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-19-168

Application No. 309470115-001

An appeal to construct an Unenclosed Front Porch, exterior alterations (new windows and facade improvements), interior alterations (Basement development, NOT to be used as an additional Dwelling), a rear addition (rear attached garage, 6.09m x 12.18m), and a front driveway (existing without permits, 8.85m x 32.42m) to a Single Detached House was **TABLED TO October 17, 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

Date: October 18, 2019
Project Number: 325477001-001
Project Number: 325634453-001
File Number: SDAB-D-19-169
File Number: SDAB-D-19-170

Notice of Decision

[1] On October 3, 2019, the Subdivision and Development Appeal Board (the "Board") heard two appeals that were filed on **September 6, 2019**. The appeals concerned the decisions of the Development Authority, issued on September 5, 2019, to refuse the following developments:

SDAB-D-19-169 (Project Number: 325477001-001)
11606 – 89 Avenue:

> **To construct a Single Detached House with Unenclosed Front Porch, rear uncovered deck (4.27 metres by 4.27 metres), rear balcony, electric fireplace, installation of a Renewable Energy Device (20 Solar-electric (PV) panels on the roof), and to demolish a Single Detached House and Accessory building (detached Garage).**

SDAB-D-19-170 (Project Number: 325634453-001)
11606 – 89 Avenue:

> **To construct a two-Storey Garden Suite (main floor Garage 6.40 metres by 9.14 metres, second floor Garden Suite 5.37 metres by 9.21 metres) and to install a Renewable Energy Device (30 Solar-electric (PV) panels on the roof).**

[2] The subject property is on Plan 1252AH Blk 27 Lot 1, located at 11606 - 89 Avenue NW, within the (RF1) Single Detached Residential Zone. The Mature Neighbourhood Overlay applies to the subject property.

[3] The following documents were received prior to the hearing and form part of the record:

- Copies of the Development Permit applications with attachments, proposed plans, and the refused Development Permits;
- The Development Officer's written submissions;

- The Appellant's written submissions including signatures of support; and
- Emails of support from the Windsor Park Community League.

Preliminary Matters

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

[5] The Chair outlined how the hearing would be conducted, including the order of appearance of parties, and no opposition was noted.

[6] The appeal was filed on time, in accordance with section 686 of the *Municipal Government Act*, RSA 2000, c M-26.

Summary of Hearing

i) Position of the Appellant, P. Horsman, representing Landmark Legacy Homes and M. and N. Cheung, the property owners:

[7] The proposed Single Detached House and Garden Suite with the height variances required have received the support of neighbouring property owners, including the most affected property owners as well as the Windsor Park Community League.

[8] The original plans were revised to include privacy screening on the proposed platform structures to address privacy concerns. The house has also been sited further to the south to increase the setback from the property to the north.

[9] The proposed structures will be similar in height to several skinny houses that have been built in close proximity to the subject site.

[10] The proposed third storey of the house will be stepped back in order to minimize any negative impacts and will not be visible from the flanking or front streets.

[11] The plans were revised in order to address comments submitted by the Community League during the community consultation process. Specifically, that there should be some variation in the exterior materials used on the north façade of the house to add visual interest and break up the massing of the blank wall. The house has also been sited further to the south in order to provide some landscaped buffering between the two properties.

[12] The goals and principles of the Mature Neighbourhood Overlay and the "Smart Choices Program" were reviewed during the design process in order to ensure compliance.

[13] P. Horsman and M. Cheung provided the following information in response to questions from the Board:

a) The additional height is required to accommodate the design challenges that arise because of the proposed flat roof and to provide sufficient ceiling height on the proposed third storey of the house. Solar panels will not be installed on the third floor penthouse.

b) The sloped roof on the garden suite will be compatible with the design of the roof on the house.

c) The recommended conditions of both the Development Officer and Transportation Services have been reviewed and are acceptable.

ii) Position of the Development Officer, R. Zhou:

[14] The Development Officer did not attend the hearing but provided a written submission that was considered by the Board.

Decision

SDAB-D-19-169 (Single Detached House)

[15] 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 development shall be constructed in accordance with the stamped and approved Drawings;

2. WITHIN 14 DAYS OF APPROVAL, prior to any demolition or construction activity, the applicant must post on-site a development permit notification sign (Section 20.6);

3. Landscaping shall be installed and maintained in accordance with Section 55;

4. Frosted or translucent glass treatment shall be used on windows to minimize overlook into adjacent properties (Reference Section 814.3.8);

5. Platform Structures located within a Rear Yard or interior Side Yard, and greater than 1.0 m above the finished ground level, excluding any artificial embankment, shall provide Privacy Screening to prevent visual intrusion into Abutting properties. (Reference Section 814.3.9);

6. Single Detached Housing requires 1 parking space per dwelling; parking may be in tandem as defined in Section 6.1(112) (Reference Schedule 1 of Section 54.2);

7. No vehicular access from 89 Avenue NW shall be permitted. The existing driveway and access off of 89 Avenue NW must be removed. (Reference Section 814.3.17);

8. A Solar Collector mounted on a roof may project a maximum of 0.5 m from the surface of the roof (measured perpendicular to the roof) when the solar collector is located 2.0 m or less from the wall of the building. In all other cases, A Solar Collector may project a maximum of 1.5m from the surface of the roof (Reference Section 50.7.1);

9. A Solar Collector shall not extend more than 1.5 m above the maximum permitted Height of the Zone or Overlay (Reference Section 50.7(1)(a)(ii);

10. A Solar Collector mounted on the wall of a building shall comply with Section 50.7.1(iv). A minimum of 0.6 m shall be maintained between the property line and the Solar Collector;

11. A Solar Collector mounted on a roof shall not extend beyond the outermost edge of the roof (Reference Section 50.7(1)(a)(iii).

Advisements:

12. Any future deck development greater than 0.6m in height will require development and building permit approvals.

13. Any future deck enclosure or cover requires a separate development and building permit approval.

14. Any future basement development requires development and building permit approvals.

15. Any future additional dwelling such as Secondary Suite shall require a separate development permit application.

16. Lot grades must match the Edmonton Drainage Bylaw 18093 and/or comply with the Engineered approved lot grading plans for the area. Contact Lot Grading at 780-496-5576 or lot.grading@edmonton.ca for lot grading inspection inquiries.

