

SUBDIVISION & DEVELOPMENT APPEAL BOARD DECISION

PRESIDING OFFICER: Michael Kartusch

BETWEEN:

COOL SMILES DENTISTRY & ORTHODONTICS
Represented by Kennedy Agrios Oshry Law

Appellant

and

CITY OF RED DEER
Development Officer, Represented by Brownlee LLP

Development Authority

and

IBI GROUP ARCHITECTS (CANADA) INC. FOR O'CHIESE HOSPITALITY LIMITED
Represented by Clark Wilson LLP

Applicant

DECISION:

The Red Deer Subdivision and Development Appeal Board directs:

1. That the hearing of the appeal in this matter be heard on November 14, 2022, starting at 9:00 a.m. with the hearing recessing as necessary, adjourning at 5:00 p.m., and reconvening at 6:00 p.m. until 8:00 p.m. or earlier if all submissions are completed before then. If the hearing does not conclude on November 14, 2022, it will continue on November 15, 2022, starting at 9:00 a.m.
2. The appeal hearing will occur in person in the City of Red Deer Council Chambers located at 4914 – 48 Avenue, Red Deer, Alberta.
3. The dates for disclosure of evidence and argument are as follows:
 - i. October 21, 2022 – Development Authority to provide its complete file to the SDAB Clerk for distribution to the Appellant and Applicant
 - ii. November 3, 2022 – Appellant's submissions
 - iii. November 9, 2022 – Applicant's submissions and Development Authority's response, if any
 - iv. November 9, 2022 - Affected persons submissions

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*, R.S.A. 2000, c. M-26 as amended (the MGA) as amended.
2. The Board is established by The City of Red Deer, Bylaw No. 3680/2022, *Red Deer Tribunals Bylaw* (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 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 Chair.
4. The preliminary issues for the Board to decide were:
 - i. The date for the appeal hearing; and
 - ii. The dates for disclosure of evidence and argument.

BACKGROUND

5. On August 30, 2022, the Development Officer approved the Development Permit Application from IBI Group for a gaming establishment at 3310 – 50 Avenue, Red Deer.
6. The Appellant filled an appeal of this decision to the SDAB on September 19, 2022.
7. On September 23, 2022, the Board wrote to the parties advising of the statutory timeframe for a hearing and proposed October 18, 2022, as the hearing date. On the same day, counsel for the Appellant advised that she was not available October 18, 2022. On September 26, 2022, the Board provided alternate hearing dates and advised that it would convene a hearing within the hearing deadlines specified in s. 686(2) to address the hearing dates and disclosure dates.
8. The Board convened a preliminary hearing on October 18, 2022, to hear from the Appellant, Applicant and Development Authority regarding hearing dates and disclosure dates.
9. The Board entered into evidence the document found in Appendix A.
10. During this preliminary hearing, the Board noted that it is attempting to conduct the hearing as quickly as it can while making sure that everyone who wishes to speak has the opportunity. It is attempting to select dates that work for all parties. Given the magnitude of the hearing, there is the potential that one day may not be sufficient. When looking at dates, the Board wishes to select a second date for the continuation of the hearing.
11. The Board noted that it is considering a 1:00 p.m. start time with an adjournment at 5:00 p.m. for dinner and a 6:00 p.m. restart time for any hearing date selected.

SUMMARY OF EVIDENCE AND ARGUMENT:

12. The Board heard from the parties regarding the scheduling of the hearing dates for the merits of the appeal and disclosure dates. A summary of the submissions of the parties is set out below.

The Development Authority

13. The Development Authority stated that it would make their representatives available for a hearing and questioned whether the hearing would occur during the day or the evening. In addition, the Development Authority advised that it would prefer to have the Appellant's disclosure date to occur first, and then have the Development Authority and others to respond with an opportunity for the Appellant to respond if required.
14. The Development Authority noted that the parties with legal counsel should be represented by counsel of their choice and a date should be chosen to accommodate the parties. This may result in some delay. The Development Authority wanted to avoid a challenge to the proceedings on the basis of procedural fairness that legal counsel of choice was not available to make oral and written submissions.
15. The Development Authority stated it is in the process of ensuring it has a complete file after a change in staff and has agreed to provide a complete copy of the file to the Clerk of the Board by October 21, 2022. The Development Authority asked for an opportunity to respond to the Appellant's submissions in writing, if required.

