

**ROCKY VIEW COUNTY
SUBDIVISION AND DEVELOPMENT APPEAL BOARD**

Board Order No.: 2019-SDAB-029

File No.: 04702038; PL20180079

Appeal by: Robert Homersham of Stikeman Elliott

Appeal Against: Development Authority of Rocky View County

Hearing Date: 2019 May 15

Decision Date: 2019 July 11

Board Members: D. Kochan, Chair
H. George
I. Galbraith
S. Hartley
W. Metzger

SUBDIVISION APPEAL DECISION

INTRODUCTION

[1] This is an appeal to the Rocky View County Subdivision and Development Appeal Board (the Board) from a decision of the Rocky View County Subdivision Authority issued March 12, 2019. In this decision the Subdivision Authority conditionally approved a subdivision application at 240094 Range Road 32 (the Lands).

[2] Upon notice being given, this appeal was heard on April 24, 2019 and May 15, 2019 in Council Chambers of Rocky View County's County Hall, located at 262075 Rocky View Point, Rocky View County, Alberta.

DECISION

[3] The appeal is allowed in part and the decision of the Subdivision Authority is varied. The Subdivision Application shall be conditionally approved subject to the following conditions:

Plan of Subdivision

- a) Subdivision is to be effected by a Plan of Survey, pursuant to Section 657 of the Municipal Government Act, or such other means satisfactory to the Registrar of the South Alberta Land Titles District;

Transportation and Access

- b) The Owner shall upgrade the existing approach on West Meadows Estates Road to a paved standard in order to provide access to Lot 2.
- c) The Owner shall construct a new paved approach on West Meadows Estates Road in order to provide access to Lot 3.

Fees and Levies

- d) The Owner shall pay the Transportation Off-Site Levy in accordance with Bylaw C-7356-2014 prior to endorsement. The County shall calculate the total amount owing:
 - (a) from the total gross acreage of Lots 1 and 2 as shown on the Plan of Survey.
- e) The Owner shall pay the County subdivision endorsement fee, in accordance with the Master Rates Bylaw, for the creation of two new lots.

Site Servicing/Developability

- f) The Owner shall prepare and register a Utility Right-of-Way, satisfactory to the County, on the title of Lot 2:
 - (a) 6 metre wide drainage easement/utility right-of-way on title along the entire southern boundary of Lot 2, in accordance with the Conceptual SSIP.
- g) The Owner is to enter into a Development Agreement (Site Improvements I Services Agreement) with the County that includes the following:
 - (a) The installation of a packaged sewage treatment system meeting BNQ or NSF 40 Standards, in accordance with the findings of the Private Sewage Treatment System Assessment and Site Evaluation prepared by SOILWORX (December 2016).
- h) Water is to be supplied by an individual well on Lots 2 & 3. The subdivision shall not be endorsed until:
 - (a) An Aquifer Testing (Phase II) Report is provided, which is to include aquifer testing and the locations of the wells on each lot; and
 - (b) The results of the aquifer testing meet the requirements of the Water Act; if they do not, the subdivision shall not be endorsed or registered.

- i) The Owner is to enter into a Deferred Services Agreement with the County, to be registered on title for each of proposed Lots 1, 2, & 3, indicating:
 - (a) Requirements for each future Lot Owner to connect to County piped water, wastewater, and storm water systems at their cost when such services become available;
 - (b) Requirements for decommissioning and reclamation once County servicing becomes available.

Taxes

- j) All taxes owing, up to and including the year in which subdivision is to be registered, are to be paid to Rocky View County prior to signing the final documents pursuant to Section 654(1) of the Municipal Government Act.

BACKGROUND

[4] On June 25, 2019, B & A Planning Group (the Applicant) submitted a subdivision application for the subdivision of a single Residential One lot that is ± 6.00 hectares (± 14.82 acres) in size, creating a ± 0.82 hectare (± 2.02 acre) parcel, a ± 1.13 hectare (± 2.80 acre) parcel with a ± 4.05 hectare (± 10.00 acre) remainder.

[5] The Lands are located at SW-02-24-03-W5M, 6.5 kilometres (4 miles) west of the city of Calgary, 0.8 kilometres (0.5 mile) south of Highway 8, at the northeast junction of Range Road 32 and West Meadows Estates Road. The Lands are approximately 6.00 hectares (14.82 acres) in area and are owned by Eric S. & Jamie H. Horvath.

