Edmonton Subdivision and Development Appeal Board

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Notice of Decision

This appeal dated April 9, 2015, from the decision of the Subdivision Authority for permission to:

Create 31 Single Detached Residential Lots, 46 Semi-detached Residential Lots and 30 Row Housing Lots

on Plan 9824939 Lot 1, located at 12710 - 41 Avenue SW and 3304 - 127 Street SW, was heard by the Subdivision and Development Appeal Board at its hearing held on May 20, 2015. The decision of the Board was as follows:

Summary of Hearing:

At the outset of the appeal hearing, the Presiding Officer introduced the members of the panel and Mr. Young indicated that he was previously an employee with the City of Edmonton Law Branch and worked with Mr. Gunther, representing the City of Edmonton Law Branch in 2013.

Mr. Laux, representing the Appellant, indicated that he was concerned with Mr. Young sitting as there has only been two years since he was a City of Edmonton employee. Mr. Laux indicated that there would still be a quorum of three Board Members if Mr. Young did not sit on the panel.

Mr. Gunther, representing the City of Edmonton Law Branch indicated that he did not object to Mr. Young sitting as a Board Member. However, if Mr. Young did not sit on the panel, he would request to table the hearing so there could be a panel of four or five Board Members.

Mr. Young stepped down from the panel of Board Members. The Presiding Officer indicated three Board Members constitute a quorum to hear an appeal and that the appeal hearing would proceed.

The appeal was filed on time, in accordance with Section 678(2) of the *Municipal Government Act ("MGA")*, R.S.A 2000, c. M-26.

The Board heard an appeal of the decision of the Subdivision Authority to approve an application to create 31 Single Detached Residential Lots, 46 Semi-detached Residential Lots and 30 Row Housing Lots located at 12710 - 41 Avenue SW and 3304 - 127 Street SW. The subject Site is zoned AG Agricultural Zone, RF5 Row Housing Zone, and RMD Residential Mixed Dwelling Zone. The Appellant is appealing conditions of the approved application.

Prior to the hearing the following information was provided to the Board, copies of which are on file:

- A written submission received from Legal Counsel for the Appellant on May 13, 2015 ("Appellant Submission");
- A copy of the Subdivision Decision; and
- A written submission received from City of Edmonton Law Branch on May 15, 2015 ("City Submission")

The Board heard from Mr. Laux, Legal Counsel for the Appellant, Stantec Consulting Ltd., who was accompanied by Mr. Nicholas, the property owner. Together they made the following points with extensive cross references to the Appellant Submission:

1. The appeal is concerning the dedication of land for the LRT right-of-way.
2. The Board has the discretion to provide dedication for any land or some land and when exercising that discretion, there is a question whether or not it is fair to take this much land considering the circumstances.
3. Land dedication relies on Section 661 of the *MGA*, which states "as required by the subdivision authority pursuant to this Division".
4. Section 662(1) of the *MGA* states that 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 for the purpose of roads, public utilities or both.
5. TAB 1, Appellant Submission includes a map and a calculation of 28.4 percent for dedication of land for roads and public utility lots, which is later referred to as public utility right of way and land for future expansion of the existing south line LRT and LRT station.
6. In a decision dated April 24, 2014, the Subdivision and Development Appeal Board ("SDAB") removed the LRT condition for the balance of the quarter section. The reasons for decision indicate it is unfair for one developer to pay the full shot for something that should be cost shared. (TAB 3, Appellant Submission)
7. Leave to appeal that decision to the Alberta Court of Appeal has been granted.
8. Per paragraph 8, Appellant Submission, the appeal was granted on satisfaction of the threshold standard of reasonable chance of success, a modest arguable standard. Leave is not a signal the appeal will succeed, the legal bar on appeal is much higher.
9. The current decision is in good standing and should be taken into consideration. While this Board is not bound by that decision, it should consider whether it really wants to come to a different conclusion.

10. At TAB 6, Appellant Submission is *Canada Lands Company CLC Limited v. The City of Edmonton and the City of Edmonton Subdivision and Development Appeal Board*, 2005 ABCA 218. (*"Canada Lands Company"*) It is the only other case in which the City required a dedication for LRT purposes. In that case the LRT land dedication was not challenged in spite of his advice to the contrary.
11. TAB 5, Appellant Submission, shows a map of the LRT lines. No timeline is in place for the development of the LRT expansion. In their opinion, it is unfair that the developer will have to pay for the LRT when the expansion may not be developed for decades.
12. Section 662 of the *MGA* confers discretion as indicated by the word "may" for the Subdivision Authority to require up to 30 percent of land for the purpose of public utilities. The City does not have a free hand to take 30 percent if less than 30 percent is sufficient and sufficient must be reasonable. What is sufficient is subject to review based on reasonability.
13. Per paragraph 18, Appellant Submission, in *Dunsmuir v. New-Brunswick* the Supreme Court of Canada determined "[i]n judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."
14. In this case the SDAB decision to require dedication of the LRT lands without compensation is not "justified" nor "within the range of possible outcomes which are defensible in respect of the facts and law."
15. It is unfair to place the entire cost of the LRT land on the Appellant when the City uses a general policy for cost sharing which includes a correlation between cost and benefit. .
16. They provided examples of other *MGA* schemes that provide for cost sharing between the developer and the City. (Paragraph 22, Appellant Submission)
17. In this case, they are paying 100 percent for a city-wide benefit.
18. Based on the Desrochers Neighbourhood Area Structure Plan ("DNASP"), City Council directed a cost sharing program for the LRT.
19. The DNASP addresses the matter of funding for LRT land: "of note is that Transportation Services is currently reviewing policies and procedures to develop measures for cost-sharing of the required LRT land, similar to how dedication is managed for arterial roadways. At the time this plan was prepared, there were no current policies or procedures for cost sharing lands dedicated for LRT right-of-way alignments" (Paragraph 29, Appellant Submission)
20. They disagree with the City that in deciding whether "sufficient" land is being dedicated, the Board should only have regard to the physical requirements for the proposed LRT. That is to say, if a certain amount of land is required for LRT construction, then only when that land is dedicated does it become "sufficient" (Paragraph 38, Appellant Submission).

