



Date: May 25, 2018
Project Number: 134196563-004
File Number: SDAB-D-18-071

Notice of Decision

[1] On May 10, 2018, the Subdivision and Development Appeal Board (the “Board”) heard an appeal that was filed on **April 16, 2018**. The appeal concerned the decision of the Development Authority, issued on April 3, 2018, to refuse the following development:

To operate a Major Home Based Business (Law Office).

[2] The subject property is on Plan 5718AE Blk 29 Lot 27, located at 10905 - 73 Avenue NW, within the (RA7) Low Rise Apartment Zone. Both the Medium Scale Residential Infill Overlay and the 109 Street Corridor Area Redevelopment Plan apply to the subject property.

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

- A copy of the Development Permit application with attachments and the refused Development Permit;
- The Development Officer’s written submission;
- The Appellant’s written submission;
- A letter from a neighbouring property owner;
- SDAB-D-15-074 ; and
- SDAB-D-13-044 (including an approved parking plan).

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

- Exhibit A – Letter in support from a neighbouring property owner, submitted by the Appellant.
- Exhibit B – Letter in support from a neighbouring property owner, submitted by the Appellant.
- Exhibit C – An aerial map of the area, submitted by the Appellant; and
- Exhibit D – Photographs submitted by the Appellant via smartphone.

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 686 of the *Municipal Government Act*, RSA 2000, c M-26 (the “*Municipal Government Act*”).

Summary of Hearing

i) Position of the Appellant, Ms. A. Kandath

- [8] Ms. Kandath is the sole practitioner of the Major Home Based Business (Law Office).
- [9] The majority of her work is done off-site and on-line.
- [10] She has one paralegal employee that comes to the house on Fridays from 1:00 p.m. to 4:00 p.m. only. The bookkeeper for the business works from Ontario. Those are her only two employees.
- [11] She meets her clients outside the office as she primarily caters to elderly customers. On occasion a client will come to the property.
- [12] There are four to five parking spaces located at the rear of the dwelling. Clients that occasionally come to the site, park in this area and walk to the front to access the entrance.
- [13] There are no courier visits to the site as she delivers documents to her clients and does all of her own banking.
- [14] She referred to the letter received from an adjacent property owner with concerns regarding parking. She stated that the property is located within the McKernan area, which is in walking distance to the University and the U of A hospital. This is a student friendly neighbourhood.
- [15] The tenant who has occupied the Secondary Suite in the dwelling for the last 8 months is a student that attends NAIT.
- [16] The immediately adjacent neighbours do not have any issues with the Secondary Suite.
- [17] She received two letters in support of the Major Home Based Business from neighbouring property owners that live immediately adjacent and across the street from the subject Site.
- [18] The Major Home Based Business has not negatively impacted the neighbourhood.

- [19] A letter was received from a neighbouring property owner with concerns regarding parking congestion in the neighbourhood. The letter did not indicate if Bylaw Enforcement was called to determine if the vehicle congestion was associated with the Law Office.
- [20] The Appellant believes that there is an excess of parking in the neighbourhood when students start going to NAIT or the U of A in September.
- [21] The number of clients has not increased since the Major Home Based Business was previously approved by the Board (SDAB-D-13-044).
- [22] She referred to the aerial map showing the location of the commercial businesses across the street and kitty corner to the subject Site.
- [23] A Major Home Based Business is a Discretionary Use in the (RA7) Low Rise Apartment Zone. The business has operated for five years with no known complaints.
- [24] In response to questions by the Board, she stated that a parking plan was approved in 2013 with four parking spaces at the rear of the property. One of the parking spaces is a tandem space.
- [25] Her vehicle occupies one of the parking spaces at the rear of the property during the day. One of the parking spaces is occupied by the tenant in the evening only. The paralegal employee does not drive to the site.
- [26] A shed in the rear of the property was demolished and this area is not used for parking.
- [27] There have been no changes to the exterior of the house.
- [28] In response to questions by the Board, the Appellant explained that she filled out the development permit application to allow room for additional employees and clients in the event that the business expands in the future. This addresses the discrepancy between her current evidence and the information contained in the development permit application.
- [29] The hours of operation and the number of employees have not changed since 2013.
- [30] The employee and any courier visit will park in the back if the need arises.
- [31] On occasion, there may be one customer visit per day and up to five courier visits per week if necessary.

ii) Position of the Development Officer, Ms. H. Xu

- [32] The Development Authority provided a written submission and did not attend the hearing.

Decision

[33] The appeal is **ALLOWED** and the decision of the Development Authority is **REVOKED**. The development is **GRANTED** as applied for to the Development Authority, subject to the following **CONDITIONS**:

1. The Development Permit for a Major Home Based Business (Law Office) has been approved for a period of five years and will expire on May 25, 2023.
2. There shall be no exterior signage, display or advertisement other than a business identification plaque or sign 20 centimetres by 30.5 centimetres in size located on the Dwelling.
3. There shall be no outdoor business activity, or outdoor storage of material or equipment associated with the business. Indoor storage related to the business activity shall be allowed in either the Dwelling or Accessory Building.
4. The business Use must be secondary to the residential Use of the building and no aspects of the business operations shall be detectable from outside the property.

[34] In granting the development, the following variance to the *Edmonton Zoning Bylaw* is waived:

1. Section 75(10) is waived to permit a Major Home Based Business within the same principal Dwelling containing a Secondary Suite.

