Red Deer Tribunals

Subdivision & Development Appeal Board

Appeal No.: 0262 001 2024
Hearing Date: May 22, 2024

SUBDIVISION & DEVELOPMENT APPEAL BOARD DECISION

PRESIDING OFFICER: D. WIELINGA
PANEL MEMBER: B. SANSREGRET
PANEL MEMBER: T. HEGER

BETWEEN:

2327203 ALBERTA CORPORATION O/A AURORA GOLF CLUB/CLUB HOUSE
Represented by Lauren Chalaturnyk, Reynolds Mirth Richards & Farmer LLP and Derek Winterhalt, owner of Aurora Golf Club

Appellant

and

CITY OF RED DEER
Represented by Debbie Hill, Development Officer and Jared McBeth, Assistant City Solicitor

Development Authority

DECISION:

The Red Deer Subdivision and Development Appeal Board (the "Board") grants the appeal and varies the Stop Order issued by the Development Authority on April 19, 2024, against the Appellant and Skyline Retail Real Estate Holdings Inc. (the "Owner"). The Board has varied the Stop Order under the heading "Action being taken; time limit" by providing further direction as to the condition requiring the Appellant and the Owner to cease operating as a Drinking Establishment and to remove the conditions requiring them to close the business no later than 9pm, stop permitting noise to emanate from the Property and not permit a lineup to form outside the business.

The revised section, as varied by the Board, is as follows:

> You are required to cease operating as a Drinking Establishment by:
>
> 1. ceasing to operate a dance floor, DJ booth and associated sound equipment immediately; and
> 2. removing the dance floor, DJ booth and associated sound equipment by June 30, 2024.
>
> You may continue to operate only in accordance with the approved development permit for a Commercial Recreational Facility (attached as Schedule "B").

A detailed summary of the decision is provided below.

JURISDICTION AND ROLE OF THE BOARD

1. The Board is governed by the *Municipal Government Act*, R.S.A. 2000, c. M-26, as amended (the "MGA"). Planning and Development is addressed in Part 17 of the MGA and in the *Matters Related to Subdivision and Development Regulation*, Alta Reg 84/2022.

2. The Board is established by *The Red Deer Tribunals Bylaw*, Bylaw No. 3680/2022, (April 11, 2022). 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 *Land Use Bylaw,* Bylaw No. 3357/2006, (August 13, 2006) (the "Land Use Bylaw").

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. This appeal concerns the issuance of a stop order (the "Stop Order") for lands municipally known as 35 – 6320 50 Avenue, Red Deer, Alberta and legally described as Lot B, CDE Plan 2509MC (the "Lands").

6. The Development Authority issued the Stop Order on the basis that a Drinking Establishment was being operated from the Lands without a development permit and required the Appellant and the Owner to immediately:

    a. cease operating as a Drinking Establishment;
    b. close the business to consumers no later than 9 pm;
    c. stop permitting noise to emanate from the property that would disturb or annoy a reasonable person in the adjacent residential neighbourhood; and
    d. not permit a lineup to form outside the business.

7. The Appellant filed an appeal of this decision to the Subdivision and Development Appeal Board on April 26, 2024.

8. The Board entered into evidence the documents found in Appendix A. There were no objections from the parties regarding the Board entering those documents into evidence.

SUMMARY OF EVIDENCE AND ARGUMENT:

The Development Authority

9. The Lands are zoned C2A Commercial (Regional Shopping Centre) District under the Land Use Bylaw. The Appellant is authorized by a development permit (the "Development Permit") to operate a Commercial Recreational Facility, not a Drinking Establishment. The Stop Order was issued to the Appellant for having a development (Drinking Establishment) without a development permit on the Lands.

10. The Land Use Bylaw provides that a development permit is required for every development unless the development is specifically exempt from having a development permit.

11. On May 11, 2023, the Appellant applied for a development permit for an expansion of Aurora Golf Club ("Aurora") ostensibly to create a space for amusement games, arcade machines, VLTs, dance floor and additional storage, marketed as "The Club House." The Development Officer issued and approved the Development Permit for a Commercial Recreational Facility at 35 – 6320 50th Avenue.

12. Beginning February 5, 2024, the City began receiving concerns though the City's Report a Problem online system. The initial complaints stated that a nightclub appeared to be operating on the Lands and the complaints inquired if a nightclub was an approved use.

13. On February 26, 2024, the Development Authority emailed Mr. Winterhalt about concerns that The Club House was operating as a Drinking Establishment. The Development Authority advised Mr. Winterhalt that a separate permit is required for operation of a Drinking Establishment and to cease operating as a Drinking Establishment until appropriate approvals and a development permit (if approved) were issued.

14. On March 5, 2024, the Appellant applied for a development permit (DP086593) seeking approval for an accessory use of a Drinking Establishment within a 29.7 m² (320 ft²) room on the Lands.

15. On March 19, 2024, the Appellant submitted a revised site plan and letter of intent for development permit DP086593 to expand the Drinking Establishment area to include all of Unit 35.

16. On April 3, 2024, the Development Authority conducted an inspection with representatives of the Alberta Gaming, Liquor and Cannabis Commission (the "AGLC") and the RCMP in response to the concerns about the activity on the Lands and to determine the nature and intensity of the primary use of The Club House. The site inspection confirmed that the business is operating as a Drinking Establishment based on its primary purpose being the sale of alcoholic beverages, the prominence of the bar services, noise and the prohibition of minors after certain hours.

