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Manitoba

The Municipal Board

1144 – 363 Broadway
Winnipeg MB R3C 3N9
Phone: 204-945-2941
Fax: 204-948-2235
www.gov.mb.ca/mr/municipal_board

October 20, 2023

Legal Services
City of Winnipeg
185 King Street
Winnipeg, MB R3B 1J1

Dear Kalyn Bomback:

RE: SUBDIVISION APPEAL BY OWNER
WITH RESPECT TO 73 INMAN AVENUE (LOT 32 BLOCK 3 PLAN 2785 WL TO EXC. WLY 40 FEET IN RL 112 AND 113 PARISH OF ST. BONIFACE)
THE CITY OF WINNIPEG
FILE NO. 23D2A-0001

We enclose for your information a copy of Municipal Board Order Number D-23-004.

Yours truly,

E. Wills

Erin Wills
Secretary

EW/sdj/enclosure

c: Carlos Gameiro, City Clerk

THE MUNICIPAL BOARD OF MANITOBA
DECISION AND ORDER

DECISION DATE: October 20, 2023 Order No. D-23-004
File No. 23D2A-0001

MATTER:	Subdivision Appeal *The City of Winnipeg Charter* Section 282.1(1)
APPLICANT	Tajinder Pal Singh
PLANNING AUTHORITY:	City of Winnipeg
HEARING DATE:	August 22, 2023
PANEL:	Shelley Hart, Acting Chair Nelson Karpa, Member Chris Fulsher, Member

PARTIES AND APPEARANCES:

for the City of Winnipeg
Kalyn Bomback, Legal Counsel, City of Winnipeg
Kevin Kowalyk, Land Development Engineer, City of Winnipeg
Elise Finnigan, Planner, City of Winnipeg

for the Appellant
Tajinder Pal Singh, Applicant

INTRODUCTION

The City of Winnipeg By-law No. 20/2023 (the "Proposed By-law") is a proposed by-law to approve a plan of subdivision and amend Winnipeg Zoning By-law No. 200/2006 to re-zone land located at 73 Inman Avenue (the "Property") in the Riel Community pursuant to Development Application No. DASZ 51/2022 (the "Application"). The Application was submitted to the City of Winnipeg (the "City") by Tajinder Pal Singh ("Applicant") on behalf of Karamjit Singh Sidhu & Sukhraj Kaur Sidhu (the "Owners").

On January 26, 2023, Council of the City adopted the following: that the subdivision under the Application be approved subject to conditions. The Applicant is appealing the decision of the City to impose condition 6) Public

Lane (the "Public Lane Condition") to The Municipal Board (the "Board") under Section 282.1(1)(d) of *The City of Winnipeg Charter* (the "Charter").

PROPERTY

The Property, legally described as Lot 32 Block 3 Plan 2785 WLTO Exc: Wly 40 feet in RL 112 to 113 Parish of St. Boniface), is located in the Varennes neighbourhood of the St. Vital ward of the Riel Community. The Property, currently occupied by a one-storey house, is a 4320 square feet corner lot bordered by three roadways: to the South by Inman Avenue; to the East by a concrete public lane; and to the North by a gravel public lane (the "Lane"). To the East of the Property is commercially-zoned land that fronts on St. Anne's Road. To the North, South and West of the Property are lands zoned "R1-M" Residential Single-Family (Medium) District.

BACKGROUND

The Applicant applied for approval of a plan of subdivision on October 20, 2022, the purpose of which was to widen the public lane with a corner cut at the northeast corner of the Property, creating one new parcel to be conveyed to the City, pursuant to Development Application No. DASZ 51/2022. Together and associated with the Application, the Applicant applied for a rezoning of the Property. The Applicant intends to build a multi-family building with three residential units on the Property.

The City of Winnipeg Public Service (the "CWPS") completed an Administrative Coordinating Group Report (the "ACG Report") for the Application on December 6, 2022. The ACG Report recommended that if council approved the Application, the Applicant should enter into a servicing agreement (the "Servicing Agreement") (elsewhere described as a development agreement for servicing) containing conditions as outlined in the ACG Report. On January 3, 2023, the Riel Community Committee (the "Community Committee") held a public hearing during which the Application was discussed. Following the public representations, the Community Committee recommended adding the Public Lane Condition to the existing conditions in the Servicing Agreement, proposed in the ACG Report under Section II – Servicing Conditions. The Public Lane Condition is defined in the Servicing Agreement as follows:

> 6) Public Lane
> The Developer shall pay to the City, in cash, on demand, $16,000 towards the cost to complete pulvimixer treatment for

the Public Lane located between St. Thomas Road and the North-South Public Lane adjacent to the Planned Area, all as determined by and to the satisfaction of the Director of Public Works.

