

SUBDIVISION & DEVELOPMENT APPEAL BOARD DECISION

CHAIR: V. Higham
PANEL MEMBER: K. Howley
PANEL MEMBER: P. Kitteringham
PANEL MEMBER: G. Marks
PANEL MEMBER: L. Mulder

BETWEEN:

FUNHAUS LTD.

Appellant

and

THE CITY OF RED DEER

Development Authority

This is a Decision of the Red Deer Subdivision and Development Appeal Board (the "Board") in respect of an application for a development permit for the use of a food establishment, within an approved Commercial Recreation Facility located at 4 & 6, 4940 54 Avenue (Lot 13, Block 6, Plan 9621292), zoned DC(28) in Red Deer, Alberta.

The Development Authority refused the application as per section 13(3)(b) of the *Subdivision and Development Regulation*, which states "the Development Authority shall not issue a development approval for a school, hospital, food establishment or residential use that is located within 300 meters of the disposal area of an operating or non-operating landfill."

The Appeal hearing took place on April 27, 2017 in the Council Chambers of The City of Red Deer, within the Province of Alberta.

Hearing Attendees

City of Red Deer Inspections & Licensing
Beth McLachlan, Development Officer
Martin Kvapil, Sr. Development Officer

Appellant
Bernard Rabski
Chris Davies
Megan Miller

Others Present

Erin Stuart, Inspections & Licensing Manager (observing)
Craig Teal, City Planner (observing)
Devon Snideman, owner of Dick's Auto and Truck Repair (in favor of Appellant)

DECISION

The Board overturns the refusal of the Development Authority (dated April 11, 2017) and approves the development permit, for the reasons noted herein.

JURISDICTION AND ROLE OF THE BOARD

1. The legislation governing municipalities in the Province of Alberta is the *Municipal Government Act*, RSA 2000, c M-26 [“MGA”]. Planning and Development is addressed in Part 17 of the MGA, and further in the *Subdivision and Development Regulation*, Alta Reg 43/2002 [“SDR”].
2. The Board is established by The City of Red Deer, Bylaw No. 3487/2012, *Appeal Boards Bylaw*. 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*.

BACKGROUND

3. The subject property is located at 4 & 6, 4940 54 Avenue (Lot 13, Block 6, Plan 9621292), zoned DC(28), within the city of Red Deer.
4. The Appellant originally applied for a development permit to serve pre-packaged food items similar to a typical concession, such as chips, chocolate bars, coffee, and bottled drinks. The Development Officer approved this permit (DP076461) on January 9, 2017.
5. The Appellant later applied to the Development Authority for a permit allowing them to serve an extended menu of food items at the same location. These proposed food items would come pre-packaged and pre-made, requiring some degree of preparation (such as warming on a small grill), and includes items such as paninis, soup, mac and cheese, and hot dogs. They also proposed to serve bottled alcoholic beverages and mixed drinks, and proposed that patrons be allowed to bring in their own food items, like food platters and birthday cakes. The request for these expanded menu and service options required a new development approval reflecting a “food establishment” (restaurant/café) use on the subject property.
6. Pursuant to Land Use Bylaw s. 2.7(1)(f), the Development Officer considered the request for this expanded use (Development Permit application DP076953), and subsequently refused it on April 11, 2017.
7. The Appellant submitted an application to appeal this decision to the SDAB on April 13, 2017 and paid the required fee at that time.
8. The subject Appeal was advertised in the newspaper prior to the hearing, and Notice of Hearing was sent on April 13, 2017 to area residents within a 100 meter radius of the subject site. No responses were received by the Board prior to the hearing.

PRELIMINARY MATTERS

9. The Chair opened the hearing and introduced the Panel and the Parties appearing before the Board. The Chair acknowledged the observers in attendance and asked if anyone would like to speak for or against the Appeal. Mr. Snideman indicated he may speak after hearing the presentations.

10. The Chair disclosed a prior relationship with one of the Appellants (Mr. Rabski), explaining that they had served as high school basketball officials in Red Deer, but indicated this had no bearing on her ability to hear the Appeal.
11. Neither party had any objection to the composition of the panel as introduced at the hearing.
12. Neither party raised any preliminary issue.
13. The Chair introduced a preliminary matter raised by the Board Clerk regarding notification to the Minister of the Environment under section 13(b) of the SDAB's "Party and Public Notification" policy. Notice of the subject Appeal had not been sent to the Minister prior to the hearing.
14. After considering the matter in a pre-hearing meeting, the Board concluded that notice to the Minister was not required in this case, since the subject Appeal could not "involve" a provincial ministry as contemplated in section 13(b), owing to the Ministry's own policy which reads: "Consent to lessen the setback distance *will not be considered* after a development permit or subdivision approval has been issued by the local authority." [emphasis added]
15. Thus, the Board confirmed that the hearing would proceed as scheduled.

ISSUE

16. The Appellant raised the following sole issue for the Board's consideration:
 - a) Should the Board exercise its discretion under section 687(3)(b) of the *MGA* to overturn the Development Authority's refusal of the subject application (DP076953), thus allowing the development proposed by the Appellant in that application?

POSITION OF THE PARTIES

Development Authority Position:

17. Beth McLachlan presented a summary of issues on behalf of the Development Authority, referring to materials identified as Exhibit B1 at the hearing. The subject Appeal pertains to the application for and subsequent refusal of development permit (DP) DP076953. The Development Authority refused the application on April 11, 2017, citing the following reason:

The Development Authority shall not issue a development approval for a school, hospital, food establishment or residential use that is located within 300 metres of the disposal area of an operating or non-operating landfill, as per section 13(3)(b) of the *Municipal Government Act Subdivision and Development Regulation*.

