

EDMONTON SUBDIVISION AND DEVELOPMENT APPEAL BOARD

Citation: P. Golec et al v Development Authority of the City of Edmonton, 2023 ABESDAB 10064

Date: July 13, 2023
Project Number: 460479621-002
File Number: SDAB-D-23-064

Between:

P. Golec et al

and

The City of Edmonton, Development Authority

Board Members

Rohit Handa, Presiding Officer
Shari LaPerle
Elaine Solez
Jack Jones
Brian Carbol

DECISION

[1] On March 27, 2023, the Subdivision and Development Appeal Board (the “SDAB” or “Board”) considered who would be affected parties pursuant to section 686(3)(c) of *Municipal Government Act*, RSA 2000, c M-26 (the “*Municipal Government Act*” or “*MGA*”), and passed the following motion:

“That property owners within a 60 metre radius of the subject property be notified of the appeal hearing.”

[2] On April 18, 2023, the SDAB made and passed the following motion:

“That the appeal hearing be scheduled on May 31, 2023 and June 1, 2023 due to party availability.”

[3] On April 20, 2023, the SDAB made and passed the following motion:

“That the appeal hearing be scheduled on June 27, 2023 and June 28, 2023 due to party availability.”

[4] On June 27, 2023, the Board made and passed the following motion:

“That SDAB-D-23-064 be raised from the table.”

[5] On June 27, 2023 and June 28, 2023, the SDAB heard multiple appeals that were filed between March 24, 2023 and April 11, 2023 against an application by the Boyle Street Service Society. The appeals concerned the decision of the Development Authority, issued on March 20, 2023, to approve the following development:

Change the Use from a Personal Service Shop to a Health Service (Strathcona Health Hub), and construct interior and exterior alterations.

[6] The subject property is on Plan I Blk 51 Lot 9, located at 10119 - 81 Avenue NW, within a DC1 - Direct Development Control Provision (“the DC1”). The Strathcona Area Redevelopment Plan (“ARP”) applies to the subject property.

[7] The appeal hearing on June 27, 2023 and June 28, 2023 was held through a combination of written submissions, in-person and video conference hearing. The following documents were received prior to the hearing and form part of the record:

- a) Copy of the proposed plan and the approved Development Permit;
- b) The Development Officer’s written submission and attachments;
- c) The Appellants’ written submissions;
- d) The Respondent’s written submissions; and
- e) Online responses.

[8] The following exhibits were presented during the hearing and form part of the record:

- a) Exhibit A – Speaking Notes - P. Golec
- b) Exhibit B – Speaking Notes - M. Heinrich
- c) Exhibit C – Speaking Notes (Rebuttal) - J. Foufas

Preliminary Matters

[9] 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.

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

[11] The appeals were filed on time, in accordance with Section 686 of the *Municipal Government Act*.

Summary of Preliminary Matters

i) *Position of the Appellants on the first preliminary matter*

Appellant Speaker No. 1 - J. Agrios, Kennedy Agrios Oshry Law

- [12] J. Agrios is representing five property or business owners on 81 Avenue between 101 and 102 Streets.
- [13] The Development Authority has approved the development as a Health Services Use. The Appellants have no objections to the ancillary health services that are being offered; however, they are opposed to the primary purpose of the proposed development, which is a Supervised Consumption Site (SCS).
- [14] J. Agrios raised a preliminary issue regarding the plans. The plans under appeal are those that were stamped and approved by the Development Authority. Last week the Applicant submitted a new set of plans that showed significant changes. It is J. Agrios' submission that the Board cannot accept the new plans. They have not been reviewed by the Development Authority and have not been circulated to and reviewed by the relevant City of Edmonton departments.
- [15] Changes from the stamped approved drawings include: an addition of a ramp which is entirely off of the property, an additional entrance on the side of the building, changes to the swing of the main entrance door, mechanical and plumbing changes, second floor reconfiguration to allow it to be a stand-alone space and interior walls moved around.
- [16] It appears that the new ramp does not meet the required accessibility criteria and requires a separate permit. As per the Direct Control Bylaw and the Area Redevelopment Plan, this is a pedestrian oriented shopping street and the ramp has a negative impact on the sidewalk and impedes access to other properties.
- [17] The City's *Complete Streets Design and Construction Standards* document sets the absolute minimum width of a sidewalk as 1.8 m (approximately 6 feet). The subject development is located on a collector street; therefore, the monolithic sidewalk in front of the development needs to be even wider - 2.3 metres. If the ramp is added, as shown in the new plans, the sidewalk will only be 5 feet 7 inches wide which does not even meet the absolute minimum.
- [18] The Applicant has two options. They can proceed based on the stamped, approved plans which the Development Authority approved, or the Applicant can ask to have the Development Permit canceled and can make a new application based on the new plans that were submitted last week.
- [19] She referenced paragraphs 36 and 37 of another decision of this Board, *SDAB-D-21-178*, which addresses the concept of new plans being submitted to the Subdivision and Development Appeal Board. Various panels of this Board have refused to accept new plans unless it is completely obvious that the revisions will result in a fully compliant development, which is not the case with these revisions.

- [20] J. Agrios provided the following responses to questions from the Board:
- a) The SDAB has no jurisdiction to authorize any development outside of the property line.
 - b) It appears that the Respondent is requesting the Board approve the development permit with a condition that the Applicant get whatever other approvals are required for the ramp. J. Agrios submits that this is an inappropriate way to proceed given the large number of changes to the stamped approved plans.
- [21] All other Appellants declined the opportunity to comment on this Preliminary Matter.
- ii) *Position of the Development Authority on the first preliminary matter*
- [22] The Development Authority had nothing further to add at this time.
- iii) *Position of I. Wachowicz, Dentons LLP, Legal Counsel for the Respondent Boyle Street Service Society on the first preliminary matter*
- [23] The additional drawings show alternate solutions to the requested variance and are simply a frame of reference for the potential direction the Board may go and what alternatives are possible. Some of the suggested changes in the additional drawings are very small and may be within the Board's ability.
- [24] He agrees that wholesale revisions should not be approved by this Board.
- [25] In response to a question from the Board, I. Wachowicz confirmed that the proceedings today are based on the drawings that have been stamped and approved by the Development Officer.
- iv) *Position of the Appellants on the second preliminary matter*

Appellant Speaker No. 1 - J. Agrios, Kennedy Agrios Oshry Law

- [26] If the appeal is proceeding based on the stamped plans, then a jurisdictional issue arises based on *Garneau Community League v Edmonton (City)*, 2017 ABCA 374 ("Garneau").
- [27] Since the subject site is within a Direct Control District, the Board's jurisdiction as per section 685(4) of the *MGA* is limited to whether the Development Authority followed the directions of council. If the Development Authority did not follow these directions it may substitute its decision; however, the Board is also required to follow the directions of Council.
- [28] The stamped plans require a variance from the requirements of the Bylaw and based on *Garneau* the variance is not one that either the Development Authority or this Board is able to grant. So there is no jurisdiction to grant the development permit.

- [29] Section 4.1 of the subject DC1 indicates that unless it is otherwise modified specifically within the Direct Control, the General Business Zone (CB2) provisions and the Main Street Overlay (MSO) govern the site. Section 819.4.13 of the MSO states that where a commercial use is provided at ground level abutting a public roadway other than a Lane, the principal entrance shall be designed for universal accessibility. This variance was missed by the Development Officer in their review of the stamped approved plans.
- [30] The initial plans showed that the principal entrance was at the rear lane/alley and the Development Officer determined that the requirements of section 819.4.13 were met. However, the drawings were subsequently revised and the stamped plans now show the principal entrance at the front adjacent to the avenue. J. Agrios referenced photographs in her submission which confirm that the principal entrance is no longer universally accessible. There is a rise from the street to the sidewalk of just under 6 inches and from the sidewalk to the main entrance of between 7 and 8 inches. According to the *Barrier-Free Design Guide* (based on the Alberta Building Code 2014) the change in rise cannot be more than 13 mm otherwise a ramp is required for universal accessibility.
- [31] The new plans that were submitted, but which have not been reviewed or approved, show a ramp has been added which does not appear to meet the required specifications. The fact that the Applicant submitted revised plans shows some acknowledgement that the approved plans do require a variance. Based on the *Garneau* decision, this Board is not able to grant the required variance. As per paragraph 40 of *Garneau*, where a Direct Development Control Provision has been written with a specific variance power in it, the Development Authority and this Board cannot revert back to using their general variance powers to grant variances to underlying regulations.
- [32] Section 12 of this DC1 contains a specific variance power:
- Notwithstanding the development regulations of this Provision, the Development Officer, in consultation with the Heritage Officer, may vary any regulation within this Provision where, in the opinion of the Development Officer, such variances would lead to better retention of character defining elements for any building on the Register or Inventory of historic Resources in Edmonton.
- [33] Just like *Garneau*, we have here a Direct Development Control that has a specific variance power; therefore neither the Development Authority nor this Board can resort to the general variance power. The only variance that can be granted must fit within Section 12 of this Direct Development Control Provision.
- [34] Section 641(4) of the *MGA* referred to in *Garneau* is now found at section 685(4) in the current version of the *MGA*.
- [35] The only option for the Board is to allow the appeals and cancel the development permit.
- [36] J. Agrios provided the following responses to questions from the Board.

- a) When she reads paragraph 16 of *Garneau*, she takes that as referring to the entire section 11 of the *Zoning Bylaw*.
- [37] The other Appellants declined the opportunity to comment on this preliminary matter.
- v) *Position of M. Gunther, City of Edmonton Legal Counsel, on the second preliminary matter*
- [38] M. Gunther explained how the City looked at the intertwining provisions. There are the Development Regulations in section 4 of the Direct Development Control Provision which refer to the applicability of the MSO as well as Section 340 of the *Zoning Bylaw*, which is the CB2 Zone. Immediately thereafter, within the scope of that particular provision, it states that the Development Officer may exercise normal variance power for the regulations found in the CB2 Zone as well as the MSO in accordance with Section 11 of the *Zoning Bylaw*.
- [39] There is also section 4.12 in this Direct Development Control Provision that speaks about the heritage situations. Their reading is that it must be determined if a proposed variance falls under the requirements of the MSO or the CB2 Zone or if it is something else as per section 4.12 of the Direct Development Control Provision.
- [40] The following example was provided. A Nightclub is restricted as to the maximum square footage allowed. If the Heritage Officer found that it would be better in keeping with the heritage character of the neighborhood that the nightclub be larger (perhaps a building would not have to be altered or that would better lead to the retention of the character defining elements) that is when Section 12 would come into play. It is a question of whether or not the variance is something that is actually found in this provision as opposed to something that is a requirement of either the CB2 zone or the MSO.
- [41] We seem to be dealing with certain issues by request of the Appellant almost as jurisdictional threshold issues. As we know from *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, there are no true questions of jurisdiction anymore and there is a caution in that case. The best way to proceed would be to hear all of the relevant evidence that may weigh into the consideration of the Board and proceed based on the entirety of the evidence.
- vi) *Position of I. Wachowicz, Dentons Legal Counsel for the Respondent, Boyle Street Service Society on the second preliminary matter*
- [42] When you look at the DC1 Bylaw, section 11 of the *Zoning Bylaw* and the MSO, it would be an error of this Board to find that it does not have the ability to grant a variance provided it is done in accordance with section 11, and which was the very error the Board made in *Garneau*.
- [43] When you look through the DC1 Bylaw what we are dealing with is Section 4.1. This is the section which incorporates the development regulations from Section 340 which are

the CB2 zone development regulations as well as section 819 which is the MSO. That is where the development regulation for universal accessibility exists.

- [44] The directions of Council are explicit that there is an ability to vary. Section 4(a) has been put immediately after section 4 and states:

The Development Officer may exercise normal variance power for those regulations of the CB2 General Business Zone and Main Streets Overlay, in accordance with Section 11 of the Zoning bylaw.

Then they go on to have other Development Regulations which are specific to this DC1 Zone.

- [45] Section 12 of the DC1 Bylaw has the words “any regulation” and it is clear that this means any regulation at all in the DC1 Bylaw. Whereas the one under Section 11 that does not require consultation with the Heritage Officer is not “any” regulation of the DC. It is those regulations that are imposed in section 1 and that is to the general regulations of the CB2 Zone, and the MSO.

- [46] This Board would err if it said it does not have the ability to use the same type of variance power that the Development Officer had. The regulation does say “in accordance with section 11”, so the normal variance power as per section 687 of the *MGA* is not available; however, the variance powers found in section 687 of the *MGA* are replicated in Section 11.3 of the *Zoning Bylaw*.

- [47] Section 11.4 has limitations on the variance powers in Section 11.3 and some hardship needs to be shown. There is a hardship in that a ramp cannot be added without tearing the building down unless you get approval from the City. No variances are being required to maximum Height, Floor Area Ratio or Density, subdivision splits do not apply and they are not seeking to change the general purpose of a Zone or an Overlay.

- [48] It would be an error to say the Board does not have the ability to grant a variance.

- [49] I. Wachowicz referred to *Rau v Edmonton (City)*, 2015 ABCA 136 and agreed with M. Gunther that the Board should proceed and look at all of the evidence and then make a decision.

vii) *Rebuttal of the Appellants on the second preliminary matter*

Appellant Speaker No. 1 - J. Agrios, Kennedy Agrios Oshry Law

- [50] J. Agrios has heard that both M. Gunther and I. Wachowicz agree that a variance is required and suggests that the Board proceed with hearing the appeal.

The Chair confirmed with the Development Authority and the Respondent that they agree that the Board does not need to make findings on the two original preliminary or jurisdictional questions and can just proceed into the remainder of the hearing.

Summary of Hearing

i) Position of the Appellants

Appellant Speaker No. 1 - J. Agrios, Kennedy Agrios Oshry Law

[51] The site is located on a unique street - 81 Avenue between 101 and 102 Streets. It is located mid-block on the south side of 81 Avenue. To the west of the site are the railway tracks resulting in a T-intersection at 102 Street.

[52] The DC1 zoning covers a very small area and was amended in January, 2023. The General Purpose of the applicable DC1 zone is:

To preserve the unique architectural character of a portion of 81 Avenue NW, provide for new commercial and compatible mixed use development opportunities and, if possible, preserve the view of the historic Canadian Pacific Railway Station to the west. This provision creates a unique pedestrian commercial shopping district while ensuring future development is compatible with the character of buildings and historic false facades.

[53] Health Services is a listed Use in this DC1 zone and Extended Medical Treatment Services is not.

[54] The site is also subject to the Main Streets Overlay and the Strathcona Area Redevelopment Plan. The purpose of the Main Streets Overlay is found at section 819.1 of the *Zoning Bylaw*:

The purpose of this Overlay is to encourage and strengthen the pedestrian-oriented character of Edmonton's main street commercial areas that are located in proximity to residential and transit-oriented areas, by providing visual interest, transparent storefront displays, and amenities for pedestrians.

[55] Both the DC1 and the MSO confirm that the location of the subject site is in an area that is intended to be pedestrian oriented.

[56] Section 685(4) of the *MGA* outlines what the Board can and cannot do in a DC district. The question is whether the Development Authority followed the directions of Council and it is the position of the group that she represents that these directions were not followed in three respects:

- a) The proposed development is a supervised consumption site, which is not an allowable Use under the applicable DC1 zone. In particular, a supervised consumption site is not Health Services.
- b) In the alternative, the City has previously classified, at a different site, a supervised consumption site as either Health Services or Extended Medical Treatment Services. In order to classify the proposed development as Health

Services, the “deeming” provisions in Section 7.1 of the *Zoning Bylaw* must be used and the development must be treated as a Discretionary Use. As a Discretionary Use, a SCS is not compatible with the surrounding area.

- c) The proposed development requires a variance to the requirement for a universally accessible principal entrance to the avenue in the MSO. The proposed development will have a negative impact on the surrounding area, and in particular, will be entirely incompatible with surrounding businesses.
- [57] Item (c), the requirement for a universally accessible entrance, has already been addressed and it sounds like the Development Authority and the Respondent acknowledge that a variance in regards to this has been missed during review and approval by the City. It is clear that the directions of Council were not followed.
- [58] If this Board does have authority to grant a variance, then section 687(3)(d) of the MGA comes into play which allows the Board to consider negative impacts of the development, not simply impacts of the variance. In this case the variance itself may have negative impacts as we are talking about Health Services with no accessible front entrance.
- [59] The Appellants also question whether this development can truly be classified as a Health Services so it is important to understand exactly what is proposed to happen at this development.
- [60] The *Mental Health Services Protection Regulation*, Alberta Reg 114/2021 at Section 1.1(c) states:
- “Supervised consumption services” means services provided to individuals in which the consumption of drugs that have previously been obtained by those individuals is supervised, in person, by the service provider or an employee of the service provider and emergency care is available and provided in response to an adverse reaction to a drug, but does not include opioid agonist treatment services.
- [61] The Respondent's material contains a study of a SCS at a different site, the Edmonton Convention Centre. That study lists the various drugs that were consumed at the site and the majority was meth.
- [62] In summary, the purpose of the proposed development is for individuals to come in and use the illegal drugs that they have somehow obtained. Someone watches them for an adverse reaction and there is someone there to provide treatment if somebody overdoses or has an adverse reaction to whatever they have taken.
- [63] Since the primary purpose of a SCS is a place where people can consume illegal drugs and while there are some ancillary health services provided, the question is whether this is truly a Health Services Use as defined.
- [64] If the Board determines that this is a Health Services Use, then to do so, it is necessary to go to the deeming provision in section 7.1 of the *Zoning Bylaw*. While the Development

Officer called this a Health Services, if you look at the actual impacts it fits better with an Extended Medical Treatment Services. The definitions of both Health Services and Extended Medical Treatment Services found in the *Edmonton Zoning Bylaw* are:

Health Services means development needs for the provision of physical and mental health services on an out-patient basis. Services may be of a preventative, diagnostic, treatment, therapeutic, rehabilitative or counselling nature. Typical uses include medical and dental offices, health clinics and counselling services, and medical cannabis clinics and counselling services.