At the Standing Policy Committee on Property and Development (the "Standing Committee") meeting on January 9, 2023, the CWPS indicated it did not support the Public Lane Condition added to the Servicing Agreement by the Community Committee. However, the Standing Committee concurred with the Community Committee and recommended the additional condition to Council. The Executive Policy Committee also concurred in the recommendation at its meeting on January 17, 2023 and forwarded the Application to Council.

Council of the City approved the Application on January 26, 2023, subject to conditions as recommended, including the Public Lane Condition. The Applicant was advised of the decision on January 30, 2023. The Applicant appealed the Council decision, on behalf of the Owners, to impose the Public Lane Condition additional to those outlined under Section II – Servicing Conditions in the ACG Report of the Administrative Coordinating Group dated December 6, 2022 (the "Appeal").

The Board notes that the Appeal pertains only to the plan of subdivision, the Servicing Agreement to which it is subject, and Council's decision to impose the Public Lane Condition as a condition on the approval of the above.

ISSUES

Whether or not the Board should dismiss the Appeal or make any decision that council, the committee of council, the planning commission or the employee designated to deal with the matter could have made.

THE LEGISLATION

The City of Winnipeg Charter Act

Appeal of decisions

282.1(1) The owner of real property to which an application under subsection 275(1) relates may appeal the following decisions to The Municipal Board:

(a) the refusal or rejection of
(ii) an application to approve a plan of subdivision;

(d) a decision to impose conditions on the approval of an application referred to in clauses (a) or (b)

Decision of Municipal Board

282.1(7) The Municipal Board must, by order, either dismiss the appeal or make any decision that council, the committee of council, the planning commission or the employee designated to deal with the matter could have made.

Conditions

282.1(8) An order may be made subject to any terms or conditions The Municipal Board considers advisable, including any condition that council, the committee of council, the planning commission or the employee designated to deal with the matter could have imposed.

Notice of decision

282.1(9) The Municipal Board must make its order within 60 days after the hearing is concluded and must send a copy of the order to council, the appellant and any other party to the appeal.

Decision not subject to appeal

282.1(10) Subject to section 495, a decision of The Municipal Board on an appeal is final and not subject to further appeal.

FACTS AND EVIDENCE

Appellant

Tajinder Pal Singh, the Applicant, made the following submissions:

- On December 28, 2022, City Councillor Brian Mayes authored an article published in the Free Press Community Review entitled, *The 'pulvimixer' lane solution*.

- The article was published shortly before the January 3, 2023 Community Committee meeting, during which the Application was discussed.
- The article stated an allocation of $350,000 per year for the new "pulvimixer" treatment was approved by City Council with the first work scheduled to take place in 2023 on seven lanes in St. Vital.
- The Public Lane Condition, for $16,000 of public lane works, is out of scope for a development of this size.
- The development will not proceed if the Public Lane Condition remains.
- The Public Lane Condition disincentivizes development and does not align with the City's densification policy.
- The Applicant is willing to pay for their share of the pulvimixer treatment for the Lane if all the residents are contributing, but it is unjustified to ask the developer to pay for the entire Lane.
- When the Application appeared before the Standing Committee and then Council, only 20 seconds were spent addressing the Application with no discussion about the Public Lane Condition.
- At the Community Committee meeting, neither councillor asked for the Applicant's position regarding the Lane improvement. It was an order which was dictated at the end of the meeting.
- The Applicant was not asked any questions regarding the condition of the Lane.
- Councillors asked the neighbours questions, but none directly related to the pulvimixer treatment.
- The neighbours voiced concerns about additional traffic in the Lane.
- Councillor Mayes asked the Applicant if the Lane was paved.
- After the neighbours presented, the Applicant had the opportunity to address any issues raised. Comments were provided to address window and lot split concerns. No direct questions had been put forward regarding the pulvimixer treatment.
- During the preparation of the Application, the Applicant worked with City planners who requested the corner cut, which the Applicant agreed to.
- The Lane was never an issue with the City planners, and it was only raised at the end of the Community Committee meeting by Councillor Mayes without an opportunity for the Applicant to respond.

- The Applicant is the general contractor for the development.

