

**SUBDIVISION AND DEVELOPMENT APPEAL BOARD (SDAB)
OF THE TOWN OF OKOTOKS
DATED MAY 16, 2024
(Adjourned from March 21, 2024)**

DECISION

Hearing held at: Town of Okotoks Municipal Centre
Council Chamber and videoconference
5 Elizabeth Street, Okotoks

Date of Hearing: May 16, 2024

Members present: Shane Hansma (Chair)
Erin Felker
Kyla Mumby

Staff present: Colin Gainer, Subdivision Officer
Janice Storch, SDAB Clerk

Board Solicitor: Janice Agrios, KC, Kennedy Agrios Oshry Law
Bryan Marback, Kennedy Agrios Oshry Law (observer)

Summary of Appeal: Against the decision of the Town of Okotoks Subdivision Authority to refuse subdivision application SD2023-9 for boundary adjustments to 17 and 38 Oak Avenue / Block X, Plan 1650E and a portion of SE ¼ 28-20-29-W4M.

Appeal filed by: Absolute Surveys Inc. (as represented by Rick Grol)

PRELIMINARY MATTERS

1. The Board asked whether there were any objections to the members of the Board. There were no objections.
2. The Board asked whether there were any objections to the proposed hearing procedure. There were no objections.

EVIDENCE

3. The Board heard verbal submissions from the following:

Colin Gainer, Subdivision Officer ("SA")
Rick Grol on behalf of Absolute Surveys Inc. ("Appellant")
Carol McClary, Expert Witness on behalf of the Appellant
Manas Shome, Expert Witness on behalf of the Appellant
Gary Waters, Property Owner

4. The Board received written submissions from the following:

Colin Gainer, SA
Rick Grol on behalf of the Appellant (which included reports from Carol McClary and Manas Shome)
Gary Waters, Property Owner

5. The Board reviewed the materials contained in the agenda package and an additional written submission received at the hearing (which is on the Board's file).

SUMMARY OF SUBMISSIONS

Submissions of the SA

6. The SA summarized the written submission on the Board's file together with the relevant bylaws, policies, plans, and legislation at issue in this appeal.
7. Under section 654 of the *Municipal Government Act* ("MGA"), the Board must be satisfied that the subdivision is suitable for the purpose for which the subdivision is intended.
8. Section 9 of the *Matters Relating to Subdivision and Development Regulation* (the "Regulation") sets out considerations related to suitability, including potential for flooding and erosion.
9. The Town's Municipal Development Plan ("MDP") sets out policy limiting development in the flood fringe.
10. The subject lands are located in the Natural Areas (NA) district under the Town's Land Use Bylaw ("LUB"). The purpose of the NA zone is to preserve natural areas. The subject lands are also located in the flood fringe under the LUB.
11. In the SA's opinion, the proposed subdivision does not conform to the MDP, LUB, and is not suitable for subdivision due to concerns related to flooding.

12. The SA answered a question from the Board and clarified that the flood fringe in the LUB was based on a 1:100 year flood event, but the MDP refers to a 1:200 year flood event.

Submissions of the Appellant

Carol McLary for the Appellant

13. Ms. McLary reviewed her written report, which is on the Board's file. She provided a visual overview of the subject lands including the boundaries, access route to the lands, and location of the proposed residential development.
14. The floor of the proposed residential development would be located at an elevation of 1,050m, which is approximately 2m higher than the elevation of floodwater in the flood fringe during a 1:100 year flood event.
15. The subdivision would not alter the total area of the parcels. The subdivision is a boundary adjustment that proposes to shift lands from Area 3 to Areas 1 and 2. No new parcels will be created, and boundary adjustments are permitted under the MDP.
16. The LUB allows for single detached dwellings in the NA district.
17. The subdivision would not affect neighbouring landowners.

