



**EDMONTON
TRIBUNALS**

*Subdivision &
Development
Appeal Board*

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Date: July 28, 2017
Project Number: 166667705-001
File Number: SDAB-S-17-005

Notice of Decision

- [1] On July 13, 2017, the Subdivision and Development Appeal Board (the “Board”) heard an appeal that was filed on **June 12, 2017**. The appeal concerned the decision of the Subdivision Authority, issued on May 25, 2017, to approve the following subdivision:

Tentative plan of subdivision to create 45 Single Detached Residential Lots; one (1) Environmental Reserve Lot, and one (1) Public Utility Lot from the NW-18-53-25-W4M north of Yellowhead Trail NW and east of 215 Street NW; Trumpeter; 12715 - Winterburn Road NW.

- [2] The following conditions of approval are being appealed:

- I (1) that the owner dedicate Environmental Reserve (ER) as a 8.26 ha lot pursuant to Section 664 of the *Municipal Government Act* as shown on the “Conditions of Approval” map, Enclosure I;
- I (2) that the owner provide money in place of Municipal Reserve (MR), in the amount of \$181,298,00 representing 0.367 ha pursuant to Section 666 and Section 667 of the *Municipal Government Act*;
- II (10) that the owner constructs a 3 m hard surface shared use path with lighting, and bollards, within the walkway, to the satisfaction of Transportation Planning and Engineering and Parkland Developer Services, as shown on the “Conditions of Approval” map, Enclosure I;
- II (11) that the owner constructs a 1.5 m concrete sidewalk with lighting, within the walkway, to the satisfaction of Transportation Planning and Engineering, as shown on the “Conditions of Approval” map, Enclosure I;
- II (12) that the owner constructs a south bound left turn bay, to the satisfaction of Transportation Planning and Engineering, as shown on the “Conditions of Approval map”, Enclosure I;

II (13) that the owner pay for the installation of traffic signals, as shown on the "Conditions of Approval" map, Enclosure II. The City of Edmonton shall complete the signal design, and the City's Electrical Services Contractor must install the signals as per the agreement between the City of Edmonton and the Electrical Services Contractor. The timing of the traffic signals installation will be at the direction of Transportation Operations. If traffic signals are not deemed warranted by Transportation Operations within 5 years of signing the Servicing Agreement, the owner will be required to provide payment to the City of Edmonton for the installation of traffic signals at that time to fulfill this obligation;

[3] The subject property is on NW-18-53-25-4, located at 12715 - Winterburn Road NW, within the (A) Metropolitan Recreation Zone, (PU) Public Utility Zone and (RSL) Residential Small Lot Zone. The Big Lake Area Structure Plan and Trumpeter Neighbourhood Structure Plan apply to the subject property.

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

- A copy of the Big Lake Area Structure Plan and the Trumpeter Neighbourhood Structure Plan;
- A copy of the Approval Letter from the Subdivision Authority with conditions; and
- The Subdivision Authority's written submissions and PowerPoint presentation.

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

- Exhibit A – Photographs provided by the Appellant.
- Exhibit B – A Traffic Impact Study ("Study") by Bunt & Associates Engineering Ltd. ("Bunt & Associates") submitted by the Appellant.
- Exhibit C – A map of adjacent Subdivisions submitted by Transportation Services, City of Edmonton (the "City").

Preliminary Matters

[6] At the outset of the appeal hearing, the Chair confirmed with the parties in attendance that there was no opposition to the composition of the panel.

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

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

Summary of Hearing

i) *Position of the Appellant, Greg MacKenzie and Associates Consulting Ltd.*

[9] Mr. R. Watkins and Mr. K. Watkins appeared on behalf of the Appellant.

Conditions of Approval II (10) and II (11)

[10] The Appellants confirmed that they have received clarification from the Subdivision Authority regarding these requirements and are no longer appealing these two conditions.

Conditions of Approval I (1) and I (2)

[11] The Appellants disagree with the Environmental Reserve (“ER”) calculation of 8.26 hectares (“ha”) and would like a 0.326 ha portion to be excluded from this calculation. They are requesting a credit for this 0.326 ha portion to be applied to the amount that they are required to pay in place of the Municipal Reserve (“MR”). They are not planning on developing this 0.326 ha portion and it would end up as a City-owned park area.