21. Instead, as indicated at Paragraph 39, Appellant Submission "in determining whether the amount of land being dedicated absent the LRT right of way is "sufficient", this Board is entitled to have regard to what is fair and reasonable. That being so, the Board is entitled to conclude that the proposed dedication of land in the subdivision for needed roadway and utility purposes is "sufficient" without the LRT dedication." In deciding whether "sufficient" land is being dedicated, the Board can determine it is patently unfair not to cost share and therefore exclude the requirement for LRT purposes**.**
22. In *Canada Lands Company*, Greisbach was being densely redeveloped to accommodate 13,000 people. To accommodate traffic flow, three access points onto 137 Avenue were planned. The Court noted that requiring the road widening dedication under Section 662 of the *MGA* was, not 'grossly disproportionate' to the size of the development, particularly given that the development will contribute to anticipated future traffic congestion on the roadway in question" (paragraph 42, Appellant Submission citing *Canada Lands Company* Paragraph 30).
23. In *Canada Lands Company* the Court of Appeal noted the community would get a substantial benefit from the two new lanes it dedicated and the appellant also benefited from the four preexisting lanes that were already available for use. The case would be comparable to the current appeal if Canada Lands Company had been asked to develop all six lanes on 137 Avenue.
24. In *Canada Lands Company* the dedication was 2 percent, here it is 8 percent.
25. The Court of Appeal adopted the language used in the textbook, Planning Law and Practice in Alberta, and stated that a dedication requirement must not be "disproportionate". In the circumstances before it, the Court measured "disproportionate" in terms of the amount of land to be dedicated for the right-of-way relative to the total area being subdivided. But there are other ways in which a taking would be disproportionate.
26. The Appellant submits that to require it to pay the entire cost of the LRT lands is grossly disproportionate where the benefit of those lands accrues to the City as a whole, or at least to a large part of the City. It is unreasonable to require dedication of land for a project, the construction of which is both uncertain and remote.
27. Dedication of land less the 8 percent LRT strip is "sufficient" because it is unfair and unjust to ask the Appellant to dedicate land without compensation for something they cannot otherwise use.
28. Generally, when land is taken by way of dedication in the subdivision context, there are firm plans for the use of that land in the very near future. Consequently, the parties that ultimately absorb the cost of the dedication derive an actual benefit from the taken land.
29. In this case, the only steps taken by the City in respect of the LRT into the Desrochers neighbourhood are to draw lines in the City's Transportation Master Plan and in the DNASP.

In response to questions by the Board, Mr. Laux and Mr. Nicholas provided the following information:

1. This appeal is not a collateral attack on Section 661 to deny the City something that it is clearly otherwise entitled to by statute despite the wording of Section 621(1). Here the words of the *MGA* must not be taken literally. It is unfair to make the developer pay the dedication of lands as there is flexibility to Section 661 of the *MGA* because lands must be provided without compensation only "as required by the subdivision authority pursuant to this Division."
2. They recognize that the LRT right-of-way needs to be protected. They are not objecting to the preservation of this strip of land for the LRT. They are objecting to the lack of compensation for dedication of the strip of land for the LRT.
3. They acknowledge that there is no right of subdivision under the *MGA* and that dedications can be required as conditions for the subdivision approval.
4. They acknowledge that the statute does allow for a dedication of the land, but note that the decision is discretionary and the Board should look at what is fair to determine if "sufficient" land has been dedicated without the LRT right-of-way portion.
5. They acknowledge that there was a benefit to this subdivision in having an LRT line and LRT Station. They clarified that the market dictates whether there are benefits from densification in particular near this utility and noted that properties immediately adjacent to or backing onto the LRT line are usually discounted.
6. They clarified their position is that fairness in cost sharing and proportionality comes into play in determining whether the specific amount of land required for dedication is "sufficient" land for the purposes of roads, public utilities or both in Section 662(3).

