



**EDMONTON
TRIBUNALS**

*Subdivision &
Development
Appeal Board*

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Date: November 14, 2018
Project Number: 284016770-001
File Number: SDAB-D-18-179

Notice of Decision

- [1] On October 31, 2018, the Subdivision and Development Appeal Board (the “Board”) heard an appeal that was filed on **October 4, 2018**. The appeal concerned the decision of the Development Authority, issued on September 26, 2018, to refuse the following development:

Construct a Major Alcohol Sales building on part of a Site.

- [2] The subject property is on Plan 1523747 Blk 27 Lot 5, located at 503 - Griesbach Parade NW, within the (GVC) Griesbach Village Centre Zone. The Griesbach Special Area and Griesbach Neighbourhood Area 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; and
 - The Appellant’s written submissions.

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, Mr. J. Murphy, Ogilvie LLP*

[7] Mr. Murphy was accompanied by Mr. S. Kozminuk and Mr. K. Braithwaite of Brentwood Developments.

[8] The proposed development is within the (GVC) Griesbach Village Centre Zone and it is important to pay attention to the purpose of this zone:

940.6(1) General Purpose (Edmonton Zoning Bylaw (the Bylaw))

To allow for a mixed Use of businesses, residences, and institutional Uses in a village centre format promoting pedestrian orientation in accordance with the design objectives in the Griesbach Neighbourhood Area Structure Plan.

[9] Mr. Murphy likened the site shape of Griesbach Village Centre to a fan. Commercial uses are located at the southeast corner and the fan opens up as it radiates outward towards the residential area creating a village centre atmosphere. The outer boundaries are not pedestrian oriented as they are bounded by 137 Avenue and 97 Street, two major roads. The pedestrian nature is within the fan.

[10] The site plan under Tab 3 was referenced to show the location of the proposed development and the existing easement. This easement requires the building to be set back further than what would normally be the case and presents a hardship for the applicant. The Development Officer agrees with this. Granting a variance to the setback would not interfere with the amenities of the neighbourhood nor materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land.

[11] A parking variance is no longer required. The proposed development is located across the street from a large transit centre; therefore the City has reduced the required number of parking stalls for the proposed development.

[12] The separation distance between the proposed development and the existing alcohol sales use at the Rosslyn Hotel must be 500 metres. The Development Officer cannot vary this requirement as section 85.2(b) of the *Bylaw*, which would permit granting a variance, has not been met:

85.2(b) Notwithstanding subsection 85(1), a Major Alcohol Sales or Minor Alcohol Sales may be located less than 500 m from any other Major Alcohol Sales or Minor Alcohol Sales if all the following regulations are met:

the Major Alcohol Sales or Minor Alcohol Sales are located outside the boundary shown in Appendix 1 to Section 85.

The proposed alcohol sales use is outside of this boundary, but the existing alcohol sales use is within the non-exemption boundary. Both alcohol sales uses must be outside of the

boundary for the exemption to apply. Therefore, a variance is required to the 500 metre separation distance.

