



**EDMONTON
TRIBUNALS**

*Subdivision &
Development
Appeal Board*

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SDAB-D-18-167

Application No. 288693702-001

The appeal hearing to operate a Major Home Based Business (massage therapy service, hours of operation: 11 AM to 7 PM weekdays and weekends with no overlapping appointments - C.A.M. THERAPEUTIC MASSAGE), expires on August 24, 2023, was cancelled due to the **Development Permit being Cancelled** by the Respondent.



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Date: October 31, 2018
Project Number: 286639019-001
File Number: SDAB-D-18-168

Notice of Decision

- [1] On October 17, 2018, the Subdivision and Development Appeal Board (the “Board” or “SDAB”) heard an appeal that was filed on September 18, 2018. The appeal concerned the decision of the Development Authority, issued on August 30, 2018, to refuse the following development:

Change the use from a General Retail Store to a Cannabis Retail Sales

- [2] The subject property is on Plan 1244HW Blk 61 Lot B, located at 8122 – Gateway Boulevard NW, within the DC1 Direct Development Control Provision (Historical Commercial). The Main Streets Overlay; Whyte Avenue Commercial Overlay; and the Strathcona 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;
 - Submission from the Appellant; and
 - Submissions from Legal Counsel for the Appellant.

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 Mr. Wakefield, Legal Counsel representing the Appellant, The Green Room, who was accompanied by Mr. Pels*

[7] Mr. Wakefield referenced his written submission.

[8] The Appellant carries on business as “The Green Room” and has been a supplier of legal medical cannabis from this location since 2015 and would like to expand his business to include Cannabis Retail Sales.

[9] The development permit application was refused because of the separation distance between the subject Site and the location of an approved Cannabis Retail Sales permit and the proximity to an AP Public Parks site as shown in TAB 20 of his submission.

[10] He referred to Section 685(3) and 685(4) of the *Municipal Government Act* which limits the scope of appeals to the SDAB in two cases:

- a. in the case of Permitted Uses, an appeal to a SDAB is allowed only where provisions of the Land Use Bylaw were "relaxed, varied or misinterpreted" or there has been a deemed refusal (s. 685(3));
- b. in the case of direct control districts, an appeal is limited to appeals where the development authority did not follow the directions of the municipal council (s. 685(4)(b)).

[11] He referred SDAB-D-18-133 (TAB 16), a decision of another panel of this Board that deals with a Permitted Use, which is a restricted appeal, pursuant to Section 685(3). The Board found that they had jurisdiction to vary the separation distances if they found the Development Officer misinterpreted or misapplied provisions of the Land Use Bylaw. The Board exercised its variance power and relaxed the separation distance in that decision.

[12] He referred to SDAB-D-17-071 (TAB 14 *Glenora Liquor*), a decision of another panel of this Board, which dealt with separation distances between alcohol sales, which is similar to Cannabis Retail Sales.

[13] In his opinion, there is no difference between misinterpretation of a *Land Use Bylaw* under Section 685(3) and failing to follow the directions of Council under Section 685(4)(b).

- [14] With regard to the distinction between *Glenora Liquor* and *Jupiter* or the present appeal by The Green Room, he stated:
- a. The fact that *Glenora Liquor* involved a DC2 Site Specific Development Control Provision and the *Jupiter* case and the present case involve DC1 Direct Development Control Provision is not a valid distinction. Subsection 685(4)(b) of the *Municipal Government Act* refers to "a direct control district", not a particular type of direct control district such as DC1 or DC2.
 - b. The DC2 in *Glenora Liquor* is site specific while the DC1 in the *Jupiter* case and this appeal covers several blocks is also not a valid distinction.
 - c. The question in any direct control zone is the nature of the Development Officer's discretion granted by Council under the particular DC in question: *Gameau* TAB 15.
 - d. Nor is it a distinction between *Glenora Liquor* and either *Jupiter* or The Green Room appeals that the Special Provisions in Sections 69 and 70 are stated to apply to the DC; since this was also the case in *Glenora Liquor* except that the special provisions were related to liquor rather cannabis. The DC1 provision of the *Edmonton Zoning Bylaw 12800* provides in subsection 710.4.5 that: "All regulations in this Bylaw shall apply to development in the Direct Development Control Provision, unless such regulations are specifically excluded or modified in a Direct Development Control Provision". In *Gameau*, the Court of Appeal held that the *Garneau* DC1 had a separate discretion delegated to the Development Officer which the development officer had failed to apply. The Court therefore quashed the SDAB's decision. The same is true in the present case.
- [15] The June 12, 2018 rezoning added cannabis retail sales to the Strathcona Area Redevelopment Plan Historical Commercial DC1. Planners intended for the Strathcona Historical Commercial Area to operate the same as other areas of the City. There is nothing in the Administration Report to Council on the Strathcona DC1 that suggests otherwise informs City Council that it is intended that the SDAB not have jurisdiction in DC1 districts unlike conventional districts such as CB2.
- [16] Further, the plan of Old Strathcona/Whyte Avenue that was before City Council as Attachment 5 to the Administrative report when it considered both rezonings (conventional and DC1) on June 12, 2018 was a plan which showed there were virtually no places in the Old Strathcona Historical Area which did not fall within one or more of the specified separation distances [TAB 2 — last page] and any possible sites were sterilized by the approved permit for 80 Avenue between 103 and 104 Streets which lies outside the Historical Commercial area. If these distances could not be varied in the DC1 district (unlike conventional districts), it would be virtually impossible to obtain a permit for cannabis retail sales in the Strathcona Historical Commercial District which would render the rezoning of that area farcical.

