



**EDMONTON
TRIBUNALS**

*Subdivision &
Development
Appeal Board*

*10019 - 103 Avenue NW
Edmonton, AB T5J 0G9
P: 780-496-6079 F: 780-577-3537
sdab@edmonton.ca
edmontonsdab.ca*

Date: October 24, 2019
Project Number: 286758265-005
File Number: SDAB-D-19-174

Notice of Decision

- [1] On October 10, 2019, the Subdivision and Development Appeal Board (the “Board”) heard an appeal that was filed on September 12, 2019. The appeal concerned the decision of the Development Authority, issued on September 5, 2019, to refuse the following development:

To continue the Use of an approved Cannabis Retail Sales.

- [2] The subject property is on Plan I Blk 60 Lot 9, located at 10117 - 82 Avenue NW, within the (CB2) General Business Zone. The Main Streets Overlay and 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 submission;
 - The Appellant’s written submissions;
 - Submissions from Legal Counsel representing Spirit Leaf Inc. in opposition to the proposed development;
 - Letter received from the Old Strathcona Business Association in opposition to the proposed development; and
 - An email and letter in opposition from a neighbouring property owner.
- [4] The following exhibit was presented during the hearing and forms part of the record:
- Exhibit A – Petition with several signatures from neighbouring property owners in support of the proposed development; a map of the area; and business cards, submitted by Legal Counsel for the Appellant.

Preliminary Matters

- [5] 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.
- [6] The Presiding Officer 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 (the “Act”)

Summary of Hearing

i) *Position of Mr. K. Haldane, Legal Counsel for the Appellant, 2113883 Alberta Ltd.,*

- [8] The proposed development, to continue the use of an approved Cannabis Retail Sales, is a Permitted Use in the CB2 General Business Zone.
- [9] The proposed setback from another Cannabis Retail Sales use is 47 metres and the requirement under section 70 of the *Edmonton Zoning Bylaw* is 200 metres (TAB 1).
- [10] The test for the variance of the development standard of a permitted use in section 687(3) of the *Act* is in the Court of Appeal decision *Newcastle Centre GP Ltd. v Edmonton (City)* 2014 ABCA 295 (“*Newcastle*”). Paragraph 7 of the decision states:

The legal test for such waivers is in the *Municipal Government Act*, and is clear. Section 687(3)(d) mandates this test:

the proposed development... would not (A) unduly interfere with the amenities of the neighbourhood, or (B) materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land...

- [11] There is no evidence of any adverse planning results associated with Cannabis Retail Sales and in the absence of that evidence it is difficult to find evidence that two Cannabis Retail Sales closer than 200 metres from one another exacerbates any negative effect or creates a new one that does not exist where there is only one Cannabis retailer.
- [12] The development was refused by the City in October 2018 on the same basis. They appealed to the Board and a neighbouring Cannabis Retail Sales, Spirt Leaf Ltd., received their permit on September 19, 2018. The Board approved a Cannabis Retail Sales permit on December 14, 2018 and that decision is in TAB 4.
- [13] TAB 2, is an email received from R. Tardif, Development Compliance Officer, indicating that the nine month date of expiry for the development permit was approaching.

[14] The City provided five options for permit holders as they approach the nine month expiry date of the Development Permit:

Option 1 – Proceed with opening the store and obtain an AGLC licence when it is available.

Option 2 – Apply for a new Class A Development Permit.

Option 3 - Apply for a new Class B Development Permit.

Option 4 - Development Permit decision through the SDAB.

Option 5 – Expiry of your Development Permit.

Mr. Haldane’s client’s application falls under Option 4.

[15] The bylaw allowing Cannabis Retail Sales was passed prior to legalization. The City was not sure when legalization would take place; therefore, a nine month expiration date was applied in the *Edmonton Zoning Bylaw* (the “Bylaw”) so the City would not have several permits approved for something that was not legalized.

[16] Cannabis retailers needed a Development Permit and an Alberta Gaming, Liquor and Cannabis (“AGLC”) licence for the operation to be legal federally. Due to the moratorium on licenses from AGLC, retailers were not able to open to sell cannabis.

[17] The nine month time limit to commence operation was removed from section 70 of the *Bylaw*.

[18] TAB 3 shows an overhead view of the subject site which is south of 82 Avenue and west of 101 Street.

[19] There is a Cannabis Retail Sales across the street from the subject site, north of 82 Avenue.

