [13] The *Newcastle Centre GP Ltd. v Edmonton (City)*, 2014 ABCA 295 decision is helpful and explains at paragraph [6] and [7] that “We, the Board, have a power to grant variances, but the bylaw creates a presumption of harm to the public, and we the Board cannot intervene unless that presumption is rebutted by the applicant. That is an error. The legal test for such waivers is in the *Municipal Government Act*, and it is clear. Section 687(3)(d) mandates this test: the proposed development ... would not (A) unduly interfere with the amenities of the neighbourhood, or (B) materially interfere with or affect the use, enjoyment or value of neighboring parcels of land.”

- [14] Marcie Kiziak, Senior Vice President of Human Resources and Managing Director of Alcanna Cannabis Stores provided the following information:
- a. The proposed cannabis retail store will be operated by Alcanna Cannabis Stores Limited Partnership – an Edmonton based corporation listed on the TSX. Its affiliated companies have been a liquor retailer in Alberta since privatization 25 years ago and they operate 178 stores in Alberta and 278 in total.
 - b. They are bringing their reputation as a first-class responsible retailer into the cannabis business. They intend to work collaboratively with all regulators going above and beyond regulated requirements including the design elements contained in section 70(5) of the *Edmonton Zoning Bylaw*. Staff are provided with more than 70 hours of training and there is a site specific security plan including key card access and trackable locking systems. They have a robust loss prevention team focused on mitigation.
 - c. The location, within a large commercial development, was chosen to ensure security for customers and employees. Stores will be bright, safe and inviting.
 - d. The proposed store is very close to the Alcanna head office and many of the head office staff frequent the shopping centre and are therefore familiar with the immediate area– none of them were even aware that Gordan Drynan Park existed. There is no natural path from the proposed store location to the park in question.
- [15] Photographs and maps were referenced to provide an overview of the site. The proposed Cannabis Retail Sales is located at the southwest corner of the site. With the exception of one building in the southeast corner, all other buildings on the site face inward toward a large parking lot. The entire site is very large at just under 36 acres (144,000 square metres). The park in question is northeast of the subject site.
- [16] The following measurements were provided (“as the crow flies”):
- a. from the building in which the cannabis retail store is proposed to the closest point of the park site is 185 metres,
 - b. from the proposed cannabis retail store to the closest point of the park is 245 metres, and
 - c. from the proposed cannabis retail store to the playground is 365 metres.
- [17] The submitted aerial photograph shows the fences separating the park to the northeast and the residential neighbourhood to the east and the existing openings or gates. A person would have to jump the fence to gain access to the park as there is no gate at that location.
- [18] The submitted maps depicted possible walking routes from the proposed retail sales to the park. The shortest possible route not blocked by a fence would be a walk of 425 metres and would require pedestrians to trespass on private property belonging to the

multi-family development to the east. A person would have to walk 1.1 kilometres to access the park from the store without crossing private property.

- [19] A series of photographs was used to show that the park cannot be seen from the proposed cannabis store as buildings and trees block the view. A person would have to be within 25 metres of the park before it is visible.
- [20] Their photos also show a significant berm between the park and the shopping centre. None of the stores, signage, parking or customers of the shopping centre can be seen from the park. Only the garbage and loading areas at the rear of the Save-On foods are visible even if a person were to stand at the very southwest corner of the park.
- [21] The proposed location for the cannabis store minimizes any potential impact on the surrounding community and it is completely appropriate for the Board to use its variance powers in this matter because:
- a. Mayfield Common Shopping Centre is vehicle focused and there is very little pedestrian traffic from the residential area to the east. Vehicle access is only possible from the south or the west.
 - b. The small neighbourhood park is located northeast of the shopping centre and has only one piece of playground equipment in the farthest corner of the site. It caters to the residents to the east and is surrounded by a fence and trees. Vehicle access to the park is from 166 Street.
 - c. The proposed cannabis store is in a large, inward facing commercial development and will be operated by a large sophisticated business.
 - d. To the south and west of the subject site is commercial development.
 - e. The proposed site cannot be seen from the park and the park cannot be seen from the proposed site. The cannabis retail sales store is separated from the park by a large parking lot and big box stores.
 - f. It would be a distance of 1.1 kilometres to travel from the proposed cannabis retail store to the park without trespassing on private property.
 - g. The park contains a playground; therefore, it is illegal for anyone to smoke cannabis at the subject park as per the *Public Places Bylaw* (Bylaw 18397).
- [22] Only one letter of opposition was received and there was no opposition from the community league, any of the adjacent businesses or from anyone else located in and around this area.
- [23] The Appellants are not opposed to any of the proposed conditions as set out in the Development Officer's written submission.