- [13] A Google Earth photograph was referenced (Tab 6) to show the location of the two alcohol sales uses and the surrounding areas. The two stores are clearly located on separate sites and are separated by 137 Avenue. Each alcohol sales use is intended to serve its own respective neighbourhood. Allowing the proposed development will not have a negative impact on any of the surrounding properties.
- [14] A Pictometry photograph under Tab 7 shows the fan shape of Griesbach Village. The commercial area is very much a village centre and is inward looking towards the community which fans out from it. Many existing trees along 97 Street and 137 have been maintained.
- [15] The ability to walk and purchase liquor is an amenity that the area is seeking; otherwise residents would have to drive across a very busy roadway to arrive at the Rosslyn liquor store. This is exactly what the pedestrian oriented village centre concept is trying to avoid as per the highlighted sections of the Griesbach Neighbourhood Area Structure Plan under Tab 8. 137 Avenue is an effective barrier between two alcohol sales uses and is just as effective as the separation distance required by the *Bylaw*.
- [16] Alberta Court of Appeal decision *Newcastle Centre GP Ltd. v Edmonton (City)*, 2014 ABCA 295 was referenced – in that case the Court said you cannot take on a presumption of harm just because two liquor stores are located within the separation distance required by the *Bylaw*. The Court referred the decision back to the Board and directed it to look at section 687(3) of the *Municipal Government Act*. On reconsideration, the Board applied the appropriate test and granted the permit. The circumstances today are similar to *Newcastle* and the Board should grant the variance.
- [17] In summary, Griesbach Village is a distinct neighbourhood designed to provide amenities for its residents. The 500 metre separation distance rule is standing in the way of an amenity that this neighbourhood needs.
- [18] Mr. Murphy has no objections to any of the conditions proposed by the Development Officer should this development be granted.
- [19] No one appeared in opposition to the proposed development including no one from the Rosslyn liquor store.
- [20] Mr. Murphy provided the following responses to questions from the Board:
- a) While the Rosslyn liquor store is outside of the 60 metre notification area, he would be surprised if they did not know of the proposed development as it has been widely publicized.
 - b) The Appellants confirmed there is a pedestrian crossing at 137 Avenue and 99 Street that recently had lights installed. However, this area is not very conducive to walking.

ii) Position of the Development Officer, Mr. P. Kowal

- [21] Mr. Kowal confirmed that the Bunt & Associates parking study provided by the Appellant is correct and the proposed development fully complies with all parking requirements. Its proximity to a transit centre reduces the parking requirements and the proposed development has an excess in the required number of parking spaces.
- [22] He confirmed that the village centre is one large site with multiple buildings and internal roadways.
- [23] He would have granted the required variances if he had the authority to do so.
- [24] Approving the proposed development makes sense from a safety standpoint. It does not make sense to require residents of a self-contained village to cross a very busy roadway to access an alcohol sales store.
- [25] If the Griesbach alcohol sales was approved first and the Rosslyn alcohol sales was applying for a permit, a variance to the separation distance would still be required as both stores must be outside of the non-exemption area located in section 85, Appendix 1.

iii) Rebuttal of the Appellant

- [26] Mr. Murphy declined the opportunity for rebuttal.

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**:
1. All access locations and curb crossings shall have the approval of the City Transportation and Streets Department prior to the start of construction. Reference Section 53(1).
 2. Access from the site to 137 Avenue, 97 Street and Griesbach Parade exists. Any modification to the existing accesses requires the review and approval of Subdivision Planning
 3. There may be utilities within road right-of-way not specified that must be considered during construction. The owner/applicant is responsible for the location of all underground and above ground utilities and maintaining required clearances as specified by the utility companies. Alberta One-Call (1-800-242-3447) and Shaw

Cable (1-866-344-7429; www.digshaw.ca) should be contacted at least two weeks prior to the work beginning to have utilities located. Any costs associated with relocations and/or removals shall be at the expense of the owner/applicant.

4. Any hoarding or construction taking place on road right-of-way requires an OSCAM (On-Street Construction and Maintenance) permit. OSCAM permit applications require Transportation Management Plan (TMP) information. The TMP must include:
 - the start/finish date of project;
 - accommodation of pedestrians and vehicles during construction;
 - confirmation of lay down area within legal road right of way if required;
 - and to confirm if crossing the sidewalk and/or boulevard is required to temporarily access the site

It should be noted that the hoarding must not damage boulevard trees. The owner or Prime Contractor must apply for an OSCAM online at:

https://www.edmonton.ca/business_economy/licences_permits/oscam-permitrequest.aspx
and,

<https://www.edmonton.ca/documents/ConstructionSafety.pdf>

5. Any sidewalk or boulevard damage occurring as a result of construction traffic must be restored to the satisfaction of Development Inspections, as per Section 15.5(f) of the Zoning Bylaw. All expenses incurred for repair are to be borne by the owner.
6. All mechanical equipment, including roof mechanical units, shall be concealed by screening in a manner compatible with the architectural character of the building or concealed by incorporating it within the building.
7. Landscaping shall be in accordance with the approved Landscape Plan, Section 55 of the Zoning Bylaw and to the satisfaction of the Development Officer.
8. Any changes to an approved Landscape Plan require the approval of the Development Officer prior to the Landscaping being installed.
9. Landscaping shall be maintained in a healthy condition for a minimum of 24 months after the landscaping has been installed, to the satisfaction of the Development Officer.