The City of Winnipeg

Elise Finnigan, a Registered Professional Planner (RPP) with the Urban Planning and Design Division's Development Applications Branch in the Planning, Property and Development Department, made the following submissions on behalf of the City:

- The multi-step approval process of a development application from submission to council decision was described.
- The Urban Planning and Design Division recommended approval of the subdivision and re-zoning as well as the associated variances as the proposal aligned completely with the policies guiding development.
- A public hearing was conducted at the Community Committee meeting where public representations are permitted.
- The Proposed By-Law has now received first reading of Council. Second and third readings are pending the outcome of the Board hearing.
- After the third reading of the Proposed By-law by Council, the Servicing Agreement is executed.
- At all City hearings during the Application process the clerk's office maintains an agenda, minutes, a disposition and a video recording.
- A USB stick, included with the City's submitted materials for the Board Appeal hearing, provides links to recordings of the City meetings relating to this Application.
- Councillor Mayes agreed that the Lane was in poor condition and mentioned the local improvement program that the City has as an option for residents. He noted that the City was specifically looking at the Lane for pulvimixer treatment.
- Delegations made in opposition to the Application at the Community Committee meeting cited the poor condition and drainage of the Lane.
- The Applicant did not mention the pulvimixer treatment before or after the public representations.
- The Community Committee, after hearing from all delegations and public representations, closed the public hearing.
- The Community Committee concurred with the recommendation of the CWPS to approve the Application, subject to the Public Lane

Condition Councillor Mayes added for the contribution to the lane pulvimixing program.

- The Standing Committee and Council both supported the Application as amended by the Community Committee.
- The Charter provides the legal framework that enables the City to operate as an organization.
- Decisions of the CWPS and Council must be informed by the Development Plan (OurWinnipeg 2045) and the Complete Communities Direction Strategy 2.0.
- The Application totally matched the preferred location criteria and design guidelines for a triplex.
- Secondary considerations are only reviewed when an Application doesn't align with the preferred location criteria, which was not the case in this Application.
- The Applicant did not have the opportunity to respond specifically to the Public Lane Condition as the public hearing had been closed when Councillor Mayes first made the motion to include it.
- The condition of the Lane was discussed during the course of the hearing but not specifically in relation to the Public Lane Condition.
- The witness was unaware of an example in the Riel Community where a similar condition has been imposed on a development application.
- The Lane was not mentioned by the CWPS during the Application process.
- A pulvimixer treatment was not imposed on five other development applications for 10 Oakleaf Drive, 11 Moore Avenue, 166 Sadler Avenue, 29 Ellesmere Avenue and 124 Stranmillis Avenue.

Kevin Kowalyk, a Land Development Engineer with the Land Development Branch made the following submissions on behalf of the City:

- As a part of his job, Mr. Kowalyk reviews servicing requirements for new developments and makes recommendations to Council.
- Mr. Kowalyk also prepares development agreements informed by the Charter and the City's planning documents and engineering judgement from various departments.
- Mr. Kowalyk contributed to the recommended Land Drainage Sewers conditions in Schedule B of the ACG Report, including that:

    a) The Developer shall, at no expense to the City, extend the

land drainage system as required to service the Planned Area and adjacent lands, as determined by and to the satisfaction of the Director of Water and Waste.

- Public Works reviewed the Application and did not have any comments or concerns regarding the Lane.
- At the Standing Committee meeting, the CWPS indicated the Public Lane Condition of $16,000 was above and beyond the requirements of the Development Agreement Parameters ("DAP"). Although it was within Council's right to impose the Public Lane Condition, the CWPS was not supportive of it as it exceeded the requirements of the DAP.
- The Riel Community has made it known that lanes are a major concern and Councillor Mayes has added lane paving conditions to servicing agreements with increasing frequency.
- This particular segment of the Lane was already approved and scheduled to be completed with the pulvimixer treatment as a part of the lane improvement program, which was itself approved and fully funded.
- Pulvimixer treatment is two to four inches of gravel mixed with a cement product which binds the gravel, providing a hard, flat surface.
- The lifecycle of pulvimixer is not yet known, making it difficult to assess its cost compared to concrete.
- The $16,000 calculation was bid-on and priced and this particular lane was $32,000 for two blocks of lane.
- The pulvimixer pilot project is a maintenance procedure that is fully funded within the approved Public Works budget. The longevity of the pilot project is unknown.
- Obligations under the City's DAP relate to capital expenditures and new infrastructure. The DAP does not deal with infrastructure maintenance.
- Councillors can add or amend the CWPS recommendations and in the Riel Community it's not atypical to have a lane-paving condition added.
- The costing of the pulvimixer treatment was provided to Councillor Mayes at his request the week prior to the Community Committee meeting.

