

Appeal No.: 0262 002 2018
Hearing Date: February 21, 2018

SUBDIVISION & DEVELOPMENT APPEAL BOARD DECISION

CHAIR: P. Kitteringham
PANEL MEMBER: K. Howley
PANEL MEMBER: F. Yakimchuk

BETWEEN:

GO OUTDOOR ADVERTISING
Represented by Rich Donadt & Dean Fraser

Appellant

and

CITY OF RED DEER
Represented by Beth MacLachlan, Development Officer
& Michelle Baer, City Solicitor

Development Authority

DECISION:

The Red Deer Subdivision and Development Appeal Board denies the Appellant's appeal of the Development Authority's decision on January 15, 2018 which refused a development permit for a billboard sign, on the lands located at 6880 50 Avenue (Lot 10, Block 2, Plan 956 MC) in Red Deer, Alberta. A detailed summary of the decision is provided herein.

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, in particular s. 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

1. On December 7, 2017, the Appellant applied to The City of Red Deer for a development permit for a billboard sign on the lands located at 6880 50 Avenue (Lot 10, Block 2, Plan 956 MC) which is zoned C4 (Commercial Major Arterial District) in Red Deer, Alberta.
2. On December 11, 2017 the LUB was amended to add regulations applicable to billboard signs.
3. On January 15, 2018, the Development Authority refused the application on the grounds that the proposed development did not comply with the LUB as follows:
 - A. The proposed billboard sign does not comply with Section 3.4(4) of the LUB as the proposed sign is within 500.0 m radius of an existing billboard sign.
 - B. Under the LUB billboard signs shall only be located along a boundary adjacent to an arterial road. The proposed billboard sign does not comply with Section 3.4(4) of the LUB as it would be located along the boundary of a service road.
4. The Appellant filed an appeal of the refusal to the SDAB on January 25, 2018.
5. The hearing was the second of three hearings that commenced and were adjourned on February 21, 2018. All three hearings involve similar application with the same persons representing the Appellant and the Development Authority.
6. At the outset of the first hearing (SDAB 0262 001 2018), the Chair advised that unless requested by the Parties, the Board would move forward with separate hearings. The Development Authority stated that while all three appeals are similar, they are not identical and requested separate hearings. The Appellant concurred, noting that some of their evidence would be carried forward.
7. The Board entered into evidence the following:

Exhibit A:	Hearing Materials (pages 8-12)
Exhibit B:	Respondent Report dated February 21, 2018 (77 pages)
Exhibit B.2:	Color Copy of Map from page 66 of Exhibit B (1 page)
Exhibit B.3:	The City of Red Deer, By-law No. 3221/99, <i>The City of Red Deer Cost Shareable Arterial Roadway Transportation System Bylaw</i> (April 26, 1999) (7 pages)
Exhibit C:	Appellant Submission dated February 15, 2018 (35 pages – attachment reference 0262 001 2018)
Exhibit C.2:	Appellant hand drawn radii calculation (1 page)
Exhibit C.3:	Wikipedia definitions & The City of Red Deer web map (2 pages)

8. Following the hearing, during the course of deliberations, the Board became aware that evidence provided by the Appellant via email on February 15, 2018 was not provided to the Board in written form and was not accepted into evidence at the hearing.
9. To ensure fullness of information, on March 08, 2018, the Board issued a Notice of Continuance to the Parties. The hearing continued on March 22, 2018.
10. On March 22, 2018, with all original panel members and Parties present, the Board confirmed the evidence entered on February 21, 2018. The Clerk then provided the information referred to in paragraph 8 above to all Parties and the Board. This was entered into evidence as:

Exhibit C.4: Appellant Submission (37 pages – attachment reference 0262 002 2018)
11. The Chair asked the Parties if they had any additional submissions to be made. There were none.
12. The Chair asked the Parties if they wished to speak to Exhibit C.4. After a brief recess to consider, they did not.

SUMMARY OF EVIDENCE AND ARGUMENT:

The Appellant

13. The Board heard from the Appellant. Speaking on behalf of the Appellant were Rich Donadt and Dean Fraser of Go Outdoor Advertising.
14. The Appellant stated that, as a stakeholder, they were consulted by The City of Red Deer in regards to the new LUB regulations. The Appellant stated that during one consultation, on November 22, 2017, a City of Red Deer representative advised that while the entire LUB is being updated, the proposed changes to the sign portion of the LUB were “fast tracked” in order to address the number of billboard sign applications.
15. The Appellant stated that the development permit met all the requirements for billboard signs found in the LUB on the date the application was submitted.
16. The Appellant argued that if the changes to the LUB were made specifically to disallow the billboard applications, and the billboard sign regulations were ‘fast tracked’ to address the number of billboard applications received in 2017, the application should be considered based on the LUB in effect at the time the application was submitted and not the date the Development Authority made the decision, which was after the new LUB regulations were adopted.
17. The Appellant stated that they have had nine applications for Billboard Sign permits in the City of Red Deer located in C4 districts, that are similar to the proposed development, and all have been approved.

