

NOTICE OF DECISION

FILE NO. **SDAB 2021-001**

APPLICATION No.: **2018-SU-00011**

DEVELOPMENT: **Subdivision**

LAND USE DESIGNATION: **R1S Single Family Small Lot Residential District**

LEGAL DESCRIPTION: **Lot 34, Block 36, Plan 192 0472**

CIVIC ADDRESS: **108 Cote Bay, Fort McMurray, Alberta**

IN THE MATTER OF AN APPEAL filed with the Regional Municipality of Wood Buffalo Subdivision and Development Appeal Board (“the Board”) pursuant to Sections 685 and 686 of the *Municipal Government Act*, R.S.A 2000, c. M-26 (“the MGA”), the Appeal Hearing was held electronically via Microsoft Teams on Thursday, June 17, 2021, in Fort McMurray, Alberta.

BETWEEN:

Mahmoud Naser (“the Appellant”)
Rashid Naser (Agent)
Shaker Naser (Agent)
Cliff Maron (Agent)

-and-

The Regional Municipality of Wood Buffalo (“the Municipality”)

BEFORE:

R. Wells, Chair
K. Carruthers
A. Crompton
N. Mahgoub
T. Tupper

Clerking Staff:

H. Fredeen, Clerk for the Subdivision and Development Appeal Board
S. Soutter, Manager, Legislative Services
D. Soucy, Legislative Officer

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- [1] At the outset of the hearing on June 17, 2021, following the introduction of the Board, the Chair confirmed with the parties in attendance that there were no objections to the constitution of the Board.

PRELIMINARY MATTERS

- [2] Board member N. Mahgoub declared for the record he has a professional association with C. Maron the Appellant's Engineering Consultant who is providing submissions on behalf of the Appellant. No objections were raised by either party.
- [3] Following requests from the parties, the Board granted additional time to make their submissions.
- [4] The Municipality indicated that they prepared a list of recommended conditions for the Board's consideration should the Board overturn the decision of the Subdivision Authority and approve the Subdivision Application.
- [5] The Appellant expressed concerns with the acceptance of the proposed conditions referred to by the Municipality as submission deadlines were stipulated by the Board.
- [6] Following a recess, the Board reserved issuing a decision on accepting the conditions and indicated further direction will be provided following submissions of the parties.
- [7] No other matters were raised.

SUMMARY OF HEARING

- [8] This Appeal is related to the conditions imposed on application No. 2018-SU-00011 for a proposed plan of subdivision to create two residential lots at 9102 McPhee Street and 108 Cote Bay (Lot 34 Block 36 Plan 192 0472) (Former Lot 1 Block 1 Plan 182 1793) (the "Subject Property").

Submissions of the Appellants

Cliff Maron, IBI Group, Engineering Consultant

- [9] Cliff Maron, IBI Group, an Engineering Consultant for the Appellants, submitted that he has been involved on and off with Mr. Mahmoud Naser's Subdivision Applications since 2011 and will be providing technical responses to the Subdivision Authority's report (Exhibit 5 pgs. 309-318).

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- [10] C. Maron argued that contrary to the submission of the Municipality, the Appellants did pursue the approved subdivision following the Subdivision and Development Appeal Board's decision on previous Subdivision Application No. 2011-SU-00009 issued on January 9, 2015; noting that the condition that the owner address the issues of servicing and onsite storm water management to the satisfaction of the Engineering Department could not be met.
- [11] C. Maron spoke to the 1982 Grading Plan (Exhibit 8, pgs. 482) and argued that contrary to the Municipality's position, 9102 McPhee Street was part of the 1982 Plan and that the Plan illustrates that drainage from 9102 McPhee Street, was by common property line at the rear of the neighboring properties. C. Maron indicated that 9102 McPhee Street and the Ptarmigan Park Subdivision grading plan, particularly for the lots on Pearson Bay, may not have been followed or may have been adjusted over the years to interrupt the anticipated drainage pattern and hence resulted in ponding water on 9102 McPhee Street.
- [12] Following the 2016 Wildfire, the Municipality commissioned IBI Group to develop grading plans for Abasand, Beacon Hill, and Waterways that closely reflected the plans prior to the wildfire plus any changes that had been made over the years. The intent of the grading plans was to improve drainage in areas of concern.
- [13] C. Maron submitted that a grading plan for the Waterways neighborhood was produced by IBI Group in 2017 (Exhibit 3 pg. 44) and is in effect today. The Plan took the existing conditions and the original 1982 grading plan into consideration. 9102 McPhee Street was included in the grading plan as it was an affected property.
- [14] C. Maron submitted that the 2017 Grading Plan was to be used for all rebuilds and Development Permit Applications. The Development Permit process required the property owner to submit a grading certificate to demonstrate that the grading plans have been followed. C. Maron noted that it is very apparent that neighbouring properties did not follow the requirements – based on the water pooling and the elevation of the fence line (Exhibit 13, pgs. 520-523).
- [15] C. Maron further submitted that the 2017 Grading Plan and the Stormwater Master Plan addresses all drainage concerns from the Subject Property and argued that the stagnant water and drainage issues affecting neighbouring properties will never be resolved if property owners and the Municipality continue to ignore the 2017 Grading Plan. It should not be up to the owner of 9102 McPhee to resolve the issues on their own.

