



**EDMONTON
TRIBUNALS**

*Subdivision &
Development
Appeal Board*

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Date: March 9, 2017
Project Number: 152674334-001
File Number: SDAB-D-17-039

Notice of Decision

- [1] On February 22, 2017, the Subdivision and Development Appeal Board (the “Board”) heard an appeal that was filed on July 24, 2014. The appeal concerned the decision of the Development Authority, issued on July 3, 2014, to approve the following development:

Construct an Auctioneering Establishments building and operate an Auctioneering Establishment on the entire Site (including existing storage building and shed), and demolish an existing storage building (Osman Auction Inc.)

- [2] The subject property is on Plan 5337NY Lot A, located at 11650 - 199 Street NW, within the IM Medium Industrial Zone. The Winterburn Industrial Area Structure Plan applies to the subject property.
- [3] The following documents were received prior to the hearing and form part of the record:
- Copy of the 2014 approved Development Permit;
 - Memorandum from Transportation Services, dated May 27, 2014 and June 2, 2014; and
 - Comments from CN Rail, property owner within the 60 metre notification area.

Preliminary Matters

- [4] At the outset of the appeal hearing, the Presiding Officer confirmed with the parties in attendance that there was no opposition to the composition of the panel.
- [5] The Presiding Officer outlined how the hearing would be conducted, including the order of appearance of parties, and no opposition was noted.

- [6] The appeal was filed on time, in accordance with Section 686 of the *Municipal Government Act*, RSA 2000, c M-26 (the “*Municipal Government Act*”).
- [7] The Presiding Officer also noted that this is a rehearing ordered by the Alberta Court of Appeal on the issue of whether, pursuant to Section 650(1)(c) of the *Municipal Government Act*, the Appellant is required to contribute to the cost of storm and sanitary sewer in the area that may or may not be “necessary to serve the development.”

Summary of Hearing

- i) *Joint Submissions of the Appellant, Osman Auction Inc., and the Respondent, City of Edmonton (Development Authority)*
- [8] The Appellant was represented by legal counsel, Mr. C. Zelyas. The Respondent was represented by legal counsel, Mr. M. Gunther. Mr. P. Kowal from the City of Edmonton Sustainable Development Department was also in attendance.
- [9] Construction work for the development has been completed and the auctioneering establishment is already open. The remaining issue pertains to storm and sanitary servicing of the site, and the associated fee assessments.
- a) Sanitary Sewer
- [10] The City is satisfied that the current on-site sanitary servicing is sufficient, though the Appellant may request to be connected to the sanitary system in the future. The City is therefore prepared to defer payment of sanitary sewer fees until such time. The parties request that the Board exercise its variance powers and remove the fee assessment of \$25,240/ha for “Winterburn Industrial North (Yellowhead Ind) Onsite Sanitary”. The variance would also remove the assessment of \$23,279/ha for “EA (WESS)”, which stands for “Expansion Assessment (West Edmonton Sanitary Sewer)”.
- b) Storm Sewer
- [11] However, the City’s position with respect to storm sewer is that as the site is a light industrial facility, the storm water from the site should be treated. Currently, the storm water flows from the site through a ditch that runs down 99 Street in a northeasterly direction to Kirk Lake, which is a natural lake. As such, the City is still assessing a drainage fee for “Winterburn Industrial North Onsite Storm”. However, the assessment applies only to 20% of the total lot area, and the City has agreed to defer payment of this assessment until such time that the storm water retention pond is constructed.
- [12] Upon questioning by the Board, the Respondent explained that the storm water retention facility will be constructed by Walton, a neighbouring property owner to the north of the subject site. However, Walton has provided no concrete timeline for the construction of this facility.