Reasons for Decision

[35] The proposed development, a Major Home Based Business, is a Discretionary Use in the (RA7) Low Rise Apartment Zone.

[36] Given this is a Discretionary Use, the Board must be convinced that the proposed development is reasonably compatible with the neighbourhood. The Board made this finding based on the following reasons:

- a. The Board received community consultation results by the Appellant in the form of two letters in support of the Major Home Based Business and the Board accepts the information provided and that the most affected adjacent neighbours are in support of this business.
- b. The Board notes that the Major Home Based Business has been in operation for five years with no known complaints.

- c. The Board acknowledges that there is sufficient on-site parking for the business, the principal Dwelling and the Secondary Suite and accepts the evidence that there will be no increased vehicular or pedestrian traffic that would have an impact on the neighbourhood. Further, the subject Site complies with the minimum required number of on-site parking spaces.
- d. The Board notes that the number of employees (two) and the scale of the operation as well as the amount of the activity occurring within the business will have a minimal impact on the neighbourhood.
- e. The Board also notes that this is a renewal of a Major Home Based Business that has successfully fit into this neighbourhood for the past five years. The Board felt, that as the Basement Suite had been constructed under the Cornerstone Program and therefore approved prior to establishing the Major Home Based Business, it has no bearing on the operation of the current Major Home Based Business.

[37] Based on the above reasons, it is the opinion of the Board that the proposed development will not unduly interfere with the amenities of the neighbourhood, and materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land.

Ms. P. Jones, Presiding Officer
Subdivision and Development Appeal Board

Board Members in Attendance

Mr. V. Laberge; Mr. C. Buyze; Ms. E. Solez

Important Information for the Applicant/Appellant

1. This is not a Business Licence. A Business Licence must be obtained separately from Development & Zoning Services, located on the 2nd Floor, Edmonton Tower, 10111 – 104 Avenue NW, Edmonton, AB T5J 0J4.
2. Obtaining a Development Permit does not relieve you from complying with:
 - a) the requirements of the *Edmonton Zoning Bylaw*, insofar as those requirements have not been relaxed or varied by a decision of the Subdivision and Development Appeal Board,
 - b) the requirements of the *Alberta Safety Codes Act*,
 - c) the *Alberta Regulation 204/207 – Safety Codes Act – Permit Regulation*,
 - d) the requirements of any other appropriate federal, provincial or municipal legislation,
 - e) the conditions of any caveat, covenant, easement or other instrument affecting a building or land.
3. When an application for a Development Permit has been approved by the Subdivision and Development Appeal Board, it shall not be valid unless and until any conditions of approval, save those of a continuing nature, have been fulfilled.
4. A Development Permit will expire in accordance to the provisions of Section 22 of the *Edmonton Zoning Bylaw, Bylaw 12800*, as amended.
5. This decision may be appealed to the Alberta Court of Appeal on a question of law or jurisdiction under Section 688 of the *Municipal Government Act*, RSA 2000, c M-26. If the Subdivision and Development Appeal Board is served with notice of an application for leave to appeal its decision, such notice shall operate to suspend the Development Permit.
6. When a decision on a Development Permit application has been rendered by the Subdivision & Development Appeal Board, the enforcement of that decision is carried out by Development and Zoning Services, located on the 2nd Floor, Edmonton Tower, 10111 – 104 Avenue NW, Edmonton, AB T5J 0J4.

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



Date: May 25, 2018
Project Number: 272140696-001
File Number: SDAB-S-18-006

Notice of Decision

- [1] On May 10, 2018, the Subdivision and Development Appeal Board (the “Board”) heard an appeal that was filed on **April 16, 2018**. The appeal concerned the decision of the Subdivision Authority, issued on March 29, 2018 to refuse the following subdivision:

Create one (1) additional Rural Residential Lot.

- [2] The subject property is on Plan 9020626 Lot D, located at 19304 - 9 Street NE, within the (RR) Rural Residential Zone. The Horse Hill Area Structure Plan (the “ASP”) and the Marquis Neighbourhood Structure Plan (the “NSP”) apply 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 Authority letter;
 - The Subdivision Authority’s written submissions including a PowerPoint presentation, and two previous Board decisions; and
 - The Appellant’s letters of support and highlighted sections of the (RR) Rural Residential Zone and the NSP.
- [4] The following exhibits were presented during the hearing and form part of the record:
- Exhibit A – Supreme Court of British Columbia Decision (Appellant); and
 - Exhibit B – Fire Protection Standards document (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 Presiding Officer stated that the Board must first determine if the appeal was filed within the legislated timelines per section 678(2) of the *Municipal Government Act* which states:

(2) An appeal under subsection (1) may be commenced by filing a notice of appeal within 14 days after receipt of the written decision of the subdivision authority or deemed refusal by the subdivision authority in accordance with section 681 [...]

[8] The decision of refusal issued by the Subdivision Authority was dated March 29, 2018, and the Appeal was filed on April 16, 2018. Mr. R. Noce, legal counsel for the Appellant, stated that since he did not know the exact date that the decision was received by his clients, the date of receipt is deemed to be April 5, 2018, seven days after the decision was mailed. Therefore, it is Mr. Noce's submission that the appeal was filed on time. Mr. M. Gunther, City of Edmonton Law Branch did not object to this interpretation.

