

Appeal No.: 0262 012 2018  
Hearing Date: November 21, 2018

SUBDIVISION & DEVELOPMENT APPEAL BOARD DECISION

CHAIR: K. Howley  
PANEL MEMBER: M. Kartusch  
PANEL MEMBER: F. Yakimchuk

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BETWEEN:

LEMUEL JAIRAL  
Represented by David Elliott

Appellant

and

CITY OF RED DEER  
Represented by Beth Mclachlan, Development Officer  
& Natasha Wirtanen, City Solicitor

Development Officer

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**DECISION:**

The Red Deer Subdivision and Development Appeal Board approves the application for the discretionary use of Cannabis Retail Sales on the Lands located at 5213 50 Avenue, Red Deer, Alberta legally described as Lots 5-6 Block 15, Plan K zoned CI (Commercial City Centre District) subject to the following condition:

1. A Development Permit shall not be deemed completed based on this approval until all conditions except those of a continuing nature, have been fulfilled to the satisfaction of the Development Officer.
2. All Development must conform to the conditions of this Development Permit and the Approved Plans and any revisions thereto as required pursuant to this Approval. Any further revisions to the Approved Plans must be approved by the Development Authority.
3. The Applicant shall repair or reinstate, or pay for the repair or reinstatement, to original condition, any public property, street furniture, curbing, boulevard landscaping and tree planting or any other property owned by The City which is damaged, destroyed or otherwise harmed by development or construction on the site. Repairs shall be done to the satisfaction of The City of

Red Deer. In the event that The City undertakes the repairs the Applicant shall pay the costs incurred by The City within 30 days of being invoiced for such costs.

4. Prior to commencing retail operations, the Applicant shall provide the Development Officer with confirmation that the Applicant has received a retail license for Cannabis from the Alberta Gaming and Liquor Commission, the form of such confirmation shall be to the satisfaction of the Development Officer.

Reasons for this decision are provided within.

## **JURISDICTION AND ROLE OF THE BOARD**

1. The Subdivision and Development Appeal Board (the Board) is governed by the *Municipal Government Act*, RSA 2000, c M-26 (the MGA) as amended.
2. The Board is established by The City of Red Deer, By-law No. 3487/2012, *Appeal Boards Bylaw* (October 29, 2012). The duty and purpose of the Board is to hear and make decisions on appeals for which it is responsible under the MGA and The City of Red Deer, Bylaw No. 3357/2006, *Land Use Bylaw* (August 13, 2006) (the LUB).
3. None of the parties had any objection to the constitution of the Board. There were no conflicts identified by the Board Members.

## **BACKGROUND:**

4. On October 17, 2018, the Municipal Planning Commission (MPC) refused a development permit application by Canna Cabana (the Appellant) for the discretionary use of Cannabis Retail Sales on the Lands located at 5213 50 Avenue, Red Deer, Alberta legally described as Lots 5-6 Block 15, Plan K zoned CI (Commercial City Centre District).
5. The MPC refused the application for the following reasons:
  - A. The proposed Site is located 88.9 m from the approved Cannabis Retail Sales use at 5121 50 Avenue, which creates a visual perception of clustering as the storefronts face the same streetscape.
  - B. The proposed 70% variance between the Cannabis Retail Sales use at the Site and the existing approval for Cannabis Retail Sales at 5121 50 Avenue is excessive.
  - C. Approval of the Site will result in three approved Cannabis Retail Sales Uses within the immediate area. This would be an excess concentration of Cannabis Retail Sales uses, which lessens the variety of different commercial business available to serve the community.

6. Section 5.7(12)(r)(ii) of the LUB requires a separation distance of 300 metres between Cannabis Retail Sales uses (CRS). The proposed development would be located within the separation distance of two approved CRS use locations.
7. The proposed development would be located 88.9 meters away from an existing CRS location at 5121 50 Avenue (the 'first location'). This equates to a 211.1 m (70%) variance of the 300 metre setback.
8. The second existing CRS location is 5511 50 Avenue (the 'second location'). The proposed development would be located 290.8 metres away from the second location. This equates to a 9.2 m (3%) variance of the 300 metre setback.
9. The Appellant filed an appeal of the refusal on October 26, 2018.
10. The Board entered into evidence the following:
  - Exhibit A-1: Hearing Materials (pages 1-62)  
Area Landowner Comment (page 63)
  - Exhibit B-1: Development Officer - Report (binder with tabs A-J)

