EDMONTON
TRIBUNALS
Subdivision & Development Appeal Board

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Date: January 26, 2017
Project Number: 230546924-001
File Number: SDAB-S-17-001

Notice of Decision

[1] On January 11, 2017, the Subdivision and Development Appeal Board heard an appeal that was filed on **December 4, 2016**. The appeal concerned the decision of the Subdivision Authority, issued on November 24, 2016, to refuse the following:

To create one (1) additional Single Detached Residential Lot.

[2] The subject property is on Plan 2639KS Blk 15 Lot 31, located at 11924 - 136 Street NW, within the (RF1) Single Detached Residential Zone. The Mature Neighbourhood Overlay applies to the subject property.

[3] The following documents were received prior to the hearing and form part of the record:

- A copy of the refused Subdivision application; and
- An Online response from a property owner in opposition.

[4] The following exhibits were presented during the hearing and form part of the record:

- Exhibit A1 to A3 – Written submissions from the Subdivision Authority, Development Services and Drainage Planning;
- Exhibit B – Proposed new subdivision plan submitted by the Appellants; and
- Exhibit C – Subdivision Plan marked with proposed access from 136 Street.

Preliminary Matters

[5] 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.

[6] The Presiding Officer outlined how the hearing would be conducted, including the order of appearance of parties, and no opposition was noted.

[7] The appeal was filed on time, in accordance with section 678 of the *Municipal Government Act*, RSA 2000, c M-26.

Motion

"that SDAB-S-17-001 be raised from the table"

Summary of Hearing

The Presiding Officer advised the Appellants that the Board would not be considering their new proposed subdivision plan, "Exhibit B", because it represents a substantive departure from the original tentative subdivision plan. The new proposed subdivision plan was not the subject of the decision of refusal and was not reviewed by the Subdivision Authority in accordance with the usual prescribed procedures.

i) Position of the Appellants and property owners, Jordan & Justin Mywaart:

[8] The Appellants tried to contact the neighbours within a 60-metre radius. They discussed the subdivision and development plan to leave the existing house on the north Lot and build a 1200 square foot bungalow on the south Lot where the existing detached garage is currently located with about 50 percent of these neighbours.

[9] The immediately adjacent neighbours to the west and south were comfortable with the proposed subdivision.

[10] Many neighbours were happy that a row house or multi-family housing was not being planned for the Site. The Appellants understand one neighbour wrote a letter of objection, but that person lives approximately five houses down the block face and is less affected by the subdivision.

[11] Services for the Lots can be provided to address the concerns of the Subdivision Authority by the establishment of an easement through the south Lot or by condominiumizing the property to share the services.

[12] The Appellants provided the following responses to questions from the Board:

a. They assumed it was possible to service the north Lot from 136 Street or 122 Avenue, although they have not fully investigated this possibility and are uncertain if cost would be a barrier.

b. They marked a copy of the tentative plan of subdivision, "Exhibit C", to illustrate how vehicular access would be provided to the new garage on the north Lot by relocating the existing driveway to the north of the proposed line of subdivision and south of the existing house. This would allow vehicular access from 136 Street.

c. They conceded that there are no other similarly sized Lots in this neighbourhood. The subject property is currently the largest Lot on the block and the proposed subdivision will create the two smallest Lots on the bock.

d. They plan to reside in the new house and their parents will move into the existing house.

ii) Position of the Subdivision Officer, Mr. G. Quashie-Sam, the Development Officer, Mr. C. Lee, and Drainage Planner, Mr. J. Tiwana

[13] Mr. Quashie-Sam indicated that the proposed subdivision application was refused primarily because it does not meet the minimum Site depth requirements for a Lot in an RF1 Single Detached Residential Zone.

[14] The City provided the following information in response to questions from the Board:

a. The creation of cross Lot servicing was not identified as a reason for refusal because there are options available to provide direct servicing to both Lots and it is the responsibility of the Applicant to investigate and provide solutions.

b. Mr. Tiwana advised that sanitary servicing for these Lots is currently only available from the lane, "Exhibit A2". However, the Applicant does have the option of extending sewer mains to provide servicing although it would be expensive.

c. The proposed subdivision will create cross Lot servicing which involve easements entered into by two private homeowners that could be ended at any time. This is contrary to the *Drainage Bylaw* which requires that each separately titled parcel be independently serviced directly off public sewer mains.

d. The sanitary sewer line that services the existing house runs from the south and will have to cross the proposed property line to continue to provide service for it.

e. A private owner-to-owner easement could be entered into to provide servicing for the subdivided Lots, but the City would not be involved in that process.

f. Mr. Quashie-Sam confirmed that servicing of the Lots was not identified as a reason for refusal in the written decision because options are technically available for the Applicant to provide services to both proposed Lots.

g. Mr. Lee confirmed that "Front Lot Line" is defined in section 6.1(39) of the *Edmonton Zoning Bylaw*. A Front Lot Line must abut a public roadway, other than a Lane and for corner Lots it is the shorter of property lines abutting public roadways. Under this definition, the Front Lot Line for the north Lot continues to be 122 Avenue, while the Front Lot Line for the south Lot will be 136 Street.

h. Given the designated Front Lot Line, the Site depth deficiency is a problem for the south Lot, but not the north Lot.

i. The diagram, marked "Exhibit A2", illustrates the existing 40 percent Rear Setback for the current Lot in comparison to the approximate new building pocket for the south Lot given the required Setbacks.

j. In his opinion, if the subdivision is approved a Lot will be created that does not comply with the Site depth requirements and this will adversely affect the immediately adjacent neighbour to the west. If the Board approves a Lot with this dimension, they will be creating a hardship Lot because variances will always need to be granted for any future development. However, the original Lot is very large and a Class A development, but for the Site depth, is possible on the south lot. He took account of the 40 percent required Rear Setback in forming this opinion.

k. Relocating vehicular access from 136 Street may require the removal of some large mature boulevard trees.

l. Mr. Quashie-Sam indicated that this will be the first subdivision of this configuration and size in this neighbourhood and so it will have a material impact because of the smaller Lot size.

m. The neighbour to the south across the lane expressed concern to the City regarding the size of the proposed Lots which will not be characteristic of this neighbourhood.

n. Mr. Quasie-Sam confirmed that the future building Height cannot be conditioned as part of a subdivision approval and that Transportation Services has indicated that it would support relocating the current vehicular access to accommodate the north Lot on 136 Street.

iii) Rebuttal of the Appellants

[15] The Appellants reiterated that they had spoken to the most affected neighbour to the west who supports the proposed subdivision. That neighbour was only concerned about a structure being built that would block light to their garden.

[16] The Appellants are prepared to commit to the development of a bungalow on the south Lot. Accordingly they are willing to agree to a condition restricting building Height, but understand that this cannot be conditioned on a subdivision approval.

[17] There are four large spruce trees on the boulevard. One may have to be removed to accommodate the relocation of the driveway, but they are committed to keeping as many as possible.

[18] Their contractor, Franken Holdings, advised them that subdividing the Lot would be ideal. However, there are other options available including condominiumizing the Site or developing a Secondary Suite or Garage Suite in lieu of a second Single Detached House.

Decision

[19] That the appeal is **ALLOWED** and the decision of the Subdivision Authority **REVOKED**. The subdivision is **GRANTED** as applied for to the Subdivision Authority, subject to the following **CONDITIONS**:

1. That the owner obtain a permit to demolish the existing garage (or make arrangements with Development Services to leave as is) prior to endorsement of the final plan. Demolition permits can be obtained from Development Services; and

2. That the owner make satisfactory arrangements with Drainage Planning and Engineering for the provision of separate services (water and sanitary) to the proposed lots. These arrangements shall include the elimination of cross lot overland drainage that will occur as a result of this subdivision and all necessary sewer main extensions at the owner's expense. (Contact Water and Sewer Servicing at 780-496-5444).

Reasons for Decision

[20] The Appellants propose to subdivide one existing corner Lot from east to west across its width. This subdivision will create two Lots: a north Lot that abuts 122 Avenue and 136 Street and a south Lot that abuts 136 Street and a lane. Under the new configuration, 122 Avenue will remain the Front Lot Line for the north Lot, while 136 Street will become the Front Lot Line for the south Lot. This reorientation changes the respective dimensions for Site Width and Site depth for the south Lot.

[21] The Subdivision Authority refused the application for two reasons. First, the proposal will result in a Site depth on the south Lot of 23.34 metres which does not comply with the 30.0 metres minimum required Site depth for the RF1 Single Detached Residential Zone under section 110.4(1)(c) of the *Edmonton Zoning Bylaw (*the *Bylaw).* Second, the two proposed Lots will be uncharacteristically small compared to properties on the block face which does not comply with section 654(2)(a) of the *Municipal Government Act (*the *Act).*

[22] Section 680(2) of the *Act* outlines the authority of the Board in appeals from refused subdivision applications.

[23] As part of this authority, section 680(2)(2)(f) grants the Board the same power that the Subdivision Authority had when making the original decision:

> (f) In determining an appeal, the board hearing the appeal may, in addition to the other powers it has, exercise the same power as a subdivision authority is permitted to exercise pursuant to this Part or the regulations or bylaws under this Part.

[24] Section 654 of the *Act* defines the authority of a Subdivision Authority making the original decision concerning an application for subdivision:

> (1) A subdivision authority must not approve an application for subdivision approval unless
>
> > (a) the land that is proposed to be subdivided is, in the opinion of the subdivision authority, suitable for the purpose for which the subdivision is intended,
> >
> > (b) the proposed subdivision conforms to the provisions of any statutory plan and, subject to subsection (2), any land use bylaw that affects the land proposed to be subdivided,
> >
> > (c) the proposed subdivision complies with this Part and the regulations under this Part, and
> >
> > (d) all outstanding property taxes on the land proposed to be subdivided have been paid to the municipality where the land is located or arrangements satisfactory to the municipality have been made for their payment pursuant to Part 10.
>
> (2) A subdivision authority may approve an application for subdivision approval even though the proposed subdivision does not comply with the land use bylaw if, in its opinion,
>
> > (a) the proposed subdivision would not
> >
> > > (i) unduly interfere with the amenities of the neighbourhood, or
> > >
> > > (ii) materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land,
> > >
> > > and
> >
> > (b) the proposed subdivision conforms with the use prescribed for that land in the land use bylaw.

[25] The subject Site is located in the (RF1) Single Detached Residential Zone.

