

Appeal No.: 0262 011 2018  
Hearing Date: November 14, 2018

SUBDIVISION & DEVELOPMENT APPEAL BOARD DECISION

CHAIR: K. Howley  
PANEL MEMBER: T. Handley  
PANEL MEMBER: M. Kartusch  
PANEL MEMBER: T. Lacoste  
PANEL MEMBER: F. Yakimchuk

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BETWEEN:

CANNA CABANA  
Represented by Jason Kostiw

Appellant

and

CITY OF RED DEER  
Represented by Debbie Hill, Development Officer  
& Natasha Wirtanen, City Solicitor

Development Officer

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**DECISION:**

The Red Deer Subdivision and Development Appeal Board denies the application for the discretionary use of Cannabis Retail Sales on the Lands located at 4804 50 Avenue, Red Deer, Alberta legally described as Lots 16-22 Block 9, Plan H zoned C1 (Commercial City Centre District).

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.
4. The Development Officer submitted a supplemental report and a copy of a recent SDAB Decision (0262 009 2018) which approves a Cannabis retail sales use at 1, 5015 48 Street and affects the proposed development. The Board recessed to allow the Appellant an opportunity to review the material.
5. Upon reconvening, the Appellant stated that he was prepared to proceed with the hearing.

**BACKGROUND:**

6. 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 4804 50 Avenue, Red Deer, Alberta legally described as Lots 16-22 Block 9, Plan H zoned C1 (Commercial City Centre District).
7. The MPC refused the application for the following reasons:
  - A. The primary responsibility of the Municipal Planning Commission is to interpret and apply the development standards established in the City's Land Use Bylaw and the Municipal Government Act, in a fair and reasonable manner. To that end, the proposed variance request is excessive, and inconsistent with the planning rationale of restricting potential clustering of this use in any one area of the city.
  - B. Additionally, the proposed variance request limits the diversity of the economic opportunities in the subject area.
8. 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.
9. The proposed development would be located 179.0 meters away from an existing CRS location at 1, 5111 49 Street (the 'first location'). This equates to a 40.3% variance of the 300 metre setback.
10. The second existing CRS location is 1, 5015 48 Street (the 'second location'). The proposed development would be located 62.0 metres away from the second location. This equates to a 79% variance of the 300 metre setback.
11. At the time of MPC's denial, the second location had not yet been approved. The decision of the MPC was based on the variance needed for the first location.
12. The Appellant filed an appeal of the refusal on October 25, 2018.

13. The Board entered into evidence the following:
- Exhibit A-1: Hearing Materials (pages 1-30)
  - Exhibit B-1: Development Officer - Report (binder with tabs A-J)
  - Exhibit B-2: Development Officer - Supplemental Report (7 pages)
  - Exhibit B-3: Development Officer – SDAB Decision 0262 009 2018 (8 pages)
  - Exhibit C-1: Appellant Submission – Blue Report Cover
  - Exhibit C-2: Appellant – Public Feedback Form (1 page)

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

#### *The Appellant*

14. The Board heard from the Appellant. The Appellant stated that the current use of the existing business is a retail store for cannabis accessories and lifestyle products (Smokers Corner). The business has been in operation at this location since 2012.
15. The Appellant explained that the proposed changes would involve exterior signage, interior cosmetic upgrades, and changes to comply with legislation and federal regulations. In addition, there will be window treatments to obstruct the view into the store, security cameras and monitoring, as well as other measures to ensure minimal impact to surrounding businesses.
16. The Appellant stated the original application and consideration for variance was supported by the Development Officer. In the City's report to MPC and in accordance with section 640(6)(a) of the MGA, it was determined that "*approving a CRS in this location would not interfere with the amenities of the neighbourhood*" and "*there is no evidence that the approval of a use similar in nature to the other Merchandise Sales businesses would result in a loss of use or enjoyment on the neighbouring parcels of land*".
17. The Appellant addressed the MPC's reason for denial starting with the proposed variance (121 m) is "excessive"; he argued there is no direction or guideline in the Land Use Bylaw (LUB) to support this conclusion. It is his position that the LUB allows for 100% variance of setback distances between CRS locations. It is the Appellant's position that since there is no guideline it is unreasonable to suggest a variance of 121 m is "excessive".
18. The Appellant further stated the CRS at the first location is not visible to the proposed development and are within distinct separate areas of commerce. At the time of the application, this was the only CRS site within in the 300 m separation setback.
19. The Appellant stated a current issue for this particular area of downtown is an abundance of vacant leases, as outlined in the November 14<sup>th</sup> decision. The conversion of the subject property to a CRS use will prevent an existing business from vacating the area.