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- [16] C. Maron submitted that the slope referred to in the Thurber Geotechnical Report (Exhibit 3, pg. 75) runs through the midpoint of 9102 McPhee Street, has a steep portion that has 2.5:1 slope, and an area that has 4:1 slope (flattened area in the southeast corner). The Thurber Geotechnical Report recommends that construction not occur on the 2.5:1 slope but indicates that access roads can be constructed on the 4:1 slope with proper engineering. The Parkland Geotechnical Report (Exhibit 3 pg.258) confirms this and has provided recommended setbacks for the top shelf and bottom shelf.
- [17] C. Maron argued that the Municipality has chosen to ignore the recommendations in the geotechnical reports and impose a condition of an environmental reserve on the entire slope. The Appellants would like to maintain ownership of the flattened slope and use it as a landscape feature for the lower shelf. A suitable compromise may be a restrictive covenant or caveat on title that prohibits development on the slopes and recognizes the required setbacks.
- [18] C. Maron stated if the Subdivision Application is rejected by the Board or if the conditions are included so that development is not feasible, then the slope will continue to sit the way it is. Approving the subdivision with feasible conditions would be a desirable solution.
- [19] C. Maron suggested that the Municipality decided to refuse the Subdivision Application to satisfy the position of adjacent property owners and are making demands that cannot be delivered. It was also noted that the Municipality has insisted that the new subdivision follow current engineering standards when the properties on two sides of the subdivision have different standards.
- [20] The Municipality recommended a condition that the Appellants must submit a storm water management plan that identifies all on-site and off-site infrastructure that is acceptable to the Municipality's Engineering Department. C. Maron submitted that this condition is unacceptable and would put the Appellants in the same position they are in now in that it would not be economically feasible to continue.
- [21] The Municipality recommended a condition be the payment of off-site levies. C. Maron requested that this condition be waived for the following reasons:
- i. There is no increase in density or housing units as a result of the proposed subdivision
 - ii. Off-site levies for the lower townsite have been waived in an attempt to attract development. The same should be applied to Waterways.

Rashid Naser

- [22] R. Naser submitted that 9102 McPhee Street was originally listed in 1966 and was subdivided in 1980. At that time, legislation required that drainage be accommodated and diverted which is still the case today. The 2017 Drainage Plan (Exhibit 3, pg. 44), approved by the Municipality, demonstrates how the water will be diverted from 9102 McPhee Street.
- [23] R. Naser argued that the stagnant water located on adjacent property lots is not caused from drainage from the Subject Property. If the issues were investigated by the Municipality and if adjacent properties abide by the 2017 Drainage Plan, the stagnation issues on these properties would not be an issue.
- [24] The Municipality has submitted that the loss of trees and vegetation has resulted in additional drainage problems. R. Naser argued that properties on Pearson Bay, are also under the same slope but there have been no measures put in place for those properties.
- [25] R. Nasser spoke to the Parkland Geotechnical Report (Exhibit 3, pg. 243) which differentiates between the two types of slopes on the property and supports the Appellants argument that the slopes are within the recommended Factor of Safety.
- [26] R. Nasser noted opposition to the Municipality's requirement for an Environmental Reserve on the slope and submitted that a restrictive covenant registered on the land title would be more desirable option.
- [27] R. Nasser spoke to concerns of adjacent property owners and noted that the owners appear to consider the Subject Property as their personal green space. It was further noted that a retaining wall located on an adjacent lot is against the approved grading plan.
- [28] R. Nasser submitted that during the rebuild following the 2016 Wildfire, heavy equipment used the Subject Property as a lay down yard and an access point, disturbing the grading. (Exhibit 3 pg. 19)
- [29] R. Nasser requested that the Subdivision and Development Appeal Board overturn the decision of the Subdivision Authority and approve the Subdivision Application for the following reasons:

- i. The Subject Property is part of the drainage and storm water management plan.
- ii. Steep slopes will not be developed, and the Appellants are supportive of a restrictive covenant registered to the titles.
- iii. Creating a Municipal reserve does not apply as the Subject Property falls under 0.8 hectares.

[30] R. Nasser concluded his submission with the following questions for the Municipality:

- i. What would be outcome of rejecting the Subdivision Application?
- ii. Is the Municipality proposing any remedies?
- iii. Will the Municipality exercise their authority to enforce adjacent property owners to adhere to drainage plans?
- iv. Does the Municipality agree that a drainage system will only work if all neighbours were a part of it?
- v. If nothing were to happen, what is the benefit?

