

REPORT TO SUBDIVISION AND DEVELOPMENT APPEAL BOARD

File: Stop Order for Lot 6, Plan 992 0950
Property Owner: Dunvegan Gardens (AB) Ltd.
Appellant(s): Dunvegan Gardens (AB) Ltd. and Brad Friesen
Subject: Appeal of Stop Order
 Contravention of Land Use Bylaw 99/059
 Development without Development Permit Approval &
 Illegal Storage of a Restricted Motor Vehicle
Legal Description: Lot 6, Plan 992 0950 (the "Lands")
Civic Address: 128 Garden Lane, Fort McMurray, Alberta
Land Use Designation: SH – Small Holdings District
Date Stop Order issued: June 9, 2011
Date Appeal was Received: June 10, 2011

Introduction

The appeal (Attachment 1) stems from the decision of the Development Officer to issue a Stop Order in relation to lands described as Lot 6, Plan 992 0950, municipally described as 128 Garden Lane (Attachment 2).

As a result of complaints received by the Planning and Development Department, the current use of the Lands was investigated. As a result of the investigation, it was determined appropriate to issue a Stop Order as a result of several contraventions of the Land Use Bylaw being observed. The Stop Order indicated the following contraventions: development without an approved development permit in relation to a commercial landscaping operation and the illegal storage of a restricted motor vehicle in relation to heavy equipment and recreational vehicles parked on the Lands.

All property owners within 120m of the subject property have been notified regarding the appeal.

Jurisdiction of the Board

On appeal of a decision of the Development Officer to issue a Stop Order, the Subdivision and Development Appeal Board becomes the Development Authority. Further, the *Municipal Government Act*, R.S.A. 2000, c. M-26, as amended provides guidance to the Subdivision and Development Appeal Board on its role on appeal:

Hearing and Decision

687(1) At a hearing under section 686, the subdivision and development appeal board must hear:

- (a) the appellant or any person acting on behalf of the appellant,

- (b) the development authority from whose order, decision or development permit the appeal is made, or a person acting on behalf of the development authority,
- (c) any other person who was given notice of the hearing and who wishes to be heard, or a person acting on behalf of that person, and
- (d) any other person who claims to be affected by the order, decision or permit and that the subdivision and development appeal board agrees to hear, or a person acting on behalf of that person.

(2) The subdivision and development appeal board must give its decision in writing together with reasons for the decision within 15 days after concluding the hearing.

(3) In determining an appeal, the subdivision and development appeal board

- (a) must act in accordance with any applicable ALSA regional plan;
- (a.1) must comply with the land use policies and statutory plans and, subject to clause (d), the land use bylaw in effect;
- (b) must have regard to but is not bound by the subdivision and development regulations;
- (c) may confirm, revoke or vary the order, decision or development permit or any condition attached to any of them or make or substitute an order, decision or permit of its own;
- (d) may make an order or decision or issue or confirm the issue of a development permit even though the proposed development does not comply with the land use bylaw if, in its opinion,
 - (i) the proposed development would not
 - (A) unduly interfere with the amenities of the neighbourhood, or
 - (B) materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land,
 - and
 - (ii) the proposed development conforms with the use prescribed for that land or building in the land use bylaw.

Further, the *Municipal Government Act*, R.S.A. 2000, c.M-26, as amended contained the following provisions:

Development Authority

624(1) Subject to section 641, a council must by bylaw provide for a development authority to exercise development powers and perform duties on behalf of the municipality.

(2) A development authority may include one or more of the following:

- (a) a designated officer;
- (b) a municipal planning commission;
- (c) any other person or organization.

Appeal Board Established

627(1) A council must by bylaw

- (a) establish a subdivision and development appeal board, or
- (b) authorize the municipality to enter into an agreement with one or more municipalities to establish an intermunicipal subdivision and development appeal board,

or both.

(2) An intermunicipal subdivision and development appeal board is a subdivision and development appeal board for the purposes of this Part.

(3) Despite section 146,

- (a) in the case of a subdivision and development appeal board formed under subsection (1)(a), councillors may not form the majority of the board or the majority of the board or a committee hearing an appeal, and
- (b) in the case of a subdivision and development appeal board formed under subsection (1)(b), the councillors from a single municipality may not form the majority of the board or of a committee hearing an appeal.