17. The RCMP advised the Development Authority that since January 2024, they attended the facility 46 times regarding noise and safety issues.

18. On April 19, 2024, the Development Authority refused the development permit application (DP086593) for a Drinking Establishment on the Lands, which is a discretionary use in the C2A district and subject to the regulations in s. 5.7 of the Land Use Bylaw. The reasons for refusal were that the proposed development does not comply with s. 5.7(1)(e) and 5.7(8)(b) of the Land Use Bylaw:

    a. The maximum gross floor area permitted under the Land Use Bylaw is 557 m² whereas the development would be 787 m².
    b. The maximum building occupancy under the Land Use Bylaw is 300 persons, whereas the maximum building occupancy under the application is 450 persons.
    c. The Land Use Bylaw provides that development should not be located where it would abut a residential land use district or a lane or street or reserve which abuts a residential land use district. There is an existing residential district to the north and west of the Lands.

19. On April 19, 2024, the Development Authority issued a Stop Order to the Appellant directing it to cease operating as a Drinking Establishment.

20. On April 25, 2024, the Appellant and the Development Authority met to discuss the Stop Order and the classification of the business as a Drinking Establishment.

21. On April 26, 2024, the Appellant filed an appeal of the Stop Order to the Subdivision and Development Appeal Board, which was within the statutory timeframe.

22. On May 3, 2024, the Development Authority provided the Appellant with the list of modifications the business might undertake to comply with the Development Permit for a Commercial Recreational Facility. Recommendations included reducing the noise, preventing a queue from forming outside the business, not operating after 10:00 p.m., not promoting alcohol sales, distributing gaming equipment throughout the Aurora and The Club House spaces and other measures to ensure the primary purpose of the customers attending the business is to participate in commercial recreational activities.

23. The Board must decide which use category properly applies to the Appellant's operations through statutory interpretation and reading the definitions in context:

    a. The primary purpose of a Drinking Establishment is the sale and consumption of alcohol.
    b. A Commercial Recreational Facility is aimed at public participation in recreational activity.

24. Both use categories may include, among other things, alcohol sales, recreational activities, entertainment, music, and dancing. They are primarily distinguished by whether the use emphasizes alcohol sales or recreational activities. The Club House includes both recreational activities and alcohol sales. However, the business is promoted, operated and designed in a manner that emphasizes alcohol sales.

25. The Club House promotes itself as a bar or nightclub. Included with the Development Authority's submissions were exhibits, including:

    a. Instagram videos depicting The Club House as a nightclub with flashing lights, loud music and many dancing patrons (Exhibits C.3(a)-(b), C.4(a)-(b), C.5(a)-(b));
    b. a screenshot of an Instagram post advertising alcohol specials and a "rager" (Exhibit A.1, page 28); and
    c. an article in the Red Deer Advocate where the business is described as a bar (Exhibit A.1, page 28).

26. The Club House is physically designed to promote alcohol sales, as it contains:

    a. a large and prominent bar;
    b. dynamic screens displaying alcohol specials; and
    c. significant space devoted to a dance floor or open area where patrons may congregate while consuming alcohol.

27. The Club House operates in a manner consistent with a Drinking Establishment use:

a. The facility closes to minors at 9:00 p.m.;
b. The operating hours extend until 2 a.m. on Fridays and Saturdays;
c. The Club House employs security measures with staff outside the facility to screen patrons;
d. At nighttime, a queue forms outside as people wait to progress through a security check; and
e. Music is played late into the night with many more patrons engaging in dancing or drinking and recreational activities.

28. The nuisance effects of the Drinking Establishment use include excessive noise, late night vehicle and pedestrian traffic. The rules outlined in s. 5.7(8) of the Land Use Bylaw apply to Drinking Establishments in the C2A District in recognition that the use category has nuisance effects that impact neighbouring properties, especially residential properties which are especially sensitive to the noise and increased late night vehicle and pedestrian traffic. The Appellant's use includes many of the nuisance effects the Land Use Bylaw was specifically designed to mitigate.

29. The Development Authority submitted that The Club House is properly categorized as a "Drinking Establishment". Allowing the Appellant to continue an unauthorized development without requiring the Appellant to comply with the Land Use Bylaw is unfair to the neighbours and others who have complied with the Land Use Bylaw. It is also contrary to the public interest, the City's development objectives, and would create uncertainty and disorder with respect to development.

30. The Development Authority submitted that the Stop Order issued on April 19, 2024, should be upheld.

31. In response to Board questions, the Development Authority stated:

a. It has not been back to inspect the premises since May 3, 2024, when the Development Authority provided a list of modifications to comply with the Land Use Bylaw to the Appellant. However, the Development Authority is aware that the Appellant continues to operate beyond 10 p.m.
b. The term "nightclub" as used in this hearing is a colloquial use and not necessarily a "late night club" as defined in the Land Use Bylaw. The Stop Order was issued in relation to the operation of a Drinking Establishment."

The Appellant

32. The Appellant has been operating Aurora at 35 – 6320 50th Avenue in Red Deer, Alberta since November 25, 2022. It is a Commercial Recreational Facility with a focus on simulated golf.