- The Lane was one of the top three lanes on the list to receive the pulvimixer treatment but Mr. Kowalyk was unsure if the work had been completed in the Fall of 2022 as scheduled.
- The $32,000 figure was the cost for two blocks of the Inman Avenue Lane, not just the Applicant's block.
- Councillor Mayes may have interpreted the $32,000 for a single block of lane and intended to divide it by half, arriving at the $16,000 figure instead of $8,000.00.
- If the lane works were a local improvement, the costing would be $1.65 per linear foot for concrete, or approximately $7,000 for the Applicant's frontage. There is no local improvement for pulvimixer.
- Prior to pulvimixer, lane conditions were addressed through paving, concrete or asphalt. There is no program to maintain paved lanes and gravel lanes are on a maintenance program, whereby gravel is added and graded based on resident complaints.
- Based on the DAP, the Public Lane Condition imposed on the Applicant is not equitable.

Kalyn Bomback, Legal Counsel for the City of Winnipeg, made the following submissions on behalf of the City:

- The CWPS did not support the decision to impose the Public Lane Condition.
- Council had the authority to make the decision they did.
- The decision is within the spirit of the prevailing by-laws, guidelines and legislation.
- The CWPS was correct and Council was working within its authority.
- By by-law and the Charter, the Community Committee had the authority to hear the Application and recommend approval of the Application subject to conditions.
- Council is the ultimate approving authority.
- The Charter states that a plan of subdivision may only be approved if it complies with OurWinnipeg 2045, secondary plans, and applicable zoning by-laws.
- The Charter permits Council to impose certain conditions on a development, referenced in section 259(1), subsections (f) and (i) of the Charter:

Conditions for plans of subdivision

259(1) Council may, by by-law, provide that approval of proposed plans of subdivision be made subject to one or more of the following conditions:

(f) that the owner of land within a proposed subdivision enter into one or more agreements with the city respecting such matters as council considers advisable or necessary, which agreements may include, without limiting the generality of the foregoing, requirements that,

(i) the owner pay to the city some or all of the cost of existing or future public works, including the cost of any related environmental, engineering or other studies or reports, which benefit or will benefit the proposed subdivision.

- This prerogative is, however, subject to Section 257(2):

Submission before setting conditions

257(2) The approval of a plan of subdivision must not be made subject to conditions unless the applicant for the approval has been given a reasonable opportunity to make submissions respecting the plan of subdivision.

- The City does not dispute that the Public Lane Condition was added after public representations closed.
- The wording of the Charter is important, including that stating, "a reasonable opportunity to make submissions respecting the plan of subdivision" must be given to the applicant, not respecting the conditions.
- At the public hearing, the Applicant did have reasonable opportunity to make submissions in relation to the plan of subdivision, particularly in relation to the condition of the lane and drainage.
- Councillor Mayes asked and received confirmation that the Applicant agreed with the content set out in the ACG report.
- The ACG report indicates vehicular access to the Property is proposed by the rear lane.
- Two neighbours who objected to the Application and made submissions spoke of concerns about the condition of the Lane,

which is frequently filled with water, in a state of disrepair, claiming that it would add greater demand on the infrastructure.

- Councillor Mayes indicated the Lane was on the list to receive pulvimixer treatment.
- After these issues were raised, the Applicant was given an opportunity to provide comments to any matter which had been raised.
- The City acknowledges the Public Lane Condition was not raised until after the close of the public representations. However, notwithstanding the concerns expressed regarding the Lane, the developer did not comment.
- At the Standing Committee meeting, the CWPS did note its reservations regarding the Public Lane Condition and the Councillors did engage in a dialogue as to its impact before unanimously forwarding the report and recommendations to Council.
- Guidance can be found in the recent decision of Arthur v. The City of Winnipeg (2023 MBKB 21), particularly paragraphs 48 to 52, Re: a planned subdivision and re-zoning.
- Commentary included in paragraph 51, states:

51. Council has the authority to pass by-laws establishing standards, criteria or requirements respecting the subdivision of land in the City. By-laws passed relating to a subdivision may establish standards, criteria or requirements respecting matters enumerated in s. 255 of the Charter. The standards, criteria or requirements include "such other matters as council may consider advisable". The City has broad power pursuant to the Charter and has the ability to impose conditions. The requirements imposed are set forth in s. 257(2) which requires the City to provide the applicant a reasonable opportunity to make submissions respecting the plan of subdivision. In this case, that right was provided by way of a public hearing at the ACC. In my view, the City has the jurisdiction and authority under the relevant provisions of the Charter to consider and pass applications for subdivision and rezoning property. The City also has the authority to impose conditions. In this case, they chose to impose conditions to ensure that the property and the proposed use complied with the terms and conditions of a servicing agreement and a zoning agreement.

