

**SUBDIVISION AND DEVELOPMENT APPEAL BOARD
PARKLAND COUNTY**

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DATE: January 5, 2017
FILE NO.: 16-D-661

Notice of Decision of Subdivision and Development Appeal Board

INTRODUCTION

[1] The Development Authority of Parkland County (the "County") refused Permit Application No: 16-D-661, Home Based Business Level 3 (Expand business to include extra outside storage of company vehicles, heavy equipment, and materials) at Block A, Plan 3984 TR, SE-7-53-1-W5, Municipal Address 1515 HWY 16A (the "Site")

[2] K&R Inc, by its agent Kelly Haberman, appealed the Development Permit.

PRELIMINARY MATTERS

A. Board Members

[3] At the outset of the appeal hearing on January 5, 2017, the Chair requested confirmation from all parties in attendance that there was no opposition to the composition of the Board hearing the appeal. None of the persons in attendance had any objection to the members of the Board hearing the appeal.

B. Additional Materials

[4] At the beginning of the hearing on January 5, 2017, the Appellant submitted a letter of support marked as Exhibit 10. Mr. Mohr submitted two Google Earth maps marked as Exhibits 8 and 9. The Board gave the parties time to review the documents. At the conclusion of that review, all parties were prepared for the hearing.

C. Miscellaneous

[5] The Board marked the exhibits as set out at the end of this decision.

[6] The appeal was filed on time, in accordance with Section 686 of the Municipal Government Act, R.S.A. 2000, c.M-26 (the "Act").

[7] The Board is satisfied that it has jurisdiction to deal with this matter. There were no objections to the proposed hearing process.

[8] Despite the comments made by Mr. Mohr about the notification process followed by the Board, no one in attendance requested an adjournment. Therefore, the hearing proceeded on January 5, 2017.

SUMMARY OF HEARING

[9] The following is a brief summary of the oral evidence heard by the Board. The Board has also reviewed all written submissions filed with the Board.

Development Authority

[10] The Board first heard from the Development Authority. The Development Authority indicated that the Site is zoned as Country Residential (CR) District. The Development Authority characterized the use as being Industrial Storage and Warehousing, which is neither permitted nor discretionary in the district. The Site is approximately 11.97 ha (29.58 acres), located next to Highway 16A and is bounded by the Wilderness Heights multi-subdivision to the south, and a 18.22 ha (45.03 acre) parcel to the west.

[11] There have been 4 Development Permits for the Site:

- a) September 16, 1998 – DP 98-D-211 for a second residence;
- b) May 14, 2012 – DP 12-D-172 for the construction of a 500.74 m² shop;
- c) October 10, 2013 – DP 13-D-531 for the construction of an overhand above the front door of the dwelling; and
- d) March 15, 2015 – revised DP 12-D- 172 to include a Home Based Business Level 3 (Mulching).

[12] Due to complaints about noise and vibration, an inspection was conducted revealing the scale and intensity of the business exceeded the threshold of the Home Based Business Level 3 approved March 18, 2015. The Development Authority advised the Appellant that approval was required and an application was submitted for the storage on the Site. The identified storage areas are 80 x 100 m and 40 x 320 m.

[13] Section 3 of the County's Municipal Development Plan Bylaw No. 37-2007 ("MDP") sets out policies for residential development. The objectives for residential development are to promote a range of housing types, and to retain the character of country residential subdivisions. The Development Authority is of the view that since the primary use is Industrial Storage and Warehousing, it will not promote a range of housing types. Further, it will not encourage the development of attractive housing, nor does it retain or add to the character or quality of life aspects.

[14] The development is not consistent with the MDP.

[15] The Development Authority provided the Board with the relevant use definitions. The Land Use Bylaw defines Home Based Business Level 3 as:

HOME BASED BUSINESS LEVEL 3 means trade or craft for gain or support conducted within the residential dwelling and/or accessory building and includes all home based businesses not considered Home Based Businesses, Level 1 or Level 2. It may include up to four (4) on-site employees in addition to the resident and the resident's family who permanently reside in the dwelling. Typical uses include contractor services, parking of commercial vehicles in excess of Home Based Business Level 2, automotive and autobody repair and on-site fabrication. This use class does not include more intensive Industrial type of uses that present exterior impacts such as noise, smoke, steam, odour, dust, fumes, exhaust, vibration, heat, glare, refuse matter, and storage of hazard or combustible materials which should be located in an industrial district.