[24] The Appellants provided the following responses to questions from the Board.

- a. They are not aware of a public walkway located between the subject site and the cemetery.
- b. The chain link fence between the park and the subject site continues all the way to the north boundary of the park and has an extensive hedge growing along it. They confirmed that the fence seems to have been vandalized to create an opening to the park from the shopping center. There is no actual gate at this location.
- c. The lane behind the Save-On Foods leads to the garbage, loading area and staff parking and loops to allow trucks to maneuver in and out. It is not a walkway. It is intended for trucks and vehicles. Windows of the multi-family development to the east overlook this lane, but the residents' view is buffered by large trees.
- d. The location of the Algonquin Motor Inn and its parking lot was shown on an overhead photo. The one letter of opposition received was from a property owner to the north of this intervening establishment.
- e. The Appellants confirmed that the fence separating the subject site from the park is 6 feet in height and is located at the top of a berm. It would be difficult to climb as the pole running along the top of the fence has wire protruding and is not smooth.

ii) Position of the Development Officers, S. Chow and I. Welch

[25] Mr. Welch provided the following responses to questions from the Board:

- a. Pedestrians will potentially trespass on private property in order to reach the park for the purpose of smoking cannabis.
- b. He agrees that the park cannot be seen from the subject site and people would have to be familiar with the area to know the park is there.
- c. He does not dispute the measurements provided by the Appellant showing that the proposed store location is located further than 100 metres from the park.

iii) Rebuttal of the Appellant

[26] The City of Edmonton cannot presume harm and there is no evidence before the Board of any harm whatsoever.

Decision

[27] 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** and **ADVISEMENTS**, as proposed by the Development Authority and reviewed by the Appellants:

CONDITIONS

1. The Cannabis Retail Sales shall not commence operations until such time as the non-medical sale and distribution of Cannabis is authorized by federal and provincial law.
2. The Cannabis Retail Sales must commence operations within nine (9) months of the date of issuance of this Development Permit.
3. There shall be no parking, loading, storage, trash collection, outdoor service or display area permitted within the required setback. (Reference Section 320)
4. All required parking and loading facilities shall only be used for the purpose of accommodating the vehicles of clients, customers, employees, members, residents or visitors in connection with the building or Use for which the parking and loading facilities are provided, and the parking and loading facilities shall not be used for driveways, access or egress, commercial repair work, display, sale or storage of goods of any kind. (Reference Section 54.1.1.c)

ADVISEMENTS:

1. This Development Permit is NOT a Business Licence. A separate application must be made for a Business Licence. Please contact the 311 Call Centre (780-442-5311) for further information.
2. Signs require separate Development Applications.
3. 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 (780-442-5311) for further information.
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. An approved Development Permit means that the proposed development has been reviewed against the provisions of this bylaw. It does not remove obligations to conform with other legislation, bylaws or land title instruments including, but not limited to, the *Municipal Government Act*, the *Safety Codes Act* or any caveats, restrictive covenants or easements that might be attached to the Site. (Reference Section 5.2)
 6. Unless otherwise stated, all above references to section numbers refer to the authority under the *Edmonton Zoning Bylaw 12800* as amended.
- [28] In granting the development, the following variance to the *Edmonton Zoning Bylaw* is allowed:
- a) The minimum required 100 metres separation distance between the Cannabis Retail Site and any Site being used as public lands zoned AP or A pursuant to Section 70(3) is reduced by 100 metres to permit a minimum allowed separation distance of 0 metres.