Mahmoud Naser

[31] M. Naser indicated that a Development Permit application (Exhibit 3 pg. 48) for a single-family dwelling to be located on the lower shelf of the Subject Property was approved; however, they were unable to follow through with the development due to time constraints and cold weather. A request for an extension was submitted to the Municipality; however, this was denied, and the permit expired.

[32] M. Naser spoke to the history of the Subject Property and the applications that have been applied for with the Municipality.

[33] M. Naser indicated that at least ten proposals have been submitted to the Municipality to address drainage plans, stormwater management plans; however, they have all been rejected.

[34] M. Naser reiterated that the 2017 Grading Plan addresses concerns with drainage and stagnation of water and if adjacent property owners do what they are required to ensure sufficient drainage, there would not be an issue.

[35] M. Naser submitted that he would like to give the Subject Property to his son so he can develop and maintain the property and would like to have two separate titles with two separate developments.

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- [36] C. Maron submitted through questioning, that the loss of vegetation due to the 2016 wildfire would reduce the slope's ability to absorb water and; although extremely unlikely, if the slope were to become saturated, the Factor of Safety could be reduced from 1.5 to 1. This scenario is unlikely to occur as drainage from the upper portion of the Subject Property is directed to McPhee Street, so there should be no increase of water on the slope between the upper and lower portion of the Subject Property.
- [37] C. Maron clarified that there is not a storm system to capture water coming from McPhee Street as the water is diverted via overland drainage; however, Cote Bay does have a storm system.
- [38] Through questioning from the Municipality, C. Maron submitted that the 2017 Grading Plan is also considered a Drainage Plan as they are one of the same
- [39] R. Naser submitted that the steep slope will be returned to natural vegetation; while the flattened slope will be grassed and mowed.

Development Authority

- [40] The Subdivision Authority submitted that a Subdivision Application No. 2018-SU-00011 was submitted in 2018. The proposed subdivision, located in the Waterways neighbourhood, was intended to consolidate 108 Cote Bay with 9102 McPhee Street ("the "Subject Property"). (Exhibit 5 pg. 322) to create two individual lots.

The Development Authority provided a summary of previous applications as follows:

- [41] Subdivision Application No. 2011-SU-00009 was filed in 2011 and refused on July 31, 2014, for the following reasons (Exhibit 5 pg. 323):
- i. Lack of suitable building sites.
 - ii. Concerns from adjacent property owners re drainage issues.
 - iii. Lack of supporting documentation including a stormwater management plan, geotechnical study, and a non-dedication of environmental/municipal reserves.
- [42] A Notice of Appeal SDAB File No. 2014-024 was filed with the Subdivision and Development Appeal Board in which the Subdivision and Development Appeal Board overturned the Decision of the Subdivision Authority and approved the subdivision with the following conditions (Exhibit 5, pg. 326):

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- i. Submission of engineering drawings.
 - ii. Submission of signed geotechnical studies.
 - iii. A plan to address servicing and on-site stormwater management issues.
 - iv. Dedication of environmental/municipal reserves.
- [43] The Applicant did not pursue the Subdivision following the Subdivision and Development Appeal Board's decision.
- [44] Prior to the 2016 Wildfire, 9102 McPhee was zoned as R1M - Mixed Form Single Detached Residential District and 108 Cote Bay was zoned as R1S - Single Detached Small Lot Residential District and both had single detached dwellings which were lost in the fire.
- [45] Following the 2016 Wildfire, the Appellants purchased 108 Cote Bay and consolidated it with their existing property, 9102 McPhee Street to form the Subject Property. This resulted in the creation of one lot with two land use designations.
- [46] In July 2018, A Development Permit Application No. 2018-DP-00488 (Exhibit 5 pg. 339) was submitted for a Single Detached Dwelling on the lower portion of the property with access from 108 Cote Bay and with a grass swale. The Development Permit was approved under the Wildfire Recover Overlay Bylaw; however, the Applicant did not follow through with the development leading to the expiration of the permit.
- [47] In November 2018, the Appellants submitted a new Subdivision Application 2018-SU-00011 to divide the Subject Property into two lots.
- [48] Upon the initial review, the Subdivision Authority noted that the Subject Property had two land designations; therefore, the Appellants were advised to address the split districting of the Subject Property. The Appellants applied for a Land Use Amendment which was supported by Administration and approved by Council on February 25, 2020, under Bylaw No. 20/002. This resulted in the redesignation of the Subject Property to a single land use designation of R1S - Single Detached Small Lot Residential District (Exhibit 5 pg. 366).
- [49] When reviewing the current Subdivision Application, No 2018-SU-00011, the Subdivision Authority took topography, dedication of reserves, stormwater management system and concerns from adjacent property owners into consideration.