[16] The Land Use Bylaw defines Industrial Storage and Warehousing as:

INDUSTRIAL STORAGE AND WAREHOUSING means development (including a security suite as defined by this Bylaw used solely for security purposes) used for either indoor or outdoor storage, warehousing, distribution or trans-shipment of raw materials, partially processed or finished goods, manufactured products, or equipment. Typical facilities would include pipe yards, heavy equipment service and storage, lumber yards, storage/warehousing compounds or distribution centres. Generally no additional processing would occur on site.

[17] The definition of Home Based Business Level 3 provides that uses do not include more intensive industrial uses with exterior impacts, such as noise, fumes, dust, etc. and may have up to 4 on-site employees in addition to the resident and family of the resident. Here, based on the number of commercial vehicles, plus 12 employees coming and going, the Development Authority determined that it does not meet the definition of Home Based Business Level 3.

[18] The Development Authority determined that the development is Industrial Storage and Warehousing, which should be directed to an industrial area due to the impact on the neighbours. Industrial Storage and Warehouse is neither permitted nor discretionary in the district. Therefore, the application was denied.

[19] If the Board determines the use is a Home Based Business Level 3, the Board should consider the use as discretionary, and address the impacts of the use on the neighbouring properties, including generation of noise, etc.; the privacy of adjacent neighbours, the parking of vehicles; and the fact that only 4 additional employees may be permitted as part of the development. The Development Authority has provided recommended conditions for the Board's consideration, in the event the Board approves the development permit.

[20] In response to Board questions, the Development Authority confirmed that a home based business does not need to be the landowner, but the intention of the use is that the resident lives in the home and has his or her business in the home. The home based business must be accessory to the residential use. The Land Use Bylaw does not contain any express limits on the number of commercial vehicles for a Home Based Business Level 3.

Appellant

[21] The Board next heard from Mr. Kelly Haberman of K&R Inc, the Appellant. He indicated that the amount of equipment stored since the original Home Based Business approval has decreased, including fewer service trucks and mulchers. Originally there were 6 mulchers, 4 service vehicles and a mechanics truck. Now, there are 4 machines and 2 service vehicles. His 3 pieces of business equipment on the Site now are parked against the tree line, since there is no work. He stated that the grader and gravel truck are used to maintain the yard and are not part of the business.

[22] He has dirt mats and blocking on site which came on site in June 2015. The dirt mats on the Site are required in his business. They are used when trees are mulched to prevent club root from spreading. The blocking was used to prop up matting so that frogs could cross on the ground underneath. Although the mats and blocking would ordinarily move from one job site to another, due to the slowdown, he brought them back to the yard. He stated that in the summer the leaves on the trees make the storage less obtrusive. He stated that he would put up a lean to along the fence line to deflect noise, if that would assist.

[23] He stated that there is pipe on the Site which is not used for his business. It is reject pipe which he took because he felt there would be value in it. He did not know how much he would receive, and is now trying to get rid of as much of it as he can.

[24] He stated that he is trying to be a good neighbor and has tried to be as neat as he can. He understands that the backup alarms can be annoying. When they are working on personal matters and are the only ones in the yard, he can unhook the beeper. However, if there are workers, they must be activated for safety reasons. He stated he was shocked by the neighbours being upset, as only one neighbor has ever asked about them.

[25] He stated that they are not a retail business and do not have a lot of traffic in the yard. When the mats are moved out, trucks come into the Site to load it up. However, the mats and blocking left in September or October of this year. If this was the only job, they would come back within a year of leaving.

[26] In response to Board questions, he indicated that the Development Authority had suggested a lean to might assist in obstructing noise and putting the materials under cover. In response to a question about the location of the storage areas being different on the application than in person, he stated the areas identified on the application were potential areas, if the current location was a problem.

[27] Mr. Haberman outlined which pieces of equipment were used in his business and which were personal. The business equipment is around the shop or against the tree line. He confirmed that he is the landowner and he lives on the land. He stated that they try to keep the beepers between 8:00 am and 5:00 pm, although sometimes it may occur after that time.

[28] There is only one person aside from his family on the Site. When mats are being moved or loaded, there are 1 or 2 trucks at a time which get loaded and leave. There may be up to 3 loads in a day.

[29] In his summary he stressed that the backup alarms are for safety reasons and are required where there are commercial trucks on the site. He stated the mats were not moved in the yard until September or October and he did clean them. He did not believe he worked beyond 6:00 pm. He stated that there are very few mats in the yard now. He apologized to the neighbours if they felt he did not care about their well-being as that was not his intention.

Those Speaking in Favour of the Appeal

[30] The Board heard from Majorie Wieben who is an employee of K&R. She indicated that the truck drivers who remove the mats are not K&R employees. Although Mr. Haberman said that there were 3 trucks in a day, which would not occur every day. On average there are 40-50 trucks a year.

