THE CITY OF
Red Deer
Subdivision & Development Appeal Board

Appeal No.: SDAB 0262 006 2017
Hearing Commenced: 29 November 2017

SUBDIVISION & DEVELOPMENT APPEAL BOARD DECISION

CHAIR: Petra Kitteringham
PANEL MEMBER: Tyler Lacoste
PANEL MEMBER: Frank Yakimchuk

BETWEEN:

LEGACY INC.
Represented by Allan Fertig, Director
Shari Lewis, AltaLaw LLP, Counsel

Appellant

and

CITY OF RED DEER
Represented by Erin Stuart, Inspections & Licensing Manager
Alifeyah Gulamhusein, Brownlee LLP, Counsel

Development Authority

DECISION:

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. 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 October 24, 2017 the Development Authority issued a Stop Order on the lands located at the easterly portion of SE ¼ Sec. 36 38-28-W4, totaling approximately 1.65 ha in area, adjacent to the QEII Highway, in Red Deer, Alberta (the subject lands).

6. Excerpt from the Stop Order:

What is being contravened	The development at SE ¼ Sec.36 38-28-W4 was commenced without a Development Permit, which contravenes *The City of Red Deer Land Use Bylaw 3357/2006* (the "LUB"). Section 2.2(1) of the LUB states that no person shall commence any development unless the development conforms to this Bylaw and a Development Permit, if required, has been issued. (Relevant sections of the LUB are attached for your reference.)
Action to be taken; time limit	You are required to remove all vehicles and structures from the Site by November 24, 2017. As the Site is currently zoned A1 Future Urban Development District, in which motor vehicle, recreational vehicle and trailer sales, service and repair are neither a Permitted nor Discretionary Use, the Site must be rezoned to an appropriate District and subsequently Development Permit approval must be obtained should you wish to continue the current use.

7. The Appellant is the owner of the subject lands and filed an appeal with the Board on November 3, 2017.

8. By mutual consent, the hearing commenced on November 29, 2017 and was adjourned to December 13, 2017. On December 13, the hearing continued and was again adjourned. By mutual consent the hearing reconvened on March 14, 2018.

9. The subject lands were annexed by The City of Red Deer from Red Deer County on November 1, 2007. Prior to annexation, the subject lands were zoned Ag – Agriculture District in which 'Warehousing and Storage – limited to storage of recreational vehicles and self-storage' was a discretionary use.

10. After annexation, the subject lands were re-zoned A1 – Future Urban Development District by The City of Red Deer, in which motor vehicle, recreational vehicle and trailer sales, service and repair are neither a permitted or discretionary use.

SUMMARY OF EVIDENCE AND ARGUMENT:

The Appellant

11. The Board heard from the Appellant. Speaking on behalf of the Appellant were Allan Fertig, a director of Legacy Inc., and Shari Lewis, counsel for the Appellant (collectively the Appellant).

12. The Appellant argued that the Stop Order was not issued properly because the subject lands are not a 'development' as defined in s. 616(b) of the MGA. The Appellant stated that there has been no change of use or change in intensity of use of the subject lands – more specifically, there has been no development on the subject lands since 2006.

13. The Appellant stated the development of the subject lands for industrial use began in 2006 and was complete prior to annexation. It is the Appellant's recollection that a permit was obtained from Red Deer County. The Appellant was not able to provide a copy of the development permit nor could Red Deer County (Ex C Tab D) when contacted by the Appellant.

14. In lieu of the development permit, the Appellant submitted a number of other documents in support of its argument that a development permit had been issued for the use - including Red Deer County assessment and tax notices dated 2003 and 2007 (Ex C Tab E) that show a change in use; a cheque in the amount of $429,000 to the order of Reinhart Oilfield Services for stripping, hauling a 4 acre lot; handwritten notes, telephone messages and faxes with handwritten notes and drawings and utility locates.

15. The Appellant argued that the tax assessments are an acknowledgement of the development by Red Deer County and that he would not have undertaken such expense if the development had not been approved and it is unreasonable to conclude that a savvy businessman would proceed with a development when a permit was required. Further, the Appellant argued that the Development Authority was aware of the use at the time of annexation.