[26] The Board finds that the proposed Use, Single Detached Housing, conforms to the Use prescribed for the land in section 110.2(4) of the *Bylaw* as required per section 680(2)(b) of the *Act.*

[27] Although the proposed subdivision will create two Lots that are uncharacteristically smaller than existing Lots along the block face and one Lot that is non-compliant because of a deficiency in the minimum required Site depth under section 110.4 of the *Bylaw*, the Board finds that the subdivision will not unduly interfere with the amenities of the neighbourhood, or materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land for the following reasons:

a) The existing corner Lot is extremely large. It is the largest Lot on the block face.

b) The dimensions of the north Lot are compliant with applicable development regulations in the *Bylaw*. The dimensions of the south Lot are compliant with applicable development regulations, other than Site depth. The deficiency in Site depth is due to the reorientation of the south Lot which, through the subdivision, will change from a corner Lot to an interior Lot.

c) While the two proposed Lots will be smaller than others along the block face, they nonetheless will be more than ample to accommodate the proposed Use.

d) The Lots are more than double the minimum required Site Area of 250.1 square metres under section 110.4(1(a) for Single Detached Housing Uses in the RF1 Zone. The north Lot will be approximately 580 square meters in size and the south Lot will be approximately 630 square metres in size, according to the tentative Plan of Subdivision.

e) In addition, both Lots exceed the 7.6 metres minimum Site Width required under section 110.4(1)(b). The Site Width for the north Lot is more than twice the minimum requirement and the Site Width for the south Lot is more than three times the minimum requirement.

f) The Board accepts the evidence of the Development Officer showing that it is possible to accommodate a fully compliant Class A Development (aside from the Site depth) on the south Lot.

g) The visual impact of the two smaller Lots viewed from the north along the block face is mitigated in part because the existing corner Lot is to be subdivided from east to west more than 25.0 metres back from the Front Lot Line along 122 Avenue. A north south subdivision would comply with the *Bylaw* and create a greater visual impact from this view. In addition, the Lot widths facing the proposed subdivision along the flanking roadway are variable.

h) The Board accepts the Appellant's submission that they canvassed the neighbours, contacting about 50 percent of residents within 60 metres of the Site, and that the contacted individuals were generally supportive of the subdivision.

i) The Board accepts the Appellant's submission that they personally contacted the most affected adjacent property owner to the west to discuss the proposed subdivision and that property owner was supportive of the proposed subdivision, and was concerned that any development on the Site be a bungalow, similar in Height to the existing houses along the block face.

j) The Board notes that no one appeared in person to oppose the appeal. The Board received one e-mail response opposed to the subdivision from owners of a property located three Lots to the east along the block face, but they provided no explanation for their position. In addition, the Board heard conflicting evidence about the adjacent neighbour to the south across the lane. The Appellant indicated that this neighbour was comfortable with the proposed subdivision. However, the Subdivision Authority indicated that this neighbour, expressed concern over the uncharacteristically small Lots. The evidence presented of opposition does not provide sufficient evidence of a material adverse impact, nor of a planning reason to deny the application for subdivision, particularly when weighed against the evidence of support.

[28] Currently there is one vehicular access off 136 Street to the existing corner Lot. This access will move on subdivision and the Subdivision Authority provided evidence that Transportation Services would support relocating the existing vehicular access on the south Lot to the north Lot. As subdivision will not alter the number of vehicular accesses off of 136 Street and given Transportation Services' support for the relocation, the Board finds that vehicular access is not a reason to deny the application.

[29] During the hearing, the Subdivision Authority raised concern that, contrary to the *Drainage Bylaw*, the proposed subdivision might involve cross Lot servicing because the sanitary sewer for the existing house on the north Lot comes from the (south) rear lane and will have to cross the south Lot. However, the Subdivision Authority also acknowledged that direct servicing could be provided to each of the two Lots in compliance with *Drainage Bylaw,* although it might be prohibitively expensive.

[30] Given the evidence of the Subdivision Authority, that servicing is possible, the Board concurs with the Subdivision Authority that this is not a reason to refuse the subdivision. Tangential issues raised about the costs and logistics of servicing these Lots, as well as compliance with the *Drainage Bylaw*, are beyond the purview of the Board. Further, the Board notes that granting an application of subdivision in no way relieves the Appellants from their legal obligation to comply with the *Drainage Bylaw,* nor any other applicable municipal or provincial regulations.

[31] For reasons above, the Board finds that even though the proposed subdivision does not comply with the minimum Site depth required pursuant to section 110.4 of the *Edmonton Zoning Bylaw*, there is no planning reason to deny the proposed subdivision and it will not unduly interfere with the amenities of the neighbourhood, or materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land.

Ms. K. Cherniawsky, Presiding Officer
Subdivision and Development Appeal Board

Board members in attendance: Ms. G. Harris, Mr. V. Laberge, Mr. A. Nagy, Mr. L. Pratt

Important Information for the Applicant/Appellant

1. 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.

ADVISEMENTS

1. That the owner is required to make satisfactory arrangements for, and pay all costs associated with separate servicing to each lot, as well as the modification, relocation and/or removal of existing services. For further information, please contact: EPCOR Distribution & Transmission Inc. (780-412-4000), TELUS Communications (Edmonton) Inc. (Residential and Business 780-423-2500), ATCO Gas (780-424-5222) and Drainage Planning and Engineering (water and sewer 780-496-5444);

2. That if power service crosses the proposed property line the owner may be required to provide a blanket easement in favour of EPCOR Distribution & Transmission Inc. if required, said easement shall be registered prior to or concurrent with the final plan (contact EPCOR Land and Administration Group at 780-412-3252);

3. That the owner shall ensure that any change in property boundaries does not cause any structures on this site to become non-compliant with the *Safety Codes Act* and *Alberta Building Code*. Permits may be required for such changes. Please contact 311 for more information, and

That the next step in the subdivision process is to have a legal instrument prepared (i.e. Plan of Survey) in order to register the approved subdivision. The legal instrument is then forwarded to the City for endorsement along with the endorsement fee ($649.00) and subsequently released to the applicant for registration at the Land Titles Office.

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Date: January 26, 2017
Project Number: 227399461-001
File Number: SDAB-S-16-003

Notice of Decision

[1] On November 24, 2016 and January 11, 2017 the Subdivision and Development Appeal Board ("the Board") heard an appeal that was filed on **October 31, 2016**. The appeal concerned the decision of the Subdivision Authority, issued on October 27, 2016, to refuse the following:

To create one (1) additional rural residential Lot.

[2] The subject property is on Plan 9022286 Blk 1 Lot 6A, located at 18650 - 8A Avenue SW, within the (RR) Rural Residential Zone. The Windermere Area Structure Plan and the Windermere Neighbourhood Structure Plan apply to the subject property.

November 24, 2016 hearing

[3] The following documents were received prior to the hearing and form part of the record:

- A copy of the Windermere Area Structure Plan ("Windermere ASP");
- A copy of the Windermere Neighbourhood Structure Plan ("Windermere NSP");
- A copy of the refused Subdivision application with an attachment;
- A written submission by the City of Edmonton Law Branch;
- The Appellant's written submissions;
- A letter of opposition from an adjacent property; and
- Two on-line responses in opposition from adjacent properties.

[4] The following exhibits were presented during the hearing and form part of the record:

- Exhibit A – A map of the area from the Appellant.
- Exhibit B – A plan of the proposed subdivision with building pockets from the Appellant.
- Exhibit C – An aerial map of the area from the Appellant.
- Exhibit D – A letter from Stantec Consulting Ltd., submitted by the Subdivision Authority.

- Exhibit E – Proposed conditions from the Subdivision Authority.

Preliminary Matters

[5] 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.

[6] The Presiding Officer outlined how the hearing would be conducted, including the order of appearance of parties, and no opposition was noted.

[7] The appeal was filed on time, in accordance with section 678 of the *Municipal Government Act ("the Act")*, RSA 2000, c M-26.

Summary of Hearing

i) Position of the Appellant, Mr. M. Lawrence of Stantec Consulting Ltd.

[8] Mr. Lawrence reviewed and refuted each of the reasons for refusal of the application for subdivision.

[9] The Subdivision Authority's reason for refusal no. I(1) states:

> the land use designation of the subject lot, as specified in Figure 5.0 - Development Concept of the Windermere Neighbourhood Structure Plan (NSP) (Bylaw 16472), is "Existing Country Residential. The subdivision does not comply with Section 3.1 – Development Goals of the Windermere NSP which states "The Windermere NSP aspires to[...] [p]rotect the existing character of country residential communities through appropriate urban design
> (i.e. transitional land use, site planning and design);"

[10] Pursuant to section 656 of the *Act*, the Subdivision Authority is responsible to provide reasons for refusal. Reason for refusal no. I(1) provides no justification and it does not comply with the definition of "reason" found in the Merriam-Webster (Appellants' submission, Tab 2, part III,) Merely citing section 3.1 of the Windermere NSP is not a reason, but only a statement. Therefore, the Subdivision Authority failed to justify why the proposed subdivision does not comply with this section.

[11] The Appellants propose one additional country residential parcel. They will not be changing the character of the area. The Appellants believe that the proposed subdivision will complement the area.

[12] Based on its location, the proposed subdivision complies with section 3.1 of the Windermere NSP, as it will create two Lots to provide a transition in Lot size between the larger parcels to the north and the smaller parcels to the south. Therefore section 3.1 as a reason for refusal has no standing.

[13] The Subdivision Authority reason for refusal no. I(2) states:

> the subdivision does not comply with Section 4.1.l - Country Residential Estate of the Windermere NSP which states "Windermere, Windermere Ridge and Westpoint Estates comprise existing country residential estate development within the plan boundary. These areas run north to the southern boundary of the plan along the North Saskatchewan River Valley top-of-bank. These residences form part of this area's early history and are expected to remain country residential. They are not intended to be further subdivided;"

[14] This is not correct, because the proposed country residential Lot will be sensitive to the existing country residential development and will not compromise the area's history (Appellant's submission Tab 2, part IV).

[15] Section 4.1.1 of the Windermere NSP which provides that the parcels of the existing country residential residences are not to be further subdivided is not an issue because the parcel to be subdivided is currently vacant and there are no improvements on it.

[16] The Appellants reviewed Figure 5.0, Tab 2, Appellant's submission which shows: a grey transition area extending from the north of the map to the south of the map; the existing country residential area west of the transition area; and, the newer development east of the transition area. There needs to be a reasonable transition between these parcels; however, this grey transition area does not extend up to the subject parcel of land. He believes that, section 4.1.1 has no relevance to this application and so this reason has no standing.

[17] The Subdivision Authority reason for refusal no. I(3) states:

> the zoning of the subject lot is (RR) Rural Residential Zone and is therefore subject to the regulations of Section 240 of the Edmonton Zoning Bylaw 12800. The subdivision does not comply with Section 240.1 of the Edmonton Zoning Bylaw 12800 which states "The RR Zone is intended to regulate rural residential development within existing rural residential subdivisions that existed prior to the passage of this Bylaw, and is not intended to facilitate future rural residential development and subdivision, which is contrary to the Municipal Development Plan;"

The General Purpose of the Zone in section 240.1 of the *Edmonton Zoning Bylaw* (the *Bylaw*) has no standing as it is not a development regulation. The General Purpose simply describes the Zone. The list of allowable Uses and the development regulations are the only items that have standing in the (RR) Rural Residential Zone ("RR Zone").

