

Appeal No.: SDAB 0262 004 2018
Hearing Commenced: July 24, 2018

SUBDIVISION & DEVELOPMENT APPEAL BOARD DECISION

CHAIR: Petra Kitteringham
PANEL MEMBER: Tyler Lacoste
PANEL MEMBER: Dianne Wyntjes

BETWEEN:

DON & SILVIA GUNDERMAN
Represented by Diana Clark

Appellant

and

GINNY CHAPMAN
Represented by Matthew James, Chapman Riebeek LLP, Counsel

Applicant

and

CITY OF RED DEER
Represented by Beth McLachlan, Development Officer

Development Authority

DECISION:

The decision of the Development Officer is varied. The application for a Development Permit for the Discretionary Use of a Home Occupation (massage therapy), as shown on the plans dated June 19, 2018, and stamped as 'Approved', copies of which form part of the approval (collectively referred to as the 'Approved Plans') on the lands zoned R1, located at 9 Allen Close, legally described as Lot 6, Block 1, Plan 5026TR is approved subject to the following conditions:

- A. A development permit shall not be deemed completed based on this approval until all conditions except those of a continuing nature, have been fulfilled to the satisfaction of the Development Officer;
- B. All development must conform to the conditions of this development permit and the Approved Plans and any revisions thereto as required pursuant to this Approval. Any further revisions to the Approved Plans must be approved by the Development Authority;
- C. If repairs are necessary, the Applicant shall repair or reinstate, or pay for the repair or reinstatement, to original condition, any public property, street furniture, curbing, boulevard landscaping and tree planting or any other property owned by the City which is damaged, destroyed or otherwise harmed by the development or construction on the site. Repairs shall be done to the satisfaction of the City. In the event that the City undertakes the repairs the Applicant shall pay the costs incurred by the City within 30 days of being invoiced for such costs.
- D. There shall be a maximum of 15 client visits to the residential premises occupied by the home occupation per week, with no more than one client at any given time, and no more than 5 clients per day;
- E. The Hours of Operation shall be from 8:00AM – 9:00PM any day of the week and no client may be on the premises before or after the stated hours.

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 (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. The panel assigned to the hearing was originally comprised of Petra Kitteringham, Tyler Lacoste and Karen Howley. Ms. Howley advised that Mr. James (counsel for the Applicant) is a colleague. She stated that she never met the Applicant nor had any involvement with the file, she also stated that she believed that she could make a decision in a fair and unbiased manner.

4. The Appellant objected to Ms. Howley sitting on the panel. Ms. Howley was replaced with Dianne Wytjes.
5. None of the parties had any objection to the constitution of the Board. There were no conflicts identified by the Board Members.
6. There were no preliminary issues for the Board to decide.

BACKGROUND:

7. On June 19, 2018 the Development Authority approved a Development Permit for a Home Occupation (the 'Permit') on the lands located 9 Allen Close (Lot 6, Block 1, Plan 5026TR) in Red Deer, Alberta zoned as R-1 (Low Density Residential) District.
8. Because the nature of the business requires client visits to the home, the Permit is a discretionary use and can therefore be appealed. The Permit complies with s. 4.7(8) of the LUB which sets out the regulations that all Home Occupations must follow.
9. The Applicant indicated on the application that hours of operation would be from 8:00AM – 8:00PM. In addition to this, at time of approval, the Development Authority imposed 4 more conditions on the Permit including a restriction on the number of client visits allowed – a maximum of 15 per week; no more than one at a time; and a maximum of 5 per day.
10. The Appellant filed an appeal with the Board on July 5, 2018 outlining numerous concerns including increased crime and traffic, available parking, enforcement of restrictions and character of the Applicant.

NOTIFICATION

11. During the hearing, the Appellant expressed concern regarding the public notification given for the Permit.
12. The Development Officer stated that the Permit was advertised in accordance with the LUB. First, before the approval, a sign was placed on the property for 5 days (from June 4-8, 2018) that provided notice of the pending application as well as information explaining how to make concerns known.

