

Appeal No.: SDAB 0262 005 2018
Hearing Commenced: August 02, 2018

SUBDIVISION & DEVELOPMENT APPEAL BOARD DECISION

CHAIR: Karen Howley
PANEL MEMBER: Tanya Handley
PANEL MEMBER: Frank Yakimchuck

BETWEEN:

PERMIT SOLUTIONS INC.
Represented by Audrey Brattberg, Academy of Learning
& Jim Kemp, Jim Pattison Developments Ltd.

Appellant

and

CITY OF RED DEER
Represented by Beth McLachlan, Development Officer
& Erin Stuart, Inspections & Licensing Manager

Development Officer

DECISION:

The application for a development permit for an Electronic Message Sign (installation and repair of existing) is approved, as shown on the plans dated August 2, 2018, and stamped as 'Approved', copies of which form part of the approval (collectively referred to as the 'Approved Plans') on the lands zoned DC(1), located at 2965 Bremner Avenue, legally described as Lot 12A, Block 14, Plan 802 1596 in Red Deer, Alberta subject to the following conditions:

- A. A development permit shall not be deemed completed based on this Approval until all conditions, except those of a continuing nature, have been fulfilled to the satisfaction of the Development Officer;
- B. All development must conform to the conditions of this development permit and the Approved Plans and any revisions thereto as required pursuant to this Approval. Any further revisions to the Approved Plans must be approved by the Development Officer;

- C. The Applicant shall repair or reinstate, or pay for the repair or reinstatement, to original condition, any public property, street furniture, curbing, boulevard landscaping and tree planting or any other property owned by the City which is damaged, destroyed or otherwise harmed by the development or construction on the site. If repairs or reinstatement are necessary, they shall be done to the satisfaction of the City. In the event that the City undertakes the repairs or reinstatement, the Applicant shall pay the costs incurred by the City within 30 days of being invoiced for such costs.
- D. The Electronic Message Sign shall not be illuminated between 10:00PM – 6:00AM on any day of the week.
- E. Third party advertising is prohibited on the Electronic Message Sign.

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 (MGA) as amended, in particular s. 685(4) and 687.
- 2. The Board is established by The City of Red Deer, By-law No. 3487/2012, *Appeal Boards Bylaw* (October 29, 2012). The duty and purpose of the Board is to hear and make decisions on appeals for which it is responsible under the MGA and The City of Red Deer, Bylaw No. 3357/2006, *Land Use Bylaw* (August 13, 2006) (the LUB).
- 3. None of the parties had any objection to the constitution of the Board. There were no conflicts identified by the Board Members.
- 4. There were no preliminary issues for the Board to decide.

BACKGROUND:

- 5. On October 24, 2006 Pattison Sign Group applied for and received a sign permit for a 'reader board' sign to be located at 2965 Bremner Avenue (Lot 12A, Block 14, Plan 8021596) in Red Deer, Alberta zoned as DC(1) (Direct Control) District. The 2006 permit imposed one condition: that 3rd party advertising not be permitted on the reader board.
- 6. On June 14, 2018, Permit Solutions Inc. applied for a development permit to "install three single face LED Electronic Message Centres to replace the existing message centres on an existing three sided pylon" (Exhibit 2 page 8). The 2018 development permit application was for the same location and was in relation to the sign approved by the 2006 Permit.

7. On June 25, 2018, the Development Officer refused the development permit application because:
 - i. An Electronic Message Sign is not a permitted or discretionary use in the Direct Control District No. 1 (DC(1)) which the lands are zoned; and
 - ii. The Sign Area of the proposed Electronic Message Sign panels faces a Residential District, which is not permitted under the LUB, s. 11.8.2.
8. The Appellant filed an appeal with the Board on July 5, 2018 on the basis that its development permit application is in relation to an existing sign and the panels must be replaced as there are no longer parts to replace/repair the existing panels.

SUMMARY OF EVIDENCE AND ARGUMENT:

The Development Officer

9. The Development Officer stated that an Electronic Message Sign is not a permitted nor a discretionary use in the DC(1) district and provided a copy of the LUB district regulations at Exhibit 2 page 15.
10. The Development Officer provided a copy of the existing 2006 permit issued for a 'reader board' sign (Exhibit 2 page 27) and advised that the sign is a legal, non-conforming use under s. 643 of the MGA. Section 643 states in part:

(3) A non-conforming use of part of a building may be extended throughout the building but the building, whether or not it is a non-conforming building, may not be enlarged or added to and no structural alterations may be made to it or in it.

(4) A non-conforming use of part of a lot may not be extended or transferred in whole or in part to any other part of the lot and no additional buildings may be constructed on the lot while the non-conforming use continues.

(5) A non-conforming building may continue to be used but the building may not be enlarged, added to, rebuilt or structurally altered except

- (a) to make it a conforming building,
- (b) for routine maintenance of the building, if the development authority considers it necessary, or
- (c) in accordance with a land use bylaw that provides minor variance powers to the development authority for the purposes of this section.

