

Appeal No.: 0262 002 2019
Hearing Date: July 4, 2019

SUBDIVISION & DEVELOPMENT APPEAL BOARD DECISION

CHAIR: M. Kartusch
PANEL MEMBER: T. Lacoste
PANEL MEMBER: F. Yakimchuk

BETWEEN:

RED DEER AND DISTRICT CHAMBER OF COMMERCE
Represented by Rick Moore, Reg Warkentin & Lindsay Knudson

Appellant

and

CITY OF RED DEER
Represented by Beth MacLachlan, Development Officer

Development Authority

DECISION:

The Red Deer Subdivision and Development Appeal Board denies the Appellant's appeal of the Development Authority's decision on June 7, 2019 which refused a development permit for a Dynamic Freestanding Sign on the lands located at 3017 50 Avenue (Lot 3, Block 1, Plan 132 1685) zoned C4 Major Arterial, 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.
2. The Board is established by The City of Red Deer, By-law No. 3619/2019, *Appeal Boards Bylaw* (April 1, 2019). 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

5. On May 30, 2019, the Appellant applied to The City of Red Deer for a development permit for a Dynamic Freestanding Sign on the lands located at 3017 50 Avenue (Lot 3, Block 1, Plan 132 685) zoned C4 Major Arterial, (the proposed sign) in Red Deer Alberta.
6. On June 7, 2019, the Development Authority refused the application on the grounds that the proposed development did not comply with the LUB as follows:
 - A. Section 11.8.2(1) of the LUB requires a Dynamic Freestanding Sign be located 100 m from a Residential District and the proposed sign is located 43 m, requiring a 57 m (57%) variance. Sections 11.4.3(1)(e) and 11.8.2(1)(a) allow the Development Authority to vary the required 100 m separation distance, however, only to a maximum of a 20% variance.
 - B. Section 11.11(2)(a) of the LUB requires a Dynamic Freestanding Sign be located along a boundary adjacent to an arterial road or collector Road. The proposed location of the Dynamic Freestanding Sign is located adjacent to a service road. Section 11.4.3(1) does not allow a variance to this regulation.
7. The Appellant filed an appeal of the refusal to the Board on June 11, 2019.
8. The Board entered into evidence the following:

Exhibit A.1:	Hearing Materials (14 pages)
Exhibit B.1:	Respondent Report dated July 4, 2019 (55 pages)
Exhibit B.2:	Aerial photos (3) and site plan (1) showing location, placement and separation distances (4 page)
Exhibit C.1:	Appellant Submission dated June 11, 2019 (8 pages)

SUMMARY OF EVIDENCE AND ARGUMENT:

The Appellant

9. The Board heard from the Appellant. They advised that the mandate of the Chamber of Commerce is to promote local business. They currently have approximately 150 members. If approved, the proposed sign would be used to promote local businesses, small businesses and non profits who are members in the Chamber of Commerce.

10. The Appellant stated that the existing freestanding, backlit, letter board sign is archaic and limited in ability. The Appellant advised that it would be cost prohibitive to build a new foundation for the proposed sign, so they propose to remove the existing letter board sign and use its foundation for the proposed sign.
11. With respect to the proposed setback from the property line, the Appellant stated that the existing sign is 0.4 m from the property line and they are not aware of any complaints concerning it or its location. Further, the Appellant stated that they maintain the green space for both the Chamber of Commerce building and the Servus Credit Union building.
12. The Appellant spoke about the residential area that is located to the east of the proposed site. The Appellant believes that the proposed sign will not affect the residential area because the sign will be V-shaped and face north-west and south-west.
13. Further, the Appellant argued that there are existing security lights located in the rear of the site that are brighter (more of a nuisance) than the proposed sign would be. The Appellant added that they plan to reduce the luminosity of the proposed sign below the minimum 350 nits between sunset and sunrise.
14. With respect to the requirement for the proposed sign to be located along a boundary adjacent to an arterial road or collector road, the Appellant stated that access to the majority of businesses along Gaetz Ave (50 Ave) is via a service road, not Gaetz Ave itself. The Appellant requested the Board consider that there are a number of signs on Gaetz Ave that are similar to the proposed sign, located along a service road.
15. The Appellant also submitted that Gaetz Ave is separated from the service road by an 11 m grass boulevard. Given that, the proposed sign will be located 27 m from Gaetz Ave, a distance that is easily visible yet not overly distracting to drivers.
16. The Appellant further argued that traffic accesses the service road from 30th Street and the service road is a dead end which carries traffic to only the Appellant's business and the Servus Credit Union.
17. The Appellant stated that the existing electronic message sign (located on Bremner Ave) is behind the residential area and not visible from the proposed sign location. They believe that this makes the requested variance of 52.03 m reasonable.