17. Unless otherwise stated, all above references to "section numbers" refer to the authority under the Edmonton Zoning Bylaw 12800.

[16] In granting the development, the following variances to the *Edmonton Zoning Bylaw* are allowed:

1. The maximum allowable Height of 8.9 metres per section 814.3(5) is varied to allow an excess of 1.0 metres, thereby increasing the maximum allowed to 9.9 metres.

2. The maximum ridge line of the roof of 10.4 metres per section 52.2(c) is varied to allow an excess of 0.2 metres, thereby increasing the maximum allowed to 10.6 metres.

Decision

SDAB-D-19-170 (Garden Suite)

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

1. The development shall be constructed in accordance with the stamped and approved Drawings;

2. WITHIN 14 DAYS OF APPROVAL, prior to any demolition or construction activity, the applicant must post on-site a development permit notification sign (Section 20.6);

3. A Garden Suite shall not be allowed within the same Site containing a Group Home or Limited Group Home, or a Major Home Based Business and an associated principal Dwelling, unless the Garage Suite is an integral part of a Bed and Breakfast Operation in the case of a Major Home Based Business. (Section 87.21);

4. A maximum of one Household shall occupy a Garden Suite. (Section 87.20);

5. The Garden Suite shall not be subject to separation from the principal Dwelling through a condominium conversion or subdivision. (Section 87.23);

6. Façades facing a Lane shall have exterior lighting. (Section 87.17);

7. Platform Structures greater than 1.0 m above Grade shall provide Privacy Screening to reduce overlook onto Abutting properties. (Section 87.14);

8. Any outdoor lighting for any development shall be located and arranged so that no direct rays of light are directed at any adjoining properties, or interfere with the effectiveness of any traffic control devices. (Section 51);

9. A Solar Collector mounted on a roof may project a maximum of 0.5 m from the surface of the roof (measured perpendicular to the roof) when the solar collector is

located 2.0 m or less from the wall of the building. In all other cases, A Solar Collector may project a maximum of 1.5m from the surface of the roof (Reference Section 50.7.1);

10. A Solar Collector shall not extend more than 1.5 m above the maximum permitted Height of the Zone or Overlay (Reference Section 50.7(1)(a)(ii);

11. A Solar Collector mounted on the wall of a building shall comply with Section 50.7.1(iv). A minimum of 0.6 m shall be maintained between the property line and the Solar Collector;

12. A Solar Collector mounted on a roof shall not extend beyond the outermost edge of the roof (Reference Section 50.7(1)(a)(iii);

13. The existing 5 m wide access to 89 Avenue located approximately 1 m from the western property line, must be removed from back of the sidewalk to the property line, with restoration of grassed boulevard. The owner/applicant must obtain a Permit to remove the access, available from Development Services, 2nd floor, Edmonton Tower, 10111-104 Avenue;

14. The proposed access from the site to the alley is acceptable to Subdivision Planning. Any modification to this proposed access requires the review and approval of Subdivision Planning;

15. Any alley, 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;

16. 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;

17. 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-permit-request.aspx and https://www.edmonton.ca/documents/PDF/ConstructionSafety.pdf

Advisements:

18. The driveway access must maintain a minimum clearance of 1.5m from all surface utilities.

19. Lot grades must match the Edmonton Drainage Bylaw 18093 and/or comply with the Engineered approved lot grading plans for the area. Contact Lot Grading at 780-496-5576 or lot.grading@edmonton.ca for lot grading inspection inquiries;

20. Unless otherwise stated, all above references to "section numbers" refer to the authority under the Edmonton Zoning Bylaw 12800;

[18] In granting the development, the following variances to the *Edmonton Zoning Bylaw* are allowed:

1. The maximum allowable Height of 6.2 metres per section 87.2(b) is varied to allow an excess of 0.8 metres, thereby increasing the maximum allowed to 7.0 metres.

2. The maximum ridge line of the roof of 7.7 metres per section 52.2(c) is varied to allow an excess of 0.3 metres, thereby increasing the maximum allowed to 8.0 metres.

Reasons for Decision (SDAB-D-19-169 and SDAB-D-19-170)

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

[20] A Garden Suite is a Permitted Use in the (RF1) Single Detached Residential Zone.

[21] The proposed Single Detached House was refused by the Development Authority because it exceeds the maximum allowable Height requirement.

[22] Section 814.3(5) of the *Edmonton Zoning Bylaw* states:

> The maximum Height shall not exceed 10.0 metres in the RF5 Zone and 8.9 metres in all other Zones.

The proposed Height of the Single Detached House is 9.9 metres, which exceeds the maximum allowed Height of 8.9 metres by 1.0 metre.

[23] Section 52.2(c) of the *Edmonton Zoning Bylaw* states:

> …the ridge line of the roof shall not extend more than 1.5 metres above the permitted building Height of Zone of overlay […]

The proposed ridge Height of the Single Detached House is 10.6 metres, which exceeds the maximum allowed ridge Height of 10.4 metres by 0.2 metres.

[24] The proposed Garden Suite was refused by the Development Authority because it exceeds the maximum allowable Height requirement.

[25] Section 87.2(b) of the *Edmonton Zoning Bylaw* states:

> The maximum Height shall be 6.2 metres where the Garden Suite has a roof slope of less than 4/12 (18.4 degrees).

The proposed Height of the Garden Suite is 7.0 metres, which exceeds the maximum allowed Height of 6.2 metres by 0.8 metres.

[26] Section 52.2(c) of the *Edmonton Zoning Bylaw* states:

> …the ridge line of the roof shall not extend more than 1.5 metres above the permitted building Height of Zone of overlay, or in the case of a Garden Suit the maximum permitted building Height in accordance with Section 87 of this Bylaw.

The proposed ridge Height of the Garden Suite is 8.0 metres, which exceeds the maximum allowed ridge Height of 8.0 metres by 0.3 metres.