[9] The Board determined that the appeal was filed on time, in accordance with section 678(2) of the *Municipal Government Act*, RSA 2000, c M-26.

[10] Mr. Noce, legal counsel for the Appellant, wanted it put on record that he objected to the process that has been followed by the City of Edmonton (the "City") regarding this subdivision application.

[11] The letter of refusal received by Mr. Noce's client dated March 29, 2018, only contained three reasons for refusal and simply referenced the Marquis NSP and section 240 of the *Edmonton Zoning Bylaw*. His client sought a legal opinion as to whether or not an appeal was worthwhile based on this refusal letter. On May 7, 2018, Mr. Noce received a report from the Subdivision Authority to which many more reasons for refusal had been added. These new reasons included:

- (1) A deficiency in site regulations;
- (2) A concern with an existing accessory building;
- (3) Future development hardship; and
- (4) Concerns regarding the limited utility services available in this area.

Further, he was provided with another submission regarding Fire Rescue Services.

[12] Mr. Noce submitted that the City knew of all of these reasons for refusal but chose not to put them into the refusal letter. In his view, it is unfair to his clients who have to come up against the City with its unlimited resources including planners, lawyers, engineers, transportation, and fire services personnel. He characterized the situation as "trial by ambush". Fairness and due process have not been properly followed.

[13] If the City were to simply rely on the issues raised in the March 29, 2018 refusal letter, he did not object with proceeding. However, he stated that he reserved the right to request a postponement at any time during the hearing if the City were to rely on new information.

A postponement is not his first choice as it would simply add more expense to his client's legal costs.

- [14] Mr. Gunther, legal counsel for the City, acknowledged that Mr. Noce's clients are not institutional developers; however, the obligation of the City is to ensure everyone is treated equally and fairly. He took exception to Mr. Noce's comments that fair process has not been followed and that this is "trial by ambush".
- [15] Mr. Gunther further stated that this is a hearing *de novo* and there are obligations on both parties to present all relevant information so that the Board can make an informed decision. There is inevitably going to be new information as the hearing is an opportunity for the various parties to provide their input regarding this subdivision refusal. Mr. Gunther noted that subdivision refusals are a rarity in the City of Edmonton.
- [16] Ms. Mah, a Subdivision Planner for the City, explained that a subdivision application is circulated to various stakeholders for feedback including EPCOR Drainage, EPCOR Power, EPCOR Water, Transportation, Development Services, Property Taxes, Servicing, Safety Codes, Parks and TELUS. In this case, the Subdivision Authority worked with Pals Geomatics Corp. ("Pals") as they had made the application on behalf of Mr. Noce's clients and all of the comments received from the various departments were e-mailed to Pals. This subdivision application had been submitted on-line; therefore, all of the comments were also available on-line for review by the applicant. Ms. Mah indicated early on to the surveyor that this application would likely be refused.
- [17] Mr. Noce acknowledged that he did have a print-out of some of these circulation responses but took the position that the Subdivision Authority discounted those comments as they had not been included in the refusal letter.
- [18] Mr. Gunther advised that if Mr. Noce would seek a postponement the City is prepared to agree to one. Mr. Noce confirmed that he is not seeking postponement at this time.

Summary of Hearing

i) Position of the Appellant, Mr. R. Noce

- [19] Mr. Noce was accompanied by his clients, Ms. D. Tetz, the land owner, and Ms. S. Scott, the land owner's daughter.
- [20] Mr. Noce referred to the three reasons for refusal outlined in the March 29, 2018 letter from the Subdivision Authority.
- [21] Refusal Reason No. 1

"The subject lot is designated as "Existing Residential" per section 5.0 - Development Concept of the Marquis Neighbourhood Structure Plan (the "NSP") (Bylaw 17396). The intent of this designation is to allow for the existing country residential

development to remain, while allowing for compatible transitional uses (i.e. single detached housing) around the existing rural residences in a sensitive manner. Creating a new country residential lot would be contrary to the intent of the Marquis NSP because it would further fragment land ownership, creating a barrier to future redevelopment of the area.

- a) The reference to “Section 5.0” is incorrect. Section 5 in the Marquis NSP concerns all-weather design. In his view, the Subdivision Authority meant to reference *Figure 5*, which is found on page 18 of the Marquis NSP. *Figure 5* is simply a map showing existing residential and has nothing to do with the appeal today.
- b) The refusal letter does not reference any part of the Marquis NSP where it is stated that the intent is to prevent further fragmentation of land ownership.

Refusal reason one is not very clear and it is his submission that it can be dismissed as there is nothing to base it on.

[22] Refusal Reason No. 2

“The subdivision does not comply with Section 6.2 Residential of the Marquis Neighbourhood Structure Plan, which states that: “Any future redevelopment of existing residential uses would be required to meet the City of Edmonton and *Capital Regional Growth Plan* residential density targets.” The Marquis NSP has a projected neighbourhood density of 38.2 units per residential hectare (uprha);”

- a) There appears to be some typos in this section and he is not sure what “uprha” is referring to.
- b) Section 6.2.1.1 provides the Policy of the Marquis NSP:

“A mixture of residential dwelling types and densities including single/semi-detached, row housing, low/medium rise density housing and medium/high rise density housing shall be provided, allowing consumer choice, a range of affordability options.”