[20] TAB 4 is the previous SDAB decision (SDAB-D-18-199) for the subject site. Paragraph 50 of that decision states:

The Board considered the submissions of the Development Authority which note that this commercially oriented portion of Whyte Avenue was identified as particularly suitable for this Permitted Use, and also that a cautious approach should be taken to all variances as the impacts of Cannabis Retail Sales and the necessity for separation distances between these Uses at this point are unknown. The Board therefore also considered the location of other nearby approved Cannabis Retail Sales.

[21] Cannabis Retail Sales are highly regulated and required to have security requirements. In his opinion, a Cannabis Retail Sales use does not generate a nuisance to the public.

- [22] TAB 5 is a Building Permit that was approved following the issuance of the Development Permit by the Board in 2018.
- [23] Mr. Haldane's client had an approved permit and commenced construction but could not comply with the nine month condition of the permit due to the AGLC moratorium and the Development Officer could not issue a new permit due to the variance required.
- [24] Section 70 of the *Bylaw* was amended respecting the nine month expiry. The Background Report of Charter Bylaw 18720 was referenced that states:

As a result of uncertainty about the dates for legalization and its accompanying federal and provincial legislation coming into force, Administration proposed the inclusion of a clause in Section 70 of the Zoning Bylaw that would result in the expiry of any permits issued after nine months. This regulation allowed the City to issue permits in advance of the date of legalization that would expire within nine months, in the event the legislation was not enacted. Now that legalization has become effective and is on a path to normalization, the nine-month expiry provision has served its purpose and is no longer required.

- [25] Mr. Haldane referred to the report submitted to Council for *Options for Managing Impacts of Major and Minor Alcohol Sales*.
- [26] The separation distance between Liquor Stores used to be 500 metres in all cases and that was reduced to 100 metres.
- [27] The report from City administration recommended the removal for distances between Liquor Stores. Mr. Haldane referred to the following excerpts from *Options for Managing Impacts of Major and Minor Alcohol Sales*:

Executive Summary

....

Administration has found that the separation distance requirement between liquor stores introduced to Zoning Bylaw 12800 has not reduced the proliferation of liquor stores in Edmonton, nor has it improved business practices. Administration could not identify a relationship between the locations of liquor stores and crime, or between the use of separation distances and the issues the regulation was intended to address.

Based on analysis, research, and engagement, Administration recommends removal of the 500 metre separation distance between liquor stores and retaining the current 100 metre separation distance from parks and schools. This is Administration's recommended option of several possible options outlined in the report.

Report

....

One of the concerns with the separation distance is that it restricts competition among liquor stores and enables a false monopoly for existing retailers. Reduced competition decreases the incentive for businesses to operate using good business practices. The 500 metre regulation creates a monopoly where only one liquor store may operate, and is the only one serving the area, regardless of consumer preferences.

[28] Most of the concerns from the neighbouring Cannabis Retail Sales business is related to competition and has nothing to do with sound planning principles.

[29] Mr. Haldane referred to the following excerpt from *Options for Managing Impacts of Major and Minor Alcohol Sales*:

Impacts and Effectiveness of Zoning Bylaw 12800 Regulations

....

Administration suggests that zoning is not an effective tool for limiting the availability and consumption of a regulated substance. Zoning regulates the use of land, and the shape and location of development. It is not intended to regulate a specific type of product.

[30] Mr. Haldane has seen how Cannabis Retail Sales operate and they do not generate any nuisance issues; clustering them together presumably would not increase nuisance issues.

[31] Mr. Haldane provided the following information in response to questions by the Board:

- a. With regard to the Court of Appeal decision *Thomas v Edmonton (City)*, 2016 ABCA 57 (“*Thomas*”), paragraph 28 was referenced:

Section 687(3)(d) constitutes an exception to the general rule requiring that the SDAB comply with the *Zoning Bylaw*. While the specific overtakes the general, as is usually the case with exceptions, the exception under s 687(3)(d) of the *Act* should not be interpreted so as to defeat the SDAB's general obligation under s 687(3)(a. I) to comply with the *Zoning Bylaw* which the exception modifies. An exception may pre-empt the general theme of the law. Indeed, that is its purpose. But logically it should only do so as precisely as the legislators intended: Sullivan, *supra* at 506. After all, an exception represents a balance that the Legislature has struck: *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 sec 68 at para 70, [2012] 3 SCR 489. It is not for the courts to alter that balance and still less for the SDAB to do so. Therefore, the rationale for this exception is relevant in interpreting the scope of the variance power conferred on subdivision and development appeal boards in Alberta under s 687(3)(d) of the *Act*.