The parties therefore agree that deferral of the 20% assessment until completion of the storm water facility is acceptable. Mr. Gunther also confirmed that the amended conditions still reserve the City's right to collect the applicable fees in the future, when it becomes necessary to do so.

c) "Necessary" to Serve the Development

- [13] The Board noted that when the Alberta Court of Appeal remitted this matter back to the Subdivision and Development Appeal Board for rehearing, it directed that the Board reconsider the matter "in a manner consistent with the statutory provision", that is, whether storm and sanitary sewer utilities are "necessary to serve the development." The Board questioned whether the proposed amendments to the conditions, as jointly submitted by the parties, satisfy both the Court's direction and the requirement that the public utility be "necessary" pursuant to section 650(1)(c).
- [14] The Respondent submitted that the determination of what is "necessary" will require a case-by-case analysis. As noted in Justice Berger's dissenting opinion, such an analysis will also involve public policy considerations. In this case, the subject property is located on a large lot with an on-site sanitary sewer system. However, the development is also located in an area that is industrial in nature, with untreated storm water flowing into a natural lake. It is therefore the City's position that the conditions and assessments, as amended, for the applicable public utilities are necessary.
- [15] Legal counsel for the Appellant stated that he did not have instructions from his client to make submissions in this regard. The Appellant's position regarding the amended conditions is that they are agreeable. That being said, counsel noted that the Appellant's position has always been that while the storm water facility remains incomplete and no concrete date for completion has been set, such public utility cannot be considered "necessary" to serve the subject development.
- [16] Regarding the comments submitted by CN Rail, neither party expressed concerns about the comments. Counsel for the Respondent noted that in his experience, the comments provided by CN Rail are fairly standard.

Decision

- [17] The appeal is **ALLOWED IN PART** and the decision of the Development Authority is **VARIED**. The development is **GRANTED** as approved by the Development Authority and amended as per the Board's October 10, 2014 decision, with the following **AMENDMENT** to **CONDITION 3** as set out in Permit Number 152674334-001, issued on July 3, 2014:

Amended Conditions:

CONDITION 3 is amended as per the joint submissions of the Appellant and Respondent:

PRIOR TO THE RELEASE OF DRAWINGS FOR BUILDING PERMIT REVIEW, the property owner shall enter into a Servicing Agreement to pay the following assessments:

- Winterburn Industrial Area Master Plan; \$125/ha
- Area Master Study (NW Annexation 1-130); \$43/ha
- Winterburn Industrial North Onsite Storm; \$85,598/ha

PACs and EA are applicable to the entire lot. Under this DP, we are only doing drainage assessment (Winterburn Industrial North Onsite Storm) for 20% of the total lot area that is 1.577 ha., with payment of this 20% assessment being deferred until such time as construction on the storm water retention pond which will serve the subject property is complete, with such pond currently depicted in Exhibit 11 to the Winterburn Industrial Area Structure Plan and proposed to be constructed directly to the north of the subject property and to the west of 199 Street, though there may be some minor deviation in the location of the said pond to be constructed. The remaining area of the lot (i.e. 80%) will be deferred until future application for subdivision or development permit, in accordance with the terms of the servicing agreement to be entered into.

The total area of the property is 7.884 ha and is obtained from the City's information computer program called POSSE. The rates are 2014 rates. The final PAC amounts will be based on the prevailing rates at the time the applicant/owner pays and enters into a servicing agreement with the City. The PACs must be paid by entering into a servicing agreement, which will be prepared by Sustainable Development. The applicant/owner should contact Raghda Abdelmonem at 780-442-7042, upon issuance of the Development Permit, when he/she is ready to initiate the servicing agreement and make payment.

Note:

Refer to Appendix I of this decision for the complete amended conditions.

Reasons for Decision

- [18] The proposed development is a Discretionary Use in the IM Medium Industrial Zone. In 2014, the Applicant received an approved developer permit with conditions for various public utilities assessments.

The Applicant subsequently appealed those conditions to a panel of the City of Edmonton Subdivision and Development Appeal Board (“the Board”). In its October 10, 2014 decision, the Board allowed the appeal in part, and amended certain conditions, but assessments for storm and sanitary sewer remained intact. The Applicant appealed further to the Alberta Court of Appeal.