33. The Club House is located at 36 – 6320 50th Avenue and specifically began operating on January 19, 2024. The expansion of Aurora to Unit 36 prompted the issuance of the Development Permit. The Club House has expanded Aurora's operations to include arcade games, billiards, air hockey, darts, dancing, as well as providing a community space for tournaments, events, and fundraisers. The Club House serves food and alcohol and prohibits minors from attending after 9:00 p.m. on Fridays and Saturdays, while Aurora allows minors at all hours.

34. On February 26, 2024, the City advised the Appellant that the City believed The Club House was operating as a Drinking Establishment. The City did not indicate what specific activities of the

Appellant placed it within the Drinking Establishment use class but simply advised it had concerns relating to The Club House refusing minors after 9:00 p.m. At that same time, the City provided documentation to the Appellant about obtaining a Drinking Establishment development permit for the entire facility. The City did not provide an explanation as to why the Drinking Establishment use should apply to the entire facility.

35. On March 4, 2024, the Appellant applied for a development permit for the Drinking Establishment Use for its VLT room only. It revised its Application on March 19, 2024, to include the entirety of Aurora and The Club House premises.

36. On April 19, 2024, the City refused that development permit application. The Appellant has chosen not to appeal the refusal as it had never intended on operating a Drinking Establishment. The application for the VLT room is part of the Appellant's original business plan. The decision to extend the Application to the entire facility was done at the suggestion of the AGLC. The Appellant hoped that this would resolve any City concerns.

37. On April 19, 2024, the City advised the Appellants the City had received complaints regarding the Appellant's activities including noise complaints.

38. On May 15, 2024, despite receiving these complaints as early as February 2024 and after repeated requests, the City finally provided the Appellant with information regarding the date, time, and nature of those complaints. The last complaint received from the City, based on the information the City has provided, was March 18, 2024. The complaints provided to the Appellant by the City appear to primarily concern noise emanating from the smoking area previously located at the rear of The Club House. Since receiving this information from the City, the Appellant has relocated the smoking area away from the rear of the building. The Appellant has never received a complaint directly from the RCMP or from neighbouring residences or businesses.

39. The Appellant has since taken steps to mitigate noise and is unaware of any complaints being made since that time. The Appellant has:

    a. Monitored noise production around the building by recording decibel readings at various times throughout the evening, installed noise mitigation measures, reduced subwoofer and speaker volumes, turned off certain speakers to direct noise away from the rear of the building and moved the smoking area away from the rear of the facility;
    b. Removed any in-house liquor advertisements and promotions and ceased any promotion of the sale of alcohol or the operation of the business as a nightclub; and
    c. Redistributed gaming equipment so that it is more evenly disbursed between the Aurora and The Club House spaces.

40. On April 19, 2024, the Appellant received a Stop Order from the City. The City emailed the Stop Order to the Appellant and owners and posted it to the door of the premises of Unit 35. The Stop Order indicated that, based on an April 3, 2024 City inspection, the City had determined that the Appellant was operating as a Drinking Establishment.

41. Following the issuance of the Stop Order, the Appellant attempted to clarify with the City what steps it was required to take to cease operating as a Drinking Establishment. The City failed or refused to provide any further clarity other than to advise the Appellant that it should simply stop operating as a

Drinking Establishment as required by the Stop Order. Since the issuance of the Stop Order, the City has advised the Appellant that it may keep The Club House open until 10:00 p.m.

42. It is the Appellant's understanding the compliance issues identified in the Stop Order relate only to the operations at The Club House and not to Aurora.

43. The Appellant submits that the following are the issues before the Board:

    a. As of April 19, 2024, was Aurora operating as a Drinking Establishment contrary to its Development Permit and the Land Use Bylaw?
    b. If Aurora was operating a Drinking Establishment as of April 19, 2024, were the terms of the Stop Order ambiguous or unreasonable?

44. The primary purpose of a facility is determined through the dominant purpose and intended use test. The test requires consideration of both the dominant purpose and intended use of the Development. The primary purpose of a Drinking Establishment must be alcohol sales for consumption on the premises.

45. The Appellant's primary purpose in operating The Club House is and has always been public participation in recreation activity and not the sale of alcohol. The sale of alcohol has been a complement to its primary aim of operating an indoor golf simulation facility, as noted in the Letters of Intent submitted as part of the Appellant's development permit applications.

46. The Appellant notes that the definition of Commercial Recreational Facility does not explicitly exempt out Drinking Establishments as it does with Gaming or Gambling Establishments. This implies that activities which may occur at a Drinking Establishment may also occur at a Commercial Recreational Facility provided that the primary purpose of the Commercial Recreational Facility is not the sale of alcohol.

47. The Appellant does not dispute that it sells alcohol at Aurora and The Club House; however, the sale of alcohol is far from its primary purpose. In approximately 16,800 ft² of space, it only had three bar service counters, one of which Aurora has removed and replaced with additional games.

48. Further, on April 3, 2024, the date of the City's inspection, the breakdown of Aurora sales at both Aurora and The Club House were as follows: 56% attributed to golf and arcade games, 20% to food and beverage, and 18% to alcohol sales. Alcohol sales are only a small portion of the Appellant's business.

49. Regarding hours of operation, the Appellant is unaware of any provisions in the Land Use Bylaw that restrict the hours a Commercial Recreational Facility may operate. Provided the business operations fall within the use class, the Land Use Bylaw implicitly provides that a Commercial Recreational Facility may remain open past 10:00 p.m.