i. Topography

A portion along the center of the Subject Property contains steep slopes (Exhibit 5 pg.403). Prior to the 2016 wildfire, these slopes had trees and vegetation, which were lost in the wildfire (Exhibit 5 pg. 312). With the loss of trees and vegetation, the ability to absorb surface run-off water reduces significantly, which may affect the stability of the slopes. Additionally, with the lack of a dedicated drainage discharge course, the water from the upper portion of the Subject Property will either drain to the lower portion via the steep slopes or drain from the upper portion towards McPhee Street. Since McPhee Street does not have a storm system to capture the water, it is believed that the water will re-enter the property from southeastern corner containing steep slopes. The lower portion of the lot does not have a dedicated drainage discourse course; therefore, the water stagnates on the lower portion of the Subject Property (Exhibit 5 pg. 404).

ii. Dedication of Reserves

The Subject Property contains steep slopes which the Municipality deems to be environmentally sensitive as they are not fit for development for the following reasons:

- Vegetation and trees have been lost in the fire or removed (Exhibit 5, pg. 312).
- Under the Waterways Slope Assessment, the area containing steep slopes was classified as Zone 2A, which is not suitable for the construction of buildings (Exhibit 5, pg. 423).
- The geotechnical study advises to keep the steep slopes vegetated and follow erosion control measures to avoid a slope failure. The Subdivision Authority therefore found that the steep slopes with required setbacks were suitable for environmental reserves. (Exhibit 5 pg. 431).
- The Appellant did not agree with the environmental reserve area and submitted an alternative proposal (Exhibit 5 pg. 432); however, the proposal was deemed to be unsuitable as the Municipality would have no access to the slopes.

iii. Stormwater Management

The area previously known as 108 Cote Bay, had a sufficient stormwater management plan; however, by consolidating the lot with 9102 McPhee Street, the existing grates on 108 Cote Bay would not allow water from the lower portion of 9102 McPhee Street

to drain into the Cote Bay storm system resulting in stagnation of water on the lower portion of the Subject Property.

A berm and grass swale were proposed by the Appellants to address the water stagnation (Exhibit 5, pg.433); however, this did not meet the Municipality's Engineering Servicing Standards. The Appellants were asked to provide additional details on their designs; however, the Appellants declined and indicated they will grade both lots to address the drainage and surface run-off issues (Exhibit 5, pg. 434).

iv. Concerns from Adjacent Property Owners

Adjacent property owners have indicated strong opposition to the proposed subdivision due to drainage and surface run-off issues impacting their properties. (Exhibit 5, pg.437) .

[50] On January 4, 2021, the Subdivision Authority refused the application resulting in the Appellant's filing a Notice of Appeal with the Subdivision and Development Appeal Board on January 11, 2021, on similar grounds as the appeal filed in 2011. (Exhibit 5 pg. 455).

[51] If the Subdivision and Development Appeal Board chooses to overturn the decision of the Subdivision Authority, it was requested that the subdivision be subjected to certain conditions. (Exhibit 5 pg. 318).

[52] The Subdivision Authority indicated that additional conditions have been created and can be shared with the Board for their consideration if requested.

[53] The Subdivision Authority Supervisor submitted that the lot was initially subdivided by the Province of Alberta in 1966 and purchased by the original owners. The Province is not bound by the MGA when considering a subdivision and do not need to consider matters such as services, environmental reserves, off-site levies etc. These items are assigned to the Municipality who will deal with these matters at the time in which a Development Permit is filed. Because the Subject Property has never been subdivided, municipal/environment reserves, storm water management, off-site levies etc. have never been considered. These matters are only looked at when a Development Permit or Subdivision Permit is applied for. In the case of a Development Permit, the Applicant bears the consequences of whatever is going to happen on the property. When subdividing, the owner can sell the property to someone else. If the subdivision is approved with these issues, the Municipality is liable and if the subdivision is approved as is, the Municipality has no right to take any reserves or address the issues. The Appellants claim they are being singled out; however, all developers follow the same process when subdividing and must address the same issues.

