

**PALLISER INTERMUNICIPAL
SUBDIVISION AND DEVELOPMENT APPEAL BOARD**

115 Palliser Trail, P.O. Drawer 1900
Hanna, AB T0J 1P0
Telephone: (877) 854-3371
Fax: (403) 854-4683

HEARING DATE: November 9, 2022
FILE NO.: 532532-22-D0089

Notice of Decision of the Board

INTRODUCTION

[1] On October 6, 2022, the Municipal Planning Commission of the Town of Drumheller (the "Town") refused development permit application no. 532532-22-D0089 submitted by Curtis Panisiak for a New Construction – Accessory Building – 32'x40' – In Conveyance Zone, with 50% Side Yard Variance and 20% Front Yard Variance (the "Application") located at Lot 10, Block 12, Plan 1313072, municipally described as 385 Starmine Drive in the Town of Drumheller, Alberta (the "Lands").

[2] On October 11, 2022, the Palliser Intermunicipal Subdivision and Development Appeal Board (the "Board") received an appeal from Holly and Curtis Panisiak (the "Appellants").

[3] The Board heard the appeal on November 9, 2022 via videoconference in accordance with the Meeting Procedures (COVID-19 Suppression) Regulation, AR 50/2020.

PRELIMINARY MATTERS

A. Board Members

[4] At the outset of the appeal hearing on November 9, 2022, the Chair requested confirmation from all parties in attendance that there was no opposition to the composition of the Board hearing the appeal. None of the persons in attendance had any objection to the members of the Board hearing the Appeal.

B. Exhibits

[5] At the beginning of the hearing, the Chair enquired if everyone in attendance had received the agenda package containing the documents received by the ISDAB (the "Agenda Package"). The Chair confirmed that the Agenda Package contains all the written materials that the ISDAB will rely upon to render its decision, that the Agenda Package was received by the Clerk in accordance with the submission deadlines, and that the Agenda Package was distributed to the Board and made available to the public before the hearing date.

[6] At the beginning of the hearing, the Chair asked whether any persons in attendance had any further information or evidence which they wished to submit to the Board for the hearing.

No further information or evidence was submitted to the Board. The Board marked the exhibits received as set out in Appendix A at the end of this decision.

D. Miscellaneous

[7] The Board is satisfied that it had jurisdiction to deal with this matter.

[8] There were no objections to the proposed hearing process.

[9] There were no preliminary matters raised at the beginning of the hearing.

[10] Other than the Appellants, the Board did not receive submissions from affected parties either in favour or in opposition to the Appeal, nor were any affected parties other than the Appellants present at the hearing.

DECISION OF THE BOARD

[11] The Board denies the appeal and upholds the decision of the Municipal Planning Commission, acting as the Development Authority, to deny the Proposed Development.

SUMMARY OF HEARING

[12] The following is a brief summary of the oral and written evidence submitted to the Board. At the beginning of the hearing, the Board indicated that it had reviewed all the written submissions filed in advance of the hearing.

Submissions of the Development Officer

[13] The Municipal Planning Commission for the Town acted as the Development Authority for the Application. At the appeal hearing, the Development Officer for the Town spoke on behalf of the Development Authority. In the summary of evidence, the Board will refer to the "Development Officer" because it was the Development Officer who spoke. The Board recognizes that the oral evidence is provided on behalf of the Development Authority.

[14] The Lands located within Countryside District under section 3.4 of the Town of Drumheller Land Use Bylaw 16.20 (the "LUB") and are also located within the Conveyance Zone of the Flood Hazard Overlay as set out in section 2.5 of the LUB.

[15] The Development Officer stated that the Application was for an Accessory Building. An Accessory Building or Structure is a Permitted Use in the Countryside District under section 3.4.2(6).