[18] The Subdivision Authority also failed to explain why the proposed subdivision is contrary to *The Way We Grow*, Municipal Development Plan ("the MDP"). To the contrary, he believes that the proposed subdivision is consistent with and meets several policies in the MDP, particularly:

a. Policy 3.6.1.6 of the MDP that states "Support contiguous development and infrastructure in order to accommodate growth in an orderly and economical fashion." The proposed subdivision meets this objective.

b. Policy 4.2.1.1 of the MDP states "Support neighbourhood revitalization, redevelopment and residential infill that contributes to the livability and adaptability of established neighbourhoods." The proposed subdivision supports revitalization and infill. They are trying to maximize lands and they are not burdening the current infrastructure.

c. Policy 4.2.1.6 of the MDP states "Optimize the use of existing infrastructure in established neighbourhoods." That objective is met as the Appellants are not asking for new services, they are just adding one additional country residential parcel of land.

d. Policy 4.4.1.1 of the MDP states "Provide a broad and varied housing choice, incorporating housing for various demographic and income groups in all neighbourhoods. The proposed subdivision will allow someone to purchase a new form of housing.

[19] After noting that the Board is not bound by previous subdivision decisions; he drew the Board's attention to the fact that a subdivision located just two Lots west of the subject Site was approved by the Subdivision Authority in 2012 after the Site was approved for a rezoning by City Council (Tab 5, Appellant's submission).

[20] The Subdivision Authority's reason for refusal no. I(4) states:

> the subject lot is 0.52 ha and the proposed lots are 0.26 ha. Therefore, the subdivision does not comply with Section 240.4(1) of the Edmonton Zoning Bylaw 12800 which states "The minimum Site Area shall be 1.0 ha;"

[21] He submitted a map of the area (Exhibit A) to show all the RR Zone Lots. The parcels in the grey transition area to the east of 184 Street are 0.1 hectares. The two proposed Lots will be twice the size as those in the grey transition area.

[22] If he divided the proposed new Lots into Lots the size of the residential ones located immediately south of Ellerslie Road, he could fit 5 of those Lots onto each of the new proposed Lots.

[23] The Lots surrounding the subject Site include substantial Single Detached Houses between 8,000 to 10,000 square feet. For context, he submitted (Exhibit B) and indicated that he could fit a 15,000 square foot Single Detached House on each of the proposed new Lots and still meet the development regulations for Setbacks in the RR Zone.

[24] The Subdivision Authority's final reason for refusal, no. I(5), states:

> a storm and sanitary servicing report was identified as a requirement to review this subdivision. The required report was not provided. Therefore, City of Edmonton Drainage Planning and Engineering does not support the subdivision.

[25] All of the Lots in this country residential area have on-site services and it does not make sense to provide a storm and sanitary servicing report to Drainage Services. Further, requesting a study was excessive, costly, and unnecessary as the Appellants' Lots would not require municipal water services.

[26] They are proposing two Rural Residential Lots ("RR Lot") for Single Detached Housing, which is a Permitted Use.

[27] Although the Lots are under the minimum Site area requirement, there are several other Lots in the area that are under 1.0 hectares.

[28] Section 617 of the *Act* states:

> The purpose of this Part and the regulations and bylaws under this Part is to provide means whereby plans and related matters may be prepared and adopted
>
> (a) to achieve the orderly, economical and beneficial development, use of land and patterns of human settlement, and
>
> (b) to maintain and improve the quality of the physical environment within which patterns of human settlement are situated in Alberta,
>
> without infringing on the rights of individuals for any public interest except to the extent that is necessary for the overall greater public interest.

In his view, the Subdivision Authority has not demonstrated that there is an overall greater public interest to refuse this application and infringe the Appellants' rights.

[29] Mr. Lawrence provided the following answers to questions from the Board:

a. He was unaware how long the RR Zone has been in the *Bylaw*.

b. Any development on the proposed Lots must comply with the *Public Health Act* regulations given that section 240.4(8) of the *Bylaw* states "Water supply and sewage disposal shall be provided in accordance with the Public Health Act regulations."

c. The grey transitional zone marked on the Windermere NSP is intended to provide transition from high density to medium density to low density.

d. The Lots located east of 184 Street are similar in size to the proposed Lots.

e. Condition I(1) of the 2012 subdivision decision states "that the owner enter into a Servicing Agreement with the City of Edmonton pursuant to section 655 of the MGA." (Tab 5, Appellant's submission). That Servicing Agreement is just a means to enter into a service agreement. When different developers are involved with new development in a neighbourhood, it allows everyone to share the costs.

f. The neighbouring 2012 subdivision approval is a Direct Control Provision ("DC Site"). However, in his view, it falls more within the residential community category.

g. The west parcel would need an access agreement with the City to accommodate vehicular access from Ellerslie Road as there is a ditch between the parcel and the roadway.

h. The land is flat. There are no impediments to development on the proposed parcels of land.

i. Rezoning the subject Site as was done with the adjacent subdivision in 2012 is an alternative that he may discuss with the property owner, but they thought that this process was reasonable. Rezoning to a DC Site is lengthy and costly.

j. They discussed the proposed subdivision with six property owners in the area. Mr. Lawrence hi-lighted an aerial map to identify those property owners' responses (Exhibit C). Based on their consultation, the hi-lighted marks show that two owners supported the proposed subdivision, two owners were unsure, and one opposed it.

k. Asked why the General Purpose of the Zone has no impact, but the Purpose of Part 17 of the *Act* does, he stated that the purpose of the *Act* sets out the parameters on how a municipality creates a land use bylaw.

l. Asked why section 240.1 containing the General Purpose of the Zone would not come into play in the Board's decision making authority under section 654(2) of the *Act*, Mr. Lawrence stated that the subdivided parcels only go beyond the General Purpose. He feels that if Lots cannot be subdivided, that rule should be stated in the Zone in the development regulations. The list of Uses in the Zone determines what type of development is allowed and because the General Purpose is not included in the development regulations, it should not be used to make a subdivision decision.

m. The parcel of land from the 2012 subdivision decision used to be part of the Windermere Golf and Country Club ("The Golf Club"). That Lot is 1.06 hectares.

n. The subject Site has been vacant since 1975.

o. Providing one additional Lot will not change the character of the area so section 3.1 and section 4.1.1 of the Windermere NSP which address protecting the existing character are not offended.

p. While section 4.1.1 of the Windermere NSP that states "These residences form part of this area's early history and are expected to remain country residential. They are not intended to be further subdivided," he believes that the language is permissive. The Windermere NSP would say "shall not" if all subdivisions were prohibited. He indicated that most area and neighbourhood structure plans use similar language.

q. The property owner, Mr. Hendricks clarified that Lot 6 and the subject Site (Lot 6A) used to be all one parcel of land. The portion of Lot 6 that became Lot 6A was initially used as a panhandle-shaped access to the balance of Lot 6.

ii) Position of the Subdivision Authority, Mr. K. Witiw

[30] The subject Site was created from Lot 6 in 1990. The Windermere ASP was created May 25, 2004. The Windermere NSP was created September 13, 2006. The current lands are known as Westpoint Estates.

[31] Based on the Windermere ASP map, this designated area is considered country residential. Similarly, the Windermere NSP map designates these parcels as un-serviced country residential.

[32] The proposed subdivision does not comply with the development goals in section 3.1 of the Windermere NSP which aspire to protect the existing character of the country residential communities.

[33] The existing residences form part of the area's early history and are not intended to be further subdivided per section 4.1.1 of the Windermere NSP.

[34] The aerial map of the area shows the context of the RR Zone. The General Purpose of the Zone states that it is not intended to facilitate future subdivision.

[35] Section 240.4(1) of the RR Zone of the *Bylaw* states "the minimum Site area shall be 1.0 hectares." The subject Site is just over a 0.50 hectare in size and the two proposed parcels are each 0.26 hectares in size, which does not meet the minimum Site area.

iii) Position of City of Edmonton Law Branch, Mr. M. Gunther

[36] The DC Site on the far west side of the Westpoint Estates was rezoned. It provides an example of the correct procedure for the proposed subdivision.

[37] The DC Site was the only portion of land owned by the Golf Club located above top-of-bank. The Golf Club wanted to dispose of this isolated land since they could not use it for the golf course and it had other development potential. Because the land was surrounded by RR Zoning, that applicant sought to bring a similar Use to it.

[38] As the *Bylaw* was clear and the RR Zone was not intended for any further subdivision, the applicant went to City Council for a DC Site rezoning, which was ultimately approved. In effect, City Council decided the Lot could be residential.

[39] The DC Site designation allows more specific oversight. For example, the properties in the grey transition zone in the Windermere NSP (figure 5.0) are all designated as Direct Control. They are subject to specific Setbacks and a minimum Site area regulation of 0.12 hectares. Regardless, a majority of the Lots along Windermere Drive are larger than the required minimum.

[40] The correct approach is to bring the application in an orderly fashion to City Council. This appeal is an "ad hoc" attempt to split the Lot and add to development without proper City servicing.

[41] The RR Zone is the only residential zone that even acknowledges that there may not be City servicing in place. A minimum Site size of 1.0 hectares was chosen for this zone because that is the minimum size appropriate for on-site servicing and separation of grey and black water.

[42] The existing Site is currently smaller than the minimum Site size allowed in the Zone, which makes it non-compliant. Further subdivision will create two 0.26 hectare Lots and double, the non-compliance.

[43] No other Lots in the Westpoint Estates located west of 184 Street are smaller than 1.0 hectares.

[44] Lots to the east of 184 Street are "legacy Lots" that range in size from 0.4 hectares to 0.6 hectares. Lots of this size have caused issues in other neighbourhoods because whenever a development permit application is made, the development is deemed a Class "B" Development due to the Lot size and notices are automatically sent out. Consequently, the smallest applications can be appealed because of personal issues between neighbours.

[45] It is the intention of City Council that no more "legacy Lots" will be created. This intention is made clear in the *Bylaw* and the Windermere NSP which prohibit further subdivision of "legacy Lots" in RR Zones

[46] The existing Lots are not sterilized, rather they need to be rezoned out of the country residential designation.

[47] The Lot was created in 1990 when all these Lots were far from Edmonton's urban development. Today the City is here and pushing further south. In his opinion, it does not make planning sense to create new un-serviced infill Lots in what is now suburbia.

[48] Policy 3.2 (Development Objectives) of the Windermere NSP includes an objective to "Provide servicing options to existing residents (Windermere and Westpoint) in the most timely and cost effective manner possible." The City required information to meet this objective.

[49] Drainage Services did not know if they could take a position on this proposed subdivision as they did not know what servicing was proposed.

[50] He submitted a letter from Stantec Consulting ("Exhibit D") that indicates that during the subdivision application process the Appellants were going to provide municipal services (water and sanitary). The City was unaware until the Appellants' presentation that they were no longer planning on servicing the proposed Lots.

[51] Section 617 of the *Act* emphasizes beneficial, orderly and economical development and that includes development of City services. Allowing development without servicing is problematic.

[52] A subdivision application is not like a development appeal, with a Use and development regulations that may interfere with pre-existing property rights. The courts have affirmed that no property owner has an automatic or common law right to subdivide their land. Subdivision is an indulgence granted at the behest of City when it is in the public interest and makes good planning sense.

[53] The Subdivision Authority refused this subdivision application based on the *Bylaw* and the applicable statutory plans.