Reasons for Decision

- [29] The proposed development is to change the Use from General Retail to Cannabis Retail Sales. The subject site is located in the CSC Shopping Centre Zone. Pursuant to Section 320.2(3) of the *Bylaw*, Cannabis Retail Sales is a Permitted Use in this zone.
- [30] Section 687(3)(a.4) of the *Municipal Government Act* (the “*Act*”) directs that in making this decision, the Board must comply with applicable requirements of the regulations under the *Gaming, Liquor, and Cannabis Act*, respecting the location of premises described in a cannabis license and distances between those premises and other premises. Based on the submissions of the parties, the Board finds that requirements of those regulations have been satisfied and this Board has met its obligation under section 687(3)(a.4) of the *Act*.
- [31] Cannabis Retail Sales is subject to Special Land Use Provisions in section 70 of the *Bylaw*. Section 70(3) sets minimum separation distances applicable to Cannabis Retail Sales:
- 70(3) Any Site containing a Cannabis Retail Sales shall not be located less than 100 metres from any Site being used for Community Recreation Services Use, a community recreation facility, a provincial health care facility, as public lands, or any Site that is designated as school reserve or municipal and school reserve at the time of the application for the Development Permit for the Cannabis Retail Sales. For the purposes of this subsection only:
- a. the 100 metres 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 “community recreation facilities” means indoor municipal facilities used primarily by members of the public to participate in recreational activities conducted at the facilities, as per the Municipal Government Act; and
- c. the term "public lands" is limited to Sites zoned AP, and Sites zoned A.

[32] A variance is required to section 70(3)(a) because the subject site is located 0 metres from a site zoned AP (Gordon Drynan Park) using the site to site method of the measurement specified in Section 70(3)(a).

[33] The Development Officer cannot grant the necessary variance to the required separation distance as section 70(4) provides: “Notwithstanding Section 11 of this Bylaw, a Development Officer shall not grant a variance to subsection 70(2) or 70(3)”.

[34] The Board’s authority to grant a variance to the minimum separation distance is different. It is found in section 687(3)(d) of the *Municipal Government Act*. Two Court of Appeal decisions cited to the Board provide direction regarding this variance authority.

[35] The first case, *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 in a zone where that type of development was a Permitted Use. In *Newcastle*, 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 intervene and grant variances unless that presumption is rebutted by the applicant (at paras 6-7). The Court expands on the Board’s obligation to provide reasons and states (at paras 11-12):

[11] Were the Board’s Reasons adequate? Was the result of applying the proper tests in s 687(3)(d) so obvious as to require no explanation in the Reasons? No. It is not self-evident that or how two liquor stores within 500 meters would interfere with neighbourhood amenities, nor that or how they interfere with or affect use, enjoyment, or value of neighbouring pieces of land. This is not a boiler factory in a residential neighbourhood. The problem only arises because there would be two liquor stores in the area. One alone is a permitted use.

[12] Therefore, if there is any interference with neighbourhood amenities, or with use, enjoyment, or value of other land parcels, the Board had a duty to explain that in its Reasons, and it did not. A mere conclusory statement does not suffice, and that is all that paragraph 10 is.

[36] In the second case, *Thomas v Edmonton*, 2016 ABCA 57, the Court of Appeal was considering the Board’s authority to waive the requirement for public consultation under the Mature Neighbourhood Overlay. In the course of that decision, the Court of Appeal

also commented more generally upon the power of the Board to vary development regulations (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.

- [37] In his written submission, the Development Officer indicates that the potential impacts of this Use are currently unknown and argues that the Board should proceed with caution 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.
- [38] During the hearing, the Development Officer agreed that although the site to site measurement is 0 metres, the distances provided by the Appellant which suggest a practical separation distance are accurate. The only potential harm he could foresee would be that if individuals knew of the park they might have incentive to cross over the subject site and vandalize the perimeter fence in order to access the park to smoke cannabis.
- [39] Based on the submissions and evidence provided by the parties, and mindful that it should refrain from automatically assuming without any basis that a variance would interfere with the amenities of the neighborhood or with the use, enjoyment and value of neighbouring properties, the Board grants a variance to section 70(3) for the reasons which follow.
- [40] Cannabis Retail Sales is a Permitted Use and the Development Officer provided no evidence of a negative impact. He acknowledged that the impacts of this Permitted Use are unknown at this point.
- [41] Based on the evidence provided by the Appellant, there are factors in this case which mitigate the potential for a material impact attributable to the requested variance to the separation distance between the sites:
- a) The subject site is a large commercial shopping centre (14.4 hectares). The park site abuts the northeast corner of subject site and the proposed Cannabis Retail Sales Use is located in the southwest portion of the subject site.
 - b) The photos demonstrate that the park site and the proposed development are visually separated. There are no direct sight lines from the park site to the proposed development.