Landscaping Notes:

- i)* Upon the first Development Permit Inspection and determination that landscape construction has been completed in compliance with the approved Landscape Plan, 20% of the approved Guaranteed Landscape Security shall be collected and retained for a period of 24 months from the date of first Development Permit Inspection.

- ii) Sites that are not completed or are not compliant with approved Landscape Plans at the first Development Permit Inspection, shall be required to submit a Security for incomplete work, up to and including the full value of the approved Guaranteed Landscape Security value.
- [28] In granting the development the following variances to the *Edmonton Zoning Bylaw* (the *Bylaw*) are allowed:
- a) The maximum allowable Setback of 3.0 metres to accommodate street related activities, such as sidewalk cafes, architectural features and landscaping that contribute to the pedestrian oriented shopping character of the area or to accommodate roadway design or to preserve existing trees as per section 940.6(5)(d) is varied to allow an excess of 1.8 metres, thereby increasing the maximum allowed Setback to 4.8 metres.
 - b) The minimum required 500 metres separation distance from any Major Alcohol Sales or Minor Alcohol Sales from any other Major Alcohol Sales or Minor Alcohol Sales pursuant to section 85.1 is reduced by 298 metres to permit a minimum required separation distance of 202 metres.

Reasons for Decision

- [29] This is an appeal of a Major Alcohol Sales Use which is a Discretionary Use within the (GVC) Griesbach Village Centre Zone.
- [30] At the outset of the hearing, both parties confirmed that due to an error or miscommunication the parking requirements were incorrectly assessed. Given the proximity of the subject site to a major transit centre, parking requirements should have been calculated in accordance with section 54, schedule 1C. Using the correct development regulations, the Development Officer confirmed that the number of on-site parking spaces far exceeds the *Bylaw* requirement. Based on the parties' representations, the Board finds that no variance to the parking requirement is required.
- [31] The Board finds that the proposed Major Alcohol Sales Use is an appropriate Discretionary Use at this location for several reasons.
- [32] First, the subject site is a large commercial shopping centre and Major Alcohol Sales is reasonably compatible with the other on-site uses.
- [33] Second, the Board accepts the submissions of both parties that a Major Alcohol Sales Use accords with the Griesbach Neighbourhood Area Structure Plan and aligns particularly with the following provisions:
- a) The requirements for Conformity with Plan Edmonton under heading No. 2, Policy Context (page 6);

- b) The Community Objectives under heading No. 4, Planning Principles (page 13); and
 - c) The Village Centre Concept under heading No. 5, The Plan (page 19).
- [34] Third, the Board accepts the parties' submissions that this type of development is entirely consistent with the self-contained and pedestrian objectives of the (GVC) Griesbach Village Centre Zone.
- [35] Two variances are required; one to the maximum Setback and one to separation distance from another Alcohol Sales Use.
- [36] The Board grants the variance to the Setback for the following reasons:
- a) The Setbacks were enacted for the subject site specifically to enhance pedestrian friendliness. The required Setback is along the external perimeter of the site abutting 137 Avenue. The pedestrian orientation is meant for the interior of the site. A variance along the outer perimeter will have no impact on the objectives outlined in the Plan.
 - b) The Board accepts the Development Authority and the Appellant's position that easements in this area create a hardship unique to this site. In order to comply with its other legal obligations, the Setback must exceed the allowed maximum.
- [37] The Board allows a variance to the required 500 metre separation distance from another Alcohol Sales Use located 202 metres to the southeast per section 85.2 for the following reasons:
- a) The two Alcohol Sales Uses are physically separated by a major arterial roadway – 137 Avenue.
 - b) The two Alcohol Sales Uses are not in direct sight of one another, they are oriented to different roadways and separated by intervening commercial buildings.
 - c) The two Alcohol Sales Uses are subject to different plans and are meant to serve different areas pursuant to their respective plans.
 - d) As indicated by all parties, a Major Alcohol Sales Use was anticipated to be located in the shopping centre. The proposed development is entirely consistent with the Griesbach Neighbourhood Area Structure Plan. It is intended to serve residents of properties within the Plan, enhance the village centre concept and add to the amenities of the area subject to the Plan.
 - e) The Board received no objections or concerns from residents from within the (GVC) Griesbach Village Centre Zone or the residential and commercial areas to the south and east.