[19] In 2016, the Court allowed the appeal and set aside the 2014 decision of this Board, remitting the matter back to the SDAB for reconsideration in a manner consistent with section 650(1)(c) of the *Municipal Government Act* (see *Osman Auction v Edmonton (City)*, 2016 ABCA 166 at paragraph 31).

[20] Section 650(1)(c) provides as follows:

650(1) A council may in a land use bylaw require that, as a condition of a development permit’s being issued, the applicant enter into an agreement with the municipality to do any or all of the following:

...

(c) to install or pay for the installation of a public utility described in section 616(v)(i) to (ix) **that is necessary to serve the development**, whether or not the public utility is, or will be, located on the land that is the subject of the development; [emphasis added]

[21] At the rehearing of this matter, the Board heard joint submissions from the Appellant and the Respondent with respect to a request for variances to the conditions of the 2014 development permit. The joint submissions related specifically to Condition 3. Neither party contested the other conditions as amended by the 2014 SDAB panel, therefore those conditions remain intact.

[22] With respect to Condition 3, the assessments regarding the “Winterburn Industrial North (Yellowhead Ind) Onsite Sanitary; \$25,240/ha” and “EA (WESS) \$23,278/ha” are struck as being un-necessary to serve the development at this time. The Board strikes these assessments on the basis that the parties have come to an agreement with respect to these two items. Both parties jointly submit that access to the City’s sanitary sewage system was not available at the time of the original application, and that such system remains unavailable. In the interim, the developer has constructed a self-contained septic system on the subject site.

[23] The Board accepts this on-site sanitary sewage system as an acceptable alternative to connection to the City’s sanitary sewage system. The Board further notes that at any future time, whether upon subdivision, further development of the property, or an application by the developer to connect to the City’s sanitary sewage system, the full cost of such connection remains recoverable by the City.

[24] Condition 3 is further amended to read as follows:

PACs and EA are applicable to the entire lot. Under this DP, we are only doing drainage assessment (Winterburn Industrial North Onsite Storm) for 20% of the total lot area that is 1.577 ha., with payment of this 20% assessment being deferred until such time as construction on the storm water retention pond which will serve the subject property is complete, with such pond currently depicted in Exhibit 11 to the Winterburn Industrial Area Structure Plan and proposed to be constructed directly to the north of the subject property and to the west of 199 Street, though there may be some minor deviation in the location of the said pond to be constructed. The remaining area of the lot (i.e. 80%) will be deferred until future application for subdivision or development permit, in accordance with the terms of the servicing agreement to be entered into.

The total area of the property is 7.884 ha and is obtained from the City's information computer program called POSSE. The rates are 2014 rates. The final PAC amounts will be based on the prevailing rates at the time the applicant/owner pays and enters into a servicing agreement with the City. The PACs must be paid by entering into a servicing agreement, which will be prepared by Sustainable Development. The applicant/owner should contact Raghda Abdelmonem at 780-442-7042, upon issuance of the Development Permit, when he/she is ready to initiate the servicing agreement and make payment.

[25] The Board finds that these amendments to Condition 3 are acceptable for the following reasons:

- a) There is a storm water ditch system in the area, which will ultimately be replaced as part of the servicing of the surrounding lands by Walton, a neighbouring property owner to the north of the subject site.
- b) Storm water facilities envisaged by the Winterburn Industrial Area Structure Plan remains unavailable, and no concrete date has been set for when such facilities will be completed.
- c) While the existing ditch system is not ideal, the Board accepts that it serves as an interim solution to drainage of storm water from the site.
- d) The amendments are acceptable to the affected parties.

[26] In referring this matter back to the Board for rehearing, the Alberta Court of Appeal indicated that the prior 2014 decision of this Board failed to address the issue of whether the provision of storm and sanitary sewer services was “necessary” to serve the subject development, pursuant to section 650(1)(c) of the *Municipal Government Act*.