Extended Medical Treatment Services means development providing room, board, and surgical or other medical treatment for the sick, injured or infirm including out-patient services and Accessory staff residences. Typical Uses include hospitals, sanitariums, convalescent homes, isolation facilities, psychiatric hospitals, auxiliary hospitals, and detoxification centres.

- [65] While Extended Medical Treatment Services refers to room and board, there is also a reference to out-patient services. When looking at both definitions, the proposed development does not fit squarely into either definition. What we really have is a type of use that was not envisioned at the time the *Zoning Bylaw* was enacted.
- [66] If this proposed Use is to be considered Health Services the deeming provision found at section 7.1.13 of the *Zoning Bylaw* must be used. Section 7.1.1(b) states:
- where specific purposes or activities do not conform to any Use definition or generally conform to the wording of two or more Use definitions, the Development Officer may, at their discretion, deem that the purposes or activities conform to and are included in that Use which they consider to be the most appropriate. In such a case, the Use shall be considered a Discretionary Use, whether or not the Use is listed as a Permitted Use or Discretionary Use within the applicable Zone; and
- [67] The deeming provision might be used if you have a Use that does not really conform to any particular Use class and then you find the one that is the closest. So if a supervised consumption site is going to be called a Health Services the deeming provision must be used to reach that conclusion.
- [68] The other situation the deeming provision could be used is if a Use conforms to two or more Use classes. This has occurred with two other supervised consumption sites in the city. The Boyle McCauley site was approved as a Health Services and the George Spady site was approved as an Extended Medical Treatment Services.
- [69] Since the City has already approved this type of Use at different sites under two different Use classes you either have a Use that does not fit neatly into existing Uses, or you have a Use that can fit into two. The Development Officer has treated this as a Class A listed Use when it should have been treated as a Class B, pursuant to the deeming provision.

- [70] It does make sense that this should be treated as a Discretionary Use since this type of Use was likely not contemplated at the time the definitions were approved in the *Zoning Bylaw*. Treating the development as a Discretionary Use would allow the SDAB to consider whether or not the Use is appropriate for a particular location.
- [71] The Health Services Use is found in 41 zones in the City. It is a Permitted Use in 28 zones including six residential zones. If the Board accepts that a SCS is Health Services then there are residential districts where a SCS could be located as a Permitted Use. There would be no buffer requirements to schools, parks, playgrounds or child cares. For other Permitted Uses, such as Cannabis Retail Sales, the *Zoning Bylaw* has also evaluated the impacts and put in various buffers. None of those protections show up in the *Zoning Bylaw* for Health Services which is an indication that SCSs were never really contemplated to be part of Health Services.
- [72] Extended Medical Treatment Services are not allowed in any residential zones. They are only allowed in six zones and are Discretionary in five of these six zones. In the one zone where Extended Medical Treatment Services is a Permitted Use there are various buffers and setbacks that are in place. From an impact standpoint it makes more sense to treat this as Extended Medical Treatment Services. This is the type of Use where the impacts of a particular location should be considered.
- [73] SCSs have been made legal by the provincial government and that is not the question of this appeal. The question is if one is appropriate at this location.
- [74] The negative impacts of the development upon the subject location must be considered and whether the neighbours should be asked to live with these impacts.
- [75] The whole point of the DC1 is to create a unique, pedestrian oriented, commercial shopping street. Page 7 of the Administration Report to Council dated January of 2023 recommending that the amendments to Bylaw 19988 to update the Historic West Richie (DC1) be approved states:
- The general intent for the area is to build on West Ritchie's existing qualities so that it can become a vibrant, historically-referenced urban village with quality urban design and architecture.
- [76] Pages 37 to 51 of J. Agrios' submission contain photographs depicting how this vision is beginning to be realized. There is a good mix of businesses with a unique character and this street is unlike any other street in the city.
- [77] While the Applicant's submissions provide quite a bit of material on why SCSs are a good idea, that is not the issue here before the Board. The question is whether it should be located on this street, given the vision for the street and what presently exists.

- [78] A study was cited regarding a SCS in Calgary that says that an increase in crime cannot be correlated with the SCS. We are not here to argue that the SCS causes an increase in crime. The issue is the impact of the SCS on this neighbourhood.
- [79] The Respondent's submissions indicate that there will be a security guard on site. The security guard is there to de-escalate, to discourage loitering, assist neighbouring businesses in de-escalation if needed, and assist in overdose response. The Respondent's submission also states that designated staff will be equipped with on-the-go emergency supplies and radios giving them the ability to leave the site within reason and respond to crises in neighbouring areas within a certain radius.
- [80] There is a recognition by the Respondents that there is an impact to the neighbourhood associated with this type of Use. The other businesses located on the street do not need security to assist with the protection of their own staff and with their developments' negative impacts to the neighbourhood.
- [81] Another concern is after the clients come in and consume illegal drugs on the site, where do they go after they leave? There is no transit available on this street. Also, where do the clients buy their drugs and where do they get the money to buy more drugs?
- [82] There are two studies about SCSs in the Applicants' material. One study focused on client feedback regarding the SCS at Commonwealth Stadium. However, no feedback was gathered from the neighbours as to what the impact was on them. One of the stated benefits of a SCS is that some of the people using these services will actually get referred into a treatment program. This study showed that only four people ended up transitioning into a program. The vast majority of people that attended this particular site in the study were simply there for the purpose of being able to consume illegal drugs.
- [83] The situation is similar with the SCS at the Edmonton Convention Centre. The report in the Respondent's submission shows that during 5 ½ months over 8,800 people visited the site. The report does not say how many people actually transitioned into a program, it just provides the number who were referred (about 100). Again no information has been provided regarding the impacts to surrounding businesses.
- [84] The proposed development is to be located on 81 Avenue which is not a main street and has no transit running on it. It ends at 102 Street because you run into the railway. This site is right in the middle of the block. Businesses will lose customers and tenants. One business owner has already lost a tenant because they determined it was not a suitable location due to the proposed SCS.
- [85] The statistics do not matter. What is important is the perception. If someone hears there is a Use where people are consuming illegal drugs and then leaving, most people will be afraid to go to that street. They are not going to read the studies about the good work a SCS may or may not be doing. People will choose not to go to the business in the area and tenants will not want to rent the buildings.

- [86] The photo of the front of the proposed site was referenced which confirms there is nowhere for someone leaving the building to go other than onto the street.
- [87] There is a concern with attracting criminals. If you are someone selling illegal drugs this is where your customers are.
- [88] The proposed development does not fit the vision of the street and will negatively impact the neighbourhood in a very profound and significant way.
- [89] J Agrios provided the following responses to questions from the Board:
- a) While the Extended Medical Treatment Services indicates inpatient care, there is also a reference to outpatient services. The Extended Medical Treatment Services Use is more appropriate because it is located in only six zones in the city. Health Services is permitted in 28 zones including six residential zones and there are no buffers from schools, child care, etc. The bigger issue is if you accept that the deeming provision should be used, and, if you do, whether or not you accept that Extended Medical Treatment Services is a more suitable use.
 - b) Without consumption there is nothing to supervise. The primary purpose is the consumption of illegal drugs and treatment will be provided if there is an adverse reaction. Without the consumption of illegal drugs there are no medical services to provide other than the ancillary health services mentioned in the Respondent's materials such as wound care and pregnancy counselling. The question remains as to whether this is even a Health Service.
 - c) The pictures of the neighbourhood do not indicate large numbers of intoxicated people on this street and there is no indication that anyone needs security. Right now it looks like the vision of the DC1 is working and there is a nice mix of businesses. By putting the SCS in the middle of the street it becomes a central hub where people will go to consume drugs. Added to that is the potential increase in criminal activity because drug sellers are going to go where the customers are.
 - d) The wording of section 687(3)(d) of the *MGA* is quite clear in that it references the impact of a development, not the impact of a variance. Also Section 11 of the *Zoning Bylaw* says that as soon as there is a variance a development is treated as a Class B development. At that point you are looking at the impact of a development.
 - e) There is something that intuitively does not make sense about a development that is a Health Services and does not have an accessible entrance. Having an alternate entrance at the side or rear of the building only makes matters worse. Now in addition to having people on the front street they are also in the back alley. It makes it more difficult for neighbours to secure their businesses if people are using multiple entrances.

- f) Extended Medical Treatment Services are only located in certain zones with appropriate setback requirements. A pedestrian oriented retail shopping street is not an appropriate location.

Appellant Speaker No. 2 - P. Golec

- [90] She has found that the terms Safe Injection Facility, Supervised Consumption Site, Supervised Injection Site, Safe Injection Facility, Supervised Consumption Service and Overdose Prevention Site are used interchangeably throughout the various literature, news media, government sources and City documents she researched. The intent of all these terms was a place for consumption of illegal substances whether injected, inhaled, ingested or smoked.

Development permit was incorrectly classified as a Class A.

- [91] In 2017 two separate Development permits were issued to Manasc Issac Architects:
- a) The continued operation of a Health Service, Safe Injection Facility at the Boyle McCauley Health Centre. That site is zoned Urban Services and Health Services is a Discretionary Use.
 - b) An Extended Medical Treatment Service Use and Safe Injection Facility at the George Spady Centre. That site is also zoned Urban Services and Extended Medical Treatment Services is a Discretionary Use in the zone.

- [92] Both of these applications were made to enable the establishment of Safe Injection Facilities. One was classed as a Health Services, listed in Section 7.4(26) of the *Zoning Bylaw* as a Commercial Use, and one was classed as an Extended Medical Treatment Service, listed in Section 7.7(4) as a Basic Service Use.

- [93] Section 7.1(3)b of the *Zoning Bylaw* specifies that specific purposes or activities which generally conform to the wording of two or more Use definitions shall be considered a Discretionary Use. The application for a “Health Hub”, including Safe Injection Facility, therefore should have been processed as a Class B permit.

The Definition of Health Services was incorrectly interpreted

- [94] Section 7.4(26) of the *Edmonton Zoning Bylaw* defines Health Services as:

development used for the provision of physical and mental Health Services on an out-patient basis. Services may be of a preventive, diagnostic, treatment, therapeutic, rehabilitative, or counseling nature. Typical Uses include medical and dental offices, health clinics and counseling services, and medical Cannabis clinics and counseling services.

- [95] Letters of support for the development were submitted to this hearing from medical professionals who claim that overdose prevention is a Health Service. These same

professionals would also consider “hospitals, sanitariums, convalescent homes, isolation facilities, psychiatric hospitals, auxiliary hospitals, and detoxification centres” as Health Services. Those Uses are included in the *Zoning Bylaw* definition of Extended Medical Treatment Services.

- [96] In this appeal, we are discussing the City of Edmonton definitions, not ones used by medical practitioners. No reasonable, law-abiding layperson would expect that the consumption of illegal substances would be included in the definition of Health Services.

The proposal is inconsistent with the spirit and intent of the Strathcona ARP

- [97] The intent of the Strathcona Area Redevelopment Plan is to build on West Ritchie’s existing qualities so that it can become a vibrant, historically-referenced urban village with quality urban design and architecture. Much progress has been made and there are new retail and residential buildings as well as long-established businesses and homes.

- [98] The proposed development would change the character of 81 Avenue for the worse and would discourage future investment by individuals or businesses. The proposed development would be operating in a mixed commercial/residential area with daycares, businesses and a seniors’ apartment complex in the immediate vicinity. It would discourage pedestrians from walking along the streets and visiting the businesses. It is inconsistent with the intent of the Strathcona ARP.

The proposed use will materially interfere with and affect the use, enjoyment and value of neighbouring parcels of land.

- [99] Inviting people to the neighbourhood for the purpose of consuming illegal substances devalues the millions of dollars invested by residential and business owners and makes the area less attractive to customers as well as future purchasers or developers. The horrific experiences of two other Alberta cities has been well documented.
- [100] The Sheldon M. Chumir Health Centre, a SCS in Calgary, began operation on October 30, 2017. A report released by the Calgary Police Service in January, 2019, showed a significant increase in crime and disorder within 250 metres of the facility since it opened. The highest volume call types in 2019 included unwanted guests, check on welfare, and suspicious persons. In contrast, both the Centre City and the rest of the city recorded approximately a 2% drop from their respective averages. Another study, released in August 2019, showed a similar trend.
- [101] On May 27, 2021, a statement was issued by Justin Marshall, who, at the time, was press secretary to Associate Minister of Mental Health and Addictions Jason Luan. The statement read, in part:

“We will be relocating the existing supervised consumption site, which has been highly disruptive to the neighbourhood, and instead add Supervised Consumption

Site capabilities within two existing partner organizations' facilities situated in more appropriate locations.”

[102] The Sheldon Chumir SCS remains operational today and from October 30, 2017 to February 28, 2023, the SCS had 265,287 client visits with an average of 109 visits per day. The most common drug used during February, 2023 was methamphetamine followed by fentanyl.

[103] A failed SCS was opened in Lethbridge in February 2018 and was closed in August, 2020 and was replaced with a mobile overdose prevention site. A study regarding this site was documented by Dr. Em Pijl, a researcher in the Faculty of Health Sciences at the University of Lethbridge. Dr. Pijl observed that the 100 metre radius directly around the SCS site experienced the greatest impact. The following are some of the comments found in this study:

“prior to the SCS, the area was comprised of various quiet businesses, and substance use (alcohol) with occasional social disorder (particularly on weekends) could be somewhat attributed to a small handful of drinking establishments in the vicinity”.

“Many respondents and participants in the study were not opposed to harm reduction or supervised consumption services, per se. There was, in fact, a range of support for these services. However, there was significant concern about the impacts on their substantial investments into their livelihoods, which they felt were being threatened.”

“Overall, antisocial behaviours cannot be unequivocally and entirely attributed to the Lethbridge SCS, due largely to the study sample size and an ongoing drug epidemic. However, it is not unreasonable to consider that drawing a diverse group of disenfranchised individuals with complex social and health needs into a single service, would result in a rise in antisocial behaviour and clashes with those businesses who have been in that relatively quiet neighbourhood (especially during the day) for between 2 and 85 years.”

These comments reflect the concerns of the residents and businesses surrounding the subject site.

[104] The opening of the Mustard Seed facility nearby, providing “advocacy, employment and housing supports” as well as meals, has led to an obvious increase in crime and social disorder in our community. Adding a SCS facility that will draw illegal drug users from other areas will further increase these problems.

[105] The Development Officer’s written submission contained the following statement: “It is the opinion of the Development Officer that the proposed Strathcona Health Hub does not unduly interfere with the amenities of the neighbourhood, nor affect the use, enjoyment

or value of neighbouring properties.” The documented experiences in both Calgary and Lethbridge do not support this statement.

Zoning is inappropriate for the proposed use

[106] The proposed development would be operating in a mixed commercial/residential area with two daycares, businesses and a seniors’ apartment complex in the immediate vicinity. There are also three educational facilities (including a gym with children’s programs), a park and numerous residential buildings within 200m. All other SCS sites in Edmonton are located within the Urban Services Zone where the general purpose is “to provide for publicly and privately owned facilities of an institutional or community service nature.” Extended Medical Treatment Services are Discretionary Uses in the Urban Services zone which is appropriate for the proposed use.

Density

[107] The City Plan has a goal of people being able to meet many of their daily needs within 15 minutes. If this is the objective, it makes no sense to locate two “Health Services” aimed at the same clientele across the street from each other.

[108] The *Zoning Bylaw* contains density restrictions for liquor stores and cannabis retail locations, yet a Health Services aimed at serving a very specific demographic has no such restriction or consideration.

Council Direction is Unclear

[109] Land Use Planning in the City of Edmonton is extremely complicated. In spite of having 48 different land use Zones, 11 Overlays and 24 Special Areas, there have been 1,240 occasions where Site Specific zoning was deemed to be required. Rather than providing clear direction to staff and to residents, thereby creating a stable framework for investments and ensuring that investments made by property owners are protected, the zoning is only an indication of what may be done today. Tomorrow, with or without public consultation, the rules may be changed. Council’s direction cannot be followed if it is unclear. It is not clear whether the Development Authority followed the directions of Council. The SDAB may, therefore, substitute its decision.

[110] P. Golec does admire Boyle Street and the people who work there; however, they are a well organized, well funded corporation. The Appellants are a group of neighbors trying to protect their businesses and their neighbourhood.

[111] P. Golec provided the following information in response to questions from the Board:

- a) She has owned a four-story condo at the corner of 81 Avenue and 99 Street for about 15 years and has noticed an increase in problems since the Mustard Seed facility opened.

- b) Currently there are occasional altercations from people travelling from the bars on Whyte Avenue. A small number of random incidents is different than what will occur when you have a focal point for people who have already purchased illegal drugs and then bring them to the neighbourhood. The Calgary study cited that the two most commonly used substances are meth and fentanyl. These substances can cause people to become agitated and they will end up wandering in the neighbourhood in an agitated state. This is a whole different level from a couple of drunks wandering home from the bar on a Friday night.
- c) It was obviously missed that a Health Services Use should be accessible. An entrance with a ramp at the front would restrict other pedestrians. An entrance at the alley would also be a problem because the alleys are not plowed in the winter and would be problematic to anyone who needs a mobility aid. The idea of releasing people who have just consumed illegal substances into a dark back alley does not make sense.
- d) The Respondent's submission stated that "wrap around services" would be provided at the proposed development. Many of these services are already being offered at the Mustard Seed across the street.
- e) A SCS should have separation from daycares, public parks, seniors apartments and the gym that offers programming for children in this neighbourhood. There are separation distances in place for Cannabis Retail Sales and Liquor Stores. P. Golec does not believe this Use was envisioned when the Bylaw was being crafted.