11. It is the Development Officer's position that the removal of the panels is a 'structural alteration' as referenced in s. 643(5) and therefore, even though the sign is legal non-conforming, the use cannot be continued.
12. Notwithstanding that, the Development Officer evaluated the application against the regulations for signs in the LUB and found it to be in contravention of s. 11.8.2(4)(c) of the LUB which prohibits signs within the Residential Proximity Sign Overlay District (within 100m of residential property) from facing a Residential District.
13. Further, it is the Development Officer's position that if the Board were to approve the application:
 - a. The Board may be exceeding its jurisdiction by allowing a use that is not permitted; and
 - b. The Board would be waiving s. 11.8.2(4)(c) of the LUB which may constitute an unreasonable exercise of the Board's discretion.

The Appellant

14. The Appellant stated that the original panels are obsolete and cannot be repaired, therefore they must be replaced and that the work to be done is simply maintenance.

The Appellant also advised that the new panels have an ambient light sensor which automatically adjusts to daylight.

15. It is the opinion of the Appellant that the sign faces onto the traffic, not the residential area and stated that there have been no complaints about the sign from the residential area.
16. Further, the Appellant argued that the corner is a high traffic corner and that the traffic impacts the residential area more than the sign. He stated that the residential property(ies) across the street are vacant or abandoned and that the only other properties are businesses and the Church.
17. The Appellant stated that the sign is essential for the businesses it serves and the businesses in turn provide a good service to the community.

FINDINGS AND REASONS

18. In reviewing this matter, the Board considered whether or not the development permit is for a “development” as defined in the LUB. The definition in the LUB mirrors the definition for “development” found in s. 616(d) of the MGA:

Development means:

- (a) an excavation or stockpile and the creation of either of them, or
- (b) a building or an addition to, or replacement or repair of a building and the construction or placing in, on, over or under land of any of them, or
- (c) a change of use of land or a building or an act done in relation to land or a building that results in or is likely to result in a change in the use of the land or building, or
- (d) a change in the intensity of use of land or a building or an act done in relation to land or a building that results in or is likely to result in a change in the intensity of use of the land or building.

The Board finds that the application does not appear to be a development. The Applicant is not seeking approval for an excavation or stockpile. The application does not concern a

change of use of land or a building, because the 2006 permit approved a sign, and there will be no change to that use. There is also no change to the intensity of the use. The Applicant does not seek to change the size of the sign or any material aspect of the sign. The Applicant is seeking to change the panels on the sign. All that is left is:

“a building or an addition to or replacement or repair of a building and the construction or placing of any of them on, in, over or under land”.

19. The Applicant is not seeking to construct a sign, as that already exists. The evidence before the Board was that the Applicant is seeking to change the panels, which do not affect the sign itself. As a result, this may not constitute a development.
20. Further, the Board notes that signs do not require a Development Permit if they comply with section 11.3 of the LUB which includes, at section 11.3(a)(d) “the re-erection a Sign that is taken down to maintain or repair the Building Façade or the Sign, provided the Sign is re-erected within 30 days and it is not materially altered”. The Board finds that the purpose of the application appears to be caught under this section and that the Sign in question meets all of the other requirements of the LUB. The Board finds that Electronic Message Signs are not prohibited in the Residential Proximity Sign Overlay District as per section 11.8.2(1)
21. However, should the Board be incorrect in its determination, it has addressed the arguments made by the parties in relation to the merits of the application and has made a determination on the development permit.
22. The evidence before the Board was that the sign in question is an Electronic Message Fascia Sign as defined in the LUB:

“Electronic Message Fascia Sign is a Fascia Sign with a portion of it that displays text, scrolling text, or characters, through electronically controlled changing lights or digital programming. Electronic Message Fascia Signs must not display videos.”
23. The sign is located in the DC1 district, which is a direct control district.
24. Section 685(4) of the MGA limits the Board’s authority when the application is a direct control district to whether or not the Development Officer followed the direction of Council. If the Development Officer did not follow the direction of Council, the Board may substitute its decision for the Development Officer’s decision as provided for by the LUB.