50. The mere existence of noise from a facility in no way places The Club House within the Drinking Establishment use class.

51. The Appellant acknowledges that it prohibits minors after certain hours. The Appellant has made an operational decision with a focus on safety to limit minors at The Club House after 9 p.m. on Fridays

and Saturdays. This decision does not relate to alcohol sales or attempts to operate a Drinking Establishment but instead reflects the commercial reality of operating a business at late hours. The Appellant has made the operational decision to prohibit minors after a certain time because its clientele shifts as the evening runs later. Minors being on the premises, especially without parental supervision, after a certain time would be contrary to public safety aims. Further, the Appellant's Class B liquor license requires it to prohibit minors.

52. The Appellant notes the City reviewed only one advertisement posted to social media by a third party to inform the issuance of the Stop Order. This advertisement predates the February 26th email from the City and does not reflect the changes the Appellant has implemented after that email.

53. The Appellant directs third parties to tailor advertisements to the Appellant's Commercial Recreational Facility purpose and not the sale of alcohol or associated activities. Ultimately, those third parties are outside of the Appellant's control and while the Appellant may direct advertisements to be taken down or modified, a third party may refuse to do so.

54. On weekends, The Club House has a dance floor and a DJ; however, the mere existence of a dance floor and DJ on two out of the seven nights that the Appellant operates is not enough to place either Aurora or The Club House within the definition of Drinking Establishment. This is because a Commercial Recreational Facility can have other secondary purposes such as dancing. The Land Use Bylaw does not prohibit dancing or DJs for those entities that fall within the Commercial Recreational Facility Use class. The use of a dance floor was included in the Appellant's Letter of Intent in support of the Development Permit, which was approved.

55. The Stop Order first requires that the Appellant cease operating as a Drinking Establishment. Given the City's subjective approach to the definition of Drinking Establishment in the Land Use Bylaw, it is impossible for the Appellant to know if or when it has brought itself into compliance at the standard the City requires but has not communicated. The Appellant has sought clarification from the City but has only been advised that it must stop operating as a Drinking Establishment.

56. The Appellant submits that where a term in the Stop Order or other statutory order is uncertain, ambiguous, and open for significant interpretation, the Order, or at the minimum the unclear term, is void for uncertainty.

57. The Stop Order requires that the Appellant bring itself into compliance immediately. The Appellant is not aware of any complaints or issues which were urgent enough to justify the requirement of immediate compliance. Nevertheless, the timeline imposed was unreasonable and cannot be achieved by the Appellant. In the event the Board is not prepared to overturn the Stop Order the Appellant requests that it be granted until June 30, 2024, to bring itself into compliance as it will require time to consult with the City on what steps it must take to become compliant and then will require additional time to institute any required measures.

58. The Stop Order also requires that the Appellant close no later than 9:00 p.m., now extended by the City to 10:00 p.m. There is no requirement in the Land Use Bylaw that a Commercial Recreational Facility close by 10:00 p.m. This condition was also never previously imposed on the Appellant by virtue of the Development Permit. If the City wishes to now impose a condition on the Appellant, that condition must serve a valid planning purpose. The City has not provided any evidence to support the necessity of a 10:00 p.m. as opposed to a 1:00 a.m. closure. If there are concerns, the

Appellant can address those by way of noise mitigation and monitoring, which would be valid planning requirements in this case, but an arbitrary closure serves no additional purpose.

59. In the event the Board is not prepared to overturn the Stop Order, the Appellant requests that the conditions of the Stop Order be varied such that Appellant be permitted to remain open until 1:00 a.m. on Fridays and Saturdays.

60. The Appellant requested that the Board grant its Appeal and overturn the Stop Order.

61. In response to Board questions, the Appellant stated:

a. Aurora is Unit 35, and The Club House is Unit 36. They are connected but operate in different units. They have the same Landlord and Owner and are the same type of facility. There was a separate development permit issued for Aurora. Both development permits are for the same use class and operations.
b. At the time of the Stop Order, the Appellant was operating under winter hours: 9 a.m. – 11 p.m. Monday to Thursday, 9 a.m. – 2 a.m. Friday and Saturday and 9 a.m. – 10 p.m. Sunday. Approximately one week before the hearing, the Appellant switched to summer hours: 11 a.m. – 11 p.m. Monday – Thursday, 10 a.m. – 2 a.m. Friday and Saturday and 10 a.m. – 10 p.m. Sunday.
c. The Appellant's revenue from liquor is about 40% of sales, and games, food and non-alcoholic beverages make up about 60% although the Appellant could not say in what proportion. If the Appellant puts in VLTs, then this will create more revenue for games. In winter, there are more golf sales. The sales from arcade games remain consistent throughout the year.
d. The dance floor is not expandable. It is about 475 ft^2 and gets quite full. There is no dancing in the rest of the space.
e. The Appellant has closed the smoking area, and smokers now go to the general exit and stand away from the building in the parking lot. Since April 19, the Appellant has stopped staff from going out the back except for door checks.
f. On February 26, when the Appellant received the first email from the City, the Appellant removed all advertisements of The Club House as a nightclub and scrubbed all sources possible. There have been no changes to its operations. In the past thirty days, the Appellant has phased out its alcohol advertisements to prevent the active promotion of alcohol. There may still be some advertisements running, but the Appellant is prepared to take those down.
g. The uncertainty of the Stop Order relates to the first point to cease operating as a Drinking Establishment. The other points are quite clear. There is uncertainty to the first point as there are several factors that go into making a facility a Drinking Establishment, and it is not clear from the terms of the Stop Order what the steps to be taken to comply are.

