

Appeal No.: 0262 014 2018
Hearing Date: December 6, 2018
& January 9, 2019

SUBDIVISION & DEVELOPMENT APPEAL BOARD DECISION

CHAIR: F. Yakimchuk
PANEL MEMBER: M. Kartusch
PANEL MEMBER: T. Lacoste

BETWEEN:

2117478 ALBERTA LTD. O/A TREES CANNABIS
Represented by Alix Reynolds

Appellant

and

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

Development Officer

DECISION:

The Red Deer Subdivision and Development Appeal Board denies the application for the discretionary use of Cannabis Retail Sales on the lands located at 6, 6782 50 Avenue, Red Deer, Alberta legally described as Lot 20A Block 1, Plan 804NY zoned C4 (Commercial Major Arterial District).

Reasons for this decision are provided within.

JURISDICTION AND ROLE OF THE BOARD

1. The Subdivision and Development Appeal Board (the Board) is governed by the *Municipal Government Act*, RSA 2000, c. M-26 (the MGA) as amended.
2. The Board is established by The City of Red Deer, By-law No. 3487/2012, *Appeal Boards Bylaw* (October 29, 2012). The duty and purpose of the Board is to hear and make decisions on appeals for which it is responsible under the MGA and The City of Red Deer, Bylaw No. 3357/2006, *Land Use Bylaw* (August 13, 2006) (the LUB).

3. None of the parties had any objection to the constitution of the Board. There were no conflicts identified by the Board Members.

BACKGROUND:

4. The hearing convened on December 6, 2018 and adjourned by mutual consent to January 9, 2019.
5. The Board entered into evidence the following:
 - Exhibit A-1: Hearing Materials (pages 1-16)
 - Exhibit B-1: Development Officer - Report (binder with tabs A-J)
 - Exhibit B-2: Development Officer - Supplemental Report (10 pages)
 - Exhibit C-1: Appellant Submission – letter (3 pages)
 - Exhibit C-2: Appellant Submission– copy of presentation (16 pages)
6. Exhibit B-2 (the supplemental report of the Development Authority) contains a copy of a LUB amendment passed on January 7, 2019 which prohibits the Development Authority from varying the separation distances between Cannabis Retail Sales uses and was not provided to the Appellant prior to the hearing.
7. The Board recessed to allow the Appellant an opportunity to review Exhibit B2.
8. Upon reconvening, the Appellant stated that she was prepared to proceed with the hearing.
9. On November 8, 2018, the Municipal Planning Commission (MPC) refused a development permit application by the Appellant for the discretionary use of Cannabis Retail Sales on the Lands located at 6, 6782 50 Avenue, Red Deer, Alberta legally described as Lot 20A Block 1, Plan 804NY zoned C4 (Commercial Major Arterial District).
10. The MPC refused the application for the following reasons:
 - A. The proposed Site is located 150.5 m from the approved Cannabis Retail Sales use at 6802 50 Avenue, which creates a visual perception of clustering as the storefronts face the same streetscape.
 - B. Approval of the Site would result in three approved Cannabis Retail Sales uses within the immediate area. This would be an excess concentration of Cannabis Retail Sales uses, which lessens the variety of commercial business available to serve the community.
11. Section 5.7(12)(r) of the LUB prohibits the Development Authority from varying separation distances (in effect January 7, 2019):
 - (r) ²The following separation distances, which shall not be varied by the Development Authority, measured in a straight line from the closest points, to/from the following specified uses are to be met, regardless of which use is approved first:
 - (i) 300 metres from the property boundary of all schools operated by the Red Deer Public School District, Red Deer Regional Catholic

Schools, and Conseil Scolaire Centre-Nord, to the occupied floor area of a Cannabis Retail Sales;

- (ii) 300 metres from the occupied floor area of one Cannabis Retail Sales use to the occupied floor area of another Cannabis Retail Sales use.

12. The proposed development requires a variance to the 300 metre setback as there is an existing Cannabis Retail Sales (CRS) location at 6751 50 Avenue (the 'first location'). This equates to:

Bylaw: 300 metres
Proposed: 226.3 metres
Variance: 73.7 metres (24.6%)

13. There is a second existing CRS location (the 'second location') which is at located at 6802 50 Avenue, requires a variance to the 300 metre setback and the proposed development. This equates to:

Bylaw: 300 metres
Proposed: 150.5 metres
Variance: 149.5 metres (49.8%)

14. The Appellant filed an appeal of the refusal on November 16, 2018.

SUMMARY OF EVIDENCE AND ARGUMENT:

The Appellant

15. The Board heard from the Appellant who spoke to the general purpose of the C4 zone which is as follows:

5.6 C4 Commercial (Major Arterial) District

C4

General Purpose

The general purpose of this District is to facilitate the development of the primary location for trade and service related to automotive transportation and the automobile traveller, and other commercial land uses which are built at low densities, in planned centres, generally, to serve the city and the region, as a whole.

16. The Appellant stated that the C4 zone allows for a number of uses that create the perception of clustering of those uses. Further, the Appellant argued that if the intent of the zone is to serve the city and region as a whole, the 300 metre setback is excessive, given that it is an area for consumer convenience.