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25. The Parties do not dispute that the sign is existing or that the sign has a development permit that was issued in 2006. The evidence before the Board was that the 2006 permit approved the sign, and then the LUB changed. Currently, the DC1 provisions of the LUB do not list Electronic Message Fascia Sign (the sign) as either a permitted or discretionary use. The 2006 permit has resulted in the lawful non-conformity of the sign.
26. In examining the 2006 permit, the Board notes that the 2006 permit approves both the sign use, as well as the construction of the sign. It is therefore the conclusion of the Board that both the use as well as the sign (the 'building' in this application) are a lawful non-conforming use and a lawful non-conforming building. The Board notes that the 2006 permit is not time restricted, and therefore the Board concurs with the Parties that the building (the sign) is a lawful non-conforming building.
27. The Board has examined the provisions of s. 643 of the MGA in regard to the lawful non-conforming use. The Board finds that the Development Officer has erred in its conclusion that the use of the sign cannot continue. Although s. 643(3) and s. 643(4) address the issue of non-conforming uses, they do not apply to the present case. The Applicant is not seeking to extend the use. The sign remains the same size and at the same location as originally approved. In addition, the Applicant is not seeking to extend the use over the parcel. The Board concludes that these provisions do not apply to the development permit application in question.
28. However, the Board must also examine the impact of the lawful non-conforming building. When an application is made for a development on a building that is lawfully non-conforming, guidance is found under s. 643(5) of the MGA. This subsection allows the lawfully non-conforming building to continue to be used unless it is enlarged, added to, rebuilt or structurally altered, subject to the three exceptions found in s. 643(5)(a) –(c):
- (a) to make it a conforming building,
 - (b) for routine maintenance of the building, if the Development Officer considers it necessary, or
 - (c) in accordance with a land use bylaw that provides minor variance powers to the Development Officer for the purposes of this section.
29. The Development Officer, in its discretion, determined that the application equated to a 'structural alteration' of the building. The Board has concluded that in making its determination of the application, the Development Officer erred by applying too broad of an interpretation of the MGA for this application.

30. In its analysis of whether what the Applicant sought was a “structural alternation”, the Board considered what would remain the same if the application were allowed. The height, the footprint and the integrity of the physical structure would all remain the same. The Board believes that in order to be a ‘structural alteration’, the execution of the application would affect, or be able to affect, the physical structure and integrity of the entire sign, not just the Electronic Fascia Sign that is one of a number of signs on the sign structure. The actions proposed in the application will not affect the structural integrity of the sign as a whole. The Applicant seeks only to change the panels on the Electronic Message Sign portion of the Sign structure, since they are obsolete and cannot be repaired.
31. For these reasons, the Board finds that the application is not a structural alteration.
32. Even if the development permit application were for a structural alteration, the Board finds that the actions proposed in the application are necessary for the routine maintenance of the building. The Board’s conclusion is based upon the evidence of the Appellant that the original panels are obsolete, outdated technology and cannot be repaired without relacing Signs panels. The Board accepts that the replacement of the panels, without affecting the structure of the sign is routine maintenance, and that it is necessary for the continuation of the use of the sign.
33. The Residential Proximity Sign Overlay District provisions in the LUB (s. 11.8.2(4)(c)) apply to this development and they prohibit signs from facing a residential district. The Development Officer refused the application, because it determined that the sign faces a residential district. The Appellant argued that the sign faces the traffic, not the residential district.
34. The Board was provided with several photographs, maps and other images of the subject property. Based on the evidence provided, the Board finds that the sign is within 100 m of a residential district and that s. 11.8.2 of the LUB applies. After careful review the Board finds that the Development Officer erred in its interpretation of the direction of Council by determining that the sign faces a residential district. The Board finds that the sign area does not face a Residential District.
35. As a result of the Board’s conclusion that the Development Officer did not follow the direction of Council, the Board is able to substitute its decision for that of the Development Officer, in accordance with the directions of Council.
36. The directions of Council in s. 11.8.2(1) do not prohibit Electronic Message Fascia Signs within 100 m of a residential district and therefore this provision does not preclude this

development permit. S. 11.8.2(3) and (4) provide further direction to the Board. The Board interprets these provisions as imposing an obligation on the approving authority (here the Board) to measure the need for signs to support commercial and public service activity, while, at the same time, being sensitive to the impact on residential uses.

37. In this regard, the Board determined that the application would have little or no impact on the residential district due to:

- a. the lack of complaints regarding the existing sign;
- b. the lack of submissions in response to the Notice of this hearing;
- c. the sign being electronic (as opposed to dynamic or a billboard); and
- d. the angle of the sign.

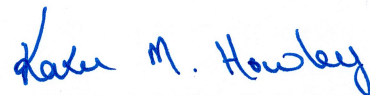
38. However, in order to minimize the potential impact of the sign, the Board has imposed a condition that the sign shall not be illuminated between 10:00 p.m. and 6:00 a.m.

CLOSING:

39. For the reasons detailed above, the Permit is approved with conditions as stated earlier.

This decision can be appealed to the Court of Appeal on a question of law or jurisdiction. If you wish to appeal this decision 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.

Dated at the City of Red Deer, in the Province of Alberta this *17* day of *August*, 2018 and signed by the Chair on behalf of all three panel members who agree that the content of this document adequately reflects the hearing, deliberations and decision of the Board.



K. Howley, Chair
Subdivision & Development
Appeal Board

EXHIBIT LIST

- EXHIBIT 1: Hearing Materials – 8 pages
- EXHIBIT 2: Development Officer (Respondent) Report – 41 pages