(4) The following persons may not be appointed as members of a subdivision and development appeal board:

- (a) an employee of the municipality;
- (b) a person who carries out subdivision or development powers, duties and functions on behalf of the municipality;
- (c) a member of a municipal planning commission.

Appeal board established

628(1) A bylaw or agreement under section 627 must

- (a) provide for the applicable matters described in section 145(b), and
- (b) prescribe the functions and duties of the subdivision and development appeal board.

(2) A bylaw or agreement under section 627 may provide

- (a) for the members of the subdivision and development appeal board to meet in committees,
- (b) for 2 or more committees to meet simultaneously,
- (c) that the committees have any or all the powers, duties and responsibilities of the subdivision and development appeal board, and
- (d) that a decision of a committee is a decision of the subdivision and development appeal board.

Appeal board evidence

629 A subdivision and development appeal board

- (a) may, while carrying out its powers, duties and responsibilities, accept any oral or written evidence that it considers proper, whether admissible in a court of law or not, and is not bound by the laws of evidence applicable to judicial proceedings, and
- (b) must make and keep a record of its proceedings, which may be in the form of a summary of evidence presented at a hearing.

The appeal was filed within the time frame set out within the *Municipal Government Act*, R.S.A. 2000, c. M-26, as amended and as such the Subdivision and Development Appeal Board has the jurisdiction to hear this appeal.

Chronology

The current use of the Lands is a Market Garden, accessory greenhouse and a commercial landscaping business. Development Permits have been issued in relation to a greenhouse and similar supporting facilities which supports the Market Garden use. Therefore, the Market Garden is an approved use on the Lands.

Complaints from residents in the Draper area were received by the Planning & Development Department, and the Development Enforcement Officer conducted an inspection of the property on May 9, 2011. The violations identified during the inspection are as follows:

- the operation of a commercial landscaping business which is not a permitted nor discretionary use in the Small Holding District;
- the illegal storage of more than one (1) recreational vehicle, and;
- the illegal storage of more than one (1) commercial vehicle having a gross vehicle weight of more than 3,000kg but less than 7,000kg.

A Stop Order was issued by the Development Officer on June 9, 2011 (Attachment 3). The order outlined these issues and identified them as illegal developments in contravention of several sections of Land Use Bylaw 99/059, as amended. The Stop Order also outlined the actions required to remedy the contraventions and imposed a deadline for when the required actions are to be completed of 4pm on September 7, 2011. The order was served by the Development Enforcement Officer on June 10, 2011 (Attachment 4).

Discussion

The question before the Subdivision and Development Appeal Board today relates not to whether the landscaping business or the storage of recreational vehicles or commercial vehicles should be approved or if it can be approved but rather the question is whether there is a contravention of the Land Use Bylaw. There is no development permit application before the Subdivision and Development Appeal Board. If the Subdivision and Development Appeal Board finds that there is a contravention of the Land Use Bylaw, then the Stop Order should be upheld.

The Land Use Bylaw 99/059, states the purpose of the Small Holdings (SH) District is:

"To provide large lot acreages intended for residential, small scale agricultural pursuits and other compatible uses on lands that are potentially susceptible to flooding which are located below the 250 m contour."

The Small Holdings (SH) District contains a number of uses which support the intent of this district as a primarily residential area, with provisions to allow local businesses and agricultural uses where specific regulations under the Land Use Bylaw can be met and there would be no impact on the surrounding community. The Small Holdings (SH) district is a residential district. It is acknowledged that the Small Holdings district is not specifically titled as a residential district; however, it is necessary to look beyond the title to the district and examine the underlying purposes and uses that are allowable in the district to determine if the purpose of the district is residential. The purpose of the district specifically indicates that the district is intended for residential among other things. Further, the list of permitted uses provides several types of residential uses.