In his view this statement contemplates options and provides the ability to create another rural residential lot.

- c) Mr. Noce indicated that at the beginning of Section 6.2 of the Marquis NSP, it states under ‘Existing Residential’ that: “[e]xisting country residential development may remain in perpetuity. Any future redevelopment of existing residential uses would be required to meet the City of Edmonton and Capital Region Growth Plan...”. In his view this reason for refusal refers to “redevelopment”. This application is for a subdivision, not a redevelopment. While the word “redevelopment” is not defined in the Marquis NSP, Council could have easily added the word “subdivision” but chose not to. Redevelopment and subdivision are two different things.

In his view the proposed subdivision is fully compliant with Section 6.2 of the Marquis NSP. This section points to *Figure 5*, which is simply a map showing the existing residential development, and the language in the section references ‘redevelopment’, which is materially different than what is proposed

[23] Refusal Reason No. 3

“the subject lot is zoned as (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.”

- a) Mr. Noce stated that nowhere does the Subdivision Authority reference what part of the Municipal Development Plan (“MDP”) they are referring to.
- b) Mr. Noce quoted from paragraphs 32 and 33 from *GVRD v. Stainsby, 2007 BCSC 585* (Exhibit A):

[32] “On the other hand, the preamble or purpose clause cannot be used to amend the meaning of a substantive provision of the bylaw: It would seem odd if general words in a preamble were to be given more weight than the specific provisions that deal with the matter”.

[33]“If there is any conflict between the general words of the preamble and the specific words of the text of the bylaw, the bylaw text must prevail.”

Mr. Noce noted single detached housing is in the text of the bylaw. It is a permitted use. It is the right of a land owner with a RR Rural Residential Zone designation to apply for a single detached house. As this decision suggests, this Board must recognize that the preamble has no legal weight and nothing before the Board indicates any concerns with the MDP.

- [24] Mr. Noce confirmed that there is a deficiency in the minimum required site area and site width. However, the Board has the discretion to waive these requirements. He referred the Board to Paragraph 193 of SDAB-S-16-003 dated January 26, 2017:

[193] 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.

The letters submitted from the adjacent property owners clearly demonstrate their support of the proposed subdivision. No letters of opposition have been received and no

one has appeared in opposition. The proposed subdivision will be compliant with the statutory plans and will fit in with the feel of the existing neighbourhood. There is no evidence that this subdivision will unduly interfere with the amenities of the neighbourhood, or materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land.

- [25] The previously referenced decision (SDAB-S-16-003) submitted by the Subdivision Authority, is not relevant to today's appeal other than the principles of law. There was tremendous opposition to that particular subdivision, the facts are totally different and the Windermere Neighbourhood Structure Plan is totally different than the Marquis NSP.
- [26] In his view, it is unclear how the statement included in the March 12, 2018 print out demonstrates that the subdivision will create development hardship for future land owners. There is nothing to substantiate this statement. While it was recommended to the applicant to pursue re-zoning, the right of rezoning exists for any land owner and not pursuing this right is not a reason for refusal.
- [27] With regard to limited services as a reason for refusal, there is no water, storm or sanitary service available. This is simply a statement of the current conditions.

Ms. D. Tetz

- [28] The subject property was purchased by Ms. Tetz's in-laws in 1966 and her husband has lived at the property most of his life. She moved onto the family property with her husband in 1985. Her mother-in-law still lives next door on the adjacent lot.
- [29] They would like to portion off a piece of land as a gift to her daughter and her family. Ms. Tetz and her husband plan to continue living on the remaining land and the other three children would eventually receive it as their share of the inheritance.
- [30] They love the community they live in, the neighbours are all very close and they hope to live here for a long time.

Ms. S. Scott

- [31] She loved growing up right next door to her grandmother and wants that for her own children.
- [32] It is important to her to be there on that land in that neighbourhood as it is a very special area.

Mr. Noce Concluding Remarks

- [33] If the Board were to approve the subdivision it is their view that there ought not to be any arterial roadway assessment as nothing is changing. No dollar amount has been provided regarding the drainage assessment to date.
- [34] In his view there will be no change in density for the existing neighbourhood.

- [35] He maintains that this subdivision is fully compliant with the intent of the statutory plans.
- [36] The Lot as it exists today has no utility services available and the service providers have either not raised any objection or have provided support for the subdivision.
- [37] Mr. Noce provided the following responses to questions from the Board:
- a) The ultimate intent is to create a subdivided lot and then apply for a development permit to build a single detached house.
 - b) The accessory building currently located on the subject site is an old shed that contains old tractors. It is located on the proposed parcel and they would not object to a condition that this building must be demolished.
 - c) They looked at other options such as a Garden Suite but this does not meet the overall objective of the land owner. The proposed subdivision is part of estate planning.
 - d) In his view, the reduction of the subject site into two lots will not impact the transition of land that will occur in other parts of the Marquis NSP. It will also not impact the existing residential neighbourhood as there are already several parcels of land with similar lot widths as shown on the notification map.
 - e) The proposed subdivision would be consistent with the policy of the NSP per Section 6.2.6.1: “Ensure that compatible land uses are developed in proximity to existing rural and agricultural uses and that appropriate transitions are provided between existing and future land uses.”
 - f) The lack of services by the Subdivision Authority was not identified as an issue by Council when they adopted the Marquis NSP.
 - g) In his view drainage issues are best left to the Development Permit stage as it is not known what is being built.
 - h) With regard to the Subdivision Authority’s list of conditions, he is of the opinion that those conditions are premature and would be best left for the Development Permit stage. They agree with all of the Adviseements and the payment of property taxes.
 - i) In his view, the future single detached house would be a development on a rural residential lot, not a redevelopment.