[16] The LUB limits development within the Flood Hazard Overlay – Conveyance Zone. The only uses which are allowed within the Conveyance Zone are *Agriculture – General* and *Recreation*

– *Non-Intensive*. The intent of the Conveyance Zone is to prohibit development which would inhibit the flow of flood waters through the community.

[17] The Development Officer explained that the Government of Alberta recently issued an updated Flood Inundation Map showing areas that are expected to be directly flooded in the event of a one in 50-year flooding event. The Lands are located in an area that may be directly flooded by water flowing at a rate of 1870 cubic meters per second to a depth of 1.22 meters (approximately 4 feet).

[18] The Development Officer explained that the Town has applied for funding to build a berm as a flood mitigation project to protect the area surrounding the Lands. The Town anticipated that the berm would be constructed in 2023, however, the project has been postponed due to funding issues. The Development Officer did not know when berm would be constructed.

[19] The Development Officer acknowledged he had discussions with the Appellants regarding the construction of an Accessory Building on the Lands in July 2022 and that he advised the Appellants that the Town would grant a development permit for an accessory building up to 40'x40', so long as the Appellants signed an agreement absolving the Town of all liability from any damages to the Appellants' property or any other person's property as a result of flooding and its impact on the proposed Accessory Building.

[20] At the time of these discussions, the Development Officer believed that the berm would be constructed in 2023. If the berm had been constructed, the Lands would be moved from the Conveyance Zone to the Protected Zone within the Flood Hazard Overlay. Had the Development Officer known that the berm would not be constructed in 2023, he would not have advised the Appellants that the Town would grant a development permit for an Accessory Building.

[21] Following their discussion with the Development Officer, the Appellants submitted the Application on September 14, 2022. The Application is for an Accessory Building (a Shop) of 32' by 40'. The proposed placement of the Accessory Building in the Application requires a 50% variance of the side yard setback and a 20% variance of the front yard setback set out in the Countryside District.

[22] The Application was brought before the Municipal Planning Commission as Development Authority as the requested variances to the side yard and front yard setbacks were greater than 10%. On October 6, 2022, the Municipal Planning Commission, as the Development Authority refused the Application. The minutes of the Municipal Planning Commission meeting state that the reason for the refusal was as the Lands are within the Flood Hazard Overlay – Conveyance Zone and that the Municipal Planning Commission did not have authority to approve a caveat to allow construction in the Conveyance Zone before flood protection measures are built to protect development in the area.

[23] In response to questions from the Board, the Development Officer explained that, although Accessory Building is a permitted use in the Countryside District zone, the Conveyance Zone prevents construction of an Accessory Building on the Lands. The Development Officer explained that section 2.5.3(4) of the LUB prohibits development unless the floodwaters will not be affected by the development. Due to the size and location of the proposed Accessory Building,

the Development Officer felt it would affect the floodwaters. The Development Officer acknowledged that there is discretion in section 2.5.3(4) for the Development Authority to allow structures to be built in the Conveyance Zone but stated that its discretion must be read in conjunction with section 2.5.3(3), which prohibits new development except for public utilities or replacing or renovating existing buildings or structures.

[24] The Development Officer explained that the term “hydrological system” used in section 2.5.3 is an engineering term referring to how water flows in and around structures, and within and outside of a riverbed. During a flood, the goal is to get water out of the flooded lands as fast as possible. The addition of any new development in the Conveyance Zone would obstruct and impede the flow of water. The Development Officer explained that if new development was allowed in the Conveyance Zone, the cumulative impact of the new development could have serious detrimental impacts on the flow of water during a flood.

[25] The Development Officer described the proposed Accessory Building as being “larger than many homes”. The size of the proposed Accessory Building and its proximity to the river would likely obstruct flood waters from draining out of the area and negatively impact the hydrological system in the event of the flood. The Development Officer did not receive any evidence to the contrary. During questioning, the Development Officer confirmed it considered the location of the proposed Accessory Building as adjacent to and upriver of 27 acres of open land which is owned by the Appellants when making this determination.