Affected Persons

62. No one spoke in favour of the appeal.

63. Elaine Geddes spoke in opposition to the appeal. She advised the Board:

a. She is a homeowner on Hallgren Avenue and her yard is 117 feet from the back of The Club House. Several Hallgren Avenue homes back onto this business and are directly and negatively impacted.
b. She sees The Club House activity outside the back and hears and feels the booming bass drumbeat noise from the DJ Booth every Friday and Saturday night from 9 p.m. until 2:30 a.m. There has been no relief from the unrelenting booming DJ music since January when The Club House opened.
c. The vibrating base drumbeat is not to be confused with loud noise that could be measured with a decibel reader. She does not hear the music, just the booming. It is not deafening noise; rather, it invades and permeates everything in her home. She can feel it through the furniture and every room, including her sleeping space. On weekend nights after a busy week at work, she is unable to sleep until after 2:30 a.m. on Saturday and Sunday mornings.
d. With the approach of warmer summer evenings, she faces being unable to enjoy the use of her backyard or to open any windows for cooling breeze on weekend evenings due to the inescapable and irregular vibrating drumming bass that resonates through everything.
e. She has made many calls over the past 3+ months to the non-emergency RCMP number and to the City's "Report a Problem" website to complain about the unbearable vibrating noise.
f. She is concerned at the loss of property value if she should she try to sell her house, which will be prohibitive once potential buyers know what use is located in such close proximity.
g. In February, she expressed her disbelief and alarm in letters to members of City Council that a nightclub of this nature would be allowed in such close proximity to single family residences.
h. In the past two months, she has been in frequent contact with the City's Licensing Department considering the zoning of this part of Village Mall and they advised her what the permitted and discretionary uses are for this zoning and that the existing zoning does not permit for the Drinking Establishment Use and that the City's permit to this business does not cover this use.
i. The residents of Hallgren Avenue have read and reread the Community Standards Bylaw, especially s. 1 as it relates to noise. It has been frustrating to them why this Bylaw would not govern this disturbing noise so close to them.
j. She requests that the Board turn down the appeal of the Stop Order regarding The Club House/Aurora to operate as a "Drinking Establishment" in this location at Village Mall. She also requests that clear direction be given regarding the enforcement action to be undertaken if noncompliance should continue.

64. Gaytan Leyden also spoke in opposition to the appeal. Ms. Leyden advised the Board:

a. She is a resident of Hallgren Avenue and The Club House is less than 50 meters from her backyard.
b. She agreed with Ms. Geddes about the booming music and how it could not be measured with decibels. She explains that when she is lying in bed, it is like a car out front with its bass blasting. She can hear it in her basement, even with the doors and windows closed. She is concerned what will happen in the spring when she needs to open the doors and windows to cool off.

c. The relocation of the smoking area helped, but the booming music remains. She could hear screaming from inside The Club House and the DJ chanting to the crowd. She notes that the noise starts at 11 p.m., and she loses sleep, which affects her work and daily life.
d. She has called the police and written to the City about this issue.

65. Both the Development Authority and the Appellant confirmed that they had the opportunity to present in a full and complete manner.

FINDINGS AND REASONS

66. The Lands are located at Unit 35, 6320 – 50th Avenue, Red Deer, Alberta and are legally described as Lot B, CDE Plan 2509MC.

67. The Lands are zoned C2A Commercial (Regional Shopping Centre) District.

68. A Development Permit (page 31 of Exhibit A.1) was issued in respect of the Lands on July 13, 2023 for "an expansion of an existing Commercial Recreational Facility (simulated golf, billiards, darts, arcade games & VLT), Restaurant and Merchandise Sales (golf equipment)" (the "Facility").

69. The Stop Order is dated April 19, 2024.

70. The appeal was filed April 26, 2024, within the 21-day time limit found in s. 686(1)(a)(ii) of the MGA.

JURISDICTION

71. The Board's jurisdiction to hear this appeal is set out in s. 687(3) of the MGA:

> **687(3)** In determining an appeal, the board hearing the appeal referred to in subsection (1)
> (a) repealed 2020 c39 s10(52);
> (a.1) must comply with any applicable land use policies;
> (a.2) subject to section 638, must comply with any applicable statutory plans;
> (a.3) subject to clauses (a.4) and (d), must comply with any land use bylaw in effect;
> (a.4) must comply with the applicable requirements of the regulations under the *Gaming, Liquor and Cannabis Act* respecting the location of premises described in a cannabis licence and distances between those premises and other premises;
> (b) must have regard to but is not bound by the subdivision and development regulations;
> (c) may confirm, revoke or vary the order, decision or development permit or any condition attached to any of them or make or substitute an order, decision or permit of its own;
> (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.

72. The Board has the authority to confirm, revoke or vary the order, decision or development permit or any condition attached to any of them or make or substitute an order, decision or permit of its own.

AFFECTED PERSONS

73. The Board must determine whether those appearing and speaking before the Board are affected persons. The Board notes that there was no objection made to those making submissions to the Board; however, the Board wishes to review this issue for completeness.