- b. In the *Thomas* decision, there was a waiver of the community consultation requirement as the Development Officer did not do community consultation on the basis that they were not going to issue the permit.

c. The Board found that failure to consult was remedied because the SDAB administration sends notices to the same parties that the Development Officer would have been required to consult. The Court of Appeal said that requirement could not be waived.

d. Mr. Haldane referenced paragraph 29 of *Thomas*:

. . . . 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.

e. The community consultation requirement is a procedural requirement and not a development standard.

f. The *Thomas* decision states why the SDAB cannot waive the community consultation requirement and the SDAB's variance power is a development standard variance power only.

g. Paragraph 31 of *Thomas* states:

. . . . What is it that must not comply with the relevant land use bylaw (in this case, the *Zoning Bylaw*) to engage the SDAB's variance power? A purposive and contextual interpretation of relevant provisions in the *Act* reveals that it is the "proposed development" itself that must not be in compliance with the land use bylaw.

h. Paragraph 32 of *Thomas* states:

In turn, the definition of "development" demonstrates that the non-compliance with the *Zoning Bylaw* relates to the physical attributes of the development in question, whether that be the physical structure of a building or addition on the land, the use or intensity of use of the land or building in question or an excavation or stockpile on the land. Section 616(b) of the *Act* defines development as follows:

"development" means

- (i) an excavation or stockpile and the creation of either of them,
- (ii) a building or an addition to or replacement or repair of a building and the construction or placing of any of them on, in, over or under land,
- (iii) a change of use of land or a building or an act done in relation to land or a building that results in or is likely to result in a change in the use of the land or building, or

- (iv) a change in the intensity of use of a land or a building or an act done in relation to land or a building that results in or is likely to result in a change in the intensity of use of the land or building
- i. This is where the Board can exercise variance powers when dealing with development standards. That is distinguished from the community consultation requirement that was the issued in *Thomas*.
- j. Paragraph 33 of the *Thomas* states:

Given the context here, the only relevant subsection is s 616(b)(ii.). Hence, to engage the SDAB's variance authority, it is the physical structure that must not comply with the relevant land use bylaw, not the failure to fulfill the procedural requirement for community consultation. That conclusion is supported by the wording of the balance of s 687(3)(d). A subdivision and development appeal board is required to consider whether the *proposed development*, notwithstanding its non-compliance with a land use bylaw, materially interferes with the amenities of the neighbourhood or materially interferes with or affects the use, enjoyment and value of neighbouring parcels of land. In other words, the test in s 687(3)(d) is directed to those cases where the physical aspects of the proposed development pose no risk to neighbouring lands notwithstanding non-compliance with development standards.
- k. The *Thomas* decision does not change the *Newcastle* decision. The test in section 687(3)(d) of the *Act* does not require an onus on the proponent of the development to prove a negative and say there is no harm. Mr. Haldane could not provide evidence that Cannabis Retail Sales causes harm. The *Newcastle* approach is the best way to deal with this. The *Thomas* decision is distinguishable as it is talking about something different.
- l. Mr. Haldane does not know when permits were issued for the other Cannabis Retail Sales uses in the area.

ii) *Position of the Development Officer, Mr. S. Chow*

- [32] Mr. Chow does not have any statistics on criminal activity related to Cannabis Retail Sales.
- [33] Cannabis Retail Sales are only Permitted Uses when they are allowed in certain zones. However, Alcohol Sales are a mix of Permitted Uses and Discretionary Uses.

iii) *Position of Mr. S. Harwardt, Legal Counsel representing Spirit Leaf Inc., an affected neighbouring business, who was accompanied by Mr. C. Horwitz*

[34] Mr. Harwardt clarified that TAB 6 of his submission does not show approved Cannabis Retail Sales locations but the markings that correspond with the signatures they received.

[35] TAB 4 shows the approved Cannabis Retail Sales locations and the Cannabis Retail Sales locations that are in review.

[36] Mr. Harwardt referenced paragraph 28 of the *Thomas* decision:

Section 687(3)(d) constitutes an exception to the general rule requiring that the SDAB comply with the *Zoning Bylaw*. While the specific overtakes the general, as is usually the case with exceptions, the exception under s 687(3)(d) of the *Act* should not be interpreted so as to defeat the SDAB's general obligation under s 687(3)(a.1) to comply with the *Zoning Bylaw* which the exception modifies. An exception may pre-empt the general theme of the law. Indeed, that is its purpose. But logically it should only do so as precisely as the legislators intended: Sullivan, *supra* at 506. After all, an exception represents a balance that the Legislature has struck: *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 sec 68 at para 70, [2012] 3 SCR 489. It is not for the courts to alter that balance and still less for the SDAB to do so. Therefore, the rationale for this exception is relevant in interpreting the scope of the variance power conferred on subdivision and development appeal boards in Alberta under s 687(3)(d) of the *Act*.