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- [54] It was further confirmed that the Municipality has not received any plans to address drainage issues, other than a suggestion that the drainage will go along the back of the homes on Pearson Bay, to Pearson Drive. There is no information on the volumes, or how it would be managed. There is no lawful or legal right for overland drainage that the proposed subdivision can take advantage of. A potential solution would be to install a pipe to the catch basin on Cote Bay; however, there is a substantial cost to do this.
- [55] Under s. 663 of the MGA, because the Subject Property is under 0.8 hectares, the Municipality cannot request municipal reserve or cash in lieu at this time; however, the offer from the Appellants to provide a section of the slope as reserve should be considered by the Board, whether that include the flattened slope in which the Municipality proposed, or just the steep slope in which the Appellant has proposed.
- [56] Mazhar Hajhossein, Manager, Infrastructure Planning Development Services, Engineering Department, noted that the Engineering Department follows the Municipality's Engineering Servicing Standards (ESS) for grading, stormwater management etc. The ESS requires that each lot be graded to drain to the Municipality's storm system or any adjacent lot if possible (with the exception of private properties) and must be graded independent from the other lots, which may require a swale.
- [57] The steepness of the slope on the Subject Property contributes to the flow from the ice melt that is diverted to adjacent properties.
- [58] It was confirmed by the Municipality, that the 2017 Grading Plan was used following the 2016 wildfire, as the grading plans for some of the older areas were not available. The 2017 Grading plans were created to ensure that when development permits for rebuilds were approved, original grading plans were followed as closely as possible. It was further confirmed that the 2017 Grading Plan is not a legal representation of a drainage plan.
- [59] The Municipality confirmed that the Subject Property is not included in the original Ptarmigan Park Grading plan (Exhibit 8 pg. 499) as it was part of the Waterways Grading Plan.
- [60] The Municipality confirmed through questioning that grading inspections are not a requirement of the Municipality. If a property owner is applying for compliance certification, then a grading inspection is required.
- [61] C. Davis, Municipal Legal Counsel, clarified that the easement requested, whether it be across the entire property or limited to a specific area, would remain in the owner's name, and would be granted in favour of the Municipality.

[62] The Subdivision Authority Supervisor submitted that in a Geotechnical Report completed by Thurber Engineering for the entire Waterways neighbourhood (Exhibit 5 pg. 408), the Subject Property was coded as Zone 2A, which indicates that it is not fit for development, which is why the easement has been requested on the slope.

Submissions Opposed to The Appeal

[63] Audrey Roger, an adjacent property owner, spoke in opposition to the appeal, submitting that drainage is her primary concern with the Subdivision Application.

[64] A. Rogers said she has owned her property on Pearson Bay since 2006 and noted that the landscape of the area has changed significantly since the wildfire event occurring in 2016.

[65] Prior to the 2016 wildfire, her property did not experience stagnant water or drainage issues. Since the rebuild, her property has experienced annual flooding as a result of the drainage originating from the Subject Property, despite the fact that she followed the applicable grading plans. It was further submitted that numerous properties in the neighbourhood have not been graded in accordance with the grading plan. A Rogers agreed with the Appellants that the Municipality should be inspecting the adjacent properties for grading compliance.

[66] A. Rogers spoke to illustrations and written comments (Exhibit 6 and Exhibit 13), noting that the Subject Property has not been maintained or mowed.

[67] A. Rogers requested that the Board uphold the decision of the Subdivision Authority and refuse the Subdivision Application due to the lack of a proven drainage plan, and further submitted that if the subdivision is approved without a proven drainage plan, it will devastate her property.

[68] Through questioning, A. Rogers confirmed that a utility right of way easement is registered on her property but submitted that there were no easements for drainage.

[69] A written submission in opposition to the appeal, was submitted by Rodney Crowe, adjacent property owner, who noted concerns with drainage from 9102 McPhee St., specifically during spring run-off and heavy rainfall.

Rebuttal - Appellant

[70] R. Naser submitted that in the Municipality's submission, it was stated that the entire slope is rated 2A, meaning it is not suitable for development; however, it actually says it is not suitable for buildings, but can be used for access.

[71] It was further confirmed by the Appellant, that the flattened slope will not be used for access; and the Appellants have no issue with an easement on the slope; however, they would like to maintain ownership of the flattened slopes as they see fit.

Rebuttal - Municipality

[72] The Subdivision Authority Supervisor submitted that they would like to see the Subdivision Application approved as it is beneficial to all parties; however, the matters identified need to be addressed beforehand. It was further submitted that the Municipality would be willing to assist and provide a preliminary review of any concepts put forward by the Appellants.

Preliminary Hearing Decision Regarding Proposed Conditions

[73] Following the submissions of the Parties, the Board issued its decision on the Preliminary Matter and allowed the Municipality to present their proposed conditions should the Subdivision and Development Appeal Board overturn the decision of the Subdivision Authority and approve the Subdivision Application. The Appellants were provided an opportunity to respond to the proposed conditions as they were presented.

[74] Condition No. 1

That the owner of the Subject Property (the “Owner”) submit a Storm Water Management Plan, which includes studies and engineering drawings (prepared by certified engineer(s)) that identifies all necessary infrastructure to be constructed by the Owner (on-site or off-site) that is acceptable to the Engineering Department of the Regional Municipality of Wood Buffalo (the “Municipality”) and in accordance with the Engineering Servicing Standards, dated March 2021, to address all stormwater and surface runoff issues on the Subject Property.

