



**EDMONTON
TRIBUNALS**

*Subdivision &
Development
Appeal Board*

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Date: November 8, 2018
Project Number: 225805726-018
File Number: SDAB-D-18-173

Notice of Decision

- [1] On October 24, 2018, the Subdivision and Development Appeal Board (the “Board”) heard an appeal that was filed on **September 30, 2018**. The appeal concerned the decision of the Development Authority, issued on September 13, 2018, to refuse the following development:

Construct exterior alterations to a Single Detached House (remove translucent window treatment on the main floor) and to construct a side landing (3.28 metres by 1.02 metres at 0.98 metres in Height), existing without permits).

- [2] The subject property is on Plan 1623224 Blk 2 Lot 22, located at 10937 - 130 Street NW, within the (RF1) Single Detached Residential Zone. The Mature Neighbourhood Overlay and the West Ingle Area Redevelopment 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;
 - E-mail from the Development Authority regarding the projection of the landing;
 - The Development Officer’s written submission;
 - The Appellant’s written submissions; and
 - One e-mail in opposition from the (south) adjacent property owner.
- [4] The following exhibit was presented during the hearing and forms part of the record:
- Exhibit A – Photographs submitted by the (south) adjacent neighbour.

Preliminary Matters

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

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

Summary of Hearing

i) Position of the Appellants, Mr. B. & Mrs. K. Basler:

- [8] They took legal possession of the subject property on July 2, 2018 and only learned of the problem after they moved into the house.
- [9] Prior to purchase and possession they completed their due diligence and sought and received title and compliance certificates.
- [10] Six weeks after they took possession, they received notice in the mail that an application had been made to change the approved frosted windows to unfrosted windows. The subject kitchen windows were installed unfrosted when they purchased the house. This application was made without their consent or knowledge.
- [11] After receiving this notice, attempts were made with the residents of the abutting house and the City to find a suitable solution that addressed their concerns as well as the safety and security risks that frosting would create for their family. They suggested installing blinds on their windows or installing privacy screening on the fence between the two houses, both of which were denied by the neighbours.
- [12] Photographs and diagrams were referenced to illustrate that the current placement of the windows is consistent with the requirements of the Mature Neighbourhood Overlay (the "Overlay") because the windows in their house is offset 18 inches from a small window on the side of the house located on the abutting property. From a practical standpoint, the line of sight from their windows does not view into or overlook a habitable space or room as defined in the Overlay. The window on their neighbour's house is immediately perpendicular to the entrance of a closet and the line of sight is through a small corner of a considerably large room to the closet door.
- [13] The *Edmonton Zoning Bylaw* defines a non-habitable room as space in a dwelling providing a service function and not intended primarily for human occupancy, including bathrooms, entry ways, corridors, or storage areas.
- [14] Requiring the windows to be frosted presents a serious safety and security risk for their family because the only way to see someone outside the side entrance door is through these windows. The side door and the windows are adjacent to one another.

- [15] It was their opinion that the negligible impact being able to view a small corner of a large room and a closet door does not outweigh the more considerable impact on safety and security that frosting the windows would entail.
- [16] Mr. Basler provided the following information in response to questions from the Board:
- a) There are front, rear, and side entrances. The mailbox is located at the front entrance.
 - b) The subject windows are the only windows in the kitchen.
- ii) *Position of Affected Property Owners in Opposition to the Appellant, Ms. L. Boraas and Ms. N. Boraas:*
- [17] They own the south abutting house.
- [18] The original development permit was refused because the kitchen windows were located across from a bedroom window in their house. The development permit was later approved with a condition that the windows be frosted to address privacy issues.
- [19] The house was built without the frosted windows. Bylaw Enforcement has been contacted numerous times and they were advised that the windows would be frosted.
- [20] Before the house was sold, a peel and stick frosting application was installed to the kitchen windows but it was removed by the new owners after they moved in.
- [21] Photographs, marked *Exhibit A*, were submitted to illustrate the line of sight from their bedroom window to the subject kitchen windows. One photograph was taken standing at the door of a walk through closet between the bedroom and a bathroom and another from the bed.
- [22] The sight lines from the kitchen windows are different depending on whether you are doing dishes or standing farther back towards the centre of the kitchen but there is a sight line into the bedroom and closet from most locations in their kitchen.
- [23] The side entrance is not the only access to their neighbour's house. There is a front door, a rear door, and a security system.
- [24] Ms. L. Boraas and Ms. N. Boraas provided the following information in response to questions from the Board:
- a) Although their blinds are typically pulled while dressing, the window provides sunlight into the room.