[37] A variance cannot simply be granted unless someone shows up to oppose that variance. The rule has to be respected. The discussion in section 687 of the *Act* was relevant in the Court's decision regarding *Thomas* and that decision has walked the *Newcastle* decision back to an extent.

[38] In the *Newcastle* decision, the Board has to provide some reasons for a decision. In that case the only concern raised from *Newcastle* was a competition argument. A planning argument was not raised in that case and the Board ignored their power to grant a setback variance, presumed harm and provided no planning reason for the refusal for the variance. That is what *Newcastle* stands for. The Board has to provide a reason for granting a variance.

[39] Even though his client is a competitor does not negate any planning reasons the Appellant raises.

[40] He referred to the Cannabis Retail Sales locations that are in close proximity to each other. There are three other locations within a 500-metre radius but outside the 200-metre setback range. Although there is no variance required for those locations, they can still be considered when determining whether or not there is a clustering and diversity of uses in the area and they form an easy walking distance.

- [41] The Cannabis Retail Sales locations shown in Tab 4 are relevant in considering whether or not diversity in the area is going to be impacted by another Cannabis Retail Sales use. The stores are within a walkable area.
- [42] TAB 5 is an aerial photograph showing the proposed location is located between 101 Street and 102 Street on the south side of 82 Avenue. The neighbouring Cannabis Retail Sales is across the avenue from the subject site.
- [43] Both of the sites are within the Whyte Avenue Commercial Overlay within the Strathcona Area Redevelopment Plan.
- [44] Pursuant to the Whyte Avenue Commercial Objectives of the Old Strathcona Area Redevelopment Plan, the first objective is to:
- Promote diversity, uniqueness and a full range of businesses and services for all residents and visitors to the area, while maintaining the compatible and balanced mix of businesses currently existing in the Whyte Avenue Commercial Area.
- [45] Not only are these two Cannabis Retail Sales uses in close proximity and easily accessible, there are multiple locations within a 500-metre radius. It is a concern that approving the proposed development will lead to a cluster of Cannabis Retail Sales.
- [46] Cannabis Retail Sales is a new Use and Council has imposed setback distances for these uses to reduce clustering of the stores.
- [47] There is already a Whyte Avenue moratorium on new bars and restaurants to reduce any further clustering.
- [48] TAB 10 is a previous SDAB decision that deals with two Cannabis Retail Sales locations on 118 Avenue which is similar to the proposed development.
- [49] Consistency in decisions is important so the developers and business owners can understand what types of things are likely to be approved.
- [50] Paragraph 50(a) of TAB 10, a previous SDAB decision (SDAB-D-18-193), the Board did not grant a variance with one of the reasons being:
- The minimum separation distance requirements contained in section 70(1) of the *Edmonton Zoning Bylaw*, to regulate the distance between Cannabis Retail Sales has been established for several reasons. Firstly, to foster a diversity of commercial and retail Uses in a given neighbourhood and secondly to prevent the clustering of Uses which have the potential, when located too close together to cause a magnification of potential deleterious effects.
- [51] The Board in SDAB-D-18-193 identified a number of concerns as outlined in paragraph 50(e) that states:

- e) In this case, the Board identified the following concerns regarding the requested variance:
- i.) The two Cannabis Retail Sales Use sites are only 156 metres apart.
 - ii.) Both Sites are located along a pedestrian friendly corridor which makes it easy for an individual to travel from one store to the other.
 - iii.) The Cannabis Retail Sales stores are not separated by any large infrastructure or natural impediments to either pedestrian or vehicular traffic.
 - iv.) The Cannabis Retail Sales stores are linearly connected by 118 Avenue and are visible to each other.
 - v.) The Board is concerned that granting the required variance could lead to a reduction in the diversity of businesses along this portion of 118 Avenue.
 - vi.) Based on information provided in the written submission of the Development Officer; the Board notes that fewer restrictions have been placed on the public consumption of cannabis than on the public consumption of alcohol. Therefore, the Board finds that maintaining the minimum required separation distance of 200 metres between Cannabis Retail Sales locations may reduce the concentration of the public consumption of cannabis along this portion of 118 Avenue.
 - vii.) The Board further notes that the subject Site is surrounded by residential housing zones, specifically an (RA7) High Rise Apartment Zone to the west and an (RF3) Small Scale Infill Development Zone to the south. Based on the close proximity of these residential uses to the subject Site, the Board is more resistant to waive the minimum 200 metre separation distance requirements pursuant to section 70(1) of the *Edmonton Zoning Bylaw*.