The Development Authority

18. The Board heard from the Development Authority who stated that the proposed sign does not comply with the LUB in 4 ways:

Regulation	Requirement in LUB	Proposed	Variance required
Setback from property line	s. 11.6.1: shall be located 1.0 m from a Boundary of a site	0.4 m	0.60 m (60%)
Proximity to another dynamic freestanding sign	s. 11.11(3)(b): shall be located a min of 300.0 m from another dynamic or electronic message sign	247.97 m	52.03 m (17.3%)
Proximity to a Residential District	s. 11.8.2(1): residential overlay district prohibits dynamic freestanding signs within 100.0 m s. 11.4.3(1)(e): DO can vary up to 10%; MPC up to 20; all other variances are prohibited	43.0 m	57.0 m (57%)
Location on a service road	s. 11.11(2)(a): shall only be located along a Boundary adjacent to an Arterial Road or Collector Road – variances not allowed in LUB	Located adjacent to a Service Road	100%

19. Notwithstanding this, the Development Authority stated that the denial was based on 2 factors - the proposed sign's proximity to a residential district and its location on a service road.
20. Section 11.4.3 of the LUB provides the Development Authority the ability to grant particular variances on sign permits as follows:

- “(d) the minimum separation distance between Signs, except for Billboard Signs which cannot be varied;*
- (e) the restriction of Dynamic Fascia Signs and Dynamic Freestanding Signs within 100.0 m of a Site located in or adjacent to a Residential District, subject to the following:*
- (i) without limited the ability of the Development Officer to refer applications to the Commission under Section 2.7(k), the development Officer may approve variances of up to 10%;*
- (ii) the Commission may approve variances between 10.1% and 20%; and*
- (iii) all variances over 20.1% are prohibited.*
- ...
- (h) setbacks.”*

21. The Development Authority acknowledged that the proposed sign is 0.4 m from the property line and that it would require a 0.6 m variance but stated that she has no objection to the setback and that the application was not refused on this basis.
22. The Development Authority stated that she also has no objection to the proximity of the proposed sign in relationship to the existing electronic message sign located on Bremner Ave. She stated that in addition to the mature landscaping, a number of commercial and residential buildings would separate the two signs. She stated that variances may be considered to the separation distances between signs.
23. The Development Authority stated that the application does not comply with the 'location criteria' found in s. 11.11(2)(a) of the LUB which allows freestanding dynamic signs to only be located along a boundary adjacent to an arterial road. The Development Authority submitted that the proposed development is located along a boundary adjacent to a service road, not an arterial road.
24. The Development Authority argued that the location of the proposed sign, adjacent to a service road makes this an improper location. Further, the Development Authority argued that allowing the proposed sign would directly contradict the express views of Council.
25. When asked what the considerations of Council were in relation to the sign regulations, the Development Authority advised that Council was presented with a number of different scenarios to demonstrate the effects of the regulations. Further, the Development Authority stated that if Council had intended to allow dynamic freestanding signs along service roads running parallel to an arterial road (Gaetz Ave), they could have included those locations in the LUB.