[27] The Board grants the variances for the Height of the Single Detached House, the principal structure proposed for the land and the variances for the Height of the Garden Suite which is secondary to the principal structure for the following reasons:

a) The proposed Single Detached House and Garden Suite have been designed with sloped roofs which will mitigate any sun shadowing concerns for adjacent property owners.

b) The Appellant has revised the original plans in response to suggestions provided by the Windsor Park Community League through the community consultation process. It was suggested that varying the exterior finishing materials on the north façade would reduce the massing impacts of the required Height variances on the most affected neighbour to the north. The House has also been sited as far south on the lot as possible in order to provide a sufficient buffer between the two lots. Privacy Screening will also be provided on the proposed Platform Structures.

c) The Board did not receive any letters of objection regarding the proposed development or the variances required and no one attended in opposition to the proposed development.

d) The most affected property owners have signed a petition of support and a letter of support was submitted by the Windsor Park Community League.

[28] Based on all of the above**,** it is the opinion of the Board, that the proposed developments 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.

I. Wachowicz, Chair
Subdivision and Development Appeal Board

Board members in attendance: B. Gibson, Mr. Buyze, L. Pratt

c.c. City of Edmonton, Development & Zoning Services, Attn: R. Zhou / A. Wen

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.

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 18, 2019
Project Number: 316044404-001
File Number: SDAB-D-19-149

Notice of Decision

[1] The Subdivision and Development Appeal Board (the "Board") at a hearing on September 12, 2019, made and passed the following motion:

> "That the appeal hearing be scheduled for October 2 or 3, 2019, at the written request of the City of Edmonton Law Branch with the agreement of Legal Counsel for the Appellant."

[2] On October 3, 2019, the Board made and passed the following motion:

> "That SDAB-D-19-149 be raised from the table."

[3] On October 3, 2019, the Subdivision and Development Appeal Board (the "Board") heard an appeal that was filed on **July 12, 2019**. The appeal concerned the decision of the Development Authority, issued on June 26, 2019, to refuse the following development:

Change the use from General Retail Stores to Cannabis Retail Sales.

[4] The subject property is on Plan 1420502 Blk 13 Lot 3, located at 2341 – Maple Road NW, within the DC1 Direct Development Control Provision (Charter Bylaw 18989). The Tamarack Neighbourhood Structure Plan and The Meadows Area Structure Plan apply to the subject property.

[5] 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;
- City Law Branch's written submissions;
- The Appellant's written submissions; and
- Online responses from adjacent property owners.

Preliminary Matters

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

[7] The Chair outlined how the hearing would be conducted, including the order of appearance of parties, and no opposition was noted.

[8] 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 (Ogilvie LLP) for the Appellant, Planworks Design & Planning Inc.

[9] There are two issues here today:

i) Whether this Board can allow this appeal.

ii) If the Board can allow the appeal should it do so?

[10] Mr. Haldane dealt with the second matter first and referred the Board to section 687(3) of the *Act* and the Alberta Court of Appeal *Newcastle Centre GP Ltd v Edmonton (City),* 2014 ABCA 295 decision to show that the required variance to the minimum required separation distance from another Cannabis Retail Sales Use should be granted.

[11] The four online responses in opposition to the proposed development relate to the existence of the Use and do not address how the 72-metre deficiency in the required separation distance from another Cannabis Retail Sales would affect the use, enjoyment or value of neighbouring properties or the amenities of the neighbourhood.

[12] Cannabis Retail Sales has been legal for a year and there is no evidence anywhere suggesting any negative impacts associated with this Use. As Cannabis Retail Sales regulations were modelled after liquor store regulations, Mr. Haldane referred the Board to a City of Edmonton report in Tab 14 of his submission. This report led to the removal of the 500-metre separation distance between liquor stores as no relationship between the locations of liquor stores and crime could be found.

[13] Both the subject site and the site of the existing Cannabis Retail Sales are over two hectares in size. If the variance was related to the minimum required separation distance from a park or school these sites would be exempt from the regulations found in section 70 of the *Edmonton Zoning Bylaw* (the "*Zoning Bylaw*"). That exemption does not apply to separating Cannabis Retail Sales Uses from each other.

[14] Mr. Haldane then continued with arguments to show that this Board has the authority to allow this appeal and issue a permit.

[15] The facts before the Board today provide an opportunity to correct an error in planning law. There ought to be a place where an affected property owner can appeal a decision made by the Development Authority where discretion has been delegated from Council to the Development Authority (an administrative body). This is a fundamental principle of administrative law.

[16] Mr. Haldane agrees that the Development Authority followed the directions of Council contained in Direct Control Bylaw 18989 ("DC1"). The appeal today is in respect of section 70 of the *Zoning Bylaw*. He is seeking a variance to a regulation that applies to Cannabis Retail Sales in general throughout the City of Edmonton.

[17] The overhead maps in Tab 2 were referenced to provide context to the both the proposed site and the site of the existing Cannabis Retail Sales. A circle indicating a 180-metre radius around the northern most point of the existing Cannabis Retail Sales site extends over the entire parcel of his client's DC1 site. The Development Officer has discretion to reduce the required separation distance by 20 metres per section 70.1(b). The existing retailer's permit was approved on November 13, 2018.

[18] Tab 3 contains a copy of section 70 of the *Zoning Bylaw* which was passed in June 2018 and applies to any district in which Cannabis Retail Sales is an available Use and does not apply to any particular area of land. The subject DC1 did not exist until after the passage of section 70.

[19] The issuance of a Development Permit that contains a variance (such as reducing the required separation distance between Cannabis Retail Sales by 20 metres) would be a Class B Discretionary permit which would normally contain the right of appeal. According to the City, because the subject Use is in a direct control district, section 685(4) of the *Act* takes away the normal right of appeal.

[20] Mr. Haldane provided a history of the subject site. In April 2019, Bylaw 18820 added Cannabis Retail Sales; Breweries, Wineries and Distilleries; and Urban Gardens as available uses in Area B of the DC1. On July 3, 2019, Bylaw 18909 was passed to allow for Medium Rise Apartments with underground and surface parking; however, the Uses added in April 2019, were inadvertently deleted. This error was corrected on August 26, 2019, and the deleted Uses were put back into the DC1.

[21] While Council approved Cannabis Retail Sales as an available Use twice for this DC1 there is nowhere within Pedestrian Friendly Commercial Node Area B (the only Area that allows Cannabis Retail Sales in this DC1) that is not within 180 metres of the existing Cannabis Retail Sales to the south across Maple Road.