[26] The Development Officer advised that in respect of recent construction in the Conveyance Zone noted by the Appellants, this construction had no development permit and that the Town has issued a Stop Order.

[27] In response to a question from the Board, the Development Officer stated that there should be no new development in the Conveyance Zone until the Town receives funding to construct a protective berm.

[28] During its concluding remarks, the Development Officer emphasized that the Province of Alberta has issued clear direction to municipalities not to authorize development in floodways, and that the Town implemented this direction in the LUB. In the Development Officer’s opinion, allowing development in a Conveyance Zone goes against the LUB.

Submissions of the Appellants Holly Panisiak and Curtis Panisiak

[29] The Appellants own and occupy the Lands.

[30] In July, 2022, the Appellants contacted the Development Officer to discuss obtaining a permit to build an Accessory Building of approximately 40’x40’ in size on the Lands. The Applicants were happy to receive the Development Officer’s email of July 12, 2022 endorsing the development and accepted the Development Officer condition to place a caveat on the Lands indemnifying the Town for any potential losses caused by the Accessory Building in the event of flooding. On this basis and in good faith, the Applicants obtained a quote to construct the Accessory Building and submitted a permit application.

[31] On October 11, 2022, the Appellants appealed the Municipal Planning Commission decision and provided written submissions.

[32] The Appellants disagreed with the Municipal Planning Commission's reasons for refusing the Application and argued that the development falls within the scope of the Conveyance Zone regulation, section 2.5.3 of the LUB, for two reasons:

- a. The proposed Accessory Building would not obstruct or have a hydrological effect on floodwaters because it will be built upriver from 27 acres of open land, which the Appellants own; and
- b. The Development Officer provided no evidence that the Accessory Building would have a meaningful impact on the water quality in the event of a flood, considering the number of homes and garages in the area.

[33] The Appellants argued that, even if the construction of a protective berm is delayed for one or two years, that length of time is not unreasonable. The Appellants offered to sign a release of liability to assume all risk that the Accessory Building may pose to the Lands and neighbouring property in the event of flooding and offered to compromise on the proposed building's size.

[34] The Appellants submitted that the Board had authority to approve the Application under the variance powers set out in section 5.5.

[35] The Appellants stated that they have seen a new development in the area around the Lands including homes and garages.

[36] In response to questions from the Board, the Appellants confirmed that they received no objections from their neighbours and that their neighbours were aware of the proposed Accessory Building. The Appellants confirmed that the proposed Accessory Building would be located approximately 150-200 feet from the nearest neighbouring home and next to 27 acres of open land, which the Appellants own. The Appellant described the community as being made up of smaller houses that are widely dispersed in the countryside. The Appellant stated that, if the river flooded and disintegrated the proposed Accessory Building, the waterflow would have to carry the debris over 27 acres of land before reaching another home.

FINDINGS OF FACT

[37] In addition to any facts found by the Board which are set out in its reasons, the Board makes the following findings of fact.

[38] The Lands are located within the Town of Drumheller and municipally described as 385 Starmine Drive.

[39] The Lands are located within the Countryside District in the LUB and within the Flood Hazard Overlay-Conveyance Zone in the LUB.

[40] The appeal and written submissions were received within the appeal period as set out in section 678(2) of the *Municipal Government Act*.

REASONS

Jurisdiction

[41] The Board notes that its jurisdiction is found in section 687 of the *Municipal Government Act*, RSA 2000, c M-26 (the "MGA"). In making this decision, the Board has considered the oral and written submissions made by the Development Authority and the Appellants. The Board notes that the Appellant's permit was under appeal and therefore, under section 687(1)(a) of the MGA, the appellant is entitled to be heard.