[38] 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.

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

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

Board Members in Attendance:

Mr. R. Handa, Mr. D. Fleming, Ms. L. Gibson, Ms. S. McCartney

cc: Development & Zoning Services – Mr. P. Kowal / Mr. H. Luke

Important Information for the Applicant/Appellant

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

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



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Date: November 14, 2018
Project Number: 286311022-001
File Number: SDAB-D-18-180

Notice of Decision

- [1] On October 31, 2018, the Subdivision and Development Appeal Board (the “Board”) heard an appeal that was filed on **October 5, 2018**. The appeal concerned the decision of the Development Authority, issued on September 18, 2018 to refuse the following development:

Change the use from a Health Services to a Cannabis Retail Sales.

- [2] The subject property is on Plan RN22 Blk 7 Lots 1-2, located at 12225 - 107 Avenue NW, within the (CB1) Low Intensity Business Zone. The Main Streets Overlay and 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;
 - The Development Officer’s written submission;
 - The Appellant’s written submissions; and
 - One on-line response and one e-mail in opposition to the proposed development.
- [4] The following exhibit was presented during the hearing and forms part of the record:
- Exhibit A – An e-mail from the Development Officer to the Appellant.

Preliminary Matters

- [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.

- [7] Prior to proceeding with the merits of the appeal the Presiding Officer asked how the supplemental documents received today are relevant. Mr. K. Wakefield explained that there is currently a matter being heard in special chambers of the Court of Queen's Bench of Alberta challenging the Expression of Interest and Lottery System used by the City of Edmonton to determine priority in issuing Development Permits for Cannabis Retail Sales. If the Appellant in the chambers application (Item 9 Inc.) is successful it could mean that today's Applicant at the SDAB hearing (Fire and Flower) is entitled to a permit out of right.
- [8] Ms. Cherniawsky and Mr. R. Handa disclosed that they had sat on the Item 9 Inc. appeal that is currently the subject of the chambers application in Court. The Presiding Officer confirmed with the parties in attendance that there was no opposition to the composition of the panel.

Summary of Hearing

i) Position of the Appellant, Mr. K. Wakefield, Dentons Canada LLP

- [9] Mr. Wakefield was accompanied by Mr. M. Anderson of Fire and Flower.
- [10] Mr. Anderson reviewed their supplemental materials which provide background information regarding the City's Expression of Interest and Lottery System.
- [11] They believe the Development Permit for the approved Cannabis Retail Sales they are too close to was obtained unfairly. Two separate Expressions of Interest applications for two municipal addresses in the same building (12321 – 107 Avenue and 10649 – 124 Street) were submitted. These locations were drawn as No. 42 and No. 44 in the lottery system. The 12321 – 107 Avenue location received an approved Development Permit and the application for the other location was subsequently withdrawn.
- [12] The landlord of this approved Development Permit reached out to Fire and Flower, and other applicants, and offered to lease this space to them. The landlord is effectively selling his Development Permit. Landlords have an unfair advantage over cannabis operators because they have the opportunity to submit multiple applications. Therefore, they are given a higher chance of obtaining a lower number in the lottery system.
- [13] The above practice goes against the City's own policies. Mr. Anderson quoted the following from a report made by administration to Council on May 22, 2018:
- Establish a process where all potential operators may have an equal opportunity to apply for a particular location
 - Eliminate multiple applications for the same location

The Expression of Interest form itself states:

I acknowledge that submitting more than one Expression of Interest for the proposed location will result in all Expression of Interest for the proposed location being disqualified and not eligible for the random selection process.