16. The Appellant also argued that the development is consistent with the uses identified in multiple statutory plans of both the County of Red Deer and the City of Red Deer as follows:

    A. The City of Red Deer Queens Business Park Industrial Area Structure Plan (Exhibit F);
    B. The City of Red Deer Municipal Development Plan (Exhibit G);
    C. The County of Red Deer Municipal Development Plan (Exhibit J Tab 7);
    D. The County of Red Deer Burnt Lake Area Structure Plan (Exhibit J Tab 8).

17. The Appellant stated that the development on the subject lands is protected under s. 643 of the MGA which allows for allows for non-conforming uses because the current City of Red Deer zoning (A1) was put into place in December 2007 which was after the subject land was developed.

18. The Appellant argued that its ability to present an adequate defence has been prejudiced by a lengthy delay (11 years) and the City's objection to the proposed development. Given the time lapse, the Appellant further argued that it is unfair to place the burden of proof on the Appellant. In response to questions from the Board, the Appellant clarified that it had sufficient opportunity to present its evidence and argument to the Board, but had concerns about its ability to find documents.

19. The Appellant requested the Board issue a permit in accordance with s. 640(6) of the MGA if the Board finds that the Stop Order was properly issued.

The Development Authority

20. The Board heard from Erin Stuart, Inspections & Licensing Manager, and Alifeyah Gulamhusein, counsel for the Development Authority (collectively the "Development Authority").

21. The Development Authority stated that there was development on the subject lands which is occurring without a development permit. The Development Authority stated that the City of Red Deer had not issued a development permit for the use. The Development Authority had no evidence that Red Deer County had issued a development permit for the subject lands before the subject lands were annexed in 2007. The lands adjacent to the subject lands were re-zoned (with a subsequent development permit) in 2000 – 2001. The Development Authority referred the Board to evidence of this at Ex B, Tab F-J which includes: an administrative report to Red Deer County Council, the Minutes of the November 7, 2000 Red Deer County Council meeting, application for a development permit, and subsequent copy of the (unsigned) development permit.

22. The Development Authority stated the adjacent lands, and evidence referred to above, were, like the subject lands, annexed in 2007. Given that the missing development permit is alleged to have been issued in 2006 or2007, it is likely that a permit has not been provided to the Appellant by the County because it did not or does not exist.

23. Further, the Development Authority noted that while the Appellant states that he does not keep records that long, the Appellant was able to provide documents from 2003, prior to the time frame when the development permit was to have been issued (Ex C Tab E).

24. The Development Authority submitted that statutory plans such as Area Structure Plans and Municipal Development Plans do not determine land use or allow for a permit to be issued. Although statutory plans have a hierarchy of application, there is no provision that provides for the LUB to be read down in the event of a conflict or inconsistency. In support of this position, the Development Authority referred to *Hartel Holdings* v. *Calgary* and *Spruce Grove* v. *Parkland* - Supreme Court of Canada and the Alberta Court of Appeal cases that held that in the event of an inconsistency between a statutory plan and the LUB, the LUB will prevail.

25. Further, the Development Authority stated that it is the LUB that puts statutory plans into practical application and quoted the City of Red Deer Queens Business Park Industrial Area Structure Plan (Exhibit F, p 5-1): *"subdivision of land within the plan area is subject to subsequent successful rezoning of the land. The majority of the lands will remain within the A1 Future Urban Development District until such time that municipal services are provided to these lands and the rezoning process occurs".*

26. In response to the Appellant's argument about lawful non-conformity, the Development Authority agreed that s. 643 of the MGA allows for protection or 'grandfathering' of legal non-conforming developments '....IF a development permit has been issued.' However, because a development permit does not exist for the development - either pre annexation or post annexation, the Appellant is unable to claim status under s. 643.

27. Further, the Development Authority argued that at the time The City of Red Deer re-zoned the subject lands from Ag to A1, the Appellant was aware that the land was not appropriately zoned. In support, the Development Authority provided copies of the The City of Red Deer Council Meeting Minutes of December 17, 2007 (Ex L) and The City of Red Deer Attendance Sheet – Industrial Annexation Rezoning Public Meeting of November 7, 2007 (Ex M).

28. The Development Authority stated that the Appellant has not made application to The City of Red Deer for re-zoning or development. This was not contested by the Appellant.