13. No concerns were submitted prior to approval, though it was noted by the Appellant during the hearing that the sign used looks very similar to a 'no parking' or 'street sweeping' sign.
14. Subsequent to the approval, the Development Officer stated that the Permit was advertised in the local paper as required by the MGA.
15. After the appeal was filed, notice of the appeal hearing was issued to the Applicant, the Appellant, the Development Authority and 39 area landowners within 100m of the property. The Appellant stated that she was aware of an area landowner at the south end of the Close (outside the 100m radius), that is opposed to the Permit but who was not in attendance because they did not receive a notice.
16. The Appellant requested permission to canvass the landowners at the south end of the close for any concerns and submit them in writing to the Board after the hearing. The Board denied this request for the following reasons:
 - a. It would be procedurally unfair to the other parties;
 - b. The MGA and the LUB regulate how notice is to be given, who gets notice and the time notification period. The Board accepts the submission and evidence from the City that notice was given as required. This is supported by the written and verbal statements of the Development Authority and also the Hearing Materials (Exhibit A). Further, no one disputed that notice was not given in accordance with the MGA and the LUB.

The Board believes that the LUB and MGA requirements are intended to ensure all Parties receive a fair opportunity to express concerns, therefore the Board finds that there was adequate time between the scheduling of the hearing and the day of the hearing to gather additional information to be presented; and

- c. The Board does not believe that delaying the hearing or decision is in the best interest of the Parties to the hearing.

SUMMARY OF EVIDENCE AND ARGUMENT:

The Appellant

17. The Appellant argued that approval of the Permit will result in an increase of transient persons in the area which will increase levels of crime in the neighbourhood. The

Appellant provided several examples of recent criminal activity in the neighbourhood. The Appellant also stated that a friend who ran a massage therapy business from her home was forced to close her business and move from the site due to the level of crime.

18. The Appellant stated that the subject property has three vehicles plus a recreational vehicle and she believes the availability of parking is a concern. She argued that increasing the amount of people parking in the neighbourhood will make the current situation worse and cause traffic safety issues.
19. The Appellant stated that because of its configuration, vehicles have one way in, and one way out of the Close. Each time a client visits will impact the entire neighbourhood. The Appellant argued that the Close is the busiest between 5:00PM-10:00PM (prime family time) as most people are home from work. Adding visitors to this means more parked cars and traffic congestion.
20. The Appellant desires a safe place in the community to live and for children to play. She believes that approval of the Permit threatens that, and impacts the entire neighbourhood.
21. The Appellant expressed concern regarding enforcement of violations and the recourse available should a violation occur. The Appellant is of the opinion that the Applicant will not abide by the restrictions imposed on the Permit and requested that if the Board approves the Permit, the number of visits allowed be reduced from 15 to 5 per week.
22. The Appellant spoke to a previous situation where a traffic 'turtle' was posted to remind drivers about safety in the Close for the community. This signage was a bylaw violation that continued a few times, but was subsequently removed following inspection by the City's Bylaw Officer. The Appellant believes this speaks to the Applicant's character and likelihood of her complying with other bylaws.
23. The Appellant also described how there is a slope in front of her parent's home and in the winter, when the snow melts, it drains toward it. This results in a large pool of water/ice which is a hazard for both vehicle traffic and pedestrians.
24. Sylvia Gunderman spoke briefly and stated that her interests had been well represented by her daughter, and that while her daughter does not live in the Close, as a family member, she represents her and her husband's interests.

The Development Authority

25. The Development Authority stated that the application complies with the requirements for a home occupation found in s. 4.7(8). Massage therapy would not emit any noise, odour, smoke or dust. There is only one employee, no on site advertising, storage, commercial vehicles or retail sales.
26. The Development Authority stated that home occupations that have visits to the home are discretionary and that the LUB does not limit the amount of visitors to the site. The Development Authority evaluates each application on its own merit and can impose conditions such as the amount of visitors to the site to help ensure that the home occupation would not unreasonably interfere with the neighbourhood.
27. In its approval, the Development Authority imposed 4 conditions. The fourth condition, the number of client visits to the home were discussed at the hearing. The Development Authority stated that she worked with the Applicant to determine the number of client visits to the home.
28. Since January, the Development Authority has issued 21 home occupation licenses throughout the City, similar to the Permit in question. These similar home occupation licenses have client visitor restrictions as follows: eleven of those are permitted 10 or less visits per week; three are permitted between 10-15 visits; and seven are permitted between 15-20 visits per week.
29. With regard to hours of operation, the Development Authority referred the Board to the Letter of Intent supplied by the Applicant (Exhibit B page 9) which forms part of the Permit and states *"between the hours of 8am-8pm, 7 days a week"*.
30. The Development Authority believes that most of the concerns of the Appellant are not related to planning and that the Permit must be evaluated on planning principles. The Development Authority stated that there are other City procedures to deal with the non-planning issues raised by the Appellant.
31. Notwithstanding that, it is the Development Authority's opinion that the Permit would not cause excessive vehicular or pedestrian traffic or interfere with the peace and quiet of the neighbourhood.
32. The Development Authority advised that the LUB does not require the Applicant to provide off-street parking for this home occupation.