Appellant Response

The Appellants submitted that Condition No. 1 is too general and is almost identical to the condition included in the previous Subdivision and Development Appeal Board Decision regarding 2011-SU-00009 (Exhibit 5 pg. 326). C. Maron also expressed concerns with the wording “*that is acceptable to the Engineering Department of the Regional Municipality of Wood Buffalo,*” arguing that this provides the Engineering Department an ability to reject any submission proposed by the Appellants.

[75] The Municipality submitted that if a drainage plan were submitted similar to the plan produced in the Development Permit Application No. 2018-DP-00488 (Exhibit 3 pgs. 55-56), and if those plans could be demonstrated and carried out in accordance with legislated requirements, the Municipality would be willing to consider that as fulfilling Condition No. 1.

[76] Condition No. 2

That the Owners shall enter into and submit to the Subdivision Authority, a true copy of an agreement with the Municipality confirming the following:

- a. That the Owner will install or pay for the installation of any public utility described in section 616(v)(i) to (ix) [of the *Municipal Government Act, RSA 2000*] that is necessary to serve the subdivision, whether or not the public utility is, or will be, located on the land that is subject of the subdivision approval (pursuant to the *MGA*, at section 655(1)(b)(iii)).
- b. That the Owner construct necessary road access upgrades within the McPhee Street/Cliff Avenue road right of way sufficient to service Lot 1A for any future development, including associated storm water management within the road right of way, in accordance with the Engineering Servicing Standards and to the reasonable satisfaction of the Municipality (pursuant to the *MGA*, at section 655(1)(b)(i)). The Municipality indicated that the Board may want to consider delaying until the time of development and registering a caveat to the title of ownership.
- c. That the Owner will construct or pay for the construction of a road, to give access to Lot 1B (pursuant to the *MGA*, at 655(1)(b)(i)) (road to Cote Bay).

Appellant Response

C. Maron submitted opposition to constructing necessary road access upgrades within the McPhee Street/Cliff Avenue right of way as this cost should not be imposed on the Appellant. Additionally, there are other properties on this road that would benefit. The Appellant argued that they should not have to bear the entire cost of the road upgrades. Condition No. 2 would make the subdivision unfeasible due to the cost.

[77] Condition No. 3

That the Owner of the Subject Property must enter into a restrictive covenant with the Municipality, capable of being registered at Land Titles, respecting the two lots proposed to be subdivided from Lot 34, Block 36, Plan 192 0472 as shown on the Subdivision Plan, as the Servient Tenements and the RWMB's roadways and Lot 33MR, Block 36, Plan 8120033 serving as the Dominant Tenements restricting that a specified portion of the Subject Property being the contours of 255 through to 261 meters are to not be built on or otherwise developed and are to be left in a natural state (the "Covenant Area") (in accordance with section 7(a), 7(b), 7 (d) of the Subdivision and Development Regulation AR 23/2002, and sections 651.1(1) and 680(2)(e) of the MGA). For clarity, the Covenant Area is shown on the attached Schedule "A". In addition, a survey plan legally describing the lands identified in Schedule "A" must be prepared and filed on behalf of the Owner at Land Titles in advance of registration of and to be referenced by this restrictive covenant.

Specifically, the covenant will limit the use of the Covenant Area by requiring this area to remain in ITS current natural state, including without limitation no alterations to the grading, no development or redevelopment, no construction, no removal of vegetation or any other GRADE ALTERING activity. The Owner will be able to maintain the Covenant Area to limit or control the growth of weeds or to plant shrubs or small plants that will help to stabilize the slope, but not to OTHERWISE remove or ... limit the growth of vegetation.

Appellant Response

There are no issues with a restrictive covenant to the steep slopes; however, the Appellant reiterated that they would like to maintain ownership of the flattened slopes.

[78] Condition No. 4

That any outstanding property taxes on the Subject Property be paid in full to the Municipality (pursuant to section 654(1)(d) of the MGA).

Appellant Response

There was no response submitted by the Appellants to Condition No. 4.

[79] Condition No. 5

That the Owner pay any applicable off-site levies prior to submitting the plan for endorsement (pursuant to section 648(1)(a) of the MGA).

Appellant Response

The Appellants submitted that off-site levies should not be required as there will be no increase to city services or density. The Subdivision began as two lots and will end with two lots.

- [80] The Appellants submitted in their closing comments that the subdivision would not move forward if the conditions proposed by the Municipality were enacted by the Board in its decision, the subdivision will not move forward.
- [81] Upon conclusion, the Chair asked the parties present if they felt that the hearing was conducted in a fair manner. No issues were brought to the Board's attention.
- [82] Due to the extensive nature of the evidence before the Board, the Chair indicated that additional time was required to review the evidence and submissions of all parties; therefore, the Chair recessed the hearing, and advised that the Clerk will communicate the Board's intentions with all parties once it is determined how it be proceeding.
- [83] On July 8, 2021, notification was sent to the parties indicating that the hearing was closed and that a written decision would be issued to all parties within 15 days.