FINDINGS AND REASONS

26. All applications before the Board must comply with the use prescribed for the property. In this case, the property is zoned C4 in which a Dynamic Freestanding Sign is a discretionary use. All the information before the Board including the location, the existing sign, the photographs and statements of the Parties indicate that the use is appropriate on this site.
27. Section 11.4.3(2) of the LUB provides a list of suggested planning criteria that may be used to evaluate whether or not a variance (or variances) is justified. These include but are not limited to:
 - A. the size and location of the Site;
 - B. the design or construction of a Building or a Sign;
 - C. the Immediate Street Context;
 - D. whether the proposed Sign would unduly interfere with the amenities of the neighbourhood or materially interfere with or affect the use, enjoyment of value of neighbouring Sites;
 - E. the heritage value of a Sign or Building;
 - F. the topography or configuration of the site;
 - G. all applicable Council policies and guidelines;
 - H. applicable Statutory Plans.

28. In reviewing these factors, the Board found two reasons that could be used as justification for variances. First, the Immediate Street Context, which is commercial and has a number of similar signs. The proposed sign would fit well and be more aesthetically pleasing than the existing letter board sign. Second, the Board does not believe that the proposed Sign would unduly interfere with the amenities of the neighbourhood or materially interfere with or affect the use, enjoyment or value of neighbouring Sites (see also 'The Variance Test' starting at paragraph #45).
29. Additionally, the Board discussed the statement of the Appellant that the proposed sign would be promoting local business in an economic time where businesses are struggling (Exhibit C1 page 2). The Board is of the opinion that economic development, financial hardship and even potential negative impacts to the tax base are compelling arguments. However, the Courts have consistently held that these types of arguments are not rooted in planning and therefore are irrelevant.
30. Based on the arguments and evidence, the Board was not persuaded that the circumstances of this application warrant the magnitude or number of variances needed. However, given the fact that there is an existing sign in the exact location of the proposed sign that appears to be compatible with the area, the Board conducted an analysis of each variance.

100 m Setback from Property Line (60%)

31. With regard to the required 100 m setback from the property line, the fact that the existing sign is setback only 40 m and there are no identified traffic or pedestrian safety concerns is evidence to suggest this variance may not be unreasonable.

Proximity to Residential District (57%)

32. As is stated in s. 11.8.2(3) of the LUB, the intent of the Residential Proximity Sign Overlay District is to ensure the design, size and type of allowable signs located near residential districts support commercial and public service activity while being sensitive to the residential context.
33. The Board was persuaded that the proposed sign would support commercial and public service activity, in particular, the advertising of the non-profit members seems appropriate located near a high-density property (the apartment to the east).
34. Further, the Board heard from the Appellant that there are existing security lights that are brighter than the proposed sign would be. The Appellant also stated that the owner of the apartment building to the east supported the installation of the security lighting.
35. There was not much evidence to support this argument. However, the Board did find photos of the site showing areas to the rear of the building that would not be well lit by a standard light fixture. Therefore, the Board believes that to achieve their purpose – to provide a deterrent for unlawful activity – the existing security lights are more likely than not, brighter than the proposed sign.
36. In the event that the Board is incorrect in this determination, it also considered what impact the proposed sign would have on the residential area in the absence of the floodlights and finds that

any impact could be mitigated by imposing conditions on the proposed sign (e.g. hours of operation, rate at which the message changes).

37. The proposed sign will also face away from the residential area, which mitigates potential impact on the residential area. For these reasons, the Board believes that varying the residential setback requirements is reasonable.

Location – Adjacent to a Service Road

38. One of the two reasons cited for refusal by the Development Authority, was non-compliance with the LUB with respect to its location along the boundary of a service road. The LUB requires the proposed sign to be located adjacent to the boundary of an arterial or collector road. There were no arguments advanced to suggest that the site is not adjacent to a service road, or that Gaetz Ave is not an arterial or collector road.
39. The Appellant argued that the Board should consider the proposed development to be adjacent to the arterial road (Gaetz Ave) because the mailing address of the proposed development is Gaetz Ave, and there is no civic or physical address referencing the service road.
40. The Appellant also urged the Board to consider other existing signs along Gaetz Ave. Other than this statement, neither Party provided the Board with information regarding other existing signs on Gaetz Avenue (e.g. number, type and location). In the absence of such information, the Board is unable to place weight on the argument.
41. The Board was not convinced that the service road should be treated differently than Gaetz Ave and is of the opinion that in order for a site to be considered adjacent to a service road, the site would need to have a civic address that references the service road.
42. However, the Board reviewed the LUB regulations for signs and found instances where the regulations vary depending on whether the site is adjacent to an arterial road or adjacent to a service road. Therefore, Board believes that this is an indication that Council considered applications similar to the proposed sign and intentionally did not make a provision to enable them.
43. It is worthwhile noting that when the site is considered to be adjacent to the service road instead of the arterial road, the Appellant would have to remove or alter mature trees in order to place a sign adjacent to the arterial road.