Appellant Speaker No. 3 - J. Foufas

- [112] J. Foufas is the owner of a mixed-use building, immediately adjacent to the planned Boyle Street site. His building consists of two retail units as well as residential tenants who are predominantly young students and people who work in the area.
- [113] The proposed development will disrupt the security and enjoyment of neighboring residents and businesses as well as over 220 licensed children's spaces within a short distance from the site and seniors who have residences and frequent the area. This pedestrian friendly street will lose what has been achieved over the last decade.
- [114] Three separate studies were quoted to illustrate the serious psychotic symptoms that can occur amongst users of illegal drugs.
- [115] These studies reinforce that any proposed development which requires a full-time security guard to perform hourly walks around the block and a crew to conduct neighbourhood garbage and needle-debris pickup multiple times during the week, is clearly going to have a negative impact on public safety and the use, enjoyment and value of the surrounding area. This site will open the door to potential violent confrontations

with vulnerable populations, and detract from the desirability of the area for investment, residents, and visitors.

[116] In November of 2021, the City of Edmonton began the process of updating the zoning of 81 Avenue in West Ritchie in the subject DC1 Charter Bylaw 19988. In the Council Report on the Bylaw (5), the stated purpose for this update was to:

update the existing Historic West Ritchie (DC1) Direct Development Control Provision to allow for more business opportunities such as Convenience Retail Stores, Breweries, Wineries and Distilleries, Cannabis Retail Sales, Markets and Special Events.

[117] None of the business owners, property owners or residents in the area opposed this rezoning because they were under the impression that this update would allow for more business opportunities in keeping with the character of the neighbourhood. This proposed Overdose Prevention Site does not comply with the character of the updated rezoning, is not a business and should not be allowed.

[118] The proposed development does not meet the General Purpose of the DC1 bylaw. Section 7.5 of the DC1 bylaw reinforces the requirement to maintain a pedestrian-friendly environment for all seasons. Having patrons to this establishment congregate outside the building or in near proximity to the building does not encourage a pedestrian-friendly environment. Intoxicated individuals arriving or leaving and interacting with visitors also does not create a pedestrian-friendly environment.

[119] The approved site plans do not meet the requirements of Section 8.2 of the Bylaw: loading, storage and trash collection areas shall be located to the rear of the principal building and shall be screened from view from any adjacent Sites or public roadways.

[120] Section 8.6 states that all existing and proposed surface parking... shall be screened from view from...adjacent Sites using methods such as Landscaping, fencing or other materials. This requirement has also not been met.

[121] There are no plans to provide a congregating area at the principal entrance, which means patrons will congregate directly in front of neighbouring businesses. Both the front and rear areas of the property abut well-established businesses and residential units.

[122] The proposed Overdose Prevention Site on 81 Avenue does not meet the requirements of the DC1 zoning. It is not business or commercial in nature. It does not add to the unique pedestrian commercial shopping district environment of the street and it does not have adequate screening or congregating areas in the plans.

[123] Over the course of Boyle Street's minimal public engagement, there have been changes to whether the facility will have a front or rear access for the patrons. The approved development permit documents show a front entrance which meets the requirements of the DC1 updated *Zoning Bylaw*, Section 7.2. "Where a Commercial Use is provided at ground level Abutting a public roadway, other than a Lane, the principal entrance shall

have direct external access to the adjacent public sidewalk.” However, Section 7.10 further adds to this, stating, “Where a Commercial Use is provided at ground level abutting a public roadway other than a Lane, the principal entrance shall be designed for universal accessibility.”

- [124] The front door access Boyle Street added in the late stages of consultation does not follow the Alberta Guidelines for Barrier Free Access. The rise from the city sidewalk to the finished floor at the principal entrance, exceeds 12 inches. As the entry is at or near the property line, it would not be possible to add the necessary ramp to access the building from the front entrance without a variance and encroachment on the pedestrian sidewalk. To access the front of the building from the dedicated handicapped parking space in the rear of the building over 100 feet away, patrons would need to navigate the narrow passageway between the properties, as well as traverse a steep grade at the front of the building. Additionally, there is a utility meter restriction mid-passage on one side that would not allow the easy transit of a wheelchair, person on crutches, or with any type of mobility issues. At this point in the passageway, access is restricted to 29 inches. These passageways are not adequately sized to serve as a corridor to the main entrance.
- [125] The importance of this lies in the reality that many of those battling addiction may have mental health issues as well as physical limitations.
- [126] Additionally, the proposed site will have Alberta Health Services (“AHS”) employees, and does not follow the standards set out in the (January 2018) Physical Security Guidelines & Standards for Government of Alberta Facilities. These guidelines should be considered for the protection of the public, employees and patrons. The guidelines reference appropriate setbacks, required congregating areas, lines of sight, security barriers and fencing, and appropriate separations with neighbouring buildings to ensure safety. With three neighbouring daycares, local seniors’ residents, and frequent visitors to this mixed-use area it is the responsibility of decision makers to take this into consideration.
- [127] Given that this is a location where extended medical services are to be offered, it is also critical that the facility provide barrier free access. At this time, the approved site plans do not meet the requirements in the DC1 rezoning guidelines and so a permit should not have been granted. If the facility is to meet any of these guidelines, it will require variances and so should not have been given a Class A development permit.
- [128] J. Foufas is concerned with the proximity of the entrances to his residential units which house predominantly young people.
- [129] He has been at this location for about 10 years and is very concerned about the impacts regarding needle debris and potential violent interactions with his tenants. Any negative impacts they have seen can be associated with the arrival of the Mustard Seed location nearby.

- [130] J. Foufas referred the Board to photographs contained in his submission that illustrate the points he has made.
- [131] He looked at data regarding the Edmonton Convention Centre provided by the Respondents and ran numbers of the wrap around service component. All categories of referral are below one percent other than one primary care category which is 1.8 percent of the number of visits for the period between November 16 and April 30, 2021.
- [132] J. Foufas provided the following responses to questions from the Board:
- a) Based on studies from other sites he expects there will be well over 100 daily visitors to the proposed development.
 - b) J. Foufas went to observe the two SCSs operating downtown and noticed that they both have setbacks in which individuals were congregating. People were sitting on the front stairs, predominantly smoking and it appeared that people were making drug deals in the parking lot or in the space in front of George Spady. These downtown locations have fenced areas, they seem to have secure entrances, setbacks and congregating spaces. Unlike the proposed development they are not a storefront and seem to have barriers and restriction points.
 - c) Last year two users of one of these facilities got into a knife fight. How do you protect both the staff and potentially such a situation from spilling onto a public street?
 - d) The existing Mustard Seed facility appears to have a setback and there are large numbers of individuals congregating, especially at certain times of the day. It is difficult to navigate the sidewalk on that side of the street at times. There is an undeveloped lot right next to the Mustard Seed and there is also a lot of congregating in that empty space.

Appellant Speaker No 4 - M. Heinrich

- [133] His family has owned a condo in Ritchie for over 15 years. They chose Ritchie because of the character of the community. The intent of the Strathcona Area Redevelopment Plan is to build on West Ritchie's existing qualities and much progress has been made since he purchased the condo in 2007. There are new retail and residential buildings as well as long-established businesses and homes.
- [134] The continued, positive evolution of the neighborhood is now threatened by the proposed development.
- [135] Boyle Street has not conducted any meaningful consultation with the members of the community; they have chosen to just tell the community what they are going to do.
- [136] Government representatives at all three levels of government have been unresponsive to inquiries about the illegal drug use at the site. Residents had the opportunity to attend a

public hearing on the zoning of the property intended for the illegal drug injection site, however the Council and administration made it clear that they were only deciding on the zoning, not how it would be implemented.

- [137] In our country, laws are enacted by municipal, provincial and federal governments. It is generally understood that legislation enacted by a higher level of government will supersede those of lower levels of government. The Parliament of Canada has enacted the *Criminal Code of Canada and the Controlled Drugs and Substances Act*.
- [138] Boyle Street is asking this Board to approve a site for the use of illegal drugs. Drug addicts using this site will have to buy their illegal drugs from elsewhere and possess these on their way to the illegal drug site. Purchase of the drugs is typically done on the street through their engagement with persons trafficking in drugs. Before the drug addict enters the illegal drug use site, two crimes under the *Controlled Drugs and Substances Act* have already occurred, possession and trafficking. The drug trafficker will logically establish his operation in Ritchie, in close proximity to the illegal drug use site.
- [139] The Province of Alberta has the ability to exempt drug use sites from the Criminal Code offences under the *Controlled Drugs and Substances Act*. When the addict enters the facility, the trafficking, possession and use of listed drugs magically becomes permissible and the offenders are no longer arrestable.
- [140] The illegal drug use site will enable the upstream offences of drug trafficking and possession that has to occur for the proposed development to be used. Health Services do not enable illegal activities and do not require security and community cleanup.
- [141] The SDAB must seriously consider their decision regarding the illegal drug use site. The drug use site cannot operate without illegal activities occurring in the neighborhood. As such, the SDAB must accept that they may be considered as complicit by endorsing drug trafficking and possession in the neighborhood.
- [142] The very first clause of the *MGA*, states that the purpose of a municipality is to develop and maintain safe and viable communities and to foster the economic development of the municipality. This serves as the keystone for all municipal services and operations. This provincial law is not optional and municipalities are expected to comply with the Act and its regulations. This should be the cornerstone of all decisions made by the City and this Board. The decisions to approve an illegal drug site will create safety issues, depression of community viability and downturn of economic development. As such, it would be contrary to the *MGA*.
- [143] Boyle Street has talked about picking up needles and providing security guards around the facility, having addicts enter from the alley and working with EPS, EMS and Fire to address the increase in activity in the community. These tactics show an acknowledgement that the illegal drug site will have a negative impact on public safety.

- [144] There is a growing body of peer-reviewed literature that examines the potential negative impacts of injection sites on neighborhoods. A study published in the journal *Drug and Alcohol Dependence* in 2019 found that the presence of a safe injection site in a neighborhood was associated with an increase in public disorder, such as public drug use, discarded needles, and public urination. Another study published in the journal *BMC Public Health* in 2018 found that the presence of a safe injection site was associated with an increase in the number of people loitering in the area, as well as an increase in the number of discarded needles. Finally, a study published in the journal *Health & Place* in 2017 found that the presence of a safe injection site was associated with an increase in the number of people engaging in public drug use in the area.
- [145] The illegal drug site is not compatible with the intent of the Strathcona Area Redevelopment Plan, nor with the character and amenities of the neighborhood. If approved, this development would invite people to our neighborhood to sell and consume illegal substances. Once impaired, they would walk our streets and alleys, interacting with area residents and visitors. The area would subsequently become an obvious destination for dealers of illegal substances seeking new clients, bringing a criminal element.
- [146] Alberta Health Services issued a report entitled “Impact: a socio-economic review of supervised consumption sites in Alberta”. This report was authored by a group of esteemed Albertans comprised of experts in business, real estate, population economics, social demography, research ethics, lived experience, addiction and recovery, harm reduction, First Nations health, mental health, trauma, pain management, law enforcement, crime reduction and justice. The committee report found that stakeholder feedback predominantly suggested that the SCSs have had a negative social and economic impact on the community.
- [147] After analyzing the individual items from the many qualitative data sources, the AHS committee found that concerns fell into eight general categories or themes:
- a) Public Safety;
 - b) General social disorder;
 - c) Consultation/communications issues;
 - d) Appropriateness of current response;
 - e) Concerns with access to treatment;
 - f) Homelessness;
 - g) Economic impacts on property and businesses; and
 - h) Concerns with site operation.
- [148] M. Heinrich addressed the public safety category, and offered a short excerpt from the expert panels report:
- A preponderance of evidence provided by area residents and officials demonstrates that criminal activity near SCS has increased. Residents at every location informed the Committee that the SCS sites act as a “magnet,” attracting

persons who are addicted to substances, whether they consume the substances at the site or not. It was reported that increased concentrations of drug users also attract drug dealers who, in turn, attract more drug users. SCS, therefore, are assumed to geographically concentrate the street-level drug market and other criminal activities. The Committee finds this to be credible.

- [149] Another major public safety issue identified was harassment in public areas. This was a concern raised by residents in SCS neighborhoods, as well as business owners and their customers. Many residents, including minors, reported being approached for money (panhandling), solicited for prostitution or being subject to verbal or physical assaults and intimidation by users of the site.
- [150] Numerous residents complained about drug users urinating or defecating on their property, or in front of their businesses, as well as uttering profanities or making rude gestures to community members and patrons of local businesses. Many reported that this resulted in a fear of using public spaces or supporting the business in the area. Parks, public libraries, stores and restaurants were reported as either not being used, or were being used far less than previously by community members, especially children and the elderly.
- [151] M. Heinrich is retired and had to pay an appeal fee in order to present his views. So even this hearing has been established to restrict public comment. He did not have the funds to hire legal representation at this tribunal. There are likely many community members who lack the funds for the application to appeal and the ability to take a day off work. It is very difficult for an individual to oppose a large, well-funded organization like Boyle Street that comprises 6 corporations, has 650 staff with an annual funding of about \$37,000,000.00.
- [152] Attention needs to be paid to people with “skin in the game”, the people directly affected by the issue. The Scona Concerned Citizens group is comprised of residents and businesses with “skin in the game”.
- [153] Boyle Street has provided letters of support from many respected doctors who took the time to write to this tribunal. While they see tragedy from drugs on a daily basis and want to do something about it, would Boyle Street staff live next door to an illegal drug site? Would they be okay with their children, grandchildren and parents interacting with drug addicts and traffickers everyday? Would they have their children in a daycare next door? Would they go to the restaurant across the street?
- [154] Many ordinary, hard-working Albertans have invested millions of dollars in their homes and businesses in the West Ritchie Area. Inviting people to this neighborhood for the sole purpose of purchasing and consuming illegal substances devalues the investment by residential and business owners and makes the area less attractive to future purchasers or developers as well as current clients. The public safety issues will have a dramatic impact on the lifestyles and well-being of the residents and business. There will be a profound

impact on the economic viability of the community. M. Heinrich estimates that at least 1,000 men, women and children would be impacted on a daily basis.

- [155] M. Heinrich questions how the Development Officer came to the conclusion that the proposed Strathcona Health Hub “does not unduly interfere with the amenities of the neighbourhood, nor affect the use, enjoyment or value of neighbouring properties.”
- [156] It was also stated that the use provides a safe out-patient facility for people requiring medical services. It is very surprising that the use of illegal drugs is considered a medical service. If this is the position of the City of Edmonton then all the bars along Whyte Avenue provide Health Services to patrons who are alcoholic.
- [157] The residents do not want Boyle Street security guards and needle pick up day in our community. Any reasonable person would reach the conclusion that the illegal drug site will have a negative impact on the community. The impact will be irreversible and the community will be in a downward spiral as business, residents and families leave Ritchie due to the decline in public safety and economic viability.

Appellant Speaker No. 5 - S. Chen

- [158] S. Chen is representing herself as well as her elderly mother. They each own a residential unit in the building directly across the alley from the proposed development. Her mother has been an owner for almost 20 years and S. Chen has owned her unit for 17 years. During their ownership the area has become more vibrant and additional services have come in.
- [159] She is in agreement with all of the information already provided by the previous Appellants.
- [160] She focused on the potential public safety concerns they have. Her mother is close to 80, walks daily and takes public transit from 82 Avenue to obtain groceries. The railway line at 102 Street prevents her mother from walking directly west along 80 Avenue.
- [161] If this is truly a Health Services hub there should not be any congregation outside the building and no one should be afraid to pass by the entryway.
- [162] Boyle Street’s website explicitly states that the health hub is strictly for service users to access on-site services. Once the service is accessed the client will be expected to leave. Where will they go after consuming the illegal drugs? The general effects of using these drugs lasts beyond the time the person stays inside the facility.
- [163] There is no space in front of the building for individuals to congregate except on the public sidewalks in front of the neighbouring businesses. If the main entrance were in the back there would also be no space for congregation except for in the alley directly in view of their residences.

- [164] Access to services could be reduced for her mother should businesses start to leave the area due to potential increased crime and trafficking. S. Chen currently rents her unit and has concerns that she will be unable to get suitable tenants in the future.
- [165] Her mother regularly frequented Chinatown prior to the SCSs locating there in 2017. Since then there has been more social disorder and congregation so she does not go there anymore due to safety concerns and potential harassment and altercations. S. Chen does not want the same thing happening to this neighbourhood.

