

Appeal # 3332 005 2012

November 7, 2012

DANA I. CARLSON, BARRISTER & SOLICITOR
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RED DEER, AB T4N 6M5

VIA EMAIL: DICLAW@HOTMAIL.COM
(PAPER COPY TO FOLLOW)

-AND-

CITY OF RED DEER (RESPONDENT)
INSPECTIONS & LICENSING
3RD FLOOR, 4914 48 AVENUE
RED DEER, AB T4N 3T4

VIA EMAIL: HOWARD.THOMPSON@REDDEER.CA
(PAPER COPY TO FOLLOW)

RE: NOTICE OF DECISION

The Red Deer Appeal & Review Board has made the attached decision.

If you have any questions or concerns please contact this office at 403.342.8132.

Cordially,



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Appeal No.: 3332 005-2012
Decision No.: 3332 005-2012
Hearing Concluded: 24 October 2012

RED DEER APPEAL & REVIEW BOARD DECISION

CHAIR: R. MOISEY
PANEL MEMBER B. FARR
PANEL MEMBER: G. LEASAK
PANEL MEMBER: P. MCGREGOR
PANEL MEMBER: D. WYNTJES

BETWEEN:

1476956 Alberta Ltd.
Represented by Quan Diep & Dana Carlson (Solicitor)

Appellant/Owner
(Appellant)

and

CITY OF RED DEER
INSPECTIONS & LICENSING
Represented by Michelle Baer (Solicitor) Erin Stuart (Inspections & Licensing Supervisor)

(The City)

BACKGROUND:

1. 1476956 Alberta Ltd. (the 'Appellant') operates a drinking establishment within the City of Red Deer known as Tequila Nightclub ('Tequila'). On January 22, 2012 the RCMP reported the occurrence of a stabbing incident at Tequila to The City of Red Deer Inspections & Licensing Department ('The City'). As a result of the report, The City met with the Appellant and advised that conditions would be imposed on the business license (#43557) under Bylaw #3332/2004 – the *Drinking Establishment Licensing Bylaw* (the 'bylaw').
2. On February 02, 2012 The City issued a letter notifying the Appellant of 8 conditions being imposed on their business license.
3. The conditions (summarized) required the following:
 1. Security: in addition to servers or those persons manning the doors, the Appellant was to ensure that there was a minimum of one security staff in attendance per seventy five patrons. Additionally, two security staff (one female) was required to conduct searches, pat downs and scans with a metal detection wand. All security staff was to wear visible clothing with the word 'SECURITY' printed on it.

2. Video Recorders: indoor, high resolution, digital, color cameras with recorders were to be installed at all entrances and exits, the area outside overlooking the queue to enter, and showing all areas of the establishment. The labeled, recorded video was to be submitted by the Appellant to The City by Tuesday of each week and The City would retain possession of the video for up to 4 weeks.
 3. Metal Detector: installation and operation of an airport style metal detector. This was to be used by all persons entering the establishment. In the event the metal detector was 'set off', security staff was required to conduct a scan with a metal detection wand, pat downs and searches. Female patrons who 'set off' the metal detector were to be patted down and searched by the female security guard.
 4. Notification: the RCMP were to be notified 30 days in advance of any event involving a ticket or cover charge.
 5. Access: the Appellant was to restrict access to the establishment to the entrance at which the metal detector was located.
 6. Lighting: the establishment was to have sufficiently bright lighting so that it and its patrons were clearly visible.
 7. Banning Patrons: patrons involved in incidents were to be banned for a period of three years; and
 8. All beverages were to be served in non breakable containers.
4. With the exception of condition #3 – the metal detector, all conditions were to be complied with within 30 days. Condition #3 was given a 60 day compliance period.
 5. On September 10, 2012 The City issued a letter notifying the Appellant of the permanent revocation of business license #43557 (the 'revocation letter'). The revocation letter indicated that conditions #1,2,3 & 5 had not been fully complied with. The revocation letter also made reference to two alleged breaches of regulations related to public safety including exceeding licensed capacity and allowing underage persons to be present. The effective date of the revocation noted in the letter was September 17, 2012.
 6. On September 14, 2012 the Appellant filed a notice of appeal with the Red Deer Appeal & Review Board ('the Board').

NOTICE TO PRODUCE

7. At the hearing on October 09, 2012, The City stated that they received videotapes from the Appellant containing security footage from August 18, 21, 24 & 25. The City stated that an initial review of the videotapes revealed multiple violations of the conditions occurring on August 18, 2012. The City stated that the decision to revoke the license had been made prior to viewing the videotapes on September 04, 2012.

