

DECISION

File:	ISDAB2021 – 10.12
Development Permit	T00113-21D
Appeal By	Trevor and Debbie Catonio Jeff and Marina Paarup Tammi Nygaard Brad and Paula Peake
Appeal Against	Development Authority of The Town of Drumheller
Property	NW 29-28-19 W4
Hearing Date	November 9, 2021
Decision Date	November 22, 2021
Board Members	Sharon Clark – Presiding Officer Gerald Champion Todd Wallace
Notes on the Hearing	The Hearing was a remote virtual meeting on the Zoom platform.

DESCRIPTION OF APPLICATION

1. The appeals before the Palliser Intermunicipal Subdivision and Development Appeal board (ISDAB or “the Board”) were brought by Trevor and Debbie Catonio (“Catonio”); Jeff and Marina Paarup (“Paarup”); Brad and Paula Peake (“Peake”) and Tammi Nygaard (“Nygaard”)
2. On September 23, 2021, the Development Authority granted, with conditions, the application by Brooks Asphalt & Aggregate Ltd. (“Brooks”) to place a mobile asphalt plant and aggregate on a 42-acre parcel registered in the name of 1720961 Alberta Ltd. The shareholders of 1720961 and Brooks appear to be one and the same.
3. The subject 42-acre parcel is located on a portion of NW-29-28-19-W4, and is included in lands covered by both the Town of Drumheller Bylaw #19-01, described as the Northwest Rosedale Industrial Area Structure Plan (“ASP”) and the Town of Drumheller Land Use Bylaw #16.20. Bylaw 16.20 designates the lands as an Employment District with “heavy industrial” being a discretionary use. Neither bylaw makes specific reference to asphalt plants. The Development Authority deemed an asphalt plant to be “heavy industrial”.
- 4.(a) The conditions on development, imposed by the Development Authority are as follows:
 1. Development shall conform to Town of Drumheller Land Use Bylaw 16.20.
 2. Development shall conform to Town of Drumheller North West Rosedale Area StructurePlan Bylaw 19.01
 3. Placement of plant to be as far from other businesses or structures including Highway 10 asfeasible in a manner satisfactory to the Development Authority.
 4. Prior to placement of Mobile Plant, Developer to enter into Environmental Bond with Town of Drumheller outlined as the beneficiary of land to a value of \$200,000.

5. Developer to undertake Phase 1 Environmental Site Assessment upon vacating property. In addition, it is recommended that the Developer undertakes a Phase 1 Environmental Site Assessment prior to development.
6. Developer to demolish house located at 3073 HWY 10 - Lot A, Plan 2654JK. Upon demolition of house, access agreement to be submitted to the Town of Drumheller.
7. Until demolition of house, access per plans submitted written authorization from the registered owner of the subject lands to be submitted to the Development Authority.
8. If the holder of the permit wishes to make any changes in the proposed development from application as approved, the holder of the permit must first obtain permission of the Development Authority. An additional development permit may be necessary.
9. A development permit is valid for 12 months from its date of issuance, unless development has been substantially started in a manner satisfactory to the Development Authority.
10. The Development Authority may grant an extension of the time the development permit remains in effect for up to an additional 12 months. The Development Authority shall only grant one extension.
11. Nuisance mitigation measures, including noise, vibration, smoke, dust, fumes, odors, heat, light, or traffic generation, measures to be undertaken, as per plans submitted.
12. All signage placements are to be made under a separate development permit application.
13. Landscaping of area viewable from Highway to be in accordance with Land Use Bylaw 16.20
 - Landscaping Standards {3.9.8) including;
 - a. All portions of a *site* not covered by structures, parking, or vehicular circulation areas shall be *landscaped*.
 - b. The minimum number of trees required for a industrial or commercial *development* shall be 1 tree per 35 square metres of *landscaped area*
 - c. Minimum height of 2 metres and/or 40 millimeters in *caliper*.

GENERAL REQUIREMENTS

1. Development shall conform to the Town of Drumheller Community Standards Bylaw 06.19.
2. Development shall conform to Town of Drumheller Tourism Corridor Bylaw 04.19.
3. Developer to submit approval under Alberta Environmental Protection and Enhancement Act to the Development Authority for Aggregate Processing, Gravel Pits and Borrow Sites.
4. It is recommended that the Developer undertakes a Phase 1 Environmental Site Assessment prior to development.
5. Development is required to comply with all federal, provincial, and other municipal legislation.
6. All Contractor(s) and Subcontractors to have a valid Business License with the Town of Drumheller.