[22] Mr. Haldane read from the SDAB website information sheet *Appeals in Direct Control (DC) Zones* which is contained in Tab 5:

> . . . . the initial question the SDAB has to address is whether, in approving or refusing the application, the Development Officer did or did not follow the directions of City Council as set out in the direct control provision and the land use / ***zoning bylaw of which it is a part***.

According to Mr. Haldane, the bolded phrase is an incorrect statement of the law. If the appeal is in respect of a provision of general application (as is section 70) it should not be captured by section 685(4) of the *Act* because it was not placed on that parcel as a result of Council's direct wish to exercise particular control over that area of land.

[23] Section 685(4)(b) directs that an appeal in a direct control is limited to whether the Development Authority followed the directions of Council. The question is "what are the directions of Council?"

[24] Section 641 of the *Act* was quoted:

> **Designation of direct control districts**
> **641(1)** The council of a municipality that has adopted a municipal development plan, if it wishes to exercise particular control over the use and development of land or buildings within an area of the municipality, may in its land use bylaw designate that area as a direct control district.
>
> …
>
> **641(3)** In respect of a direct control district, the council may decide on a development permit application or may delegate the decision to a development authority with directions that it considers appropriate.

The "directions" mentioned in 641(3) do not come up until the land is designated. It is Mr. Haldane's submission that the directions of Council are only what are contained in the direct control provision. If the regulations of general application are not mentioned in the direct control provision they are amendable to this Board's variance power.

[25] Mr. Haldane referred the Board to the following sections of the *Zoning Bylaw* which are found under Tab 7:

> **40. Applicability**
>
> The General Development Regulations shall apply to all developments on all Sites, and shall take precedence except where the regulations of a Zone, Overlay or Development Control Provision specifically exclude or modify these provisions with respect to any Use.
>
> **69. Special Land Use Provisions**
>
> **69.1 Applicability**
>
> (a) The Special Land Use Provisions apply to the Uses listed in any Zone or Direct Control Provision in which they are located. They shall take

> precedence and be applied in addition to the requirements of the Zone, except where a Zone, Direct Control Provision or Overlay specifically excludes or modifies these provisions with respect to any Use.

Section 70 is a Special Land Use Provision and applies in the direct control provision but it is not part of the direct control provision unless Council puts it within the direct control.

[26] Mr. Haldane referenced section 710 of the *Zoning Bylaw* which deals generally with direct control.

> **710.4 Development Regulations**
>
> 1. All developments ***shall*** [emphasis added] comply with the development regulations contained in an approved Area Redevelopment Plan or Area Structure Plan, (…)
>
> …
>
> 3. A development ***may also*** [emphasis added] be evaluated with respect to its compliance with:
>
> a. the objectives and policies of an applicable Statutory Plan;
>
> b. the General Regulations and Special Land Use Provisions of this Bylaw; and
>
> c. …

It is clear that section 710.4(1) and 710.4(3) are different and the application of 710.4(3) appears to be discretionary.

[27] A revised chart that was submitted prior to the hearing by Mr. Haldane shows the 43 direct control districts in Edmonton that include Cannabis Retail Sales as an available Use and includes the date that each bylaw was passed.

a) 27 of these direct control provisions contain no regulations on Cannabis Retail Sales.

b) 16 of these direct control provisions either express that Cannabis Retail Sales should be developed in accordance with section 70, or that Cannabis Retail Sales be restricted to the first floor of the development.

It was noted that several direct controls were passed on the same day including one direct control that contains regulations on Cannabis Retail Sales while another passed on the same day contains no regulations. Council clearly means different things when they say section 70 applies in one direct control provision and is silent on another direct control provision.

[28] Tab 9 contains a copy of *Parkdale-Cromdale Community League Association v. Edmonton (City)*, 2007 ABCA 309 ("*Parkdale-Cromdale*"). This Court of Appeal decision was referenced to support the principle that including only a Use in a direct control provision does not mean you ignore the regulations related to that Use.

[29] Tab 10 contains a copy of *McCann v Edmonton (City)*, 2017 ABCA 323 ("*McCann*") and provides some insight as to what is in a direct control provision and what is not. This appeal related to the development of a child care services use in an area governed by a direct control provision that was passed before the passing of the current *Zoning Bylaw*. The Appellant argued that the direct control provision said to use the regulations in the residential zone in effect at the time which said that Child Care Services should be developed in accordance with "section x" of *Land Use Bylaw 5996*. The Appellant argued that "section x" of *Land Use Bylaw 5996* was still alive at the time of that Development Permit application. The Court of Appeal rejected that and said it is only what is in the direct control provision that lives on.

[30] The Court of Appeal, in *McCann*, is saying that there is a limit to what is in the direct control provision and the reference has to be direct. The subject DC1 says nothing about section 70 of the *Zoning Bylaw*; therefore, on the reasoning in *McCann*, section 70 is not part of that direct control provision.

[31] Tab 11 contains a copy of *Garneau Community League v Edmonton (City)*, 2017 ABCA 374 ("*Garneau*"). *Garneau* dealt with the Board allowing a variance to direct control regulations that were referenced in the direct control provision which said development shall comply with the regulations in the RF3 District. The direct control provision said you may allow variances to these regulations if they further the goals and objectives found in the direct control.

[32] The Court of Appeal's decision in *Garneau* contained the following instructions to the Board:

> [41] As a result, the decision is cancelled and the matter referred back to the SDAB to rehear the matter in accordance with this decision and the following directions:
>
> a. the SDAB is required by section 641(4)(b) of the *Municipal Government Act* to make its decision "in accordance with the directions" of Council; and
>
> b. variances from minimum setback or other requirements specified in RF3 may only be granted pursuant for individual applications, where such "relaxations would assist in the achievement of the development criteria in Clauses 3, 4 and 5".

[33] The City's position is that *Garneau* directs that in a direct control this Board can only do what the Development Authority can do and has no additional variance powers. When the Board re-heard the appeal, the Board found that granting the variances does support the goals outlined in the Plan and is compliant with Council's directions as outlined in that

direct control provision. Unless it is in the direct control provision, this Board can vary development regulations; when it was re-heard the Board granted variances including parking under section 66 of the *Land Use Bylaw 5996*.