687(3) In determining an appeal, the subdivision and development appeal board

- (a) repealed;
- (a.1) must comply with any applicable land use policies;
- (a.2) subject to section 638, must comply with any applicable statutory plans;
- (a.3) subject to clause (a.4) and (d), must comply with any land use bylaw in effect;
- (a.4) must comply with the applicable requirements of the regulations under the Gaming, Liquor and Cannabis Act respecting the location of premises described in a cannabis licence and distances between those premises and other premises;
- (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.

Issues to be decided

[42] The Development Officer submits that new developments, such as the Accessory Building applied for, are not permitted within the Conveyance Zone.

[43] The Board has determined that the following issues need to be addressed:

- a. What is the proposed use?
- b. Is the use allowed within the Countryside District?
- c. Is the use allowed within the Conveyance Zone?
- d. If the use is allowed in the Countryside District and the Conveyance Zone, should the Board exercise its discretion to allow the requested variances to the front and side yard setback?

1. What is the use?

[44] The Appellants and the Development Officer agree that the use applied for is an Accessory Building. The Board accepts that the proposed development is an Accessory Building based on the existing dwelling unit on the Lands and the description of the proposed development in the Application as a standalone garage.

2. Is the use allowed in the Countryside District?

[45] The Board notes that the uncontested evidence is that the Lands are located in the Countryside District. The Board accepts that the Lands are located in the Countryside District.

[46] The Appellants and the Development Officer agree that an Accessory Building is a permitted use in the Countryside District as set out in section 3.4.2(6) of the LUB. The Board has reviewed section 3.4.2(6) of the LUB and finds that an Accessory Building is a permitted use in the Countryside District.

3. Is the use allowed in the Conveyance Zone?

[47] The LUB provides for overlays which applies regulations to designated lands in addition to those set out in the land's underlying Land Use District. The purpose of an overlay, as set out in section 2.2.1(1) of the LUB is:

"to facilitate the implementation of specific goals and objectives contained in the Municipal Development Plan, including protecting *development* from environmental hazards and vice versa ..."

[48] Section 2.5 of the LUB provides for a Flood Hazard Overlay. The general intent of the Flood Hazard Overlay, as set out in section 2.5.1 of the LUB is:

"To identify lands within the *Town* that are susceptible to flooding during high water events and to regulate the *use* and *development* of the land with an area susceptible to flooding."

[49] Lands within the Flood Hazard Overlay are identified as being either in the Conveyance Zone or the Protected Zone.

[50] The Board notes the uncontested evidence is that the Lands are located in the Conveyance Zone. The Board finds that the Lands are located in the Conveyance Zone.

[51] The Board has considered each section of the Conveyance Zone Uses and Regulations in the LUB. The Board finds that the use of an Accessory Building is not allowed in the Conveyance Zone as:

- a. An Accessory Building is not an allowed use in the Conveyance Zone (s. 2.5.3(1));
- b. The Accessory Building has the potential to increase the obstruction of flood waters (s. 2.5.3(2) and (4)); and
- c. New development is not allowed in the Conveyance Zone except in limited circumstances which are not applicable to this matter (s. 2.5.3(3)).

[52] Section 2.5.3(1) limits the uses allowed within the Conveyance Zone to *Agriculture – General* and *Recreation – Non-Intensive* where the use is listed as permitted or discretionary in the underlying Land Use District. The proposed Accessory Building does not fall within the use of *Agriculture – General* or *Recreation – Non-Intensive*. Therefore, the proposed Accessory Building does not comply with the use prescribed for the Lands. Although an Accessory Building is permitted in the Countryside District, it is not one of the limited uses allowed in the Conveyance Zone.

[53] Sections 2.5.3(2) and (4) prohibit development in the Conveyance Zone and construction of structures in the Conveyance Zone where the development or structure has the potential to increase the obstruction of flood waters. The Board has considered the size of the proposed Accessory Building. The proposed Accessory Building is 32'x40'. Given the size of the proposed Accessory Building, the Board finds that it would likely obstruct flood waters. As such, the Accessory Building is not allowed in the Conveyance Zone. The Board acknowledges the submissions of the Appellants that any structure within the Conveyance Zone would obstruct flood waters. The Board accepts the submissions of the Development Officer that if new development was allowed in the Conveyance Zone, the cumulative affect of the new development could pose a serious risk during a flood.