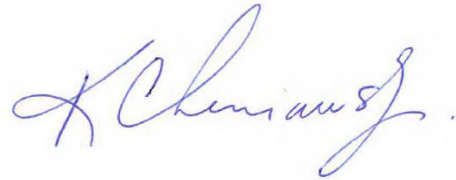
- c) The shopping center parking lot and the building containing the proposed development are obscured by a berm, mature landscaping along the fence and intervening commercial buildings along the east and north boundaries of the subject site.
- d) Based on the photographs provided by the Appellant, an individual would have to travel more than 150 metres from the proposed development before the park site would become partially visible.
- e) The subject site and the park site are also functionally separated. The majority of the shopping centre is oriented towards the interior and away from the park site. It consists of large, big box commercial establishments and a significant portion of customers would be arriving by vehicle. Vehicles accessing the subject Site must enter from the south or the west and would not pass the park or otherwise be alerted to its existence. The park site is accessed from the east along 166 Street.
- f) The south and west boundaries of the park site are enclosed by a six foot chain link fence. There are no gates on the west side abutting the subject Site. The Board notes that the grade of the park site is higher than the grade of the subject site. Therefore, the perimeter fence is located on top of a berm which makes it higher than 6 feet and, with the adjacent tall hedge, more difficult to traverse.
- g) The shortest walking distance from the building which contains the Cannabis Retail Sales Use to the nearest corner of the park is 185 metres and involves climbing over or through the fence and hedge, passing the intervening buildings and traversing the parking lot and its access roads.
- h) The shortest walking distance from the premises to the nearest corner of the park is 245 metres and involves climbing over or through the fence and hedge, passing the intervening buildings and traversing the parking lot and its access roads.
- i) The shortest walking distance using a gate is 425 metres and involves crossing the private parking area and the lawn of the multi-family development to the east as well as passing the intervening buildings and traversing the parking lot and its access roads.
- j) A pedestrian must walk more than a kilometer to legally access the park without crossing any private property.

[42] While the Development Officer raised the potential for trespassers and damage to the existing fence, the Board notes that these issues are pre-existing enforcement issues and there is no evidence before the board that they would be exacerbated by the addition of the Cannabis Retail Sales Use at the proposed location in the far portion of the subject site.

[43] The Board considered the one letter of objection received from the owner of a property within the notification zone. The author's main concern was with Cannabis Retail Sales

Use and its potential link to crime. They were also opposed due to the proximity of residential properties which might be occupied by children and youth. The Board notes that Cannabis Retail Sales is a Permitted Use in the CSC Shopping Centre Zone, there are no required separation distances from residential uses and no supporting evidence was provided for the author's opinion concerning crime.

- [44] The Board notes that the Appellants also argued that the appeal should be allowed as they are first class, responsible retailers and will bring this good reputation to the cannabis space. The Board did not take this factor into consideration in exercising its discretion because an issued development permit is attached to the land. The rights are not restricted to a particular appellant.
- [45] For these reasons, the Board finds that the proposed development 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.



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

Board Members in Attendance:

Mr. V. Laberge; Ms. E. Solez; Mr. L. Pratt

CC: City of Edmonton, Development & Zoning Services, Attn: S. Chow / I. Welch / H. Luke
City of Edmonton, Law Branch, Attn: Mr. Gunther

Important Information for the Applicant/Appellant

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

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



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C&H Properties Inc.
1702, 10104-103 Avenue
Edmonton, AB T5J 0H8

Date: October 26, 2018
Project Number: 286886504-001
File Number: SDAB-D-18-166

Notice of Decision

- [1] On October 11, 2018, the Subdivision and Development Appeal Board (the “Board”) heard an appeal that was filed on September 17, 2018. The appeal concerned the decision of the Development Authority, issued on August 30, 2018, to refuse the following development:

Change the Use from Health Services to Cannabis Retail Sales.

- [2] The subject property is on Plan 1722889 Blk 1 Lot 47, located at 16703 - 82 Street NW, within the (CSC) Shopping Centre Zone. The Edmonton North Area Structure Plan and Schonsee Neighbourhood Structure Plan apply to the subject property.
- [3] The following documents were received prior to the hearing and form part of the record:
- A copy of the Development Permit application with attachments, proposed plans, and the refused Development Permit;
 - The Development Officer’s written submissions;
 - The Appellant’s written submissions; and
 - One on-line response in opposition.

Preliminary Matters

- [4] At the outset of the appeal hearing, the Presiding Officer confirmed with the parties in attendance that there was no opposition to the composition of the panel.
- [5] The Presiding Officer outlined how the hearing would be conducted, including the order of appearance of parties, and no opposition was noted.
- [6] The appeal was filed on time, in accordance with section 686 of the *Municipal Government Act*, RSA 2000, c M-26.