- [17] City Council's directions cannot reasonably be considered to constitute an intentional rezoning charade for the Old Strathcona Historical Commercial District but that is the effect of what the Development Officer is now suggesting. Clearly the City's left hand and right hand are not communicating.
- [18] At the *Jupiter* hearing, the City referred to a SLIM Map [TAB 20 — last page] and suggested that it showed more potential locations for retail cannabis sale in Strathcona Historical Commercial district, BUT:
- a. the SLIM map comes with an express Disclaimer by the City as to its accuracy TAB 10;
 - b. there is no evidence that the SLIM map was before Council when it passed the rezonings applicable to both conventional districts and the Strathcona Historical Commercial DC1 on June 12, 2018. The evidence is that City Council only had Attachment 5 to the Administration Report TAB 2 which shows virtually no locations which are unaffected by one of the mandated separation distances. The SLIM Map is irrelevant to Council's intention in amending the Historical Commercial DC1;
 - c. in any event, the SLIM Map, itself, only shows one potential site (outlined in dark blue) within the Strathcona Historical Commercial Area that does not fall within one of the applicable separation distances. It simply does not make sense that the City or the City Council would have amended the DC1 zoning for the entire Strathcona Historical Commercial Area to allow cannabis retail sales at only one site.
- [19] The SDAB in *Jupiter* acknowledged the differences between the two maps (paragraph 138, TAB 18) but failed to address the three points immediately above. It is respectfully submitted that the Board should have made a determination since it had the evidence to do so before it.
- [20] Mr. Wakefield provided the following information in response to questions by the Board:
- a. He referred to the *Blatchford* case and stated that Section 685(3) of the *Municipal Government Act* relates to the Direct Control and the hurdle is for conventional zones and whether they are Permitted Uses.
 - b. Section 685(4) is clear if the directions of City Council are not followed then the Board needs to deal with that first.
 - c. In his opinion, the Board is bound by the Court of Appeal and it would be an error of law if its decisions were not followed. However, if that decision is incorrect, adhering to it compounds an error.
- [21] Mr. Pels stated that he is the owner of The Green Room which has been in operation since 2015.
- [22] In his opinion, The Green Room is a pillar in the community and the blue print for cannabis retail sales.

- [23] The Green Room was the first cannabis retail store in Edmonton and is not a publicly traded business.
- [24] He was not able to get any other business classification other than a cannabis retail store. He was assured that operating under this classification was the correct way to operate.
- [25] He has an obligation to his customers and employees to maintain and continue operating the business.
- [26] He referred to newspaper articles provided to the Board regarding his business for the Board to review when making their decision.
- [27] Mr. Wakefield referred to TAB 20 of his submission, photographs showing the subject Site, and the adjacent park.
- [28] Although this park is intended as a park, it is usually used by vagrants.
- [29] Mr. Wakefield and Mr. Pels provided the following information in response to questions by the Board:
- a. Mr. Pels stated that, although the adjacent site is intended for a park, it is not intended to be used as a park for children. The park does not have any playground equipment for children to use.
 - b. Mr. Wakefield stated that the news articles submitted outline that people cannot smoke in a playground or other parks. This park is across the street from the subject Site where the public can smoke. In his opinion, that is a good reason to grant a variance.
 - c. Mr. Wakefield referred back to the mapping layout from other cannabis retail stores. He stated that the previously approved cannabis store is catered to more drive in customers. The Green Room is a few blocks away and is more pedestrian friendly.
 - d. The location of the subject Site is more visible to customers.
 - e. The Development Officer has the discretion to vary a 20 metre distance between an approved cannabis store.
- ii) Position of the Development Officer, Mr. Welch, who was accompanied by Mr. Chow*
- [30] Mr. Welch stated that the site across the street from the subject Site is considered a Public Park and is used for a variety of events throughout the year.
- [31] There are several buildings that are available in this area that would accommodate the use of a cannabis retail business.

