

Appeal No.: 0262 003 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 two billboard signs on the lands located at 4676 61 Street (Unit A, Condominium Plan 102 1595) 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 two billboard signs on the lands located at 4676 61 Street (Unit A, Condominium Plan 102 1595) which is zoned I1 (Industrial Business Service 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. Billboard signs must be located along a boundary adjacent to an arterial road and the proposed billboard signs are located along the boundary of a collector road; and
 - B. Only one billboard sign is allowed on a site.
8. The Appellant filed an appeal of the refusal on January 25, 2018.
9. The hearing was the last of three hearings that commenced and were adjourned on February 21, 2018. All three hearings involve similar applications with the same persons representing the Appellant and the Development Authority.
10. At the outset of the first hearing (SDAB 0262 001 2018), 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 13-17)
Exhibit B:	Respondent Report dated February 21, 2018 (78 pages)
Exhibit B.2:	Colour Copy of Map from page 65 of Exhibit B (1 page)
Exhibit B.3:	The City of Red Deer, By-law No. 3221/99, <i>The City of Red Deer Cost Shareable Arterial Roadway Transportation System Bylaw</i> (April 26, 1999) (7 pages)
Exhibit C:	Appellant Submission dated February 15, 2018 (35 pages – attachment reference 0262 001 2018)
Exhibit C.2:	Aerial photos of the site (colour, 2 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. The Clerk then provided the information referred to in paragraph 12 above to all Parties and the Board. This was entered into evidence as:

Exhibit C.3: Appellant Submission (37 pages – attachment reference 0262 003 2018)
15. The Chair asked the Parties if they had any additional submissions to be made. There were none.
16. The Chair asked the Parties if they wished to speak to Exhibit C.4. After a brief recess to consider, they did not.

SUMMARY OF EVIDENCE AND ARGUMENT:

The Appellant

17. The Board heard from the Appellant. Speaking on behalf of the Appellant were Rich Donadt and Dean Fraser of Go Outdoor Advertising.
18. 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.
19. 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.
20. The Appellant argued that if the changes to the LUB were made specifically to disallow the billboard applications, and 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.
21. 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.
22. One of the reasons the Development Authority denied the application is because the siting criteria found in s. 3.4(4)(c)(i) of the LUB prohibits more than one billboard from being located on a site. The Appellant stated that if the Board chose to consider the application under the ‘new’ LUB, they would amend their application by removing the proposed sign to the south and that all other aspects of the application would remain the same.

23. The Appellant also addressed the requirement relating to billboard signs as found in the location criteria of the LUB (s. 3.4(4)(b)(i)), that a billboard sign be located along a boundary adjacent to an arterial road. The Appellant argued that the site is a corner lot and that the proposed billboard signs would be located along 48th Avenue, not 61st Street.
24. The Appellant also argued that the proposed development conforms to the surrounding area which is industrial.
25. In support of these arguments, the Appellant submitted Exhibit C.2 – two colour aerial photographs of the site and the area immediately surrounding it.

The Development Authority

26. The Board heard from the Development Authority. Speaking on behalf of the Development Authority were Michelle Baer, City Solicitor and Beth McLachlan, Development Officer.
27. The Development Authority acknowledged that the application was refused based on the ‘new’ LUB regulations (adopted December 11, 2017).
28. 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.
29. 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.
30. 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.
31. 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.”.

32. The Development Authority further argued that it is essential for the Board to consider the LUB regulations which, they submitted, provide express, clear direction from Council when considering applications for billboard signs. The Development Authority argued that the regulations speak to where billboard signs are appropriate – which is in areas with high volume, vehicular traffic roadways (arterial roads).
33. The Development Authority stated that 48th Avenue is not an arterial road as per Exhibit B.3 (The City of Red Deer, By-law No. 3221/99, *The City of Red Deer Cost Shareable Arterial Roadway Transportation System Bylaw* (April 26, 1999)) which shows and lists 48th Avenue as being an arterial road only from Ross (50th) Street to 45 Street.
34. The Development Authority argued that the placement of billboard signs on roads other than arterial roads, such as 48th Avenue, is visually distracting and can in some cases be considered unattractive. Therefore Council, by way of the LUB has restricted their locations as being adjacent to arterial roads.
35. It is the Development Authority’s position that the proposed development does not fit with the immediate street context with respect to the lower volume of traffic on collector roads.
36. The Development Authority also addressed the siting criteria regulation that only one billboard sign shall be placed on a site. It is the position of the Development Authority that approving the proposed development would require the Board to waive the siting criteria entirely and that such a variance could be considered an unreasonable exercise of discretion of the Board.

FINDINGS AND REASONS

What is the Operative Law?

37. In order for the Board to consider the application, the Board must first determine if the December 2017 amendments apply to the application.
38. 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.

39. 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*'.
40. 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 G) 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 for development is filed.
41. 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.
42. 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.
43. 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.
44. 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.
45. The Board finds that the amendments made to the LUB in December 2017 apply to this application.

Should the Application be Approved?

46. The Development Authority's Exhibit B.3 identifies the location of arterial roads within the City of Red Deer. The Board is persuaded that the portion of 48 Avenue on which the proposed development is located, is not an arterial road as specified within the exhibit, therefore the Board finds that the proposed development does not comply with the location criteria established in the LUB.
47. Notwithstanding this, the Board may approve a development that does not comply with the LUB if it is convinced that the proposed development would not unduly interfere with the amenities of the neighbourhood, or materially interfere with or affect the use, enjoyment or value of the neighbouring parcels of land (s. 687 MGA).

48. It is the Development Authority's position that collector roads have a lower volume of traffic than arterial roads and that because of this; the proposed development does not fit with the immediate street context.
49. The Appellant argued against this point, stating that the proposed location is industrial in nature.
50. The Board believes that it is likely that there are many areas of the City in which a proposed billboard sign could be seen from an arterial road while not being located on an arterial road (as is the case of the subject).
51. The Board agrees with the Development Authority that to approve the application, it would effectually be waiving the location criteria in the LUB. The Board finds waiving of the location criteria to be excessive and it is not persuaded to exercise its discretion based on the arguments presented.
52. With regard to the siting criteria, s. 3.4(4)(c)(i) of the LUB, which prohibits more than one billboard sign on a site, the Board heard from the Development Authority that the LUB regulations provide clear guidance when considering applications for billboard signs and that Council for The City of Red Deer adopted them after receiving public input regarding sign proliferation.
53. In support of this, the Development Authority provided a report that Council used in determining the regulations which includes a summary of the input received and the rationale for the resulting regulations.
54. In order to comply with the siting criteria, the Appellant offered to amend the development permit application by removing one of the billboard signs. While an Appellant may be able to amend an application before the Board, the Board finds that it would be immaterial to the outcome in this appeal, the Board having not been persuaded to waive the location criteria.
55. For these reasons the appeal is denied.

CLOSING:

Dated at the City of Red Deer, in the Province of Alberta, this 4th 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.

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