[31] She felt a lean to would address the concerns identified. She stated that the pipe is owned personally by Mr. Haberman. He is not taking any more and he is trying to get rid of it. She stated that the hours of operation are generally 8:00 am to 5:00 pm. She agreed with Mr. Haberman's submissions. She felt the trees provided visual coverage. She did not believe this was industrial storage.

[32] The Board also heard from Dong Liu, Mr. Haberman's wife. She agreed with what Mr. Haberman and Ms. Wieben stated. They wish to be a good neighbor. She indicated that since they moved in 2 years ago, there has been an increase in wildlife in the area.

Those Speaking in Opposition to the Appeal

[33] The Board heard from Charlotte Kinash-McNeill who lives immediately behind the shop area in the Wilderness Heights subdivision. She stated that the use is beyond a home based business and in her view, it was industrial. She stated the equipment operates from 6:00 am or 7:00 am to 9:00 or 10:00 pm each day of the week. The backup beepers create noise. The noise from the operations is every day of the week, and means that she cannot open her windows or doors, due to the noise. In the summer the Appellant was cleaning mats. She heard the sound of the gas powered washer for days and the pounding as the mats were being cleaned. She stated it was like living in the middle of an industrial park. She objected to the view of the tractor trailers and the mats, which is worse when the leaves are off the trees. She stated that when they are not working, the Appellant parties at the shop or sets off fireworks. She felt they should move or put up a high sound barrier because the leaves are not a sufficient sound barrier. She felt the noise was out of control. She has put in many upgrades in her house and cannot enjoy it. She worried about who would buy her house due to the noise.

[34] The Board heard from Mr. Brent Adams, who lives in the Wilderness Heights subdivision. He has worked as an industrial welder for 20 years and felt that all of the equipment on site is industrial. He complained that the noise was disturbing to his wife and children. He agreed with the concerns about resale, given the noise and eyesore from the Appellant's use. He does not feel that the use is a home based business. He showed the Board a video taken on his iPhone during the day on January 5, 2017 to highlight for the Board the sound of the beepers.

[35] The Board heard from Mr. Ray Sperling who lives in the Wilderness Heights subdivision. He stated his house is 50 yards to the pipe storage area and 100 yards from the back door of the Appellant's house. He stated that the Appellant's operation is an eyesore and he and his children are disturbed by the beeping of the backup alarms and the vibration when the mats are dropped. He believes the road access for big trucks with big loads is insufficient. He has been employed for 20 years in the oil and gas industry and stated that he found it hard to believe that the pipe was not stored for an oil company. He was annoyed that the situation has gone on for as long as it has.

[36] The Board heard from Mr. Greg Mohr who lives in the Wilderness Heights subdivision. Mr. Mohr lives at the top of the hill and indicated that the situation is worse as the sound travels up the hill. When he bought his property, he was told there would be no commercial or industrial opportunity for the Site. He stated he bought his acreage for the quality of life and to get away from things. The grounds shakes from the mats and there is significant noise due to the Appellant's use. He stated there has been a decrease in the amount of wildlife. He is concerned about his property values and the ability to resell his land. He has complaints about the noise, irritation and general pollution. He disputed the Appellant's statements that the noise is from 8:00 am to 5:00 pm. He stated the sounds of back up alarms start as early as 6:45 am. and have disturbed his family significantly, including when his wife was recovering from eye surgery. The mats sound like cannons when they are dropped. He was concerned about what he called "business creep". If this use was approved, it will open the door to other property development in the area, which will affect his resale value. He was concerned about road safety due to visibility from the intersection. In terms of noise abatement, he felt that there needs to be a berm. He felt that the Appellant should have come to talk with the neighbours rather than waiting for them to talk to him. Mr. Mohr had concerns about process in that he received notice of the hearing on December 23, 2016. The County offices were closed until December 30. He did not feel that the notifications were fair and it inhibited his ability to be part of the process.

DECISION OF THE SUBDIVISION AND DEVELOPMENT APPEAL BOARD

[37] The Board denies the appeal. The Development Permit is refused.

FINDINGS OF FACT

[38] The Site is located at Block A, Plan 3984 TR, SE-7-53-1-W5, Municipal Address 1515 HWY 16A.

[39] The Site is zoned as Country Residential (CR) in Parkland County Land Use Bylaw 20-2009, as amended.

[40] The use Home Based Business Level 3 is a discretionary use within the County Residential District.

[41] The Appellant is an affected person.