The Board then heard from Mr. Gunther, representing the City of Edmonton Law Branch, who extensively cross referenced the City Submission in making the following points:

1. He provided the Board with a background of the area which falls under the Heritage Valley Plan, as well as the DNASP. The LRT line was shown on the initial plan.
2. The DNASP is not enabling legislation, nor binding. Per Section 680(2)(a.1) of the *MGA* the Board "must have regard to any statutory plan", including the DNASP in the case. The DNASP is relevant in evaluating the conditions of subdivision.
3. Section 2.3 of the DNASP (Tab 3, City Submission) outlines that the Appellant was a participating landowner involved in the creation of the statutory plan as proposed to and ultimately passed by City Council.
4. The DNASP specifically addresses dedications for the LRT right-of-way (Tab 3, page 42, City Submission): "Dedication of the right-of-way to accommodate the LRT development will be pursued by Transportation Services by means of subdivision and area development. Of note is that Transportation Services is currently reviewing policies and procedures to develop measures for cost-sharing of the required LRT land, similar to how dedication is managed for arterial roadways. At the time this plan was prepared, there were no current polices or procedures for cost-sharing lands dedicated for LRT right-of-way alignments."

5. Land dedication for the LRT right-of-way is provided pursuant to Section 661 and 662 of the *MGA*. These sections do not contemplate cost-sharing.
6. Land dedication for the LRT right-of-way does not fall within Section 648 of the *MGA*. Section 648 deals with arterial roadways and this dedication cannot be considered part of the arterial roadways cost-sharing plan.

The Board then heard from Ms. Sizer, representing the City of Edmonton, Transportation Services who made the following points:

1. She imposed the conditions that are being appealed.
2. She provided the Board with her written submission, marked "Exhibit A".
3. The DNASP was designed to incorporate the LRT by closely aligning its land use with the approved station locations. Lands in the vicinity of the LRT will be designed as Transit Oriented Development, with reduced parking, upgraded pedestrian connections, higher densities and mixed uses.
4. No other alignment is possible for the LRT in Heritage Valley. Failing to obtain this land for LRT purposes puts the implementation of the LRT at risk.
5. The condition requiring dedication of the land for the LRT is in accordance with the DNASP in particular with the earlier quote concerning the LRT right-of-way at page 42 of the DNASP (Tab 3, City Submission).
6. The City did in fact initiate talks with developers in the Heritage Valley Arterial Roadway Assessment basin so that the dedication could be shared. However the Heritage Valley developers, through the ARA Steering Committee, did not support inclusion of LRT lands in the area basin. Since a cost-share mechanism was not supported by area developers, the city reverted back to requiring the LRT lands through dedication by means of subdivision as outlined in the DNASP.

The Board then heard from Ms. Cej, representing the City of Edmonton, LRT Design & Construction, who made the following points:

1. She provided the Board with information regarding the LRT extension south from Century Park and its future construction including a map and full plan of what will be built out by 2040, marked "Exhibits B, C, and D".
2. Significant planning has gone into this area since 2001 including design work, planning, and engineering. The City has prepared plans for the area, alignment profile cross sections, desktop drainage reviews, utility reviews and geotechnical investigations**.**
3. The alignment for the area under appeal was approved in July 2008.
4. The concept plans approved in 2010 were based on the Rutherford Neighbourhood Area Structure Plan which is adjacent to the DNASP.
5. The City tries to avoid future expropriation for the LRT lines due to the time and costs involved.
6. The developers were advertising the area as being in close proximity to the LRT line and the City was asked for a plan to provide to owners and potential buyers confirming this information.

7. The City needs to take the design and an implementation plan as far as possible to be in a position to act quickly when funding envelopes become available and to increase leverage with other levels of government.

In response to questions by the Board, Ms. Cej provided the following information:

1. She confirmed that the right-of-way varies from 17.2 metres to 26.7 metres in width and that the 8.5 percent dedication required for the LRT right-of-way represents the minimum amount of land necessary to comply with the LRT guidelines.

The Board then heard from Mr. Gunther, representing the City of Edmonton Law Branch, who made the following points:

1. The *MGA* provides municipalities with a set of tools to provide funding and enable them to grow and provide infrastructure. Not all of these tools are the same.
2. Section 662 of the *MGA* is one of those tools.
3. Section 648 of the *MGA* deals with off-site levies and is related to cost-sharing which is a different tool. Section 655 is related to public utilities that are necessary to serve the subdivision. It is a different tool than Section 662.
4. Section 662 was considered in the *Canada Lands Company CLC Limited v. The City of Edmonton and the City of Edmonton Subdivision and Development Appeal Board* decision (Tab 2, City Submission). The Court of Appeal found Section 662 to be broader in scope than Section 655.
5. According to the Court of Appeal Section 662 does not expressly require land dedicated be correlated to the needs generated by the subdivision. Further, it should be read in a broad and purposive manner consistent with direction of the Supreme Court of Canada and the purpose of requiring land dedication under Section 662 is to provide roadways and public utilities which ultimately will be used by citizens of the municipality, including those residents in the subdivision. (Paragraph 9, City Submission).
6. Section 662 is in place to allow municipal planning to be implemented so the City does not have to be reactive and it can move forward and in a cost effective manner.
7. The City cannot trespass on the rights of others per Section 617 of the *MGA.*
8. He agrees with the Appellant that the City would have to buy this strip of land if no subdivision were to occur.
9. But that is not the case, here a subdivision is proposed by the Appellant and the principles of planning and conditions can be applied. It makes sense to make the parties who come to the City looking for subdivision approval to dedicate the land for this purpose.
10. This submission is supported by *19354 Yukon Inc. v. The City of Calgary* (Tab 1 Paragraph 8, City Submission) which reads, "[t]he proper interpretive approach to adopt in this Application is not a strict approach, as the land dedication in question is not akin to expropriation or confiscation without compensation. While s.666 of the *Act* requires a developer to dedicate and provide land for municipal and/or school reserve, such dedication and provision is only required when a developer voluntarily makes an application to subdivide land. This application, if successful, can eventually lead to the developer realizing a profit from the increased value of the subdivided land."