DEVELOPMENT PERMIT

This permit is issued subject to the following conditions:

- a. That the development or construction of the said land(s) will not begin until after the End of Appeal Period Date.
 - b. That the development or construction shall comply with the conditions of the decision herein contained or attached.
 - c. That the development or construction will be carried out in accordance with the approved plans and application.
 - d. Should you wish to appeal this decision, an appeal may be made to the Secretary of the Development Appeal Board within 21 days of the Decision Date.
 - e. That this permit shall be invalid should an appeal be made against the decision. Should the Development Appeal Board approve this issue of this permit, this permit shall be valid from the date of decision and in accordance with the conditions of the Development Appeal Board.
5. The ISDAB hearing on November 9, 2021 was held through a combination of written submissions and video conference.
 6. The following documents were received prior to the hearing and form part of the record:
 - a) Copy of the Development permit application, letter of intent from the developer (with attachments) and the approved Development permit (with conditions);
 - b) The Development Officer's written submissions;

- c) Written submissions from all four appellants (being letters of opposition to the proposed development);
 - d) one letter in opposition to the development from an adjacent property owner.
7. Attending at the hearing via Zoom were:
- a) the Board
 - b) the Clerk
 - c) the Development Officer in training
 - d) the CAO for the Town of Drumheller
 - e) Eugene Foisy, on behalf of Brooks
 - f) all four appellants

PRELIMINARY MATTERS

- 8. The Clerk advised that due to technical difficulties the hearing could not live stream on the Town of Drumheller YouTube channel but that any members of the public who wished to observe the hearing would be provided a Zoom Link.
- 9. One board member advised that he, by virtue of his municipal position had had a past working relationship with one of the appellants. This was not a recent relationship and the subject of the hearing had never been discussed. The Presiding Officer confirmed with all parties in attendance that there was no opposition to the composition of the panel.
- 10. The Presiding Officer outlined how the hearing would proceed including the order of appearance of the parties and no opposition was noted.
- 11. The appeals were filed on time, in accordance with s.686 of the Municipal Government Act R.S.A 2000, c.M – 26 (“M.G.A.”)

SUMMARY OF HEARING

i) Position of the Development Officer

- 12. The Town of Drumheller CAO and the Development Officer in training submitted a report and appeared by video conference.
- 13. (a) The application for a development permit was received on August 31, 2021 and it was decided by the Development (“D.A.”) that this proposed asphalt plant was a discretionary use in an Employment District.
- (b) Section 606(1) M.G.A. establishes advertising requirement for uses such as the within application, including newspaper advertising.

- (c) Section 606.1 M.G.A. permits council to create an advertisement bylaw, which was done by way of s. 15.12, L.U.B 16.20.
 - (d) L.U.B. 16.20 s. 15.12.1 and s. 15.12.2 specify that prior to approving a development for a discretionary use the D.A. shall require posting a notice on the property describing the proposed development and advising where further information may be obtained. Such notice to be posted for a minimum of 10 days prior to issuance of a notice of decision. Further, notification shall contain information about the proposed development, the time and date that decision will be rendered, a final date to submit comments and contact information for the applicant and the town. (Emphasis added)
 - (e) The newspaper advertising published by the D.A. did not contain contact information for the applicant. The sign posted on the proposed development site did not include date and time that the decision would be rendered, nor did it contain contact information for the applicant.
 - (f) The Municipal Planning Commission considered the application on September 23, 2021, and rendered the conditional development permit referenced in paragraph 4 (a) herein.
14. s. 5.15.3 of L.U.B. 16.20 requires the Development Authority, upon approval of a development permit to send notice of that decision to the applicant land owner, each owner of adjacent land and others who, in the opinion of the Development Authority, may be materially impacted by the development. The D.A. decided to circulate within a radius of 800 m (1/2 mile) and identified 44 impacted parcels. Twenty-six (26) landowners received notification; eighteen (18) did not. The D.A. is unsure as to why the 18 landowners did not receives notification.
15. Notwithstanding the aforesaid deficiencies, Development Authority supported the development at the ISDAB hearing on November 9, 2021.

ii) Position of Appellant, Catonio (in opposition to development)