[54] It is extremely rare for the Subdivision Authority to refuse a subdivision application. Refusals are the exception, not the rule. The Subdivision Authority takes this refusal very seriously. This application is a shortcut route to what might amount to a valid development.

[55] With respect to questions from the Board, Mr. Gunther provided the following:

a. Westpoint Estates consists of 29 Lots. The smallest Lot is 0.40 hectares.

b. The nearby subdivided DC Site was originally zoned AG, not RR.

c. The basis for the rationale requiring a minimum Site area of 1.0 hectares in the RR Zone may be out of date, but if so, it is up to City Council to amend it and they have not done so.

d. He was unaware of whether there were development permit application problems similar to those he cited in other RR Zones associated with the proposed developments on Westpoint Lots east of 184 Street.

e. The Subdivision Authority simply referenced sections 3.1 and 4.1.1 of the Windermere NSP as reasons for refusal because they speak for themselves and provide direction about the spirit and intent of the Windermere NSP.

f. Mr. Witiw indicated that the smallest Lots of 0.40 hectares are located east of 184 Street. The proposed Lots are on the west side of 184 Street. They would be 0.26 hectares, substantially less than the other existing Lots west of 184 Street. Allowing these two anomalous Lots would therefore change the character of this area.

g. Mr. Gunther was asked if the Windermere NSP could mean that subdivisions prohibited at the time of passage, might nonetheless proceed at a later time. He submitted that the meaning of section 4.1.1 of the Windermere NSP is plain on its face. It states "They are not intended to be further subdivided." The wording does not mean anything else. He does not see a distinction based on the absence of the word "shall." Also, the City must have regard to both the *Bylaw* and the statutory plans.

h. Mr. Gunther, was asked to explain the meaning of the phrase ", which is contrary to the Municipal Development Plan" in section 240.1 of the *Bylaw*. In his view the General Purpose of the RR Zone references the old Municipal Development Plan, not the current plan, *The Way We Grow*. However, the general principles about sustainable planning are the same. Both plans promote sustainable, orderly infill development. Allowing additional un-serviced, unplanned Lots in the RR Zone is not consistent with the aims of urban development in the plans.

i. Mr. Witiw indicated that the intent of the MDP is to provide planning policy for urban development. In his view, additional rural residential development does not fit in with this plan.

j. Mr. Gunther was asked if the case of *Newcastle Centre GP Ltd. v. Edmonton (City) 2014 ABCA 295* concerning the Board's authority to grant variances in the development context was not more applicable to the Board's authority under section 654(2) than the case cited by the City of *Thomas v. Edmonton* (2016 ABCA 57) which deals with the Board's authority to waive requirements for procedural fairness. Mr. Gunther submitted that both tests are relevant. In his opinion, the other factor the Board must consider is whether the decision makes planning sense. For example if there was no one in opposition to a proposal, it does not mean that appeal is automatically approved.

[56] The Presiding Officer asked Mr. Witiw and Mr. Gunther if the City proposed any possible conditions for the subdivision if the Board were to allow the appeal.

They provided a document with conditions ("Exhibit E").

[57] Based on the new evidence concerning conditions and servicing, as well as the absence of certain City representatives due to illness, the Presiding Officer asked the parties to speak to a potential tabling of the matter to allow time for both parties to review the new information concerning services and conditions presented at the hearing.

[58] Mr. Lawrence indicated that this was the first time he knew of any potential conditions and he was disappointed that a representative from Drainage Services could not attend the hearing.

[59] Mr. Gunther indicated that the conditions presented were based on what was applied for and premised on information previously provided by the Appellants concerning their intentions about servicing. Based on new information that the Appellants do not wish to use any municipal services, the conditions may need to be revised.

[60] All parties agreed to continue the hearing January 11 or 12, 2017.

Decision

[61] The Subdivision and Development Appeal Board, at a hearing on November 24, 2016, made and passed the following motion with the consent of all parties:

> "That the hearing for SDAB-S-16-003 be TABLED to January 11 or 12, 2017. The City will provide the Appellant with any changes to the proposed conditions for subdivision presented during the hearing by December 9, 2016. Written submissions from the parties with respect to possible conditions must be sent to each other and to the Board on or before January 5, 2017."

January 11, 2017 Hearing

[62] On January 11, 2017, the Board made and passed the following motion:

> "That SDAB-S-16-003 be raised from the table."

[63] The following documents were received prior to the hearing and form part of the record:

- Amended conditions of approval submitted by the Subdivision Authority;
- City of Edmonton circulation comments submitted by the Subdivision Authority;
- Supplemental written submission by the City of Edmonton;
- The Appellant's response to the amended conditions of approval submitted by the Subdivision Authority.

- Supplemental written response to Appellant's response submitted by the City of Edmonton.

[64] The following exhibits were presented during the hearing and form part of the record:

- Exhibit F – an Engineering plan submitted by the City.
- Exhibit G – a fire hydrant coverage map submitted by the City.
- Exhibit H – a photograph submitted by property owners in opposition.

Preliminary Matters

[65] 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.

[66] The Presiding Officer outlined how the remainder of the hearing would be conducted, including the order of appearance of parties, and no opposition was noted.

Summary of Hearing

i) Position of the Appellant, Mr. M. Lawrence of Stantec Consulting Ltd.

[67] After confirming the Board had reviewed the Appellant's written response submitted December 15, 2016, Mr. Lawrence provided the following with respect to the City of Edmonton's supplemental response in their January 5, 2017 submission:

a. A roadway upgrade is not required and the City has not explained why it is needed. He estimates that it will cost approximately $100,000.00 for the roadway modification. This is extremely costly and unreasonable for just one additional Lot.

b. His aerial photograph of the area shows the physical connection from the old Ellerslie Road (that connects to Keswick Way) to the existing Ellerslie Road that leads to the Golf Club.

c. The City did not deal with the roadway upgrade and alignment costs for Ellerslie Road when the adjacent land was originally subdivided and developed. It should have been assigned to the Keswick developer.

d. In his opinion, the City is trying to correct their mistake by forcing his client to pay for the costs. It is extremely costly and unreasonable to ask his client to pay for this roadway improvement.

e. The Golf Club land formerly included DC Lot 7 which abuts Ellerslie Road. At the time it was rezoned and subdivided the City asked for ARA and drainage assessments for the portion that became Lot 7, but later waived the drainage assessment. He agrees with the City decision not to require a drainage assessment for the Golf Club as there is no existing drainage basin.

f. The City also exempted the property owner from any costs to upgrade Ellerslie Road. The City should have included a roadway upgrade requirement as a condition of approval for the subdivision of Lot 7, but they opted not to. It is unfair and unreasonable for his client to now be required to pay to upgrade the road.

g. The City submitted photographs to demonstrate a 5-year period of the deterioration of Ellerslie Road. In his view, this deterioration is due to the members of the Golf Club. The Golf Course is seasonal, but the Golf Club is used year round and accessed by many members.

h. The City admitted that they made a mistake in their approval of a Development Permit for Lot 3 by not requiring that applicant to pay for an Arterial Roadway Assessment ("ARA") or Drainage Assessment. It is unfair to make the Appellant pay for these costs when the aforementioned properties did not have to pay them.

i. In his opinion, the City has had problems with the transition between rural sections and urban sections of land and to fix their mistakes, are forcing unreasonable costs on the Appellant.

[68] Mr. Lawrence provided the following responses to questions from the Board:

a. The land was annexed from the County many years ago. No levies or assessments were charged in 1990 at the time of the subdivision of Lot 6.

b. The EPCOR condition to install a fire hydrant will cost approximately $15,000.

c. In his opinion, the roadway upgrade and fire hydrant installation will benefit the adjacent properties to the west.

d. As adjacent owners have completed development, the Appellant will not recuperate any of the costs from those adjacent properties.

e. There is an existing water service line adjacent to the subject Site so it is possible to connect the subject Lots to that line. A sanitary connection is located at the other end of the road. Sanitary connection to municipal services is possible, but they did not do a cost estimate to link their Lots to the sanitary line. They plan to maintain the property as rural with a cistern and septic.

f. He is not disputing the authority of the City to impose the proposed conditions, rather he is arguing that the imposition of these conditions (with the large associated costs) on this subdivision is unfair given they were not imposed on others, even if that was due to error.

g. It should not make any difference to the conditions whether, the subject Site is rezoned (DC) or subdivided within the existing RR Zone designation as the two processes are similar.

h. They were not told by the City what the ARA cost would be.

i. They are not disagreeing that they should pay a portion of the Ellerslie Road upgrade. However, the cost should be proportional. Ellerslie Road is a Local Road and not an Arterial Road. They are unsure what the proportional share would be.

j. If Ellerslie Road as a Local Road needs to be repaired, a local improvement agreement can be made as long as you receive the consent of all the benefited parties.

[69] Mr. Lawrence provided the following comments concerning the City's amended conditions of approval:

a. Condition I(1 and 2): engineering drawings are not required for a servicing agreement as the Appellants do not want any utility services.

b. Condition I(3): they are not opposed to paying all outstanding property taxes.

c. Conditions II(1 and 2): they will wait for the City's response to comment.

d. Condition II(3): they expect the City to waive this condition as the Appellants do not want any sanitary or storm water services.

e. Condition II(4): the ARA requirement should be removed.

f. Conditions II(5 and 6): not required for the subject Site.

g. Condition II(7): not necessary and should be removed.

h. Condition II(8): not necessary as a fire hydrant exists in front of the subject Site.

ii) Position of Mr. M. Gunther, City of Edmonton Law Branch

[70] Mr. Gunther brought forward the members of the various City of Edmonton branches one at a time to explain their conditions.

iii) Position of the Subdivision Authority, Mr. B. McDowell

[71] In his view, the Appellant never intended to accept any of the conditions. He intended to get a refusal and then seek approval from this Board without the costly conditions.

[72] He believes that this subdivision application is a shortcut in the planning process. The correct procedure is to make a rezoning application and concurrently amend the Windermere NSP and ASP all of which will be considered and approved by Council.

[73] The Lot 7 subdivision by the Golf Club was approved because the property was rezoned to Direct Control, (approved by City Council), the Windermere NSP and ASP were amended, (approved by City Council), and the owners entered into a service agreement with the City and paid the costs. This process is standard, which is why the City approved it.

[74] The Appellants should not be exempt from the charges because of the scale of the subdivision. The City has been fair and consistent, they did not ask for the Permanent Area Contributions (PACs) but did ask for the ARAs for that application.

iv) Position of Transportation Services, Ms. K. Sizer

[75] She deals with conditions related to the roadway improvement and the ARA.

[76] The Roadway improvement condition is only for costs of the portion of the roadway that is in front of the subject Site.

[77] The ARA is a separate condition. The ARA will cost the applicant $91,300.

[78] Lot 3 was not required to pay the ARA because that Development Permit decision was made in error by the City. It may not have been properly circulated to all departments. Apart from this error the City has consistently required the ARA.

[79] She submitted “Exhibit F”, an engineering plan for the roadway improvement. The developer to the south is also being required to fund the Ellerslie Road upgrade. Both the applicant of the proposed subdivision and the developer of the lands to the south are required to share the costs through a servicing agreement. Subsequently, there will be boundary recovery for the two developers through servicing agreements.

