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## TOWN OF BANFF DEVELOPMENT APPEAL BOARD

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File No: 18DP77

Appeal: 02-19

Appeal by: Alcanna Cannabis Stores Limited Partnership

Appeal against: Development Authority of the Town of Banff

Hearing dates: April 18, 2019

Decision date: April 18, 2019

Board members: Dak Kerr, Vice Chair, public representative  
Peter Eshenko, public representative  
Ray Horyn, public representative  
Karen Sorenson, council representative  
Grant Canning, public representative  
Kendra Van Dyk, Parks Canada representative

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### DECISION

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#### Description of Application:

1. The appeal before the Development Appeal Board (the "board") was brought by Alcanna Cannabis Stores, represented by Stirling Wood of Alcanna Ltd.
2. On February 26<sup>th</sup>, 2019, the Municipal Planning Commission (the MPC) approved the application of 2104944 AB Ltd./Jeff Hines for a change of use from General Retail Store to Storefront Cannabis Retail at 203B Bear Street. The property is located within the CD (Downtown) Land Use District. The proposed use is a discretionary use within the district.

**Procedural History:**

3. The hearing commenced on April 28<sup>th</sup>, 2019.

**Decision:**

4. The appeal is denied, and the decision of the Municipal Planning Commission is upheld. A development permit shall be issued by the Development Authority.

**Appearances:**

5. The board received submissions from:
- a) Dave Michaels for the Development Authority
  - b) Stirling Wood for the appellant
  - c) Christopher Souster, counsel for the applicant
  - d) Jeff Hines, the applicant

**Background and Summary of Evidence:**

Preliminary Matter

6. The Board indicated that, as a preliminary matter, it wanted to review Alcanna's standing to appeal the development permit application. The Board's view is that the onus is on the appellant to show that it has standing to appeal development permit application 18DP77 under the provisions of Section 685 of the Municipal Government Act (MGA). The board pointed out that Section 685 speaks to the grounds for appeal and who has the right to submit an appeal. Further, the MGA references the term "affected person" with regard to grounds for appeal, who can file an appeal and who must be notified of the DAB's hearing, but the term "affected person" is not defined in the MGA. The Board understands it is responsible to determine who is deemed to be "affected". The Board determines affected persons on a case-by-case basis and the onus is on the person or persons appealing an application to show they are affected by the proposed development.

7. Mr. Souster argued that Alcanna should not be permitted an appeal under the MGA as no provisions of the Land Use Bylaw were relaxed, varied or misinterpreted in relation to development permit application 18DP77. He pointed out that neither the Town of Banff Land Use Bylaw nor the MGA defines an "affected person". He stated that nothing in the appellant's evidence shows that the proposed change in use of 203B Bear Street affects the use, enjoyment or amenities of the appellant's property. The premises of the appellant is not a neighbouring property and is separated by a distance of 210 metres. He stated that furthermore, matters related to the Alberta Gaming and Liquor Commission (the AGLC) must be appealed to that authority.

8. Mr. Wood submitted that Alcanna Ltd. owns the Liquor Depot, which is also located at the north end of Bear Street. As a store owner on Bear Street, Alcanna is an affected party, and as a company also in the cannabis retail business, Alcanna has an interest in ensuring that all cannabis retailers follow the Town of Banff regulations.
9. The Board found that Alcanna has status to appeal for the following reasons and that it would hear the appeal:
  - a. The Land Use Bylaw 4.15.1 states that "A person affected by an order made under s. 685 of the Act in respect of a development may appeal the order to the Development Appeal Board". The term "affected person" is not defined in law. While there is some jurisprudence on the matter of who is affected, the responsibility for determining this still rests with the Board to undertake and review on a case-by-case basis.
  - b. The Board notes that there is a special circumstance in Banff with its fixed boundaries, small size of less than 4km<sup>2</sup> and unique governance regime, whereby virtually all property owners and businesses might be considered directly or indirectly, to be affected by application of the development review process and the Land Use Bylaw. The proper administration of the review and appeal process serves the public interest.
  - c. The Board also notes that the appellant is a business owner located within the same road, block, and district as the subject property of this appeal.

#### Submissions of the Development Authority

10. Mr. Dave Michaels provided information on key federal, provincial and municipal legislative pieces which relate to this appeal:
  - a. The Federal Cannabis Act, passed on October 17, 2018, enables provinces to have authority over the control and distribution and sale of cannabis.
  - b. The Province of Alberta passed Bill 26 on November 17, 2018 giving the Alberta Gaming and Liquor Commission authority for oversight, compliance and retail licensing of cannabis in the province.
  - c. The Town of Banff Bylaw 421 came into effect on October 18, 2018. This bylaw amended the Land Use Bylaw and set the municipal legislative framework for retail stores wishing to sell cannabis in the Town of Banff under the defined use of Storefront Cannabis Retail. Sections of the Land Use Bylaw were amended and several requirements, specific to Storefront Retail Cannabis were added.
11. Storefront Cannabis Retail was added as a Discretionary Use in the CD (Downtown) Land Use District only. As a discretionary use, all applications for Storefront Cannabis Retail are forwarded to the MPC for decision. In its decisions on retail cannabis applications the MPC must take into account the following three key considerations:
  - a. The requirement under provincial regulations for a 100 metre separation from a cannabis retailer to a health care facility, a school or a parcel designated as a school. The LUB has an additional separation requirement