- b) The window in their bathroom is frosted.
- c) There is another window located in the bedroom.

iii) Position of the Development Officer, Ms. E. Lai:

[25] Ms. Lai did not attend the hearing. A written submission provided by Mr. K. Yeung was considered by the Board.

iv) Rebuttal of the Appellants:

[26] The kitchen is a rectangle with a large island in the centre. The window of the bedroom on the adjacent house can only be seen if you are standing at the sink or at one side of the kitchen island.

[27] The original proposal of the builder was to install three to four feet of privacy screening on top of the fence in the direct line of sight between the windows. They reiterated that they have discussed the use of up/down blinds on the kitchen windows but neither option was acceptable to their neighbour.

Decision

[28] The appeal is **ALLOWED** and the decision of the Development Authority is **REVOKED**. The development is **GRANTED** as applied for to the Development Authority.

Reasons for Decision

[29] Single Detached Housing is a Permitted Use in the (RF1) Single Detached Residential Zone.

[30] The proposed development was refused by the Development Authority because it found that the side kitchen windows of the subject Dwelling overlooks into the abutting property and does not comply with section 814.3(8) of the *Edmonton Zoning Bylaw* (the *Bylaw*) and because of a deficiency in the minimum required distance from the side landing to the side property line abutting 10933 – 130 Street NW, pursuant to section 44.1(a).

[31] Prior to the hearing, the Board received confirmation from the Development Authority that the side landing complies with the requirements of section 44.1(a) of the *Bylaw* and a

variance is not required. The property owners in attendance at the hearing did not challenge this finding.

[32] Section 814.3(8)(c) of the *Bylaw* states:

Where an interior Side Setback is less than 2.0 metres,

- a. the applicant shall provide information regarding the location of side windows of the Dwellings on the Abutting properties and Amenity Areas on Abutting properties;
- b. the side windows of the proposed Dwelling shall be located to reduce overlook into Amenity Areas of the Abutting properties; and
- c. the proposed Dwelling shall incorporate design techniques, such as, but not limited to, translucent window treatment, window location, raised windows, or Privacy Screening, to reduce direct line of sight into the windows of the Dwelling on the Abutting property.

[33] The subject windows are the only windows in the kitchen of the house that overlook the side yard and a small bedroom window located on the south elevation of the house on the immediately abutting property.

[34] Based on a review of the photographic evidence provided, the windows are offset from each other. The Board notes that the photographs submitted by the most affected property owner illustrate that from some angles there is a direct sight line into the kitchen windows on the subject property.

[35] Based on a review of the photographs provided, the sight lines between the windows are limited to only a few locations in the kitchen of the subject Dwelling.

[36] The blinds on the small bedroom window of the house on the abutting property can be drawn to eliminate incidents of problematic over sight and there are other windows in the bedroom that will provide a source of natural sunlight.

[37] The subject windows provide the only source of natural light into the Appellants' kitchen and requiring the windows to be frosted will have a greater impact on their quality of life and the use and enjoyment of their property than that of the abutting neighbour by allowing the windows to remain unfrosted.

[38] The Board finds that section 814.3(8)(c) does not require the complete elimination of direct line of sight into the windows of the Dwelling on an abutting property but merely a reduction in the direct line of sight.

[39] The fact that the windows are offset and the installation of blinds on the bedroom window located on the abutting house provide sufficient design techniques to reduce direct line of sight into the windows of the Dwelling on the abutting property, pursuant to section 814.3(8)(c).

- [40] Based on the evidence provided, the Appellants are willing to work with the owners of the abutting property to solve the problem and have suggested several options including the installation of blinds on the subject windows.
- [41] Based on all of the above, the Board finds that allowing the removal of the translucent window treatment on the main floor kitchen windows 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, and does not violate section 814.3(8)(c).

Mr. I. Wachowicz, Chair
Subdivision and Development Appeal Board

Board members in attendance: Mr. B. Gibson, Ms. D. Kronewitt-Martin, Ms. E. Solez, Mr. J. Wall

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.



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SDAB-D-18-174

Project No. 260998990-001

An appeal to Construct a Single Detached House with rear attached Garage, Basement development (NOT to be used as an additional Dwelling), covered rear deck (3.66 metres by 4.88 metres), fireplace, veranda (7.32 metres by 2.0 metres/ 3.81 metres) was TABLED to November 21 or 22, 2018.



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Date: November 8, 2018
Project Number: 286660760-001
File Number: SDAB-D-18-175

Notice of Decision

[1] On October 24, 2018, the Subdivision and Development Appeal Board (the “Board”) heard an appeal that was filed on **September 24, 2018**. The appeal concerned the decision of the Development Authority, issued on September 14, 2018, to refuse the following development:

To change the Use from General Retail Stores to Cannabis Retail Sales.