[52] In his opinion, the reasons for not granting the variance in that decision are also applicable in the subject case.

[53] The Board identified several concerns such as the separation space. The separation space is even smaller in the subject case.

[54] There are residential uses in proximity of the proposed Cannabis Retail Sales but not as close as the previous decision.

[55] Although the previous Cannabis Retail Sales application for the subject site was previously approved, there was not opposition noted in that decision.

- [56] Mr. Harwardt's client circulated a letter around the area outlining the issue and the variance being sought and received signatures in opposition to the proposed development (TAB 2).
- [57] Mr. Horwitz stated that he is the Vice President of Spirit Leaf Ltd., and has resided in Edmonton for approximately 20 years. He has owned, operated, and worked in businesses on Whyte Avenue during those years.
- [58] The proposed Cannabis Retail Sales is a concern. The location is on a corner that attracts vulnerable people to the community. There have been several issues in this area and people entering the Spirit Leaf store. They have had to call police on occasion. There are several stores in this area that have a high crime rate due to vulnerable people gathering there.
- [59] Mr. Horwitz provided the following information in response to questions by the Board:
- a. There are patterns on Whyte Avenue where people tend to gather mostly on businesses that deal with alcohol or cannabis.
 - b. His business has been operating for approximately five months in the current location. He operates two other cannabis stores in Edmonton; however, most of the negative issues are at his Whyte Avenue location.
 - c. Mr. Harwardt referred to an aerial map showing the park where individuals are allowed to use cannabis which is two blocks from the subject site.
 - d. Mr. Horwitz outlined the mixture of businesses in the area.
 - e. Mr. Harwardt stated that when considering the impact on the neighbourhood as a whole the Board needs to look at the cumulative impact.
 - f. The report to Council noted the separation distances have not prevented proliferation.
 - g. The Old Strathcona Business Association submitted a letter in opposition to the proposed development.
 - h. Mr. Harwardt referred to TAB 6 of his submission. Some of the residents that signed the petition opposed to the proposed development are outside the 60-metre notification radius but is not conclusive and some residents can still be impacted. There are apartments above a number of the businesses on Whyte Avenue.
 - i. They used three different methods when doing community consultation. They did their consultation within a two block radius, behind Whyte Avenue and with customers coming to their store.

- j. Community consultation was done when they heard an appeal was filed on the proposed development.

iv) Rebuttal of the Appellant, Mr. K. Haldane

- [60] He provided the Board with signatures in support of the proposed development and business cards of the businesses on Whyte Avenue, marked *Exhibit A*.
- [61] In the previous SDAB decision, a similar petition was done but no names or addresses were received.
- [62] He confirmed that he spoke to businesses within the 60-metre notification radius outlining the proposed Cannabis Retail Sales.
- [63] No one attended the hearing in opposition other than Legal Counsel and the owner of Spirit Leaf Ltd.
- [64] The Mustard Seed Church is a block south of the proposed Cannabis Retail Sales and the existing Cannabis Retail Sales.
- [65] Mr. Haldane referenced the following paragraphs of the *Newcastle* decision:
- [12] Therefore, if there is any interference with neighbourhood amenities, or with use, enjoyment, or value of other land parcels, the Board had a duty to explain that in its Reasons, and it did not. A mere conclusory statement does not suffice, and that is all that paragraph 10 is.
- [13] There was only one adverse effect postulated by the respondent flowing from this proposed second liquor store. It was that if the existing liquor store ever later needed a new development permit (eg to move, enlarge, renovate, or rebuild), then it would be the second liquor store, and so might be refused a new development permit.
- [14] Does that possibility of future harm to the tenant relate to the neighbourhood or its amenities? Does it affect the use, enjoyment, or value of any other parcels? Or does it relate instead to the other business or its owner? The Board made no fact findings to link the respondent's permit-fora-move concern with any test in s 687(3)(d).
- [66] With regard to clustering, he agrees that there is a cluster of businesses that have been addressed by Council for bars and pubs and there is a desire for diversity within the Strathcona Area Redevelopment Plan. Whyte Avenue has a mixture of business uses including a variety of commercial businesses within the same use class.
- [67] The Board has to meet the section 687(3)(d) test for a variance.