[12] The portion of land they are referring to is the area that has been circled in red on the diagrams in the written submission of the Subdivision Authority. This portion of the property does not meet the definition of ER per section 664(1) of the *Municipal Government Act*:

664(1) Subject to section 663, a subdivision authority may require the owner of a parcel of land that is the subject of a proposed subdivision to provide part of that parcel of land as environmental reserve if it consists of

- (a) a swamp, gully, ravine, coulee or natural drainage course,
- (b) land that is subject to flooding or is, in the opinion of the subdivision authority, unstable, or
- (c) a strip of land, not less than 6 metres in width, abutting the bed and shore of any lake, river, stream or other body of water for the purpose of
 - (i) preventing pollution, or
 - (ii) providing public access to and beside the bed and shore.

[13] The 0.326 ha portion is an approximate measurement and was calculated from an aerial photograph. This area is clearly visible on an overhead photograph as it is open, with no trees. It contains no aquatic vegetation such as cattails, no standing water, and is currently overgrown with Canada thistle.

- [14] The land in question was part of the previous owner's homestead; he lived there for over 50 years. The land is not unstable or wet and a large storage building and various pieces of equipment have been located on it for 30 to 40 years. There are many 30 to 40 foot tall trees to the east and north of the area circled in red.
- [15] A series of photographs was presented (marked *Exhibit A*). The photographs show the original house at the bottom of the hill; the storage shed; various abandoned pieces of equipment and garbage; the treed roadway leading to the land under appeal; a large open area; and the lowest point between the house and the road.
- [16] All of these photographs show that this is a developable area which is not wet or subject to flooding. The buildings and other items have been located here for up to 50 years. Although these photographs were taken in July they would show the same conditions in the spring or fall.
- [17] The Appellants have drilled two geotechnical test holes to determine if the disputed area is prone to flooding or is unstable and the results confirm that the disputed area does not meet the definition of ER per section 664(1) of the *Municipal Government Act*. However, they did not have the results of these tests with them.
- [18] The cross section drawing (Attachment VI) in the Subdivision Authority's submission is not accurate. It is not a scaled drawing and does not accurately show the topography of the land or the location of the wet area.

Condition of Approval II (12)

- [19] The Appellants try to develop property as efficiently and effectively as possible and keep costs low by not providing unnecessary infrastructure. The requested south bound left turn bay is unnecessary as the majority of people coming out of adjacent subdivisions would be travelling straight south on Winterburn Road (215 Street NW) to access Yellowhead Trail NW.
- [20] A left turning bay could cost \$60,000 to \$70,000 to construct but this is an estimate only and they have not done the actual calculations.
- [21] They hired transportation engineers from Bunt and Associates to do a review of the south bound left turn bay requirement and submitted the Study to the Board (marked *Exhibit B*).
- [22] This Study looked at current traffic volume as well as projected traffic volume once the whole area is built out and it concluded that the potential magnitude of south bound left turning traffic at this location does not warrant the construction of a left turn bay. Eventually 215 Street NW will be upgraded to a four-lane, divided arterial roadway and a left turn bay can be constructed at that time.

- [23] According to the City it is standard engineering practice for a left turn bay to be required for arterial roadway connections. If this turn bay is not constructed now it is likely that a significant amount of time will pass before there is another opportunity. However this reasoning is irrelevant if the turn bay is not required.
- [24] The City's reasoning that south bound left turning vehicles will create traffic congestion which will worsen as development to the north continues is contradicted by the Bunt & Associates Study.
- [25] Based on the evidence presented in the Bunt & Associates Study, the requested left turning bay is not necessary for a 45 house subdivision.