29. The Development Authority objected to the Appellant's request for the Board to issue a development permit if it finds that the stop order was validly issued because while the LUB does allows a development authority to approve a permitted or a discretionary use, the Board may not vary a use. Further, the Development Authority noted that s. 687(3) of the MGA allows the Board to issue a permit even if the development does not comply with the LUB if it would not unduly interfere…..AND the proposed development conforms with the use.

30. The Development Authority also noted that the Appellant was and is aware that re-zoning and permitting is required, and referred the Board to the email between the Development Authority and the Appellant in 2015 (regardless of the land it applies to) found at Ex B Tab D.

31. The Development Authority went on to add that, the current zoning (A1) was created specifically by The City of Red Deer when the lands were annexed for the purpose of allowing existing permitted uses to continue until such time as the lands are developed. The Appellant was made aware during that process that zoning and permitting are required (Ex L & Ex M).

FINDINGS AND REASONS

32. This appeal concerns the issuance of a stop order by the Development Authority in relation to the subject lands.

33. In this appeal of a stop order, the Development Authority must establish that there is a development occurring on the subject lands, and that there is no development approval.

IS THERE AN EXISTING DEVELOPMENT?

34. In order for the Board to uphold a stop order, it must determine if the Development Authority has established that there is a development occurring on the subject lands.

35. The Development Authority provided photographs showing trailers on the subject lands.

36. The Appellant argued that the Stop Order was not issued properly because the subject lands are not a 'development' as defined in s. 616(b) of the MGA. The Appellant stated that there has been no change of use or change in intensity of use of the subject lands – more specifically, there has been no development on the subject lands since 2006.

37. The Board understood the Appellant's argument to be that there is no development occurring on the subject lands because the use has been existing on the lands since 2006 (before the subject lands were annexed to the City of Red Deer). The Appellant's position appears to be that since the use pre-existed the annexation, it does not constitute a development.

38. The Board notes that the definition of "development" (which is the same in both the MGA and the LUB) is the following:

"development" means
(i) an excavation or stockpile and the creation of either of them,
(ii) a building or an addition to or replacement or repair of a building and the construction or placing of any of them on, in, over or under land,
(iii) a change of use of land or a building or an act done in relation to land or a building that results in or is likely to result in a change in the use of the land or building, or
(iv) a change in the intensity of use of land or a building or an act done in relation to land or a building that results in or is likely to result in a change in the intensity of use of the land or building;

39. The "development" in question is the use of the subject lands for motor vehicle, recreational vehicle and trailer sales, service and repair use, which is a change in use from the pre-existing agricultural use.

40. The Board is not persuaded by the Appellant's argument which is, in essence, that there is no development because the change in use from agricultural to industrial occurred before the annexation. The evidence before the Board is that the Appellant is operating a motor vehicle, recreational vehicle and trailer sales, service and repair use on the subject lands. The Appellant admitted that this use was being conducted on the lands (as supported by its own evidence of assessment and tax notices). The Appellant is arguing both that it is not a development (see the argument in this paragraph 40) and that it has a permit for the development (see paragraph 42). These arguments cannot co-exist. The Board rejects the argument that what is occurring on the subject lands is not a development.

41. The Board finds that there is a "development" within the meaning of the MGA occurring on the subject lands.

IS THERE AN EXISTING DEVELOPMENT PERMIT FOR THE USE FROM EITHER COUNTY OR CITY?

42. The Appellant's position is that the stop order should be overturned because it does have development approval for the use. However, the Appellant stated that it did not keep a copy of the development permit and the County could not provide a copy of the development permit to it. In support of its argument that there was development approval for the use on the subject lands, the Appellant provided evidence which it stated showed that there was development approval. That evidence (see paragraph 14) included Red Deer County assessment and tax notices dated 2003 and 2007 (Ex C Tab E) that show a change in use, the cheque in the amount of $429,000 to the order of Reinhart Oilfield Services for stripping, hauling a 4 acre lot; handwritten notes, telephone messages and faxes with handwritten notes and drawings and utility locates.

43. The Board considered the Appellant's evidence and finds it to be inconclusive – specifically:

   A. Cheque: The cheque is payable to Reinhart Oilfield Services, and not Red Deer County. This cheque may indicate that development occurred, but it does not indicate the location or provide information that municipal development permission has been granted for the

development. As such, it does not persuade the Board that Red Deer County has granted development approval for the use.