Summary of Hearing*i) Position of the Appellant, C & H Properties Inc.*

- [7] Mr. M. Podmoroff made a submission on behalf of C & H Properties. He was accompanied by Mr. J. Williams and Mr. G. Williams.
- [8] The reason for refusal is the minimum separation distance requirement from a Cannabis Retail Sales to a school (Florence Hallock school) has not been met. The Appellant referred the Board to the Exhibits contained within his written submission that show that the school is situated upon a separate Site west of Poplar District Park. The Exhibits include a Joint Use Agreement between the School Board and the City which confirm that there are two separate Sites. Both sites are reserve in their entirety and the school Site comprises only a small part of the larger reserve Site.
- [9] Mr. Podmoroff quoted paragraph 29 from *Thomas v Edmonton (City)*, 2016 ABCA 57 which addressed the variance powers of the Board:
- [...] 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. However, 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 section 687(3)(d) of the Municipal Government Act are met.
- [10] The school is located on the most westerly portion of a very large Site consisting of two legal lots. The strict application of the minimum required separation distance serves no purpose because of the size of the Site on which the school is located. According to the Court of Appeal, the Board has the authority to vary this requirement.
- [11] Playing fields delineated by large mature trees and undulating surface contours are located between the school and the proposed development. There is fencing on the north part of the Site and a fenced off fire station is also located on a portion of the Site.
- [12] Mr. Podmoroff referred to a survey prepared by an Alberta Land Surveyor, *Exhibit F*. It shows the distance from the closest point of the proposed development to the southwest edge of the commercial property is 139.69 metres. The Development Officer's reason for refusal states that the proposed setback from the edge of the subject property to the school is 95 metres. These two measurements added together (139.69 metres and 95 metres) show that the closest point of the proposed Cannabis Retail Sales to the closest Site boundary of the Poplar District Park site is 234.69 metres.

- [13] The proposed development is a Permitted Use on a commercial site that is physically separated from the school by 605 metres as shown on *Exhibit G* of the Appellant's written submission. The school is well beyond the 200 metre radius required by the *Edmonton Zoning Bylaw* (the *Bylaw*) and well beyond the 100 metre measurement required by Provincial legislation.
- [14] The distance from the Site boundary of the proposed Cannabis Development to the Site boundary of the Site of a future school is 359 metres per *Exhibit H*.
- [15] The Appellants provided the following responses to questions from the Board:
- a) They confirmed that the proposed Use at this location complies with all of the Alberta Gaming, Liquor and Cannabis Regulations.
 - b) A person standing kitty corner from the proposed site would not be able to see the school due to the undulating terrain and large trees.
 - c) The first phase of the subject Site was developed as a drug store with a medical clinic. Their development company subsequently purchased the north portion of the Petro Canada lands to the east. As a requirement of this subdivision, the City required the Appellants to consolidate this newly purchased portion with the existing drug store site further to the west.
 - d) The proposed Cannabis Retail Sales is not visible from the southwest corner of 167 avenue and 82 Street as it is obscured by the Rexall building.
 - e) 167 Avenue and 82 Street are major bus routes. There are two through-traffic lanes as well as a third turning lane on each of these roads at this location. A pedestrian would have to cross these two major roads and travel along the sidewalk running along the south side of 167 Avenue to access the school from the Cannabis Retail Sales. It would be difficult to shortcut through the park due to the presence of barrier fences around the fire station.
 - f) The Appellants do not have any concerns with any of the Development Officer's suggested conditions in his written submission.
 - g) A small portion of two pylon signs located adjacent to 82 Street and adjacent to 167 Street will be used for advertising by the proposed Cannabis Retail Sales. The actual sign on the storefront of the Cannabis Retail Sales will not be visible from the corner.

ii) Position of the Development Officer, I. Welch and S. Chow

- [16] Mr. Welch clarified that the lands upon which the school and the park are located on are on a single lot and they are considered as one Site with a school on one side and the park

on the other. In Edmonton, schools routinely use surrounding fields for outdoor activities through joint use agreements.

[17] Although the proposed Cannabis Retail Sales is a bit further away from the corner of the subject Site, overall it still meets the separation requirements of the *Bylaw*. As noted in his written submission, the majority of residents in the public consultation process indicated that Cannabis Retail Sales should be located at least 200 metres away from schools and Council adopted this distance in the recently written regulations. Even if the Development Officer had the authority he would not have granted a variance in this instance.