18. The location criteria found in s. 3.4(4)(b)(i) of the 'new' LUB regulations state that billboard signs shall only be located along a boundary adjacent to an arterial road. If the Board considers the application under the 'new' LUB, the Appellant argued that the civic address of the subject location is 50th Avenue, which is an arterial road and therefore the application complies with that aspect of the siting criteria.
19. The Appellant stated that the area is highly commercial in nature and the proposed development would comply with the immediate street context and would not interfere with the use, enjoyment or value of neighbouring parcels of land.
20. The siting criteria found in s. 3.4(4)(c)(iii) of the 'new' LUB regulations state that billboard signs shall be located a minimum of 500.0 m from another billboard sign. The Appellant concurred that there is an existing billboard sign located 425m from the proposed development but argued that the variance is small, 75m which is a 15% variance.
21. In support of this, the Appellant submitted the definition of 'arterial road' and 'sub arterial road' as found in Wikipedia and a map from The City of Red Deer website. The Appellant noted that the service road cannot be found on The City's own map.
22. An area landowner, Robert Bonam, spoke in favour of the appeal. He stated that the public consultations on the billboard sign regulations occurred during business hours at the local malls. It was his opinion that the consultation represents one-one thousandths of the public and that without statistics on how many people contributed to the public consultation then the consultation evidence submitted by the Development Authority (Exhibit A Tab I) should be irrelevant.
23. Mr. Bonam also stated that the regulation that requires billboards be located adjacent to an arterial road is unfair because, based on the regulation and the location of greenspaces next to arterial roads, it's impossible to put a billboard on an arterial road.

The Development Authority

24. The Board heard from the Development Authority. Speaking on behalf of the Development Authority were Michelle Baer, City Solicitor and Beth McLachlan, Development Officer.
25. The Development Authority acknowledged that the application was refused based on the 'new' LUB regulations (adopted December 11, 2017).
26. The Development Authority responded to the 'fast tracking' argument of the Appellant. The Development Authority concurred that there were an increased number of billboard sign applications received in 2017 but argued that the 'fast tracking' of the billboard sign regulations was a legitimate action taken by Council in response to citizen pressures to review the regulations.

27. The Development Authority argued that the application should be decided based on the LUB that is in effect on the day the decision is made, not the LUB in effect on the day the application was submitted. In support of this argument, the Development Authority submitted the following:
 - A. LAUX - Planning Law and Practice in Alberta, 3rd ed (LAUX), an authoritative text, which states that the law in force at the time the decision is made is the operative law; and
 - B. Love v. Flagstaff (County of) Subdivision and Development Appeal Board, 2002 ABCA 292, a case heard by the Court of Appeal, which found that a permit application may be defeated by a change in law that occurs between the date of filing the application and the final decision on the application.
28. The Development Authority argued that based on these, the Board must evaluate the application using the LUB in effect at the time it makes the decision.
29. The Development Authority stated that the application does not comply with the 'location criteria' found in s. 3.4(4)(b)(i) which allows billboards to only be located along a boundary adjacent to an arterial road. The Development Authority argued that the proposed development is located along a boundary adjacent to a service road and the service road separates the proposed development from Gaetz Avenue which is an arterial road.
30. The Development Authority argued that service roads evolved out of a need to move a reduced amount of traffic at a slower pace to the businesses that they feed. It is the Development Authority's position that the location of the proposed development, adjacent to a service road makes this an improper location for the development.
31. The Development Authority also stated that the application does not comply with the 'siting criteria' found in s. 3.4(4)(c)(iii) which specifies that billboards shall be located a minimum of 500.0 m radius from another billboard sign and that when measuring the radius, and a 500.0 m radius is drawn around billboard signs, none of the 500.0 m radius shall overlap.
32. To support this, the Development Authority provided excerpts from the LUB as well as an ortho photograph showing the service road and the location of an existing billboard sign within 425 m of the proposed development.
33. The Development Authority also provided a map of all arterial roads and their descriptions as found in in The City of Red Deer (Exhibit B.3) as found in The City of Red Deer, By-law No. 3221/99, *The City of Red Deer Cost Shareable Arterial Roadway Transportation System Bylaw*. The bylaw correlates with The City of Red Deer 1996 Transportation Plan Update.
34. The Development Authority submitted that waiving or varying the siting and location criteria in the LUB is outside the authority of the Development Authority as per s. 3.4(4)(e)(i) which states:

"The Location Criteria listed in s.4(4)(b) and the Siting Criteria listed in 3.4(4)(c) shall not be varied by the Development Authority."

35. The Development Authority acknowledged that notwithstanding this, the application could be approved by the Board under s. 687(3)(d) of the MGA which states that in determining an appeal, the 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 the neighbouring parcels of land, and

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

36. However, it is the position of the Development Authority that the Board should not waive the location criteria or vary the siting criteria because, The Development Authority argued, that City Council expresses its intentions through bylaws and that the amendments to the LUB in December 2017 were made, in part, to give guidance to the Board when contemplating applications for billboard signs.
37. The Development Authority submitted that approving the proposed development would be, in effect, ignoring the messages from City Council that limiting the proximity of billboard signs to each other is an important step towards limiting the proliferation of billboard signs in the community.
38. In support of this, the Development Authority provided an administrative report outlining the material and rationale that was considered by Council prior to adoption of the ‘new’ LUB regulations that pertain to billboard signs.