[80] The listed conditions are standard conditions issued on all subdivision approvals. The portion of Condition II(1) in parenthesis that includes servicing costs for sidewalks, shared use path and transit infrastructure can be excluded since the RR Zone does not have sidewalks.

[81] Mr. Gunther indicated that if you apply for a macroscale subdivision such as the lands to the south of Ellerslie Road, every single Lot pays for their share of the ARA and roadway upgrade requirements through fees that are implemented by the Developer with the costs passed on in the sale price for each new property owner. Microscale subdivisions are usually infill subdivisions within Mature Neighbourhoods, where servicing already exists.

[82] The proposed application does not fit neatly within the microscale subdivision category or the macroscale subdivision category.

[83] He indicated that Lot 3 would not have to pay for roadway improvement of Ellerslie Road as that Lot does not abut Ellerslie Road.

[84] Ms. Sizer indicated they also consider the condition of the roadway and the need to cut into a road to facilitate servicing when determining if a roadway assessment will be sought. The road was in better condition 5 years ago when Lot 7 was subdivided and there was no need to cut into the road to service Lot 7. Ellerslie Road has worsened since then and it will have to be cut to provide access to the (west) proposed Lot, which is also why the Appellant will have to pay for the roadway costs.

[85] ARA costs are calculated using Site area on a per hectare basis by City Bylaw. The Use developed on the subject Lots does not factor into the calculation. In this case, the ARA will cost the applicant approximately $91,300.

[86] Mr. Gunther indicated that the *Act* is vague when it comes to calculating the costs for servicing assessments. The calculations for off-site levies are based on political decisions approved by City Council through other bylaws in which City Council determined that Site area, not Use, was the determinative factor for assessments.

[87] The City only has two opportunities to require servicing agreements, the subdivision stage and the development stage. Occasionally when an ARA is assessed on development the applicant will argue that the ARA be reduced if the proposed development uses only a portion of the subject Site. That argument does not apply with subdivision. The City prefers to assess ARA on subdivision.

[88] The Board has the authority to amend conditions, but they need compelling evidence to determine why costs should be reduced. The Board should only determine whether to keep or remove an ARA. The Board does not have the authority to amend the formulas to calculate the ARA found in other Bylaws passed by City Council or to arbitrarily reduce them.

[89] He confirmed that the subject Site was annexed in 1982 by the City of Edmonton and the existing Lot was subdivided in 1990. He is not aware of any levies at those times.

[90] Ellerslie Road will have to be upgraded at some point and there will be no costs issued to the applicant if there is no subdivision application. However, if a new Development Permit application is made on the subject Site, the ARA will be required even without subdivision.

[91] Ms. Sizer indicated that the Development Permit application stage is when road accesses are determined by Transportation Services based on the type of development and the location proposed on the plans.

v) Position of EPCOR Water, Mr. D Mathew and Mr. D. Hoeskema

[92] EPCOR proposes two conditions for water: extension of the 200 millimetre off site water main and the installation of a fire hydrant.

[93] The typical urban standard separation distance for fire hydrants is 90 metres. The rural standard is 150 metres. These values are dictated by fire safety. They submitted a map, (Exhibit G).

[94] The existing fire hydrant covers 98 percent of the property using the 150 metres requirement. The second fire hydrant would help the general area and this Lot as less pressure would be lost along the hose. Currently they are not sure exactly where development would take place within the proposed subdivision. 150 metres is the standard. The circle shown on the map is not intended to indicate the range of the fire hydrant, just how to space out the fire hydrants.

[95] As Lots get subdivided, developers are responsible to install infrastructure to standards. Developers are responsible for the frontage of their property. If one developer opts out then the next developer who wants to access the system must rip out the entire infrastructure from the earlier development to meet their own Site requirements.

[96] Costs can be recouped with these conditions or through the rate base in which case the City would be paying for all of it.

[97] The service line ends at the existing fire hydrant and it could provide water service to the proposed Lots.

[98] There was discussion with the Golf Club about providing services to the Golf Club. One requirement was another fire hydrant to be located at Ellerslie Road. The Golf Club chose not to proceed with servicing and that requirement was removed.

[99] The Board asked EPCOR if it made a difference that the Appellant wants to maintain RR Zoning and continue to use well water. They stated that the EPCOR condition arose out of the subdivision. With any subdivision comes an infrastructure requirement, regardless of the desire for the Lots to receive municipal services.

[100] EPCOR has no ability to respond to Development Permits. With infill, EPCOR works with Drainage Services.

[101] Reviewing the enclosure, servicing goes to the very southwest corner of the subject Site. That is the end of the line. That line permits servicing to the Lot and provides fire protection.

[102] Asked how the requested infrastructure is necessary to serve the proposed subdivision as required by the *Act*, they stated there needs to be a new fire hydrant to adequately serve the western portion of the subdivision.

[103] EPCOR has two classifications, Low Density Zoning, which requires 150 metres spacing and High Density Zoning, which requires 90 metres spacing. Currently, the property does not meet 150 metres. With other smaller Lots, they require 150 metres spaces or tighter to prevent gaps.

[104] As Tab 2 of the Appellant's submission shows, Windermere Ridge is serviced. The bulk of the Westpoint area has the ability to connect, but not every Lot is connected. The "grey area" is east of 181 Street and is a serviced transition zone.

[105] The Appellant is not asking for water. The intention of the main is not to supply water. However, if anything happens to the west, they have a main to tap into. The proposed conditions give other properties options and there is an assumption of services with development. It is unfair for people to opt out and create gaps.

[106] The main extension runs along road. Services connect to the main.

vi) Position of Mr. Gunther and Ms. Hanley of Drainage Services

[107] Mr. Gunther indicated that Drainage Services usually receive a drainage concept plan on how a subdivision will be serviced. Because the applicant has refused to provide such a plan, Drainage is not in a position to make a recommendation other than that the subdivision be refused since they do not have the content for a servicing agreement.

[108] Even if the applicant refuses municipal services, they would still impose these conditions to extend sanitary services for future development.

[109] There are so many unknowns with this application that it puts the City in a difficult position to accurately identify and implement the required conditions. Because engineering plans have not been submitted by the applicant, the City feels that the proposed conditions are needed to cover their requirements.

[110] Ms. M. Hanley of Drainage Services clarified that they are only dealing with sanitary services. When Drainage Services adds conditions on sanitary services it is not just to service one property, but to allow capacity for other properties to connect to the system.

[111] Drainage Services was not consulted with the Lot 3 application because of a circulation error.

[112] Mr. Gunther confirmed that if the subject Site remained and a new Development Permit application was made for a House, the property owner would have to pay approximately $180,000 for costs based on roadway improvement condition and the ARA condition.

[113] Ms. Hanley confirmed it would cost the property owner of the subject Site approximately $50,000 for a Drainage Assessment.

[114] Asked if the conditions are necessary to serve the subdivision as stated in section 655 of the *Act*, Mr. Gunther stated that the Board can determine that the drainage servicing is not needed, but the City has determined that subdivisions need to be serviced properly and the greater public interest is that new Lots are serviced. That is the City's interpretation of section 655 of the *Act.*

[115] The Presiding Officer referenced section 655 of the *Act* that states:

> …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 subdivision, whether or not the public utility is, or will be, located on the land that is the subject of the subdivision approval […].

The Presiding Officer indicated that section 655 provides that the public utility is to serve the subdivision and does not say the City's interest.

[116] Mr. Gunther indicated that it is not within the public interest for each City Lot to decide whether they want servicing for water compared to an "out-house". Edmonton is an urban municipality.

[117] He reiterated that if the applicant wants an urban-size Lot, they need urban-type servicing. Properties cannot have it both ways.

vii) Position of Mr. McDowell

[118] Mr. McDowell indicated that the Subdivision Authority circulates applications to several departments within the City. Each department sends back novels full of information. It is impractical to put all of this information within the decision and list of conditions. Therefore, conditions are sometimes vague to allow different Departments to determine what is needed.

[119] The City does not differentiate between rural and urban subdivision applications, that is why they do not support Rural Residential subdivisions. They apply the same standards and conditions to each subdivision.

[120] He indicated that the DC Lot 7 subdivision was the only top-of-bank parcel in the area and (AG) Agricultural Zoning allows Single Detached Housing as a Discretionary Use. RR Zoning is the only residential zoning that allows Lots not to be serviced, but this is based on larger Lots. Lot size is related to sanitary services, septic fields may not be located too close to neighbouring properties.

[121] The Subdivision Authority considers the surrounding Lots and area when they decide subdivision applications.

[122] Mr. Gunther indicated that any self-servicing on-site without municipal services would still have to be reviewed with an engineering plan and stamped by Safety Codes.

[123] With respect to a question from the Board, as to how the test of section 654(2)(a) applies to the proposed application, Mr. Gunther indicated that the property owners in attendance would be best to answer the question of impact of non-compliance with the RR Zone.

v) Position of Mr. J. Freeman and Ms. L. Osborne, Affected Property Owners in Opposition to the proposed subdivision

[124] They own Lot 4, which is directly north of the property. When they were first approached by the applicant, they initially supported the proposal as they hoped it would prevent a multi-family development. However, they have since withdrawn their support for the project.

[125] They are having difficulty reconciling the nature of the proposed subdivision with RR Zoning. This RR Zone designation is not given to new Lots. It is included in the *Bylaw* to protect and preserve pre-existing developments within RR Zoning. The proposed subdivision does not meet the intent or the spirit of the RR Zone.

[126] They submitted a photograph of the boundary to show where the proposed development will potentially be going, (Exhibit H).

[127] They believe the proposed development will be intrusive.

[128] Their property is not serviced. If they were applying today for their property, they would not get permission. Their property was “grandfathered” in. They believe under current rules they would not be allowed to have a septic field and they would have to pay about $250,000 to bring services to their property.

[129] They moved in about 26 years ago. In their area, there are five properties, each approximately 5 acres in size. Three are developed. When they moved in, there was no development around them. The only traffic in the summer was from the Golf Club. On the north side of the property is a wildlife corridor.

[130] There was an unsuccessful attempt to subdivide Lot 3 nine years ago. Neighbours, including the Appellant, opposed it as they were interested in keeping historical nature of Westpoint Estates.

[131] The developers of Keswick tried to keep a buffer between that area and the Westview Estates to preserve its historical nature. The developers planted trees every 6 feet. The Developers at Keswick made larger houses on the south side of Ellerslie Road to match their area.

[132] They tried to get water and sanitary services supplied, but not all their neighbours would not agree to install the services.

[133] They would like to keep neighbourhood as is.

[134] They believe the proposed development would block their view to the south.

[135] The Appellant is a developer and this is a "for profit" development.

[136] They purchased their property in 1989. They started building in 1990. The Appellant approached them at that time for a trade of property to make the property line more uniform. They did not agree to this. They did not receive notice of the 1990 subdivision.

[137] The subject Site includes trees and is used for storage for a construction company, they believe it is a result of property to the west being sold, which also belonged to the Appellant.