ii) *Position of the City of Edmonton*

Mr. M. Gunther, Law Branch

- [38] The City is not attempting to be obstructionist or foil the plans of Mr. Noce’s clients. The City’s position is that good planning principles, the relevant documents, statutory plans and the *Edmonton Zoning Bylaw* do not support what is being planned here and that is the

basis of the refusal. This area of the City is on the periphery of development and redevelopment and it must be treated with caution from a planning perspective.

- [39] He confirmed that the Reasons for Refusal No. 1 should refer to “Figure” 5.0.
- [40] The concept of the Marquis NSP does not support further rural residential lots. Policy 6.2 (‘Residential’) is very careful in its language and makes numerous references to “existing” rural residential lots. The NSP explicitly notes that existing country residential development may remain in perpetuity but no additional lots are being created with this designation.
- [41] Section 240.1 of the *Edmonton Zoning Bylaw* is not a “preamble” – it is the vision that Council has for existing country residential development. This is confirmed by the Board’s decision in SDAB-S-16-003 dated January 26, 2017.
- [183] 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] 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.
- [42] Mr. Gunther also quoted Paragraphs 188 and 189 of the same SDAB decision, which are also relevant to the current proposed subdivision:
- [188] 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.
- [189] 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.
- Policy 3.6.1.6 mandates orderly development.
- [43] Mr. Gunther cited the *Rossdale Community League v Edmonton (City)* 2017 ABCA 90 and stated that under that decision more emphasis is placed on the ‘General Purpose’ of the *Edmonton Zoning Bylaw*, as discussed above, and it is treated in a more significant manner than Mr. Noce’s view of the General Purpose of the Zone.
- [44] Mr. Gunther emphasized that it is important to look at the big picture and decide if the proposed subdivision makes good planning sense and is consistent with Council’s documentation. While this particular case is unique because it involves a mother and

daughter, the character of the applicant cannot factor into the decision. If the subdivision is approved, the applicant has a legally mandated right to build a single family home. In this particular situation, the Marquis NSP and the *Edmonton Zoning Bylaw* are not supportive of future development or redevelopment.

- [45] The existing lot is already deficient with regard to size and subdividing the existing lot would result in the creation of two deficient lots.
- [46] While there are three existing country residential properties fronting on 195 Avenue NE which appear to be similar in size to the proposed lot, they date back to the 1950s or early 1960s and different planning principles were in place at that time. All of the other lots in the vicinity are larger than the subject property and the surrounding area consists of un-subdivided Agricultural Zoned land.
- [47] The subdivision would create future development hardship. A lot that cannot be effectively developed forces the Development Officer to grant variances at the Development Permit stage such as variances to setbacks and minimum required site area.
- [48] The densification of un-serviced lots makes it difficult 10 or 15 years in the future when servicing is provided in the area.
- [49] With regard to servicing, there are still a few properties that use wells in the area. This lack of water service also creates concerns from a fire rescue services perspective.
- [50] The concern with fragmentation is that it prevents any larger scale redevelopment from occurring in the later future when the use of the land has been decided. Mr. Gunther referred to a neighbourhood of approximately 20 homes in the Ellerslie area called “Wernerville” as an example of what could occur if such subdivision of lands were allowed. In “Wernerville”, these country residential lots are all owned by different individuals, have ditches and no sewers or services are in place, which has created an island of un-serviced country residential lots in that area and along with it a host of issues. Allowing subdivision in the subject area could result in the same island of un-serviced country residential lots that are marginally larger in size than the lots around them. This is not good planning or good foresight.

Ms. S. Mah, Subdivision Authority

- [51] The purpose of the Marquis NSP is to provide a strategic planning framework and the addition of an additional single detached lot will not promote compact or orderly development. In fact, in this case it will create a further undersized lot.
- [52] Ms. Mah referenced many sections of the MDP and cross referenced it with the Horse Hill ASP, specifically policies 3.6.1.6, 3.4.1.6, and 3.2.1.6.
- [53] Building on these references, she noted that while the Horse Hill Area Structure Plan (the “ASP”) and the Marquis NSP indicate that existing country residential development may remain in perpetuity, the key word is “existing”. It is not responsible planning to allow ad

hoc developments and it is not the intention of Council to currently allow any more country residential lots.

- [54] Statistics in the Marquis NSP were gathered from the *Capital Regional Growth Plan* and from the City which has its own density targets. This is how the projected neighbourhood density of 38.2 units per residential hectare was arrived at. The proposed lot should have 5 dwellings to support the density targets for future redevelopment to meet these targets. This subdivision would make such targets impossible.

Another subdivision application was refused in 2000 by the Board (SDAB-S-00-019) in the Agricultural Zone abutting the subject land. The Marquis NSP and the Horse Hills ASP did not exist at that time. The current plans now guide the appropriate planning development that is supposed to occur in this area.