- [27] The Board finds that the provision of storm water drainage and treatment facilities as per the Winterburn Industrial Area Structure Plan will ultimately be necessary to serve the development and avoid the health hazard of untreated runoff from industrial land in open ditches, that become breeding grounds for mosquitos. However, the Board accepts the position of the parties, that is, sanitary sewer facilities were unavailable at the time that the Appellant established its business and constructed its building. As such, the provision of a self-contained on-site sanitary sewage system was the only feasible option available to the developer at the time, as the City was not in a position to ensure access to sanitary sewer facilities. The existing interim solution is therefore acceptable until such time as the official facilities are completed.
- [28] The Board notes that Walton was not directly represented at the hearing, though administration for the Board confirmed that Walton had been notified of the rehearing. The Board also received assurances from the Appellant and Respondent that Walton was informed of the re-hearing of this matter.
- [29] The Board was also in receipt of comments submitted by CN Rail, to which the Respondent assured the Board that neither the current nor future surface drainage arrangement would constitute any problems for the adjacent CN Rail operations.
- [30] For the above reasons, the Board finds that the proposed amended conditions as jointly submitted by the Appellant and Respondent are for the purposes of installing or paying for the installation of public utilities that are “necessary to serve the development”, as required under section 650(1)(c) of the *Municipal Government Act*. The Board allows the appeal in part, and grants the subject development permit with the amended conditions.

Mr. N. Somerville, Presiding Officer
Subdivision and Development Appeal Board

APPENDIX 1: Complete Amended Conditions to Permit Number 152674334-001

1. PRIOR TO THE RELEASE OF DRAWINGS FOR BUILDING PERMIT REVIEW, the applicant or property owner shall submit a Landscape Plan.
2. PRIOR TO THE RELEASE OF DRAWINGS FOR BUILDING PERMIT REVIEW, the applicant or property owner shall provide a guaranteed security to ensure that landscaping is provided and maintained for two growing seasons. The Landscape Security may be held for two full years after the landscaping has been completed. This security may take the following forms:
 - a) cash to a value equal to 100 percent of the established landscaping costs; or
 - b) an irrevocable letter of credit having a value equivalent to 100 percent of the established landscaping costs.

Any letter of credit shall allow for partial draws. If the landscaping is not completed in accordance with the approved Landscape Plan(s) within one growing season after completion of the development or if the landscaping is not well maintained and in a healthy condition two growing seasons after completion of the landscaping, the City may draw on the security for its use absolutely. Reference Section 55.6.

3. PRIOR TO THE RELEASE OF DRAWINGS FOR BUILDING PERMIT REVIEW, the property owner shall enter into a Servicing Agreement to pay the following assessments:
 - Winterburn Industrial Area Master Plan; \$125/ha
 - Area Master Study (NW Annexation 1-130); \$43/ha
 - Winterburn Industrial North Onsite Storm; \$85,598/ha

PACs and EA are applicable to the entire lot. Under this DP, we are only doing drainage assessment (Winterburn Industrial North Onsite Storm) for 20% of the total lot area that is 1.577 ha., with payment of this 20% assessment being deferred until such time as construction on the storm water retention pond which will serve the subject property is complete, with such pond currently depicted in Exhibit 11 to the Winterburn Industrial Area Structure Plan and proposed to be constructed directly to the north of the subject property and to the west of 199 Street, though there may be some minor deviation in the location of the said pond to be constructed. The remaining area of the lot (i.e. 80%) will be deferred until future application for subdivision or development permit, in accordance with the terms of the servicing agreement to be entered into.

The total area of the property is 7.884 ha and is obtained from the City's information computer program called POSSE. The rates are 2014 rates. The final PAC amounts will be based on the prevailing rates at the time the applicant/owner pays and enters into a servicing agreement with the City. The PACs must be paid by entering into a servicing agreement, which will be prepared by Sustainable Development.

The applicant/owner should contact Raghda Abdelmonem at 780-442-7042, upon issuance of the Development Permit, when he/she is ready to initiate the servicing agreement and make payment.