FINDINGS OF FACT

The Board makes the following findings of fact:

- [84] The Site is located at 108 Cote Bay, Fort McMurray, Alberta, legally described as Lot 34, Bock 36, Plan 1920472.
- [85] The Site is zoned R1S – Single Family Small Lot Residential District
- [86] The Subdivision application proposes to create two (2) lots from the Subject Property.

DECISION

- [87] **It is the decision of the Subdivision and Development Appeal Board to uphold the decision of the Development Authority. The appeal for Subdivision No. 2018-SU-00011 is DENIED.**

REASONS FOR THE DECISION

Jurisdiction

[88] The Board notes that its jurisdiction is found in section 680(2) of the MGA. In making this decision, the Board has examined the provisions of the Land Use Bylaw 99/059 as well as considered the oral and written submissions made by the Development Authority and the Appellant, and those speaking in opposition to the appeal.

680(2) In determining an appeal, the board hearing the appeal

(a) repealed 2020 c39 s10(48);

(a.1) must have regard to any statutory plan;

(b) must conform with the uses of land referred to in a land use bylaw;

(c) must be consistent with the land use policies;

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

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

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

(2.1) In the case of an appeal of the deemed refusal of an application under section 653.1(8), the board must determine whether the documents and information that the applicant provided met the requirements of section 653.1(2).

(2.2) Subsection (1)(b) does not apply to an appeal of the deemed refusal of an application under section 653.1(8).

Affected Persons

[89] The first question the Board must determine is whether the Appellants are affected. The appeal was filed by the Appellants, Mahmoud Naser and Amani Abu Abboud, with Shaker Naser, (son), Rashid Naser (son), and Cliff Maron (Engineering Consultant) representing them as agents. Since it is their Subdivision Application under appeal, the Board finds Mahmoud Naser and Amani Abboud to be affected.

[90] Audrey Rogers and Rodney Crow live in residences adjacent to the Site. Due to the proximity of their properties, Ms. Rogers and Mr. Crow are affected, and both have provided evidence to the Board.

Alberta Land Stewardship Act (ALSA)- Regional Plan and Statutory Plans

[91] The Board notes that it must act in accordance with any applicable ALSA regional plan, any applicable land use policies, and statutory plans. There was no information provided by either party in relation to either the ALSA regional plan or any applicable statutory plans. The Board can only conclude from the absence of information that the development complies with any applicable regional plan, land use policies or statutory plans because there is no evidence to the contrary.

Questions to be Addressed

[92] The Board finds that the following questions arise:

- a. Is the land proposed to be subdivided, suitable for the purpose for which the subdivision is intended? Under section 654(1)(a) of the MGA?
- b. Does the proposed subdivision comply with the Subdivision and Development Regulations and if it does not, should the Board exercise its discretion under section 680(2)(e) of the MGA to vary the regulations?

Suitability

[93] Under section 654(1)(a) of the MGA, the Board must first determine the suitability of the lands, the Board reviewed sections 7(a), 7(c), and 7(d), of the *Subdivision and Development Regulation* (see Appendix No.1).

Topography (Section 7(a))

[94] The Board examined the “Tentative Plan Showing Proposed Subdivision” submitted by the Municipality (Exhibit 5 pg. 322) and notes that a significant portion of the lands have tight bands indicating steep slopes which are unsuitable for development as agreed to by both parties. Even if the steep slopes are preserved by a restrictive covenant, obligations must be imposed to ensure that there is an enforcement of the obligations. Concerns that were identified in the Thurber Report (Exhibit 3 page. 91), were not addressed and therefore, the Board has insufficient information to determine if the topography of the lands to be subdivided is suitable for development.

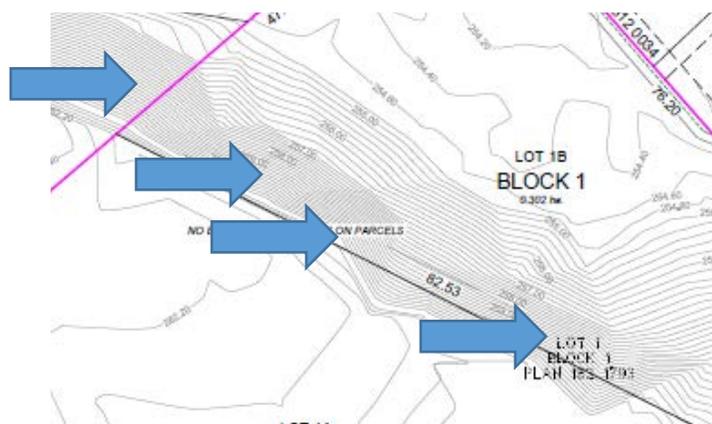


Figure 1 – Exhibit 3, pg. 322

Storm Water Collection and Disposal (Section 7(c))