- [55] Ms. Mah presented a PowerPoint presentation which provided context regarding the site and included aerial maps showing east and west views. The last image in the PowerPoint referred to the Windermere subdivision application that was before the Board in January, 2017 which would have created plan fragmentation and was ultimately denied by the Board (SDAB-D-16-003).

Ms. T. Edgecombe Fire Rescue Services

- [56] Fire Rescue Services would consider this a redevelopment, increasing density and fire risk in the area.
- [57] Ms. Edgecombe reviewed the City Standards for Fire Protection (Exhibit B) and indicated that hydrants require 90-metre spacing with a flow rate of 100 litres per second. There are currently no municipal hydrants in this neighbourhood – the nearest one is three minutes away and the closest fire station is ten kilometers away from the subject site.
- [58] Should a fire occur, a “shuttle” operation would have to be set up. A tanker truck would go to a fill station (in this case the nearest hydrant 3 minutes away) and would dump the water into a holding tank set up on site. Such a tank would be the responsibility of the property owner. A typical family home would require approximately a 20,000 gallon tank or a combination of smaller tanks to hold that amount of water. Photographs were provided to give an indication of how large the tanks would be. The exact volume of water required would be determined once it is known what will be built on the site.
- [59] The responsibility for the operation and maintenance of such a fire fighting solution are the responsibility of the property owner. If annual inspections and maintenance are not regularly carried out Fire Services takes on the risk of an unreliable water source.
- [60] While the Alberta Building Code does not mandate hydrants for single family homes, the City of Edmonton does have standards and in this rural residential area it is one hydrant every 90 metres.

Mr. B. Langille, Development Authority

- [61] The directions of Council are quite clear that no redevelopment or subdivisions are intended in the RR Rural Residential Zone.
- [62] The existing lot is non-conforming and any proposed development on the new lot would require variances to both site area and site width and notices would have to be sent to the neighbours. It is likely that future Board hearings would be required.
- [63] The proper channels should be followed for development such as re-zoning; in his view this type of decision should be considered by Council.
- [64] A demolition permit would be required for the accessory building currently on the proposed site.
- [65] The creation of more lots makes it more difficult for the City to purchase land for future development as there are more owners that have to be dealt with.

Mr. M. Gunther, Law Branch – Concluding Remarks

- [66] A subdivision is not a right that any landowner has. A subdivision is an indulgence granted by the Subdivision Authority when it is consistent with the appropriate legal documents.
- [67] While there are similar rural residential properties nearby, these developments date back to the late 1950s to late 1960s, they were most likely in Sturgeon County and construction standards were different at that time. These properties are now within the boundaries of an urban municipality. There is now a higher standard of development and better planning principles are applied. Even in 2000 when the decision was made to refuse the subdivision of the adjacent lot it was recognized it was not good planning to fragment land of this nature.
- [68] There is no basis to defer an Arterial Road Assessment to the Development Permit stage as requested by the Appellant. Section 648 of the *Municipal Government Act* stipulates that an arterial road assessment is imposed at subdivision or development. In any other subdivision in the Marquis Neighbourhood such an assessment would be imposed at the time of subdivision. No one should be treated unfairly or different than anyone else. Should this subdivision be approved an Arterial Road Assessment would be applicable.
- [69] The City provided the following responses to questions from the Board.
- a) This is a primarily agricultural part of the City and fragmentation makes future redevelopment more difficult. While this particular area can be left in perpetuity, the density target of 38.2 for this area has to be made up in the surrounding areas when a decision is made regarding how to redevelop the area. That is why currently there is no future rural residential permitted.

- b) While this Board can vary the minimum required site area and width for this subdivision, a non-compliant lot will be created. Any future development permit application will not meet the minimum required site regulations, and as such variances will be required at the Development Permit stage. The intent of the Marquis NSP is not to create any further rural residential. Approving the subdivision would create new development by giving development rights to the new landowner.
- c) The neighbourhood is dominated by houses that are around 50 years old and property owners could choose to sell to a developer. If you suddenly have a 2018 build with a 60 year life span it may not be economical for a developer to purchase that lot, thereby hindering future development.
- d) Subdividing creates an additional landowner who must be consulted when conducting land use planning for the area. This could slow down development.
- e) Legal Counsel for the Appellant stated that the facts in SDAB-S-16-003 are very different than today's appeal; however, the similarities of that case are far greater than the differences. Much of the discussion and argument in that case dealt with the planning merits of approving additional rural residential lots anywhere in the City.
- f) Mr. Gunther confirmed that the owner of a rural residential property has the right to demolish an existing structure and build a new one.

[70] The ASP and NSP were developed with a lot of input and at a great deal of expense. They both provide guidance to things such as the location of services, utilities and density targets and should not be discounted.

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

[71] Approving this subdivision will result in no change in the total hectares of rural residential land in this area. All that is happening is adding one lot.

[72] The 2000 SDAB case referred to by the City is very different than the subject appeal. The significant difference is that the 2000 appeal dealt with land that was zoned Agricultural.

[73] Section 656(2) of the *Municipal Government Act* states that the Subdivision Authority MUST provide the reasons when issuing a decision of refusal. The March 29, 2018, refusal letter did not contain all of the reasons; and in his view new reasons cannot be brought up at the hearing.