20. With regard to the economic diversity in the area, the Appellant argued that the use of the proposed development as a retailer of cannabis is an extremely similar use to the existing cannabis accessory and lifestyle products, which is already patronized by cannabis users and enthusiasts. Approving this development would ensure no change to the economic diversity, as this is a similar use in an existing location.

*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 that the recommendation for approval was based on the existence of the first location only, where the physical landscape has several mitigating factors including four lanes of traffic and existing buildings.
23. The Development Officer stated that when the proposed development is also considered in conjunction with the second location, the cumulative impact of the two relaxations needed to approve this application would result in clustering of the use in a small area.
24. The Development Officer stated that while the proposed development would not produce any noise, odors, smoke, emissions or have outside storage, it lacks the mitigating physical landscape from the second location. Approving the application could result in visual clustering and there is ease of access between proposed development and the second location.

**FINDINGS AND REASONS**

25. With respect to the first location (40.3% setback variance), the Board is persuaded by the Development Officer's analysis and believes that the concerns identified by the MPC are well mitigated by the physical landscape of the area.
26. The MPC was concerned that the variance is excessive. Further, the decision of the MPC stated that the setback was put in place to prevent clustering and encourage economic diversity. The Board agrees that a 40.3% variance seems excessive. However, the existing physical landscape prevents the visual appearance of clustering and limits functional clustering (foot and vehicle traffic connections).
27. The proximity of the second location to the proposed development has some significant differences from the first. The variance needed is 79%; they are across a two lane street from each other and are easily visible to each other. Lacking the physical landscape barriers of the first location, the Board believes that approving the proposed development in proximity of the second location would cause a clustering of the same type of uses.

28. The Appellant argued that the existing business sells cannabis accessories and that the application for CRS is an incredibly similar use and therefore approving the development would simply allow an interior change to the business.
29. The Board believes that the sale of cannabis and the sale of cannabis accessories are distinctly different. Cannabis is one time use – you use it and it is gone. An accessory supports the use of cannabis and may be used multiple times. With the sale of cannabis, there would be an increase in activity due to more frequent visits; therefore, the Board believes that permitting the sale of cannabis would increase the intensity of the use of the property.
30. This is also supported by the statement of the Appellant that provincial regulations require the primary use of the business be cannabis sales and not accessories. The Appellant commented that other locations are experiencing a 60% cannabis, 40% accessory sales split. The dollar amount of the sales of each are reported monthly to the Alberta Gaming and Liquor Commission.
31. The Board was persuaded by the reports of the Development Officer. The initial report that recommended approval was written prior to the second location being approved. While the supplemental report from the Development Officer, written after the approval of the second location, does not make a recommendation for denial or approval, it acknowledges that the cumulative impact of the two variances will result in a clustering of the use in the area (Exhibit B2 para 8).
32. The Board is persuaded that a high concentration of one type of use in an area does not allow for, or limits, a diverse mix of options in an area. Approval of this application would have a stagnating or limiting affect on the area, due to duplication of this use in close proximity.
33. For these reasons, the development is denied.

Dated at the City of Red Deer, in the Province of Alberta this 27 day of November, 2018 and signed by the Chair on behalf of all five 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 1-30)
- Exhibit B-1: Development Officer - Report (binder with tabs A-J)
- Exhibit B-2: Development Officer - Supplemental Report (7 pages)
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