Appellant Speaker No. 6 - R. Bligh

- [166] His family has owned Klondike Insurance for over 30 years. They are located directly across from the proposed development. They have 27 employees, all female except for three. The safety of their employees as well as their clients is in jeopardy and property values and the business itself will be negatively impacted.
- [167] R. Bligh is a founding member of the Scona Concerned Citizens group which has over 100 members. They have a vested interest because they created the success seen in this neighbourhood. A petition conducted by this group received over 1100 signatures asking Boyle Street to find an alternate location.
- [168] The many residents and business owners he spoke to feel very strongly that drug addiction should not destroy a vibrant community by increasing violent crime and decreasing safety. Many of these people have recently had personal bad experiences with drug addicts. Others cited having to clean up needles and human excrement.
- [169] These types of negative encounters have dramatically increased since the Mustard Seed opened and since nearby churches have opened overnight shelters. A large binder of documents has been put together supporting the need for a better location for this site.
- [170] The main issues are that the site is being located in such a highly dense neighbourhood, street drug consumption sites are definitely not a Health Services and no reasonable person would conclude that it is. The proposed development will cause damage to neighbouring properties and losses to businesses.
- [171] Four daycares are in the immediate vicinity, there are at least nine childrens' activity centres, elementary schools, seniors housing locations and the health hub would be in the middle of many residential sites. This is all documented in detail on the maps that were submitted.
- [172] Boyle Street did not consider any of these impacts and neither did the City of Edmonton.
- [173] The drugs being used within the facility are untested street drugs. Hard street drugs are known to cause unpredictable and violent behaviours. The users will be inside the facility for 15 to 20 minutes. When they leave the centre they are a risk to the community.

- [174] When people think of Health Services they think of a walk-in medical clinic, a dentist, etc. They would never conclude that Health Services is a facility for street drug consumption and would never conclude that security guards and increased police patrols would be required as a result of a Health Services.
- [175] Statistics from other consumption sites illustrate the negative impacts. Would you rent a condo by a site such as this, invest in real estate, go to a restaurant or grocery store or simply go elsewhere? Most people would choose to go elsewhere.
- [176] R. Bligh urged anyone who has doubts of the consequences to go and sit outside the downtown SCS to witness what happens there and to see the condition of people when they come out. Drug dealers can be seen selling to addicts while they are lined up and hard drugs are consumed in front of the businesses on the street.
- [177] R. Bligh states the same thing that happened to Chinatown can happen to this neighbourhood.

Appellant Speaker No. 7 - F. Giesbrecht

- [178] F. Giesbrecht agrees with everything the other Appellants have already presented.
- [179] F. Giesbrecht is the owner of Avenue Appliance which has been at this location since 1970. They own both the building and the business.
- [180] It is understood that street life is hard and living life on the street with a drug addiction is even harder. The rules of street life are diametrically opposed to the activities of retail business and the safe use of community spaces by local residents.
- [181] Street life has always been a part of Whyte Avenue in some form or other but the conflicts with the street and their business have increased over the last four years since the Mustard Seed moved in and since the churches opened to provide shelters. Avenue Appliance shares the back alley with the Mustard Seed.
- [182] Incidents include vandalism, broken windows, damage to their large sign, graffiti and individuals urinating and defecating at the rear and in front of their business, needles discarded on their property, garbage from the back alley dumpster strewn about, and recently people were throwing the grease from the grease buckets of surrounding restaurants around. There were even needles and a knife on the roof of her building and people sleeping at the rear of their building.
- [183] Staff and customers have been accosted and street people loiter at business entrances. Their biggest concern is an increase in customers expressing discomfort and fear for their safety. Emergency vehicles are regularly situated near the Mustard Seed. The Edmonton Police Service has been overwhelmed and response times are too slow.

- [184] Social services provided in the area have limited hours of operation. Street life is 24 hours a day.
- [185] Avenue Appliance is a well established business that brings people to the area and income to the other nearby shops.
- [186] The area has many positive business owners who are problem solvers. They have to work hard to make a profit. However, they cannot see how a harm reduction site in addition to the Mustard Seed that is already there can coexist with the businesses and residents in the community. Statistics show there is already too much social cost put on a really dense area. They are being asked to take on too much. The proposed development will intensify issues that they already face on a daily basis.

Appellant Speaker No. 8 - N. Lau

- [187] He represents a small family business that has been impacted by the Mustard Seed and they have had tenants leave after hearing the news of the proposed injection site.
- [188] As a father he would not bring children to the area now. It is too dangerous and inappropriate to bring young children around people struggling with addictions. The safe injection site will increase the amount of exposure to young children in the area and is not a good idea.
- [189] It is the responsibility of adults to recognize that children need to be protected from people high on drugs. Sites should be chosen that have more precautions, setbacks and more safety barriers. Young mothers need to be prevented from being accosted.

ii) Position of M. Gunther, City of Edmonton Legal Counsel who was accompanied by T. Piorkowski, the Development Officer and H. Luke, Senior Planner

T. Piorkowski:

- [190] The site is zoned DC1 Direct Development Control Zone. The DC1 Bylaw 19988 references the CB2 Zone and the Main Streets Overlay.
- [191] Following a review of the scope of the application and the floor plans, she determined that the proposed application met the definition of Health Services Use. A Health Services use means development used for the provision of physical and mental Health Services on an out-patient basis. Services may be of a preventive, diagnostic, treatment, therapeutic, rehabilitative, or counseling nature. Typical Uses include medical and dental offices, health clinics and counseling services, and medical Cannabis clinics and counseling services. On review of the approved plans, there is no indication of facilities that would be used for in-patient services or services of an extended duration.
- [192] No overnight facilities are being proposed which would make this proposed development an Extended Health Service Use. Several other development permit approvals for Health Services or Extended Medical Treatment Services, specifically the George Spady Centre

that has a detoxification unit with overnight stays. This was approved as an Extended Medical Treatment Service Use. The Boyle McCauley Health Centre does not offer overnight stays and was approved as a Health Services Use.

- [193] Based on all of this information, it was ascertained that the proposed development was a Class A Health Services Use.
- [194] The application description, floor plans and site plan were reviewed and it was determined that proposed development complied with the DC1, CB2 and Main Streets Overlay regulations. However, over the course of the application, the floor plans changed and there was confusion regarding the location of the primary entrance.
- [195] The decision to approve the application was made by the Development Authority on March 20, 2023. Even though notification is normally not circulated for Class A development approvals, the decision was made to notify property owners within 100 metres of the subject site.
- [196] T. Piorkowski and H. Luke provided the following information in response to questions from the Board:
- a) The plans that were stamped approved in March, 2023, indicated that the primary entrance would be located on 81 Avenue.
 - b) The Section 7.1 deeming provisions were not used. Through collaborative discussions with City team members and a review of other applications, it was determined that the most appropriate use was Health Services. It is important to consider the Use in an application, not the user of a development. Based on the information provided, it was determined that this was the most appropriate Use.

M. Gunther:

- [197] From a legal perspective and based on the wording of the *Zoning Bylaw*, the proposed development is a Health Services Use. An analysis of the Use can only be completed based on the information submitted to the Development Authority. In addition this is based on what the law has determined about the purpose of a Safe Consumption Site. This issue has gone to the Supreme Court of Canada because these developments are contentious in nature and there are varying degrees of public opinion about the merits or drawbacks. Ultimately it is intended and exists for the purposes of medical health.
- [198] The Supreme Court decision that addressed Safe Injection Sites was referenced, *Canada (Attorney General) v PHS Community Services Society, 2011 SCC 44* (“PHS”). In that case the Supreme Court said that a Safe Injection Site is a strictly regulated health facility.
- [199] These facilities are regulated by Health Canada and Alberta Health Services. The exemption found in section 56.1 of the *Controlled Drugs and Substances Act* is limited to approvals only for “medical purposes”. The PHS case also says that approval of a Safe

Injection site is not an invitation for everyone who so chooses to open up a facility for drug use.

- [200] It was noted that the supplemental information provided by the Respondent was not available to the Development Officer. However, the evidence includes letters from professors and doctors at the University of Alberta Faculty of Medicine and AHS Public Health. The letter from the Faculty of Medicine states that “a Safe Consumption Site is part of the medical standard of care for people with opioid use disorders”.
- [201] On this basis, it is fair and appropriate to characterize this Use as a Medical Services Use. It is not appropriate to characterize it as an Extended Medical Service Use which is the other Use class found in the *Zoning Bylaw* that has been cited in this appeal. This application does not include overnight accommodations and if there was a plan to provide overnight accommodations that would require a different development permit application and perhaps a rezoning because Extended Medical Uses is not a listed use in this DC1 Zone.
- [202] There is the question of what should be done with the front step. The Main Streets Overlay requires universal accessibility for commercial Uses, including Health Services, that front a street that is not a lane. There is one step at the front of this building and a solution has to be found to provide universal accessibility.
- [203] The initial plans included the primary access at the rear of the building. At some point, the primary access was shifted to the front of the building and the Development Officer did not catch the change when the plans were stamped approved. At this point, there are two solutions, firstly a compliance condition can be imposed pursuant to Section 11.1(e) of the *Zoning Bylaw*. Development approval is granted by the Board subject to a compliance condition that universal accessibility be provided at the primary entrance. The benefit is that barrier free access is required by the *Building Code*. It is not the role of the Board to adjudicate building code matters. However, a solution will have to be addressed and Section 11.1(e), if within the purview of the Board. The solutions may include lowering the front door or installing a ramp which will not require substantive changes to the plans and may require an encroachment agreement which is outside the scope of development permit approvals.
- [204] The second solution would be that the Board consider granting a variance. It was noted that the test for the variance is set out in section 11 of the *Zoning Bylaw* and not Section 687 of the *MGA* because this site is zoned DC1.
- [205] When the Development Officer and ultimately the Board formulates a decision it is a question of land use. There are other mechanisms in law and the *Controlled Drugs and Substances Act* that oblige an Applicant for a medically approved Safe Consumption Site to make an application to the government minister and meet stringent criteria that address many of the issues that have been raised. Section 56.1 requires an Applicant to address the need for that facility in the community and address the potential impacts on crime and the location of the site. While these are land use considerations the question today is

whether or not this is a Permitted Use, is a variance required, does the variance meet the test and alternatively, whether or not it can remain a Permitted Use if a compliance condition is applied.

[206] The concerns of the community were acknowledged. However, the role of the Development Officer and the Board is to apply the *Zoning Bylaw* and the relevant land use considerations. This exercise involves consideration of the Use and not the user. Therefore, it is not helpful to refer to individuals using this facility as “a certain demographic” or “those people”. The focus needs to be on the Use. Individuals will be using a Health Service even though it may not be conventional or what is seen in other contexts.

[207] M. Gunther provided the following information in response to questions from the Board:

- a) While the *PHS* decision involved a charter of rights issue and the division of power between federal and provincial governments, it also talked about the discretionary exercise of issuing an exemption to allow Safe Consumption Sites to exist. The decision also acknowledged that the substances, themselves, are acquired independently and often but not always illegally. However, this does not lessen the fact that what happens at the facility is a health use.
- b) Separation distance requirements have not been established in the *Zoning Bylaw* for this type of Use. If it was a Discretionary Use there would be some flexibility for a Development Officer or the Board to impose this requirement or determine, it was not compatible with surrounding uses. In this case City Council included Health Services as a Permitted Use and there is no flexibility.
- c) This is a Permitted Use and there was no room in the analysis to consider incompatibility factors that might be considered if it were a Discretionary Use instead. It is difficult to determine what ancillary crime could be attributed to the existence of a Safe Consumption Site. Without specific evidence it is to a large degree speculation. All of the concerns were acknowledged but this issue is not a land use planning consideration and is not addressed in the *Zoning Bylaw*. Any associated problems with criminality are addressed by the police.
- d) Health Services is defined in the *Zoning Bylaw* as “development used for the provision of physical and mental Health Services on an out-patient basis. Services may be of a preventive, diagnostic, treatment, therapeutic, rehabilitative, or counseling nature. Typical Uses include medical and dental offices, health clinics and counseling services, and medical Cannabis clinics and counseling services.” This provision is broad and encompassing. The definition speaks to therapeutic treatment which based on the submissions of the Respondent is part of the standard of care of the treatment of opioid dependency. Although this is not a doctor or dentist office, given the wide scope, it falls within the Uses that this definition is intended to capture.

- e) Extended Health Services as a Use expressly includes a requirement that there is room and board and other medical treatment. This proposed development is clearly encompassed with a Health Service Use based on all of the evidence that has been provided by medical professionals and the courts about the nature and purpose for this activity. There is nothing else in the Bylaw that captures the proposed development as a Use.
 - f) It was clarified that either a variance or a compliance condition will be required given the change in the plans.
 - g) The *PHS* decision dealt with a constitutional argument between the federal and provincial governments and several other issues but the key to this decision is that it recognized that at the core, a Safe Consumption Site is not just a place where people go to use drugs. It exists as a form of medical treatment and is a strictly regulated health facility. If this was in doubt before this case, that argument ends with the decision. It was noted that the Government of Canada backed down following the decision and conceded that it was primarily existing for the purposes of health.
 - h) The Health Services definition is extremely broad and it was drafted that way because health services, including treatments for opioid use or any disease, are much different in 2023. The standard of care for many diseases and addiction is much different today than it was 20 years ago.
 - i) Based on the information that has been provided, this facility will provide treatment and rehabilitation. The intention of a Safe Consumption Site is in part rehabilitative, to provide harm reduction until an individual can get turned around or reduce harm while in the throes of their disease. This is a Health Service Use. Nothing was included on the plans that led the Development Officer to believe that there were any community service components or accessory uses. This is not a place for individuals to go to hang out, individuals will receive support for the addiction that they are facing through a Health Services Use.
 - j) The Health Services definition was updated in 2017 to include medical cannabis clinics. However, it could not be confirmed whether or not updates to this definition will be included in the new *Zoning Bylaw*.
- iii) *Position of the Respondent, I. Wachowicz, Dentons LLP, Legal Counsel for the Respondent Boyle Street Service Society, who was accompanied by E. Tanti, S. Addorisio and M. Taylor with Boyle Street Service Society and C. Johnson with Beljan Developments:*

I. Wachowicz

[208] This is an application for development in a DC1 Zone, pursuant to DC Bylaw 19998 which was passed on January 23, 2023. It is noted that 51 Uses are listed in the Bylaw. A

DC Bylaw does not designate Uses as either Discretionary or Permitted. The Uses on the list are all allowed Uses in the DC1 Zone, in other words Permitted Uses. The list of Uses in this DC1 Bylaw includes Health Services.

[209] The proposed development fits the definition of Health Services, it cannot be anything else. The Appellants have noted that another Use Class, Extended Medical Treatment Services, is not one of the listed Uses in the DC1. However, the proposed development is not an Extended Medical Treatment Service.

[210] If it is determined that this is a Health Service, the Use is settled and it cannot be reviewed again. In this case, City Council has deemed the list of Uses in this DC1 Zone to be compatible with surrounding land uses.

[211] Several health services will be offered at this location but the one health service that is causing the most concern is the Safe Injection Site portion. This allows in a controlled manner, supervised consumption of drugs that if consumed elsewhere would be illegal. The question is how can this be allowed because it is illegal and criminal. In fact it is not because what makes it illegal is a federal statute, the *Controlled Drugs and Substances Act*. That Act does not say that drugs are illegal all the time, it allows exemptions for medical purposes, pursuant to Section 56.1(1) which states:

For the purpose of allowing certain activities to take place at a supervised consumption site, the Minister may, on any terms and conditions that the Minister considers necessary, exempt the following from the application of all or any of the provisions of this Act or the regulations if, in the opinion of the Minister, the exemption is necessary for a medical purpose:

- a) any person or class of persons in relation to a controlled substance or precursor that is obtained in a manner not authorized under this Act; or
- b) any controlled substance or precursor or any class of either of them that is obtained in a manner not authorized under this Act.

[212] The federal government has created an exemption for medical purposes. However, an application has to be made to the federal government pursuant to section 56.1(2) which states:

An application for an exemption under subsection (1) shall include information, submitted in the form and manner determined by the Minister, regarding the intended public health benefits of the site and information, if any, related to

- a) the impact of the site on crime rates;
- b) the local conditions indicating a need for the site;
- c) the administrative structure in place to support the site;
- d) the resources available to support the maintenance of the site; and
- e) expressions of community support or opposition.

[213] The government minister makes a decision based on the information required in the application. Section 56.1(3) states:

An application for an exemption under subsection (1) that would allow certain activities to continue to take place at a supervised consumption site shall include any update to the information provided to the Minister since the previous exemption was granted, including any information related to the public health impacts of the activities at the site.

[214] This regime is completed by the federal government as part of the *Controlled Drug and Substances Act*. It is not illegal activity. It is part of the Act which does include prohibition on certain narcotics but also includes steps to assist people who are having trouble with these substances. This facility will not be able to operate if a licence is not issued by the federal government.

[215] All of the aspects reviewed by the federal government are health related, what are the public health impacts, is it necessary for a medical purpose.

[216] Many of the submissions addressed the concept that the traditional health care services and safe injection being proposed at this facility are different things. However, they are not, the proposed safe injection part of this development is a health service.

[217] Pursuant to section 7.4(26) of the *Zoning Bylaw* a Health Service is defined as “development used for the provision of physical and mental Health Services on an out-patient basis. Services may be of a preventive, diagnostic, treatment, therapeutic, rehabilitative, or counseling nature. Typical Uses include medical and dental offices, health clinics and counseling services, and medical Cannabis clinics and counseling services”.

[218] This definition is very broad, it does not need to be expanded to include anything that the medical profession deems to be diagnostically, rehabilitatively or therapeutically valid. There are many types of health treatment modalities that are not universally acclaimed. This does not mean that they are not health services as defined by the Bylaw. Having a supervised consumption site authorized by the federal government is one more type of treatment modality that is now being advanced by the medical professionals. It is therapeutic and rehabilitative, it is medical treatment.