[138] If this subdivision is approved, it sets a precedent for further subdivision.

[139] At one time, the City provided amortization of utilities. This was not done is this area. They need to form a corporation to service properties and they understand the Appellants desire not to connect to City services due to the expense.

[140] Two houses on the subject Site would be too much especially given the maximum Site coverage allowed. They would push right into view from their window because of the long skinny configuration of the Lots.

[141] They conceded that currently there could be one house on the west end of the property. Most likely, development would occur in the middle and this would set up more opportunity for landscaping. With two residences, it would be tight and there would be little space for a buffer in terms of trees.

[142] Because of the trees, they do not see the neighbours at all, other than the Keswick properties in the distance. They cannot see past their neighbour to the east to the other side of 184 Street where the smaller RR Lots in the other portion of Westpoint Estates are located.

[143] Their house is 4200 square feet in size and includes two artists' studios. It is set back from the property at the minimum allowable distance. They would not be allowed to build there now because top-of-bank issues.

vi) Position of Mr. D. Zerbin, an Affected Property Owner in Opposition to the proposed subdivision

[144] Mr. Zerbin owns Lot 3. He is opposed to the subdivision, as expressed in the letter he submitted to the Board.

[145] Upon development of his property, he did not pay an ARA or road improvements. The contractor applied for all permits. He does not recall any discussion about servicing. He does have water services, for which he paid approximately $18,000.00. He does not have sewage services.

[146] He values privacy, the animals and the environment. The area has a certain character. All the Lots are large. Uniformity and aesthetic which form the character of the area would be lost if the proposed Lot, which is already smaller than the rest, were made into two even smaller Lots. It would feel like they were "tacked on."

[147] He confirmed there are only four houses standing in the area. He is not opposed to one additional house. But allowing two houses would take it over the tipping point and would be approaching the character of Keswick to the south rather than Westpoint Estate.

[148] He confirmed that he cannot see the Westpoint Estate houses past his neighbour to the east on the other side of the ravine and east of 184 Street. He can see the Golf Club and river through the trees.

iv) Rebuttal of the Appellant

[149] The Appellants have heard some information for the first time today, but they are prepared to complete the hearing.

[150] Transportation Services did not discuss their new boundary recovery condition with them and it will be a consideration in entering into a servicing agreement.

[151] There are several uncertainties for this client. The City has to be very specific in what they are asking for because the evidence from the hearing shows that there are extremely high costs associated with the proposed conditions for his client.

[152] Their intent in applying for subdivision is not to go through the "back door" to get approval. They are just trying to abide by the rules of the City with the MDP, the Windermere NSP and ASP and the *Bylaw*.

[153] He reiterated that during the November hearing the City admitted that they referenced the old MDP and it is not the same as the new MDP so this is not a valid reason for refusal. They have cited sections of the new MDP which are consistent with the proposed development. This means the subdivision is not contrary to the MDP and therefore it is not contrary to the General purpose of the RR Zone as worded in section 240.1

[154] There was confusion during the process about what was wanted and when. They were never advised that Drainage Services expected them to connect to their sanitary services. The Appellant never told the City that they were going to connect, the Appellant does not want to connect because the costs are too high.

[155] Drainage Services wanted them to do a neighbourhood design report for drainage. It seemed excessive for one additional Lot. He tried to contact Drainage Services but never heard back and was never given a reasonable explanation for why this report was required.

[156] He reiterated that the conditions are unnecessary and the costs are too high. The City is unnecessarily adding costs through conditions to take them to the point that the subdivision will not proceed.

[157] The Site is within an RR Zone, where it is implicit that there is no expectation to provide municipal services. They are planning to build on-site services. Maybe in the future with a Development Permit application they might connect into municipal services. Their expectation has always been to provide their own on-site services.

[158] They must meet the Alberta Health regulations as per the RR Zone. This level of services is not sub-standard, it will ensure that reasonable service is provided.

[159] In his opinion, Transportation Services have chosen not to answer the ARA question as to why the Golf Club did not have to pay for any ARA costs as part of the development process in 2010 when a portion of its land (which later became Lot 7) was within the catchment.

[160] The Keswick development caused the need to realign Ellerslie Road, the Appellant did not cause this and it is unfair to ask the Appellant to pay any or all of these costs. Similarly, Lot 3 is off of Ellerslie Road and they were not asked to pay to improve it.

[161] He respects that the neighbours are concerned about change, but notes that The City recently amended the *Bylaw* to allow skinny Lots. The character of a neighbourhood does change over time. This is like an infill project.

[162] In his view, there is no substantial evidence that two new Houses as compared to one new House would negatively impact the adjacent properties. The property owner of Lot 3 would not even see Houses built on the proposed Lots from his property. With one big house Lot 4 could be obstructed, but the separation distance is the length of an ice arena.

It is a long way and the screening is excellent. He disagrees that the subdivision would limit the neighbours enjoyment of their property.

[163] With respect to questions from the Board, Mr. Lawrence provided the following:

a. There is a distinction between the proposed Lots and standard residential Lots. In his view, the character of the Rural Residential area is not affected as this is still a large parcel of land.

b. In his view, Lot size is a factor in the RR Zone, but it is not the only factor. He believes that the proposed Lots are more in keeping with a rural setting than an urban setting.

c. Asked at what point would subdividing Lot 6A go too far, he indicated that two proposed Lots is the maximum in his opinion. Any number more than two Lots would be excessive.

d. He reiterated that the subject Site is currently an anomaly and splitting one anomalous Site into two Lots would not have a negative impact on adjacent properties.

e. He asks the Board to exercise its discretion to allow the subdivision and split the Lot into two without the imposition of conditions requiring municipal services as the Lots will be serviced with on-site servicing and do not need municipal services.

Decision

[164] The appeal is **DENIED** and the decision of the Subdivision Authority is **CONFIRMED**. The subdivision is **REFUSED**.

Reasons for Decision

[165] Section 680(2) of the *Municipal Government Act (*"the *Act")* outlines the authority of the Board in appeals of subdivision decisions. It provides:

> In determining an appeal, the board hearing the appeal
>
> (a) must act in accordance with any applicable ALSA regional plan;
>
> (a.1) must have regard to any statutory plan;
>
> (b) must conform with the uses of land referred to in a land use bylaw;
>
> (c) must be consistent with the land use policies;

(d) must have regard to but is not bound by the subdivision and development regulations;

(e) may confirm, revoke or vary the approval or decision or any condition imposed by the subdivision authority or make or substitute an approval, decision or condition of its own;

(f) may, in addition to the other powers it has, exercise the same power as a subdivision authority is permitted to exercise pursuant to this Part or the regulations or bylaws under this Part.

[166] Section 680(2)(2)(f) grants the Board the same power that the Subdivision Authority had when making the original decision, that authority is found in section 654 of the *Act* which provides:

(1) A subdivision authority must not approve an application for subdivision approval unless

(a) the land that is proposed to be subdivided is, in the opinion of the subdivision authority, suitable for the purpose for which the subdivision is intended,

(b) the proposed subdivision conforms to the provisions of any statutory plan and, subject to subsection (2), any land use bylaw that affects the land proposed to be subdivided,

(c) the proposed subdivision complies with this Part and the regulations under this Part, and

(d) all outstanding property taxes on the land proposed to be subdivided have been paid to the municipality where the land is located or arrangements satisfactory to the municipality have been made for their payment pursuant to Part 10.

(2) A subdivision authority may approve an application for subdivision approval even though the proposed subdivision does not comply with the land use bylaw if, in its opinion,

(a) the proposed subdivision would not

(i) unduly interfere with the amenities of the neighbourhood, or

(ii) materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land,

and

(b) the proposed subdivision conforms with the use prescribed for that land in the land use bylaw.

[167] The subject Site, Plan 9022286 Blk 1 Lot 6A (Lot 6A), is situated in the (RR) Rural Residential Zone ("RR Zone"). It is located in Westpoint Estates, a subdivision of the Windermere neighbourhood and is subject to the Windermere Area Structure Plan ("the Windermere ASP) and the Windermere Neighbourhood Structure Plan ("the Windermere NSP). Westpoint Estates was annexed from County of Strathcona agricultural lands and subdivided many years ago into large irregular top-of-bank Rural Residential Lots ("RR Lot") when the area was rural and far from any urban development or services. The City has since grown up around this area.

[168] Lot 6A was created in the 1990s by a subdivision of Lot 6 removing a panhandle roadway access from the remainder of that Lot. Lot 6A is unique:

a. It is a regularly-shaped, rectangular corner Lot abutting 8A Avenue SW and Ellerslie Road and separated from the top-of-bank by Lot 6 and Lot 4.

b. Lot 6A is approximately 35.4 metres from north to south along 8A Avenue SW and 146.5 metres from east to west long along Ellerslie Road, for a Site area of 0.52 hectares.

c. It is much smaller than the 5 immediately surrounding Westpoint Estates RR Lots north of Ellerslie Road which extend to the top of bank, the DC Lot 7 to the west and the parcel of park space adjacent to the east.

d. Lot 6A abuts Ellerslie Road directly across from the Keswick neighbourhood.

e. It is much larger than the urban serviced RSL (Residential Small) Lots in the Keswick neighbourhood abutting Ellerslie road to the south.

f. Lot 6A has been vacant since it was created and a residence was never built on it. Based on the photographic evidence of the neighbours, Lot 6A is currently used for storage

[169] The Appellant applied to create one additional RR Lot by subdividing Lot 6A into two equal rectangular Lots, each 0.26 hectares in Site area.

[170] Despite earlier correspondence to the contrary with respect to water and sanitation, the Appellant does not wish to have municipal services for the two Lots.

[171] The Subdivision Authority refused the subdivision application based on five reasons:

a. Non-compliance with one goal listed in section 3.1 of the Windermere NSP, to "[p]rotect the existing character of country residential communities through appropriate urban design (i.e. transitional land use, site planning and design."

b. Non-compliance with section 4.1.1 of the Windermere NSP.

c. Non-compliance with the General Purpose of the RR Zone found in section 240.1 of the *Edmonton Zoning Bylaw (*"the *Bylaw").*

d. Non-compliance with the 1.0 hectare minimum required Site area for the RR Zone found in section 240.4(1) of the *Bylaw*.

e. Failure to provide a storm and sanitary servicing report identified as required to review the subdivision and to determine drainage requirements.

[172] The Subdivision Authority argues that the Windermere NSP and the RR Zone provisions are self-evident and the non-compliance is obvious.

[173] The fifth reason for refusal was prompted by the City's belief that the Appellant was seeking to connect to nearby municipal services. At the hearing it became evident that the Appellant was not seeking to connect to urban services. Nonetheless, the City proposed the imposition of several conditions requiring connection to municipal services should the subdivision be approved.

[174] The Appellant objects to the imposition of conditions associated with the provision of municipal services to the two Lots and the imposition of various off-site levies, including the ARA and the roadside improvement assessment for the portion of Ellerslie Road adjacent to the two Lots.