- of a 100 metre separation between a cannabis retailer and a daycare or playground.
- b. The Land Use Bylaw requires a separation of 30 metres between Storefront Cannabis retailers.
  - c. Section 10.6.3 of the Specific Use Regulations of the Land Use Bylaw states that a Storefront Cannabis Retail premises *shall not contain a window facing a sidewalk or lane.*
12. The proposed location at 203 Bear Street did not meet the requirements of the Land Use Bylaw for Cannabis Storefront because it had windows facing the street.
13. The property owner had submitted a separate development permit application (18DP82) for exterior renovations to the front of 203 Bear Street. The proposed renovations would result in the Storefront Cannabis Retail Premises at 203B Bear street not having windows that face the street and would thereby bring the premises into conformance with s10.6.3 of the Land Use Bylaw.
14. Completion of the renovations would be required before the Development Permit (18DP77) for the change of use to Storefront Cannabis Retail would be issued.
15. The development permit for exterior renovations (18DP82) was approved with no variances. Notice of the decision was issued and the appeal period has expired.
16. Mr. Michaels provided drawings of the proposed renovations with his submission.
17. Mr. Michaels stated that upon completion of the renovations at 203 Bear Street, 203B would have no windows facing the street and that the premises would comply with s.10.6.3 of the Land Use Bylaw. The building would also comply with the Design Guideline 12.3.7 (l) of the Land Use Bylaw which states that *interior space configurations shall provide an unobstructed view into the building or product display window from an adjacent sidewalk.*

Submissions of Mr. Stirling Wood, representing the appellant.

18. Mr. Wood argued that the MPC did not properly consider s. 12.3.7 (l) of the Land Use Bylaw in its decision because the reconfiguration of the interior premises would obstruct visibility into the building at 203B Bear Street.
19. He stated that to overcome s.10.6.3 of the Land Use Bylaw, the applicant intends to reconfigure the floor plan by moving a wall so that the window at the street property line would no longer look into the premises, and instead would look into Suite 203A. The result would be that Suite 203B would no longer have a window facing the front street. Mr. Wood submitted that this reconfiguration

would deliberately and intentionally obstruct the view into the building from an adjacent sidewalk, thereby violating Land Use Bylaw s.12.3.7 (l).

20. Mr. Wood further submitted that removing the window from Suite 203B would intentionally circumvent the purpose of the Land Use Bylaw for the CD Commercial (Downtown) Land Use District found in s.12.3.2 which states that *"new development shall enhance the public realm"*.
21. In his second reason for the appeal, Mr. Wood argued that the proposed floor plan, which was presented to the MPC, shows a line of sight from the exterior sidewalk through the front door of 203B Bear Street and that this conflicts with AGLC cannabis policies prohibiting the visibility of cannabis related items or material from the exterior of the premises.
22. He stated that s.12.3.7 (k) of the Land Use Bylaw requires that the interior of the premises is at all times visible from the sidewalk and that the applicant can not meet this requirement and the AGLC policy.
23. In an additional reason for the appeal, Mr. Wood argued that the proposed redevelopment of the interior space at 203B Bear Street contravenes s.12.3.2 of the Land Use Bylaw and does not enhance the public realm. Mr. Wood argued that 'shall' is an operative word meaning mandatory compliance with bylaw.
24. He further stated that the redevelopment, which includes reconfiguration of an interior wall intentionally circumvents the purpose of s.12.3.2 by decreasing visibility into the premises. Preventing tourists and residents from seeing in to the premises would not enhance the public realm.
25. Mr. Wood further submitted that the Land Use Bylaw amendments made by the Town of Banff regarding cannabis retail stores were enacted so that such stores would be placed in locations that, while not prominent features of the town, could be easily accessed. The indirect benefit would be that less desirable basement retail units would be ideal locations. Approving this application would end this benefit. He further noted that basement units, unlike street level units, are not required to ensure doors and windows are clear glazed and unobstructed.

*Submission of Mr. Christopher Souster, counsel for the applicant*

26. Mr. Souster submitted that development permit application 18DP77 was approved on the condition of the elevation changes proposed and approved in 18DP82. The development permit for 18DP77 would only be issued when the approved renovations are completed. There were no variations or relaxations of 18DP77.