[34] Tab 12 contains excerpts from Gwendolyn Stewart-Palmer's and Frederick A. Laux's book, Planning Law and Practice in Alberta (4th edition) ("Stewart-Palmer and Laux"). The first excerpt refers to section 641(3) of the *Act* and Mr. Haldane referenced footnote 136 in section 6.2(2)(c)(i):

> . . . . The probable intent is to permit either delegation for a specific application or to empower a council to delegate the decision-making power in general terms so as to apply to all applications filed after the delegation. […]

That is what has happened in Edmonton and that is what appears in section 710 of the *Zoning Bylaw* with respect to direct control. Section 710 is a general delegation of the authority. The difficulty that arises is that there is less than full direct control and the directions do not address everything that Development Authority may be called upon to decide on.

[35] Mr. Haldane further quoted excerpts from Stewart-Palmar and Laux at section 6.2(2)(e):

> A right of appeal is also afforded to provide a forum in which adjustments, variances or waivers can be made in connection with the development standards. In conventional districts council sets development standards in the abstract on the assumption they will apply in the normal case. . . .

That is exactly what Council did when they passed section 70 of the *Zoning Bylaw*.

> . . . . But not all cases are normal so a sober second consideration should be given in cases where the strict application of the rules would produce a needlessly unfair result. . . .

Section 617 of the *Act* says the purpose of Part 17 is to allow for the orderly development of land without infringing on private property rights except to the extent necessary for the greater public good. In the case of a permitted use, a variance to a development regulation that causes no harm to anyone should be granted. Mr. Haldane's client has private property rights and he has a permitted use – what is the harm in granting the variance?

> . . . . In other words, the appeal affords a means by which rules of general application can be adjusted or varied to suit individual circumstances. But if a council has established development standards on a site-specific basis by exercising direct control, it will have tailored those standards to suit the particular circumstances of the case before it. […]

Council chose to remain silent and did not reference section 70 as they did in many of the other direct control provisions that allow Cannabis Retail Sales. They made that choice in

the face of an existing Cannabis Retailer that would necessitate a variance to section 70 in order for the Use to have any meaning in this zone.

[36] If Council makes a decision or exercises true direct control and tells the Development Authority how to make the decision, there is no right of appeal. However, when they do not say anything, the Development Authority is making a decision without the directions of Council and that is amenable to review by this Board.

[37] Section 6.2(2)(e) of Stewart-Palmer and Laux goes on to say:

> The *Garneau* case turns on the specific limits imposed on the variance power granted to the development authority under s. 11.6(3) of Edmonton's bylaw. The question of whether a board should be able to exercise the rights in ss. 684 to 687 when council has left gaps or conferred discretion, absent a limitation like s. 11.6(3) remains outstanding. […]

[38] Section 11.6(3) is a regulation in *Land Use Bylaw 5996* that said where Council has conferred discretion in a direct control you shall not apply your general variance power. In other words, if they give you the right to vary a regulation in the direct control you do not have your normal section 11 variance power. In the Board's original decision that led to the *Garneau* decision it was only the reasons for approval that were faulty because the Board was able to grant the required variances in the re-hearing.

[39] Tab 13 contains a copy of SDAB-D-19-050 which concerned a liquor store in a direct control provision that was within the required 100-metre separation distance from a park per section 85 of the *Zoning Bylaw*. The Appellant presented exactly the same principles that are being presented today – direct control applies only to what is specifically in the direct control provision. In that case, the direct control provision did not say anything about the application of section 85. The decision turned on use of the word "may" in section 710.4(3) of the *Zoning Bylaw* (see paragraph 26 above).

[40] Where Council delegates discretion to a Development Officer with no way to review the exercise of discretion it is a major issue in planning law. It takes away a right of appeal that is fundamental to protecting private property rights.

[41] In summary, section 70 is not part of the subject DC1; therefore, section 685(4) of the *Act* does not limit this Board's authority in respect of a direct control provision of general application. It only applies if Council wishes to exercise particular control in that direct control provision. Section 685(4) should not bar an appeal where a decision can be made by the Development Authority capriciously without giving reasons.

[42] Mr. Haldane provided the following responses to questions:

i) In this case, the Development Officer did not have the ability to grant the needed variance as he would still be governed by section 70.1(b).

ii) The wording of paragraph 29 in the *Garneau* decision is because of the specific direct control provisions that were under appeal. The Court of Appeal said it was an error to consider additional variance powers. The argument that was advanced at the hearing was the Board did not make the mistake that the Appellant alleges.

iii) The online comment from an adjacent neighbour that says "one in the neighbourhood is enough" relates to the Use rather than a separation issue as the complaint would still be the same if the separation distance increased by 70 metres.

ii) Position of the Development Authority

[43] Mr. M. Gunther, Law Branch, and Mr. I. Welch, Development Officer appeared to represent the City of Edmonton.

[44] It is important to recognize that direct control zoning is something that is different than conventional zoning. As per the *Act*, it is zoning where Council wants to exercise a specific level of direction and control over a specific parcel of land or a specific area. That is why infringing on individual property rights has to be looked at in the context of direct control property.

[45] If a developer wants to develop a unique development such as mixed commercial and residential uses on a unique site there are benefits to using direct control zoning. However, there is also much less flexibility to do things outside the scope of not just the direct control provision but the prescriptions of Council that are found in the *Zoning Bylaw*. The *Zoning Bylaw* and the direct control provision for that site will govern very strictly what can be done with the land.

[46] Mr. Haldane's arguments are premised on five incorrect points of law.

i. <u>Only those regulations or requirements found in the four corners of the direct control provisons are directions of Council.</u>

[47] The starting point is to look at what the powers are on a direct control appeal in the *Act*. Section 685(4) addresses the scope of a direct control appeal:

> **685(4)** Despite subsections (1), (2) and (3), if a decision with respect to a development permit application in respect of a direct control district
>
> (a) …
>
> (b) is made by a development authority***, the appeal is limited to whether the development authority followed the directions of council*** [emphasis added], and if the subdivision and development appeal board finds that the development authority did not follow the directions it may, in accordance with the directions, substitute its decision for the development authority's decision.

[48] The wording and sentence structure of that sentence are important. At issue is whether it is a decision in respect to a Development Permit application in respect of a direct control district. It is the Development Permit application that is at issue here and now the appeal flowing from that Development Permit application. It is ultimately the decision of the legislator and then Council as to how this has been structured.