11. Good planning reasons are used to approve the plan and it is perfectly fair and justifiable to require the dedication of land for the LRT. They are not asking the Appellant to build the LRT.
12. Arterial roads are a different situation. Developers are compensated, but they must give the land, prepare it and build the road, sidewalks and streetlights.
13. Here under Section 662, only land is required. Where numbers add up to under 30 percent developers are asked to do their part. It is not unfair, it is just good planning. Section 662 is one of a very few instances where the City has specific legislative authority to impose conditions on subdivision. This tool is given to the city from the province to enable it to impose exactly the condition complained of to fund the infrastructure. It would be negligent of the City not to use these types of tools so long as it is fair. Here it is fair because developer is voluntarily seeking subdivision.
14. Further, the LRT was mentioned in the Appellant's marketing and promotional materials as benefiting the area.
15. The word "sufficient" stated in Section 662(3) of the *MGA* does not equate to the term "reasonable". If the Board makes a decision about what is "sufficient," it is true that the Court of Appeal would analyze the Board's decision on the "reasonableness" standard of review, but there is no definition of "sufficient" which is synonymous with "fairness". While the Board has a residual discretion in Section 662 of the *MGA* it cannot be exercised on the basis that the word "sufficient" in Section 662(3) means "fair."
16. This is not an unreasonable or unfair decision. It is consistent with what is permissible under the *MGA*. It avoids undue delay and additional costs.
17. Section 662(3) restricts the amount of land that may be required to what is "sufficient" for the purpose of roads or public utilities such as the LRT. It does not create an unfair burden. Here what is "sufficient" is a strip of land which is identified and used in the developers marketing materials (Tab 4, City Submission).

In response to questions by the Board, Mr. Gunther provided the following information:

1. The grey sections labeled "Roads" and the purple sections labeled "PUL" outlined on the Title Area map at TAB 1, Appellant Submission represent the total land required for roads and public utility lots and equal 28.4 percent.
2. These lands are required per Section 662 of the *MGA* based on what is needed.
3. He clarified that the developer participated in the process of developing and writing the DNASP which was brought forward to City Council.
4. Plans for the LRT were included in the DNASP, moving forward and Council relied on those plans.
5. Different lands have different constraints and requirements.
6. In this case the only methods that Transportation Services could have developed for cost sharing would have been a unilateral agreement amongst the developers or a joint letter from the City and the developers to the Minister of Municipal Affairs seeking an amendment to Section 648 of the *MGA* to add LRT right-of-ways to the list.

7. At the end of the day the City's hands are tied by the *MGA*. Section 648 of the *MGA* lists the types of infrastructure for which capital costs can be shared. This section does not include the LRT. The City stretched the definition of "roads" in Section 648 to include transit stations for buses but cannot stretch it further to include the LRT right-of-way.
8. Discretion should be used in this case to require the 28.4 percent dedication as the *MGA* allows for up to 30 percent but no more than what is sufficient. Here there is no question but that the 8.5 percent strip is needed for the LRT right of way. This is not an unfair top up.
9. This case is distinguishable from *Canada Lands Company* as in that case the Court had to consider whether the preexisting four lane roads were sufficient for the purpose of roads without the dedication requiring two additional lanes under Section 662. Here there is no pre-existing LRT right-of-way at all; therefore, the lands dedicated cannot be sufficient for the purpose of a public utility without the strip required for the LRT right-of-way.
10. He confirmed that Section 621(1) precludes compensation in the absence of express authority to provide it, and Section 661 precludes compensation to owners of proposed subdivisions for the provision of land as required by the Subdivision Authority. Therefore, any presumption of compensation is rebutted by the express terms of the legislation.

In rebuttal, Mr. Laux and Mr. Nicholas made the following points:

1. The DNASP process is an expensive and lengthy one which occurs in partnership with the City and developers.
2. The DNASP was prepared in good faith and at the time Transportation Services put in that they would pursue measures to share costs. Later, all they did was go to the ARA Steering Committee and propose that the LRT dedication be added in with arterial roadways. The Committee refused as an LRT right-of-way is not an arterial roadway. The City put forth no further efforts to find a funding approach.
3. In their opinion, this is not an example of good planning as the imposition of dedication creates a competitive disadvantage for the land owner who must eat the cost or require people within the area to pay $5000 more a door than others across the trail for the same townhouse.
4. There will be no added delay or cost for the City if the land is preserved for the LRT. There are several ways to condition these costs. They are amenable to any negotiations.
5. At page 42 of the DNASP (Tab 11, Appellant Submission) City Council did direct that the dedication for LRT right-of-way be by subdivision and Section 662 involves dedication without compensation on subdivision. However, in the next sentence City Council used the word "dedication" in conjunction with arterial roads. Compensation is involved with arterial roads so the meaning of "dedication" in the first sentence should be broadened to include "dedication with compensation." City Council was directing some form of cost sharing in the first sentence.
6. There is no indication of when the LRT will be functional.