FINDINGS AND REASONS

What is the Operative Law?

39. In order for the Board to consider the application, the Board must first determine if the December 2017 amendments apply to the application.
40. The Development Authority believes that the operative law should be the law in place at the time the application is decided and provided two authoritative forms of planning law references in support.
41. It is the Appellant’s position that the operative law should be the law in place at the time the application was submitted. The Appellant submitted an email from the Development Authority dated November 23 (Exhibit C page 27) in which the Development Authority states that: ‘...the

earliest the new billboard sign regulations would be in place is December 11th, following the Council decision’.

42. The Appellant stated to the Board that he felt the LUB amendments were passed for the purpose of addressing the number of billboard sign applications. In reviewing the excerpt of LAUX (Exhibit B, Tab G) the Board notes that it examines the idea of a permit being ‘blocked’ by an amendment to the LUB; and that in order to determine that an amendment should not be applied to an application, there should also be a finding of bad faith – that there be little or no indication of zoning changes or regulations pending until after the application for development is filed.
43. The Board finds that this is clearly not the case in this application, which was filed on December 7, 2017 – after the Appellant knew of the pending LUB changes.
44. Further, the Board notes that while the email states the earliest that the sign regulations would be in place, it does not provide comment as to whether or not those regulations would apply to an application submitted prior to them being passed.
45. The Board finds that in this instance, where the Appellant had made a development permit application, there was no guarantee that the application would be decided based on the LUB in effect on the date of the application.
46. The Board is persuaded by the excerpts from LAUX, and the case law provided. LAUX is a widely accepted authority in planning law and the Courts have clearly settled that the law in place at the time the decision is made is the operative law.
47. The Board finds that the amendments made to the LUB in December 2017 apply to this application.

Should the application be approved?

48. The Development Authority argued that the application should be denied based on its non-compliance with the LUB with respect to its location in proximity to an existing billboard sign and its location along the boundary of a service road.
49. The Development Authority also argued that because the application does not comply with the LUB, approval of this proposed development would require a significant variance to be granted. Such a variance could be considered as an unreasonable exercise of discretion, which would result in a loss of jurisdiction.
50. The Appellant argued that the Board should consider the proposed development to be adjacent to an arterial road because of the very similar immediate street context of the service road and the fact that the mailing address of the proposed development is Gaetz Avenue, which is an arterial road.

51. The LUB 3.4(4)(a)(i) states that a billboard sign should respect the immediate street context. The LUB defines this as existing buildings and signs along the same street frontage (both sides of the street) as the proposed development or sign and within the same block. Based on the maps, aerial photographs and description of the area provided by both Parties, the Board is persuaded that the proposed development respects the immediate street context.
52. The Board considered the LUB s. 3.4(4)(b)(i) - location criteria, which states that billboards signs shall only be located along a boundary adjacent to an arterial Road. There is no dispute between the Parties that Gaetz Avenue is an arterial road.
53. The Board heard submissions from both Parties as to whether or not the proposed development is located on the service road that links businesses to Gaetz Avenue or whether it's located on Gaetz Avenue. The Board is persuaded by the civic address of the proposed development and finds that the proposed development is located on Gaetz Avenue. Therefore, the Board finds the proposed development complies with the location criteria found in s. 3.4(4)(b)(i) of the LUB.
54. The Board then turned its mind to the siting criteria found at s. 3.4(4)(c)(iii)(1) of the LUB which states that billboard signs shall be located a minimum of 500.0 m radius from another billboard sign. The LUB goes on to say that: "...if a 500.0 m radius is drawn around billboard signs, none of the 500.0 m radius shall overlap;"
55. The Board interprets this to mean that where there are two billboard signs neither radius should overlap. The Board is persuaded by Development Authority's submission that this effectively means that the distance between billboard signs is a 1000.0 m radius. Therefore the proposed Billboard Sign does not comply with current LUB regulations.
56. While the Board may approve a development that does not comply with the LUB, consideration must be given to the extent of such a variance s. 686 of the MGA. The proposed development would require a variance of 57.5%. The Board finds the requested variance to be excessive.
57. For these reasons, the appeal is denied.

CLOSING:

Dated at the City of Red Deer, in the Province of Alberta, this 04th day of April, 2018 and signed by the Chair on behalf of all panel members who agree that the content of this document adequately reflects the hearing, deliberations, and decision of the Board.



P. Kitteringham, 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.

- Exhibit A: Hearing Materials (pages 8-12)
- Exhibit B: Respondent Report dated February 21, 2018 (77 pages)
- Exhibit B.2: Color Copy of Map from page 66 of Exhibit B (1 page)
- Exhibit B.3: The City of Red Deer, By-law No. 3221/99, *The City of Red Deer Cost Shareable Arterial Roadway Transportation System Bylaw* (April 26, 1999) (7 pages)
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