The Appellant

16. The Appellant stated that there had been some discussion about the hearing date of November 14, 2022, among counsel for the Appellant, Applicant and Development Authority. The Appellant advised that counsel for the Applicant had not advised if it was available November 14, 2022.
17. The Appellant proposed November 14, 2022, for the merit hearing. For a hearing of this nature an adjournment of 30 days is not out of line.
18. Based on representations during the hearing that the Applicant's lead counsel could be replaced by alternate counsel, the Appellant suggested November 14, 2022, as the hearing date. The Appellant acknowledged that if the Applicant's choice of counsel is Mr. MacPherson, they are entitled to be represented by Mr. MacPherson. However, the Appellant cannot accommodate an earlier date than November 14. The Applicant is available November 21 and 22. As of November 23, Appellant's counsel is in a hearing for a week. The Appellant advised that its counsel's firm is small and there is no other counsel who could replace Ms. Agrios for a hearing of this nature.
19. In regard to disclosure, the Appellant has requested the Development Authority's entire file. The Appellant proposed that the order of disclosure be the Development Officer first, then the Applicant and then the Appellant, to prevent multiple rounds of responses. The Appellant advised that it has requested from the Applicant the parking calculations for the entire site, not just the development area.

20. The Appellant did not object to a written response of the Development Authority before the hearing, but expressed concerns about the scope of the response, noting that if the response is clarification, then it has no objection, but a rebuttal may be going beyond what is appropriate. The Appellant initially proposed November 7 as its date for disclosure, but in recognition that November 11 is a statutory holiday was agreeable to November 3, 2022.

The Applicant

21. The Applicant was concerned about the delay in the hearing of the merits of the appeal. The Applicant's position was that the hearing should have been held within 30 days from the date of the appeal, which period expires October 19, 2022. Its perception was that the Appellant is using delay tactics. The Applicant argued that it was important to schedule the hearing as soon as possible, and ideally within October.
22. The Applicant argues that s. 686(2) of the MGA requires the hearing to be held within 30 days after receipt of a notice of appeal. Although it did not object to a preliminary hearing within 30 days to set the hearing date on a consensus basis, it urged the Board to have consideration to the case law on adjournment which provides that the Board must balance fairness to the Appellant against the costs to the owner and the public interest. The Applicant referenced *Seabolt Watershed v. Yellowhead*, a 2002 Court of Appeal case, and a 2011 Court of Queen's Bench decision setting out factors to be considered when granting an adjournment, including prejudice arising from the adjournment and whether the applicant for the adjournment is attempting to delay proceedings. The Applicant did not provide the Board with copies of the referenced cases.
23. The Applicant had 2 reasons for its request for early dates.
- i. It argued that due to the economic situation, the Applicant would suffer prejudice. The delay would lead to increased economic costs to the Applicant. The Applicant argued that delaying the hearing would cause a delay in the issuance of the development permit and building permits. Due to the delay, the Applicant will face increased costs for construction on this \$7-8M project. In addition, the hotel is foregoing bookings in anticipation of a January 1, 2023, start which will not be able to be accomplished if the permits are delayed. The Applicant read out a letter from Mr. Sovenko of Eagle Builders LP (but did not provide a copy to the Board). This letter referenced the difficulty of guaranteeing pricing for extended periods of time and referenced possible cost increases to various elements of the construction materials. The Applicant argued that the total cost of the project could increase 6-7% if it is delayed.