- 16. They reside across the highway from the proposed site and submit the noise emanating from the plant will create a great nuisance especially considering dawn to dusk hours of operation during prime working season when the appellants would like to be outside enjoying their acreage.
- 17. They submit the unpleasant odour coming from the plant will negatively impact their lives. They are concerned that the toxic emissions will be harmful to their health. They point out that Brooks acknowledges the plant will emit dust and odours but plans to trap the “majority” of dust and odours so as to “minimize” the odours, gases or clouds of dust going into the environment. The key words are majority and minimize. The smell will still be there and just because it may be minimized doesn’t mean it isn’t bad.
- 18. They have concerns regarding traffic. The proposed plant would be located along side Highway 10 which is a busy, main tourist corridor. They believe the added truck traffic will exacerbate an already dangerous road situation and may negatively affect tourism.
- 19. They are concerned that the plant will negatively affect their property value – who wants to live beside something smelly and noisy?

iii) Position of the Appellant, Paarup (in opposition to development)

20. They are vehemently opposed to this development being so close to residential dwellings – including theirs. They state that heavy industries such as asphalt plants are considered hazardous and dangerous to the health of the environment.
21. They cite that this particular location does not meet safe distance requirements from residential areas in that the proposed location is directly across the street from numerous homes and that regardless of current zoning, allowing an asphalt production facility to be built in its proposed location poses a direct danger to the community as a whole.
22. They advise that a similar asphalt production project had obtained temporary approval at this site approximately 15 years ago for a single operating season.
23. They advise there were multiple complaints from area residents as a result of the earlier asphalt plant. These complaints were directed to the Town of Drumheller and to the Environmental Protection Agency complaints department about the emittance of billowing black smoke, noxious fumes and odours. They maintain these environmental pollutants triggered asthma and other health conditions.
24. They raise an issue with respect to Volatile Organic Compounds (VOCs) which their research indicates are particles of dangerous substances emitted into the atmosphere after certain chemical reactions which can stay air borne indefinitely. They submit that asphalt plants emit significant amounts of those gases and consequently living next to such plants can be hazardous to the health of the environment and people.
25. They raise a concern regarding potential ground water contamination and the resulting threat to the closely proximate Red Deer River.
26. They feel the history behind the location of an asphalt plant at this particular site has been forgotten and was not considered when the current project was being considered.

iv) Position of the Appellant, Peake (in opposition of the development)

27. They are the operators of a tourist dwelling that will be materially impacted by this asphalt plant.
28. They have been unable to determine the duration of this proposed operation and feel both the application and development decision lack clarity with respect to duration and community impact.
29. They feel this operation will result in loss of quiet enjoyment for area residents as a result of escaping nuisances.
30. They are concerned there will be a change to or loss of air quality due to emissions that cannot escape the valley. They question whether this development should even be in the valley and enquire as to whether there has been a plume dispersion assessment or a tonnes per day mass emission study.

31. They submit there is no buffer between adjacent properties with incompatible land uses where only a public highway separates contiguous properties.
32. They feel this is a non-permitted use in Bylaw 16.20 and point out condition 2 of the development permit which requires the development to conform to the Town of Drumheller Bylaw 19.01 being the Northwest Rosedale Industrial Area Structure Plan which specifically states in section 36 (E) that:

‘when considering a development in this area regard must be given to the aesthetics of the area and that industries creating excessive noise, vibration, smoke, dust or odour shall not be allowed.’

33. These appellants also raise the traffic issue and the fact that the highway next to the proposed site is a 100 km/hr zone with potential collision risk due to increased large vehicle traffic and other associated traffic.

v) Position of Appellant, Nygaard (in opposition to development)

34. This appellant state that Brooks operated a temporary asphalt plant in the same location 10-12 years ago. That operation caused major air quality, noise, dust and traffic issues. It was vehemently opposed by residents and only operated on a temporary basis for a short time.
35. She takes the position that this type of development should be away from residences and incompatible businesses such as a meat processing facility, ice-cream/fast food facility and coffee shop.
36. She states that because asphalt plants have a limited operational season (Brooks suggested May-October), with operations being weather dependent, this plant will operate from sunrise to sunset and will negatively impact residents, businesses, and tourists.
37. She also expresses concern about increased traffic on Highway 10

vi) Letter from Adjacent Landowner (opposed to development)

38. The adjoining landowner immediately to the west of the proposed site, Tony Xu, of Riverside Packers provided a letter in opposition to this development, stating that it would negatively impact his business and the anticipated expansion of that business. That letter was read into record.

vii) Position of Developer – Brooks Asphalt & Aggregate Ltd (represented by Eugene Foisy)

39. Per its letter of intent, provided in support of its development application, Brooks details that it has long been a provider of municipal infrastructure construction from deep utilities to parking lots. It hopes to continue to successfully bid on such projects in the Drumheller region and requires a staging area to set up operations and store required material and equipment.