Condition of Approval II (13)

- [26] The Appellants have no objection to paying for their proportionate share of the required traffic signals at the intersection of 215 Street NW and Yellowhead Trail NW. Such a requirement is usually put on an Arterial Roadway Assessment ("ARA") and the costs are shared by all developers. The requirement for the traffic lights is a result of all the traffic in the area and their 45 lot subdivision should not be required to pay the entire cost.
- [27] They were told by the Subdivision Authority that because it is not yet in the ARA, this same condition has been issued to the last three or four subdivision applications. Their objection is to the way the condition is worded. The condition states that if the traffic signals are not built within five years, they have to provide the money to cover the entire cost. They want the condition to be revised to make it clear that this will be a cost shared item.

ii) Position of the City of Edmonton

- [28] Mr. M. Gunther of Law Branch, Mr. S. Carlyle of the Subdivision Authority and Ms. K. Sizer with the Transportation Services appeared on behalf of the City.

Conditions of Approval I (1) and I (2)

- [29] Mr. S. Carlyle and Mr. M. Gunther addressed these two conditions of approval. Mr. Carlyle confirmed that 8.26 ha is the correct area for the ER, and the 7.83 ha shown on Enclosure I of the Approval, is a typographical error.
- [30] Mr. Carlyle reviewed his PowerPoint submission. The approximate area of the land in dispute is circled in red on the various maps and diagrams in the submitted documents.

- [31] The area circled in red is designated as a Natural Conservation Area in both the Big Lake Area Structure Plan and the Trumpeter Neighbourhood Structure Plan and is zoned (A) Metropolitan Recreation Zone. Both the land use designation and zoning are consistent with lands dedicated as ER. The red circled area is also part of the North Saskatchewan River Valley and Ravine System Protection Overlay.
- [32] Surveys would have been completed at the time the above statutory plans were drafted, including top-of-bank designation, and the area of 8.26 ha for the ER would have been determined during these surveys. They do not have specific information as to how the calculation of 0.326 ha (that is the disputed area) was arrived at by the Appellant.
- [33] The cross section drawing (Attachment VI) reflects the conditions that were observed during a July 7, 2017, site visit and shows the location of the existing house and shed. The drawing was made to the best of Mr. Carlyle's ability with the assistance of three other City employees who accompanied him on July 7. No measuring instruments were used other than GPS.
- [34] The line marked "UDL" on Attachment VI is the Urban Development Line. The area to the left of the line toward the existing house is considered developable. The area to the right of this line is at a lower elevation and is considered to be within a ravine and is therefore not developable. This UDL was established and accepted on-site with the Appellant a few years ago. The Appellant could have disputed the location of the UDL before City Council during the statutory plan process. They must have known that the area in question would eventually be designated ER.
- [35] Mr. Carlyle reviewed the photographs contained in his PowerPoint presentation which he used to illustrate that the area in question is at a lower elevation and has wet, spongy areas. These photographs were taken on an extremely hot day in July and he believes there would be more wet areas during the spring or fall seasons, which could possibly be prone to flooding. The existing buildings are between 20 and 30 feet from an area that stays wet all year.
- [36] Mr. Carlyle believes that the results of the geotechnical test holes drilled by the Appellant may have been submitted to the City but he personally has not seen that report.
- [37] The cash collected by the City in place of MR is used to fund parks within the general vicinity.
- [38] The ability to develop within an area does not determine the ER designation. The area in question falls within a ravine and there is no specific definition of ravine within the legislation as no two ravines look the same. There can be high and dry areas within portions of a ravine; Mill Creek Ravine and Whitemud Ravine were provided as examples.

- [39] Higher areas within these ravines have had houses on them in the past but these areas are still within the ravine. In this case, the area in question may be a higher area within a ravine but it is still lower than the surrounding land and is therefore designated as ER.

Condition of Approval II (12)

- [40] Mr. M. Gunther and Ms. K. Sizer addressed this condition of approval. Ms. Sizer confirmed that she had previously received a copy of the Bunt & Associates Study.
- [41] She agrees with everything contained within the Bunt & Associates Study except the conclusion that there is not sufficient traffic to warrant construction of a south bound left turning bay. Ms. Sizer acknowledged that due to the low volume of south bound left turning vehicles, a standard size turning bay may not be required. The City would be willing to discuss a minimized design.
- [42] The standard length for a left turning bay is 50 metres. For a south bound left turning bay from 215 Street NW into the subject subdivision, the City would consider a 20 to 25-metre long bay.
- [43] Eliminating this turning bay would create safety concerns and traffic delays as vehicles turning left would be stopping in the only through-lane south bound. This section of 215 Street NW will remain a two lane roadway for a significant amount of time until the roadway is widened.
- [44] The volume of south bound traffic will increase as development to the north continues. It is proposed that 215 Street NW will eventually connect with Ray Gibbons Drive (to the north east).
- [45] The proposed left turning bay is required to provide access to this subdivision as this intersection is the only way in and out. Section 655 of the *Municipal Government Act* provides the City authority for imposing this condition.