8. The Appellant stated that they provided the only copy of the videotape footage to The City and thus were not able to speak to it.
9. The Board recessed to discuss production of the videotapes. Upon reconvening, the Board issued a Notice to Produce with the following instructions:
 - a. No later than 8:00 a.m. on Friday, October 12, 2012, The City was required to provide to the Board and the Appellant a copy of the security footage of August 18, 2012 together with a list of the approximate time(s) in the security footage that the alleged security deficiencies took place and a description of the alleged deficiencies.
 - b. If either party had a response to the information, it was to be filed with the Board and the opposing party no later than 12:00 p.m. on October 22, 2012.
 - c. The Board advised the Parties that the hearing would reconvene at 5:00 p.m. on Wednesday, October 24, 2012 to hear arguments relative to the videotape.

ISSUES / ARGUMENTS

AUTHORITY OF THE BOARD

10. Sections 10-12 of the bylaw give the Inspections & Licensing Manager of The City the authority to suspend or revoke a drinking establishment business license. In this case, The City chose to revoke the license. With respect to revocations, s. 12 of the bylaw states:

“12 The Inspections and Licensing Manager may permanently revoke a license where:

(a) in the reasonable opinion of the Inspections and Licensing Manager, the continued operation of the establishment would endanger the safety, health or welfare of the public;”

11. Section 29(7) of The City of Red Deer Committees Bylaw #3431/2009 gives the Board the authority to hear and make decisions on appeals arising from the bylaw. Further, s. 29(12) of the Committees Bylaw states:

“29 (12) When considering the merits of an appeal or a review, the Board shall have regard to:

(a) the need to maintain the integrity of the policies which the applicable bylaw and statutes are intended to promote;
(b) the potential cost implications to the City of the decision of the Board; and
(c) the need to fairly treat the persons affected by the order or decision under appeal.

12. The City's position was that the power of the Board in this case is limited to either denying or upholding the appeal; the Board can not substitute or vary the revocation. This was not disputed by the Appellant.

13. The Board is an administrative decision making body whose only authority is that which is expressly granted to it by statute. The Board agrees that the matter before the Board the revocation of the license and whether or not it was reasonable for the Inspections & Licensing Manager to make the determination that the continued use or operation of the establishment would endanger the safety, health or welfare of the public.

REASONABLENESS OF THE MANAGER TO REVOKE LICENSE

The City's position:

14. The City provided the Board with a chronological history of enforcement related issues (March 2011 – September 2012) relative to Tequila.
15. The City stated that the decision to revoke the license was the result of the accumulation of issues involving non compliance with the conditions imposed on February 02, 2012; disclosure of violent incidents by the RCMP and an inspection of Tequila conducted on August 22, 2012 by the Red Deer Public Safety Compliance Commission (the 'Commission').
16. The City stated that the Commission was established in 2012 to respond to concerns related to drinking establishments. It includes representatives from Red Deer City RCMP, Red Deer City Emergency Services, Red Deer City Inspections & Licensing, Alberta Gaming & Liquor Commission and Alberta Health Services. The City stated that the Commission is prevention and enforcement based and that it strives to improve the safety of staff and patrons, and to reduce the negative impact drinking establishments have in the community.
17. The City stated that the inspection resulted in charges being laid against the Appellant by the RCMP. One of the charges is for exceeding the occupant load. The maximum occupant load of Tequila is 100 people. The evidence provided to the Board showed the count at the time of the inspection to be 225 – more than double.
18. In support of this, The City provided a photograph showing totals of 222 and 225 on the counters used during the inspection (Exhibit C). Red Deer Emergency Services advised that during the count, the lights were turned on, entrances and exits were sealed and patrons were asked to remain in the same area while the count was conducted.
19. The City stated that a second charge was laid that relates to underage persons. The City stated that at the time of the inspection, 12 underage persons were in the establishment.
20. The City argued that although the charges are related to matters outside the scope of The City, they are considered to be relevant to the safety, health or welfare of the public, particularly because the public includes patrons of Tequila.

The Appellant's Position:

21. With respect to the security footage, the Appellant argued that he was not aware of incidents of non compliance with security conditions (number 1 & 5). He stated that upon being made aware, he took immediate corrective action including the termination of key security staff.