- [68] Mr. Haldane reiterated that his client had an approved permit issued by the Board but due to the moratorium they were not able to open in time.
- [69] In his opinion, his client qualifies to meet the test of the Board.
- [70] He agrees that the petitions submitted by both parties are equal. However, his client provided information to the people they spoke to regarding the variance.
- [71] With regard to the letter received from the Old Strathcona Business Association, he believes his client's business is one of the five businesses approved listed in their letter in the Old Strathcona area.

Decision

- [72] 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. Cannabis Retail Sales shall include design elements that readily allow for natural surveillance to promote a safe urban environment, where applicable and to the satisfaction of the Development Officer, including the following requirements:
 - a. customer access to the store is limited to a storefront that is visible from the street other than a Lane, or a shopping centre parking lot, or mall access that allows visibility from the interior of the mall into the store;
 - b. the exterior of all stores shall have ample transparency from the street;
 - c. any outdoor lighting shall be designed to ensure a well-lit environment for pedestrians and illumination of the property; and
 - d. landscaping shall be low-growing shrubs or deciduous trees with a high canopy at maturity to maintain natural surveillance.
 2. Signs require separate Development Applications.
 3. 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.
 4. Any outdoor lighting for any development shall be located and arranged so that no direct rays of light are directed at any adjoining properties, or interfere with the effectiveness of any traffic control devices.

NOTES:

1. This Development Permit is NOT a Business Licence. A separate application must be made for a Business Licence. Please contact the 311 Call Centre (780-442-5311) for further information.
2. Unless otherwise stated, all above references to section numbers refer to the authority under the Edmonton Zoning Bylaw 12800 as amended.
3. With future changes of use for this site, Subdivision Planning will require the applicant to provide parking justification and conduct observations on site to establish if parking continues to be sufficient for the site.

[73] In granting the development the following variance to the *Edmonton Zoning Bylaw* (the “*Bylaw*”) is allowed:

1. The minimum required 200 metres separation distance between the Cannabis Retail Sales from any other Cannabis Retail Sales pursuant to section 70.1 is reduced by 153 metres to permit a minimum allowed separation distance of 47 metres.

Reasons for Decision

[74] The proposed development is to continue the Use of an approved Cannabis Retail Sales, a Permitted Use in the (CB2) General Business Zone.

[75] Special Land Use Provisions in section 70 of the *Bylaw* regulate this Permitted Use Class and provide in part:

1. Any Cannabis Retail Sales shall not be located less than 200 m from any other Cannabis Retail Sales. For the purposes of this subsection only:
 - a. the 200 m separation distance shall be measured from the closest point of the Cannabis Retail Sales Use to the closest point of any other approved Cannabis Retail Sales Use;
 - b. A Development Officer shall not grant a variance to reduce the separation distance by more than 20 m in compliance with Section 11; and
 - c. The issuance of a Development Permit which contains a variance to separation distance as described in 70(1)(b) shall be issued as a Class B Discretionary Development.

- [76] The proposed development requires a variance of 153 metres to section 70.1(a) because it is located 47 metres from an existing approved Cannabis Retail Sales based on the method of calculation for separation distances prescribed by the *Bylaw*.
- [77] According to the refused permit, the Development Officer refused the application because he is prohibited from granting the required variance by section 70.1(b) and 70.4 of the *Bylaw*.
- [78] Unlike the Development Officer, the Board has discretionary authority to grant this 153 metres variance pursuant to section 687(3)(d) of the *Municipal Government Act* (the “*Act*”) which states:

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.

- [79] During the hearing the Board was presented with two Court of Appeal decisions, *Newcastle Centre GP Ltd. v Edmonton (City)* 2014 ABCA 295 (“*Newcastle*”) and *Thomas v Edmonton (City)*, 2016 ABCA 57 (“*Thomas*”) related to the Board’s variance powers under section 687(3)(d) of the *Act*.

- [80] The Appellant argued that per *Newcastle*, the test for variances to development regulations is found in section 687(3)(d). Following the Court of Appeal decision, the Board must find a planning reason to deny this application for a Permitted Use. He cited the following paragraphs of the *Newcastle*:

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

[13] There was only one adverse effect postulated by the respondent flowing from this proposed second liquor store. It was that if the existing liquor store ever later needed a new development permit (eg to move, enlarge, renovate, or rebuild), then it would be the second liquor store, and so might be refused a new development permit.