17. In support of this, the Appellant provided photographs and maps identifying the clustering of existing businesses in the area. This includes the location of 5 liquor stores in the vicinity which the Appellant believes is relevant to consider, as liquor stores are merchandise sales of an Alberta Gaming and Liquor Commission (AGLC) regulated product, similar to cannabis. The Appellant stated that the AGLC does not require a separation distance for liquor or cannabis sales.
18. The Appellant argued that the number of uses prescribed for the C4 zone demonstrates that it is working to serve the City and larger region and that by having an appropriate number of CRS uses, the area will be competitive and able to provide for consumer demands.
19. The Appellant also argued that the separation distance of 300 metres is subjective and arbitrary and supported this by stating that different municipalities have different separation distances, with some municipalities not imposing separation distances at all.
20. The Appellant argued that the variance requests are justified based on prior Board decisions.
21. With respect to the variance of 24.6% to the first location, the Appellant stated that it is located across a major roadway (with a treed median) from the proposed development, there is limited pedestrian access, and the actual distance between the first location and the proposed development is 450 metres.
22. The Appellant stated that these factors prevent the proposed development from unduly interfering with the neighbourhood. Further, the Appellant stated that the visual perception of clustering is limited by the geographical landscape that neither store can see the other from its doorway, as the first location faces south while the proposed development would face east.
23. With regard to the second location, the Appellant expanded on the argument found at paragraphs 16, 17 & 18 of this decision, stating that approval of the 49.8% variance would not interfere with the use, enjoyment of the neighbourhood as it was no different than that of the previous use in that area. The Appellant also stated that they are willing to work with any conditions deemed necessary by the City of Red Deer in order to achieve approval.

The Development Officer

24. The Board heard from the Development Officer who spoke to Exhibit B2 – the supplemental report and the operative bylaw for the appeal. The Development Officer stated that the LUB now prohibits variances to the 300 metre separation distances between CRS uses and that the prohibition is the strongest measure council could take to show the direction intended to not allow any variances to the separation distance.
25. The Development Officer stated that the proposed development is an appropriate use for the site and that the impact of approval would generally not be expected to be any different than the impact from the previous use which was a commercial service facility (nail salon).

26. However, when asked if approval would interfere with or affect the use of neighbouring parcels of land, the Development Officer stated that there are separation distances between CRS uses and other uses such as daycares so approval would limit the variety of businesses in the neighbourhood.
27. The Development Officer stated that the proposed development is located along the same street as the other two approved CRS uses and would create a visual perception of clustering, as two of the storefronts would face the same side of the street. The Development Officer stated that clustering and separation distances are not a consideration for uses other than late night drinking establishments and CRS uses.
28. With regard to the Appellant's reference to prior Board decisions, the Development Officer stated that prior decisions do not set precedence; each appeal is heard on its own merit.

FINDINGS AND REASONS

29. The Board considered the statements of the Appellant with regards to the number of liquor stores and other uses that she believes creates the visual perception of clustering in the C4 Zone.
30. The Board considered the two uses under the LUB to have identified separation distances are CRS and Late Night Drinking Establishments. The recent amendment to the LUB which prohibits variances to the setback distance between CRS's does not apply to Late Night Drinking Establishments. Therefore the Board believes that the setback is intentional regardless of the similarities between Late Night Drinking Establishments and CRS.
31. Given the significant difference in the variances requested (24.6% in relation to the first location and 49.8% in relation to the second location), in making its determination, the Board considered each variance on its own merit.
32. In considering the variances requested for both locations the Board considered the following from the MGA:

687 (3) In determining an appeal, the subdivision and development appeal board

...

(d) may make an order or decision or issue or confirm the issue of a development permit even though the proposed development does not comply with the land use bylaw if, in its opinion,

(i) the proposed development would not

(A) unduly interfere with the amenities of the neighbourhood, or

(B) materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land, and

(ii) the proposed development conforms with the use prescribed for that land or building in the land use bylaw.

33. The Board determined that the proposed development would not have a negative effect on the neighbourhood and the use conforms with all other respects of the LUB given the potential impact to the neighbourhood to be no different than that of the previous use.
34. The variance requested to the first site located at 6751 50 Avenue is 73.7 meters (24.6%) to the 300 metre separation distance. The Board determined this requested variance would be acceptable when taken into consideration geographical factors such as a six lane roadway with as well as two service roads with treed median. While the storefronts are located on the same street, the Proposed Site storefront would be east facing and the Approved Site is south facing.
35. The variance requested to the second location located at 6802 50 Avenue is 149.5 metres (49.8 %) to the 300 metre separation distance. The Board determined this requested variance meets variance test for the same reasons as paragraph 33 of this decision.
36. However, the Board determined the requested variance to be excessive in this instance when considering the geographical factors such as two commercial buildings a two lane roadway. The Proposed Site is visible to the second location and vice versa, therefore the Board believes this would give a visual perception of clustering.
37. For these reasons, the development is denied with conditions as stated earlier.

Dated at the City of Red Deer, in the Province of Alberta this 22 day of January, 2019 and signed by the Chair on behalf of all three panel members who agree that the content of this document accurately reflects the hearing, deliberations and decision of the Board.



F. Yakimchuk, Chair
Subdivision & Development
Appeal Board

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

APPENDIX A

Documents presented at the Hearing and considered by the Board.

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