Setback from existing electronic sign (17.3%)

44. The Board heard from the Parties that the existing electronic sign (located on Bremner Ave) is located on a different street, is not visible from the proposed sign and is separated by a number of commercial and residential buildings as well as mature landscaping. These are factors that would help mitigate or limit any potential impact on the residents in the area, and varying this regulation would be appropriate in this situation.

The Variance Test

45. The Board finds its authority and limitations in the MGA. Section 687(3) states:

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| <p>(3) In determining an appeal, the subdivision and development appeal board</p> <ul style="list-style-type: none">(a) must act in accordance with any applicable ALSA regional plan;(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 <i>Gaming, Liquor and Cannabis Act</i> 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,<ul style="list-style-type: none">(i) the proposed development would not<ul style="list-style-type: none">(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, |
| <p style="text-align: center;">and</p> <ul style="list-style-type: none">(ii) the proposed development conforms with the use prescribed for that land or building in the land use bylaw. |

46. The Board finds that Gaetz Ave is business focused. The Servus Credit Union sign located to the south appears to be larger than the proposed sign, and the photograph provided (Exhibit B1 page 28) shows signs in the distance to the north. The Board finds that the proposed sign is consistent with the existing area.

47. Further, the proposed sign is very similar to the existing sign. The proposed sign would not change the existing footprint, it would still have two posts, use the existing base and would not require altering of landscaping. The major differences are that the existing sign is two sided while the proposed sign is v shaped, and the display area would be changed from a backlit sign to one that is digitized.
48. Given the proposed sign's similarities to the existing one, and that s. 11.4.2(1)(b) of the LUB permits the Development Authority to "*impose any condition needed to mitigate the effects of the Illumination on Sites in a Residential District*" it was difficult to imagine that the proposed sign would have a negative impact on the surrounding area.
49. The Board believes that the proposed development meets the variance test.
50. Notwithstanding the above, s. 687(3)(a.3) of the MGA uses mandatory language - that the Board must make determinations (decisions) that comply with the LUB.
51. Further, the Board is mindful of s. 643(5) of the MGA that refers to Non-conforming use and non-conforming buildings. The section compels compliance with the LUB unless the Development Authority has been given minor variance powers:

(5) A non-conforming building may continue to be used but the building may not be enlarged, added to, rebuilt or structurally altered except

- (a) to make it a conforming building,**
- (b) for routine maintenance of the building, if the development authority considers it necessary, or**
- (c) in accordance with a land use bylaw that provides minor variance powers to the development authority for the purposes of this section.**

52. Three of the four variances needed to approve the proposed sign exceed 50%, more than half of what is required. So, while the Board finds that the proposed sign meets the variance test, it was not presented with a good reason, or something that would make this property unique, that would warrant the exercising of its variance power where the variances are not considered 'minor'.

CLOSING:

53. For these reasons, the appeal is denied.

Dated at the City of Red Deer, in the Province of Alberta, this 17th day of July 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.



FOR: M. Kartusch, 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** after the issue of this decision.

APPENDIX A

Documents presented at the Hearing and considered by the Board.

- Exhibit A.1: Hearing Materials (14 pages)
- Exhibit B.1: Respondent Report dated July 4, 2019 (55 pages)
- Exhibit B.2: Aerial photos (3) and site plan (1) showing location, placement and separation distances (4 page)
- Exhibit C.1: Appellant Submission dated June 11, 2019 (8 pages)