4. PRIOR TO THE RELEASE OF DRAWINGS FOR BUILDING PERMIT REVIEW, the owner must enter into a Municipal Improvement Agreement with the City for the following improvements:
 - reconstruction of the most southern culvert crossing to a width within a range of 11.5 metres to 13.5 metres, located approximately 115 m south of the north property line; and
 - hard surfacing of the access/drive aisle of both accesses from the edge of driving surface to the property line.

The Agreement must be signed by the property owner and returned to Transportation Services to the attention of Loli Fernandez (780-944-7683) including an irrevocable Letter of Credit in the amount of \$55,000.00 to cover 100 percent of construction costs. The Agreement will be forwarded directly to the owner for his signature. Once signed, the owner is required to have a Civil Engineer submit stamped engineering drawings for approval by the Transportation Services.

5. PRIOR TO THE RELEASE OF DRAWINGS FOR BUILDING PERMIT REVIEW, the owner must enter into a Servicing Agreement with the City of Edmonton for the payment of the ARA owing on the portion of the property being developed. This lot is within the Winterburn Industrial Arterial Roadway Assessment (ARA) catchment. The amount of ARA owing using the 2014 rate totals \$481,950 for the entire site. The proposed development represents a 39.8 percent increase in development on the property therefore, 39.8 percent of the ARA amount for the entire property in the amount of \$191,816.10 is owed with this development application. Upon future development or subdivision of the site, the remaining 60.2 percent (in the amount of \$290,133.90) will be collected. The assessment amount may be adjusted to reflect the current ARA rate at the time the Servicing Agreement is signed. The owner must contact Raghda Abdelmonem (780-442-7042) of Sustainable Development for more information on the Servicing Agreement and ARA owing. The owner must enter into a Servicing Agreement with the City of Edmonton for the payment of the ARA owing on the portion of the property being developed.
6. All access locations and curb crossings shall have the approval of the City Transportation and Streets Department prior to the start of construction. Reference Section 53(1).
7. The most northern access from the site to 199 Street exists; however, Transportation Services will not permit a graveled access to a paved roadway. The access/drive aisle of the access must be hard surfaced from the edge of driving surface to the property line, as shown on Enclosure I. The pavement will limit loose gravel from being carried onto the paved surface of the adjacent roadway from the graveled yard. Any further modification to the existing access requires the review and approval of Transportation Services.

8. The most southern access from the site to 199 Street located approximately 115 metres south of the north property line, must be reconstructed as a culvert crossing to a width within a range of 11.5 metres to 13.5 metres to accommodate large vehicles. In addition, the access/drive aisle of the access must be hard surfaced from the edge of driving surface to the property line, as shown on Enclosure. The proposed gate must not swing out over road right-of-way. It must either swing into the property or slide along the fence. No objects are permitted to encroach onto, over or under road right-of-way.
9. There may be utilities within road right-of-way not specified that must be considered during construction. The owner/applicant is responsible for the location of all underground and above ground utilities and maintaining required clearances as specified by the utility companies. Alberta One-Call (1-800-242-3447) and Shaw Cable (1-866-344-7429; www.digshaw.ca) should be contacted at least two weeks prior to the work beginning to have utilities located. Any costs associated with relocations and/or removals shall be at the expense of the owner/applicant.
10. There are existing trees and shrubs adjacent to the site that must be protected during construction. Should removal of the trees and shrubs be required, the owner/applicant must contact Marshall Mithrush of Community Services (780-496-4953). Any removal costs shall be borne by the owner/applicant.
11. Any hoarding or construction taking place on road right-of-way requires an OSCAM permit. It should be noted that the hoarding must not damage boulevard trees. The owner must call Transportation Operations at 780-442-6458 to arrange for the permit.
12. Any boulevard damage occurring as a result of construction traffic must be restored to the satisfaction of Transportation Services, as per Section 15.5(f) of the Zoning Bylaw. The boulevard will be inspected by Transportation Services prior to construction, and again once construction is complete. All expenses incurred for repair are to be borne by the owner.
13. Bicycle parking (a minimum of 5 spaces) shall be provided in accordance to Section 54.3.
14. Immediately upon demolition of the building, the site shall be cleared of all debris.
15. The applicant/owner shall provide parking for People with Disabilities (a minimum of 3 spaces) in accordance to Section 54.1(3).
16. All activities or operations of the proposed development shall comply to the standards prescribed by the Province of Alberta pursuant to the *Environmental Protection and Enhancement Act* and the regulations pertaining thereto.
17. All outdoor trash collection areas shall be located and screened in accordance with Sections 55(4) and (5).