74. The Appellants are the recipient of the Stop Order and are therefore affected.

75. Those persons who spoke in opposition to the Appeal reside on Hallgren Avenue, which is within 100 metres of the Lands. Due to the proximity of their residence to the Lands, the Board finds that they are affected.

QUESTIONS TO BE DETERMINED

76. In its decision, the Board must determine:

A. Was the Stop Order properly issued?
   i. Did the Stop Order correctly identify the Lands?
   ii. Was the Stop Order served on the date that it was issued?
   iii. Did the Stop Order give a date by which to comply?
B. Did the Development Authority establish that there is a breach of the MGA or the Land Use Bylaw?
C. If so, should the Board exercise its authority under s. 687(3)(c) of the MGA to vary the Stop Order?

77. In making this decision, the Board has examined the provisions of the MGA and has considered the oral and written submissions made by and on behalf of those who provided evidence: the Development Authority, the Appellant and the witnesses who spoke in opposition to the appeal.

A. Was the Stop Order properly issued?

78. The first question the Board must address is whether the Stop Order was validly issued. The onus is on the Development Authority to establish that the Stop Order was valid.

79. The Board first considered whether the Stop Order met the technical requirements set out in s. 645 of the MGA. The Board notes that the Appellant did not argue that there was a breach of the requirements in the MGA; however, the Board must still be satisfied that the requirements for the Stop Order were met, particularly in light of the question about whether the Stop Order applies to Unit #35 or #36.

80. In order to determine whether the technical requirements for a valid Stop Order have been met, the Board must address the following questions:

i. Did the Stop Order correctly identify the lands?
ii. Was the Stop Order served on the date that it was issued?
iii. Did the Stop Order give a date by which to comply?

81. Should the Board find that the technical requirements for a valid Stop Order have been met, the Board must then proceed to determine whether the Stop Order was validly issued for a breach of Part 17 of the MGA or the Land Use Bylaw.[1]

i. Did the Stop Order correctly identify the lands?

82. The Stop Order is found at page 19 of Exhibit A.1. The Stop Order identifies that it has been issued in respect of property municipally described as #35, 6320 – 50th Ave, Red Deer, Alberta which has a legal description of Plan 2509MC, Lot B. The description in the Stop Order is for the Lands.

83. In their submissions, the Appellants submitted that Aurora has been operating at #35, 6320 – 50th Ave, Red Deer, Alberta since November 25, 2022, and has expanded to #36, 6320 – 50th Ave, where it operates The Club House.

84. The Board finds that Units 35 and 36 function operationally as one unit. The photos submitted by the Appellant show the two units separated by an open garage door covered by lights (Tab 1 of Exhibit B.2), evidencing that no separation exists between the two units. The Appellant's existing Development Permit (page 31 of Exhibit A.1), which applies to #35, 6320 – 50th Ave, describes "an expansion of an existing Commercial Recreational Facility" rather than a new facility.

85. As the two units operate functionally as one unit, a Stop Order that applies to Unit 35 would apply to Unit 36 and vice versa. Therefore, the Board finds as a fact that the Stop Order correctly identifies the Lands.

ii. Was the Stop Order served on the date it was issued?

86. The date of the Stop Order is April 19, 2024 (page 19 of Exhibit A.1). According to the Stop Order, it was posted to #35, 6320 – 50th Ave, Red Deer, Alberta and sent by registered mail to the Appellant, the Owner and Alexandra Bochinski of DLA Piper (Canada) LLP. There was no evidence before the Board about the date on which the Stop Order was served on the Appellant. However, the Board notes that, from the Appellant's initial written submissions enclosed with the Notice of Appeal (page 5 of Exhibit A.1), it appears that the Appellant had a call with the City of Red Deer about the terms of the Stop Order on April 19, 2024. Further, the Appellant did not contest the date of service of the Stop Order.

87. In the absence of any contrary evidence, the Board finds as a fact that the Development Authority issued the Stop Order on April 19, 2024 and served it on April 19, 2024 on the Appellants. Because the Stop Order was issued and served on the same day, this element of technical compliance has been established by the Development Authority.

[1] The Board understands that a stop order may be issued for the breach of a development permit or subdivision approval. In the current circumstances these are not relevant, and the Board will not address them further.

iii. Did the Stop Order give a date by which to comply?

88. Page 2 of the Stop Order (page 20 of Exhibit A.1) directs the Appellants to immediately:

a. cease operating as a Drinking Establishment;
b. close the business to consumers no later than 9pm;
c. stop permitting noise to emanate from the Property that would disturb or annoy a reasonable person in the adjacent residential neighborhood; and
d. not permit a lineup to form outside the business.

89. The Board finds as a fact that the use of the word "immediately" is a clear direction on the timing for compliance.

B. Did the Development Authority establish that there is a breach of the MGA or the Land Use Bylaw?

90. Having determined that the technical elements of the Stop Order were established by the Development Authority, the Board must determine if the Development Authority has established breaches of the MGA or the Land Use Bylaw.

91. The Development Authority argued that the Appellant was using the Lands as a Drinking Establishment, without a development permit, contrary to the MGA and the Land Use Bylaw.

92. The uncontested evidence of the Development Authority was that there was no development permit to use the Lands as a Drinking Establishment. The question is whether the activity meets the definition "Drinking Establishment".