22. The Appellant advised that he is always present, 'on the floor' and 'hands on' during operation of Tequila. He stated that there are pre-shift and end of night meetings with security staff to review protocols. He advised that live security camera feeds are viewable in his office. Two members of the security staff were in attendance at the hearing and spoke in support of the arguments.
23. The Appellant argued that he is cooperating with The City and that he has and continues to make sincere efforts to comply with all of the conditions imposed on February 02, 2012. To support this, he provided the Board with a detailed account of actions taken in an effort to comply with the conditions.
24. Two witnesses spoke in support of the Appellant's effort to comply with condition #2 – video recorders; the process used to install the security video cameras and the problems encountered providing The City with viewable security footage.
25. With regard to the violent incidents disclosed by the RCMP, the Appellant argued that outside the premises, he has little to no control and if he were to attempt to assert some control, he may be subject to violations under *The Police Act* or *The Criminal Code*. Further to this, the Appellant argued that the incidents could be attributed to any one of several drinking establishments within a few blocks of Tequila - there is no record from the RCMP of transgressions outside the establishment that can be directly attributed to Tequila.
26. The Appellant conceded that the inspection conducted on August 22, 2012 was serious and accepts responsibility for it. However, the Appellant disputed the results of the person count - he stated that 147 persons were counted by the head of security of Tequila, not 225 as counted by the Commission. He stated that the room is very small and finds it difficult to believe that 225 people could be in the space at the same time. Further, he believes that it would be easy to double count.
27. The Appellant stated that he is embarrassed that underage patrons were permitted in the establishment. He stated that the security personnel responsible for checking identification has been terminated.
28. The Appellant argued that revocation of the license was made arbitrarily with no means of measuring whether or not it is reasonable. The Appellant stated that there have been significantly more altercations at similar drinking establishments and that The City is holding Tequila to a higher standard than is expected of other drinking establishments.
29. The Appellant submitted that he has a 10 year history of operating drinking establishments and has never encountered issues to this extent.

Board Findings:

30. Section 12 of the bylaw states the following:

“12 *The Inspections and Licensing Manager may permanently revoke a license where:*

(a) in the reasonable opinion of the Inspections and Licensing Manager, the continued operation of the establishment would endanger the safety, health or welfare of the public; or

(b) *the license has been suspended once and grounds exist under section 10 to suspend the license for a second time within a period of 24 months.*

31. The bylaw clearly allows for the revocation of the license. It is the responsibility of the Appellant to convince the Board that The City ('Inspections and Licensing Manager' in the bylaw) acted unreasonably.
32. There were two main arguments advanced by the Appellant in this respect – the first being that the revocation was arbitrary, that there is no standard to determine what is reasonable. The second argument was the Appellant has taken many actions in an effort to comply with the conditions and for that reason, revoking the business license is unreasonable.
33. The Board finds the argument that there is no measurable standard by which to determine whether or not The City acted reasonably is flawed. When it comes to bylaw enforcement, there will always be a 'first'. The City acknowledged that this is the first revocation of a drinking establishment business license under the bylaw and the Commission was established in 2012; thus there are no other license revocations to compare with. These are facts of the case, not an absence of standards.
34. Further, the Board does not agree with the argument of the Appellant that there is no measurable standard to determine whether or not The City acted reasonably in revoking the license. There is extensive case law that has established the 'reasonable person' as an acceptable test or legal standard by which to measure an action of an individual. The Board also accepts this as a standard by which actions can be measured.
35. The Board heard from The City that the conditions imposed on the Appellant on February 2, 2012 are consistent (or standard) with conditions imposed on other drinking establishments. This was not refuted by the Appellant. Further, the Board finds the conditions to be measurable.
36. The conditions that drew the most discussion at this hearing included: security (#1); video recorders (#2); metal detector (#3); and access (#5). Upon reviewing the conditions, the Board finds the conditions include at least one measurable standard that can be used to determine compliance.
37. With respect to security personnel, the conditions outline the minimum number of personnel that are required to be in attendance based on the number of patrons in Tequila. Further, the conditions outline the actions security personnel should take in order to ensure compliance with the conditions.
38. The condition relating to the video recorders outlines the purpose of the condition as well as provides detailed descriptions of what should be captured by the recorders – in fact, the condition states that The City and the RCMP will attend the premises to approve the positioning of the recorders (Exhibit A, Page 32). Also included is a schedule by which the Appellant is to supply the security footage to The City.
39. There are two other considerations of the Board that contributed to the Board finding that The City did not act unreasonably. First, the information provided by the Appellant was contradictory. Several times the Appellant stated that he is a very 'hands on' manager yet he stated that he was

also unaware that the conditions were not being complied with. Additionally, no written policies or procedures were provided to the Board to demonstrate responsibilities or accountabilities.