- [14] Does that possibility of future harm to the tenant relate to the neighbourhood or its amenities? Does it affect the use, enjoyment, or value of any other parcels? Or does it relate instead to the other business or its owner? The Board made no fact findings to link the respondent's permit-fora-move concern with any test in s 687(3)(d).
- [81] Further in the Appellant's view, *Thomas* is not relevant as the Court of Appeal in that case was dealing with a public consultation requirement enacted to ensure procedural fairness that the Board has no authority to waive rather than a development regulation governed by section 687(3)(d).
- [82] The operator of the nearest approved Cannabis Retail Sales Use, from which the variance was needed, argued that this case could be distinguished from *Newcastle* as the variance to separation distance raised planning concerns apart from the purely commercial competitive issues at play in that case. Further in their opinion, *Thomas* did walk back the *Newcastle* decision with respect to variances to development regulations including separation distances. The Board should consider the words of the Court of Appeal in paragraph 29 of *Thomas*:
- To relieve against hardship, the Legislature has conferred on the Subdivision and Development appeal boards the authority to relax – that is vary, dispense with or waive development standards in the applicable land use bylaw providing certain conditions as set out in section 687(3)(d) are met.
- [83] Bearing these cases and the parties' submissions in mind, the Board considered the following factors in determining whether or not to grant the variance to the required separation distance for the proposed Cannabis Retail Sales Use.
- [84] First, the Board considered that the scope of application is for a continuation of a previously approved Cannabis Retail Sales Use and in particular that:
- i) The Board approved a Cannabis Retail Sales Use at the subject site in December 2018 after considering the two cited cases, the applicable *Bylaw* provisions and statutory plans, the location of all nearby approved and pending Cannabis Retail Sales Uses, a supporting petition and opposition by the City.
 - ii) The Board's approval was not appealed.
 - iii) The Development Permit approved by the Board was subject to a condition imposed per section 70 of the *Bylaw* in effect at the time. It required the Cannabis Retail Sales Uses must commence operations within nine months of the issuance of that permit.
 - iv) Cannabis retailers require both a municipal Development Permit and an Alberta Gaming, Liquor and Cannabis ("AGLC") licence for the operation to be legal federally. Due to the moratorium on licenses from AGLC, the Appellant and many

- other potential retailers were not able to open their businesses and sell cannabis to the public.
- v) The nine month time limit to commence operation was removed by Council from section 70 of the *Bylaw* in February 2019 after the Board's decision.
 - vi) A Building Permit was subsequently approved and the Appellant commenced construction, but could not comply with the nine month condition of the permit due to the AGLC moratorium on all cannabis retailers. In other words, but for the moratorium, this application would not have been required.

[85] The Board notes that the Development Officer was required by section 70 to refuse the application. The Development Officer did not appear, but his report acknowledges the Board's decision in SDAB-D-18-199 and the subsequent change to section 70. The Report specifically continues:

However, due to the AGLC moratorium on new cannabis retail sales licenses that was lifted on 30 May 2019, the City has allowed Development Permit holders to apply for a new development permit to "continue to operate" their existing locations. This is to provide all the development permit holders who may have been affected by the AGLC moratorium a reasonable amount of time to make a decision about how to proceed with their business, and if necessary, file any required appeals to the SDAB.

Based on the above, the City takes no position on re-granting the original variance as granted for the subject Cannabis Retail Sales.

- [86] In the interests of fairness to all the participants, the Board considered whether any relevant factors had materially changed since the issuance of SDAB-D-18-199 and the changes to the *Bylaw*.
- [87] Unlike the situation in SDAB-D-18-199 where no opposition was noted, the Board received mixed evidence about the views of the community:
- i) The Appellant provided a petition in favour of the proposed development which was more specific with respect to its location relative to the nearest approved Cannabis Retail Sales than the one provided to the Board in SDAB-D-18-199. It included several signatures of employees or owners of businesses located within the 60-metre notification zone.
 - ii) The operators of the nearest Cannabis Retail Sales Use (46 metres from the proposed development) provided a petition in the form of a letter against the proposed development signed by individuals associated with addresses within and beyond the 60-metre notification zone as well as a letter of opposition signed by the operator's landlord. These letters cite concerns with clustering and variances in general.