7. The *19354 Yukon Inc. v. The City of Calgary* case is not correct. This condition takes something without any compensation. There is no benefit to the Appellant because at common law you could subdivide as of right.
8. Section 662(1) of the *MGA* must include fairness which gives the direction. Section 662(3) does not even come into play and the City can make no requirement for what is sufficient for the LRT because it is unfair to impose the condition. Cost sharing is what is fair.
9. If the condition is removed, the City will simply have to find another way to fund the Public Utility Lot.

Decision:

that the appeal be DENIED and the decision of the Subdivision Authority CONFIRMED. The subdivision is GRANTED as applied for to the Subdivision Authority, subject to the following CONDITIONS:

I The Subdivision by Plan is APPROVED on April 2, 2015, subject to the following conditions:

1. that the owner provide money in place of Municipal Reserve, in the amount of $275,096.25 representing 0.405 ha pursuant to Section 666 and Section 667 of the Municipal Government Act;

2. that the owner enter into a Servicing Agreement with the City of Edmonton pursuant to Section 655 of the Municipal Government Act;

3. that the owner prepare the necessary plans and documentation to grant new or carry forward existing easements and restrictive covenants in favour of the City of Edmonton, EPCOR Distribution & Transmission Inc., and EPCOR Water Services Inc., as required by the aforementioned agencies or shown on the engineering drawings that are deemed to be part of the Servicing Agreement;

4. that the owner dedicate a Public Utility lot to conform to an approved Concept Plan or to the satisfaction of Transportation Services for the future LRT line, as shown on the "Conditions of Approval" map, Enclosure I;

5. that the owner dedicate road rights-of-way to conform to an approved Concept Plan or to the satisfaction of Transportation Services for James Mowatt Trail SW and 41 Avenue SW, as shown on the "Conditions of Approval" map, Enclosure I;

6. that subject to Conditions I (4) and I (5), the owner clear and level the future LRT line Public Utility lot, James Mowatt Trail SW and 41 Avenue SW as required for Public Utility lot dedication and road rights-of-way;

7. that the approved subdivision LDA14-0034 be registered prior to or concurrent with this application for the logical extensions of roadway connections and for essential water main feeds;

8. that the owner register a noise attenuation berm restrictive covenant in favour of the City of Edmonton against the lots backing onto 41 Avenue SW and the future LRT Public Utility lot, to protect the integrity of the berm)", as shown on the "Conditions of Approval" map, Enclosure I; and

9. that the owner pay all outstanding property taxes prior to the endorsement of the plan of survey.

II That the Servicing Agreement required in Clause I (2) contain, among other things, the following:

1. that the owner pay all servicing costs, assessments, roadway modification costs (including but not limited to sidewalk, shared use path and/or transit infrastructure), construction costs and inspection costs required by this subdivision;

2. that the owner pay all costs specified in the Servicing Agreement prior to endorsement of the plan of survey;

3. that the owner pay the Drainage Assessments applicable to this subdivision;

4. that the owner pay the Arterial Roadway Assessments applicable to this subdivision;

5. that the owner submits an Erosion and Sediment Control (ESC) Plan specific for this development and for implementation during and after construction in accordance with the City of Edmonton ESC Guidelines and Field Manual;

6. that the owner submits detailed engineering drawings and technical studies in accordance with the City of Edmonton Design and Construction Standards and to the satisfaction of the City Departments and affected utility agencies;

7. that the engineering drawings include a 300 mm offsite water main connection, to the satisfaction of EPCOR Water Services Inc., as shown on the "Conditions of Approval" map, Enclosure I;

8. that the owner construct a 1.5 m concrete sidewalk with lighting, and bollards, within the walkways, to the satisfaction of Transportation Services, as shown on the "Conditions of Approval" map, Enclosure I;

9. that the owner construct a 1 m berm centered on property line and 1.8 m noise attenuation fence contained wholly within private property, as per the City of Edmonton Roadway Design Standards Drawing #5205 and in conformance with the submitted noise study, for all lots backing onto 41 Avenue SW and the future LRT Public Utility lot, to the satisfaction of Transportation Services, as shown on the "Conditions of Approval" map, Enclosure I;

10. that the owner construct all fences wholly on privately-owned lands, to the satisfaction of Transportation Services and Sustainable Development, as shown on the "Conditions of Approval" map, Enclosure I; and

11. that the owner is responsible for the landscape design and construction within the Public Utility lots, road islands, boulevards, medians and walkways, to the satisfaction of City Departments and affected utility agencies.

Enclosure I is a map of the subdivision identifying major conditions of this approval.

The existing Deferred Reserve Caveat registered on the SE 13-51-25-W4M is to be carried forward on title. Lot 1, Plan 982 4939 will require money in place of Municipal Reserve representing 0.405 ha, however, it should be noted that the money in place will be reduced at the time of plan endorsement to account for arterial roadway dedication.