[74] This is a contiguous development in the RR Zone and does not result in fragmentation of Agricultural land. It is not an ad hoc development; it is part of a rural residential community in the City of Edmonton.

[75] His clients have not circumvented the planning process and had every right to apply for subdivision.

- [76] This is not infill development or redevelopment as suggested by Fire Rescue Services and the requirements of Fire Rescue Services are best dealt with at the Development Permit stage.
- [77] The City indicated that an “island” of country residential will be created such as what exists near Ellerslie Road. However, Council has already made the decision that the future of this site will remain country residential.

Decision

- [78] The Appeal is **ALLOWED** and the decision of the Subdivision Authority is **REVOKED**. The subdivision is approved as applied for to the Subdivision Authority, subject to the following **CONDITIONS**:
- i. That the tool shed on the lot being created by this subdivision be removed.
 - ii. That variances be granted to allow for the width to be 24.00 metres and the area to be 0.19 hectares.
 - iii. That the owner will pay all outstanding property taxes prior to the endorsement of the plan of survey.

Reasons for Decision

- [79] The Appellant raised the issue of fairness stating that all the reasons for refusing this subdivision had not been presented in the refusal letter. The Board considered and heard their arguments and do not believe it will have an effect on the Board’s decision or the Appellants’ ability to present their case.
- [80] Evidence was presented that this hearing was about a development, a re-development or a subdivision. The Board deems this to be a hearing about a subdivision.
- [81] Section 680(2)(f) of the *Municipal Government Act* (the *Act*) states:

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.

The Board notes that the power granted to the Subdivision Authority is found in section 654 of the *Act*.

Section 654(2) of the *Act* states:

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.

[82] The Board notes that this subdivision application to create a Lot with a Width of 24.00 metres, a Depth of 79.60 metres, and an Area of 0.19 hectares is deficient in the Site Width and Site Area regulations of the (RR) Rural Residential Zone (“RR Zone”).

[83] Despite these deficiencies the Board notes that based on the titled lot map of the area, there are other similar sized parcels in the neighbourhood. Further, based on the submitted aerial imagery and photographs, the Board finds that there will be no noticeable material change nor impact to the neighbourhood, meeting the test outlined in section 654(2)(a)(ii) of the *Act*. The Board grants the variances to the Site Width and Site Area of the Lot.

[84] The Board finds that there were six letters of support from immediate neighbours, no letters objecting and no neighbour appeared in opposition to this subdivision.

[85] With respect to the two aforementioned deficiencies, Site Width and Site Area, the Board finds that despite possible variances to future development on the Site, the proposed subdivision would not further aggravate the existing non-conforming parcels of land in the neighbourhood. Because the subject Site is located in the centre of the rural residential area and surrounded by other parcels of rural residential land, this provides a buffer between other newer residential areas that lessens the impact of the subdivision. The Board finds that this is not an ‘ad hoc’ development but is contiguous in nature within this existing Rural Residential development.

[86] The Board notes that the proposed subdivision will not increase the overall size of the existing rural residential area within the Marquis Neighbourhood Structure Plan (“the NSP”) and Horse Hill Area Structure Plan (“the ASP”).

[87] The Horse Hills ASP under *Existing Residential* states:

“The City’s policies do not support the development of new country residential on larger rural residential subdivisions within the boundaries of the City of Edmonton. Any development within the planned area must meet the City of Edmonton and Capital Region Board’s residential density targets.”

While it may be the City’s policy it is not specifically referenced as an outcome or a requirement of the ASP. The Board deems this not to be a new residential subdivision as noted in the policies but is simply the carving out of a new lot within the existing country residential area.

[88] The Board heard from the City that subdividing a lot was not a ‘right’ but an ‘indulgence’ by the Subdivision Authority if it was granted. The Board disagrees with this finding as section 654(1)(a) of the *Municipal Government Act* states that the Board may do so if: “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”. This is a rural residential area and all sites will continue to be used as such.

[89] Section 680(2)(b) of the *Municipal Government Act* states:

In determining an appeal, the board hearing the appeal must have regard to any statutory plan.

The Board notes that the Subdivision Authority referenced portions of the NSP and ASP in their refusal and stated in their written submission that:

The statutory plans do not support the development of a new country residential or larger rural residential subdivisions within the boundaries of the City of Edmonton. The purpose of these policies is to preserve the pre-existing un-serviced Rural Residential (RR) lots, but not to add additional RR lots.

The Board finds that no such provision exists in the NSP or ASP regarding a prohibition on additional RR lots. Further, policy 4.1.1 of the ASP states that the City’s policies do not support ‘larger rural residential subdivisions’ within the boundaries of the City of Edmonton. This application is for a smaller subdivision, one additional lot in an existing Rural Residential Zone that does not increase the size of the existing Rural Residential Zone. (Emphasis added)

[90] The City stated that there would be a problem with community services in this area. However, it was noted that at present, no services are provided to this existing rural residential area. Changing these requirements for one lot seemed to be unreasonable to this Board. In fact, the bylaws of EPCOR Drainage, EPCOR Water Services and Wastewater Treatment indicate that they cannot cross the proposed property line. There are no existing services and they have no stated reasons to not support this application.

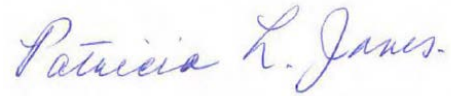
Transportation indicated they would support the application. The only community service that objected to this subdivision was Fire Protection Services.