Condition of Approval II (13)

- [46] Traffic lights would normally be dealt with through an ARA. In this case the City had approached the ARA Steering Committee to have these lights included but were told that a developer must bring this item forward.
- [47] The traffic lights at the intersection of 215 Street NW and Yellowhead Trail NW have been identified through a Traffic Impact Assessment report as a need as this corridor has reached the congestion threshold. Development cannot proceed until this intersection is signalized. Section 655(1)(b)(i) of the *Municipal Government Act* allows this condition to be imposed. This provision provides the City the authority to require an applicant to enter into a servicing agreement for the construction of a road, which includes the traffic lights that operate the road.

- [48] The Appellant's subdivision is the first approval that has received this condition. However, this condition will be included in future subdivision approvals. The Appellant will be reimbursed as the adjacent lands develop.
- [49] Ms. Sizer provided an area map (marked *Exhibit C*) showing pending subdivisions to the north of the subject intersection that will also be required to share in the cost of this traffic signal.

Mr. Gunther indicated that the authority to require an applicant to pay for all or a portion of an improvement with an excess capacity is contained within section 651(1) of the *Municipal Government Act* that states:

651(1) An agreement referred to in section 648, 650 or 655 may require the applicant for a development permit or subdivision approval

- (a) to pay for all or a portion of the cost of an improvement constructed or paid for in whole or in part by a municipality at any time prior to the date of approval of the development permit or subdivision approval application, or
- (b) to construct or pay for all or a portion of an improvement with an excess capacity.

- [50] With respect to a question from the Board, Mr. Gunther acknowledged that section 651(2) of the *Municipal Government Act* states that the City "may" within the subdivision agreement, provide for a reimbursement and section 651(3) of the *Municipal Government Act* states if there is such an agreement, then the City "must" reimburse.

Mr. Gunther requested a brief recess to discuss Condition II (13) with his clients and the Appellant.

- [51] Mr. Gunther advised the Board that all parties would agree to adding the following clause at the end of Condition II (13):

"...with excess capacity to be reimbursed by future benefitting developers through servicing agreements".

iii) Rebuttal of the Appellant, Mr. R. Watkins

- [52] Mr. Watkins confirmed they are in agreement with the revised wording for Condition II (13) and will also pursue this matter with the ARA Steering Committee.
- [53] He indicated that he was involved with the creation of the Big Lake Area Structure Plan and much of the work to develop the plan was done using aerial photographs.

- [54] He did not pursue the issue of the ER with City Council as this would have delayed development by at least a year. He has had many discussions with administration and expected that he would receive some kind of credit regarding the MR requirement.
- [55] With regard to Attachment VI, no evidence has been presented by the City that this area is not developable. He has evidence from the person that has lived on the subject land for 50 years that there has never been any flooding. He is therefore asking for a reduction in the MR as this land should never have been taken as part of the ER.
- [56] He reiterated that the Bunt & Associates Study confirms that there is no need for a south bound left turning bay into the subdivision. He is willing to discuss providing a shortened turn bay, which would be more appropriate.

Decision

- [57] The appeal of Conditions I (1), I (2), II (10), and II (11) is **DENIED**. The appeal of Condition II (12) is **ALLOWED**. Condition II (13) is **REVISED** by adding at the end of it the words:

“...with excess capacity to be reimbursed by future benefitting developers through servicing agreements”.