[219] This is supported by numerous medical professionals who have provided letters of support. These letters demonstrate that the medical profession considers Supervised Consumption Sites to be a form of treatment. The letter from Dr. Kathryn Dong, AHS Chair in Emergency Medicine Research, Associate Professor, Department of Emergency Medicine, Addiction Medicine Physician, Royal Alexandra Hospital dated June 16, 2023 states:

An Overdose Prevention Site (OPS), located in the proposed Strathcona Health Hub, would provide access to an urgently needed health service. Deaths due to

drug poisoning remain elevated above pre-pandemic levels and are entirely preventable with access to immediate medical care, such as that which would be provided within an OPS.

Access to supervised consumption services is considered part of the medical standard of care for people with opioid use disorders. The evidence is clear – we should be striving to offer this service in every community across Alberta as one of several immediate measures to reduce deaths from the use of substances from a highly toxic illegal market. In larger cities, many sites will be needed. Areas where local data show a concentration of drug poisoning events and/or deaths should be prioritized. In Edmonton, the location of the Strathcona Health Hub meets this threshold.

[220] The key point is that an Addiction Medicine Physician is qualified to state that this is a part of health care service.

[221] A letter dated June 16, 2023 signed by Dr. C. Sikora, Lead Medical Officer of Health - Edmonton Zone; Dr. D. Li, Edmonton Zone Clinical Department Head of Addiction and Mental Health, S. Clelland, Executive Director, Addiction Medicine and Virtual Opioid Dependency Program and M. Snaterse, Executive Director, Addiction & Mental Health, Edmonton Zone stated:

Supervised consumption services (SCS), including Overdose Prevention Sites (OPS), are part of a range of evidence-based services that aim to reduce harm, support prevention, and provide treatment for Albertans.

[222] The letter dated June 13, 2023 from Dr. A Singh, Clinical Professor at the University of Alberta states:

The addition of an Overdose Prevention Site (OPS) to the Strathcona Health Hub ensures that much needed health services will be offered to the vulnerable clients who access this facility. The goal of an OPS is to provide a wide range of health support for people who use criminalized substances including overdose prevention and response, preventive, diagnostic, treatment, therapeutic, rehabilitative, or counseling services. These facilities save lives and improve health. In the past, these sites have demonstrated the ability to provide a wide range of health services.

[223] There are numerous other letters from medical professionals on file that all provide the same opinion. This is a Health Service.

[224] Section 7.7(4) of the *Zoning Bylaw* defines Extended Medical Treatment Services as:

Development providing room, board, and surgical or other medical treatment for the sick, injured or infirm including out-patient services and Accessory staff residences. Typical Uses include hospitals, sanitariums, convalescent homes,

isolation facilities, psychiatric hospitals, auxiliary hospitals, and detoxification centres.

- [225] An Extended Medical Treatment Service is an auxiliary hospital because it provides room and board. The proposed development therefore cannot be an Extended Medical Treatment Service. It is a Health Service which is a listed Use in the DC1 Zone.
- [226] Section 7.1(b) of the *Zoning Bylaw* states “ where specific purposes or activities do not conform to any Use definition or generally conform to the wording of two or more Use definitions, the Development Officer may, at their discretion, deem that the purposes or activities conform to and are included in that Use which they consider to be the most appropriate.” This provision does not apply to this development permit application.
- [227] It is clear that everything being proposed, including the supervised consumption site are all Health Services.
- [228] The Board has to determine whether or not the Development Officer followed the direction of Council with respect to the Use and the development regulations. It was acknowledged that there is an issue with the step at the front entrance to the building. Photographs were referenced to illustrate the small raised step at the front of the building. The problem is that the DC Bylaw incorporates by reference, the Main Streets Overlay, which is Section 819 of the *Zoning Bylaw*. Section 819.4(13) states:
- Where a Commercial Use is provided at ground level Abutting a public roadway other than a Lane, the principal entrance shall be designed for universal accessibility. A maximum of two ground floor commercial units may share a common entranceway.
- [229] The term “universal accessibility” is not defined in the *Zoning Bylaw*. The *Building Code* explains how universal accessibility can be achieved. Without a definition, it is difficult to determine what is meant by universal accessibility. The small step at the front door will not provide wheelchair access and is therefore not universally accessible. It was noted that the step also exists in front of a number of other buildings along this block and has existed for many years for non-conforming buildings.
- [230] The suggestions made by the City on how to deal with this situation are supported. The Board can either impose a condition of compliance or grant a variance and waive this requirement. It was his opinion that granting a variance and waiving the requirement would be the best way to deal with the issue because imposing a condition will require an Encroachment Agreement to facilitate a ramp that would be on City property.
- [231] There are several reasons to support waiving the requirement. In this case, the Development Officer failed to address the requirement to provide universal accessibility pursuant to section 819.4(13) of the *Zoning Bylaw*. Therefore the Board can now substitute their decision but only to ensure that this requirement is satisfied. The ability to grant a variance was supported by the Court of Appeal in *Garneau*. However, the Board

cannot use the variance power provided in section 687(3) of the MGA. The Board can only use the variance power that was available to the Development Officer because this is part of the direction of Council. DC Bylaw 19998 explicitly contemplates variances to the MSO. Section 4.1(a) states that “The Development Officer may exercise normal variance power for those regulations of the CB2 General Business Zone and Main Streets Overlay, in accordance with Section 11 of the Zoning Bylaw”.

- [232] Section 11 provides general variance power to the Development Officer. Section 11.3(1)(a) states: “the Development Officer may approve, with or without conditions as a Class B Discretionary Development, an application for development that does not comply with this Bylaw where: the proposed development would not, in their opinion unduly interfere with the amenities of the neighbourhood; or materially interfere with or affect the use, enjoyment or value of neighbouring properties”. This variance test is identical to the test for the Board provided in section 687(3) of the *MGA*.
- [233] Section 11.3(2) states that “the Development Officer may approve, with or without conditions as a Class B Discretionary Development, an enlargement, alteration or addition to a non-conforming building if the non-conforming building complies with the Uses prescribed for that land in this Bylaw and the proposed development would not, in their opinion unduly interfere with the amenities of the neighbourhood; or materially interfere with or affect the use, enjoyment or value of neighbouring properties”.
- [234] Both of these sections may have implications in this case. This is an old building with a small step at the front that does not comply with the requirement of section 819.4(13) to provide universal accessibility. The Development Officer could have allowed an alteration to a non-conforming building or granted a variance.
- [235] However, section 11.4(1)(a) limits the variance power and states that “ a variance may be considered in cases of unnecessary hardship or practical difficulties peculiar to the Use, character, or situation of land or a building, which are not generally common to other land in the same Zone”.
- [236] There is a hardship and practical difficulty in this case because of the small step at the front of the building. If there was room between the front entrance and the sidewalk a ramp could be installed easily. However, the door and the step are right on the property line. This will require a ramp to be installed outside of the subject lot which will require interior alterations to the building or acquiring an Encroachment Agreement with the City to allow the ramp to be built on City property.
- [237] This development regulation applies to many Zones and encompasses a large area of the City. This is why Council was explicit when drafting the DC Bylaw to include variance power for the Development Officer to vary the Main Streets Overlay.
- [238] Granting the variance and waiving the requirement could further the General Purpose of this DC1 Zone which is to “create a unique pedestrian commercial shopping district

while ensuring future development is compatible with the character of buildings with historic false Façades”.

- [239] Waiving the requirement to install a large ramp at the front of the building will preserve the pedestrian nature by retaining the historic facades intact and not impeding pedestrian flow along the sidewalk if an Encroachment Agreement was granted by the City. For these reasons granting the variance may further the General Purpose of the Zone.
- [240] This issue may have to be dealt with by the Applicant in any event because it is estimated that 1 percent of their patients use a wheelchair which will require them to establish a procedure to assist them into the building. There may be other *Building Code* issues that will have to be dealt with in the future.
- [241] This is a Health Service, a listed Use in this DC1 Zone. City Council has already deemed the Use to be compatible with surrounding Uses. The Use cannot be challenged because of the required variance. Although case law is not certain on determining what can be assessed when considering a variance, it was his opinion that there is a strong indication from the Alberta Court of Appeal that while the Board can hear evidence on a wide range of issues, the focus has to be on the actual variance and the impact of the variance.
- [242] Court of Appeal decision, *Edmonton (City of) Library Board v Edmonton (City of)*, 2021 ABCA 355 (“*Library*”) was referenced. Paragraph 55 states: “ Fourth, in formulating its “opinion” regarding the proposed development, an appeal board should assess the scope and substantive impact of the requested variance since they will be directly related to the potential negative effects of the proposed development”.
- [243] Section 11 does say the impact of the development, not the variance. In this case the only issue is the front step. The Applicant is most negatively impacted by the step because they want all of their patients to be able to access the building. The neighbouring property owners are not impacted because leaving the step will allow the current facade to remain more consistent with the neighbouring buildings which also have a step.
- [244] Paragraph 55 of the *Library* decision also states: “ In making its case for a variance, an Appellant may refer to or lead evidence regarding the proposed development generally and how it relates to the development standard for which a variance is sought”. The focus has to be on the substantive impact of the requested variance and how it relates to the development standards. The Court of Appeal is directing the Board to focus on the variance itself. In this case the required variance impacts the Applicant more than neighbouring property owners. The simplest way to deal with the situation is for the Board to waive the requirements of section 819.4(13) and make the Applicant deal with the situation.
- [245] However, if the Board disagrees and decides to consider the impacts of the entire development upon the neighborhood, a lot of evidence has been provided regarding the negative impacts. Existing problems in the neighbourhood related to the Mustard Seed have been raised. The Mustard Seed operates a Drop-In Centre, a totally different Use

than a health treatment centre. Therefore, it is not fair to assume that the proposed development will create the same kind of problems. The issues being experienced by property owners in this area were acknowledged but it was the opinion of I. Wachowicz that the proposed development will improve the current situation. This is a supervised site that will take individuals off the street into a supervised site, needles will be disposed of by a Registered Nurse instead of being discarded on the street.

- [246] This location was chosen because of the ongoing problems in this area. The proposed development is meant to improve the situation and reduce the problems. Security staff associated with the clinic will improve the situation and be a positive addition to the neighbourhood.
- [247] This development was proposed in response to a report prepared by the Alberta government entitled *Impact: A Socio-economic review of supervised consumption sites in Alberta dated March 5, 2020*. The Alberta government is funding this proposal as part of their approach to deal with this problem and help neighbourhoods.
- [248] This Use was front and centre discussed and contemplated by City Council when Bylaw 19998 was passed on January 20, 2023, which was not long ago.
- [249] I. Wachowicz provided the following information in response to questions from the Board:
- a) The preference and cleanest way to deal with this issue would be for the Board to grant a variance.
 - b) The whole concept of the medical exemption contemplates the fact that the controlled substances will have been obtained in a manner not authorized by the Act. Section 56.1(1)(a) states: the exemption is necessary for: any person or class of persons in relation to a controlled substance or precursor that is obtained in a manner not authorized under this Act. People are already in possession of the substance in a matter not authorized under the Act. This is part of the theme of the *Controlled Drugs and Substances Act*. Therefore, even if the Board dislikes the fact that the substances are obtained illegally, refusing the development based on this reason would be an attempt to repeal section 56.1 of the *Controlled Drugs and Substances Act* which is outside the jurisdiction of the Board.
 - c) Section 56(4) of the Act states: “the Minister may give notice, in the form and manner determined by the Minister, of any application for an exemption under subsection (1). The notice shall indicate the period of time — not less than 45 days or more than 90 days — in which members of the public may provide the Minister with comments”. It is entirely within the purview of the federal government to determine the manner and form of that consultation process.
 - d) The positive impact of installing a ramp is that anyone in a wheelchair will be able to access the building without assistance. On the other hand installing a ramp

on the sidewalk could impede pedestrian flow and the uniformity of the building facades along this block.

- e) The use of the word “may” instead of “shall” in Section 11.4(1)(a) of the *Zoning Bylaw* is more permissive. It is no longer mandatory to consider hardship or practical difficulties but it is still a factor when accessing a variance.

S. Addorisio

[250] S. Addorisio is one of the registered nurses who works for the operator. A Powerpoint presentation was used to provide an overview of the proposed operations and services and why the proposed development is a Health Service.

[251] An elder has gifted a Cree name, mahihkan kamik/Wolf Den to the Health Hub.

[252] Wolf Den introduces a flexible program model which integrates physical and mental health care provider oversight, people with lived experience and community support.

[253] The Health Hub aims to incorporate harm reduction, public health, social services, addiction treatment and withdrawal management within an overdose prevention service (“OPS”) setting. This model will address the overdose risk posed by the increasing toxic drug supply and wrap around services that fit in line with the province’s recovery-oriented systems of care.

[254] While the primary intention of the OPS is to reduce overdose deaths and related harms (i.e. multiple non-fatal overdoses, anoxic brain injuries), further objectives include providing a low-barrier access to wrap-around care including referrals to the full continuum of addiction, mental and physical health care services.

[255] Several peer review studies were referenced, specifically *Integrating Supervised Consumption into a Continuum of Care for People who use Drugs* which states:

Integrated and co-located health service models-effectively “one stop shops” – could improve health outcomes for people who inject drugs by combining the prevention of immediate drug-related harms with access to primary care, mental health care and social service programs.

[256] Does *Evidence Support Supervised Injection Sites?* states that:

There are more than 90 SISs worldwide; Vancouver’s SIS has operated since 2003. Many other Canadian jurisdictions are planning SISs; these should be tailored to community needs. Services at SISs include emergency response to overdoses; injection-related first aid; assessment and referral to primary health care; harm reduction counseling; exchange of needles and other drug paraphernalia; and condom provision. These sites support users to seek counseling, detoxification, and treatment for addiction.

- [257] The core team of staff that will be on site on a daily basis includes a Team Lead, two Registered Nurses, Social Worker/Support Worker, Mental Health/Addictions Support Worker, Intensive Community Support Worker and a Security Guard. The Registered Nurses will be responsible for assessments, wound care, withdrawal management, sexual health testing, immunizations, prenatal care, overdose response, dispensing prescribed medications and pregnancy testing. The Social Worker will provide housing and financial support; psychological and cultural needs. The Mental Health/Addictions Support Worker will provide harm reduction education, overdose response and mental health support. The Intensive Community Support Worker position was developed in response to community concerns and will engage with residents and businesses; address community concerns, assist in overdose response and complete neighbourhood walks. The Security Guard will be responsible for timed neighbourhood walks; assist in overdose response and de-escalation as well as discouraging loitering.
- [258] Weekly programming will also be offered by a Physician/Nurse Practitioner. One on one group counselling will be offered by a Therapist and the Housing First Worker will help individuals access affordable housing. A Cultural Support Worker will provide access to Elders, traditional medicines, Indigenous Harm Reduction and reconnection with family.
- [259] The development Floor Plans were reviewed to illustrate how the facility will be laid out, the location of the offices, treatment rooms, waiting areas, an observation room, the nurse's station, three consumption booths and the staff area.
- [260] When an individual first visits the facility they will first meet with an intake worker who will review the guidelines for service. If the client agrees they will provide a full name and Personal Health Number ("PHN"). If they do not have one they will be assisted by staff to obtain one. A PHN has to be provided as a requirement of the provincial government. A code name will then be provided that will be used by the client before entering the facility on each visit. The service user will then be assessed by the on site nurse. If the assessment is satisfactory and the type of substance is discussed they are assigned to a sterile booth. When service users come in what they think they purchased is usually not what they are consuming. They do not have testing services on site and that is what is killing individuals because they do not know what is in the substance they are using. The site will be supervised by staff who will offer support in harm reduction, listen to concerns and provide safe use education. Once the client is done they will be asked to dispose of their needle in a safe receptacle and will proceed to an observation area where they will be able to connect with staff to discuss needed resources and build trusting relationships. The client will be assessed one more time by a nurse to ensure that they are able to leave.
- [261] The following information was taken from the information provided on the WHYSCS website:

It's important to note; Supervised consumption services (SCS) can reduce a number of drug-related harms and improve the health of people who use drugs. The evidence says that supervised consumption services...

Prevent overdose deaths
Decrease unsafe drug use practices
Decreased HIV/HCV transmission risk
Increase access to health and social services

Despite common concerns, existing scientific research indicates that SCS do not increase crime and may improve public order in their neighbourhoods. SCS are typically implemented in areas with public drug scenes and are designed to bring pre-existing public drug use inside.

Despite common concerns, existing scientific research indicates that SCS do not increase crime and may improve public order in their neighbourhoods. SCS are typically implemented in areas with public drug scenes and are designed to bring pre-existing public drug use inside. Thus, concerns about the potential to increase public drug use or the number of improperly discarded syringes are typically unwarranted. In fact, evidence shows reductions in public drug use and publicly discarded needles around SCS after they open, decreases or no changes in violent crime, and no verified changes in drug trafficking. However, there have been some mixed findings on changes in property crime, loitering, and other public nuisances in areas surrounding SCS.

[262] The Health Canada website states:

Supervised consumption services save lives and benefit communities. Supervised consumption sites provide a safe, clean space for people to bring their own drugs to use, in the presence of trained staff. This prevents accidental overdoses and reduces the spread of infectious diseases, such as HIV. Supervised consumption sites may offer a range of evidence-based harm reduction services, such as drug checking. The sites also provide access to important health and social services, including substance use treatment for those who are ready.

[263] Alberta Health Services released data on overdose deaths on June 26, 2023. From January 1, 2023 to April 30, 2023, in Alberta there have been 613 deaths. That is 153 preventable deaths per month, just over 5 per day in Alberta with the highest number of deaths between the ages of 25 and 39. This shows the urgent need for this service.

[264] S. Addorisio provided the following information in response to questions from the Board:

- a) Supervised Consumption Sites are federally funded. The Overdose Prevention Site is provincially funded. SCS sites are permanent but the licence for an Overdose Prevention Site has to be renewed annually.