Manas Shome for the Appellant

18. Dr. Shome reviewed his written report, which is on the Board's file. He does not have concerns with respect to the subdivision and the Sheep River's morphology. The main channel is 400-500m from the proposed subdivision and contains heavily vegetated areas between the channel and the lands.
19. The river channel is very stable near the proposed subdivision, and there are no concerns about erosion in the flood fringe or migration of the main channel. The heavy vegetation provides erosion resistance and can lower flood velocity.
20. The flood fringe is calculated to a 1:100 year flood event; however, there is very little information available about water inundation on the subject lands.
21. The 1:100 year flood event floodwater level would be 1047.92m. The floor of the proposed residential development on the lands would have a floor level of 1050m, over 2m above the flood level.
22. The location for the proposed residential development is already much higher than the realistic 1:100 flood level, per modelling.

23. A flood will not reach the proposed development, and the proposed development will not affect flood activity.
24. Dr. Shore responded to questions from the Board and clarified that, during a flood event, the flood elevation would remain the same, however, the flood depth would vary across the floodplain and flood fringe.

Gary Waters, Appellant and landowner

25. Mr. Waters provided background to the subject lands, the intended purpose of the subdivision and the proposed use of the lands.
26. Mr. Waters purchased the subject lands in 1990 and moved a house to the subject lands in 2002. Mr. Waters currently resides on the subject lands. He has had no issues with flooding.
27. Various easements and rights of way on the subject lands have been granted to the Town, from time to time.
28. Mr. Waters successfully applied to subdivide the subject lands in 2017, however, the costs to proceed with the subdivision were too high.
29. In 2018, Mr. Waters submitted a boundary adjustment application, but did not follow through with it as he wanted a proposed development on the high ground.
30. The proposed subdivision does not change the access road, and would remove the necessity for an easement.
31. The proposed subdivision is a boundary adjustment to lands that are above the flood level and are not at risk of flooding.

Rick Grol for the Appellant

32. Mr. Grol reviewed his written submissions, which are on the Board's file.
33. The land is suitable for the proposed subdivision and the SA made errors in the decision.
34. The SA's reliance on the draft Sheep River Hazard Study ("SRHS") in coming to its decision was contrary to section 638.2(3) of the MGA.
35. The proposed subdivision meets the requirements of section 9 of the Regulations.

36. The proposed subdivision is permitted by section 2.2(7) of the LUB as the subdivision is only a boundary adjustment.
37. The NA district permits residential development, and permits up to two (2) dwellings in one (1) building.
38. The MDP is a high-level document/policy, and it is not a regulatory document. The MDP only creates policies to be taken into account, and the SA cherry-picked policies to justify its decision, when it should have viewed the MDP holistically in its entire context. The SA did not reference section 1.4.1(e) of the MDP in its decision.
39. The Board has broader discretion than the SA pursuant to section 654 of the *MGA*, as the Board must only have "regard" to a statutory plan, while the SA "must conform" to the same.
40. The proposed dwelling is a discretionary use.
41. The subject lands are suitable for subdivision. There is servicing available, other than water, which can be remedied by drilling a well.
42. Mr. Waters has been very agreeable and has worked with the Town with respect to easements and rights of way, previously.
43. The Appellant requests that the Board overturn the SA's decision. Mr. Waters would be willing to grant an emergency access easement over the existing driveway on the north of the subject lands should the appeal be granted.

Board Questions for the Subdivision Authority

44. The Board asked the SA whether it permitted water wells to satisfy the water service requirement. The SA replied that this was permissible, but generally not where it would be possible to tie in to the Town's water servicing lines.
45. The Board asked the SA whether it would be possible to tie the proposed residential development into the Town's sewer lines. The SA stated that the sewer line most proximate to the proposed residential development was not a force main, but gravity assisted, and tying in would be possible.
46. The Board asked the SA whether an earthworks permit would be required to raise the lands in the flood fringe. The SA replied that a permit would be required, except in AG districts. The SA did not know whether a permit had been obtained for the earthworks that occurred on the proposed residential development site.