- [95] Given the high-water table and the loss of natural vegetation on the slopes due to the 2016 wildfire, as well as the submissions in opposition of the appeal submitted by adjoining property owners Audrey Rogers (Exhibit 6, pg. 458 and Exhibit 13, pg. 516) and Rodney Crowe, (Exhibit 14, pg. 524), it would be insufficiently robust for the Board to make a determination to know that the Appellant has properly and fully considered the impact of storm water collection and disposal.
- [96] Because of the known concerns, the Board cannot determine if the lands are suitable because the Appellant has not provided sufficient evidence for the Board to determine whether the lands are suitable. Furthermore, concerns arise that imposing conditions after a subdivision approval may lead to a position where reports are submitted that are either insufficient or require more consideration, but the Board is functus once it makes its decision.

Potential for Flooding Subsidence and Erosion

- [97] The steep slopes shown in Figure 1 (Exhibit 3 pg. 322) bring forward a potential for erosion or subsidence, where the upper portion of the Subject Property could potentially slide into the lower portion of the Subject Property. There was no evidence to address these scenarios. Additionally, the Board heard no evidence of plans for flooding.
- [98] The Board finds that the application for subdivision is insufficient. The Board is not persuaded by the evidence and does not believe that the imposition of conditions would address the concerns that it has in relation to storm water collection and disposal and the potential for flooding subsidence and erosion.

Dated at the Regional Municipality of Wood Buffalo in the Province of Alberta, this 23RD day of JULY 2021.

CHAIR:

Section 17 (1) FOIP

APPENDIX "A"

RELEVANT LEGISLATION

Municipal Government Act

Approval of application (Subdivision)

s.654(1) A subdivision authority must not approve an application for subdivision approval unless

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

Subdivision and Development Regulation

Relevant Considerations

s.7 In making a decision as to whether to approve an application for subdivision, the subdivision authority must consider, with respect to the land that is the subject of the application,

- (a) its topography
- (c) storm water collection and disposal
- (d) any potential for the flooding, subsidence or erosion of the land

APPENDIX "B"

DOCUMENTS RECEIVED AND CONSIDERED BY THE SDAB:

Exhibit No.	Description	Page Numbers	Filing Date
	Subject Area Map	Page 2	2021-01-13
1.	Notice of Appeal	Pages 3-4	2021-01-11
2.	Subdivision Authority Decision	Pages 5-7	2021-01-11
J1	Email: Request for Postponement of Merit Hearing	Page 8	2021-01-12
J2	Email: Request for Preliminary Hearing Date of March 11, 2021	Page 9	2021-01-18
J3	Email: No contest with March 11, 2021 Hearing date	Page 10	2021-01-18
P1	Board Decision – Preliminary Hearing	Pages 11 - 16	2021-03-25
3.	Appellant Disclosure Evidence	Pages 17 - 307	2021-05-27
4.	February 25, 2020, Council Meeting video Clip	Pages 308	2021-05-27
5.	Municipality Disclosure Evidence	Pages 309 - 457	2021-06-03
6.	Audrey Rogers, Submission in Opposition to Appeal	Pages 458 - 466	2021-06-10
7.	Appellant Rebuttal Evidence	Pages 467 - 477	2021-06-14
8.	Cliff Maron Statement	Pages 478 - 482	2021-06-14
9.	Waterways Storm Water Masterplan	Pages 483 - 495	2021-06-14
10.	Illustration of Neighbouring Fence	Page 496	2021-06-14
11.	Mahmoud Naser Statement	Pages 497 - 507	2021-06-14
12.	Supporting Documentation re Easements	Pages 508 - 515	2021-06-14
13.	Audrey Rogers Illustrations	Pages 516 - 523	2021-06-16
14.	Rodney Crowe, Submission in Opposition to Appeal	Page 524	2021-06-17
15.	Cliff Maron Speaking Notes	Pages 525-529	2021-06-17

APPENDIX “C”**REPRESENTATIONS**

PERSON APPEARING	CAPACITY
Deepinder Dhaliwal	Subdivision Officer, Planning and Development Regional Municipality of Wood Buffalo
Such Chandhiok	Subdivision Authority Supervisor, Planning and Development, Regional Municipality of Wood Buffalo
Chris Davis	Municipal Legal Counsel Regional Municipality of Wood Buffalo
Camille Goodheart	Municipal Legal Counsel Regional Municipality of Wood Buffalo
Mahmoud Naser	Applicant/Appellant
Rashid Naser	Agent – Appellant
Shaker Naser	Agent – Appellant
Cliff Maron	Agent/Engineering Consultant – Appellant
Audrey Rogers	Adjacent Property Owner