The following uses are the permitted uses listed in the Small Holdings (SH) district:

- Accessory Building;
- Essential Public Service;
- Home Occupation;
- Manufactured Home;
- Modular Home;
- Park;
- Public Use;
- Public Utility;
- Satellite Dish Antenna;
- Single Detached Dwelling;

The following are the discretionary uses in the Small Holdings (SH) district:

- Amateur Radio Antenna;
- Family Care Dwelling;
- Home Business;
- Market Garden;
- Temporary Building or Structure;
- Bed & Breakfast;
- Campground;
- Community Service Facility;
- Country Inn;
- Guest Ranch;
- Intensive Agriculture;
- Kennel;
- Outdoor Recreation Facility;
- Resort Facility.

Therefore, although the district is not specifically called a residential district, when the Land Use Bylaw is read in its entirety, the intent of the Small Holdings district is residential and uses that are compatible with such a use.

The approved use of the subject property is a Market Garden and associated Accessory Buildings (Greenhouses). Development Permits have been applied for and obtained for that use.

The definition of Market Garden according to the Land Use Bylaw 99/059 is:

"the growing of vegetables or fruit for commercial purposes."

The current commercial landscaping business being operated does not fall under the Market Garden definition but rather under the definition of Contractor, General. The definition of Contractor, General according to the Land Use Bylaw 99/059 is:

*"development used for industrial service support and construction. Typical uses include oilfield support services, laboratories, cleaning and maintenance contractors, building construction, **landscaping**, concrete, electrical, excavation, drilling, heating, plumbing, paving, road construction, sewer or similar services of a construction nature which require on-site storage space for materials, construction equipment or vehicles normally associated with the contractor service. Any sales, display, office or technical support*

service areas shall be accessory to the principal general contractor use." (emphasis added)

No approvals or other authorization exists for the operation of a commercial landscaping business on the subject property. Under the Small Holdings (SH) District Contractor, General is not listed as a permitted nor discretionary use and therefore cannot be approved by the Municipality or Subdivision and Development Appeal Board. Therefore, the operation of such a business on the Lands constitutes a contravention of the Land Use Bylaw.

There is little dispute that the landowner is operating a commercial landscaping operation from the Lands. This is evidenced not only by the number of commercial vehicles located on the Lands but also large mounds of dirt and various stockpiles of landscaping materials including various types of stone and rocks that are located on the Lands (see photographs attached to the Stop Order which is Attachment 3 to this Report). In addition, the Landowner has made representations that they are operating their commercial landscaping operation from the Lands. Based on a review of the "About Us" page of the Dunvegan Gardens website, www.dunvegangardens.ca, Dunvegan Gardens are garden centres, greenhouses, tree nurseries, market garden, gift shops and landscapers located in Fort McMurray (Attachment 5).

The landowner is entitled to operate a Market Garden and an accessory greenhouse on the Lands. Further, a development permit was issued for stockpiling. The development permit for stockpiling only allows for the removal of materials from Parcel F and the stockpiling of those materials alone on the Lands. The stockpiling permit does not contemplate stockpiling as part of a commercial landscaping operation. If the stockpile is to remain, it should be established that it cannot be used as part of the commercial landscaping operation. A Market Garden use is the growing of vegetables or fruit for commercial purposes. Any activities not directly related to the growing of vegetables or fruit would be outside of the Market Garden use and would require approvals. Development permits have been issued for some uses accessory to a Market Garden, such as a greenhouse. The greenhouse is accessory to the Market Garden use, i.e. for the growing of fruits and vegetables and was not approved as a Greenhouse use but rather as an accessory use to the primary use of the Market Garden. The heavy equipment and the storage of mounds of dirt, rocks and stone is not accessory to or form part of a Market Garden use.

The Land Use Bylaw provides:

76.2 Except as otherwise permitted under section 76 of this Bylaw, no motor vehicle other than a passenger vehicle, recreational vehicle and/or one (1) commercial vehicle having a gross vehicle weight (G.V.W.) of more than 3000 k.g. GVW but less than 7,000 k.g. GVW shall be parked on a site in a residential district for longer than is necessary for loading or unloading.

The inspection resulted in a determination that more than one (1) commercial vehicle was being stored on the Lands. No approvals or other authorization exists for the storage of more than one (1) commercial vehicle having a gross vehicle weight of more than 3,000kg but less than 7,000kg. The photographs attached to the Stop Order (Attachment 3 to this Report) clearly show that there is more than one (1) commercial vehicle on the site. As such, a contravention of the Land Use Bylaw exists and should be remedied.