## **SUMMARY OF EVIDENCE AND ARGUMENT:**

### *The Appellant*

11. The Board heard from the Appellant. The Appellant stated that he is a sole proprietor proposing to operate a Cannabis Retail Sales (CRS) business at 5213 50 Avenue.
12. The Appellant addressed the MPC's reason for denial starting with the proposed variance (211.1 m) being "excessive"; he argued that a July 05, 2018 email response from the Development Officer stated "The City may consider variances to the 300 m separation distance. Each application would be considered on its own merit through a review process."
13. The Appellant stated there are few options for CRS locations in Red Deer due to the separation limitations from schools, playgrounds, etc. He further stated that CRS retailers are finding it difficult to find landlords that support CRS as they are only permitted in the C1 and C4 Districts only.
14. The Appellant explained that having a business in the C4 District is not a practical option for CRS as it is mostly industrial, has limited foot traffic and would be more prone to vandalism. The C1 district is a more controlled, higher foot traffic area therefore considered the most viable option.
15. The Appellant stated there is a visual perception of clustering in Red Deer when looking at things such as car dealerships and grocery stores. These businesses are located in close proximity to

each other, stimulating the market therefore providing good competition among similar businesses.

16. The Appellant further stated that currently Downtown Red Deer has many vacant spaces. The proposed development is to be located in a historical building that has been unable to secure long term tenants for many years. It is the Appellant's opinion this would bring revitalization back to this area where currently there is a visual cluster of empty buildings.
17. The Appellant stated that when looking at other areas with CRS such as Colorado or Vancouver clustering due to inexpensive rent brought in a concentration of customers, therefore increasing the economy in an area that was once deserted.
18. The Appellant argued when you limit the variety of commercial uses in one area you also increase the likelihood of one retailer controlling the market. Competition stimulates the market which is beneficial to both the consumer and the surrounding businesses due to the potential increase in foot traffic to the area.
19. The Appellant stated that the impact of the proposed use would be minimal as the proposed business is a small retail space (39 ft. x 19 ft.). The customer's shopping area would have a menu board for selection located in the front, while the rear of store is for employees only and product storage.
20. The Appellant explained that this location already meets or exceeds many of the AGLC security requirements such as double steel doors, bars in windows, brick walls, security cameras and monitoring. There would be no major changes other than renovations for standard signage and upgrades to the façade as necessary.

*The Development Officer*

21. The Board heard from the Development Officer who stated that they have no authority to vary the setback distances imposed by the LUB.
22. The Development Officer stated the recommendation for denial was based on the proposed development considered in conjunction with the other two approved locations; the cumulative impact of the two relaxations needed to approve this application would result in clustering of Cannabis Retail Sales uses in a small area.
23. The Development Officer stated that the Appellant does not have the AGLC license, which is required to operate a CRS, however the Appellant has met the basic eligibility requirement. If this application were to be approved this issue should be addressed via condition on the Development Permit requiring that prior to operation, confirmation that the Applicant has received all appropriate licensing from the AGLC must be provided.

24. The Development Office stated it is of the opinion that impact of the CRS is not expected to be any different than the impact from other Merchandise Sales businesses previously located at the Proposed Site.
25. The physical landscape between the subject site and the other two approved locations is two commercial buildings and a two lane roadway. All three storefronts face the same direction, and one of the approved locations can be seen from the subject site and vice versa.
26. The Development Officer stated the use would require 211.1 m (70%) variance from the first location and 9.2 m (3%) variance to the second location if approved. While the 3% variance is considered minimal the 70% is considered excessive as it is over half the required separation. Resulting in excessive concentration as there are no physical barriers to reduce the visual perception of clustering.
27. When asked about what other similar sized municipalities are doing in regard to the separation distance, the Development Officer confirmed Alberta Health Services made a recommendation that the separation distance should be between 300 m to 500 m. The larger centers, Calgary and Edmonton have moved forward with 150 m to 200 m however, there is no information for similar sized municipalities to the City of Red Deer at this time.