Reasons for Decision:

1. The Appellant applied for subdivision approval which was granted by the City subject to several conditions. The appellant appealed two conditions involving the dedication, without compensation, of an 8.5 percent portion of the parcel of land for a Public Utility Lot (for a future LRT line):

> I.4 that the owner dedicate a Public Utility lot to conform to an approved Concept Plan or to the satisfaction of Transportation Services for the future LRT line, as shown on the "Conditions of Approval" map, Enclosure I; and
>
> I.6 that subject to Conditions I (4) and I (5), the owner clear and level the future LRT line Public Utility lot, James Mowatt Trail SW and 41 Avenue SW as required for Public Utility lot dedication and road rights-of-way.

2. The two conditions were imposed by the Subdivision Authority pursuant to Sections 661 and 662 of the *MGA* which provide*:*

   Section 661 The owner of a parcel of land that is the subject of a proposed subdivision must provide, without compensation,

(a) to the Crown in right of Alberta or a municipality, land for roads, public utilities and environmental reserve, and

(b) subject to section 663, to the Crown in right of Alberta, a municipality, one or more school boards or a municipality and one or more school boards, land for municipal reserve, school reserve, municipal and school reserve, money in place of any or all of those reserves or a combination of reserves and money,

as required by the subdivision authority pursuant to this Division.

Section 662(1) 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 for the purpose of roads, public utilities or both.

(2) The land to be provided under subsection (1) may not exceed 30% of the area of the parcel of land less the land taken as environmental reserve or as an environmental reserve easement.

(3) If the owner has provided sufficient land for the purposes referred to in subsection (1) but the land is less than the maximum amount authorized by subsection (2), the subdivision authority may not require the owner to provide any more land for those purposes.

3. Sections 661 and 662 of the *MGA* grant the Subdivision Authority discretionary authority to require the owner of a parcel of land who is applying for subdivision approval to provide, without compensation, part of that parcel for the purpose of roads, public utilities, or both. This discretion is restricted to the lesser of two limits: the dedication can be no more than 30 percent of a parcel (Section 662(2)); and the dedication can be no more than the amount of land that is "sufficient" for the purpose of roads, public utilities or both, if that amount is under 30 percent of a parcel (Section 662(3)).
4. The Parties agreed that
    a. the City is not seeking more land than is needed for the LRT purposes, this is not a case where there is no relationship between the required dedication and the utility requirement;
    b. the land dedication required under all the conditions of subdivision approval consists of 19.9 percent for Roads and 8.5 percent for a Public Utility Lot for the LRT right-of-way for a total of 28.4 percent of the parcel; and,
    c. the LRT falls within "public utility" as defined in section 616(v) of the *MGA*.
5. The Appellant argues that a 19.9 percent dedication for roads is "sufficient" without the LRT portion. Also, it is unfair, unreasonable and beyond the spirit and intent of the *MGA* in any event to require the LRT portion without compensation.

6. The City argues that the 28.4 percent requirement is the minimum amount of land "sufficient" for the purposes of roads and public utilities. Without the 8.5 percent dedication, no land would be dedicated for the purposes of a public utility. Therefore, 19.9 percent is not "sufficient." The 28.4 percent requirement is authorized, fair and just in exchange for being granted subdivision rights and is based on proper planning principles.
7. The SDAB's authority in this appeal is set out in Section 680(2) of the *MGA*. As noted by the Appellant, the role of the SDAB is to consider the subdivision application afresh relative to the two appealed conditions. In determining the appeal, the Board must have regard to all statutory plans, including the DNASP (section 680(2)(a.1) of the *MGA)*. The Board is bound by decisions of the Alberta Courts and the Supreme Court of Canada.
8. The Court of Appeal, in *Canada Lands Company* established the applicable standard of judicial review if this decision is appealed:
   "The question of whether the SDAB has authority under s.662 of the *MGA* to require roadway dedication in excess of the minimum necessary for the proposed subdivision is a question of statutory interpretation outside the core of the SDAB's expertise. Therefore, that question is reviewable on a standard of correctness. However, the SDAB's determination of the percentage of land to be dedicated for roadway widening must be given deference and reviewed on a standard of reasonableness." (Paragraph 10)
9. The Board confirms the two conditions which require the dedication of the 8.5 percent strip of land for LRT purposes for the following reasons.
10. The imposition of the two conditions does not cause the total required land dedication to exceed the maximum of 30 percent in Section 662(2). The parties agree the entire dedication represents 28.4 percent of the total parcel and is accurately reflected in the map at TAB 1, Appellant Submission.
11. The imposition of the two conditions does not cause the total required land dedication to exceed the maximum in Section 662(3), the amount of land "sufficient" for the purposes of section 662(1) and no more, because:
    a. Section 662, including the word "sufficient," must be interpreted using the methods of statutory interpretation directed by the Supreme Court of Canada and cited in the reasoning of the Court of Appeal in *Canada Lands Company* at Paragraphs 16-26:
        i. The Supreme Court of Canada directs that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament." (Paragraph16)
        ii. Using this analysis, the Court of Appeal determined that given the purpose of municipalities and the purpose of Part 17 of the *MGA*, "[t]he purpose of requiring land dedication under s.662 is to provide roadways and public utilities which ultimately will be used by citizens of the municipality, including those resident in the subdivision." (Paragraph 20).

iii. The Board notes that the Court of Appeal did not accept the proposition that "because the 'user pay' principle governs the powers of planning authorities and corresponding obligations of developers, s.662 should be interpreted as requiring a landowner to dedicate only the amount of land 'that is reasonably necessary to serve the roadway and utility needs of the subdivision'" (Paragraph 24).