- [91] The Board acknowledges that Council recognizes this area of the Horse Hill neighbourhood is rural residential and the NSP and ASP do not provide any conflict with future development in this cluster of rural residential lots. The Board does not support the conclusion reached by the Subdivision Authority, that by granting this subdivision, it would create a barrier on future redevelopment of the area.
- [92] The Board heard arguments from the City that this subdivision would increase fragmentation and create hardship for future development. This is only one additional lot and further, the City acknowledged that future uses and plans for this area had not been determined. The Board concluded that one additional lot, within a rural residential that will retain the same area footprint, will not create a barrier, increase fragmentation or slow down future development.
- [93] With respect to the NSP projecting a neighbourhood density of 38.2 units per residential hectare, the Board has concluded that this subdivision will not change the density of the area. In fact, the Board's decision supports policy 6.2 of the NSP and 4.1.1.6 of the ASP to accommodate residential clustering. This lot is surrounded on all sides by other rural residential lots as shown in figure 5 in the NSP. In addition, the NSP recognizes that the "[e]xisting country residential development may remain in perpetuity" indicating that neighbourhood density should not be applied to these areas as there is no timeline that can be applied to their development.
- [94] The City talked about the "Vision" of City Council. The Board recognizes that the City has an overall plan for the development of Edmonton going into the future, and the Board agrees that this is important to have. But the future does not have any time limits on it. Although the Board is cognizant of the Vision of City Council it is only one of the factors that must be considered. This Board is appointed to deal with subdivisions and developments in the present under the current bylaws in effect.
- [95] The Subdivision Authority provided two references to *The Way We Grow*, the Municipal Development Plan (MDP). Section 3.6.1.6 refers to promoting contiguous development and the Subdivision Authority stated it was tied to both the ASP and the NSP. However, the Board found no similar references in either the ASP or the NSP.
- [96] The second reference from the MDP was section 3.2.1.6 which states: "Prevent fragmentation of agricultural lands in the urban areas prior to urban expansion." This area is zoned Rural Residential and not Agricultural.
- [97] This Board is not bound by precedents and must consider each case on its individual merits. The Board acknowledges the previous Board decision (SDAB-S-16-003). Although there are some similarities such as both being RR areas and both have a guiding ASP and NSP. However, this Board notes that the earlier decision was based on a variety

of different factors that were not before this Board, including a different Neighbourhood Structure Plan, Site location, neighbourhood layout, and community feedback.

- [98] In the SDAB-S-16-003 Windermere decision, the Board gave precedence to the General Purpose. This Board acknowledges the General Purpose of the (RR) Zone but finds that the General Purpose of the Zone describes the development regulations and is not itself a regulation. Although the (RR) Zone states that the Purpose of the Zone is not intended to facilitate future subdivision, the Board finds in this particular case that this proposed subdivision meets the test set out in section 654(2) of the *Act*.
- [99] In the Windemere decision the Board found that the Windemere NSP directed that the existing residences are not to be further subdivided, a regulation that is not contained in the Marquis NSP. Further, that same section in the Windemere NSP states that it is intended to preserve a set number of pre-existing, large, un-serviced RR Lots. Again, this regulation is not included in the Marquis NSP.
- [100] The Site location of the Horse Hill subdivision is centered in an area of rural residential lots. It is surrounded on all sides by similar rural residential lots. The location of the subdivision appeal in the Windemere area is very different as it was across the street from a newly developed subdivision.
- [101] The City also quoted from paragraph 188 of the Windermere decision to indicate that any future rural residential development or subdivision in a Rural Residential Zone is contrary to the MDP. The Board feels that if this is so, any future home on a rural residential lot being planned to be built would also be in contravention, notwithstanding it is a permitted use. The Board deems this is not the intent as it would steralize any development opportunity on an rruual residential land. The Board did not find evidence was provided to indicate where it is contrary to the MDP and therefore, meets the intent of section 240.1. As previously mentioned, there was community support for this subdivision from the area, whereas, with the Windermere appeal there was general opposition to that subdivision. Therefore, this Board has recognized the differences in SDAB-S-16-003 and the subject appeal in reaching its decision.
- [102] The Appellant agreed to the condition of removing the shed and to the Advisements. The Board determined that the other listed conditions should be dealt with at the Development Permit stage.
- [103] The Board further notes that any future development may be subject to conditions and development regulations, when applying for a development permit.
- [104] Based on all of the above, the Board finds that the proposed subdivision is suitable for the purpose for which the subdivision is intended, and that the proposed 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.

A handwritten signature in blue ink that reads "Patricia K. Jones". The signature is written in a cursive style.

Ms. P. Jones, Presiding Officer
Subdivision and Development Appeal Board

Board Members in Attendance:

Mr. V. Laberge; Mr. C. Buyze; Ms. E.Solez

Important Information for the Applicant/Appellant

1. Obtaining a subdivision approval does not relieve you from complying with:
 - a) the requirements of any other appropriate federal, provincial or municipal legislation,
 - b) the conditions of any caveat, covenant, easement or other instrument affecting a building or land.
2. When an application for a subdivision has been approved by the Subdivision and Development Appeal Board, it shall not be valid unless and until any conditions of approval, save those of a continuing nature, have been fulfilled.
3. 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.