40. One of its largest pieces of equipment is a 2000CM1 asphalt plant, capable of producing up to 300 tons per hour, which includes an asphalt plant silo, asphalt rap system, drum, control tower, bag house, cold feed storage bins, generator, oil storage tanks and propane storage tanks. Supporting materials and equipment were noted as aggregate materials, conveyor belts, skid steers, front end loaders, excavators, graders and bull dozers, trucks and other mobile equipment and pipe.
41. Brooks included 2 pictures of asphalt plants located at what appear to be prairie sites.
42. Hours of operation are described as dawn until dusk, typically from May through October.
43. The letter of intent acknowledges, “Sadly, there is a risk of pollutants that need to be mitigated and ensure all precautions are taken.” And then goes on to list risks and measures “available to both us and the surrounding community,” described as follows:
 - (a) Noise pollution – to mitigate the noise of heavy equipment and generators, equipment is properly maintained, noise bylaws are followed, and signs are posted to facilitate community members in contacting “our health and Safety team” with respect to issues or concerns.
 - (b) Flammable and Explosive Pollutants – tar and propane are stored on site. Storage facilities meet and exceed all necessary requirements. Daily walk about and routine maintenance are referenced as is “our Environment Management Policy.”
 - (c) Noxious Odours – The Environmental Protection Act requires daily testing and the Bag house aspect of the plant “traps the majority of dust and odours to ensure we are minimizing any noxious odours, gases or clouds of dust.”
 - (d) Dust and Traffic control – use of water and regulating traffic to 15 km/hr are the preferred methods of controlling dust.
44. Brooks provided, as part of its letter of intent:
 - (a) an Environment Canada publication entitled “Hot Mix Asphalt Plants”
 - (b) section 2 of a policy document from Smith Group Holdings labelled as “Environmental Management”
 - (c) a Natural Resources Canada publication entitled “AutoSmart”
45. Brooks maintains it is a good corporate citizen who gives back to the community in a variety of ways.
46. Brooks asserts it was unaware of any citizen or community concerns emanating from the same site where it now proposes to establish a “mobile asphalt plant and aggregate.”

viii) Rebuttal from the Development Authority

- 47. The D.A. had searched town records and were unable to locate a record of any complaints from anyone about the previous operation of the asphalt plant.
- 48. The proposed location is now classified as an Employment District under L.U.B 16.20. and regarding the zoning as MR-2 under Bylaw 19.01 (the Northwest Rosedale Industrial Area Structure Plan) which specifically prohibits industries creating excessive noise, vibration, smoke dust or odour; the D.A. advised this MR-2 zoning had never been enacted.
- 49. In response to questions the D.A. did confirm that Bylaw 19.01 had never been repealed or amended.

DECISION

- 50. The appeals are ALLOWED and the decision of the Development Authority is REVOKED. The development is REFUSED.

REASONS FOR DECISION

A. Lack of Notice

- 51. (a) The Development Authority proceeded with the development application notwithstanding failure to comply with the notice requirements mandated by ss. 606 and 606.1 MGA and ss. 15.12.1 and 15.12.2. of L.U.B 16.20
- (b) The Letter of Decision resulting from the MPC meeting of September 23, 2021 failed to comply with the mandatory requirement of s. 15.15.3 of L.U.B 16.20
- (c) Relying on Thomas v. Edmonton (City), 2016 ABCA 57 – the ISDAB finds failure to provide notice in accordance with the legislation to be fatal, in that failure to comply is a breach of procedural fairness and cannot be waived by the ISDAB.

B. Conflicting Bylaws

- 52. (a) The Statutory Plan ASP 19.01 remains in full force and effect. It has never been repealed or modified. The area governed by ASP 19.01 includes the land proposed for the subject mobile asphalt plant. ASP 19.01 provides for light industrial uses as a discretionary use. Nowhere is any provision made for any heavy industrial use.
- 53. Condition #1 of the Development Permit Notice of Decision requires compliance with Town of Drumheller L.U.B 16.20 which states:

s. 1.3.2. – compliance with the requirements of this bylaw does not exempt any person from the requirement of any statutory plan.