[2] The subject property is on Plan 1225U Lots 1-4, located at 12120 - Jasper Avenue NW, within the (CB3) Commercial Mixed Business Zone. The Main Streets Overlay and the Oliver Area Redevelopment 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 including a PowerPoint presentation; and
- Two on-line responses in opposition to the proposed development.

Preliminary Matters

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

[5] The Chair 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, Mr. R. Noce, Legal Counsel for Alcanna Cannabis Stores Ltd. and Ms. M. Kiziak, representing Alcanna Cannabis Stores Ltd.:*

[7] Section 70 of the *Edmonton Zoning Bylaw* sets out the regulations relating to Cannabis Retail Sales and the separation distance requirements. The Development Authority has determined that the proposed development is located too close to public lands and does not comply with section 70(3).

[8] Pursuant to section 70(4), a Development Officer shall not grant a variance to subsection 70(2) or 70(3). Therefore, even if a Development Officer thought the site was appropriate, a variance could not be granted.

[9] Cannabis Retail Sales is a Permitted Use in the (CB3) Commercial Mixed Business Zone.

[10] The proposed development complies with all the requirements of the *Gaming, Liquor and Cannabis Act* and the Gaming Liquor and Cannabis Regulations.

[11] The *Municipal Government Act* has been amended to include section 687(3)(a.4) which states:

must comply with the applicable requirements of the regulations under the Gaming, Liquor and Cannabis Act respecting the location of premises described in a cannabis licence and distances between those premises and other premises.

The proposed development is fully compliant with the requirements of the *Gaming, Liquor and Cannabis Act* and therefore complies with section 687(3)(a.4).

[12] Variance power is provided to the Board in section 687(3)(d) of the *Municipal Government Act*. The Board may vary where, 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 of value of neighbouring parcels of land.

[13] The Court of Appeal has provided guidance to the Board in terms of variance power. *Thomas v Edmonton (City)*, 2016 ABCA 57 at paragraph [29] states:

[...] 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.

[14] *Newcastle Centre GP Ltd. v Edmonton (City)*, 2014 ABCA 295 at paragraphs [6] and [7] states:

[...] 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 is clear. Section 687(3)(d) mandates that 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 neighbouring parcels of land . . .

- [15] Based on these decisions it has been determined that the Appellant does not have to prove or disprove harm. The onus is on the party advocating harm to prove the harm.
- [16] Other than the two on-line responses submitted, no one else has expressed any opposition to the proposed development and it was noted that the Development Officer was not in attendance at the hearing.
- [17] Ms. Kiziak provided an overview of the proposed store at this location. Alcanna Cannabis Stores Limited Partnership is affiliated with a liquor retailer in Alberta since privatization.
- [18] The company is an Edmonton based, TSX listed public company and is an active member of the community.
- [19] They are building a brand trusted by regulators, landlords, communities and customers. Their real estate focus is on large commercial developments with sophisticated landlords that prefer an upscale and mature concept. This concept will be ahead of the curve and lead the market to responsible use and consumption.
- [20] The store security is industry leading with all product secured in locked glass cases or in a vault. During the first week of operation additional security and line management was provided and 17,000 transactions were completed.
- [21] Their stores refuse service to anyone who appears to be intoxicated and all of their stores close at 10:00 p.m. The goal is to make cannabis acceptable and eliminate the black market.
- [22] The subject site is in disrepair and will require a significant investment. Renderings of the exterior and interior were referenced to illustrate how the building will be renovated and modernized.
- [23] The proposed location is on a busy main street to address the safety of employees and customers. All of their employees are highly trained customer experienced representatives.
- [24] Mr. Noce referenced a series of photographs and diagrams contained in his PowerPoint presentation to illustrate the location of the proposed development and the distance

between the proposed Cannabis Retail Sales and the land zoned (A) Metropolitan Recreation Zone.