- b) The facility will be drop-in only. Appointments can be arranged to access some of the other services that will be provided.
- c) It is not anticipated that clients will have to line up outside. The waiting area and waiting room are large enough to accommodate any individuals coming to the facility. There will also be a Security Guard on site who will be monitoring the situation.
- d) The location was chosen based on a needs assessment which demonstrated that drug related calls to emergency services were increasing every week as well as discussions with outreach workers regarding the needs in this area.
- e) 197 overdose deaths have occurred in Edmonton over the past four months.
- f) The use of the overdose prevention site is a health service. Letters have been provided by many medical professionals who have all stated that a supervised injection site is a health service. This development constitutes one continuous Health Service, as defined in the *Bylaw*, that deals with individuals who suffer from substance addiction. Use of a safe injection site is a health service.
- g) There is no on site drug testing because it is funded by AHS and they would have to receive approval to do so.
- h) The site will be open seven days a week, 8 a.m. to 10 p.m. Staff will be on site from 7:00 a.m. to 11 p.m. They would love to be able to do drug testing on site. The site was chosen because of the need in this immediate area.
- i) It is difficult to anticipate the number of visits but the expectation is that the same individual could come in three or four times per day and there could be 40 to 50 unique visits per day.
- j) Based on her experience, there is a high misconception that when someone leaves the site after using it they will not be able to realize the world around them or make decisions. This is simply not the case, but if they were in an agitated state and staff and security were not able to deescalate the situation, 911 would be called and the individual would not be allowed to leave the facility. It is important to note that the individual would use anyway and it is better to have them come in off the street to a facility where they can be assessed.
- k) This site was chosen because the individuals are there already. The research shows that a substance user is not going to travel a long distance. Most of the people will be in the area and walk to the facility.
- l) This program with medical support, cultural support, financial and housing support is the first of its kind in Edmonton. It will take public drug use off the street and save lives. Assessing the success rate is complex. The wait for detox is long and the window of opportunity is short. Triage will be discussed with the

George Spady Centre in order to get individuals into detox and treatment in a timely manner.

- m) Provincial and federal regulations include timelines and reassessments. Time limiting this permit would change it considerably and is not necessary given the provincial and federal regulations. A licence will only be granted for 6 months and then has to be renewed annually. The regulations require feedback to be provided to the Government. The Community Action team will allow business owners, residents and staff to come together to discuss neighbourhood activity and trends which will be reported back to the Government.

C. Johnson:

- [265] He is an Urban Planner with Beljan Developments. They have completed numerous commercial and residential developments in this area and recognize that homelessness is a city wide issue. Boyle Street's mission to end homelessness is supported and it requires a wide range of approaches including community centres, health hubs and partnerships.
- [266] Beljan has worked closely with Boyle Street Community Services over the years including this proposed development.
- [267] The Strathcona ARP puts great emphasis on the importance of retaining heritage-defining character and the importance to the neighbourhood and area. As part of the Development Permit for the Site, these character defining elements are not being contemplated, rather they are being enhanced as part of the exterior alterations of the Site.
- [268] The West Ritchie Area is defined by a variety of characteristics which includes: a unique mix of commercial, industrial, residential and institutional land uses; a collection of 'false front' architecture; and a history of German establishments. This plan encourages West Ritchie's transition into a vibrant, historically - referenced urban village with quality urban design and architecture.
- [269] Furthermore, these 'false fronts' are consistent throughout 81 Avenue and make up the special vista towards the Canadian Pacific Railway Station.
- [270] The Strathcona ARP identifies the following as a listed Land Use Issue:
2. 81 Avenue between 101 and 102 Streets has a unique character due to its vista to the historic CPR Station and its concentration of buildings with historic 'false front' façades. Development pressures threaten this character.

The Strathcona ARP further defines Policies to keep the heritage character of the area which can be defined below:

2. [...] to maintain the unique character of 81 Avenue between 101 and 102 Streets. The DC1 Provision will maintain the ‘false front’ façade character of this area and seek to preserve the view to the historic CPR station to the west.

4. The creative retrofitting of existing buildings is encouraged.

[271] Overall the site adheres to the principles outlined in the ARP and the General Purpose of the DC1 Zone. Many urban areas are served by a variety of different forms of health services which are an essential part of urban life. Everyone is entitled to appropriate access to health care. The City of Edmonton has undertaken the City Plan where the goal is to allow residents to meet their daily needs within 15 minutes. Health services will continue to be present throughout neighbourhoods in many forms and they cannot be marginalized given a perceived notion about the clientele who will be using the service.

[272] The site preserves the heritage character of the area and is in keeping with the General Purpose of the DC1 Zone.

[273] As previously noted, there was an oversight by the Development Officer regarding the initial application. Although not indicated on the drawings, it has always been the intention to make this building barrier free. The barrier free entrance was originally planned at the rear of the building but through discussions with EPS and other stakeholders the decision was made to move the primary entrance to the front of the building facing 81 Avenue. This led to the oversight of the variance. The Development Officer indicated that a condition could be imposed to require universal accessibility. If a condition is imposed a ramp will be constructed to the primary front entrance. Preliminary plans have been submitted. The ramp will comply with the *Building Code*. In addition to the ramp, the entrance is within a City right of way and an encroachment agreement will be required. If the condition is allowed and the ramp is approved this will be a character building on a character street that will be accessible to everyone.

[274] C. Johnson provided the following information in response to questions from the Board:

- a) The possibility of cutting the door down to street level has been considered but not in great detail. It was his opinion that this would result in the need for an interior ramp instead of an exterior ramp.

M. Taylor

[275] She is a Registered Nurse and has worked in the downtown core for 28 years. A question was asked about what happens when a user leaves the facility. This is the fourth overdose prevention site that they are running. The original one is at Boyle Street Community Centre, one operating at the Temporary Shelter at the Edmonton Convention Centre and one at Commonwealth Stadium. Through experience they have learned that when people leave the site they are in a very different place than if they had been using it on the street. The reason is that in the world of substance use and harm reduction there are 3 things that impact how someone will react to a drug. Different drugs have different effects, how is

the person mentally and physically and the third piece is the setting. When someone is using drugs in a back alley where they are cold, frightened, hungry, thirsty, and experiencing extreme distress from living in poverty, they have a certain reaction. When they come into a warm, well lit space and are offered something to eat and drink, their reaction to the drugs is very different. There were only two occasions that the police had to be called. It is not that people use drugs and “lose their minds”. When treating people with respect and care, the responses were much better.

- [276] One of the main lessons learned from operating the other sites is that people leaving the site view themselves and the world differently and are less likely to cause any problems. The Commonwealth site was the first one that the provincial government was involved with and they insisted on community feedback which included providing neighbours with contact information and conducting ongoing community meetings. It was noted that they did not receive one call from a neighbour. The safe injection site was always the quietest area at the Boyle Street Community Centre. However, COVID-19 changed things drastically because of the resulting rise in homelessness.
- [277] It is difficult to gauge success. Sometimes former users cannot come back to tell them what happened because substance abuse is triggered visually. However, when individuals are able to access therapy their lives completely change and they no longer need the Centre. It was noted that everyone experiences different stressors and a different time frame to deal with their issues. Many individuals have done very well.
- [278] M.Taylor provided the following information in response to questions from the Board:
- a) Half of the staff have lived experiences with substance abuse and are aware when things are not going well for users and from a staff perspective. They are constantly checking with individuals to get their suggestions and make sure that they are getting what they need.

E. Tanti

- [279] It was clarified that this site is governed by provincial legislation and the Minister of Addictions and Mental Health oversees the process. The regulations and requirements are the most stringent in the country. The services have to be provided in a certain way and they are required to provide regular updates to the community regarding the impacts. A “Good Neighbour Commitment” was made in concert with the community that they have to adhere to and they are judged on this. Data is also provided to the provincial government on an annual basis that will be used to determine licensing.
- [280] When this *Bylaw* was passed on January 23, 2023, they had announced the proposed facility ahead of that Council meeting. Representatives of Boyle Street Community Services attended the public hearing. He spoke to Council and answered questions about the site and health services were discussed. Council was completely aware of the facility when passing the Bylaw and that it fell under a Health Services Use.

[281] E. Tanti provided the following information in response to questions from the Board:

- a) The Good Neighbour Commitment for this site is available on their website and has to be provided as part of the regulations and application for the licence. It is a statement but not a formal signed document. It was developed based on the two public forums held with the community, emails, discussions with the Business Association and City Council, as well as learned experience from operating other facilities.
- b) In order to apply for a licence, they had to go through an extensive community consultation process outlined by the provincial government. This included two public forums, the creation of a website that contained contact information and provided an opportunity for people to email questions, comments and concerns.
- c) He acknowledged that some of the Appellants are not satisfied with the consultation process. However, both of the community forums were attended by over 200 individuals. City and provincial officials as well as EPS, EMS and Fire were in attendance to answer questions. The forums were recorded and submitted as part of the community consultation. It is their intention to be a good neighbour and work with the community on an ongoing basis. The Community Liaison staff position on site has been created in direct response to the community consultation to provide direct access if a problem arises. The Security Guard position and neighbourhood walkabouts were also requested by the community and they have committed to this. Garbage collection and needle debris pick up has been implemented in response to neighbourhood concerns.
- d) Data and statistics about the service, adherence to the Good Neighbour Commitment and feedback from the community will have to be provided to the provincial government on an ongoing basis.
- e) In determining the need in this area, Boyle Street Community Services staff spoke to substance users. The Community Liaison Officer spoke with business owners and unhoused individuals to assess their needs. These conversations started before the application was made and will continue on an ongoing basis.

[282] At this point, I. Wachowich clarified that the federal government sets out the exemption concept that allows it to be noncriminal. The powers of the Minister in the *Controlled Drugs and Substances Act* have been delegated to the Province. The Province operates the program under their *Mental Health Services Protection Act*. They establish the requirements and complete the monitoring by way of a 6 month and then annual reviews. The provincial government administers the program on behalf of the Federal Government.

[283] If the Board does decide to proceed by way of creating a development permit condition, it may be helpful to have the condition read “must provide barrier free access to the front door”. This will satisfy section 819.4(13) of the *Zoning Bylaw*.

iv) *Rebuttal of the Appellants*

Appellant Speaker No. 1 - J. Agrios, Kennedy Agrios Oshry Law

[284] The Appellants are not debating the merits of safe consumption sites; the issue is if the SCS should remain at this location. There is still an issue with this Board’s authority to grant a variance.

[285] The Development Officer has issued this as a Class A permit and did not look at the impact on any of the surrounding neighbours. The City and the Applicant are arguing that the Use is Health Services; therefore no deeming provision is involved and the impacts to surrounding neighbours does not need to be considered.

[286] The Respondents referred to the *PHS* case. While that case is fairly complex, it was not dealing with the definition of Health Services in the *Edmonton Zoning Bylaw*.

[287] The primary use of the proposed development is not treatment and it is not therapy. Statistics from both the Convention Centre and Commonwealth sites show the vast majority of people accessing SCSs do not access any treatment. When you look at the activities occurring at a safe injection site you have people who are engaging in what is otherwise an illegal activity - the purchase and possession of illegal drugs. In order for this to be allowed, an exemption is required from the federal Health Minister.

[288] In *PHS*, the Minister revoked the exemption. The court in *PHS* did not say that allowing people to consume illegal drugs is Health Services. That case was dealing with people’s *Charter* rights under Section 7 of the *Canadian Charter of Rights and Freedoms* (the right to life, liberty and security of the person - paragraphs 91 to 93 of the decision). The court in *PHS* found that by revoking the exemption to section 7 of the *Charter*, the rights of individuals using illegal drugs were being violated because they were being denied access to potential medical care in the event of an adverse reaction. The exemption is needed for these individuals to be able to access medical care; nowhere in the decision is the court equating the consumption of illegal drugs with medical treatment or Health Services.

[289] This same case, *PHS* at paragraph 17, talks about the history of SCSs in North America and speaks about a history of a particular site in the lower east side of Vancouver. This was the first one in all of North America and opened in September, 2003. The definition of Health Services in the *Edmonton Zoning Bylaw* predates 2003. This particular Use did not exist at the time the definition of Health Services was added to the *Zoning Bylaw* because there was no such thing as a SCS anywhere in North America.

[290] There is no question that an SCS involves the consumption of illegal drugs. It is an illegal activity and the only thing that allows it to happen is an exemption granted by the federal

Minister of Health. The City and the Applicant are both saying that something that would otherwise be illegal is obviously a Health Service. At the very least, to call this Use a Health Service you must resort to the deeming provision.

- [291] The Respondent tried to equate this discussion of what constitutes health services to people who do not like chiropractic services or acupuncture. Those do not involve illegal activities.
- [292] The impacts of allowing an illegal activity to occur (but for an exemption from the government) on a street in a DC1 zone intended for a pedestrian oriented commercial shopping street must be looked at.
- [293] The City has classified a SCS as Extended Medical Treatment at the George Spady Centre. The City said that George Spady is different because it has an overnight detox. The detox was there before; it is a separate pre-existing Use. The SCS is totally separate from the overnight detox and there is no overnight component. This is confirmed by the plans contained in P. Golec's submissions.
- [294] This confirms that the City takes the view that SCSs can fit two or more Use classes and that brings you back to the deeming provisions; this must be treated as a Discretionary Use and the impacts must be looked at.
- [295] The Board had asked about the existing social disorder on Whyte Avenue from the bars. This is entirely different from a SCS. While there are parties at the bars on weekend nights, these are two separate issues. You have people who have overconsumed alcohol on weekends versus people who are looking for a place to use their illegal drugs.
- [296] Because of the zoning, businesses that locate on Whyte Avenue and people that visit Whyte Avenue know what to expect. It is a zone where there are Bars and Nightclubs. A business or owner on this street zoned DC1 would not expect to encounter a SCS and the associated impacts. We heard the SCS would operate 14 hours a day, 7 days a week. It is not just weekend nights. The impacts are not even close to what is being seen on Whyte Avenue associated with the bars.
- [297] There are no development permit conditions that could make a SCS work here. The *Zoning Bylaw* acknowledges that some Uses do not work at certain sites and that is why some Uses are not allowed in certain zones no matter what conditions are applied. Sometimes you have separation distances from incompatible uses such as between Cannabis Retail Sales and schools. In certain locations you cannot have a Cannabis Retail Sales Use at all because it does not fit the zone, and that is the case here. The impacts of a SCS at this particular location cannot be mitigated.
- [298] The standards for SCSs talk about the designated search area. This refers to the area where the facility has to look for needles and other drug paraphernalia being disposed of. There is a reference to a safety plan to deal with incidents arising from users of the

- facility. These are not impacts you would expect on this particular street. These requirements are an acknowledgement of the impacts this development will have.
- [299] The configuration of the site itself creates a problem. There needs to be an area where people can congregate and this is not possible because this site is built right up to the property line without setback to the avenue.
- [300] When you have to start looking at putting a number of conditions on a permit or Use to make it fit that tells you that maybe it does not fit.
- [301] The Applicant does not anticipate having line-ups; however, they also stated how needed this facility is and the potential is there for it to be well used. There is inconsistent information here. The building is small and so is the waiting area; it is not a stretch to say there will be line-ups. Even medi-centres have line-ups for people waiting to get in.
- [302] One of the Boyle Street representatives provided some anecdotal evidence from the Commonwealth SCS site and said it was not a problem. J. Agrios provided anecdotal evidence that says otherwise. During that time frame she was quite involved with an organization that had its offices at Commonwealth Stadium. There was an increase in break-ins to vehicles, increases in employees being approached for money, increases in employees being put into uncomfortable situations to the point where that organization implemented a policy that if anyone had to go to their vehicle they had to be accompanied. This was during the daytime.
- [303] The Applicant spoke of the misconception about the condition of people leaving a SCS. People feel they are at risk if they are around users of meth. While this may be an uneducated viewpoint, it is the perception that is important - especially when you are talking about a commercial shopping street. People do not want to rent on a street where there are users of illegal drugs and customers will not want to frequent establishments near there. They will not read the literature and the material that was provided at this hearing.
- [304] What is the point of an Area Redevelopment Plan or an Overlay and what is the point of doing a DC1 that is designed to achieve certain goals and then approve a development that is totally contrary to those goals.
- [305] Everyone agrees that this proposed development needs a variance and it was missed. The wording of the provision says to consider the impact of the development, not the impact of the variance.
- [306] There is fairly clear direction in *Thomas v Edmonton (City)*, 2016 ABCA 57 (“*Thomas*”). Paragraph 33 says:

.....A subdivision and development appeal board is required to consider whether the *proposed development*, notwithstanding its non-compliance with a land use bylaw, materially interferes with the amenities of the neighbourhood or

materially interferes with or affects the use, enjoyment and value of neighbouring parcels of land.