- [14] An e-mail dated October 30, 2018, from Mr. S. Chow (Development Officer) to Mr. K. Wakefield was submitted as *Exhibit A*. This e-mail confirms that applications for 12321 – 107 Avenue and 10649 – 124 Street were submitted on June 27, 2018 and their random draw numbers for the Expression of Interest were #42 and #44. The application for 12321 – 107 Avenue was approved on August 14th. The other application for 10649 – 124 Street was withdrawn on September 28th.
- [15] For the above reasons it is not proper for a Development Permit to be issued to 12321 – 107 Avenue. The approval for the above address forms the basis for today’s hearing regarding a deficiency in separation distance.
- [16] Mr. Wakefield referred to several maps in the supplemental submission which show separation distances from the proposed location to other Cannabis Retail Sales as well as from sensitive use areas such as parks. A City map showing proposed zoning locations for Cannabis Retail Sales was referenced. These maps confirm that the proposed location is suitable other than not meeting the separation distance requirement from the approved Cannabis Retail Sales at 12321 – 107 Avenue.
- [17] Mr. Wakefield summarized the contents of his written submission.
- [18] **Tab 1**
Section 70(1) of the *Edmonton Zoning Bylaw* (the *Bylaw*) stipulates that Cannabis Retail Sales shall not be located less than 200 metres from any other Cannabis Retail Sales. Section 70(1)(b) states that the Development Officer may not grant a variance to reduce this separation distance by more than 20 metres. The Board has greater variance powers per section 687(3)(d) of the *Municipal Government Act* (the *Act*).
- [19] **Tab 2**
Contains a report from City Administration to Council supporting Charter Bylaw 18387 and states “Walkable commercial areas (main streets, downtown) are desirable for cannabis stores”. The proposed location meets this criteria.
- [20] **Tab 3 and 4**
Mr. Wakefield confirmed that the proposed Use at this location complies with all of the requirements of the *Gaming, Liquor and Cannabis Act and Regulation*. There are strict controls on minors not accessing stores and the prohibition of sale of cannabis to minors. Fire and Flower has even stricter controls and will have a two point contact system for checking the age of customers. Identification will be requested from anyone who appears to be less than 25 years of age.

[21] **Tab 5**

Contains a copy of section 11 of the *Bylaw* which outlines the variance powers of the Development Officer.

[22] **Tab 6**

Contains a copy of section 687(3)(d) of the *Act* which outlines the Board's jurisdiction:

In determining an appeal, the subdivision and development appeal board

may make an order or decision or issue or confirm the issue of a development permit even though the proposed development does not comply with the land use bylaw if, in its opinion,

(i) 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,

and

(ii) the proposed development conforms with the use prescribed for that land or building in the land use bylaw.

[23] **Tab 7**

Their Development Permit application was submitted June 29, 2018, by Fire and Flower for the present site. The refusal was dated September 18, 2018, due to a deficiency of 78 metres in the required setback.

Item 9's case is very parallel to today's situation. Should the Item 9 appeal and the City's lottery system not prevail, Fire and Flower would have been entitled to a permit. The City has 20 days to acknowledge completeness of the application per section 683.1(1) of the *Municipal Government Act*. If no further request for information is made by the City, Fire and Flower's application would be deemed complete after 20 days from June 29, 2018.

[24] **Tab 8**

The City's slim map system was shown to demonstrate shows the zoning in the surrounding area.

[25] **Tab 9**

Contains an aerial and street level photograph of the building where the proposed development is to be located as well as the immediately surrounding commercial buildings.

[26] **Tab 10**

Contains photographs of the 124 Street and 107 Avenue locations referred to by Mr. Anderson. The land title search confirms that both of these addresses are on one title.

[27] **Tabs 11 and 12**

Contain copies of two previous SDAB decisions regarding Cannabis Retail Sales (SDAB-D-18-133 and SDAB-D-18-153) in which the Board used their discretion to reduce the required separation distances.

[28] **Tab 13**

Contains two Edmonton Journal articles regarding smoking rules.

[29] Mr. Wakefield reiterated that the Expression of Interest and Lottery System was not handled according to the City's own rules. The landlord of the two addresses referred to was advantaged and Fire and Flower was disadvantaged.