- [32] He confirmed that there is a pending application for a cannabis retail business in the vacant CIBC building.
- [33] In his opinion, the issue before the Board is consistency. The two previous decisions were consistent with the wording and specifics of the DC and no additional variances were granted.
- [34] Although there is no rule for precedence, there should be some consistency.
- [35] It is appropriate for the Board to respect previous Board decisions and if they have jurisdiction to hear the appeal.
- [36] In the first cannabis decision that Mr. Wakefield presented, the Board took jurisdiction but did not grant a variance.
- [37] The approved site referred to the on setback map is where it is currently operating. There will be additional cannabis retail stores operating in the future. Even though the DC1 zone may have limited opportunities for cannabis retail stores, there are other locations on Whyte Avenue.
- [38] There are different locations on Whyte Avenue with different zones where a cannabis retail store can operate. There are other approved cannabis stores along Whyte Avenue and some south of Whyte Avenue.
- [39] Mr. Welch provided the following information in response to questions by the Board:
- a. If the proposed development is approved, that will impact a higher priority number in the lottery.
 - b. A higher ranked number in the lottery will be impacted and subject to refusal based on the separation distance.
 - c. When reviewing development permit applications, they ensure all the information needed is correct or that will slow the process down.
 - d. He does not have a legal background, but, in his opinion, the previous two cannabis decisions are correct.

iii) Rebuttal of the Appellant, Mr. Wakefield

- [40] In the cannabis setback map, Mr. Wakefield understood that the numbers represented the applicant's number in the lottery. He confirmed that the number for the application in the lottery is 82 and not 104.
- [41] Mr. Wakefield referred to the Slim Map in TAB 20 showing other cannabis retail stores.

- [42] There are other locations on Whyte Avenue that would be suitable for the proposed business. However, City Council must have a purpose to go through the rezoning process.
- [43] The Green Room has provided medical cannabis; therefore, recreational cannabis should be allowed.
- [44] In his opinion, there are only a few locations that are approved for cannabis retail sales. In his opinion, this will impact a retail operator that is selling medicinal cannabis.
- [45] In his opinion, City Council did not want that to happen.
- [46] Mr. Wakefield provided the following information in response to a question by the Board:
- a. The map in TAB 2 of his submission, separation of cannabis stores from Sensitive Uses: Strathcona, was provided to City Council with the Charter Bylaw 18387.

Decision

- [47] The appeal is DENIED and the decision of the Development Authority is CONFIRMED. The development is REFUSED.

Reasons for Decision

- [48] Section 685(4)(b) of the *Municipal Government Act* states that:

Despite subsections (1), (2) and (3), if a decision with respect to a development permit application in respect of a direct control district is made by a development authority, the appeal is limited to whether the development authority followed the directions of council, and if the subdivision and development appeal board finds that the development authority did not follow the directions it may, in accordance with the directions, substitute its decision for the development authority's decision.

- [49] Cannabis Retail Sales is a listed Use in the DC1 (Historical Commercial) Direct Development Control Provision, pursuant to section 4(f).
- [50] The proposed Cannabis Retail Sales does not comply with the minimum separation distance requirement from public lands pursuant to section 70.3 of the *Edmonton Zoning Bylaw* (the *Bylaw*).

[51] The DC1 Direct Development Control Provision which is incorporated into the Strathcona Area Redevelopment Plan does not contain development regulations for Cannabis Retail Sales.