- [307] That passage makes it pretty clear that you are looking at the impacts of the proposed development, not just the variance.
- [308] The City and Respondents both agree that a variance was missed and are urging the Board to either impose a compliance condition or just grant a variance. The Board needs to closely look at both options and they are both outside of the Board's authority.
- [309] It is not the City's role to come and defend the error and to come up with solutions. The Applicant can argue about solutions but it is not what the City should be doing. The Development Officer's role is to simply come to the Board and explain their decision. Because of the order of presentation at the SDAB hearing such as this, the Development Authority ends up making arguments that are actually not part of their decision.
- [310] The first offered solution was to impose a compliance condition. The City went so far as to say there could just be a creative solution without any plans being circulated. If that is the case why bother submitting any plans at all? The creative solution involves a plan and requires a significant amount of change which has to be reviewed for compliance. This Board cannot simply do that on the fly.
- [311] The Applicant has provided their preferred solution - a ramp on City property. C. Johnson with Beljan has acknowledged that barrier free accessibility is a fundamental condition of good design and it is also a provision in the Main Streets Overlay. However, the ramp they have designed results in a non-compliant sidewalk. Also the top landing does not meet the minimum size requirements of the *Barrier Free Design Guide*. New plans are required to be circulated through the appropriate departments. For a new plan to be reviewed and circulated, there needs to be a new development permit application.
- [312] The second option is the variance. The City treated this as a Class A Permitted Use and therefore did not consider any impacts. Yet in the last paragraph of the Development Officer's report she states that "It is the opinion of the Development Officer that the proposed Strathcona Health Hub does not unduly interfere with the amenities of the neighbourhood, nor affect the use, enjoyment or value of neighbouring properties." This does not belong in her report since no impacts were looked at.
- [313] Based on *Garneau*, the Board's authority is the same as the Development Officer's as this is a Direct Control Zone. As per section 11.4(b) of the *Zoning Bylaw*, the Development Officer is not able to vary Height. A variance is required to the Height of the rise to the principal entrance. This means the Board also has no authority to vary height here.
- [314] The argument that decides this whole appeal goes back to section 15 of the Main Streets Overlay:

When the Development Officer determines that a Development Permit application does not comply with the regulations contained in this Overlay:

- a. the Development Officer shall send notice to the municipal address and assessed owners of land wholly or partly located within a distance of 60.0 m of the Site of the proposed development, and the President of each affected Community League and each Business Improvement Area Association operating within the distance described above to outline any requested variances to the Overlay and solicit comments directly related to the proposed variance;
- b. the Development Officer shall not render a decision on the Development Permit application until 21 days after notice has been mailed, unless the Development Officer receives feedback from all specified recipients; and
- c. the Development Officer shall consider any comments directly related to the proposed variance when determining whether to approve the Development Permit application in accordance with Section 11.3.

[315] The community consultation requirement cannot be waived, varied and or replaced with some other consultation. This has been confirmed by the courts at paragraphs 36 and 37 in *Thomas*.

[316] While *Thomas* was looking at section 687(3)(d) of the *MGA* and we are looking at section 11.3 of the *Zoning Bylaw*, if the wording of the two sections is compared it is exactly the same. The bottom line is a variance cannot be granted here because there is a mandatory community consultation requirement in Section 819.4(15) and the court in *Thomas* directs that this consultation cannot be varied. This argument applies to this hearing before the Board.

[317] While M. Gunther admonished some of the Appellants for how they characterized the users of this facility in this case what is being forgotten is the impacts of people with “skin in the game” - those that live there and have invested in businesses and properties.

[318] J. Agrios provided the following responses to questions from the Board:

- a) Height can refer to anything that is the vertical distance between two points. Here we are talking about varying the Height of the rise at the front entrance.
- b) J. Agrios acknowledges that an exemption is being granted. But the impacts of an otherwise illegal activity needs to be considered. The granting of the exemption does not determine the issue of whether a SCS falls under the definition of Health Services.
- c) The vast majority of people accessing the facility take illegal drugs. The Board might decide that Health Services is the closest Use to describe the application,

but it doesn't fit squarely, so the Board has to go to using the section 7.1 deeming provision. The City itself has classified SCSs as two separate uses in the City.

- d) She has no idea if the deeming provision was used in any of the previous applications at other sites.
 - e) The Board must refuse this development. The required variance cannot be granted because the mandatory consultation in accordance with the bylaw did not take place.
 - f) The effect of not granting a Height variance would be to allow the rise to the front step to be in excess of what would be the maximum allowed Height. The required variance is effectively varying Height.
 - g) Although *Thomas* was written at a time when community consultation was an obligation of the Applicant rather than the Development Officer, the underlying point from *Thomas* is variance power. Community consultation is a procedural requirement that cannot be waived and it does not matter who is doing it.
- v) *Response to Rebuttal - I. Wachowicz, Dentons LLP, Legal Counsel for the Respondent Boyle Street Service Society*

[319] Section 819.4(13) states: "Where a Commercial Use is provided at ground level Abutting a public roadway other than a Lane, the principal entrance shall be designed for universal accessibility. A maximum of two ground floor commercial units may share a common entranceway.. Universal accessibility is not a defined term. It does not incorporate by reference the Government of Alberta *Barrier Free Design Guide*. "Barrier free paths of travel", part of the *Building Code* are used. It does not say you must comply with the *Barrier Free Design Guide*.

[320] There is a problem because the existing step cannot accommodate a wheelchair. However, it does not have to be dealt with in a specific manner and can be addressed with the imposition of a condition by the Board.

[321] A compliance condition can be imposed on a listed Use when the condition is used to confirm compliance. This Board can impose a condition that says "must provide universal accessibility to the principal entrance". A variance would then not be necessary. The only outstanding issue, that the principal entrance be designed to provide universal accessibility can easily be dealt with by imposing a condition to ensure compliance.

[322] The Board has the ability to approve it. Upon approval of permit and a condition, it becomes an enforcement issue if the Applicant does not comply with that condition.

[323] The *Barrier Free Design Guide* from 2017 is not incorporated by reference in the DC Bylaw.

[324] The Board has jurisdiction to grant the variance for two reasons. Section 11.4(1)(b) of the *Bylaw* states: “except as otherwise provided in this Bylaw, there shall be no variance from maximum Height, maximum Floor Area Ratio or maximum Density regulations”. This is not a height regulation, it is a regulation that requires universal access and can be varied.

[325] Section 819.4(15)(a) of the *Bylaw* states:

When the Development Officer determines that a Development Permit application does not comply with the regulations contained in this Overlay:

- a. the Development Officer shall send notice to the municipal address and assessed owners of land wholly or partly located within a distance of 60.0 m of the Site of the proposed development, and the President of each affected Community League and each Business Improvement Area Association operating within the distance described above to outline any requested variances to the Overlay and solicit comments directly related to the proposed variance

[326] This is not a normal development permit application in an area that falls within the Main Streets Overlay, specifically sites zoned CNC, CSC, CB1, CB2, CHY, CO and CB3. Section 4.1 of the DC *Bylaw* includes certain provisions of the Overlay. This is the same section that contains variance power. Section 4.1 allows the Development Officer to exercise normal variance power for those regulations of the CB2 General Business Zone and Main Streets Overlay in accordance with Section 11 of the *Zoning Bylaw*, it does not reference section 819.4(15).

[327] The DC1 *Bylaw* has two types of variance power, the first is a variance power contained in section 12 that requires consultation with the Heritage Officer. Section 1 has its own variance power and it says you can exercise normal variance power in accordance with section 11. Normal powers under section 11 do not include a consultation requirement. This is an explicit direction from City Council that when dealing with any modifications of section 340 or section 819, the powers contained in section 11 apply and section 11 does not contain a consultation requirement.

[328] The issue of the variance does not arise if the Board simply mandates compliance with the imposition of a condition.

[329] I. Wachowicz provided the following information in response to questions from the Board:

- a) The variance power in section 819.4(15) does not have to be used. This DC1 *Bylaw* is specific and section 4.1(a) allows the Development Officer to vary the MSO by using section 11, which does not include a consultation requirement.
- vi) *Response to rebuttal - M. Gunther, City of Edmonton Legal Counsel*

- [330] The City takes direction from the Court of Appeal. Court of Appeal decision, *Windy Field Ltd v Cardston (County)*, 2023 ABCA 1. This decision addressed the role of the Development Officer and the municipality when making submissions and this decision confirms that it is not such that the role of the Development Authority is simply to explain what was done, but to make submissions regarding reasons or to explain the decision made. In this case it is more complicated. The City is trying to offer some solutions to the Board over legal issues that arise because of an 8 inch step at the front of a building.
- [331] This unique situation favours the imposition of a development permit condition to cure the concern. The solution to this problem, an accessibility ramp, does not itself require a development permit, pursuant to section 12.2(s) of the *Zoning Bylaw*. Therefore, imposing the condition on this development will not require any further review. If the development is to occur on the road right of way it will require an Encroachment Agreement with the City that would be granted by Transportation Services. Neither of these alternatives require a development permit and the solution is most elegantly dealt with by imposing a compliance condition.
- [332] It was his opinion that *Thomas* does not prevent the Board from granting a variance to the consultation condition in this case. This is based on a reading of what is before the Board and *Thomas*. In this case variance power is set out in the DC *Bylaw*. *Thomas* discussed the wording of section 687(1) of the *MGA* and based on that wording the Court of Appeal held that there was no ability to grant a variance to the community consultation requirement. That is because the wording says that under section 687(3) the Board may make a decision even though the proposed development does not comply with the Land Use Bylaw. The words “Proposed development” means bricks and mortar. On the other hand, in this situation, the language is different. Section 4.1 of the DC *Bylaw* says that the Development Officer may exercise normal variance power which is not defined in the *Bylaw* or the *MGA*.
- [333] Interpreting on plain meaning as a change to the rules and requirements. It also says the Development Officer may exercise normal variance power for those regulations of the MSO. It does not say may vary the requirements of the proposed development. Section 11 uses different language than section 687 and says in section 11.3 the Development Officer may approve with or without conditions, an application for development that does not comply with this *Bylaw*. It does not say proposed development, it uses application which suggests a more fulsome context than just the bricks and mortar. It incorporates the subsequent test that the proposed development would not interfere with the amenities of the neighbourhood or materially affect the use and enjoyment of neighbouring properties. This goes to the test not what can actually be varied. There are differences between the *MGA* and the *Zoning Bylaw* and there is a broader authority and if the Board feels that in order to issue the development permit, a variance is the preferable option, there is a path to do that.

[334] M. Gunther provided the following information in response to questions from the Board:

- a) In *Thomas*, the Court looked at sections to determine the implications and the intention of the legislator. It could be such that it could be written into the *Zoning Bylaw* that a Development Officer may decide to waive community consultation. There is no common law rule that there has to be consultation on a variance, it is all based on legislation. Given the uniqueness of this case where there is a more elegant solution that does not require a further development permit, proceeding by way of a compliance condition is a more preferable option than going through the analysis of the variance process.
- b) If universal accessibility is the concern, it does not require a development permit to create this, and there is an easy solution. If the Board was to impose a condition and a material change was required, it was acknowledged that the issue could be back before the Development Officer.

vii) *Appellants rebuttal*

Appellant Speaker No. 1 - J. Agrios, Kennedy Agrios Oshry Law

[335] It is true that “universal accessibility” is not specifically defined in the *Zoning Bylaw* and can be addressed in a number of ways; however, the plans must be looked at by the City and evaluated. The Applicant’s specific solution is unclear and if a condition were added to the permit it would be unclear if and how that condition can be met.

[336] If a decision is approved with a wide open condition such as “comply with the accessibility requirements” then the compliance is achieved by meeting that condition. As long as universal accessibility is achieved somehow, there is nothing to enforce. Another non-compliance may be created but that is unknown right now.

[337] Normally you have a stamped plan and if the development is not built according to the stamped plan you have something to enforce.

[338] There is no variance power in section 819. We are talking about a mandatory notice requirement. Section 819.4.15, which is not complied with, does not give any kind of a variance test. It just says if you are considering a variance here are your mandatory notice requirements. We are talking about some kind of variance to the notice requirements in order to get you to section 11. Based on *Thomas*, you cannot get to section 11 without complying with the notice requirements. While no permit would be required to build a ramp on City property, other approvals are needed. In the normal course of procedures, the plans showing the ramp would be circulated to transportation who might say that the ramp is creating a non-compliant sidewalk.

[339] Section 11.3 of the *Zoning Bylaw* and section 687(3)b of the *MGA* are virtually identical. *Thomas* would apply to both sections in the same way. The Chief Justice at paragraphs 36 and 37 in *Thomas* is essentially saying that it does not make sense to apply a variance test

to a procedural community consultation requirement. You basically make it meaningless if it were subject to variance powers.

[340] It seems astonishing that we have a City lawyer here arguing why the Development Officer should not have to comply with a mandatory community consultation requirement in a City bylaw. J. Agrios questions how the optics of this look for the City and Respondent.

[341] J. Agrios provided the following responses to questions from the Board:

- a) She agreed that the addition of a compliance condition regarding a ramp could result in the City Transportation department voicing their concerns with the plans, and which could cause the requirement for the application to be resubmitted. However, there could also be a requirement for a permit under other City bylaws.
- b) Also, if some of the permit requirements are being satisfied by an off-site improvement such as the ramp with an encroachment agreement onto City property, this indicates some type of variance is required. The development regulations should be satisfied within your own property.
- c) Neighbours should be able to weigh in on narrowing a sidewalk to something that does not comply with City standards. Perhaps the ramp is not consistent with the look and feel of the neighbourhood or other concerns will be raised.
- d) A curb cut is not the same as a ramp, as it is not required to satisfy the requirements of a development.

Appellant Speaker No. 2 - P. Golec

[342] According to the City, when the application was received, the Development Authority decided as a team that it was a Health Services Use, they looked at the DC1, Strathcona Area Redevelopment Plan, Main Streets Overlay and subsequently issued a Class A permit.

[343] When the MSO was applied the universal accessibility requirement was missed. The Development Officer looked at previous permits and decided that the Health Services definition fit the Use despite the fact that the George Spady permit had been issued as an Extended Medical Treatment Services.

[344] Documents previously submitted by P. Golec shows that the two existing permits are exactly the same. Two identical permits were approved under two different Use classes, which should automatically cause this to be a Class B application and permit.

[345] In the undated and unsigned submission from the Development Authority to the SDAB it is very clearly stated that “It is the opinion of the Development Officer that the proposed Strathcona Health Hub does not unduly interfere with the amenities of the neighbourhood, nor affect the use, enjoyment or value of neighbouring properties.” This

seems to be some kind of acknowledgement that the Use did not fit neatly into one definition and this same Use had previously been approved in two different ways.

- [346] The Mustard Seed was approved as a Health Services Use and it offers housing support, meals, and various other things similar to what is being proposed here.
- [347] Boyle Street referred to scientific studies that spoke of reduced drug use around SCSs. Most of these studies are from Seattle or Vancouver where drug use is rampant. The Alberta studies show quite the opposite.
- [348] She agrees that the Use needs to be looked at instead of the user. The fact remains that whoever uses this site will have committed at least one crime to get there and will leave the site in an impaired state. The Use is attracting the user.
- [349] The site-exception to the *Controlled Drugs and Substances Act* allowed this to happen as a Health Services. As addressed in the provincial study one of the problems arising is that some law enforcement people are seeing it as a “no-go zone” around these facilities and are not enforcing illegal drug possession and sales.
- [350] In response to a question from the Board, it was stated that 911 would be called if someone was really agitated. The Calgary Police Service quarterly reports regarding the SCS in Calgary show that in the first 3 months of 2019 there were 154 publicly generated calls for service to the Sheldon M. Chumir Health Centre. This is 71 calls above the three year average. Approximately two thirds of the publicly generated calls in quarter one were generated by Alberta Health Services staff.
- [351] P. Golec attended the zoning hearing with City Council that took place in January, 2023, to refresh the DC1 zoning. Boyle Street was allowed to make a presentation. Mayor Sohi was very clear that Council was not looking at potential development on the site; they were just looking at the zoning.
- [352] The question arose if the definition of Health Services would change in the upcoming new land use bylaw for the city which is in development. Although the new bylaw is not yet in force, there currently do not appear to be any changes to the definition.
- [353] In response to a question from the Board, P. Golec believes that since there has never been an appeal regarding this type of a use, the definition of Health Services has not been thoroughly looked at.

Appellant Speaker No. 2 - J. Foufas

- [354] The proposed development has been referred to as being “therapeutic” in nature. J. Lam, an addictions medicine physician, finds that Injectable Opioid Agonist Treatment (iOAT) needs to be distinguished from SCSs where staff watch over users and are ready to resuscitate them with naloxone. Naloxone’s role is to reverse overdoses. It does not treat opioid-use disorder in a continuing way. Boyle Street’s own development application

narrative states that “Strathcona Health Hub will provide a variety of health services but the primary function will be an overdose prevention service”.

- [355] It is critical to obtain medical intervention as soon as possible after administering / receiving Naloxone. The result of this immediate requirement for intervention highlights the need for the appropriate setbacks and a space for EMS response that is not achievable on a busy pedestrian street with a front door access point.
- [356] Previous approvals for similar SCSs were given by the City; however, two different Use definitions were used (Health Services Use and Extended Medical Treatment Services).
- [357] The Health Services use definition does not address the impacts of the security requirements and regular needle cleanup on surrounding properties as these characteristics are unique to this use and would not apply to any other typical use found under the broad definition of health services.
- [358] If you remove the words: “providing room and board” and “accessory residences,” from the Extended Medical Treatment Services use you have a use description that includes many of the auxiliary services proposed by Boyle Street.
- [359] The permit should have been issued as a Discretionary Use because you have specific purposes or activities that do not conform to any Use definition or generally conform to the wording of two or more Use definitions.
- [360] Boyle Street is seeking an approval on a late submission of revised floor plans which include significant exterior and interior alterations. The mere submission of late adjustments to floor plans does not absolve the development authority from a thorough review process to ensure compliance with DC1, MSO and ARP guidelines, especially considering the profound impacts on the surrounding areas and businesses.
- [361] In summary, therapeutic services would imply ongoing medical treatments of a healing nature. A SCS is not providing that type of service. It mainly provides immediate medical intervention on an out-patient basis.
- [362] The decision to be made by the Board in this matter is a substantial one with lasting consequences for our street and the City of Edmonton as a whole.