[42] Those speaking in opposition to the appeal (Ms. Kinash-McNeill, Mr. Adams, Mr. Sperling and Mr. Mohr) are affected persons.

[43] The proposed use is not a Home Based Business Level 3. It is an Industrial Storage and Warehouse use.

REASONS

[44] The Board notes that its jurisdiction is found in section 687(3) of the Municipal Government Act. In making this decision, the Board has examined the provisions of the County's Land Use Bylaw ("LUB"), and has noted the County's Municipal Development Plan as referenced in the Development Authority's Report. The Board has also considered the oral and written submissions made by the Appellant, Mr. Haberman on behalf of K&R Inc, those speaking in favour of the appeal (Ms. Wieben and Ms. Liu) and those speaking in opposition to the appeal (Ms. Kinash-McNeill, Mr. Adams, Mr. Sperling and Mr. Mohr).

687(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 the land use policies and statutory plans and, subject to clause (d), the land use bylaw in effect;*
- (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.*

Appellant and Affected Person

[45] The Appellant K&R Inc. was the applicant for the Development Permit and as such, the Board finds the Appellant is affected by the proposed development.

[46] The Board heard from Ms. Kinash-McNeill, Mr. Adams, Mr. Sperling and Mr. Mohr who all live in the Wilderness Heights subdivision. Due to their proximity to the Site, the Board finds they are affected by the proposed Development.

Land Use District

[47] The property is zoned County Residential (CR) District.

Nature of Use

[48] Within Section 5.1, the purpose of the County Residential District is:

1. Purpose

To provide for traditional multi-parcel country residential subdivision/development identified in a statutory plan for that use and related uses, including minor agricultural pursuits. Subdivision and development may be serviced by private on-site systems.

[49] Within section 5.1, Home Based Business Level 3 is a Discretionary use, but must be compliant with section 12.9 (Home Based Business). The following note is also found in section 5.1:

Compliant with Section 12.9 Home Based Business

With the exception of an auto body business including auto body shop and steel fabrication shop on NE 12-51-27-W4M within 152.4 m (500 ft.) of a multi-parcel residential subdivision

[50] Section 12.9.3 of the County's Land Use Bylaw

3. The following provisions shall apply to Level 3 Home Based Businesses:

a) with the exception of the CRWL – Country Residential Work/Live District, a home based business level 3 is neither permitted nor discretionary within a multi-parcel residential subdivision (excluding rural centres) or row housing development and/or if the location of the development is within 152.4 m (500.0 ft.) of a multi-parcel residential subdivision (excluding rural centres) or row housing development;

b) outside storage of goods, materials, commodities or finished products shall be at the discretion of the Development Authority;

c) the display or placement of signage on the premises of a home based business shall be in accordance with Subsection 15.5;

d) the home based business use shall not generate noise, smoke, steam, odour, dust, fumes, exhaust, vibration, heat, glare, refuse matter and storage of hazard or combustible materials considered offensive or excessive by the Development Authority;

e) at all times the privacy of the adjacent residential dwellings shall be preserved and the Home Based Business use shall not unduly offend neighbouring or adjacent residents by way of excessive lighting, late calling of clients of an unreasonable number, traffic congestion, or excessive on-street or off-street parking, etc;

f) the parking of any commercial vehicles, including the number considered and location, shall be at the discretion of the Development Authority, notwithstanding, the

parking of school buses in excess of the number allowed shall be as per the Community Standards Bylaw;

g) in addition to the resident and the resident's family who permanently reside in the residential building on the subject parcel, up to four (4) additional other employees may be permitted as part of the approval and operation of a home based business level 3, if deemed appropriate by the Development Authority; and

h) the business owner shall obtain a Business License pursuant to the County's Business License Bylaw.

Is the Use a Home Based Business Level 3?

[51] The first question for the Board to determine is what is the use being applied for. The Board heard from Mr. Haberman, of the Appellant, who indicated that the use was a Home Based Business Level 3. He stated that the current intensity of the use being applied for was less than the use for which he had previously received development approval.

[52] By contrast, the Development Authority determined that the use was not a Home Based Business Level 3, but that it was an Industrial Storage and Warehousing use.

[53] The Board has examined the definition of Home Based Business Level 3 and notes that in interpreting legislation, the Board must use a broad and purposive analysis to determine the meaning. The Appellant owns and lives on the property. However, the real question is whether the use falls within the definition of "Home Based Business Level 3", or whether it is "industrial storage and warehousing".