- [25] The building is located on Jasper Avenue and was originally an Earls Restaurant but has been vacant for more than one year.
- [26] The land zoned (A) is located on 100 Avenue. The Development Officer determined that the proposed development was 80 metres from the “public lands”, Grant Notley Park. The gathering place (gazebo / park) is located in the southwest corner of 116 Street and 100 Avenue, 848 metres from the proposed Cannabis Retail Sales Use. Grant Notley Park is an area with greenspace and a gazebo, bordered by 100 Avenue, 116 Street, trees and a ravine.
- [27] The public lands are not visible from the proposed development and the proposed development is not visible from the public lands. The proposed Cannabis Retail Sales is separated by Jasper Avenue, buildings and 100 Avenue.
- [28] The subject site to the closest point of the park which requires a person to trespass onto private property and walk into the ravine (in a direct line, without any of the detours caused by following a road) is 80 metres as calculated by the Development Officer. There is a significant slope from the private parking lot into the ravine which is covered with heavy forest and brush.
- [29] The distance of the proposed Cannabis Retail Sales to the entrance of the park (ravine), in a direct line without any of the detours caused by following a road is 219 metres and the proposed Cannabis Retail Sales is approximately 294 metres of lawful travel (walking) away from the entrance to the ravine.
- [30] There is no play area or place for people to congregate at the entrance to the ravine. There is simply a set of stairs leading down to Victoria Park Road.
- [31] Photographs of the promenade were referenced to illustrate that there are public benches installed on the public sidewalk.
- [32] Section 540.1 of the *Edmonton Zoning Bylaw* states that the Purpose of the Metropolitan Recreation Zone is to preserve natural areas and parkland along the river, creeks, ravines and other designated areas for active and passive recreational uses and environment protection in conformance with Plan Edmonton and the North Saskatchewan River Valley Area Redevelopment Plan.
- [33] The subject location is an appropriate place for the proposed Cannabis Retail Sales, especially compared to other options in the area. The proposed location is a single use building with ample parking and will not only repurpose a building that has been vacant for over a year but also improve the neighbourhood.

[34] Grant Notley Park is defined as “parkland” pursuant to section 11(g) of the *Public Places Bylaw*. Therefore, the smoking of any tobacco or cannabis product is not allowed, pursuant to section 12.1(1)(f).

[35] Mr. Noce provided the following information in response to questions from the Board:

- a) The Appellant has not had any discussions with the Oliver Community League.
- b) It was his estimation that the ravine is sloped at approximately a 45 degree angle leading down to Victoria Park Road and the stairs are quite steep to accommodate this slope.
- c) It was acknowledged that individuals will create their own walking paths but in order to access the ravine from the proposed store within an 80 metre separation distance, private property would have to be trespassed.
- d) Regarding an on-line response in opposition, Mr. Noce stated that it is a bold assertion to assume that the homeless and transient populations in this area are cannabis users.
- e) It was his opinion that the proposed development will actually be an improvement to this area along Jasper Avenue because it will rejuvenate a site that has been vacant for more than one year and will provide more eyes and ears on the street.

ii) Position of the Development Officer, Mr. I. Welch:

[36] Mr. Welch did not attend the hearing but provided a written submission that was considered by the Board.

Decision

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

- 1) The Cannabis Retail Sales must commence operations within nine (9) months of the date of issuance of this Development Permit;
- 2) Exterior lighting shall be developed to provide a safe lit environment in accordance with Sections 51 and 58 and to the satisfaction of the Development Officer.
- 3) Any outdoor lighting for any development shall be located and arranged so that no direct rays of light are directed at any adjoining properties, or interfere with the

effectiveness of any traffic control devices. (Reference Section 51 of the Edmonton Zoning Bylaw 12800).

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.

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

1. The minimum required separation distance requirement from public lands (Grant Notley Park) as per section 70(3) is varied to allow a deficiency of 20 metres, thereby decreasing the minimum required separation distance to 80 metres.

Reasons for Decision

[39] Cannabis Retail Sales is a Permitted Use in the (CB3) Commercial Mixed Business Zone. The only issue before the Board is that the proposed development is 80 metres away from public lands, instead of the required 100 metres separation distance as set out in the *Edmonton Zoning Bylaw* per section 70(3).

[40] The Appellants seek a variance from that development regulation. The Board grants the variance, and does so for the following reasons:

- a) The subject site is large and there is significant on-site parking that causes the actual retail location to be further away from the public lands than the actual site boundary would indicate.
- b) The subject site is separated from the public lands by Jasper Avenue, a six lane arterial road, which creates a significant barrier between the subject site and the public lands that are at issue.
- c) The public lands at issue are not easily accessed by pedestrians from the subject site due to the interposition of highly developed private property between the subject site and the public lands, reducing the likelihood that the customers of the proposed development would walk to the public lands and consume cannabis on the public lands. It is actually 294 metres from the Cannabis Retail Sales building to find the first access point to the ravine park system.
- d) The public lands are not visible from the subject site.

- e) The public lands located within the 100 metre radius from the subject site are not developed, contain no recreational facilities, but are in fact a heavily treed, steeply sloped ravine. It is not a location that would tend to attract any public congregation.

[41] For these reasons, the Board concludes that granting the variance will not unduly interfere with the amenities of the neighbourhood nor materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land.

Mr. I. Wachowicz, Chair
Subdivision and Development Appeal Board

Board members in attendance: Mr. B. Gibson, Ms. D .Kronewitt-Martin, Ms. E. Solez, Mr. J. Wall

Important Information for the Applicant/Appellant

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