18. The off-street parking, loading and unloading (including aisles or driveways) shall be hardsurfaced, curbed, drained and maintained in accordance to Section 54.6.
19. The development shall comply to the performance standards for the IB District in accordance to Section 57 of the *Edmonton Zoning Bylaw*. (Reference Section 400.4(6)).
20. No parking, loading, storage, trash collection, outdoor service or display area shall be permitted within the required 3.0 metre yards. (Reference Section 420.4(3).)
21. Landscaping shall be in accordance to Section 55.
22. An approved Development Permit means that the proposed development has been reviewed only against the provisions of the Edmonton Zoning Bylaw. It does not remove obligations to conform with other legislation, bylaws or land title instruments such as the *Municipal Government Act*, the ERCB Directive 079, the *Edmonton Safety Codes Permit Bylaw* or any caveats, covenants or easements that might be attached to the Site.

Notes:

- Signs require separate Development Applications.
- The City of Edmonton does not conduct independent environmental checks of land within the City. If you are concerned about the suitability of this property for any purpose, you should conduct your own tests and reviews. The City of Edmonton, in issuing this Development Permit, makes no representations and offers no warranties as to the suitability of the property for any purpose or as to the presence or absence of any environmental contaminants on the property.
- A Building Permit is required for any construction or change in use of a building. For a building permit, and prior to the Plans Examination review, you require construction drawings and the payment of fees. Please contact the 311 Call Centre for further information.

Important Information for the Applicant/Appellant

1. This is not a Building Permit. A Building Permit must be obtained separately from the Sustainable Development Department, located on the 5th Floor, 10250 – 101 Street, Edmonton.
2. Obtaining a Development Permit does not relieve you from complying with:
 - a) the requirements of the *Edmonton Zoning Bylaw*, insofar as those requirements have not been relaxed or varied by a decision of the Subdivision and Development Appeal Board,
 - b) the requirements of the *Alberta Safety Codes Act*,
 - c) the *Alberta Regulation 204/207 – Safety Codes Act – Permit Regulation*,
 - d) the requirements of any other appropriate federal, provincial or municipal legislation,
 - e) the conditions of any caveat, covenant, easement or other instrument affecting a building or land.
3. When an application for a Development Permit has been approved by the Subdivision and Development Appeal Board, it shall not be valid unless and until any conditions of approval, save those of a continuing nature, have been fulfilled.
4. A Development Permit will expire in accordance to the provisions of Section 22 of the *Edmonton Zoning Bylaw, Bylaw 12800*, as amended.
5. This decision may be appealed to the Alberta Court of Appeal on a question of law or jurisdiction under Section 688 of the *Municipal Government Act*, RSA 2000, c M-26. If the Subdivision and Development Appeal Board is served with notice of an application for leave to appeal its decision, such notice shall operate to suspend the Development Permit.
6. When a decision on a Development Permit application has been rendered by the Subdivision and Development Appeal Board, the enforcement of that decision is carried out by the Sustainable Development Department, located on the 5th Floor, 10250 – 101 Street, Edmonton.

NOTE: The City of Edmonton does not conduct independent environmental checks of land within the City. If you are concerned about the stability of this property for any purpose, you should conduct your own tests and reviews. The City of Edmonton, when issuing a development permit, makes no representations and offers no warranties as to the suitability of the property for any purpose or as to the presence or absence of any environmental contaminants on the property.