

Appeal No.: 0262 001 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 3119 49 Avenue (Lot K, Plan 4213 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:

5. On December 07, 2017, the Appellant applied to The City of Red Deer for a development permit for a billboard sign on the lands located at 3119 49 Ave (Lot K, Plan 4213 MC) which is zoned C4 (Commercial Major Arterial District) in Red Deer, Alberta.
6. On December 11, 2017, the LUB was amended to add regulations applicable to billboard signs.
7. 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 is located within 100 metres of a residential district, which is prohibited; and
 - B. The proposed Billboard Sign is located within a 500.0 m radius of another Billboard Sign, which is prohibited.
8. The Appellant filed an appeal of the refusal on January 25, 2018.
9. The hearing commenced and was adjourned on February 21, 2018. At the outset of the hearing, the Board noted that in addition to the matter described above, there were two more appeals scheduled to be heard – SDAB 0262 002 2018 (6880 50 Avenue) & SDAB 0262 003 2018 (4676 61 Street), both involving similar applications with the same persons representing the Appellant and the Development Authority.
10. 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.
11. The Board entered into evidence the following:

Exhibit A:	Hearing Materials (pages 1-7)
Exhibit B:	Respondent Report dated February 21, 2018 (83 pages)
Exhibit B.2:	Color Copy of Map from page 66 of Exhibit B (1 page)
Exhibit C:	Appellant Submission dated February 15, 2018 (35 pages)
12. 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.
13. 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.

14. On March 22, 2018, with all original panel members and Parties present, the Board confirmed the evidence entered on February 21, 2018 and asked the Parties if they had any additional submissions to be made. There were none.

SUMMARY OF EVIDENCE AND ARGUMENT:

The Appellant

15. The Board heard from the Appellant. Speaking on behalf of the Appellant were Rich Donadt and Dean Fraser of Go Outdoor Advertising.
16. 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.
17. 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.
18. The Appellant argued that if the changes to the LUB were made specifically to disallow the billboard applications, and that because 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.
19. 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.

The Development Authority

20. The Board heard from the Development Authority. Speaking on behalf of the Development Authority were Michelle Baer, City Solicitor and Beth Maclachlan, Development Officer.
21. The Development Authority acknowledged that the application was refused based on the ‘new’ LUB regulations (adopted December 11, 2017).
22. 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.

23. 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.
24. 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. Hence, the Development Authority stated that the application does not comply with the 'location criteria' found in s. 3.4(4)(b)(ii)(2) of the LUB, which prohibits billboards from being located within 100.0 m radius of a residential district, nor does it 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.
25. To support this, the Development Authority provided excerpts of the LUB as well as an aerial photograph showing a residential area located immediately east of the proposed site, a second residential area located to the north and the location of two existing billboard signs in the area – one within 275 m and a second within 400 m of the proposed development.
26. The Development Authority submitted that waiving or varying the siting and location criteria is outside the authority of the Development Authority as per s. 3.4(4)(e)(i) of the LUB 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."*
27. 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.”.

However, it is the position of the Development Authority that waiving the location criteria and varying the siting criteria (by 60% and 73% for the existing billboards) is excessive and would be an abuse of the Board’s power.

28. 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.
29. The Development Authority submitted that approving the proposed development would be, in effect, ignoring the messages from City Council that a billboard sign is not an appropriate use next to a residential district and that limiting the proximity of billboard signs to each other is an important step towards limiting the proliferation of billboard signs in the community.

FINDINGS AND REASONS

What is the Operative Law?

30. In order for the Board to consider the application, the Board must first determine if the December 2017 amendments apply to the application.
31. 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.
32. 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’.
33. 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 F) 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 is filed.
34. 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.
35. 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.

36. 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.
37. 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.
38. The Board finds that the amendments made to the LUB in December 2017 apply to this application.

Should the application be approved?

39. The Development Authority argued that the application should not be approved because it is not an appropriate use of the site - it does not comply with either the location or siting criteria found in the LUB and that waiving or varying the location or siting criteria is excessive for this application and approval could be considered an abuse of the Board's variance power under s. 687(3)(d).
40. The Appellant believes that the application is similar to other applications that have already been approved.
41. Section 3.4(4)(a)(i) of the LUB states that a billboard sign should respect the immediate street context that it is located in. The LUB provides that the immediate street context refers to 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.
42. Immediately east of the proposed site is a parcel zoned R2 Residential (Medium Density) District. One of the residential buildings on that site is directly adjacent to the proposed billboard sign.
43. There is a second residential development located across 32 Street to the north. This parcel is zoned R3 Residential (Multiple Family) District. One of the residential buildings on that site faces the proposed site and looks directly onto the location where the billboard is proposed to be located.
44. The Board finds that the proposed development does not respect the immediate street context as it is in close proximity to a residential neighbourhood. Thus it is non-compliant with the LUB with respect to location criteria.
45. The proposed development is within 500.0 m of two existing billboard signs. This was not contested, thus the application is non-compliant with the LUB with respect to siting criteria.
46. Nevertheless, the Board considered its authority under s. 686 of the MGA to approve the development. The Board has not been provided with a compelling reason to consider waiving the

location or siting criteria requirements given the significant amount of residential development in the area that is in close proximity to the proposed development.

47. For these reasons, the appeal is denied.

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 1-7)
- Exhibit B: Respondent Report dated February 21, 2018 (83 pages)
- Exhibit B.2: Color Copy of Map from page 66 of Exhibit B (1 page)
- Exhibit C: Appellant Submission dated February 15, 2018 (35 pages)