[18] The following responses were provided to questions from the Board:

- a) Two separate lots could still be considered as a single site as per the definition of Site in the *Edmonton Zoning Bylaw*. The Petro Canada lot, the Rexall lot and the subject lot could potentially be considered as either three separate Sites or they could also legally be considered as one Site.
- b) Although they have not personally visited the two Sites in question, from the evidence provided they would agree that the Cannabis Retail Sales cannot be seen from the corner of 167 Avenue and 82 Street.
- c) The Development Authority has to strike a balance between providing a reasonable provision for Cannabis Retail Sales and preventing the products from falling into the hands of vulnerable individuals. Even with the fencing mentioned by the Appellant, it is Mr. Imai's opinion that the proposed development is too close to a school resulting in a significant likelihood of harm. Mr. Welch confirmed that it is a K-9 school.
- d) The Development Authority could not comment on how much of a material impact signage would make.
- e) Similar regulations regarding separation distances are in effect for alcohol sales and other socially controversial uses. Mr. Welch confirmed that these measurements are taken "as the crow flies" (site to site).

[19] Mr. Welsh referred to SDAB-D-18-133 when asked to comment on Paragraph 14 of the Appellant's submission and stated that the Municipal and Provincial standards can be considered together when establishing separation distances.

iii) Rebuttal of the Appellant

[20] The Appellants currently have an approved development permit with no variances for a Major Alcohol Sales Use which is located on the subject Site and physically closer to the school than the proposed Cannabis Retail Sales. The location of this approved permit was shown on a Site diagram. This approval was obtained prior to the required lot

consolidation so it was approved without a variance, despite the fact the applicable regulations are substantially the same. It is much larger than the proposed Cannabis Retail Sales and they have difficulty understanding the fairness, given that they only became off-side due to the City requiring consolidation.

- [21] Because of the Site boundary being redefined, their measurement from the school is now affected for the current development permit application.
- [22] The Appellants agree that drugs or alcohol should not fall into the wrong hands. The AGLC has set stringent regulations to prevent this from occurring. Cannabis Retail Sales operators must submit to regular inspections, require identification prior to purchase and maintain records of purchasers. This is beyond what is in place for alcohol sales. There are enough checks and balances in place to prevent a youth from wandering into the proposed retail store and obtaining a cannabis product.
- [23] Signage is no different than signage for alcohol sales and should be treated as a teaching opportunity by parents.
- [24] In summary, the proposed development is a permitted use in this zone and 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.

Decision

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

CONDITIONS

5. The Cannabis Retail Sales shall not commence operations until such time as the non-medical sale and distribution of Cannabis is authorized by federal and provincial law.
6. The Cannabis Retail Sales must commence operations within nine (9) months of the date of issuance of this Development Permit.
7. 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.
8. Any outdoor lighting for any development shall be located and arranged so that no direct rays of light are directed at any adjoining properties, or interfere with the effectiveness of any traffic control devices. (Reference Section 51 of the Edmonton Zoning Bylaw 12800).

NOTES:

1. Signs require separate Development Applications.
 2. This Development Permit is not a Business Licence. A separate application must be made for a Business Licence.
- [26] In granting the development, the following variance to the *Edmonton Zoning Bylaw* is allowed:
- a) The minimum required 200 metres separation distance between the Cannabis Retail Sales Site and a School Site (Florence Hallock School) pursuant to Section 70(2) is reduced by 105 metres to permit a minimum allowed separation distance of 95 metres.

Reasons for Decision

- [27] The proposed development is to change the Use from a Health Services Use to a Cannabis Retail Sales Use. The Subject Site is located in the (CSC) Shopping Centre Zone. Pursuant to section 320.2(3) of the *Edmonton Zoning Bylaw* (the *Bylaw*), Cannabis Retail Sales is a Permitted Use in this Zone.
- [28] Cannabis Retail Sales is subject to regulations under the *Gaming, Liquor, and Cannabis Regulation*, AR143/96. Section 105 deals with the locations of premises described in a cannabis licence and distances between those premises and certain other premises. Section 687(3)(a.4) of the *Municipal Government Act* (the *Act*) directs that in making this decision, the Board must comply with those requirements.
- [29] Based on the Appellants' submissions, the Board finds that requirements of those regulations have been satisfied and this Board has met its obligation under section 687(3)(a.4) of the *Act*.
- [30] Cannabis Retail Sales is also subject to Special Land Use Provisions in section 70 of the *Bylaw*. Section 70(2) sets minimum separation distances applicable to Cannabis Retail Sales:

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.