[6] The Lands' land use designation is Residential One District, which is regulated in section 48 of the Rocky View County, *Land Use Bylaw C-4841-97* [the *Land Use Bylaw*].

[7] On March 12, 2019, the Subdivision Authority conditionally approved a subdivision application on the following grounds:

- a) That the application to create a ± 0.82 hectare (± 2.02 acre) parcel, and a ± 1.13 hectare (± 2.80 acre) parcel with a ± 4.05 hectare (± 10.00 acre) remainder from a portion of SW-2-24-3-W5M was evaluated in terms of Section 654 of the Municipal Government Act and Sections 7 and 14 of the Subdivision and Development Regulations, and having considered adjacent landowner submissions, it is recommended that the application be approved as per the Tentative Plan for the reasons listed below:
 - (a) The application is consistent with statutory policy;
 - (b) The subject lands hold the appropriate land use designation;
 - (c) The technical aspects of the subdivision proposal have been considered, and are further addressed through the conditional approval requirements

- b) Owner is required, at their expense, to complete all conditions attached to and forming part of this conditional subdivision approval prior to Rocky View County (the County) authorizing final subdivision endorsement. This requires submitting all documentation required to demonstrate each specific condition has been met, or agreements (and necessary securities) have been provided to ensure the condition will be met, in accordance with all County Policies, Standards and Procedures, to the satisfaction of the County, and any other additional party named within a specific condition. Technical reports required to be submitted as part of the conditions must be prepared by a Qualified Professional, licensed to practice in the Province of Alberta, within the appropriate field of practice. The conditions of this subdivision approval do not absolve an Owner from ensuring all permits, licenses, or approvals required by Federal, Provincial, or other jurisdictions are obtained.
- c) Further, in accordance with Section 654 and 655 of the Municipal Government Act, the application is approved subject to the following conditions of approval:

Plan of Subdivision

- (a) Subdivision is to be effected by a Plan of Survey, pursuant to Section 657 of the *Municipal Government Act*, or such other means satisfactory to the Registrar of the South Alberta Land Titles District;

Transportation and Access

- (b) The Owner shall upgrade the existing approach on West Meadows Estates Road to a paved standard in order to provide access to Lot 2.
- (c) The Owner shall construct a new paved approach on West Meadows Estates Road in order to provide access to Lot 3

Fees and Levies

- (d) The Owner shall pay the Transportation Off-Site Levy in accordance with Bylaw C-7356-2014 prior to endorsement. The County shall calculate the total amount owing:
 - (i) from the total gross acreage of Lots 1 and 2 as shown on the Plan of Survey.
- (e) The Owner shall pay the County subdivision endorsement fee, in accordance with the Master Rates Bylaw, for the creation of two new lots.

Site Servicing / Developability

- (f) The Owner shall prepare and register a Utility Right-of-Way, satisfactory to the County, on the title of Lot 2:
 - (i) 6 metre wide drainage easement/utility right-of-way on title along the entire southern boundary of Lot 2, in accordance with the Conceptual SSIP.

- (g) The Owner is to enter into a Development Agreement (Site Improvements / Services Agreement) with the County that includes the following:
 - (i) The installation of a packaged sewage treatment system meeting BNQ or NSF 40 Standards, in accordance with the findings of the Private Sewage Treatment System Assessment and Site Evaluation prepared by SOILWORX (December 2016).
- (h) Water is to be supplied by an individual well on Lots 2 & 3. The subdivision shall not be endorsed until:
 - (i) An Aquifer Testing (Phase II) Report is provided, which is to include aquifer testing and the locations of the wells on each lot; and
 - (ii) The results of the aquifer testing meet the requirements of the Water Act; if they do not, the subdivision shall not be endorsed or registered.
- (i) The Owner is to enter into a Deferred Services Agreement with the County, to be registered on title for each of proposed Lots 1, 2, & 3, indicating:
 - (i) Requirements for each future Lot Owner to connect to County piped water, wastewater, and storm water systems at their cost when such services become available;
 - (ii) Requirements for decommissioning and reclamation once County servicing becomes available.