[49] The Court of Appeal took note of that in the *Garneau* decision. *Garneau* used the words "land in a direct control district" in several instances to discuss when these limited powers are available. Paragraph 26 of the *Garneau* decision states:

> . . . . The discretion to grant variances otherwise available to a subdivision and development appeal board, pursuant to section 687(3)(d), is not available where the appeal relates to land in a direct control district.

It is not a question as to where in the bylaw or where in the direct control a specific requirement can be found but rather what the bylaw says is the requirement or the directions of Council. It is a question of whether the land or the subject property is in the direct control provision and whether the development application is for that property in a direct control provision.

[50] The other relevant statements that must be considered are the comments of Justice F. Slatter in an Application for Permission to Appeal decision, *Rossdale Community League v Edmonton (City)*, 2017 ABCA 90 ("*Rossdale*") at paragraph 11.

> . . . . Municipal planning documents should be interpreted harmoniously, both internally and collectively. Each particular planning document should be read as a whole, to extract its proper meaning. Further, when there are numerous applicable planning documents, an attempt should be made to read them all in a harmonious fashion.

[51] It is incorrect to parse the *Zoning Bylaw* into different sections and say that some constitute the directions of Council and other portions are not binding or applicable to the directions of Council. We know from the Courts that we have to look at the entirety of the documents and when we are dealing with land in a direct control district it has to be a question of whether the directions of Council were followed.

[52] It is important to recognize that the *Zoning Bylaw* is the law. It is a Bylaw that was passed by an elected body and applies to the Development Officer, developers who are developing land in the City and also parties like the Board and the Courts interpreting the law. Only if there is a specific exception are the Courts or the Board able to vary what is stated in the law. Section 687(3)(d) of the *Act* is one of these specific exceptions. When that section is not applicable, section 687(3)(a.3) states:

> (2) In determining an appeal, the subdivision and development appeal board
>
> ...
>
> (a.3) subject to clauses (a.4) and (d), must comply with any land use bylaw in effect.
>
> ...

[53] There is nothing else that allows the Board or the Development Officer to deviate from the written law in this case.

ii. A variance power exists in this context

[54] Paragraph 29 of *Garneau* contains the following statement:

> . . . . [T]here is no basis for a subdivision and development appeal board to have broader powers on appeal than the development authority with respect to land in a direct control district.

[55] The Court of Appeal, having considered all of the issues argued by legal counsel experienced in municipal law, determined there is no basis for an SDAB to have broader powers than the Development Officer.

[56] The whole purpose of a direct control zone is that Council has specific control and more oversight than in conventionally zoned land. Therefore, when Council prescribes requirements to the Development Officer there is no ability for further variation.

[57] It was argued that where there is an ambiguity or silence in the direct control bylaw that section 687(3) of the *Act* ought to be applicable. In *Garneau*, all three Justices, after listening to all of the issues, agreed that this was an incorrect and unreasonable interpretation of the law.

[58] While there may be circumstances where a variance can be issued in a direct control context, usually this is where the criteria for a variance are written directly into the provision. In this case, the directions of Council are very clearly defined in the *Zoning Bylaw*:

> **70. Cannabis Retail Sales**
>
> 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:
>
> …
>
> b. A Development Officer shall not grant a variance to reduce the separation distance by more than 20 m in compliance with Section 11;
>
> …

Section 11 of the *Zoning Bylaw* is the general variance power which puts criteria on the circumstances on when a variance may be issued.

[59] If the law in Alberta is that the SDAB has no greater powers than the Development Authority's powers, section 70.1(b) is the scope of the Board's powers.

iii. <u>The suggestion that something must be read into the fact that this direct control zone was passed after a neighbouring store had already opened.</u>

[60] The Appellant argued that when Council passed this DC1 they must have known that the existing Cannabis Retail Sales was within the 200-metre buffer. In the case where there is a site specific direct control zone that prescribes a Use that is right next to a park or something that can be assumed to be there permanently perhaps there is a conflict. That is not what we are dealing with here. Retail stores come and go and it is unlikely that Council would consider that there is another Cannabis Retail Sales nearby.

[61] A similar point relates to the chart the Appellant submitted setting out various direct control bylaws and taking note that some reference section 70 while others do not. The better practice would be not to reference section 70 in the context of the direct control as it is already applicable. The correct approach is to recognize that the *Zoning Bylaw* sets out requirements that are City wide and there is no necessity to put these requirements into specific zones. This is a drafting issue; it does not in any respect go to the fact that section 70 applies to some zones and not to others.

[62] Section 69 of the *Zoning Bylaw* states in plain language that these requirements apply:

> **69.1 Applicability**
>
> The Special Land Use Provisions apply to the Uses listed in any Zone or Direct Control Provision in which they are located. They shall take precedence and be applied in addition to the requirements of the Zone, except where a Zone, Direct Control Provision or Overlay specifically excludes or modifies these provisions with respect to any Use.

Case law such as *Rossdale* says you have to read the entirety of the *Zoning Bylaw* as one.

iv. <u>The suggestion that the applicability of section 70 is discretionary.</u>

[63] Mr. Gunther referred to section 710.4(3) of the *Act:*

> 3. A development may also be evaluated with respect to its compliance with:
>
> . . .
>
> b. the General Regulations and Special Land Use Provisions of this Bylaw;
>
> . . .

[64] The Appellant argued that the word “may” allows some discretion regarding compliance with the Special Land Use Provisions. In light of the specific direction in section 69 of the *Zoning Bylaw* and the fact that we are dealing with a direct control provision, the only way we can read this harmoniously is that the Development Officer does not have unlimited discretion. An example where section 710.4(3) is applicable would be the

Strathcona Direct Development Control Provision which lists 35 different Permissible Uses and then at the end it says any other Use that is similar to the above 35 that have been listed. In that case, the Development Officer has to make the call as to whether or not the Use is similar to those other 35 expressly listed Uses. Section 710.4(3) gives the Development Officer a framework to do that.

[65] Mr. Gunther referred to *Parkdale-Cromdale*. That case dealt with liquor store site separation setbacks and that case clearly says that those site separation distances are applicable in direct control zones.