As a result of the inspection, it was determined that more than one (1) recreational vehicle was being stored on the site. No approvals or other authorization exists for the storage of more than one (1) recreational vehicle. However, upon further review of the Land Use Bylaw it was determined that the under section 76.3 of the Land Use Bylaw the storage of recreational

vehicles in only addressed in the urban service area as opposed to the rural area:

76.3 Only one recreational vehicle or utility trailer may be kept on a residential lot in the urban service area provided it meets the rear and front yard setback requirements for accessory buildings in that district unless the recreational vehicle or utility trailer is less than 2.0 in height, then the required setback is 0.0m.

As a result, Planning & Development is recommending that the Stop Order be varied so as to remove the reference to a contravention of the Land Use Bylaw as a result of more than one (1) recreational vehicle being stored on the lands and the requirement for all but one (1) recreational vehicle to be removed from the Lands.

The continued use of the property in its current fashion is not acceptable. It is anticipated that, if left as is, the property will continue to negatively impact the use, enjoyment, amenity, and value of neighbouring properties and adversely affect the amenities of the surrounding neighbourhood. The use of the lands for a commercial landscaping operation and the storage of unauthorized vehicles (commercial and recreational vehicles) has resulted in the Lands being in contravention of the requirements under the Land Use Bylaw.

Section 645 of the *Municipal Government Act* provides:

Stop Order

645(1) Despite section 545, if a development authority finds that a development, land use or use of a building is not in accordance with

- (a) this Part or a land use bylaw or regulations under this Part, or
- (b) a development permit or subdivision approval,

the development authority may act under subsection (2).

(2) If subsection (1) applies, the development authority may, by written notice, order the owner, the person in possession of the land or building or the person responsible for the contravention, or any or all of them, to

- (a) stop the development or use of the land or building in whole or in part as directed by the notice,
- (b) demolish, remove or replace the development, or
- (c) carry out any other actions required by the notice so that the development or use of the land or building complies with this Part, the land use bylaw or regulations under this Part, a development permit or a subdivision approval,

within the time set out in the notice.

(3) A person who receives a notice referred to in subsection (2) may appeal to the subdivision and development appeal board in accordance with section 685.

If the Subdivision and Development Appeal Board finds that the use of the Lands does not comply with the Land Use Bylaw, which in the opinion of the Development Officer, is the case, then the Stop Order should be upheld and the landowner should be required to take the required steps to bring the Lands into compliance with the Land Use Bylaw.

Recommendation

The Planning and Development Department recommends that the Subdivision and Development Appeal Board uphold the decision of the Development Officer and maintain the issuance of the Stop Order on Lot 6, Plan 992 0950, requiring that the property be brought into compliance by undertaking the following work:

- remove the landscaping business and all associated activity and material, including but not limited to the storage and maintenance of commercial vehicles and landscaping equipment, the stockpiling of fill, and landscaping supplies and materials from the Lands;
- remove the commercial vehicles so that only one (1) commercial vehicle having a gross vehicle weight (G.V.W.) of more than 3,000 kg but less than 7,000 kg remain on the Lands;

before 4pm on September 7, 2011.

Rationale

Allowing the continued operation of a landscaping business on the property without the appropriate Municipal approvals will negatively affect the use, enjoyment, amenity and safety of surrounding properties and unduly impact amenities of the neighbourhood. Further, the landscaping business is a use which is neither permitted or a discretionary use in the Small Holding (SH) district, which district by its nature is a residential district as evidenced by the purpose of the district and the permitted uses. The number of commercial vehicles stored on the site are beyond what is permissible under the Land Use Bylaw without approval, and therefore these contraventions should be remedied. The provisions of the Land Use Bylaw were put in place by Council to balance the interests of the individual landowners and ensuring orderly development of the Municipality as a whole. It is important for the provisions of the Land Use Bylaw to be followed and therefore, the Stop Order should be upheld.

Attachments:

1. Appeal filed by Dunvegan and Brad Friesen
2. Subject Property Map
3. Stop Order
4. Note to File
5. About Us Page www.dunvegan.ca