Municipal Reserves

- (j) The provision of Reserve in the amount of 10 percent of the area of Lots 1 & 2, as determined by the Plan of Survey, is to be provided by payment of cash-in-lieu pursuant to Section 666(3) of the Municipal Government Act:
 - (i) The Applicant shall provide a market value appraisal, prepared by a certified appraiser, in accordance with Section 667(1)(a) of the Municipal Government Act, and the satisfaction of Rocky View County:
 - (ii) Reserves for Lot 3 are to be deferred with Caveat, pursuant to Section 669(2) of the Municipal Government Act.

Taxes

- (k) All taxes owing, up to and including the year in which subdivision is to be registered, are to be paid to Rocky View County prior to signing the final documents pursuant to Section 654(1) of the Municipal Government Act.

[8] On April 1, 2019, the Appellant appealed the Development Authority's decision. The Notice of Hearing was circulated to 53 adjacent landowners in accordance with the *Municipal Government Act*, RSA 2000, c M-26 and Rocky View County Council Policy C-327, *Circulation and Notification Standards*.

PRELIMINARY MATTER

[9] The Board heard verbal submissions from:

- a) Johnathan Lang, Stikeman Elliot, on behalf of Robert Homersham; the Appellant;
 - (a) Due to family responsibilities, the Appellant asked to adjourn the hearing until May 15, 2019
- b) Stefan Kunz, Municipal Planner, for the Development Authority
 - (a) In agreeance with adjournment to May 15, 2019

SUMMARY OF EVIDENCE

[10] The Board heard verbal submissions from:

- a) Stefan Kunz, Municipal Planner, for the Development Authority;
- b) Sean MacLean, Planning and Development Supervisor;
- c) Bob Homersham, for the Appellant

[11] The Board received no letters in support of or opposition to the appeal.

[12] The Board received no letters in opposition to the appeal.

Development Authority's Submissions

[13] No municipal reserve have ever been taken on this property.

[14] Deferred Reserve Caveat (DRC) registered in 1961, means no Municipal Reserves have ever been taken on the lands.

[15] Documents registered prior to 1963 are not legally enforceable under the modern legislation.

[16] The caveat is not registered on any of the titles for the lands.

[17] The DRC does not satisfy the Municipal Reserves requirement.

[18] At no point have the lands provided Municipal Reserves or Cash In Lieu.

- [19] In 1961 the owner of the land subdivided a portion of the lands to create 2 – 20 acre parcels in the north west section of the quarter section.
- [20] At the time of subdivision the Municipal Reserves requirement was 10% of the lands set aside for recreation or educational opportunities for Albertans.
- [21] The DRC transferred the Municipal Reserves to the larger section of the parcel.
- [22] In 1974 the 120 acre remainder was subdivided into 5 – 20 acre parcels with a 20 acre remainder.
- [23] The Municipal Reserves on each 20 acre parcel was 2 acres but because they had to also include the Reserves from the 40 acres under the DRC, these parcels also should have included 2/3 of an acre from the deferral, however only the 2 acres was paid.
- [24] The County has no recourse in getting the reserves from the DRC from 1961.
- [25] The subject lands do not have anything saying a Municipal Reserve was previously provided.
- [26] The DRC's were removed during the subdivision process after identification that the DRC was no longer relevant.
- [27] The DRC was registered on the 2 – 20 acre parcels and the remaining 120 acre parcel in 1961.
- [28] The payment of the transportation levy is required as per condition 3.

Appellant's Submissions

- [29] The Deferred Reserve Caveat (DRC) registered in 1961.
- [30] There are three ways to pay Municipal Reserves dedication of lands, cash-in-lieu or a deferment to another parcel of land.
- [31] At the time the Act was called the Survey's and Expropriations Act, this was repealed by the first planning act. This act was then further incorporated into Section 17 of the Municipal Government Act.
- [32] A historical title search was completed to confirm that the caveat was not registered on the two 20 acre parcels; however, it was registered against the 120 acre parcel.
- [33] The Horvath's land is 14 acres of one of the 20 acre subdivided lots.
- [34] The County has the responsibility to collect the Municipal Reserves from the 120 acre lands when it was further subdivided, in addition to the deferred amount from the originally subdivided 40 acres.
- [35] The caveat was then discharged from the property; however, there is a lack of historical documents regarding this.