[66] If the purpose of section 710 is to allow unfettered discretion and allow these requirements in the Special Land Use Provisions to be optional the result is that these direct control zones would actually have less control than other zones in the City.

v. *Garneau* is either not good law or is obiter

[67] *Garneau* is a decision of the Court of Appeal. At the time of *Garneau*, the role of section 687(3)(d) of the *Act* in direct control sites was uncertain. The Court of Appeal answered that question and it is the law in Alberta until the Court of Appeal dictates otherwise. It is the lens through which direct control is regulated in Alberta.

[68] It is the direction of Council that the subject site is not a viable site for the development of another Cannabis Retail Sales because of an adjacent Cannabis Retail Sales. To suggest that only some part of the *Zoning Bylaw* or some part of the direct control provision ought to be given the status of the instruction of Council is an unreasonable parsing of law and is inconsistent with case law.

[69] It is the City's position that the arguments that have been raised do not have a basis in law and that this appeal be refused.

[70] Mr. Gunther provided the following responses to questions from the Board:

a. The fact that section 70 is referenced in some of the direct controls and not others is simply a drafting issue. Council is not the body that actually drafts legislation; it adopts legislation. In some cases, it is the developer advancing the direct control and in other cases it is City administration.

b. Mr. Gunther believes in this case, the direct control zoning was proposed by the developer and the request to include Cannabis Retail Sales was by the landowner.

[71] Mr. Welch, the Development Officer, stated that prior to the subject application there were already approvals for two other Cannabis Retail Sales within the vicinity of the proposed location as shown on Cannabis Retail Sales map.

[72] In a previous SDAB decision, a Cannabis Retail Sales Use in a direct control zone across from a park was allowed after a variance was granted to the required separation distance. Mr. Gunther clarified that in that case the direct control was worded differently and

allowed variances to virtually all of the regulations. Also, when Cannabis Retail Sales was added as a listed Use to the bylaw a Council report was submitted in conjunction stating that planners had no objections to Cannabis Retail Sales being added as a listed Use. Because of that broad variance power written right into that direct control zone itself, it would have been absurd not to use that express variance power to override the site separation distance when City planning had no land use concerns in this particular case. In today's appeal, there is no provision that allows for that express variance power.

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

[73] Mr. Haldane is not arguing that section 70 of the *Zoning Bylaw* is discretionary nor is he arguing that the general regulations do not apply because of the word "may" in section 710 of the *Zoning Bylaw*.

[74] In this particular DC1, Cannabis Retail Sales Use was added at the request of the developer. It was removed entirely by accident because of an amendment by another developer for the addition of underground parking and some residential Uses. It was not a heated issue as to whether or not this Use was to be put back into the current DC1.

[75] Mr. Haldane is not advancing that *Garneau* is not good law. In *Garneau*, the proposition that there is no authority for this Board to exercise discretion or to review the exercise of discretion by the Development Officer in general terms was not advanced at the Court of Appeal. Legal Counsel on both sides was dealing only with the issue of that particular direct control district; Council had specified exactly what the Development Authority was to do.

[76] Mr. Haldane referenced paragraph 29 of *Garneau* which says that the interpretation is that there is an authority to review the Development Officer's decision.

[77] Mr. Haldane is not suggesting that the Development Authority has authority other than what is stated in the direct control. However, without specific instruction in the direct control there is no direction from Council.

[78] The entire concept of direct control is created in section 641 of the *Act.* Section 641 is different than section 640 which are the general land use regulations and outlines that decisions are delegated. In direct control, Council is making a decision with respect to a particular piece of land it wishes to exercise particular control over and gives directions to its delegate. How can it be said that they were giving directions to the delegate when they passed section 70 of the *Zoning Bylaw*. The subject piece of land never passed Council's mind when they passed section 70.

[79] The directions are only what are in the direct control provision. That is made clear by the chart previously presented that shows, even on the same day, Council might say section 70 applies or they might say nothing.

[80] *Garneau* is in the context of varying what is in a particular direct control provision and does not talk about varying anything else. *Garneau* is being read much more broadly by the City than the circumstances on which it was decided require and with this interpretation there is no recourse for a landowner who is adversely affected by the Development Officer's decision.

[81] Mr. Haldane agrees with the City's statement that we have to read the whole bylaw and it has to be harmonious. However, it is clear that in law, different words mean different things and he does not believe we can just accept the statement that section 70 written or not in direct control provisions is a drafting error.

[82] Council should be given credit for knowing what is on the ground when making decisions. Within six blocks of the subject site we can see parking lots that can be turned into parks or high rises. While parks and schools may be less transient than a retailer they are by no means permanent.

[83] Reading the *Zoning Bylaw* the way the City suggests, sterilizes this site for a Use that was intentionally added in twice by Council. Council made a decision to leave out the words "Section 70 applies". The suggestion was made that the developer or administration wrote the bylaw; however Council is the one that passed it – it is their bylaw.

[84] Mr. Haldane reiterated that his main argument is that the directions of Council are what is in the direct control provision and do not extend to the general regulations of the *Zoning Bylaw*.

Decision

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

Reasons for Decision

[86] The Appellant had applied to the Development Authority for a Development Permit to develop a Cannabis Retail Sales Use. The land is part of a Direct Control Provision, namely a DC1 Direct Development Control Provision, created by Charter Bylaw 18989 ("DC1"). Cannabis Retail Sales is a listed Use in this DC1.

[87] The DC1 does not contain any specific development regulations with respect to Cannabis Retail Sales. Additionally, the DC1 does not explicitly incorporate the provisions of section 70 of the *Edmonton Zoning Bylaw* ("the *Zoning Bylaw*") which are the *Zoning Bylaw's* standard development regulations for Cannabis Retail Sales.

[88] However, we must consider the provisions of section 710.4(5) of the *Zoning Bylaw*:

> **710.4(5)**
>
> All regulations in this Bylaw shall apply to development in the Direct Development Control Provision, unless such regulations are specifically excluded or modified in a Direct Development Control Provision.

As a result of that provision, section 70 of the *Zoning Bylaw* must be applied to this application.

