

SUBDIVISION & DEVELOPMENT APPEAL BOARD DECISION

CHAIR: R. MOISEY
PANEL MEMBER B. FARR
PANEL MEMBER P. MCGREGOR
PANEL MEMBER G. LEASAK

BETWEEN:

MULTIPLE BOWER NEIGHBOUHOOD LANDOWNERS
Represented by Brenda Gulke

Appellant

and

CITY OF RED DEER
DEVELOPMENT OFFICER
Represented by Vicki Swainson

Development Authority

and

CORK'D TAPHOUSE & GRILL
Represented by Darren McArthur

Applicant

DECISION:

MOVED by B. Farr, seconded by P. McGregor:

RESOLVED that the Subdivision and Development Appeal Board having heard all of the parties who wished to speak both in favour and against the appeal filed by B. Gulke (on behalf of multiple landowners) regarding the July 31, 2012 decision of the Development Officer that approved the application for a seasonal outdoor patio located at 100, 2325 50 Avenue (Lot 22; Block 2, Plan 802 2947) hereby reverses the decision of the Development Officer and allows the appeal. The development is denied.

CARRIED

BACKGROUND:

1. The property is located at 100, 2325 50 Avenue and is zoned C2B – Commercial Shopping Center District. The property houses a commercial strip mall known as Bower Plaza. Cork'd Taphouse & Grill (Cork'd) is a drinking establishment located in the north east corner of Bower Plaza. Drinking establishments in this district are considered discretionary.
2. The east side of Bower Plaza is set back from the lot line enough to accommodate waste bins and storage sheds. As such, it is wide enough to accommodate vehicle traffic and was referenced

throughout the hearing as the 'laneway'. For clarity, this 'laneway' is not a public alley or road - it is privately owned. The owner has not restricted regular vehicle traffic from using the laneway and it is commonly used as a convenient vehicle access crossing between Bower Mall (on Bennett Street) and Boyce Street.

3. The neighbourhood is known as the Bower Neighbourhood and includes the Bower Mall (across the street) on the north side; single family dwellings and multiple family buildings (apartments) to the east; and commercial buildings to the south and west.
4. The Applicant submitted an application to develop an outdoor patio (total area 84.5 square meters) at Cork'd which was approved by the Development Officer. A drinking establishment has existed at this location since 1991; however, the Applicant has operated Cork'd at this location for only the past 18 months.
5. Multiple landowners in the area have appealed the decision of the Development Authority to this Board.

ISSUES / ARGUMENTS:

PRELIMINARY ISSUE

6. The Board questioned the Development Authority with respect to s. 2.4(1)(c) of *The City of Red Deer Land Use Bylaw #3357/2006* as amm. ('LUB') which requires the Applicant to provide proof of ownership or authority when making a development application. The Development Authority stated that the Owner of the land provided a letter of authorization and agreed to provide a copy of it to the Board. Entered as Exhibit 6.

NEIGHBOURHOOD CONSULTATION

7. The Appellant stated that the neighbourhood was not provided with notification of the proposed patio prior to it being considered and approved by the Development Officer. Several of the written submissions supported that statement and expressed great concern for the lack of notification (Exhibit I).
8. The Development Authority stated that the LUB requires decisions of the Development Authority to be advertised once in a newspaper. Section 2.9(1) of the LUB reads as follows:

"Notice of all decisions by the Development Authority on development permit applications shall be given to the applicant and to all other interested persons by way of a notice published once in a newspaper circulating in the City."
9. The Appellant, together with several of the written submissions of area landowners indicated that they became aware of the proposed patio after reading of it in the newspaper. The Board has no opinion on the notification process of the proposed patio or whether a newspaper advertisement is an appropriate way to furnish notice to the neighbourhood.
10. Based on the written submissions, the Board is satisfied that proper notification procedures were followed with respect to the appeal.