[36] The Interpretation Act Section 36 deals with all acts that are repealed and replaced. This states:

- a) s.36(1)(a) – If an enactment is repealed and a new enactment is substituted for it, the procedure established by the new enactment shall be followed as far as it can be adapted.
- b) s.36(1)(e) – If an enactment is repealed and a new enactment is substituted for it, all regulations made under the repealed enactment remain in force and are deemed to have been made under the new enactment, insofar as they are not inconsistent with the new enactment.

[37] The process of deferring reserves to another parcel has been in place for as long as we need it to be in place for our circumstances. The effect of this is that the DRC that was passed in prior to 1963 must be granted under the current legislation.

[38] The DRC is noted on the Subdivision plans against the remnant 120 acres in the 1970's and then further Subdivided in 1990's. This DRC was recognized and applied post 1963, during those Subdivisions', under the legislation at the time; and would still apply under the Municipal Government Act.

Appellant's Rebuttal

[39] None.

Development Authority's Closing Comments

[40] The Municipal Reserve being dedicated through deferral means the amount is still accessible but it will be collected at a later date. Deferral implies this will be collected in the future.

[41] The obligation of Rocky View County to collect in accordance with the DRC is vitally important. However, in this case the County was not in the position to act on the pre 1963 DRC.

[42] The definition of the former act as stated in the Municipal Government Act lists the Planning Act of 1963 as the first act.

[43] There is consistency when applying these policies, during the Subdivision of the land in the 1990's were not able to collect the Municipal Reserves due to the fact the document was pre 1963 when the Planning Act came into place.

[44] It was determined when validating this application that Municipal Reserves had been not been provided.

[45] The Municipal Government Act explicitly states that the former acts to be considered begin with the Planning Act of 1963.

Appellants Closing Comments

[46] Case law strongly suggest that by simply extinguishing prior rights through a repeal and replacement of similar acts is something that the courts would look to interpret in a way that does not allow for that.

[47] The Interpretation Act states that when you repeal and replace when interpreting the replacement legislation one has to take care that you preserve existing and/or accrued rights that occurred under the previous legislation that replaced it to the extent you can.

[48] There is a provision in the Municipal Government Act, and all previous legislation/acts, which allows a deferral to another parcel to satisfy the Municipal Reserves on a parcel.

FINDINGS & REASONS FOR DECISION

[49] The Board finds it has the authority to make a decision on this matter pursuant to section 687(3)(d) of the *Municipal Government Act*.

[50] The Board reviewed all evidence and arguments, written and oral, submitted by the parties and will focus on the most relevant evidence and arguments in outlining its reasons. The Board considered the context of the proposed subdivision, sound planning considerations, the merits of the application and all applicable legislation, plans, and policies,

[51] The Board finds the applicant's obligation to provide Municipal Reserves was discharged when the Deferred Reserve Agreement (DRC) Document 5621 IH was registered in 1961. As noted in the agreement, the intention of the DRC was to transfer the obligation to dedicate reserves from the two 20 acre parcels to the remainder. One term of the DRC states: Public Reserve is protected for public use and shall hereafter be designated and dedicated in a like area from the balance after subdivision of the said lands, in substitution for any and all reserve which could now or might hereafter be required from, or in respect of the said subdivided land. The DRC further states: The Covenant Agreement shall be binding upon and shall ensure to the benefit of the Owner and the said Municipal District and their respective successors and assigns, and shall be and is deemed to be a covenant running with the land. It is clear from the above two terms that the expressed intent of the DRC was that the two 20 acre parcels created in 1961 were discharged from any current and future obligation to provide reserve land or money in place of reserve land. This intent appears to have been honoured in 1990 when the northern 20 acre parcel was subdivided into four parcels and the registered survey plan of the land noted "Reserves were previously provided" by deferral as per DRC #5621 IH.

CONCLUSION

[52] For the reasons set out above, the appeal is allowed and the decision of the Subdivision Authority is revoked. The Subdivision is approved without the requirement that cash-in- lieu of reserve be provided by the appellant.

Dated at Rocky View County, in the Province of Alberta on July 11, 2019.



Don Kochan, Chair
Subdivision and Development Appeal Board

EXHIBIT LIST

DOCUMENTS PRESENTED AT THE HEARING AND CONSIDERED BY THE BOARD

NO.	ITEM
1.	Development Authority's Report to the Board (60 pages)
2.	Development Authority's presentation to the Board (35 pages)
3.	Appellant's presentation to the Board (29 pages)