[52] Section 710.4(5) of the *Bylaw* states:

All regulations in this Bylaw shall apply to development in the Direct Development Control Provision, unless such regulations are specifically excluded or modified in a Direct Development Control Provision

Therefore, it is the direction of Council that the proposed Cannabis Retail Sales must comply with the development regulations contained in section 70 of the *Bylaw*.

[53] Section 70.3(a) of the *Bylaw* states that:

Any Site containing a Cannabis Retail Sales shall not be located less than 100 m 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 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 “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.

[54] Based on the evidence provided, the distance from the closest point of the Site on which the proposed Cannabis Retail Sales Use is located and the Site of the public lands is 21 metres.

[55] Consequently, the requirements of section 70.3 of the *Bylaw* have not been met. Pursuant to section 710.4(5) of the *Bylaw*, the proposed development must comply with the requirements of section 70.2 because they have not been excluded or modified in the DC1 (Historical Commercial) Direct Development Control Provision.

[56] Therefore, the Board finds that the Development Officer did follow the direction of Council by refusing this development permit application.

- [57] Further, the Development Authority has no variance power in this matter, as set out in section 70.4 of the *Edmonton Zoning Bylaw*. Therefore, the Development Authority also followed the direction of City Council by not granting a variance.
- [58] Finally, in an appeal in a Direct Development Control District, this Board cannot exercise any variance power that is not given to the Development Authority in the Bylaw, pursuant to *Garneau Community League v. Edmonton (City)*, 2017 ABCA 374. At paragraphs [39] and [40], the Court states:
- [39] The SDAB correctly concluded pursuant to section 641(4)(b) of the *Municipal Government Act* that the Development Officer did not follow the directions of Council when he failed to consider the specific variance power in the GARP to relax the RF3 "regulations for individual applications, where such relaxations would assist in the achievement of the development criteria in Clauses 3, 4 and 5". However, the SDAB also failed to follow the directions of Council in granting the development permit. First, it took into account the general variance power in section 11.5 of the Bylaw (mirrored by section 687(3)(d) of the *Municipal Government Act*), despite the clear prohibition in section 11.6(3) of the Bylaw. Second, it adopted an unreasonable interpretation of the scope of section 641 of the *Municipal Government Act* and the specific variance power in section in the GARP to relax the RF3 regulations for individual applications, where such relaxations would assist in the achievement of the development criteria in Clauses 3, 4 and 5.
- [40] In summary, the SDAB is entitled to substitute its decision for that of the Development Officer having found, correctly, that he failed to follow the direction of Council. **However, because this property is zoned direct control, section 641(4) applies and the SDAB must also follow the directions of Council.** In particular, the broad variance provisions of section 11(5) of the Bylaw (and section 687(3)(d) of the *Municipal Government Act*) are constrained by section 11.6(3) of the Bylaw. It provides that "where the issuance of a Development Permit for any use involves the exercise of any specified discretion ... to relax a regulation of a District or any other regulation of this Bylaw, he shall not permit any additional variance from that regulation pursuant to Section 11.5."Accordingly, the only permitted variances are specifically enumerated in the Development Criteria of the GARP, and clauses 3 and 5 of the Development Criteria in the GARP. That is, "relaxations that would assist in the achievement of the development criteria" that the development "shall be compatible with the scale, massing and siting of adjacent buildings ..." and "shall incorporate building details and finishing materials which are common to the domestic architecture of the turn of the century and the early 1920's detached housing in the area". **[Emphasis Added]**.

- [59] As the Board determined that the Development Officer followed the directions of Council by refusing this development permit application and not granting a variance, and that the this Board cannot exercise any variance power that is not given to the Development Authority pursuant to the *Garneau* decision, the Board will not make a finding whether a variance should be granted to the minimum required separation distance from an approved Cannabis Retail Sales.
- [60] That said, the parties discussed the well-known Lord Denning allusion to the “Man on the Clapham Omnibus”, and all parties agreed that the common citizen of Edmonton would likely expect Cannabis Retail Sales in the Whyte Avenue area. Quite simply, this Board has considerable sympathy for the Appellant, but greater deference to the aforementioned *Garneau* decision of the Court of Appeal of Alberta.
- [61] Therefore, the appeal is dismissed.



Mr. W. Tuttle, Presiding Officer
Subdivision and Development Appeal Board

Board Members in Attendance:

Mr. R. Handa; Mr. L. Pratt; Ms. S. McCartney; Ms. M. McCallum

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

Important Information for the Applicant/Appellant

1. 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.
2. 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.