Instead the Court of Appeal ruled that "the use of the word 'sufficient' in s.662 equips the subdivision authority with flexibility in determining the amount of land required, but also limits the exercise of that discretion. The absence of the wording in s.662 limiting the obligation of an applicant for subdivision to provide roads 'required to give access to the subdivision' suggests a legislative intent not to limit the discretion to require dedication in that respect." (Paragraph 25).

iv. The Court of Appeal also concludes that "[b]oth s.666 and s.662 indicate that the *MGA* includes a cost spreading policy which must be balanced against the user pay principle." (Paragraph 26)

Therefore the Board accepts the submission of the City that the word "sufficient" in Section 662(3) is to be attributed its plain and ordinary meaning. "Sufficient" means "enough to meet the needs of a situation or a proposed end". The Board does not accept that the word "sufficient" in Section 662(3) means the same as the word "reasonable" or the word "fair." The Board recognizes that its decisions will be reviewed by the appellant courts based on the standards of review set out in *Dunsmuir*, and determined in *Canada Lands Company*, but notes the standard of review of the Board's decision about whether a particular percentage of land is sufficient in a given case is a different issue than the meaning of the word "sufficient" in Section 662(3).

b. The parties agreed that the percentage of land requested under the two conditions are not more than what is needed for LRT purposes. The City representative for Transportation Services also indicated that the 8.5 percent requirement represents the minimum amount of land needed to meet the LRT design standards. The parties disagree only with respect to the issue of compensation for that 8.5 percent strip of land.

c. The Board notes that without the two conditions, there would be no dedication of any portion of the land for the purpose of this public utility (the LRT line). A dedication of 19.9 percent for roads would not be sufficient for LRT purposes.

12. The Appellant cited several Sections of the *MGA* which create funding mechanisms to support the argument that a core theme of the Act is that those parts of a municipality that benefit from a municipal infrastructure should contribute to its cost and that this theme applies to Section 662. The Board does not agree. The Appellant's argument was previously advanced and rejected by the Alberta Court of Appeal in *Canada Lands Company* (at Paragraphs 15- 26). The reasons above pertaining to the meaning of "sufficient" apply with equal force to this argument that it is necessarily unfair to require the dedication for LRT purposes absent cost sharing. The Court of Appeal concluded that "[b]oth s.666 and s.662 indicate that the *MGA* includes a cost spreading policy which must be balanced against the user pay principle." (paragraph 26).
13. The two conditions do not fall within any of the statutory cost sharing schemes cited by the Appellant. The Board notes the requirement of land without compensation under Section 662 is a different mechanism than those cited by the Appellant and it is not necessarily unfair. In *Canada Lands Company,* the Court of Appeal held that the correct interpretation of Section 662 of the *MGA* is that it authorizes dedications in excess of the minimum necessary for the proposed subdivision. Also, Section 662 does not include the qualifications or the responsibilities contained in the other schemes. Unlike arterial roadways and conditions under Section 655 pertaining to public utilities, the Appellant is not required to construct or pay for the construction of the infrastructure, this dedication deals with land only.
14. The two conditions are consistent with the DNASP and City of Edmonton's Municipal Plans:
    a. As all parties were well aware, the LRT is a centrepiece around which the DNASP has been designed. The LRT is referenced extensively in the Vision, Goals, Development Objectives and Policy Implementation portions of the DNASP. The location of the LRT route and right-of-way is identified in several maps in the DNASP.
    b. The DNASP outlines the manner in which its provisions concerning the LRT system comply with the applicable municipal policies in the City of Edmonton's Municipal Development Plan – The Way We Grow (DNASP Office Consolidation February 2014. Appendix A at pages 49-51).
    c. The DNASP outlines the manner in which its provisions concerning the LRT system comply with the strategic goals of the City of Edmonton's Transportation Master Plan – The Way We Move. (DNASP Office Consolidation February 2014. Appendix A at page 52).
    d. Policy 3.5.10 of the DNASP was cited by both parties. It specifically addresses the LRT right-of-way and clearly contemplates dedication of land for the LRT by means of subdivision (DNASP at page 42):

> "The dedication of the right-of-way to accommodate the LRT development will be pursued by Transportation Services by means of subdivision and area development. Of note, is that Transportation Services is currently reviewing policies and procedures to develop measures for cost-sharing of the required LRT land, similar to how dedication is managed for Arterial roadways. At the time this plan was prepared, there were no current polices or procedures for cost-sharing lands dedicated for LRT right-of-way alignment."