[175] The Appellant argues that the refusal is incorrect and the application should be allowed because:

a. The stated reasons are conclusions, not reasons. The Subdivision Authority merely quoted sections from the applicable plans and *Bylaw*. They failed to provide a necessary explanation to justify alleged non-compliance.

b. The subdivision complies with section 3.1 of the Windermere NSP because creating one additional country residential Lot will be consistent with the existing country residential development and character of the surrounding community. In addition, the subdivision will provide a transition as expressed in section 3.1 between the larger RR Lots to the north and the smaller urban Lots to the south.

c. The subdivision complies with section 4.1.1 of the Windermere NSP because the Use is not intended to be commercial. The proposed country residential Use will be sensitive to existing residential development and will not compromise the area's history.

d. The direction in section 4.1.1 of the Windermere NSP that parcels are not intended to be further subdivided does not apply in this case because:

i) it applies only to existing country residential residences and this parcel has been vacant and has no improvements; and

ii) it applies only to Lots that back onto the North Saskatchewan River valley, Lot 6A is an isolated parcel that fronts Ellerslie Road and does not back onto the North Saskatchewan River valley.

e. The General Purpose of the RR Zone is merely an introductory clause. It is not a development regulation; therefore, it should not be a reason to deny the subdivision. In any event, the proposed development is consistent with the intent of the MDP cited in section 240.1, particularly policies 3.6, 4.2 and 4.4.

f. Single Detached Housing is a Permitted Use so the proposed subdivision conforms to the *Bylaw.*

g. The refusal is unfair because it is inconsistent with previous decisions including the rezoning of Lot 7, located two Lots to the west and redevelopment decisions for the Windermere Golf and Country Club and for Lot 3, located two Lots to the east.

h. While the proposed Lots do not meet the minimum required Site area of 1.0 hectares, the subdivision should be allowed because:

i) there are other Lots in the community under 1.0 hectares;

ii) the applicant discussed the subdivision with his neighbours and received positive responses, with letters of support; and

iii) the proposed Houses will be comparable in size and value with the surrounding Lots and will not compromise the character of the community.

i. The lack of documents cited as a reason for refusal is wrong because the demand was premature, unnecessary, excessive and too costly.

j. The subdivision should be granted per section 617 of the *Act* because the Subdivision Authority has not shown why the greater public interest necessitates infringing the Applicant's rights.

k. The subdivision complies with section 7 of the *Subdivision and Development Regulation.*

[176] Per section 680(2)(a.1) of the *Act* the Board is not strictly bound by applicable statutory plans, but it must have regard to them. The three applicable statutory plans are the Windermere NSP, the Windermere ASP, and the MDP.

[177] The Board agrees with the Subdivision Authority's first reason for refusal that the proposed subdivision does not comply with one of the objectives stated in section 3.1 of the Windermere NSP. However, Board disagrees that this non-compliance is so self-evident that it requires no explanation.

[178] The Board finds the proposed subdivision does not "[p]rotect the existing character of country residential communities through appropriate urban design (i.e. transitional land use, site planning and design" for the following reasons:

a. It will create two rectangular Lots. Each Lot will be approximately four times larger than the Lots in the Keswick subdivision to the south and four to eight times smaller than the 6 other Lots north of Ellerslie road. The subdivision appears on its face to be consistent with the goal in the sense that it creates a transition in Lot size.

b. However, when section 3.1 is read in context of the entire Plan, it is event that the proposed subdivision does not fall within meaning of transition in the Plan. Section 4.2.1 explains that a new Large Lot Residential ("LLR") area is to be established as a transitional land use for all three Country Residential areas including Westpoint Estates. The subject Site is not identified as an LLR Lot.

c. The Plan marks an area in grey for a chain of LLR Lots running from north to south along the entire eastern perimeter of the country residential Lots located east of 184 Street. It specifies parameters for size and servicing of these LLR Lots and prohibits their subdivision.

d. There is no similar LLR transition land use Lots identified for the portion of Westpoint estates adjacent to the subject Site. The Windermere NSP contemplates an abrupt change between the historic RR Lots and the newer suburban Keswick Lots.

e. Lot 6A is less than 150 metres in length. Subdividing what appears as a small island surrounded by five much larger country residential Lots is insufficient to create a transitional buffer zone on the southern perimeter of the country residential Lots along Ellerslie road and east of 184 Street.

f. The Board also disagrees with the Appellant's submission that two Lots (but no more) on what was formerly a driveway area will be consistent with the existing country residential development and the present character of the surrounding community.

g. One residence can be developed of right as a Permitted Use on the 0.52 hectare area which comprises Lot 6A. Despite the Lot's anomalous features, development of a Single Detached House on it could be absorbed by the immediately abutting Lots (Lot 6 and Lot 4) thereby preserving the existing country residential landscape and feel. These abutting Lots are each 1.95 hectares, almost double the minimum required Site area.

h. Two residences, on two separate Lots, occupying the same space would have a materially different impact. If Lot 6A is halved and the density doubled, the ensuing residential development is less able to be visually absorbed, especially given the large houses envisioned by the Appellant. The two new RR Lots at 0.26 hectares each will have substantially smaller buffer zones or potential for landscaping to separate each from the other than a single development on Lot 6A has placed between Lots 4 and 6. The new landscape will be markedly different from country residential and begin to resemble the suburban Keswick area.

[179] The Board agrees with the Subdivision Authority's second reason for refusal. The proposed subdivision is contrary to section 4.1.1 of the Windermere NSP for the following reasons:

a. Section 4.1.1 provides that Windermere, Windermere Ridge and Westpoint Estates comprise existing country residential estate development within the plan boundary and directs that the existing residences are not to be further subdivided.

b. The Appellant argues that the direction against further subdivision should not apply as Lot 6A has been vacant (without a house or residence) since its creation and the direction only applies to the larger top-of-bank Lots.

c. The Board does not agree that the existence of a house or residence should determine whether or not the direction against further subdivision applies.

d. As the Appellant notes, subdivision applies to parcels of land, not to residences. Further the Appellant's interpretation that RR Lots could be subdivided and developed if vacant, but not if a residence has been previously built, has no planning rationale and would lead to absurd results.

e. Read in context, the purpose of section 4.1.1 is twofold. It is intended to preserve a set number of pre-existing, large, un-serviced RR Lots, but not to increase that number by adding new RR Lots through further subdivision.

f. Nothing in the Plan excludes Lot 6A from the application of the direction against subdivision. To the contrary, Lot 6A is located in Westpoint Estates, and falls within the existing country residential estate development described in section 4.1.1 and in other sections and diagrams in the Plan.

g. Therefore, Lot 6A is one of the identified RR Lots to which the direction against further subdivision applies and the proposed subdivision is not in compliance with the direction in section 4.1.1.

[180] The Board considered whether the proposed subdivision complies with the listed Uses, the General Purpose and development regulations for the RR Zone contained in the *Bylaw*.

[181] Per section 680(2)(d) of the *Act*, the Board may not approve a subdivision unless it conforms with the Uses referred to in the *Bylaw*.

[182] The Proposed Use, Single Detached Housing, is a Permitted Use listed in the RR Zone, per section 240.2(4). The Board finds that the subdivision conforms to the Use prescribed.

[183] The Board disagrees with Appellant that the General Purpose of a particular Zone is not relevant to a subdivision decision. Section 654(2) of the *Act* empowers the Subdivision Authority to approve a subdivision in certain circumstances notwithstanding that "the proposed subdivision does not comply with the land use bylaw." There is no restriction in the *Act* limiting the usual meaning of "land use bylaw" to development regulations and listed Uses.

[184] Further the General Purpose for each Zone is a direction of City Council which gives guidance and context, thereby informing both development and subdivision decisions. There is no planning reason to disregard it.

[185] The Board also notes that the Appellant himself seeks subdivision without the imposition of conditions requiring the provision of municipal services that are standard in urban residential zones. It is the General Purpose of the RR Zone which provides the foundation for the exception which the Appellant seeks. The General Purpose stipulates that the RR Zone contemplates residential development generally without requiring connection to a full range of urban utility services.

[186] Conformance with the General Purpose of the RR Zone in section 240.1 of the *Bylaw* is a relevant factor for the Board to consider in approving the subdivision and assessing proposed conditions.

[187] Section 240.1 provides:

> The purpose of this Zone is to provide for Single Detached Residential development of a permanent nature in a rural setting, generally without the provision of the full range of urban utility services. The RR Zone is intended to regulate rural residential development within existing rural residential subdivisions that existed prior to the passage of this Bylaw, and is not intended to facilitate future rural residential development and subdivision, which is contrary to the Municipal Development Plan.

[188] Lot 6A was created by subdivision in 1990, accordingly it is one of the "existing rural residential subdivisions that existed prior to the passage of this *Bylaw*." The Appellant seeks to subdivide Lot 6A for future residential development. However, the Appellant agued that the restriction does not apply because the subdivision is consistent with policies 3.6, 4.2 and 4.4 of the MDP.

[189] Based on a plain reading of section 240.1, the Board finds that the phrase ", which is contrary to the Municipal Development Plan." refers to the immediately prior phrase "future rural residential development and subdivision" and indicates that any future rural residential development and subdivision in an RR Zone is contrary to the MDP.

[190] While the Board accepts the Appellant's submission that the proposed development complies with some of the policies enunciated in the MDP, it finds that a subdivision which adds to the number of un-serviced Lots and increases density in a preexisting RR Zone which is now adjacent to fully serviced urban developments is not consistent with Policy 3.6.1.6, nor with other policies in the MDP.

[191] The Board accepts the Subdivision Authority's position that both the current MDP and its predecessor are designed to protect existing RR Lots, but not to increase their numbers, as the urban neighbourhoods expand up to the existing country residential areas. The Board agrees that approving additional un-serviced Lots when municipal services are available is not consistent with planning principles and orderly, economical and beneficial development.

[192] Lot 6A is currently non-compliant at 0.52 hectares in Site area and the proposed Lots will each measure 0.26 hectares in Site area. This is contrary to the plain wording of the development regulation in section 240.4(1) which states: "The minimum Site Area shall be 1.0 ha."

[193] The Board finds that the proposed subdivision is contrary to the General Purpose of the RR Zone (section 240.1) and will result in two Lots which do not comply with minimum required Site area of 1.0 hectares per section 240.4(1) of the RR Zone.

[194] Section 654(2) of the *Act*, gives the Board discretion to approve the subdivision despite non-compliance with *Bylaw*, if it would not unduly interfere with the amenities of the neighbourhood, or materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land.

[195] In making this determination the Board has considered the impacts of noncompliance with the *Bylaw* in isolation and the impacts of noncompliance with the *Bylaw* in the context of the Appellant's request that the Board also impose no conditions requiring the provision of municipal services to the new Lots.