- [88] The Board also carefully reviewed the letter in opposition from the Old Strathcona Business Association. In this letter, the Association references concerns over “an additional cannabis retail store” and states “there were over 20 applications for cannabis retail in our area with only five permits approved, which is a healthy mix for our district.” Based on the evidence received from all sources, it appears that the proposed application to continue the previously approved Cannabis Retail Sales Use was one of the five existing Cannabis Retail Sales permits listed in that letter as part of the healthy mix.
- [89] The Board considered the evidence before it of adverse impacts associated with granting the variance to allow the proposed Cannabis Retail Sales to be located 47 metres from the previously approved location on the north side of Whyte Avenue.
- [90] As noted by the Appellant, no evidence was presented that in the intervening months since the previous decision that allowing a single variance to the separation distance regulation has exacerbated and adversely impacted the area. Also, unlike the first hearing when the situation was unclear and the City took a cautious stance objecting to the same variance, the City took no position in this appeal.
- [91] The operators of the nearest Cannabis Retail Sales Use raised issues with regard to vulnerable people entering their store and congregating at nearby locations, but could not provide evidence that it was due to the existence of their Cannabis Retail Sales Use as opposed to the existence of other Uses in the immediate area or that the requested variance would add materially to the current problems.
- [92] The operator of the nearest Cannabis Retail Sales Use also argued that the variance should not be allowed because of its magnitude. The proximity of only a Cannabis Retail Sales Use requiring a variance has not changed since the original decision. As noted in SDAB-D-18-199, it is located 47 metres away on the north side of Whyte Avenue, a major roadway with a centre median, controlled pedestrian cross walks and signage to discourage “j-walking”. There is no direct access mid-block and pedestrians must proceed to either the west or east intersection to travel from one store to the other. The only additional information on this point available to this Board was that the nearest Cannabis Sales Use is in fact recessed from Whyte Avenue, oriented to east and therefore, less visible to the proposed development than it might otherwise be at a distance of 46 metres.
- [93] The Board considered the Strathcona Area Redevelopment Plan and finds that allowing the variance is not inconsistent with the objective in it to promote diversity, uniqueness and a full range of businesses and services along this portion of Whyte Avenue for the following reasons:
- i) Based on the evidence of the Appellant and the operators of the nearby Cannabis Retail Sales Use, there is a wide variety of businesses on both sides of the blockface along Whyte Avenue and in the broader area.

- ii)* This commercial diversity is even acknowledged in the letters of opposition submitted by the operators of the nearby Cannabis Retail Sales Use.
- iii)* If the Board took a broader approach under the Strathcona Area Redevelopment Plan and considered a 500-metre radius, the evidence before it suggests there would be fewer approved Cannabis Retail Sales locations at this time than were considered at the previous hearing which originally allowed the variance.
- iv)* All of the evidence before the Board shows that in the two block radius of the subject Site there is a mixture of businesses in compliance with the Whyte Avenue Commercial Objectives of the Strathcona Area Redevelopment Plan and the proposed Cannabis Retail Sales Use would not result in a clustering of Uses so as to materially reduce the diversity of Uses in this dense and diverse commercial area contrary to the Plan.

[94] Based on the above, it is the opinion of the Board that the proposed development will not unduly interfere with the amenities of the neighbourhood, nor materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land.



Mr. B. Gibson, Presiding Officer
Subdivision and Development Appeal Board

Board Members in Attendance:

Ms. K. Cherniawsky; Mr. D. Fleming; Ms. M. McCallum; Mr. A. Nagy

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

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



EDMONTON
TRIBUNALS

*Subdivision &
Development
Appeal Board*

*10019 - 103 Avenue NW
Edmonton, AB T5J 0G9
P: 780-496-6079 F: 780-577-3537
sdab@edmonton.ca
edmontonsdab.ca*

SDAB-D-19-175

Application No. 311293064-001

An appeal to install (1) Freestanding General Advertising Sign with an electronic Changeable Copy panel containing on-premises and off-premises Advertising (incl. digital and static panels 6.1m x 13.5m facing E)(Condominium Corporation 9122259) was **TABLED TO NOVEMBER 13 or 14, 2019.**



**EDMONTON
TRIBUNALS**

*Subdivision &
Development
Appeal Board*

*10019 - 103 Avenue NW
Edmonton, AB T5J 0G9
P: 780-496-6079 F: 780-577-3537
sdab@edmonton.ca
edmontonsdab.ca*

SDAB-D-19-147

Application No. 309196698-001

An appeal to construct a three storey addition to an existing Minor Impact Utility Services Use building (Street Railway Substation No. 600), and to change the Use to a mixed Use Commercial building to the basement floor - Specialty Food Services; main floor - one Restaurant and one General Retail Store; second floor - General Retail Stores; third floor - one Bar and Neighbourhood Pub with 54.1 m² of Public Space and two Professional, Financial and Office Support Services Uses); and to construct exterior alterations on the Site (upgrading the concrete paving, adding benches and seating) was **WITHDRAWN**.