27. He pointed out that pursuant to s.10.6.3 of the Land Use Bylaw "*a storefront Cannabis Retail premises shall not contain a window facing a sidewalk or lane.*" 203B Bear Street location would only have a door and no windows facing the sidewalk or lane.
28. Mr. Souster argued that the Land Use Bylaw does not provide specific guidance on the portion or percentage of a door that must be clear glazed. He submits that doors are not required to be 100 percent clear glazed and unobstructed under the Bylaw.
29. He also argued that 'interior' is not defined in the Land Use Bylaw or other relevant legislation and regulations. He submits that a reasonable interpretation of 'interior' is that one may see inside the premises through the door and that 'interior' does not mean that the entirety of the premises must be seen.
30. He submits that the door of the proposed renovations at 203B does not obstruct the 'interior'; of the premises which would always remain visible.
31. He noted that there will be no product display windows in the premises.
32. Mr. Souster stated that the renovated interior baffle wall design would allow for an unobstructed view into the building, but would block sightlines to any cannabis products sold at the rear raised portion of the premises. This configuration would not be inconsistent with other retail locations in the town.
33. Mr. Souster further submitted that the applicant has not deviated from the any regulations and the MPC did not err in its decision to approved the development permit for the change of use

Mr. Jeff Hines, the applicant

34. Mr. Hines stated that the application is complaint with all regulations and that is opinion is that the appeal is intended to limit competition.

The Development Authority

35. Mr. Michaelis' view is that the requirement s.12.3.7 of the Land Use Bylaw can be satisfied given the fact that the door facing the street is clear-glazed and unobstructed and that one may see into the building, just not all the way into the back of the unit.
36. He is confident that the application clearly meets the purpose of the CD District, the design and development regulations, and that the new development will enhance the public realm.

### Rebuttal from the appellant

37. Mr. Wood doesn't believe the application conforms with the Town of Banff Land Use Bylaw. Cannabis Retail Stores are a new use in this municipality and it is important to clearly understand the constraints.
38. Regarding visibility and the Land Use Bylaw requirements, Mr. Wood does not claim that is necessary to see into an entire building, but he believes the requirement is to have reasonable visibility. Land Use Bylaw s. 12.3.7 (l) uses the wording 'shall not obstruct'. Mr. Wood stated the original building would have had good visibility before proposed renovations. When the renovations are complete, visibility would be reduced – and that is an obstruction.

### Reasons

Based on the evidence presented through the written and oral submissions from the appellant, the applicant and administration, the board considered and found the following:

39. Section 10.6.3 of the Land Use Bylaw which states *a storefront cannabis retail premises shall not contain a window facing a sidewalk or lane*. Based on the evidence provided, the Board found that a separate development permit for the exterior building renovations (18DP82) was approved by the Development Officer. The approved renovations would change the window arrangements for 203 Bear Street with the result that there would not be a window at the 203B Bear Street premises. The board finds that this ensures the use of the premises for storefront cannabis retail would be in compliance with s.10.6.3.
40. Section 12.3.2 of the Land Use Bylaw which describes the purpose of the CD (Downtown) Land Use District as *the focal point for residents and visitors, the purpose of this district is to provide retail and commercial services, visitor accommodation, visitor information facilities, and apartment housing in mixed-use development. New development shall enhance the public realm, with a focus on pedestrian areas*. Based on the evidence provided, particularly the visual representations of the proposed work to be completed through the approved development permit for exterior building renovations (18DP82), the Board finds that the use of the premises for storefront cannabis retail will be in compliance with s.12.3.2. In fact, the Board found the new building design to be a significant improvement from what currently exists.
41. Subsection (k) from s. 12.3.7 of the Land Use Bylaw which states *Windows and doors at the street property line shall be clear-glazed and unobstructed so that the interior premises are at all times visible from the sidewalk. Tinted or reflective glazing is not permitted*. Based on the evidence provided, particularly the visual representations of the proposed work to be completed through the approved development permit for exterior building renovations (18DP82), the Board finds that the interior of the premises will be unobstructed. The board

also finds that the proposed renovations would ensure that ~~cannabis~~cannabis product would not be visible from the street. The Board finds the use of the premises for storefront cannabis retail will be in compliance with s.12.3.7 (k).

42. Subsection (l) from s.12.3.7 of the Land Use Bylaw which states *Interior space configurations shall provide an unobstructed view into the building or product display window from an adjacent sidewalk.* Based on the evidence provided, particularly the visual representations of the proposed work to be completed through the approved development permit for exterior building renovations (18DP82), the Board finds that the interior space configurations at 203 Bear Street will not be obstructed. The Board therefore finds that the use of the premises for storefront cannabis retail will be in compliance with s.12.3.7 (l).

### CONCLUSION

43. On this basis, the Board is of the view that the proposed change of use complies with Land Use Bylaw. Accordingly, the Board upholds the decision of the MPC and denies Appeal #02-19.



Dak Kerr, Vice Chair  
Development Appeal Board

May 3/2019  
May 3rd, 2019