Reasons for Decision

- [58] Section 664(1) of *Municipal Government Act* allows a Subdivision Authority to require the owner of a parcel of land that is subject of a proposed subdivision to provide part of that parcel of land as an Environmental Reserve if it consists of, among others, a swamp, gully, ravine, coulee, natural drainage course or land, that in the opinion of the Subdivision Authority, is unstable or subject to flooding.
- [59] The City of Edmonton (the “City”), in its submissions, argued that all of that land that has been required in the subdivision approval to be dedicated as Environmental Reserve fits within those criteria which are in section 664(1)(a) and (b). The City pointed out that:
- a) All of the land being dedicated as Environmental Reserve is lower in elevation than the top-of-bank designation and the Urban Development Line, which was developed in conjunction with the Appellant.
 - b) The City presented evidence showing that as late as July 7, 2017, much of the land around the portion of land that the Appellant believes was not properly designated as Environmental Reserve was in fact spongy and potentially marshy.

- [60] The Board notes it did not have from the Appellant any drawing of the 0.326 hectares that they allege was not properly designated as Environmental Reserve. The Appellant presented no geotechnical evidence showing that the part of the land that they say is not properly designated Environmental Reserve is not prone to flooding or is unstable.

It is important to note that the Appellant does not take issue with the vast majority of the land being dedicated as Environmental Reserve. The Appellant alleges that a small portion of the proposed Environmental Reserve lot is not Environmental Reserve as defined in section 664 of the *Municipal Government Act*, a parcel of land that they allege is 0.326 hectares in size.

However, without the Board being presented with any evidence as to the precise location of this 0.326-hectare parcel and the elevation of land that is within the alleged 0.326 hectares, it is impossible for the Board to find in the Appellant's favour on this point. This is particularly so when the evidence of the City includes photographs of the general area within which this 0.326-hectare parcel is supposed to be, is lower in elevation than the Urban Development Line, has different vegetation and portions of which are still spongy and wet in the summer time.

- [61] For these reasons the Board finds that, when weighing the evidence before it, the general area of the land that the Appellant believes contains 0.326 hectares of "developable land" is Environmental Reserve as defined in section 664 of the *Municipal Government Act* by being part of a ravine system. The appeal of Conditions I (1) and I (2) is denied for these reasons.

- [62] In its notice of appeal, the Appellant also appealed Conditions II (10) and II (11) dealing with paved pathway conditions. At the beginning of the hearing, the Appellant withdrew those two grounds of appeal and so the Board did not deal with those conditions and those conditions shall remain in the subdivision approval.

- [63] The next condition being appealed was II (12):

"that the owner constructs a south bound left turn bay, to the satisfaction of Transportation Planning and Engineering, as shown on the "Conditions of Approval" map, Enclosure I".

On this point the Appellant presented an expert Traffic Impact Study ("Study") dated July 4, 2017, from Bunt and Associates Engineering Ltd.

- [64] This Study evaluated both the site generated traffic and also did a sensitivity analysis estimating additional growth in both the Trumpeter and Hawks Ridge neighbourhoods and the increased traffic volume this growth will have for Winterburn Road (215 Street NW). After conducting this analysis, Catherine Oberg, P. Eng. had concluded that "the potential magnitude of southbound left turning traffic is not significant enough to warrant construction of a left turn bay in this location".

The Board accepts the opinion and concludes the south bound left turn lane is not necessary. The Board notes that the City did not have an expert report that provided a different opinion. The City submission, with respect to the Study was that they agreed with the data, calculation and methodology, but simply disagreed with the conclusion generated from that analysis. On the balance of probabilities, the Board accepts the evidence of Ms. C. Oberg and finds that the south bound left turning bay requirement set out in Condition II (12) is not necessary and therefore that condition is removed from the subdivision approval.

- [65] The final condition appealed was Condition II (13). After much discussion, both the Appellant and the City agreed that this condition could be varied by adding at the end of it the words “...with excess capacity to be reimbursed by future benefitting developers through servicing agreements”. Condition II (13), as varied by the above words, is confirmed.
- [66] In conclusion, the appeal of Conditions I (1), I (2), II (10), and II (11) is **DENIED**, the appeal of Condition II (12) is **ALLOWED** and Condition II (13) is **REVISED** with the addition of the words set out above.



Mr. I. Wachowicz, Chair
Subdivision and Development Appeal Board

Board Members in Attendance:

Mr. N. Somerville; Mr. C. Buyze, Ms. N. Hack; Mr. J. Wall

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.