PARKING / TRAFFIC / SAFETY

11. The Appellant and several written submissions (Exhibit I) expressed concern for pedestrian safety specifically with respect to removal of the existing sidewalk that runs in front of Cork'd.
12. The Appellant noted that the majority of parking stalls of Bower Plaza are provided at the opposite (south) side.
13. The Board received several written submissions that expressed concern for traffic access and egress. The Appellant also spoke to this. The north side access is almost directly across from the Bower Mall entrance which contributes to the activity level at the access. The Appellant stated that traffic has increased significantly over the last few years with the large box store developments nearby and stated that the north side access is heavily used and not well configured for the proposed patio.
14. The Applicant stated that he has submitted a request to Bower Plaza to install additional speed bumps in the alley for traffic calming.
15. The Development Authority stated that the LUB requires Bower Plaza to have 233 parking stalls and although 5 stalls will be eliminated to accommodate the proposed patio, Bower Plaza still exceeds the LUB with 242 stalls.
16. With respect to the sidewalk, the Development Authority stated that Bower Plaza has applied for an exterior upgrade and the pedestrian walkway is adequately addressed in that plan and will be marked. Also stated that the LUB requires only a 7.0 meter driving allowance in the parking lot and with the proposed patio there will still be a 12.0 meter driving allowance.
17. Other than the requirement of parking stalls to be accessible, there is nothing in the LUB that regulates the configuration of parking stalls on a lot. Further, the number of stalls provided at Bower Plaza exceeds the LUB requirement therefore the Board has no issue with respect to parking.
18. Similarly, the Board believes that the questions of traffic flow and pedestrian safety have been addressed. The driving allowance required by the LUB is 5.0 meters more than is required and a marked sidewalk will be completed as part of the exterior upgrades to Bower Plaza.

USE OF PROPOSED PATIO

19. The Development Authority stated that the proposed patio is considered an accessory use and would not increase seating capacity – seating on the patio is proposed to be removed from the interior of the business and thus should not increase noise. Because the drinking establishment is existing and there is no intensification, the Development Authority did not request a noise impact statement.
20. The Development Authority stated that the application was referred to the RCMP who had no objection to the proposed patio. The Development Authority advised that if residents have complaints relative to noise, they can be addressed by the RCMP.

21. Section 1.3 of the LUB provides the following definitions:

“Accessory Building means a secondary building on a site, the use of which is subordinate and incidental to that of the principal building and includes a garage, carport, greenhouse, playhouse, treehouse, tool shed, garden shed or workshop but does not include a temporary building.”

“Accessory Use means a use which is subordinate and incidental to that of the principal use.”

22. To determine whether or not the proposed patio is an accessory use, the Board considered the application of the LUB to other types of accessory buildings. For example, garages are specifically included in the definition of accessory building and are naturally and normally incidental to the use of a residence in that they are used for such things as sheltering vehicles and storing tools. They are not (or should not be) used for the same purpose as the residence which is used for such things as sleeping or eating.

23. The LUB defines ‘drinking establishment’ as having the primary purpose of selling alcoholic beverages for consumption which may also include the preparation and consumption of food. The Applicant stated that the proposed patio would be used to sell alcoholic beverages and food. Therefore the Board respectfully disagrees with the statement of the Development Authority that the proposed patio is an accessory use. The Board finds the use of the proposed patio to be a drinking establishment.

24. Having so determined, and based on the definitions above, the Board also finds that the proposed patio is not an accessory building within the definition of the LUB.

COMPLIANCE WITH LUB REGULATIONS

25. The Development Authority stated that the proposed patio complies with the C2B LUB regulations. This was not disputed.

26. However, s. 5.7(1)(e) of ‘General Commercial District Regulations’ in the LUB reads as follows:

“A drinking establishment in a C2A, C2B and C4 district shall 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. This prohibition shall not apply to a drinking establishment which is proposed as an accessory use, subject to the developer providing the Development Authority as part of the application for a development permit, an impact statement being an assessment of measures to be taken to ensure that noise or visual impacts from the drinking establishment will not negatively affect adjoining properties.”

27. The Board finds this section lacks clarity. The use of the words ‘shall not’ in the first statement is mandatory language, indicating that drinking establishments are not permitted to or must not abut a residential area or a lane, street or reserve that abuts a residential area. This section does not address how outdoor patios or expansions to existing drinking establishments are to be considered.

28. As previously noted, Cork'd is an existing drinking establishment that abuts a reserve that abuts a residential area. To interpret this section, the Board considered its intent. The Board believes that the intent of this section is to protect residential districts from potential negative impacts that may be generated by a drinking establishment and therefore believes that this section applies to the proposed patio. This is explored further in the next section of the decision.