[196] The Board finds that non-conformity with sections 240.1 and 240.4(1), regardless of the conditions, could unduly interfere with the amenities of the neighbourhood, or materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land for the following reasons:

a. The Subdivision Authority argued that a material adverse impact was created by the sheer magnitude of the non-conformity with required Site area (0.74 hectares or approximately one fourth of the minimum required for each Lot). The Board disagrees with a conclusion based solely on this factor. While impact is often positively correlated with the magnitude of non-compliance, this is not always true. The Board finds that magnitude of the non-compliance is a factor to be considered, but alone it is not determinative.

b. Based on the evidence of all parties as at the time of the hearing, support for the subdivision was mixed. Two of the five RR Lot owners were unsure about the subdivision. The owners of the abutting Lot to the northeast (Lot 4) and the next Lot to the east (Lot 3) do not support the subdivision - they provided written opposition and appeared before the Board in person. The sole neighbour in support of the subdivision is the owner of the abutting property to the west (Lot 6), who purchased it from the Appellant.

c. The owners of Lots 3 and 4 opined that the subdivision would negatively impact the value of their properties. However, the Board received no further evidence to confirm or quantify the existence of a potential adverse financial impact.

d. The Keswick suburban subdivision is directly south of Lot 6A. The Board finds that the proposed subdivision is unlikely to have a negative impact on those properties as the suburban RSL Lots to the south are significantly denser and are separated from the subject Site by Landscaping and Ellerslie Road.

e. To the north of Ellerslie Road, Westpoint Estates is comprised of 29 Lots separated into two areas by 184 Street, a green space and a ravine. The subject Site is on the west portion.

f. The 22 Westpoint Estates Lots to the east of 184 Street range in size from 0.41 hectares to 0.53 hectares. Some are serviced, others are not. The east Lots are separated from the subject Site by 184 Street, a ravine and a greenspace along Ellerslie Road. Based on the evidence of the neighbours in opposition, the east Lots are not visible from the west Lots. Non-conformance with the Bylaw is unlikely to impact these Lots given the visual and physical separation.

g. The immediate vicinity west of 184 Street is most germane to assessing the impact of the proposed subdivision on neigbouring properties. Five top-of-bank RR Lots ranging in size from 1.95 to 2.31 hectares surround Lot 6A. The residential DC Lot with a Site area of 1.06 hectares is located two Lots to the west. The park space across 184 Street to the east is greater than 1.0 hectares.

h. Apart from Lot 6A, the east portion of Westgate Estates is a typical country residential area, characterized by extremely large residential Lots located at significant distances from one another and backing onto the top-of-bank green space. Abundance of space is a major factor in the use and enjoyment of these Lots.

i. Lot 6A is very different from the others. It is a rectangular shape, considerably smaller and shallower than the others. It fronts onto two roadways and backs onto Lot 4.

j. Based on the submitted evidence, given the location and narrow rectangular configuration of Lot 6A, splitting it into two Lots and doubling the density, creates the potential for two permitted residential developments that will stand out significantly and create a material visual impact.

k. Given the relatively smaller Lot size (approximately one eighth the Site area of the two adjacent Lots), the new developments will be located in uncharacteristically close proximity to both the larger neighbouring Lots and to one another. Lots 4 and 6 will not be able to absorb this density in the way they could absorb a single residence. The Appellant's own submission (Tab 6, Appellants submission) showing the compliant building pocket demonstrates the impact that two residences in close proximity on abutting smaller 0.26 hectares. Lots will have on the existing country residential landscape. The Appellant has indicated an intention to build large houses, comparable in size to those on the neighbouring properties.

l. The Appellant argues that City Council has adopted a policy in favour of infill and that change is part of infill. While this may be true in general, it is not true for legacy Lots in RR Zones. The *Bylaw* and the Plan both promote the preservation of existing RR Lots as they are and prohibit the creation of new RR Lots through further subdivision.

m. The Board concludes that allowing this subdivision and doubling the density on this already uncharacteristically small rectangular Lot, contrary to the Plan and in non-compliance with the *Bylaw*, will change the existing country residential character of this portion of the RR Zone in a manner which causes a material adverse impact on neigbouring properties which currently enjoy abundant space and a rural setting.

[197] In assessing the potential impact of subdividing Lot 6A despite non-compliance with the 1.0 hectare Site area requirement, the Board is also mindful that the Appellant seeks approval for two 0.26 hectare RR Lots which will remain un-serviced due to the financial considerations.

[198] The RR Zone regulates the existing legacy Lots that were created many years ago in formerly rural settings which have become surrounded by the City's urban development. Unusually large Site areas and lack of urban servicing were two key characteristics of RR Lots.

[199] The Board heard evidence that these characteristics are related. The lack of available municipal servicing was a part of the planning rational for the larger minimum required Site area. The Subdivision Authority argued that if the subdivision is permitted, then servicing must be required in keeping with the commitment not to increase the number of un-serviced Lots surrounded by urban development.

[200] The Appellant argued the RR Zone contemplates un-serviced Lots and that conditions requiring the two Lots to receive municipal services were unnecessary, unfair and unreasonable.

[201] The Board finds that urban servicing is not mandatory in the RR Zone. The Windermere NSP encourages, but does not oblige, owners of legacy Lots to provide municipal services (section 4.1.1). Similarly, the General Purpose of the RR Zone (section 240.1) recognizes these Lots exist generally without the provision of the full range of urban utility services. However, this exception is limited to existing Lots and for the reasons outlined above is part of the rationale for not allowing further subdivision.

[202] The Board heard much evidence from EPCOR and various City Departments about proposed conditions requiring municipal services to be provided to the Subdivision and about which properties would potentially benefit from the conditions imposed on this subdivision.

[203] The Subdivision Authority submitted that the 1.0 hectares minimum Site area was required to separate grey water from black water. They submitted that the 1.0 hectare standard may or may not be out of date; however, the Windermere NSP was passed in 2006 and both it and the RR Zone have been revised on several occasions and the minimum Site area for un-serviced Lots remains unchanged by City Council.

[204] During their submissions, both parties referred to the newest country residential estate area, Windermere Ridge Estates. According to the Windermere NSP, this area has been built to an urban and serviced standard (unlike Westpoint Estates). These newer legacy Lots are zoned Direct Control to accommodate single family residential development in a rural setting, generally without the full range of urban utility services, with appropriate development criteria to ensure compatibility with the character of the surrounding area. They allow for smaller site areas (0.20 hectares), but include the development regulation proviso: Water supply and sewage disposal for each Lot shall be provided in accordance with the Public Health Act regulations, except that no in-ground disposal of sanitary wastes, including septic fields and mounds shall be permitted. (DC2 550).

[205] In support of the application for subdivision, the Appellant also pointed to the fact that Lots in the grey transition zone permit minimum Site areas of 0.10 hectares. However, the Board notes that those Lots must be fully serviced to an urban standard. This again demonstrates a relationship between Lot size and servicing.

[206] Neither party provided a definitive answer to the question of whether two abutting 0.26 hectares, un-serviced RR Lots could create an adverse impact for the neighbouring properties, especially with respect to sanitary services. Although both parties acknowledged that other regulations would apply.

[207] Based on the submitted information, the Board is not satisfied that the test in section 654(2)(a) is met if two abutting 0.26 hectares. RR Lots are approved despite non-compliance with the *Bylaw* and conditions are not imposed requiring the provision of municipal servicing, particularly for sanitation.

[208] The Subdivision Authority cited failure of the Appellant to provide a storm and sanitary servicing report it required to review the application as its final reason for refusal.

[209] At the time of application, the Subdivision Authority understood the Appellant wanted water and sanitary services. The Appellant clarified that no services are wanted and therefore he believes the demand for information is unnecessary and unfair. He has not provided the report.

[210] The Subdivision Authority maintains the information is needed as part of the assessment of requirements and argues in part that it was unable to provide all required details of the servicing conditions as the Appellant had taken the position that servicing was not needed and consequently did not supply the information necessary to determine the specifics of servicing.

[211] At the end of the hearing, the Appellant also argued that there are several unfair uncertainties in the proposed conditions and that Subdivision Authority must be very specific about what they require in the conditions because there are extremely high costs associated with the proposed conditions.

[212] The Board recognizes that some latitude with respect to the particulars of conditions is necessarily involved in the subdivision process and is achieved through servicing agreements. However, with the present lack of information and the uncertainty as to the substantive obligations incorporated the conditions and the impact of not requiring municipal services (particularly drainage and sanitary services), the Board is unable to determine whether or not the proposed conditions should be removed or whether or not the conditions as proposed are sufficiently certain to address concerns raised by two abutting, 0.26 hectares, un-serviced RR Lots at this location.

[213] This is also a reason to deny the appeal.

[214] Despite recognizing the Board is not bound by precedent, the Appellant argued that the subdivision should be approved without many of the proposed conditions as part of a general expectation of fairness given three earlier decisions by the Subdivision Authority and by the Development Authority pertaining to Lot 7, the Windermere Golf Course and Lot 3.

[215] While it is true that the Board is not bound by precedent and must consider each case on its individual merit, it is also true that the Board owes all appellants an overriding duty of fairness.

[216] The Board finds the cited decisions are not entirely comparable and it would not be appropriate to impose conditions based on select portions of those decisions.

[217] Lot 3 involved a development permit application on a 1.95 hectare RR Lot. The Subdivision Authority agreed that certain conditions, including the ARAs and service assessments, were left out in error. It is not good planning to impose conditions for the current subdivision on the basis of an error made in a prior development case as that would perpetuate the error and improperly move costs from applicants to the general rate base contrary to City Bylaws and policies.

[218] Lot 7 involved the subdivision and rezoning of an (AG) Agricultural Site to Direct Control. Conditions were applied as part of a more fulsome process where City Council itself exercised more control. The Subdivision Authority indicated that the ARA was applied to Lot 7 and that a road improvement was not assessed based on the road conditions at that time and the fact the existing road would not need to be disturbed. Lot 7 was 1.05 hectares in Site area.

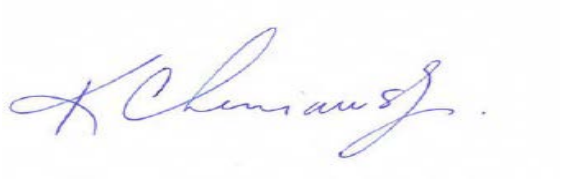
[219] The Development Permit application for the Windermere Golf Course involved development on exempted lands and did not involve any use of the top-of-bank portion of land located within the catchment area.

[220] During the hearing, the Subdivision Authority suggested that the Appellant was pursuing an inappropriate course of conduct in coming to the Board seeking relief from conditions that would otherwise be imposed as part of subdivision in concert with a usual rezoning application.

[221] Through the hearing, it became evident that Lot 6A is unusual and possibly unsuited to the RR Zone. It might be more amendable to rezoning as Direct Control (in accordance with the General Purpose and Application of the (DC2) Site Specific Development Control Provisions in sections 720.1 and 720.2 of the *Bylaw)* than to simple subdivision within the RR Zone.

[222] However, the Board finds nothing untoward *per se* about the Appellant's choice to pursue subdivision over rezoning to Direct Control based on financial reasons.

[223] Taking all the above factors into account, the Board confirms the decision of the Subdivision Authority to deny the application for subdivision.



Ms. K. Cherniawsky, Presiding Officer
Subdivision and Development Appeal Board

Board members in attendance: Mr. V. Laberge, Ms. G. Harris, Mr. L. Pratt

Important Information for the Applicant/Appellant

1. 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.