[30] Approving the proposed development does not result in significant clustering. There is no opportunity for another Cannabis Retail Sales Use to operate to the east along 107 Avenue until you get past the two Cemeteries. There is also no other similar use to the west until you get to 124 Street. No adverse effects on the neighbourhood would be created by approving the proposed development.

[31] The Appellants provided the following responses to questions from the Board:

- i) There is currently a vape shop located at the property that has the approved Cannabis Retail Sales permit at 12321 – 107 Avenue. The vape shop door fronts onto 107 Avenue but they are unsure how the door of a potential Cannabis Retail Sales would be oriented. AGLC regulations require a separate receiving area.
- ii) The vape shop and the Fire and Flower store are both on the same side of 107 Avenue but there is a block in between them.
- iii) The Appellants used the aerial photograph under Tab 9 and the Board's 60 metre notification map to provide context to the area and identify the variety of businesses surrounding the proposed development along 107 Avenue. There are primarily walk-up apartments to the south of 107 Avenue and there is a mix of uses to the north.

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

[32] Mr. Welch clarified that each municipal address in Edmonton was entitled to submit an Expression of Interest for Cannabis Retail Sales as opposed to only one per titled lot. In a number of cases owners of multi-bay buildings were able to submit multiple Expression of Interest entries. However, if two bays were selected, the one with the earlier priority

would only be able to apply for a Development Permit at the address drawn. The second bay would be subject to the same separation rules as all other applications and would inferably be denied by the Development Officer as an automatic refusal. Moreover, the two separate bays entered into the lottery could not be combined.

- [33] According to Alberta's property rights, a registered land owner who has been issued a legal permit can dispose of it as he sees fit subject to the restrictions of the *Edmonton Zoning Bylaw*. A Cannabis Retail Sales must open within nine months of the issuance of a permit.
- [34] While the Appellants are questioning the lottery process it is the submission of the Development Authority that this is an acceptable method of determining the priority of permit reviews. In this case, Mr. Bernstein's property obtained an approved permit; as a result, the Fire and Flower application is subject to an automatic refusal as it is too close to an approved Cannabis Retail Sales.
- [35] There are still locations within the area that could obtain a Cannabis Retail Sales permit – 12204 - 106 Avenue being one of them. This confirms that no hardship is present; therefore, no variance should be given.
- [36] The Development Officers provided the following responses to questions from the Board:
- i) They confirmed that a Cannabis Retail Sales can only go into the bay for the address that the Development Permit was issued on. An operator can change the orientation of the doorway but must only occupy the space specified on the permit.
 - ii) If an approved Cannabis Retail Sales wants to expand into a second bay they must submit a new application to do so. After the Expression of Interest time period is complete future Cannabis Retail Sales applications will be subject to the standard first come first serve basis.
 - iii) Parking requirements in this area are subject to the Main Streets Overlay which requires one parking stall per 100 square metres no matter what the Use class is. Both the approved development permit and the proposed Fire and Flower location meet the parking requirements.
 - iv) The Business Revitalization Zone (BRZ) was not notified regarding the approved location on 124 Street and 107 Avenue as it was a Class A Development Permit with no variances. The Development Authority only sends notices to Community Leagues, BRZ's and property owners within a 60 metre radius if a variance has been granted or the permit was issued as a Discretionary Use.
 - v) The Development Authority has received very few comments from BRZ's regarding any cannabis locations throughout the City.
 - vi) They do not know the lottery number of the proposed development.

- vii) It is their opinion that a 78 metre deficiency in the separation distance would create a negative impact. It would be a shorter walk for a person to go from one store to another. One of the goals of the cannabis retail regulations is to prevent clustering to discourage the potential for social disorder. Further, more stores of the same use reduce the overall variety of stores in the area.
- viii) Mr. Welch referred to the Alberta Court of Appeal decision *Newcastle Centre GP Ltd. v Edmonton (City)*, 2014 ABCA 295 [*Newcastle*] which directs that the Board must have an evidence basis for approving or denying variances. This does not close the door to the Board considering planning goals and practices. It is a commonly accepted planning goal to maximize the potential variety of businesses in an area.
- ix) Mr. Welch could not comment as to whether approving the proposed development would result in clustering.
- x) Granting a variance of 78 metres would be approximately a 30 percent reduction in the required separation distance. Normally anything over 10 percent is considered quite significant.