54. (a) Condition #2 of the Development Permit Notice of Decision requires compliance with Town of Drumheller Northwest Rosedale ASP bylaw 19.01 which states:
- s. 36 (E) (3) – industries creating excessive noise, vibration, smoke, dust or odour shall not be allowed in this district.
- (b) Part 17 M.G.A. governs planning and development and Division 4 of part 17 governs statutory plans, included s.633 (1) dealing with area structure plans. S. 637 M.G.A. specifies that adoption of a statutory plan (which the ISDAB submits includes an ASP) does not require a municipality to undertake any projects referred to.
- (c) S. 687 (3) (a.2) M.G.A mandates the ISDAB to comply with any statutory plans. An ASP is a statutory plan.
55. (a) The ISDAB finds the statutory scheme to support the proposition that ASP 19.01 takes priority over LUB 16.20 with the result that an asphalt plant, being a use, which emits noise, noxious odours, vibration, smoke and dust shall not be allowed at its proposed site.
- (b) Th ISDAB further finds s. 1.3.5 of LUB 16.20 to be of no assistance to the applicant or D.A. stating as it does, “the provisions for this bylaw, when in conflict, shall take precedence over other bylaws.”
- (c) Further, just because the Town may never have undertaken any project referred to in ASP 19.01 does not extinguish the existence of this statutory plan and its compliance with its requirements as is confirmed in LUB 16.20, s. 1.3.2
- C. Undue Interference with Amenities of the Neighbourhood and Material Interference with the Use, Enjoyment and Value of Neighbouring Parcels of Land
56. (a) The Appellants all provided compelling evidence in opposition to the development. Their concerns were not mere speculation. An asphalt plant previously located on the proposed current site created noise, dust, odours. The ISDAB finds as a fact that the previous plant interfered with the amenities of the neighbourhood and materially interfered with the use and enjoyment of the neighbouring parcels of land.
- (b) The ISDAB finds as a fact that complaints were launched by the citizen of the neighbourhood with respect to the earlier plant and these complaints were never adequately addressed.
- (c) The ISDAB does not accept that Brooks has adequately addressed environmental and citizens’ concerns:
- i) it has provided no environmental assessment or reports to address the existence (or lack thereof) of contamination resulting from its earlier asphalt operation;

- ii) considering that the principles of Brooks (as developer) and 1720961 Alberta Ltd. (as landowner) are one and the same there will potentially never be an obligation to comply with development condition #5 (phase 1, Environmental Assessment) upon vacating the property.
- iii) no area specific pollutant mitigation details were provided. The ISDAB takes notice that the proposed development site is located in a valley, in near proximity to the Red Deer River.

57. For these reasons the Board finds the proposed development will negatively interfere with the amenities of the neighbourhood and will negatively and materially interfere with the use, enjoyment, or value of neighbouring parcels of land.

IN SUMMARY

58. The appeals are allowed, the decision of the D.A. is revoked and the development is refused for the following reasons:

- (a) The D.A failed to comply with the mandatory notice requirement prior to approving the proposed development and then failed to comply with the notice requirements of its decision.

In the event the Board is found to be in error for refusing the development as a result of the aforesaid notice deficiencies, in the alternative:

- (b) The Board finds the provisions of the A.S.P (Bylaw 19.01) to take priority over L.U.B 16.20 with the result that the proposed development cannot occur at the proposed location.

In the event the Board is found to be in error in deciding the statutory plan takes precedence over the L.U.B, then in the further alternative:

- (c) The Board finds the proposed development will negatively and materially interfere with the amenities of the neighbourhood, and with the use, enjoyment or value of neighbouring parcels.

November 22, 2021
DATE



Sharon Clark - PRESIDING OFFICER
Intermunicipal 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, RSA 2000,c M-26.

PERSONS APPPEARING		
1.	Darryl Drohomerski and Antonia Knight	Development Authority
2.	Trevor and Debbie Catonio	Appellant
3.	Jeff and Marina Paarup	Appellant
4.	Tammi Nygaard	Appellant
5.	Brad and Paula Peake	Appellant
6.	Eugene Foisy, on behalf of Brooks	Applicant