## **FINDINGS AND REASONS**

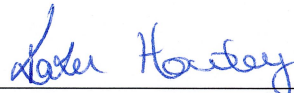
28. The MPC was concerned that the variance is excessive. Further, the decision of the MPC stated that the setback creates a visual perception of clustering as the storefronts face the same streetscape, which lessens the variety of different commercial business available to the serve the community.
29. While a 3% setback is minimal the Board agrees that 70% variance seems excessive. However, the Appellants argument persuaded the Board that in this case it makes sense from an economic perspective.
30. The Board is guided by the test set out in s. 687(3)(d) of the MGA which states that in determining an appeal the Board
  - (d) 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,

31. There was no evidence presented to support that varying the setback in this situation would unduly interfere with the amenities of neighbourhood, or materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land.
32. The Report from the Development Officer to MPC discusses the relevant planning principals that supports that this particular site is appropriate for a CRS use. Adjacent uses (i.e. Hemp n Stuff) are compatible with the proposed use and the impact from a CRS use is not expected to be any different than the impact from other merchandise sales businesses previously located at the proposed location.
33. During the Appellants argument he stated the proposed development would be located in a neighbourhood that is currently run down, with many vacant buildings currently earmarked for social services. By providing business in that area, it provides an opportunity for growth. Allowing CRS uses increases the diversity for that particular area, therefore supporting urban renewal with potential to attract new businesses and investors, giving strength to urban renewal and revitalization.
34. The Board was persuaded by the Appellants argument that the potential benefit of the proposed development is more significant than a “perceived” negative impact. The photographs found in Exhibit C1 show little Gaetz Avenue diverging away from Gaetz Avenue. One photo in particular at tab B page 6 shows the streetscape from the proposed CRS location to the first location. The First location exists on Little Gaetz and the proposed is on Gaetz therefore the streetscape of Gaetz Avenue remains intact. The Board considers that visual clustering is mitigated by this streetscape.
35. The Board made the observation that Little Gaetz is a one lane, low traffic volume street in the direct vicinity of the proposed development. Given the intended small size and operation ability of the proposed development, the Board finds that there would be minimal impact, if any, on Little Gaetz.
36. During the Appellants argument he stated this would be a smaller business with limited customer space, in an area where currently there is limited development. This creates potential for other services (i.e. complimentary businesses) in this particular area, as well potential to increase tenancy in an otherwise vacant space. The Board accepts this argument and agrees that the proposed development could potentially be a catalyst to future business investment in the area.
37. The Board decided that any potential impact is mitigated by the size of the space. The small size of this business will keep intensity and volume low.
38. The Board accepts the Development Officer’s position that the application would not produce any noise, odors, smoke or emissions, or have any outdoor storage.
39. Due to the nature of the potential CRS the Board believes there would be no limit to other commercial uses in that area as there was no evidence in support of that position before the

Board. Further the Development Officer did not dispute the Appellants argument that there is a surplus of vacancies in the area.

40. The Appellants pointed out that the subject site is currently vacant, as well as other buildings adjacent to the subject site. The proposed area consist of cluster of boarded up buildings, social services, and empty lots, retail is falling away from this area which shows that there is room for growth and diversity.
41. The Development Officer's description of the area suggests an existing diversity – adjacent uses include other CI commercial businesses such as offices, merchandise sales, social services, and commercial service facilities.
42. The Board believes that filling vacant commercial space in the CI district will lead to an increase in consumer foot traffic, which in turn increases vibrancy and supports retail diversity in the area.
43. For these reasons, the development is approved with conditions as stated earlier.

Dated at the City of Red Deer, in the Province of Alberta this <sup>06</sup>05 day of December, 2018 and signed by the Chair on behalf of all three panel members who agree that the content of this document accurately reflects the hearing, deliberations and decision of the Board.



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K. Howley, Chair  
Subdivision & Development  
Appeal Board

This decision can be appealed to the Court of Appeal on a question of law or jurisdiction. If you wish to appeal, you must follow the procedure found in section 688 of the *Municipal Government Act*, which requires an application for leave to appeal to be filed and served **within 30 days** of this decision.

## **APPENDIX A**

Documents presented at the Hearing and considered by the Board.

- Exhibit A-1: Hearing Materials (pages 1-62)  
Area Landowner Comment (page 63)
- Exhibit B-1: Development Officer - Report (binder with tabs A-J)