40. Second, the Appellant acknowledged that many conditions itemized in the February 02 letter had not been complied with. When asked specifically about the use of a metal detection wand, as required by condition # 3, the Appellant stated that the wand was located in the coat check area and it must have been overlooked. This response indicates to the Board that the Appellant did not pay adequate attention to ensure compliance with the conditions being imposed.
41. The Board agrees with the Appellant on the point that activities outside of Tequila are beyond his control and that the Board has no evidence that would indicate that the incidents disclosed by the RCMP can be attributed to Tequila.
42. Even so, considering the events, history and the evidence, the Board finds that The City was not unreasonable in revoking the license in order to protect the safety, health and welfare of the public.

FAIRNESS OF REVOCATION

The City's position:

43. The City agreed with the Appellant that revocation is serious and stated that The City takes the safety of the public, including the patrons of Tequila, seriously.

The Appellant's position:

44. The Appellant stated that revoking the license is equal to taking away his livelihood. The Appellant argued that it is too severe for a first offence and that it is the most severe remedy compared with the remedies available to other authorities (i.e. the Courts).
45. The Appellant asked the Board if he should be subjected to the loss of his livelihood in the absence of a measurable standard. The Board has already found that the conditions imposed on February 02, 2012 are measurable and are the standard that the Appellant should have met.

Board Findings:

46. The Appellant maintained throughout the hearing that he provides (or it is his intent to provide) a safe environment for the public to gather, consume alcohol and socially recreate. The Board believes that the first steps to accomplish this would have been compliance with the conditions imposed by The City.
47. The Board was presented with both written and verbal evidence of the communications between The City and the Appellant with regard to the conditions of the license. The Appellant did not argue that the conditions were unreasonable or appeal them at the time they were imposed.
48. The Board believes that bylaw allows for the revocation of the license in order to ensure drinking establishment license holders can be held accountable for the safe operation of drinking establishments. The City afforded the Appellant ample opportunity to comply with the conditions.
49. The license to operate a drinking establishment is a privilege afforded to residents of the City of Red Deer under the bylaw. It is not a right. Businesses are expected to comply with licensing

requirements and rectify deficiencies in a timely manner. The conditions imposed upon the business license on February 02, 2012 had still not been complied with even after a full seven months had passed.

50. Revocation of the license is permitted under the bylaw. The Inspections & Licensing Manager acted reasonably and within the confines of the bylaw when the revocation was issued. Whether or not the bylaw should allow for revocation is not for the Board to decide.

Closing Statements

51. It should be noted that during closing statements, The City made reference to a case decided by the Court of Queen's Bench. The Appellant objected to the reference, arguing that The City was using the case out of context. Neither party provided the Board with a copy of the case, and it was disregarded by the Board.

DECISION

MOVED by G. Leasak, seconded by P. McGregor:

RESOLVED that the Red Deer Appeal & Review Board having heard the parties who wished to speak both in favour and against the revocation of business license #43557 in respect of the Tequila Nightclub drinking establishment, the Board hereby UPHOLDS the revocation. The appeal is denied. In accordance with s. 13(b) of the bylaw, the revocation is effective 7 days from the issuance of this decision.

CARRIED

CLOSING

Dated at the City of Red Deer, in the Province of Alberta this 6 day of November, 2012 and signed by the Chair on behalf of all five panel members who agree that the content of this decision fairly reflects the hearing, deliberations and decision of the Board.



R. Moisey, Chair
Red Deer Appeal & Review Board

LIST OF EXHIBITS

Exhibits (including amendments to)	
Exhibit A	Agenda 35 pages
Exhibit B	Correspondence from Red Deer Downtown Business Association
Exhibit C	Photograph of 'counter' totals from inspection on August 21, 2012
Exhibit D	Submission from The City re: jurisdiction of Board – 3 pages
Exhibit E	Copy of email – notice to produce security videotapes
Exhibit F	Security video tapes (memory stick)
Exhibit G	Submission dated October 10, 2012 from The City re: security videotapes
Exhibit H	Revocation letter dated September 10, 2012 from The City
Exhibit I	Submission from Appellant re: security videotapes – 1 page, not labelled