Decision

- [363] The appeals are ALLOWED and the decision of the Development Authority is REVOKED. The development is REFUSED.

Reasons for Decision

I. Introduction

[364] The proposed development is for a Change of Use from a Personal Services Shop to a Health Service Use governed by a Direct Development Control (DC1) Provision. The development includes both interior and exterior alterations.

[365] Under the DC1 Provision (Charter Bylaw 19988), Health Services is a listed Use.

[366] The Development Permit was granted by the Development Authority as a Class A permit, suggesting that no regulatory relaxations or variances were required to support the proposed development.

[367] The grounds for appeal advanced by the Appellants are:

- a) The incorrect Use was applied to the proposed development;
- b) If the Use is best characterized as a Health Services Use, the deeming provisions in section 7.1(3)(b) of the *Edmonton Zoning Bylaw* (the “Bylaw”) ought to have been used, thereby converting the Use to a Discretionary Use;
- c) The proposed development is not reasonably compatible with the surrounding Uses as a Discretionary Use;
- d) The City has varied, or missed a variance required to support the development, which is a section of the Main Streets Overlay (the “MSO”);
- e) Such a variance to the *MSO* cannot be granted without community consultation; and
- f) The proposed development, which requires a variance, fails to satisfy the variance test in the *Bylaw*.

[368] In the context of an appeal concerning a DC1 provision, the Board’s authority is found at section 685(4) of the *Municipal Government Act* (the “MGA”). That section reads:

(4) Despite subsections (1), (2), (2.1) and (3), if a decision with respect to a development permit application in respect of a direct control district

...

(b) is made by a development authority, the appeal may only be made to the subdivision and development appeal board and 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.

[369] Accordingly, the Board must assess each ground of appeal to first determine whether the Development Authority followed the directions of City Council. Only if an error has occurred can the Board intervene. Moreover, if an error has been made, the Board’s

authority is limited from its usual authority to only the powers available to the Development Authority.

[370] For the sake of organizing its analysis, the Board will therefore consider the following issues to determine the outcome of these appeals:

- 1) What is the proper characterization of the Use (grounds for appeal a, b, and c);
- 2) Is a variance required by the development (ground d); and
- 3) Can a variance be granted pursuant to this Board's authority (grounds e and f)

[371] For the reasons that follow, the Board finds it must grant the appeals and revoke the decision of the Development Authority.

II. Proper Characterization of the Use

[372] The proposed development has been characterized as a Health Services Use. The Use is defined at section 7.4(26) of the *Bylaw* as:

Health Services means development used for the provision of physical and mental Health Services on an out-patient basis. Services may be of a preventive, diagnostic, treatment, therapeutic, rehabilitative, or counseling nature. Typical Uses include medical and dental offices, health clinics and counseling services, and medical Cannabis clinics and counseling services.

[373] As previously mentioned, this Use is a listed Use under the relevant DC1 Provision. The Appellants submit that a better characterization of the Use is an Extended Medical Treatment Services Use. That Use is defined at section 7.7(4) of the *Bylaw* as:

Extended Medical Treatment Services means development providing room, board, and surgical or other medical treatment for the sick, injured or infirm including out-patient services and Accessory staff residences. Typical Uses include hospitals, sanitariums, convalescent homes, isolation facilities, psychiatric hospitals, auxiliary hospitals, and detoxification centres.

[374] This Use is not listed within the DC1 Provision. Accordingly, if this is the proper characterization of the purported activities in question, the development cannot be approved *ab initio*.

[375] Alternatively, the Appellants submit that the activities in question either do not conform with either Use definition or generally conform to the wording of both definitions. If this is the case, the deeming provisions in section 7.1(3) of the *Bylaw* must be used, rendering the Use a Discretionary Use. If that were the result, an analysis must be undertaken to determine whether the Use is reasonably compatible with the surrounding Uses.

- [376] The Respondent and the Development Authority, on the other hand, both contend that the Use is best characterized as a Health Services Use without the need to resort to the deeming provisions. The Board agrees.
- [377] The purported activities have been referred to by many names throughout the appeal including a safe injection site, supervised consumption sites, and an overdose prevention service.
- [378] Regardless of the term used (the Board will proceed with the term *Overdose Prevention Service* or *OPS* throughout these reasons), the activities occurring on the site can generally be described as individuals attending on site, consuming illegal drugs in a supervised environment, and receiving medical support in the event of an adverse event as a result of that consumption.
- [379] While there are ancillary services associated with this principal activity, including counseling, support services, and mental health services, it is the principal activity which the Appellants take the greatest issue with.
- [380] The Board recognizes that *OPS* are relatively new Uses given that they have only been authorized by the federal government for just over 10 years. Accordingly, it is safe to say that when the *Bylaw* was originally passed, an *OPS* was never contemplated by Council as a possible Use.
- [381] However, whether a subset of a Use is contemplated when the *Bylaw* was originally passed is not entirely relevant to the Board's assessment of the proper characterization of the Use. The Board must instead look to the wording of the Use as currently passed by Council to determine whether the activities fall within the definition.
- [382] The Board appreciates the submissions from the Appellants that the precursor to any purported Health Service offered on the premise is the consumption of illegal substances. However, the purpose of the development is not to enable or promote the use of illegal substances by the community.
- [383] Rather, the purpose of the facility is to provide services to those members of the community who are already using these substances in uncontrolled and unhygienic ways. Moreover, this usage currently occurs in places where supports cannot be provided in the event of an adverse reaction.
- [384] Accordingly, the Board is not persuaded by the notion that the initial act of consuming illegal substances takes this Use outside of the wording of a Health Services Use. That definition requires the provision of physical and mental Health Services on an out-patient basis. The Health Services may be of a preventive, diagnostic, treatment, therapeutic, rehabilitative, or counseling nature.
- [385] Based on the evidence provided by the development operator during the appeal, the Board is of the opinion that the main activities occurring on the site relate to providing

preventative, treatment, rehabilitative and counseling services to members of the community who are suffering from addiction.

- [386] The services include preventing adverse events, through sterilized supplies and a clean environment. The services also include treatment by qualified practitioners who are able to respond in the event of an adverse reaction and this treatment can be obviously medical in nature, such as the administration of an immediate drug or medication. Moreover, there are many services that qualify as counseling services occurring throughout the development - although these activities are much less contentious.
- [387] Therefore, the Board is satisfied that the proposed development conforms to the Use definition of Health Services. While it may not have been initially contemplated when the *Bylaw* was passed, the *Bylaw* is regularly amended.
- [388] In fact, the Use definition for Health Services was updated as recently as June 2017. In addition, the Board heard evidence that another similar development was previously approved as a Health Service in the City.
- [389] Accordingly, Council could have turned its mind to whether or not an *OPS* should be excluded from the Health Service Use definition and has chosen not to. While nothing really turns on this one way or the other, the Board uses this example to simply illustrate the point that a novel Use should not be immediately subject to the deeming provisions in section 7.1 simply because it is novel.
- [390] Where a Use conforms to the wording of a definition, specifically where broad language has been used to encompass a wide range of activities as was done here, an activity ought to be characterized as that Use whether or not it was considered at the time of passing the *Bylaw*.
- [391] However, that does not entirely end the discussion around the deeming provision. The deeming provision is engaged in two circumstances: where a specific purpose or activity does not conform with any Use definition (which this Board has found it does) and where a specific purpose or activity generally conforms to the wording of two or more Use definitions.
- [392] Therefore, the Board must also consider whether the activities also generally conform to the definition of Extended Medical Treatment Services.
- [393] In analyzing the language of that definition, the Board is of the opinion that the key characteristic of the Use includes providing room, board, and surgical or other medical treatment. While out-patient services may be included within the purview of this Use, it is not a defining characteristic in comparison with the Health Services definition.
- [394] The proposed development does not provide room or board. While there are arguably medical treatment services occurring within an *OPS*, the Board finds the word “and” operates to suggest that it must be all of the items listed, and not simply one.

- [395] Accordingly, the Board determines in order for a Use to be properly characterized as an Extended Medical Treatment Service, there must be room, board, **and** surgical or medical treatment. The first two just simply do not exist within the specific purposes and activities purported by the operator.
- [396] In supporting the contention that the Use ought to be characterized as an Extended Medical Treatment Service, the Appellants raised that another *OPS* site was approved by the Development Authority as an Extended Medical Treatment Service.
- [397] However, the Board gives this submission little weight. Firstly, the Board heard evidence that the approved *OPS* as an Extended Medical Treatment Service included detox facilities where individuals could remain on the premises for an extended period of time and where room and board were provided in those instances. Secondly, the Board is not bound by a previous characterization of the Development Authority in any event.
- [398] The Board's decision today is based on the information that has been provided and its finding is based on the direct wording in the Use definitions of the *Bylaw*. This brings us to the second rationale raised by the Appellants as to why Extended Medical Treatment Service is the proper characterization of the activities.
- [399] The Appellants submitted that, wording aside, the Board ought to look at the types of zones where the two Uses are generally permitted to assess where these activities are more appropriately suited.
- [400] That is not the purpose of this Board. The Board does not question the wisdom of whether or not a specific Use is suitable within a given Zone. That is for Council to decide. The Board's purpose is to interpret and apply the rules passed by Council and has done so today.
- [401] Many other arguments were advanced by the Appellants regarding why the purported purpose and activity is inappropriate at the proposed location. While the Board understands these concerns, they do not necessarily go to the question of whether or not the Use was properly characterized in the first instance.
- [402] While those considerations may be applicable in the analysis of a Discretionary Use, the Board has determined that the Use is not Discretionary. It is a Health Service listed Use in the DC1 Provision and a deeming provision was not required to reach such a finding. The purpose and activities proposed do conform to the Health Service Use definition.
- [403] Accordingly, the Board finds no error by the Development Authority with respect to the characterization of the Use and is of the opinion that the Development Authority followed the directions of Council in this respect.

III. Is a Variance Required?

[404] The DC1 provision lays out the Development Regulations applicable to proposed developments at subsection 4 of the Provision. That section reads:

1. Except if modified by this Provision, development regulations in this Provision shall be as prescribed in Section 340 of Zoning Bylaw 12800 (the CB2 General Business Zone) and as modified by Section 819 of Zoning Bylaw 12800 (the Main Streets Overlay), notwithstanding Section 800.2(2)(a) of Zoning Bylaw 12800.

a. The Development Officer may exercise normal variance power for those regulations of the CB2 General Business Zone and Main Streets Overlay, in accordance with Section 11 of the Zoning Bylaw.

[405] Clearly, Council intended for the regulations of the CB2 zone and the MSO to apply to developments within the DC1 area in their entirety, unless modified by the DC1 Provision directly.

[406] Section 819.4(13) of the MSO states:

Where a Commercial Use is provided at ground level Abutting a public roadway other than a Lane, the principal entrance shall be designed for universal accessibility. A maximum of two ground floor commercial units may share a common entranceway.

[407] During the hearing, both the Respondent and the Development Authority acknowledged that this regulation applies to the proposed development. Accordingly, the Board need not go any further in assessing whether the Development Authority followed the directions of Council.

[408] While additional plans were provided to the Board, the Board undertook its analysis with respect to the need for a variance on the basis of the stamped “Approved” plans. It is clear from those plans that section 819.4(13) is not complied with and the photographs provided reinforce the finding that the premises is not universally accessible.

[409] A regulation was missed, as a result of revisions to the drawings, during the development permit application process. Accordingly, the Development Authority failed to follow the instructions of Council and the Board may “step into the shoes” of the Development Authority to consider this variance.

IV. Should the Variance be Granted?

[410] Counsel, representing several of the Appellants, raised an objection to the granting of the variance by the Board based on the the principles enunciated in *Thomas v Edmonton (City)*, 2016 ABCA 57 (“*Thomas*”).

[411] Specifically, Counsel raised the issue that any variance to the regulations of the *MSO* are subject to the community consultation requirements in section 819.4(15). Counsel made

the submission that since the variance was missed by the Development Authority, community consultation could not have occurred.

[412] Accordingly, and in recognition of the decision in *Thomas*, the Board cannot grant the variance without this condition being met.

[413] In response the Respondent argued that community consultation is not required in this circumstance given the direct reference in the DC1 Provision. Specifically, the Respondent relies on the wording in subsection 4(1)(a):

The Development Officer may exercise normal variance power for those regulations of the CB2 General Business Zone and Main Streets Overlay, in accordance with Section 11 of the Zoning Bylaw.

[414] The Respondent believes that this language allows the Development Officer, and in turn this Board, to sidestep the community consultation requirements and go directly to the normal variance power contained in the *Bylaw*. In other words, the Respondent submits that this language amounts to a modification of the consultation requirements by the DC1 Provision.

[415] The Board disagrees. Council incorporated all of the MSO into the DC1 provision by direct reference. This includes the requirement for community consultation at section 819.4(15) which is a condition precedent to the issuance of a development permit (*Thomas* at para 44).

[416] In other words, the consultation must occur prior to a permit being issued. The logical conclusion is that before the normal variance power is engaged, the consultation must first occur.

[417] Therefore, while it is true that the Development Authority has its normal variance power with respect to the regulations of the MSO, they must also still comply with the community consultation requirements, absent any direct language in the DC1 Provision removing the requirement.

[418] The Board is bound by the *Thomas* decision. *Thomas* has made it clear that a failure to do so constitutes a breach of procedural fairness which the Board has no jurisdiction to waive (at para 48). If any doubt exists, the Court makes it abundantly clear at para 52:

This being so, the enforceability of the community consultation requirement in the Zoning Bylaw is not contingent on whether a Development Officer or the SDAB decides it is, or is not, warranted, useful or desirable in a particular case. That decision is not theirs to make. The legislative choice falls within the exclusive jurisdiction of the City. It has made its choice. Community consultation is a mandatory requirement in certain instances involving mature neighbourhoods. That legislative choice should be respected. Thus, when prescribed, community

consultation is a condition precedent to the issuance of a valid development permit.

- [419] While *Thomas* dealt with the Mature Neighbourhood Overlay of the *Edmonton Zoning Bylaw*, the principles are consistent with the interpretation issue of the *MSO* which is before the Board and the consultation requirements are nearly identical between the two Overlays.
- [420] Accordingly, the Board is of the opinion that community consultation is required, cannot be waived, and the Board must exercise a supervisory authority to ensure that a proper consultation has occurred (at para 51 of *Thomas*).
- [421] The Respondent also made the alternative argument that a compliance condition under section 11.1(1)(e) could be used in lieu of a variance requiring the applicant to comply with section 819.4(13) of the *Bylaw*.
- [422] This would in effect negate the need for a variance and allow the Board to dispense with the community consultation requirements since the development would in theory comply with the regulations in the Overlay.
- [423] However, the Board does not believe that this is an appropriate occasion to impose a compliance condition. The regulation at issue requires that the principal entrance be designed for universal accessibility. In the current proposed state, the principal entrance is not designed in this way, regardless of the definition of universal accessibility one subscribes to.
- [424] Moreover, the paths to compliance with this regulation are varied and uncertain. On the one hand, the Applicant could lower the elevation of the primary entrance door sill to be at grade. However, a change of this nature would necessitate a new development permit for exterior alterations and should go through the appropriate process with the Development Authority.
- [425] On the other hand, the Applicant could provide a barrier free ramp to the proposed entrance as was suggested during the hearing. While it was true that a development of this nature is exempt from the requirement for a development permit in the *Bylaw*, the fact remains that compliance through this avenue would require approvals from City departments granting an easement given that the existing building facade is directly on the Front Lot Line.
- [426] Accordingly, the Board finds that those suggested processes should occur in the proper manner. It would be unfair for this Board to impose a compliance condition which may warrant an additional development permit in any event, or where compliance is impossible to achieve because it depends on the acquiescence of a third party or parties.
- [427] The Board is therefore of the opinion that permit compliance conditions are not suitable to remedy this non-compliance with the regulations of the *MSO*.

[428] Accordingly, the Board finds that:

- a) a variance is required to the MSO;
- b) the variance triggers a community consultation requirement;
- c) no consultation has occurred;
- d) such consultation cannot be waived per the Court of Appeal's decision in *Thomas*; and
- e) it is inappropriate under the circumstances to cure the non-compliance, thereby dispensing with the need for a variance, by way of a compliance condition.

[429] Having arrived at this finding, it is therefore unnecessary for the Board to consider the general variance power in section 11.3 of the *Bylaw*. Community consultation is a condition precedent to the issuance of a development permit and, by extension, the granting of a variance. That consultation did not occur and therefore neither can the granting of a variance.

V. Conclusion

[430] In consideration of the foregoing, the Board is of the opinion that the Development Authority correctly characterized the proposed Use as a Health Services Use and followed the directions of Council in that regard.

[431] However, the Development Authority failed to follow the directions of Council by not recognizing that the development did not comply with section 819.4(13) of the MSO.

[432] Once that non-compliance is identified, a community consultation procedure is triggered which did not occur and cannot be waived by the Development Authority and, by extension, cannot be waived by this Board. This consultation is a condition precedent to the issuance of a development permit and the exercise of the regular variance power in section 11.3 cannot occur without it.

[433] Finally, this is not an appropriate situation to cure non-compliance with a compliance condition given the unique circumstances surrounding the development in relation to the non-compliance.

[434] Accordingly, the appeals must be allowed and the Development Permit revoked.



Rohit Handa, Chair
Subdivision and Development Appeal Board

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. 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.
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 Services, located on the 2nd Floor, Edmonton Tower, 10111 – 104 Avenue NW, Edmonton, AB T5J 0J4.