The Applicant argued that lack of availability of the Appellant's counsel for weeks or months should be addressed by someone else in her firm to replace her. The Applicant argued that delaying the appeal hearing for years may make it economically pointless and referenced *Panhuis v. Lamont*, a 2000 Court of Appeal decision, arguing that an attempt to delay the hearing beyond early November is a delay tactic.

The Applicant stated that if lead counsel (Mr. MacPherson) is not available, then alternate counsel at his firm (Ms. Anderson) would be available at the earlier possible date.

- ii. The Applicant also referenced a brochure which it claimed was a smear campaign with racist tropes against the proposed development. The Applicant read the contents of the brochure to the Board (but did not provide a copy to the Board). The Applicant argued that the contents of the brochure has points in it similar to the concerns raised by the Appellant.
24. The Applicant stated they were available November 14, and at the end of October. If the hearing goes over to November 15, the Applicant's lead counsel has a commitment in Regina that day. In regard to disclosure, the Applicant stated that its most effective submissions would be made after the Development Authority's file was released and after the Appellant's submissions. Following a discussion of dates, the Applicant noted that November 9, 2022, for disclosure was attainable.
25. Following the discussion regarding disclosure dates, the Applicant stated that Mr. MacPherson was not available November 14 or November 15 for a hearing and asked for an earlier date. The Applicant stated that it was prejudiced by Mr. MacPherson not being available. Although available for the alternative proposed dates of November 21 and 22, the Applicant stated that it faced a difficult choice of 2 prejudices: the first of earlier dates without counsel of choice and the second later dates with counsel of choice. It stated that its choice was that of the earlier dates without counsel of choice, but it reserves the right to raise its concerns on appeal.
26. After hearing from the Applicant that lead counsel for the Applicant was not available for November 15, the Board re-canvassed various dates in late October and early November with the parties:

	Appellant	Applicant	Development Authority
October 27	Available during day only	Available (M. MacPherson and J. Anderson)	Available
October 28	Not available	Available (M. MacPherson and J. Anderson)	Available
October 31	Not available	Available (M. MacPherson and J. Anderson)	Available
November 7-8	Not available	Available	Available
November 9	Not available in the evening	Available	Not available
November 14	Available	Available (M. MacPherson and J. Anderson)	Available
November 15	Available	Available (J. Anderson)	Available
November 16	Not available	Available (M. MacPherson and J. Anderson)	Available
November 17	Not available	Available (M. MacPherson and J. Anderson)	Available

November 21	Available	Available (M. MacPherson and J. Anderson)	Available
November 22	Available	Available (M. MacPherson and J. Anderson)	Available
November 23	Not available	Unknown	Unknown

27. The parties agreed that if the Board selected November 21 and 22, the disclosure dates should move one week from the dates discussed.

FINDINGS AND REASONS

28. Although section 686(2) of the MGA provides that the Board must hold a hearing within 30 days, it is not unusual for a board to open an appeal hearing to preserve its jurisdiction and to adjourn the hearing to a mutually convenient date. That is the situation before this Board. The Board attempted to hold a merit hearing within the 30-day window, but this could not be accomplished due to scheduling issues of the various parties.
29. The Board provided notice of a preliminary hearing at which time the Board heard from the Appellant, the Applicant, and the Development Authority about possible dates for the appeal and disclosure dates. In setting these dates, the Board is mindful of its obligations to provide procedural fairness to the Appellant, the Applicant, the Development Authority, and any persons affected by the development permit in question. In coming to its decision about hearing and disclosure dates, the Board has attempted to balance various considerations: the right of the various persons to counsel of their choice; the desire for a speedy hearing; the need for adequate and timely disclosure for all persons who appear before the Board as well as for the Board itself. In weighing these considerations, the Board is aware that it cannot satisfy all of the interests of all of the parties.
30. At the conclusion of the hearing, the Board was faced with 3 possible hearing dates:
- i. October 27 with a “spill over” date of November 14, 2022
 - ii. November 14 with a “spill over” date of November 15, 2022
 - iii. November 21 with a “spill over” date of November 22, 2022
31. The Board first considered the October 27/November 14 dates. The Board has rejected these dates for the hearing for the following reasons. Although the start date is in October, thus satisfying the Applicant’s desire for an October hearing date, the Appellant’s counsel is not available into the evening. If the hearing does not conclude during the day, then the hearing would have to be adjourned for approximately 2 ½ weeks for the “spill over” date, which is not optimal. Further, if the hearing is October 27, there is very little time (only 9 days from October 18, 2022) for disclosure to occur. The Development Authority stated it would be providing the file on October 21. That would leave only 6 days for all parties to provide their submissions. The Board is of the view that such a tight timeline for submissions and responses would not be procedurally fair to any party, nor would it be fair to the Board which also needs to review the materials in preparation for the hearing. Also, the Board must provide at least 5 days’ notice of the hearing. Setting a hearing date of October 27, 2022 does not provide sufficient time for the Board to provide notice (which will include advertising).