B. Assessment and Tax Notices: The Appellant argued that the assessment and tax notices are evidence of development approval. The Development Authority argued that assessment and tax notices have no bearing on land use as set out in the MGA. A planner cannot impose a value on an assessment because of what is permitted to be developed there, nor can an assessment stand in the stead of land use permission. The Board accepts that the assessment and tax notices show that the land has been developed. However, the Board is familiar with the MGA provisions and acknowledges that the areas of planning and taxation are separate and must be administered separately. The fact that there is development occurring on lands which is assessed and taxed by a municipality is not evidence in support of development approval for the use. Therefore, these documents do not persuade the Board that Red Deer County issued a development permit for the use.

C. Telephone messages, faxes, utility locates: The Appellant argued these document support development approval for the use on the subject lands. The Board reviewed them and notes that they do not reference a development permit and, in some cases it is not clear that they are in reference to the subject land. As a result, these documents do not persuade the Board that Red Deer County issued a development permit for the use.

44. Conversely, the Development Authority has provided clear, written records for the adjacent lands dating back to 2000.

45. The Board has considered the Appellant's argument that it did get a development permit for the use. The Board turned its mind to consider whether the annexation and possible human error lead to the inability of the Appellant to produce a development permit. The Board finds that while it is possible that one municipality could misplace documents, it is unlikely that two municipalities and the appellant could lose (or fail to keep) all documentation relative to the alleged permit. Documents of this nature are significant - if the permit was issued there would surely at least be *some* conclusive evidence of it. However, the Appellant did not produce any such documentation.

46. The Board finds that the there is no development permit issued by Red Deer County for the development.

47. The Development Authority stated that the Appellant has not applied for rezoning or a development permit from The City of Red Deer. This was not disputed by the Appellant. Therefore, the Board finds that there is no development permit for the use issued by the City of Red Deer.

EFFECT OF STATUTORY PLANS ON LAND USE / LEGITIMATE EXPECTATION OF USE

48. The Appellant argued that the development is consistent with the City's statutory plans. The Board understood this argument to be that since the development is consistent with the statutory plans, the use should be permitted to remain.

49. In response, the Development Authority argued that the statutory plans do not determine land use or authorize a development permit to be issued and the LUB should govern in the event of an inconsistency.

50. The Board agrees with the submissions of the Development Authority that statutory plans (as defined in the MGA) speak to future use of land and are not the mechanism by which uses of land are approved by the Development Authority. While statutory plans do provide for future land uses, specific uses of land are authorized by development permits which are issued under the LUB. Therefore, the consistency of the use with the statutory plans is necessary, but it is not development approval and the Board does not find it to be so.

51. As noted above, the current use of the subject lands is neither permitted nor discretionary in A1 zoning. The Board cannot vary use. Since the LUB does not authorize the use, the use cannot remain. Even if that were not the case, and the subject land was zoned to authorize the use, the Appellant still requires a development permit. The mere fact of constructing buildings and using the property does not mean that the use has been authorized.

IS THE USE A LAWFUL NON CONFORMING USE UNDER S. 643 OF THE MGA?

52. The Appellant argued that the development on the subject lands is protected under s. 643 of the MGA as a non-conforming use. Its argument was based on the fact that the City of Red Deer put the current zoning (A1) into place in December 2007 which was after the subject lands were developed.

53. The Development Authority argued that the protection of s. 643 of the MGA applies only to a lawful non-conformity, which requires a development permit to have been issued for the use before the LUB was amended. The Development Authority argued that because there is no development permit, the Appellant is unable to claim status under s. 643.

54. The Board finds that the LUB changed in December 2007 and that the AI zoning was imposed in December 2007, which was after the subject lands were developed. However, as noted above the Board also finds that the Appellant did not obtain a development permit for the use on the subject lands from either Red Deer County or The City of Red Deer. In order to claim the protection of a lawful non-conformity under s. 643 of the MGA, the Appellant has to show that, before the LUB changed, it either did not need a permit for the use, or that it was issued a permit for the use. For the reasons set out above, the Board finds that the Appellant has not established either fact.