18. Ms. McLachlan confirmed that the subject parcel is within an area referred to as the "Railyards" in the City's "Greater Downtown Action Plan," as shown on the *Land Use Bylaw* District map and on aerial photos presented in Exhibit B1, Figures 1-3 (pages 6-8).

19. The subject's Commercial Recreation Facility is an approved use, and the proposed "food establishment" accessory use is considered Discretionary under the *LUB DC(28)*. The subject property is adjacent to commercial businesses, and within an area designed to facilitate transition from industrial to commercial uses.
20. Ms. McLachlan explained that a previous application for the Discretionary Use of a Commercial Recreation Facility at the subject property was approved on January 9, 2017. This Approval (DP076461) included the sale of pre-packaged foods which did not fall into the category of a "food establishment," and was not subject to s.13(3)(b) of the *SDR*.
21. Ms. McLachlan further explained that the application under review in the subject hearing is for a "food establishment" (restaurant/café), which includes additional food options requiring some degree of on-site preparation and warming, as well as the service of alcoholic beverages. Thus, the application under review in the subject hearing is subject to section 13(3)(b) of the *SDR*, which occasioned the referenced refusal by the Development Officer on April 11, 2017.
22. Ms. McLachlan explained that the subject property is located within approximately 220 meters (and the subject building within approximately 250 meters) of a non-operating landfill site identified as the "Great West Adventure Park." This landfill site was in operation between 1923 and 1947.
23. As submitted in the City's evidence package (Exhibit B1), their Environmental Services department completed an Environmental Risk Management Plan ("ERMP") for the non-operating Great West Adventure Park landfill. This report was developed after completing a Phase I and Phase II Environmental Site Assessment for the landfill site. These reports were initiated to ascertain the environmental risks arising from the historic landfill site, and to develop a more effective review process for future subdivision and development applications – while preserving appropriate protection for all stakeholders.
24. The ERMP determined that the level of risk for subdivision or development beyond 100 metres from the boundary of the waste disposal site is negligible and does not warrant special environmental, mitigative, or adaptive considerations.
25. Based on the recommendation of the ERMP, and because 4940 – 54 Avenue is located more than 200 metres and across the river from the non-operating landfill, Environmental Services has no objection to the proposed development in relation to the landfill setback.
26. The City submitted that the proposed development conforms to all applicable plans, regulations and bylaws, excepting the 300-metre landfill setback provision noted in the *SDR*.
27. In summary, the City submitted that the subject application is "an appropriate case for the SDAB to use its discretion" under section 687(3)(b) of the *MGA* to allow the proposed development as requested. Section 687(3) reads as follows:
 - (3) In determining an appeal, the subdivision and development appeal board ...
 - (b) must have regard to, but is not bound by the subdivision and development regulations;

Appellant Position

28. Megan Miller spoke on behalf of the Appellant from submissions marked as Exhibit C1. She described the proposed "Funhaus" development at the subject location as being new and unique in Red Deer. She further described the facility as one that would offer bouncy castles, obstacle courses, archery tag, pool ball, darts, and more as activities, and would also offer food and beverage items as identified in the application under review (DP076953).
29. Ms. Miller explained that the facility is currently approved for serving some hot and cold beverages as well as pre-packaged foods. The Appellant would like to expand beyond what is currently approved to include some food preparation on-site and service of selected alcohol beverages, as detailed in Exhibit C1.
30. Ms. Miller informed the Board that the current business has had two safety inspections done on the premises, during which they informed the Inspector of their current and future goals and of the current appeal process. The Appellant committed to ensuring the activities within the proposed establishment remain compliant, presently and in the future.
31. Mr. Devon Snideman of Dick's Auto and Truck Repair (located at 4938 - 54 Avenue in Red Deer, near the subject property) spoke in favour of the Appellant. Mr. Snideman stated that he did not have any objection to the proposed development, and stated that the facility looks clean and safe.

BOARD FINDINGS

32. The Board finds that it should exercise its discretion under section 687(3)(b) of the *MGA* to overturn the Development Authority's refusal of the subject application (DP076953), and to allow the development proposed by the Appellant.
33. The Board is satisfied that the subject application conforms to all applicable plans, regulations, and bylaws, excepting the 300-metre landfill setback provision noted in section 13(3)(b) of the *SDR*, which the Board is not bound by (under section 687(3)(b) of the *MGA*).
34. The Board accepts and relies upon the conclusions of the ERMP, which determined that the level of risk for subdivision or development beyond 100 metres from the boundary of the former waste disposal site is negligible, and does not warrant special environmental, mitigative, or adaptive considerations.
35. While the Board gave its mind to the rationale behind section 13(3)(b) of the *SDR*, given the conclusions of the ERMP and the tacit support for the subject application by the City's Environmental Services department and a neighboring commercial enterprise, the Board finds no compelling reason to deny the proposed development application.

CONCLUSION

36. For the reasons outlined herein, the Board overturns the Development Authority's refusal of permit application DP076953, and approves the proposed development permit.

DATED at the city of Red Deer, in the Province of Alberta, this 10th day of May, 2017.



Vesna Higham, Chair
Red Deer 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.

EXHIBIT LIST

- A1 Hearing Materials with Agenda cover page, Appeal Form and attachments, email from subject property owner authorizing Megan Miller to represent the Appellant. (6 pages)
- B1 Development Authority Submission (23 pages)
- C1 Appellant Submission (5 pages)