> The two conditions are consistent with and contemplated by this excerpt. The DNASP explicitly directs Transportation Services to pursue dedication by means of subdivision which under the provisions of the *MGA* is accomplished only through Section 662. While the DNASP then notes that Transportation Services is currently reviewing policies and procedures to develop cost-sharing measures, it also notes there are no current cost-sharing policies or procedures. The parties agree alternative cost-sharing policies were unsuccessfully pursued. The Appellant believes City efforts were insufficient. In any event, at the time the DNASP was adopted by Council and at the time of the appeal the only means to pursue dedication of lands for the LRT right-of way by means of subdivision and development is Section 662.

15. The Appellant was actively involved in the negotiation and development of the DNASP which had been built around the LRT and the Appellant was well aware of the location of LRT right-of-way on the subject parcel.
16. Both parties recognized that the Appellant does not have a right to subdivide. Seeking subdivision approval triggers City authority to impose certain conditions and require dedications or compensation under several sections of the *MGA*, including Sections 655, 661, 662, 664, 666 and 667. Per *19354 Yukon Inc. v. The City of Calgary* (Tab 1 Paragraph 8, City Submission):

> "[t]he proper interpretive approach to adopt in this Application is not a strict approach, as the land dedication in question is not akin to expropriation or confiscation without compensation. While Section 666 of the *Act* requires a developer to dedicate and provide land for municipal and/or school reserve, such dedication and provision is only required when a developer voluntarily makes an application to subdivide land. This application, if successful, can eventually lead to the developer realizing a profit from the increased value of the subdivided land."

This analysis of the interpretation of Section 666 of the *MGA* was endorsed by the Alberta Court of Appeal in *Canada Lands Company* for the interpretation of Section 662 of the *MGA* (Paragraph 17). The Board accepts that Section 662 is a tool given to the City from the province to impose exactly the type of conditions under appeal. Its use is fair in part because it is contemplated in the *MGA* when a developer is voluntarily seeking subdivision.

17. The Appellant and subsequent residents of the subdivision will also benefit from the LRT dedication of 8.5 percent the subject parcel. The future LRT development is a positive factor cited by the developer in its own marketing materials. The Appellant agreed that proximity to the LRT is a benefit to the future residents, but argued there is also a city-wide benefit and the cost is grossly disproportionate. However, according to the Court of Appeal, "[t]he purpose of requiring land dedication under s.662 is to provide roadways and public utilities which ultimately will be used by citizens of the municipality, including those resident in the subdivision. (*Canada Lands Company* Paragraph 20).

18. The Board does not agree that it is unreasonable to require the dedication of the portion for the LRT right-of-way on the basis of uncertainty and remoteness given the circumstances of this case. As outlined in the DNASP, this whole area is to be built around the LRT transit. It is marketed on this basis. Submissions by the City and evidence provided by Transportation Services in Exhibits B, C and D indicate significant design, planning and engineering steps have been taken with respect to the LRT development. These steps go far beyond merely drawing lines on the City's Transportation Master Plan and on the DNASP. Sound planning principles dictate that the City must move forward as far as possible to be in a position to take advantage of future funding envelopes and the City is taking steps to move forward. In any event, regardless of this timetable, it is the application for subdivision initiated by the Appellant at present time that has triggered the City's authority to require dedication without compensation for public utilities under Section 662.
19. In sum, while the Board is mindful that the dedication represents a significant portion of the parcel of land (8.5 percent), it is not grossly disproportionate. The two appealed conditions are confirmed because: the conditions are consistent with a plain and purposive interpretation of the *MGA* and Section 662 in particular; the total required dedication is less than the 30 percent limit; 8.5 percent is the minimum portion of the parcel required for the public utility purpose of an LRT; without the LRT portion, the dedication is not sufficient for the public utility purpose; dedications under Section 662 are triggered by applications for subdivision and can involve benefits which extend beyond the subdivision to the residents of the City; dedication of the LRT portion was contemplated by and consistent with the DNASP; the Appellant was well aware of the LRT location and benefits from subdivision approval based on a DNASP centered on proximity to LRT; and, significant and certain steps have been taken by the City with respect to the LRT project.
20. The Board notes that the Alberta Court of Appeal in *Canada Lands Company*, settled that there can be no compensation in this case "because s.662 of the *MGA* does provide statutory authority to require dedication, the appellant's argument [that compulsory acquisition of land under Section 662 constitutes a 'taking' which, short of full compensation requires explicit legislative sanction] does not prevail in this case. Moreover s.621(1) precludes compensation in the absence of express authority to provide it, and s.661 precludes compensation to owners of proposed subdivisions for the provision of land for roads as required by the subdivision authority. Therefore, any presumption of compensation is rebutted by the express terms of the legislation."
21. Finally, the Board acknowledges the earlier SDAB Decision dated April 24, 2014 and currently before the Court of Appeal, but notes it is not bound by that Decision. Each appeal must be considered on its own merits, the presented evidence and arguments which include other decisions of the Board and the courts. In this appeal, the Board benefited from the provision of written submissions with legal argument and authorities prior to the hearing. At the hearing, both parties were represented by legal counsel who made extensive argument. Submissions were also made by two representatives of the City and one representative of the Appellant, each with personal knowledge relevant to the appeal.

Important Information for 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*, R.S.A. 2000, c. M-26.

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