IMPACT ON NEIGHBOURHOOD – USE, VALUE & ENJOYMENT OF PROPERTY

29. Section 687(3) (d) of the MGA speaks specifically to the power of the Board to allow for variances from the LUB and to the impact of an application on the neighbourhood. It states that the Board:

“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”

30. The Appellant stated that the proposed patio will devalue residential property and by extension, decrease tax revenue for The City of Red Deer. The Appellant also stated that increased business to the bar would be devastating to area resident's quality of life and enjoyment of their properties.
31. The Appellant stated that noise emanates from rear doors propped open and that it is reasonable to anticipate increased noise because there is no barrier to reduce it. The Appellant stated that there have been many calls to the RCMP and the drinking establishment regarding the noise but it is a ongoing problem.
32. In addition to written submissions, the Board heard from 3 landowners of Broughton Crescent who stated that their backyards face the alley and drinking establishment. One landowner stated that the distance from the corner of backyard to the drinking establishment is 39.3 meters (129 feet). The Broughton Crescent owners stated that customers leaving the drinking establishment fight and scream on the street and that it is loud enough to keep them awake when their windows are open.
33. The Appellant expressed concern regarding the permit 'staying with the land'. While the Appellant believes that the Applicant has good intentions of running the proposed development in a considerate, respectful manner, a future owner may not.
34. The Appellant did not have any additional evidence to support that the properties would decrease in value but stated that the proximity of the proposed patio will deter potential purchasers.
35. The Applicant stated that the intent is to operate the proposed patio similar to what is done currently at the Earls Restaurant - in the summer season the proposed patio would close at 10:00 pm. In the winter season the proposed patio would be used for storage of patio furniture etc. The Applicant advised that Cork'd is licensed for service until 2:00 a.m.

36. The Applicant advised that the current ratio of food to liquor sales is 50:50 and believes that the proposed patio will not have any more impact on the neighbourhood than already exists. On the contrary, the Applicant stated that if the patio is denied, it would result in promotion of more evening events.
37. The Applicant advised that the proposed patio will have speakers to provide background music, is to be constructed of composite linoleum decking with tempered glass partitions (3 feet 6 inches in height) and landscaping on the north side (facing Bower Mall).
38. The Development Authority stated that the proposed patio faces north towards commercial buildings and that any noise from the proposed patio towards the residential district on the east should be mitigated by the 13 meter wide municipal reserve. The Development Authority stated that the multi family building to the east does not have balconies and believes this contributes to any noise impact being negligible.
39. Photographs of the reserve located between the residences and the proposed patio show that it is relatively flat in nature with no landscaping or other barriers that would mitigate the travel of noise. Together with the written and verbal submissions from area landowners, the Board is convinced that there is an existing noise issue that materially affects the use and enjoyment of the neighbouring parcels of land.
40. While the existing drinking establishment is not before the Board for consideration, it is a logical conclusion that noise coming from the drinking establishment, which is currently indoors, would only increase if the drinking establishment was expanded to include an outdoor patio.
41. Further to this, the Board is also mindful of s. 3(5) of *The City of Red Deer Community Standards Bylaw #3383/2007* which prohibits drinking establishments from emanating noise such that it annoys or disturbs any person outside the boundary of the drinking establishment.
42. The evidence of noise mitigating measures before the Board included:
 - a. statement of the Development Authority that the width of the reserve should mitigate noise issues;
 - b. north side elevation plan showing tempered glass surrounding the proposed patio 3 feet 6 inches in height (Exhibit I page 15);
 - c. north side elevation plan showing landscaping surrounding the proposed patio 3 feet 6 inches in height (Exhibit I page 15);
 - d. statement of the Applicant that the proposed patio would close at 10:00 p.m. and that he intends for it to be operated in a courteous and respectful manner.
43. The Board finds that there is not adequate evidence to suggest that noise issues that may arise from the proposed patio have been adequately addressed.

CLOSING:

For the reasons detailed above, this appeal is allowed and the development is denied.

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 21st day of September, 2012 and signed by the Chair on behalf of all four panel members who agree that the content of this document adequately reflects the hearing, deliberations and decision of the Board.



R. Moisey, Chair
Subdivision & Development Appeal Board

EXHIBIT LIST

- Exhibit 1.....Agenda
- Exhibit 2.....Applicant written (typed) submission
- Exhibit 3.....Appellant written (typed) two page submission
- Exhibit 4.....Area Landowner written (typed) submission (Chilibeck)
- Exhibit 5.....Area Landowner written submission (Rumohr)
- Exhibit 6.....Letter of Authorization from Owner to Applicant