iv) Rebuttal of the Appellants

- [37] Mr. Anderson advised Fire and Flower was number 73 in the lottery process. However, they were not allowed as many tickets in the lottery system as a landlord with multiple bays. These multiple applications should not have been allowed to proceed.
- [38] Mr. Wakefield stated that while the Development Officer referred to hardship, this is not the test that the SDAB must consider. As per section 687(3)(d) the Board must decide if the proposed development creates an adverse effect on the surrounding area.
- [39] Mr. Welch could not comment regarding clustering. In the City's brief before the Court of Queen's Bench of Alberta, the City submitted that Item 9 should appeal to the SDAB for a variance. If this variance were to be granted you would end up with two stores across the street from one another on Whyte Avenue. The City's position in that case suggests that they are not concerned with clustering in a general perspective.
- [40] The Appellants reviewed the overhead photograph of the area and indicated there are substantial vacant spaces in the area providing an opportunity for a variety of business to move in. 124 Street has a large variety of mostly commercial uses; it is one of the most diverse areas in the City.
- [41] While the City sets out general numbers for separation distances from schools, parks and other Cannabis Retail Sales everyone recognizes that this is general rule. Like all good systems there is an appeal process and in this case the SDAB is mandated to look at each

case on an individual basis. It is not unreasonable for the SDAB to grant a variance to allow the proposed development.

- [42] Fire and Flower have found that their other Cannabis Retail Sales locations are having a complimentary effect on nearby businesses due to the increase in foot traffic. They believe the proposed development will help revitalize the area.
- [43] They confirmed they have no objections to any of the suggested conditions on the Development Officer's report.

Decision

- [44] 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. There shall be no parking, loading, storage, trash collection, outdoor service or display area permitted within the required 4.5m (14.76 ft.) setback. (Reference Section 340.4(3) & (5).)
3. 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:

- a. 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.
 - b. Signs require separate Development Applications.
 - c. Unless otherwise stated, all above references to section numbers refer to the authority under the Edmonton Zoning Bylaw 12800 as amended.
- [45] In granting the development the following variance to the *Edmonton Zoning Bylaw* (the *Bylaw*) is allowed:

- a. The minimum required 200 metres separation distance from any Cannabis Retail Sales from any other Cannabis Retail Sales pursuant to section 70(1) is reduced by 78 metres to permit a minimum required separation distance of 122 metres.

Reasons for Decision

- [46] The proposed development is to change a Health Services Use to a Cannabis Retail Sales Use. Pursuant to section 330.2(3) of the *Bylaw*, Cannabis Retail Sales is a Permitted Use in the (CB1) Low Intensity Business Zone.
- [47] Cannabis Retail Sales is subject to regulations under the *Gaming, Liquor, and Cannabis Regulation*, AR 143/96. Section 105 deals with restrictions on the locations of licensed cannabis premises. Namely, the section stipulates distances between those premises and certain other sensitive uses. Section 687(3)(a.4) of the *Municipal Government Act* (the *Act*) directs that in deciding an appeal the Board must comply with those requirements.
- [48] Based on the submissions of the Respondent and the Development Officer, the Board finds that the proposed development complies with these regulations and any duty it may have pursuant to section 687(3)(a.4) has been discharged.
- [49] The Board was presented with two main grounds for appeal:
- i) The unfairness in the lottery system; and
 - ii) 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.
- [50] With respect to the first ground of appeal, the Board finds that it is not relevant to the issue at hand and declines to grant the appeal on this basis.
- [51] While fairness with respect to the application of the section 687(3)(d) test and the *Bylaw* in general is a requirement of this Board, fairness in the lottery system is not an appropriate planning consideration in deciding this appeal. Moreover, it is beyond the purview of this Board.
- [52] As such, the Board does not make a finding on the adequacy of the lottery system and any alleged unfairness that has resulted by its application. A determination of that issue is better suited for another forum.
- [53] This Board's test in determining an appeal is set out in section 687(3)(d) of the *Act*. This is the Appellant's second ground of appeal. On this basis, the Board grants the appeal in finding that the proposed development will not materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land or interfere with the amenities of the neighbourhood. The Board makes this finding for the following reasons:

- i) Cannabis Retail Sales is a Permitted Use in this Zone and, with the exception of the separation distance, complies with all other development regulations.
- ii) The Board was provided with no evidence from either the City or neighbours that a reduction in the separation distance in this situation would interfere with the use, enjoyment, or value of neighbouring parcels of land.
- iii) While the City provided a cautionary statement in its legal brief that the effects are unknown, they provided no evidence suggesting interference with neighbouring parcels would occur. This Board received direction in *Newcastle* from the Court of Appeal that a presumption of harm cannot be inferred from a non-compliance with the *Bylaw*, which is in essence what the City is asking this Board to do.
- iv) In the interest of fairness, this Board must make a decision at the time of the appeal. We cannot wait for future evidence, one way or the other, before deciding the merits of the appeal before us. We must make a decision on the evidence presented and in consideration of the circumstances of each application.
- v) While there were responses supporting the refusal of the permit from neighbouring parcels, the Board gives no weight to those responses. The responses all related to parking issues and were not related to the separation variance being sought. Given that the proposed development complies with the parking regulations and no parking variance is required this Board declines to consider the responses in making its determination.
- vi) On the issue of interference with the amenities of the neighbourhood, the Board is satisfied that no such interference will result.
- vii) The City provided evidence that granting this application may result in clustering of cannabis stores in the neighbourhood. The City cited a previous SDAB decision which dealt with the West Jasper Area Redevelopment Plan. On that occasion, this Board denied an application that was seeking a relaxation to the separation distances between Cannabis Retail Sales Uses.
- viii) Notwithstanding that consistency is desirable, the Board notes that it is not bound by precedential SDAB decisions and that each appeal must be decided on its own merits.
- ix) Moreover, the Board distinguishes that previous decision for following reasons:
 - (a) The previous decision dealt with an area development plan that expressly contemplated a variety of business along the subject corridor. There is no such reference in the West Ingle Area Redevelopment Plan.
 - (b) The subject area in the previous decision was an area under redevelopment with substantially fewer opportunities for commercial enterprises. As discussed below, this is not the case in the appeal before us today.

(c) The Cannabis Retail Sales in that decision was located in the same block as the previously approved application. However, in this case, there is a separation of an entire block between the two Uses.

- [54] In coming to its decision that the amenities of the neighbourhood will not be interfered with by this development, the Board accepts the evidence of the Appellant that there are a variety of Uses prevalent in this area. Moreover, the Board finds that the addition of one Cannabis Retail Sales Use would not offend the generally accepted planning desire for diversity in the area.
- [55] The Board bases this finding on the evidence of the Appellant that there are ample additional commercial spaces in close proximity to the proposed location for other forms of commercial uses. The addition of this Cannabis Retail Sales premises would not preclude the establishment of other uses in the area and would add to the economic diversity sought by the City.
- [56] Moreover, this location is essentially at the end of the commercial corridor. The establishment of this location will not cause a proliferation of Cannabis Retail Sales because there are no other potential locations in the immediate area for a permitted Cannabis Retail Sales along 107 Avenue.
- [57] The only other potential locations for Cannabis Retail Sales in the immediate area will be subject to the separation distances of previously approved cannabis applications and are not otherwise affected by the approval of this development.
- [58] This is a unique circumstance where a development is proposed on the fringe of a Cannabis Permitted Zone. The Board notes that given the zoning further east along 107 Avenue Cannabis Retail Sales would not be an available Use. These circumstances serve to prevent any potential clustering cited as a concern by the City.
- [59] For the above reasons, this Board is satisfied that its test under section 687(3)(d) of the *Act* has been met and it is an appropriate circumstance to grant a variance to the minimum required separation distance.



Mr. R. Handa, Presiding Officer
Subdivision and Development Appeal Board

Board Members in Attendance:

Ms. K. Cherniawsky, Mr. D. Fleming, Ms. L. Gibson, Ms. S. McCartney

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

Important Information for the Applicant/Appellant

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

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