[54] Section 2.5.3(3) provides that new development and structural alterations to existing development are not allowed in the Conveyance Zone except to accommodate public utilities, or to replace or renovate an existing building or structure. The Appellants have not identified how the proposed development may fall within any of these exceptions.

[55] The Board has considered the Appellants' request to vary the requirements of the LUB pursuant to section 5.5 of the LUB. The Board notes it may also vary the LUB under section 687(3)(d) of the MGA. The Board finds it cannot vary the LUB to allow an Accessory Building in the Conveyance Zone as an Accessory Building does not conform with the use prescribed in the LUB for land within the Conveyance Zone as set out above. As such, the Board cannot vary the requirements of the LUB under section 687(3)(d)(ii) of the MGA or section 5.5.1(3) of the LUB.

[56] The Board has also considered the submissions from the Appellants that they are willing to sign an agreement with the Town which would require them to take all liability for the Accessory Building. There is no discretion within the LUB to allow for a use within the Conveyance Zone subject to such an agreement. The Board does not accept that such an agreement changes the fundamental requirements of the LUB which does not allow for an Accessory Building within the Conveyance Zone.

[57] The Board has also considered the submissions from the Appellants that they own the adjacent property and that in the event of a flood, the Accessory Building would not damage any other structures. The Board does not accept this submission. There is no basis in the LUB to allow for development in the Conveyance Zone on the basis that it is unlikely to damage other structures if swept away in a flood. The Board accepts the submission of the Development Officer that the purpose of the Conveyance Zone is to allow flood waters to move out of the area and to prevent development which would obstruct flood waters. Even if the Accessory Building would not damage other structures if swept away, the Board finds that it will obstruct the flood waters.

4. If the use is allowed in the Countryside District and the Conveyance Zone, should the Board exercise its discretion to allow the requested variances to the front and side yard setback?

[58] As the Board has found that the use is not allowed within the Conveyance Zone, the Board is not required to go further and consider the requested variances to the front and side yard setback.

Further Comments

[59] The Board is sympathetic to position of the Appellants. The Board acknowledges the Appellants reached out to administration for the Town prior to proceeding with the Application and were advised, incorrectly, that the Town would allow for such a development on the Lands. The Appellants made the Application in good faith. The Board notes that the Development Officer acknowledged that it was likely a mistake to have advised the Appellants that they would be granted a development permit without certainty that a berm would be constructed in 2023.

[60] Issued this 22nd day of November, 2022 for the Palliser Intermunicipal Subdivision and Development Appeal Board.


L. Taylor, Clerk of the ISDAB, on behalf of L. Casey, Chair
PALLISER INTERMUNICIPAL SUBDIVISION AND DEVELOPMENT APPEAL BOARD

This decision may be appealed to the Court of Appeal of Alberta on a question of law or jurisdiction, pursuant to Section 688 of the Municipal Government Act, RSA 2000, c M-26.

**APPENDIX "A"
REPRESENTATIONS**

PERSON PRESENTING TO THE BOARD

1.	D. Drohomerski, Development Officer
2.	A. Knight, Development Officer in training
3.	H. Panisiak, Appellant
4.	C. Panisiak, Appellant

**APPENDIX "B"
DOCUMENTS RECEIVED AND CONSIDERED BY THE ISDAB**

Exhibit	Description	Page #
1.	Appellant - Appeal Information – Holly and Curtis Panisiak	1-2
	Additional Information – Email from D. Drohomerski dated July 12, 2022	3
2.	Application for Development Permit and attachments:	4-8
3.	Development Permit Notice of Decision dated October 6, 2022	9-10
4.	Development Authority Submission	11-36