33. The Development Authority spoke to the enforcement of the LUB. Investigations of violations are conducted on a per complaint basis, provided the complaint is made in writing. Further, investigations are not just one-time or one day, depending on the nature of the complaint, they may be conducted over a period of time. Residents are encouraged to keep a detailed log of events and photographs to assist with the investigation. If the violation is confirmed, enforcement provisions in the LUB may be used.

The Applicant

34. The Applicant reiterated that the Permit complies with the LUB and that personal issues are not relevant.
35. The Applicant stated that the clientele will be friends, family and referrals and therefore not transient. She stated that as a parent, she would not permit transient people in her home as her children will frequently be present.
36. The Applicant agreed that she has three personal vehicles plus a recreational vehicle but argued that there is ample on-street parking for clients. The Applicant stated that attributing any parking or traffic problems in the Close to the Permit is a stretch.
37. With respect to hours of operation, the Applicant stated that most of the visits would take place during school hours and after dinner. If the Board allows the Permit she requested that the hours of operation be between 8:00AM – 10:00PM, seven days a week as an 8:00PM time slot is very popular. The length of an appointment is approximately 1.5 hours so the last client booking would be 8:00PM and gone by 10:00PM.
38. Two area landowners made submissions in support of the application, verbal and written, reiterating many of the Development Authority and Applicant comments.

FINDINGS AND REASONS

39. There is no dispute that the application complies with the LUB. The purpose of the LUB is as follows:

1.2 General Operative Clauses

(1) Purpose of the Land Use Bylaw

The purpose of this Bylaw is to regulate and control or to prohibit the use and development of land and buildings within The City to achieve the orderly, economical and beneficial development and use of land and patterns of human settlement for the overall greater public interest and for that purpose, amongst other things:

40. Given the purpose of the LUB and the fact that compliance with it is not in dispute, the Board accepts that the Permit meets the requirements of the LUB and finds that it is suitable for the property.
41. The Board must make decisions in accordance with its governing legislation. Specifically, this can be found in s. 687 of the MGA which states:

- (3) In determining an appeal, the subdivision and development appeal board
- (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 *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.

42. The Development Authority and the Applicant argued that the concerns of the Appellant are not planning considerations. The Board agrees that much of the Appellants' concerns such as crime, safety and clientele as well as the personal interactions and statements of other bylaw infractions are not planning considerations and the Board has no authority over them.
43. The Board believes that parking and traffic are relevant planning considerations, however, the evidence presented is that parking is not required for the application. The evidence did not convince the Board that one client visiting the home at a time would create extensive parking and traffic concerns.
44. The Board considered s. 687(3)(d)(i)(A) & (B) above, which instructs the Board, in certain situations, to consider whether or not the development would interfere with the neighbourhood, or the use, enjoyment or value of land. The Appellant's position is essentially, that the Permit would interfere with the neighbourhood and affect the use or enjoyment of land.
45. The Development Authority explained that the regulations for Home Occupations and conditions imposed on permits help to ensure that Home Occupations do not negatively impact the surrounding neighbourhood. The Development Authority also explained the procedures in place for investigation and enforcement of violations. The Board is convinced that the regulations are adequate for the nature of the business.
46. The Development Authority approved the Permit based on hours of operation from 8:00AM – 8:00PM, 7 days a week with a maximum of 15 client visits per week, with no more than one client at any given time, and no more than 5 clients per day. The Appellant requested that the Board reduce the maximum visits allowed to five clients per week. The Applicant requested that the Board increase the hours of operation to from 8:00AM - 10:00PM, 7 days a week.
47. Based on the representation of the Applicant that a large number of clients prefer an 8:00PM time slot and that it was her original intention to have the last appointment of the day begin at 8:00PM (finishing before 10:00PM), the Board varies the hours of operation to 8:00AM to 9:00PM. Further, many businesses of this nature close by 9:00PM and as such, the Board finds this closing time to be acceptable.

CLOSING:

48. For the reasons detailed above, the Permit is approved with conditions as stated earlier.

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 07th day of August, 2018 and signed by the Chair on behalf of all three 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

EXHIBIT LIST

- EXHIBIT A: Hearing Materials - 15 pages
- EXHIBIT B: Development Officer (Respondent) Report – 40 pages
- EXHIBIT C: Applicant Report – 2 pages