55. The Board notes that the Appellant argued that its ability to present an adequate defence was prejudiced by a lengthy delay (11 years) and the City's objection to the proposed development. The Appellant's argument did not relate to the manner in which the hearing before this Board was conducted. Rather, its argument addressed the difficulty in obtaining proof of its position. The Board acknowledges this argument, but notes that the Appellant was able to find other documentation from 2007 and earlier. The Board accepts the statement of the Appellant that it had sufficient opportunity to present the evidence and argument it had.

56. Although the Appellant argued that the burden of proof had been placed upon it, the Board notes that its analysis is in line with the following:

> [11] The Appellant relies on Laux, Planning Law and Practice in Alberta, 3d. ed. (Edmonton: Juriliber, 2002) to the effect that once a municipality establishes that the use of land is outside the current rules, the resulting burden on the recipient of the Stop Order is limited only to providing sufficient evidence to raise a doubt about the status of his development as non-conforming. The Appellant argues that to the extent that doubt is raised, it must be resolved in favour of the recipient of the Stop Order. The following excerpt from Laux reflects the Appellant's position:[1]
>
> > "... [O]nce a breach of the current rules has been proved, the evidentiary burden shifts to the alleged violator to produce evidence showing that his is a non-conforming use or building within the meaning of s. 643.[1] If he does not produce any evidence to that effect, he runs a grave risk of being found guilty of the infraction. However, if he produces <u>sufficient</u> evidence to raise a doubt about whether his case falls within s. 643, that doubt should be resolved in his favour.[2] ..." (at p. 15-25) [emphasis added]

57. As noted above, the Board has found that Development Authority established that the use of the subject lands is outside the current rules. The Board has examined whether the Appellant has provided sufficient evidence to raise a doubt about the status of the development as non-conforming. The Board has found that the Appellant did not do so.

CAN THE BOARD ISSUE A PERMIT?

58. The Appellant has asked the Board to issue a permit in accordance with s. 640(6) of the MGA, if it finds that the stop order was validly issued.

59. The Development Authority objected to this request because the Board is not able to vary use, and the use is neither permitted or discretionary in the district.

60. The Board notes that s. 687(3) (d) (ii) specifies that the Board does not have the authority to vary the use. Therefore, the Board cannot grant a permit for the use. The Board notes that if the Appellant wishes to obtain a development permit for the use, the subject land must first be re-zoned.

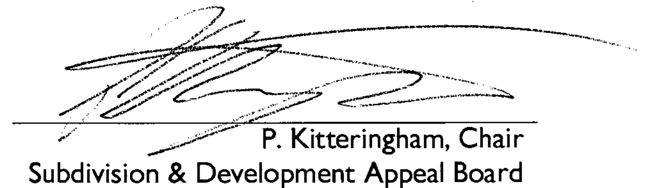
[1] *Emeric Holdings Inc. v. Edmonton (City),* 2009 ABCA 65 at para 11.

CLOSING:

61. For the reasons detailed above, this appeal is denied and the stop order is upheld.

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 23 day of March, 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

December 13, 2017
Ex A: Hearing Materials (pages 1-5)
Ex B: Development Authority Submission (pages 76-167 of Hearing Materials)
Ex C: Appellant Submission (pages 6-75 of Hearing Materials)
Ex D: Development Authority Submission – MGA Excerpts
Ex E: Appellant Submission - Legacy Inc. Submissions to SDAB – 7 pages
Ex F: Appellant Submission – The City of Red Deer Queens Business Park Industrial Area Structure Plan
Ex G: Appellant Submission – The City of Red Deer Municipal Development Plan
Ex H: Appellant Submission - Composite Assessment Review Board Hearing Materials (22 pages)
Ex I: Appellant Submission – April 2008 Site Plan

March 14, 2018
Ex J: Appellant Submission – Legacy Inc. Submission to SDAB – March 12, 2018
Ex K: Development Authority Submission – Respondent Report for the SDAB Additional Submissions – March 12, 2018
Ex L: Development Authority Submission – The City of Red Deer Council Meeting Minutes of December 17, 2007 (3 pages)
Ex M: Development Authority Submission – The City of Red Deer Attendance Sheet – Industrial Annexation Rezoning Public Meeting of November 7, 2007 (2 pages)
Ex N: Appellant Submission – Picture Location & Angles (2 pages)