93. Under the Land Use Bylaw, a "Drinking Establishment (adult entertainment prohibited)" is defined as:

> an establishment the primary purpose of which is the sale of alcoholic beverages for consumption on the premises and the secondary purposes of which may include entertainment, dancing, music, the preparation and sale of food for consumption on the premises, take-out food services and the sale of alcoholic beverages for consumption away from the premises as accessory uses but does not include or permit adult entertainment. This drinking establishment includes any premises in respect of which a "Class A" Liquor License has been issued and where minors are prohibited by the terms of the license and where no adult entertainment is permitted.

94. A "Commercial Recreational Facility" is defined in the LUB as:

> a facility in which the public participate in recreational activity, and without limiting the generality of the foregoing, may include amusement arcades, billiard or pool halls, bowling alleys, fairs, gymnasiums, racquet courts, roller skating, and simulated golf but does not include a gaming or gambling establishment.

95. For the Stop Order to be valid, the Board must be satisfied that there is a Drinking Establishment operating on the Lands. For the reasons below, the Board finds that the current use of the Lands is as a Drinking Establishment.

96. The Definition of "Drinking Establishment" notes that the establishment must have as its primary purpose the sale of alcoholic beverages. The Board notes that the evidence given by the Appellant in answer to the Board's questions was that alcohol sales make up 40% of its revenue, a significant fraction. The remaining 60% is divided amongst game, food and beverage sales, although the Appellant could not say in what proportion. The Board acknowledges that the Appellant also provided revenue percentages for April 3, 2024. However, because April 3, 2024, was a Wednesday, the Board gives this evidence less weight as it may not reflect the revenue generated by the facility on other days of the week. The Board finds that 40% for one item (alcohol) is significant, particularly since the evidence was that no other single item made up the same proportion of revenue. The evidence of such a significant percentage of revenue comprised of alcohol sales is sufficient to conclude that the primary purpose is for the sale of alcoholic beverages. The Board finds that the primary purpose of the facility is for "the sale of alcoholic beverages for consumption on the premises".

97. The Board also considered the type of clientele the facility attracts. The pictures and videos entered as evidence showed that a large part of the Appellant's clientele uses its dance floor and drinks alcohol. The Board was persuaded by this evidence. A smaller portion of the Appellant's clientele uses the arcade games, billiards, air hockey and darts offerings.

98. The Board notes that the definition of "Drinking Establishment" includes "entertainment, dancing, music," as secondary purposes. The definition of "Commercial Recreational Facility" does not contain similar language. While a Commercial Recreational Facility may have dancing and music, dancing and music would not be a primary or secondary purpose of a Commercial Recreational Facility. A dedicated dance floor and DJ booth suggests that dancing and music are either a primary or secondary purpose of the facility, supporting the conclusion that this is a "Drinking Establishment".

99. The Board finds that a large part of the Appellant's clientele uses its dance floor rather than its arcade games and other commercial recreational offerings. The Board finds that the facility's dance floor suggests to clients and residents in the area, as demonstrated by the evidence given by Ms. Geddes and Ms. Layden, that the facility is a "nightclub" in the colloquial sense of the word. The Board finds that the suggestion that the facility is a "nightclub" leads to clientele that primarily use its dance floor and consume alcohol rather than partake in its arcade games and other commercial recreational offerings.

100. The Board finds that the prohibition to minors after 9 pm, extended operating hours, security measures outside the facility and queues outside the facility also support that the Facility is a Drinking Establishment rather than a Commercial Recreational Facility. While they are not determinative of whether the Lands are primarily used for "the sale of alcoholic beverages for consumption on the premises", they support the other factors listed above, in the Board's conclusion.

101. The Board notes that there was an advertisement of alcohol. The Board is aware of section 564 of the MGA:

> **Operating a business without a licence**
> **564** In a prosecution for contravention of a bylaw against engaging in or operating a business without a licence, proof of one transaction in the business or that the business has been advertised is sufficient to establish that a person is engaged in or operates the business.

102. While this appeal is not a prosecution as contemplated by section 564, the advertisement supports a conclusion (in addition to the factors above) that the facility is a Drinking Establishment. The Board recognizes that Commercial Recreational Facilities may serve alcohol, but finds the evidence of an advertisement as further evidence supporting alcohol sales, and when combined with the other factors, weighs in favour of the Board's conclusion that the Appellants operate a Drinking Establishment.

103. No argument was raised by either party as to whether the use of the Lands as a Drinking Establishment was lawfully non-conforming. Therefore, the Board finds that the Stop Order was validly issued in relation to the condition to cease operating as a Drinking Establishment.

C. Should the Board exercise its authority under s. 687(3)(c) to vary the Stop Order?

104. The Board finds that the Stop Order was validly issued.

105. The Board acknowledges the Appellant's argument that the Stop Order is void because it is uncertain. The Board does not accept this argument. The definition of "Drinking Establishment" provides that a Drinking Establishment's primary purpose is the sale of alcohol. To comply, the Appellant would need to reduce the primary nature of the alcohol sales.

106. Based on the evidence, the Board is prepared to provide further direction under its power to vary the Stop Order or substitute an order of its own to clarify the expectations for the Appellant.

Further Direction regarding Cease Operating as a Drinking Establishment

107. As stated above, the Board finds that a large part of the Appellant's clientele uses its dance floor rather than its arcade games and other commercial recreational offerings. The Board has found that the facility's dance floor suggests to clients and residents in the area, as demonstrated by the evidence given by Ms. Geddes and Ms. Layden, that the facility is a "nightclub".