- [31] Using the Site to Site method of the measurement specified in section 70(2)(a), the Development Officer determined that the distance between the Subject Site and the closest point of the boundary of the School Site is 95 metres.
- [32] Section 70(4) provides: “Notwithstanding Section 11 of this Bylaw, a Development Officer shall not grant a variance to subsection 70(2) or 70(3)”. Therefore, the Development Officer denied the application.
- [33] The Appellant argues that the Board should take a practical approach to the meaning of Site and measure the separation distance to the portion of the lot that is Zoned CS3 per their *Exhibit A*. In this way, the Board can find that proposed development is in fact compliant and no variance is required.
- [34] The Board disagrees with this interpretation.
- [35] Site is defined in section 6 of the *Bylaw* as “an area of land consisting of one or more abutting Lots”. By definition, a portion of a lot is not to be considered a Site. The School and the joint use park areas further to the east are all located on a single lot (Plan 042 5915, Block 118, 2MR). The Board finds that this single lot is the Site being used for a public library, or for public or private education (the School Site).
- [36] The method of Site to Site measurement specified in section 70(2)(a) is also clear and there is no authority in the *Bylaw* to substitute another method of measurement as suggested by the Appellant.
- [37] Therefore, the Board finds that the Development Officer’s calculation is correct and a variance to section 70(2) of 105 metres is required. While the Development Officer cannot grant a variance to the minimum separation distance, the Board has a discretionary authority to do so in accordance with section 687(3)(d) of the *Act*.
- [38] The Appellant argued that a variance should be granted if needed because the proposed development is compliant with section 105 of the regulations enacted under the *Gaming, Liquor and Cannabis Regulation*.
- [39] The Board is not persuaded to allow the appeal on this basis. The Board adopts the reasoning on this issue found in SDAB-D-18-133 and cited by the Development Officer:
- [76] The net effect of section 70 is that criteria more extensive and at times stricter than the criteria established in section 105(3) of the *Gaming*,

Liquor, and Cannabis Regulations have to be met by the Applicant for Cannabis Retail Sales. The municipality has the ability to create regulations for Cannabis Retail Sales in addition to the provincial regulations and the municipality has done so in section 70 of the *Edmonton Zoning Bylaw*.

[77] So, we are left with two sets of development criteria that apply to Cannabis Retail Sales. All such applications must comply with the locational requirements in section 105(3) of the *Gaming, Liquor, and Cannabis Regulations*. Those locational requirements cannot be varied by this Board, pursuant to section 687(3)(a.4) of the *Municipal Government Act*.

[78] In addition, an Applicant must abide by the development regulations set out in section 70 of the *Edmonton Zoning Bylaw*. Those criteria can be varied by this Board if the tests set out in section 687(3)(d) are met.

[37] The Appellant and the Development Officer both cited *Thomas v Edmonton*, 2016 ABCA 57 to the Board. In *Thomas*, the Court of Appeal was considering the Board's authority to waive the requirement for public consultation under the Mature Neighbourhood Overlay. In the course of that decision, the Court of Appeal also commented more generally upon the power of the Board to vary development regulations:

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. (Paragraph 29)

[41] The Appellant argued that this is also an appropriate case for relief from hardship because of the large size of the School Site as demonstrated by the fact that the proposed premises is physically separated from the School by 605 metres.

[42] The Board is also guided by the Court of Appeal decision in *Newcastle Centre GP Ltd v. Edmonton (City)*, 2014 ABCA 295. *Newcastle* involved the Board's authority to grant a variance to the required separation distance between two liquor stores in a zone where that type of development was a Permitted Use. In *Newcastle*, The Court of Appeal ruled that it was an error for the Board in that case to assume, without any explanation, that the *Bylaw* creates a presumption of harm to the public or that it cannot intervene and grant variances unless that presumption is rebutted by the applicant (at paragraphs 6-7). The Court expands on the Board's obligation to provide reasons and states:

Were the Board's Reasons adequate? Was the result of applying the proper tests in s 687(3)(d) so obvious as to require no explanation in the Reasons? No. It is not self-evident that or how two liquor stores within 500 meters would interfere with neighbourhood amenities, nor that or how they interfere with or affect use, enjoyment, or value of neighbouring pieces of land. This is not a boiler factory in a residential neighbourhood. The problem only arises because there would be two liquor stores in the area. One alone is a permitted use. (Paragraph 11).