32. The Board was then left with 2 options for hearing dates: November 14/15 or November 21/22. These options are also not optimal. For the November 14 and 15 dates, Mr. MacPherson, lead counsel for the Applicant is available for some or all of November 14 but is not available for November 15. All other counsel are available for those dates. These are the earlier dates and are only 4 weeks from October 18. All counsel are available for the November 21/22 dates, but these dates are 5 weeks from October 18, 2022. The Board notes the comments of the Applicant regarding the cost impacts from delaying the hearing. The Board also noted notes the comments of the Applicant that if faced with hearing dates on November 14/15 (earlier) but without Mr. MacPherson or later dates of November 21/22 with Mr. MacPherson, it would prefer the earlier dates.
33. In the face of the Applicant's comments about its choice for earlier dates and the availability of Ms. Anderson as well as the other counsel, the Board selects November 14/15 for the hearing. These dates are only a delay of 4 weeks from October 18 and the end of the 30-day period mentioned in section 686(2). The delay is relatively short, particularly given the size of the project (\$7-8M) and the interest that it is raising in the area (see the Applicant's comments about brochures etc.). The Board notes that the November 14/15 hearing dates provide time for disclosure and time for notices to be distributed. In light of the comments that Mr. MacPherson was available for November 14, but had to accommodate a hearing on November 15 in Regina, the Board has examined the hearing start time on November 14 and determined that the hearing will convene earlier, at 9:00 a.m.
34. Having selected November 14 and 15 for the hearing dates, the Board directs the following dates for disclosure of evidence and argument:
- i. October 21, 2022 – Development Authority to provide its complete file to the Board Clerk for distribution to the Appellant and Applicant
 - ii. November 3, 2022 – Appellant's submissions
 - iii. November 9, 2022 – Applicant's submissions and Development Authority's response, if any
 - iv. November 9, 2022 - Affected persons submissions
35. These dates were agreed by the Appellant, Applicant and Development Authority and give time for the Appellant to provide their submissions to the Applicant so it can respond to the Appellant's submissions. These dates also give the Board time to review submissions before the November 14 hearing. Although not specifically mentioned in the hearing, the Board has selected November 9, 2022, for affected persons to provide submissions, as they would be able to review Appellant's submissions.
36. The Board notes that the Applicant raised concerns with comments made in brochures circulating in the area. The Applicant did not attribute these brochures to the Appellant. The Board has placed no weight on the contents of the brochure as read aloud by the Applicant. The Board was not provided with a copy of the brochures. Moreover, the only issues before the Board are hearing dates and disclosure dates and the brochures are irrelevant to those determinations.

CLOSING:

37. For the above reasons, the Board sets above dates for the hearing of the appeal and the disclosure of evidence and argument.

Dated at the City of Red Deer, in the Province of Alberta, this 20th day of October 2022 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.



for: Michael Kartusch, Presiding Officer
Subdivision & Development Appeal Board

APPENDIX A

Exhibit A.1: Notice of Preliminary Hearing for Proposed Gaming Establishment 2 pages