108. The Board amends the Stop Order to require the Appellant to cease the operation of and remove the facility's dance floor, DJ booth and associated sound equipment.

109. The Board is of the view that the Land Use Bylaw does not permit Drinking Establishments within a C2A district where it would abut a residential land use district because of the noise impacts which a Drinking Establishment may create for the abutting residential uses. The removal of the dance floor, DJ booth and associated sound equipment would reduce the noise and would deter the clientele seeking to use the facility as a "nightclub" and encourage patrons to participate in the Appellant's commercial recreational offerings, bringing the facility in compliance with the Development Permit as a Commercial Recreational Facility.

Other Conditions

110. The Board finds that the Land Use Bylaw does not require a Drinking Establishment to be shut down after a certain time. Further, if the Appellant operates under its existing Commercial Recreational Facility Development Permit, that Development Permit does not contain any limits regarding hours of

operation. As a result, the Board is of the view that the Stop Order should be varied to remove the condition regarding hours of operation.

111. In relation to the last two conditions (see below), the same reasoning as set out above applies. The Land Use Bylaw does not prohibit a Commercial Recreational Facility:

a. from noise emanation (subject to the City's Community Standards Bylaw which this Board is not empowered to enforce); and
b. from having line ups.

112. Further, if the Appellant operates under its existing Commercial Recreational Facility Development Permit, the Development Permit does not contain any limits regarding noise (again, subject to the City's Community Standards Bylaw) or on the number of people who can queue to enter.

113. As a result, the Board is of view that the Stop Order should be varied to remove from the Stop Order those conditions:

a. prohibiting noise to emanate from the Lands that would disturb or annoy a reasonable person in the adjacent residential neighbourhood; and
b. prohibiting a lineup to form outside the business.

114. In relation to the time for compliance with the Stop Order, the Stop Order specifies that the Appellant must "immediately" cease operating as a Drinking Establishment. The Appellant has asked that it be granted until June 30, 2024, to bring itself into compliance as it will require time to institute any required measures.

115. In coming to its decision, the Board has weighed the nuisance concerns against the reasonable time that it would take for the Appellants to make the necessary changes to its facility. The Board recognizes that this work cannot be done immediately and wishes to provide the Appellants a reasonable period within which to come into compliance. However, the Board does not wish to provide an extended period for compliance, particularly in light of the stated nuisance concerns. In addition, the Board is of the opinion that there should be no use of the premises as a Drinking Establishment without the appropriate development permit.

116. In weighing these interests, the Board varies the time for compliance as follows:

a. The Appellant and the Owner must immediately cease to operate a dance floor, DJ booth and associated sound equipment.
b. The Appellant and the Owner must remove the dance floor, DJ booth and associated sound equipment by June 30, 2024.

117. The Board is of the view that the Appellant must immediately cease to operate the dance floor, DJ booth and associated sound equipment. However, the Board acknowledges that the Appellant must have time to remove the dance floor, DJ booth and associated sound equipment. The Board is of the view that the extension of time should provide sufficient time for the Appellants to remove the dance floor, DJ booth and associated sound equipment.

118. The Development Authority's stated concerns are about nuisance such as noise. This is a reasonable concern. The Board has balanced the need for the mitigation of nuisance effects with providing the Appellants with the opportunity to bring themselves into compliance and is of the view that the above variation to the Stop Order addresses both concerns.

CLOSING:

119. For these reasons, the appeal is allowed and the section of the Stop Order under the heading "Action being taken; time limit" is varied as follows:

    You are required to cease operating as a Drinking Establishment by:

    1. ceasing to operate a dance floor, DJ booth and associated sound equipment immediately; and
    2. removing the dance floor, DJ booth and associated sound equipment by June 30, 2024.

    You may continue to operate only in accordance with the approved development permit for a Commercial Recreational Facility (attached as Schedule "B").

Dated at the City of Red Deer, in the Province of Alberta, this 5th day of June, 2024 and signed by the Presiding Officer on behalf of all panel members who agree that the content of this document adequately reflects the hearing, deliberations, and decision of the Board.

Lori Stubbard, Board Clerk
for
Don Wielinga, Presiding Officer
Subdivision & Development Appeal Board

This decision can be appealed to the Court of Appeal on 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.

APPENDIX A

Exhibit A.1:	Hearing Materials	45 pages
Exhibit A.2:	E. Geddes Written Submission	2 pages
Exhibit B.1:	Appellant Submission – Letter to Subdivision and Development Appeal Board	1 page
Exhibit B.2:	Appellant Submission – Written Submission	96 pages
Exhibit C.1:	Development Authority Submission	10 pages
Exhibit C.2:	Development Authority Submission (Exhibit Package)	79 pages
Exhibit C.3(a):	Development Authority Submission (Exhibit P – Part 1) Video 1	
Exhibit C.3(b):	Development Authority Submission (Exhibit P – Part 1) Video 2	
Exhibit C.4(a):	Development Authority Submission (Exhibit P – Part 2) Video 1	
Exhibit C.4(b):	Development Authority Submission (Exhibit P – Part 2) Video 2	
Exhibit C.5(a):	Development Authority Submission (Exhibit P – Part 3) Video 1	
Exhibit C.5(b):	Development Authority Submission (Exhibit P – Part 3) Video 2	