- [43] The Court reasoned that if there is any interference with neighbourhood amenities, or with use, enjoyment, or value of other lands, the Board had a duty to explain that in its reasons and that a bare conclusion would be insufficient.
- [44] Based on the submissions and evidence provided by the parties in this particular appeal, the Board grants a variance to section 70(2) of the *Bylaw* for the reasons which follow.
- [45] In his written submission, the Development Officer indicates that Cannabis Retail Sales is a Permitted Use and the potential impacts of this Use are currently unknown. The Development Officer provided no evidence of a negative impact with respect to the requested variance. Despite the lack of evidence, he argues that due to the recency of legalization of recreational cannabis sales, the Board should proceed with caution 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 of the *Bylaw*.
- [46] In the hearing, the Development Officer indicated a concern that although there was a significant distance to be travelled, children might be able to access the store during breaks in the school day. The Appellants countered that there are strict regulatory mechanisms to ensure minors do not access their products. Furthermore, those regulations are even stricter than the ones applicable to a larger Major Alcohol Sales Use which was recently approved in the abutting bay of the building containing the proposed development located in closer proximity to the School Site.
- [47] As a result of unrelated development on other portions of the shopping centre, the land was recently required to be re-subdivided and then consolidated. Prior to this application, the Major Alcohol Sales Use was approved for the abutting bay to the west. That Major Alcohol Sales Use is much larger. It is located closer to the School Site and subject to identical separation regulations. At the time of that approval the portion of the Subject Site containing the common building was not consolidated with the remaining portion which is closer to School Site and the development permit was approved without any variances. The two Uses are being constructed simultaneously. But for the consolidation required by the City, the proposed Cannabis Retail Sales Use would have been a Permitted Use in compliance with the *Bylaw* had the City taken the same approach as it did for the abutting Major Alcohol Sales Use.
- [48] Based on the evidence provided by the Appellant, there are factors in this case which mitigate the potential likelihood of a material impact attributable to the requested variance to the separation distance between the two Sites:

- a) The Subject Site is a large multi-Use shopping centre with several separate commercial buildings including a large two storey commercial building in the southwest corner which blocks the sight line to the proposed Cannabis Retail Sales from the edge of the School Site. Uses in the shopping centre are oriented towards the interior.
- b) There is an additional 139.69 metres between the edge of the Subject Site nearest the School Site and the Cannabis Retail Sales premises.
- c) While the Site to Site measurement is 95 metres and 200 metres is required, in this case the legal lot upon which the School is located is very large resulting in a physical separation of 605 metres between the School building and the proposed development.
- d) The view from the School grounds of the shopping centre within which the development is to be located is obscured by the topography of the park, the intervening fire station, and perimeter trees planted at the edge of the area to be used for the School and interspersed on the School Site.
- e) The 605 metres separation distance cannot be directly traversed by a pedestrian. Traffic and pedestrian controls add practical separation between the developments.
 - (1) It is 234.69 metres through the shared parking area past other commercial developments from the nearest point of the proposed Cannabis Retail Sales to the nearest point of lot within which the School is located.
 - (2) The Subject Site is also separated from the School Site by two major arterial roadways, each with three lanes of traffic. A pedestrian must cross a right turning service lane, two light controlled intersections, and another right turning service lane before entering the School Site.
 - (3) Then the pedestrian must travel an additional 359.28 metres crossing two full ball diamonds and an undulating field (meant to keep recreational uses separate) and the remainder of the joint use area before reaching the nearest point of the boundary planned the future School property.

[49] The Board considered that no affected parties appeared to oppose or support the development and the School Board took no position. The Board received one objection which cited a general concern that the rules of the *Bylaw* should be followed. The Board notes that “the rules of the *Bylaw*” and the *Act* incorporate authority to grant variances in appropriate cases.

[50] For these reasons, the Board finds that the proposed development 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.

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

Board Members in Attendance:

Mr. V. Laberge; Mr. L. Pratt, Ms. E. Solez, Mr. W. Tuttle

CC: City of Edmonton, Development & Zoning Services, Attn: Mr. I. Welch / Mr. S. Chow /
Mr. H. Luke
City of Edmonton, Law Branch, Attn: Mr. M. Gunther
Mr. M. Podmoroff

Important Information for the Applicant/Appellant

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

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