[54] The definition of "Home Based Business Level 3" requires that use class not include more intensive industrial types of uses that present exterior impacts such as noise, smoke, steam, odour, dust, fumes, exhaust, vibration, heat, glare, refuse matter, and storage of hazard or combustible materials which should be located in an industrial district. The Board heard evidence from those speaking in opposition to the appeal that there are exterior impacts to the use. Those speaking in opposition noted the noise coming from the washing of mats. They stated that the noise from the back up beepers disturbed their use and enjoyment of their property. The Board heard the video played by Mr. Adams with the beepers. They also all indicated that there were significant negative vibrations due to the dropping of the mats on the ground and due to the washing of the mats. The Appellant did not dispute these impacts, but only suggested that the duration of the noise was not as long as suggested by those speaking in opposition to the appeal.

[55] The Board is of the view that the development causes significant and negative exterior impacts including noise and vibrations. Further, the storage of the materials is outside, which creates an exterior impact on the neighbouring properties. The Board is of the view that these significant, negative impacts take the development outside the definition of a Home Based Business Level 3.

[56] The Board finds that the use falls within the definition of "Industrial Storage and Warehousing". The use is predominantly outdoor storage of goods used in industrial applications (blocking, mats, etc.). The Appellant has indicated that the mats and blocks are being stored on Site until they can be shipped to their next job. This seems to fall squarely within the definition of "Industrial Storage and Warehousing". Further, the maintenance and cleaning of the products, especially the mats is causing a negative impact. The Board finds that the cleaning of the mats is a use which would typically occur in an industrial area.

[57] Since "Industrial Storage and Warehousing" is neither permitted nor discretionary in the County Residential District, the Board has no authority to grant the permit. Therefore, it denies the appeal.

[58] Given its determination that the use is "Industrial Storage and Warehousing", it is not necessary for the Board to address the impact of the development on the neighbours. However, the Board does wish to comment on the impact. Had the Board found that the use was a "Home Based Business Level 3" (which it did not), that use is discretionary use in the Country Residential District. Therefore, as referenced in *Rossdale Community League (1974) v. Edmonton (Subdivision and Development Appeal Board)*, 2009 ABCA 261, the Board must assess the compatibility of the use applied for with the neighbouring uses.

[14] The object and purpose of a discretionary use is to allow the development authority to assess the particular type and character of the use involved, including its intensity and its compatibility with adjacent uses.

[59] In considering the impact of the development on the neighbours, the Board would have found that the use was not compatible with the neighbouring uses due to the negative impacts of noise (back up alarms), vibration and visual impact. In the determination of the Board, these impacts make the development incompatible with the country residential use of the adjacent owners in the Wilderness Heights subdivision.

[60] Due to the conclusion of the Board that the use is neither permitted nor discretionary in the CR District, and, in the alternative, not compatible, the Board does not need to address the application of section 12.9.3 of the Land Use Bylaw.

[61] Finally, the Board notes that the provisions of the Municipal Development Plan Bylaw 37-2007 for this area are to support country residential subdivisions. This development is inconsistent with that goal.

Issued this 12th day of January 2017 for the Parkland County Subdivision and Development Appeal Board


Phyllis Kobasiuk, Chair
SUBDIVISION AND DEVELOPMENT APPEAL BOARD

This decision may be appealed to the Court of Appeal of Alberta on a question of law or jurisdiction, pursuant to Section 688 of the Municipal Government Act, R.S.A. 2000, c.M-26. This section requires an application for leave to be filed with the Court of Appeal of Alberta within 30 days of receipt of this decision.

APPENDIX "A"
REPRESENTATIONS

PERSON APPEARING

-
1. Kim Kozak, Assistant Development Officer
 2. Karen Kormos, Development Planner
 3. Kelly Haberman, K&R Inc.
 4. Marjorie Wieben
 5. Dong Liu
 6. Charlotte Kinash-McNeill
 7. Brent Adams
 8. Ray Sperling
 9. Greg Mohr

APPENDIX "B"
DOCUMENTS RECEIVED AND CONSIDERED BY THE SDAB:

1.	Table of Contents and Agenda	December 7, 2016
2.	Notice of Appeal	December 22, 2016
3.	SDAB Clerks Report	December 22, 2016
4.	Letter in opposition to the Appeal – Brent and Amanda Adams	December 23, 2016
5.	Submission of the Development Authority	December 28, 2016
6.	Letter in opposition to the Appeal – Ray and Jennifer Sperling	December 30, 2016
7.	Submission of the Applicant/Appellant	December 7, 2016
8.	Google Earth map	January 5, 2017
9.	Google Earth map	January 5, 2017
10.	Letter of Support for K&R Inc.	January 5, 2017
11.	Video (Mr. Adams)	January 5, 2017