[89] Section 70 creates a 200-metre separation distance between Cannabis Retail Sales Uses. It is agreed by all parties that the proposed Cannabis Retail Sales Use is 128 metres away from an existing Cannabis Retail Sales Use. Section 70.1(b) does give a limited variance power to the Development Authority:

> **70.1(b)**
>
> A Development Officer shall not grant a variance to reduce the separation distance by more than 20 m in compliance with Section 11; […]

However, as the proposed Cannabis Retail Sales is 72 metres short of the required separation distance, the variance required exceeded the variance power granted to the Development Authority by section 70.1(b). Accordingly, the Development Authority refused the application for the Development Permit.

[90] As this is an appeal from a rejection of a Development Permit application in a Direct Control Provision, this Board's authority is set out by section 685(4) of the *Municipal Government Act* ("the *Act*")which states:

> **685(4)** Despite subsections (1), (2) and (3), if a decision with respect to a development permit application in respect of a direct control district
>
> (a) …
>
> (b) is made by a development authority, the appeal is limited to whether the development authority followed the directions of council, and if the subdivision and development appeal board finds that the development authority did not follow the directions it may, in accordance with the directions, substitute its decision for the development authority's decision.

[91] It was conceded by the Appellant that the Development Authority did not have the discretion to grant this Development Permit. That, in and of itself, would be enough to dispose of this appeal. It is clear that the Development Authority followed the directions of Council as set out in the DC1 as well as in section 70 of the *Zoning Bylaw* and therefore, this Board does not have the authority to interfere in the decision made by the Development Authority.

[92] The Appellant, however, submits that because section 70 is not specifically listed or referred to in the DC1 that this Board does have the ability to use its general variance power with respect to the decisions made by the Development Authority in relation to section 70. The Board does not agree with that provision.

[93] The Board's authority in a situation such as this was set out by the Court of Appeal in 2017 in *Garneau Community League v Edmonton (City)*, 2017 ABCA 374 ("*Garneau*"). The Appellant's approach to the interpretation of section 685 (which in 2017 was section 641 of the *Act*) is the very approach that was rejected by the Court of Appeal in the *Garneau* decision. The Board notes the following excerpts from *Garneau*:

> [28] The respondent submits that section 641(4) does not limit the SDAB's jurisdiction because Council exercised less than complete control over the direct control district, in which case the appeal is a hearing *de novo* on the merits of the development. In support of this proposition the respondent relies on the following excerpt from Frederic A Laux, Q.C., *Planning Law and Practice in Alberta*, 3d (Edmonton: Juriliber Limited, 2010) at p 6-45 :
>
> > Where council has exercised less than complete direct control over a specific site that is the subject of a permit application, either because it has remained silent on some material particulars or because it has left the development authority with a discretion, a literal interpretation of s. 641(4)(b) might suggest there is no right of appeal. However, a purposive approach to interpreting Pt. 17 of the *Municipal Government Act* leads to the conclusion that a right of appeal on the merits of the development does exist. Where council has left gaps or conferred a discretion, it in fact has not exercised direct control over that element. Consequently, the rules pertaining to appeals in non-direct control districts should apply to the extent that true direct control has not been utilized. It follows that in those circumstances the panoply of appeal rights and powers set forth in ss. 684 to 687 should apply.
>
> [29] We do not agree with this approach. Section 641(3) provides that if council does not decide the development permit application in respect of a direct control district it "may delegate the decision to a development authority with directions that it considers appropriate." The respondent's interpretation suggests that where discretion is delegated to a development authority (for example, to grant certain variances), the subdivision and development appeal board is not limited on the appeal to exercising the discretion granted to the development authority. In other words, the subdivision and development appeal board is not required to proceed in accordance with the directions" of council pursuant to section 641(4)(b) but is instead at liberty to proceed pursuant to section 687(3)(d) to grant variances not contemplated by council for that direct control district. That interpretation is inconsistent with the plain wording of section 641.4(b) and undercuts the ability of council to exercise effective control over a direct control district as contemplated in section 641 of the *Municipal Government Act.* To the extent that council's directions gave a development authority the ability to consider "the

> merits of the development", the subdivision and development appeal board has similar authority. However, there is no basis for a subdivision and development appeal board to have broader powers on appeal than the development authority with respect to land in a direct control district.

[94] The direction of the Court of Appeal to the SDAB is clear. If an appeal from a decision of the Development Authority is with respect to land in a Direct Control District, the SDAB has no more discretion than did the Development Authority. As it is conceded that the Development Authority did not have the discretion to grant this permit, neither does this Board.

[95] The Court of Appeal in *Garneau* was even more explicit in paragraph 26 of its decision, the last sentence of which states:

> [26] . . . . The discretion to grant variances otherwise available to a subdivision and development appeal board, pursuant to 687(3)(d), is not available where the appeal relates to land in a direct control district.

[96] This sentence is clear and is controlling on this Board. This appeal deals with land in a Direct Control District: therefore, this Board does not have the ability to grant a variance pursuant to 687(3)(d) of the *Act*. It is clear from section 687(3)(a.3) of the *Act* that this Board is required to comply with the *Zoning Bylaw* unless section 687(3)(d) applies. As it does not apply on land in a Direct Control District, the Board is bound by the *Zoning Bylaw*.

[97] Section 70 of the *Zoning Bylaw* is clear: the maximum variance that can be granted to the 200-metre separation distance between Cannabis Retail Sales Uses is 20 metres. The required variance in this case is 78 metres. To grant this permit would be to ignore the provisions of section 70 of the *Zoning Bylaw*.

[98] As section 687(3)(d) of the *Act* is not available on this appeal, the Board has no authority to interfere with the decision of the Development Authority and the appeal is denied.

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

Board Members in Attendance:
Mr. B. Gibson, Mr. C. Buyze, Mr. L. Pratt

cc: City of Edmonton, Development & Zoning Services, Attn: Mr. I. Welch / Mr. Harry Luke
City of Edmonton, Law Branch, Attn: Mr. M. Gunther

Important Information for the Applicant/Appellant

1. This decision may be appealed to the Alberta Court of Appeal on a question of law or jurisdiction under section 688 of the *Municipal Government Act*, RSA 2000, c M-26.

2. When a decision on a Development Permit application has been rendered by the Subdivision and Development Appeal Board, the enforcement of that decision is carried out by Development & Zoning Services, located on the 2nd Floor, Edmonton Tower, 10111 – 104 Avenue NW, Edmonton, AB T5J 0J4.