47. The Board asked the SA if artificially created elevations would affect the flood fringe or floodway. The SA replied that the Flood Hazard Overlay defined the flood fringe and floodway.

Board Questions for the Appellant

48. The Board asked the Appellant about risks associated with a well. The Appellant replied that wells are regulated by the Province.

49. The Board asked the Appellant whether the proposed lot would meet requirements for a well. The Appellant replied that this requirement would be a condition of the subdivision.

DECISION

50. The decision of the Subdivision Authority is confirmed and the appeal is dismissed.

REASONS

MDP

51. The Board accepts the SA's submission that the proposed subdivision does not conform with the MDP or the LUB. While section 1.4.1(e) of the MDP permits boundary alterations of existing lots, the Board is of the view that the proposed subdivision remains limited by section 1.4.1(g)(ii) and is contrary to the intention of section 1.4.1(d).

52. Section 1.4.1(d) evinces Council's intention to limit permanent development of previously undeveloped sites in the flood hazard area, including the flood fringe as defined by the Province's current Flood Hazard Mapping. The subject lands are within the flood fringe under the Province's current Flood Hazard Mapping.

53. The application proposes to subdivide the subject lands to facilitate future development within the flood fringe, which is contrary to section 1.4.1(d) of the MDP. The proposed subdivision does not conform to the MDP's intent of limiting permanent development of previously undeveloped sites in the flood fringe.

54. Section 1.4.1(g)(ii) prohibits subdivision of previously undeveloped areas unless the applicant is able to demonstrate by analysis that a proposed development is safe or that provincial requirements enables development to take place. It further provides that in no case will subdivision be allowed to occur within the 1:100 flood fringe.

55. This appeal concerns lands located within the 1:100 flood fringe as stated both in the Provincial Flood Hazard Map, the MDP, and section 2.2 of the LUB. Section 1.4.1(g)(ii) of the MDP does not contain an exception for boundary adjustments.

LUB

56. The subject lands are contained in the flood fringe as defined in the Flood Hazard Overlay in the LUB and are in the NA district.
57. The primary intent of the NA district is to protect and enhance natural areas and natural assets. Minimal development may occur in a few areas that have historical consideration for Single Detached Dwellings. No evidence was presented to the Board to support such a historical consideration.

Suitability

58. Section 9 of the Regulations states that the SA must consider any potential for the flooding, subsidence, or erosion of the land and any other matters that it considers necessary to determine whether the land that is the subject of the application is suitable for the purpose for which the subdivision is intended.
59. Having reviewed the MDP, LUB, and Provincial Flood Hazard Mapping, the SA concluded that the subject lands are not suitable for the purpose of the subdivision due to the potential for flooding. The Board agrees with this finding.
60. The Appellant submits that the SA improperly relied on the SRHS in issuing its decision contrary to section 638.2 of the *MGA*. In the Board's opinion, the SRHS is not a policy under section 638.2 of the *MGA*, but was simply information that the SA considered as part of the information gathering process in accordance with section 9 of the Regulation.

Previous Approval

61. The previous approval was made under a previous MDP and LUB. The SA and the Board must consider application under the current and existing MDP and LUB. As such, the Board places no weight on the previous subdivision approval.

Summary

62. The proposed subdivision is located within the flood fringe. Council has directed in the MDP and LUB that development in the flood fringe should be limited. The Board finds that the application is contrary to the intent of the MDP and LUB with respect to further development in the flood fringe.
63. The SA had regard to and properly assessed the applicable policies of the MDP and LUB and properly considered matters under section 9 of the Regulations in concluding that the Land was not suitable for the purpose of the subdivision.

64. The Board confirms the decision of the Subdivision Authority. The appeal is dismissed.

Dated this 29th day of May 2024.

----- Original Signed -----

Shane Hansma, Chair
Subdivision and Development Appeal Board