- Similarly, City Council made recommendations on matters they deemed to be advisable following a thorough discussion at the

Community Committee meeting and the Applicant had reasonable opportunity to make submissions respecting the plan of subdivision.

- In the context of the Charter, the Public Lane Condition as added by Council was consistent with section 259(1).
- The decision made by Council is one which effectively brings the proposed development closer to, and within the spirit of what is contained in OurWinnipeg 2045 and the Complete Communities Direction Strategy 2.0.
- Council took necessary steps to ensure the proposed development complied with the planning by-laws.
- The subdivision standards by-law establishes standards for subdivisions as it relates to the DAP, ensuring parties pay their equitable share of costs.
- Lane works is a public works maintenance responsibility and is not captured by the DAP. However, Council has the authority to impose conditions relating to public works and cost recoveries and, by a majority vote, they may seek such cost recovery.
- In consideration of the impact of the proposed development upon the lane and the community, imposing this condition did assist with ensuring conformance with the City's planning by-laws and policy.

ANALYSIS

The Board has carefully considered all the evidence and submissions presented by the parties at the hearing.

The Board has reviewed this matter on the fundamental principles contained in the Charter, the Development Plan (OurWinnipeg 2045), the Complete Communities Direction Strategy 2.0., the Residential Development Guidelines and the DAP.

The Board agrees that the City has broad authority given to it under Section 6(1) of the Charter to impose conditions on a subdivision.

The Board further agrees that Council has the authority under Section 259(1) of the Charter to provide approval of proposed plans of subdivision be made subject to one or more conditions respecting such matters as Council considers advisable or necessary.

Section 257(2) of the Charter is particularly instructive for the Board. The legislation requires that the approval of a plan subdivision must not be made

subject to conditions unless the applicant for the approval has been given a reasonable opportunity to make submissions respecting the plan of subdivision.

The Board notes that the wording in Section 257(2) is for the benefit of the applicant in that it provides for an applicant's right to be heard. As such, the Board has decided to interpret Section 257(2) of the Charter broadly, such that the conditions of a plan of subdivision (referred to in that section) could also include any conditions set out in a servicing agreement on which a plan of subdivision is conditional.

Within the spirit of the Charter, the Board suggests that the inference to be derived from a logical and fair reading of Section 257(2) is that Council should not impose conditions on a plan of subdivision without providing a reasonable opportunity for the applicant to make a submission respecting the conditions before they are imposed.

The CWPS did not recommend the addition of the Public Lane Condition to the Servicing Agreement, deeming it to be nonconforming with the DAP. In the Board's view, this lack of conformity established a greater onus on the Community Committee to provide the Applicant with the opportunity to speak directly to the Public Lane Condition under consideration.

The Community Committee had an opportunity to raise the Public Lane Condition, which it would appear had already been contemplated, prior to the conclusion of the public hearing. The Community Committee, however, did not share its intention to impose the Public Lane Condition or provide any details of this condition during the public hearing, including on the issue of cost or cost recoveries. The evidence reveals that the cost issue may have also been misinterpreted by the Community Committee. The evidence is clear that the Public Lane Condition was added after public representations and the public hearing had already closed. Sharing and discussing the Public Lane Condition with the Applicant before the public hearing was closed would have ensured procedural fairness.

The Board also considered the reasonableness of the Public Lane Condition. The City confirmed that the pulvimixer treatment is a maintenance activity and that the Lane was already approved and scheduled for pulvimixer treatment in 2022 within the existing public works budget. This did not give rise to any reasonable assumptions that the Applicant might be subject to lane costs.

CONCLUSION

Based on the evidence and submissions provided at the Appeal hearing the Board concludes that the Applicant was not given reasonable opportunity to make a submission respecting the Public Lane Condition, nor was the Public Lane Condition reasonable in the circumstances. The Board will therefore order that the Public Lane Condition be removed from the Servicing Agreement on which subdivision approval is subject, with all other terms and conditions in the Servicing Agreement to remain as is.

The Board notes that the proposed rezoning amendment of the Proposed By-law associated with the Application is not part of this Appeal. The Board's Order applies only to the plan of subdivision and the Servicing Agreement to which it is subject.

THEREFORE, THE BOARD ORDERS:

That the City of Winnipeg By-law No. 20/2023 **be approved** and proceed to second and third reading by City of Winnipeg Council, subject to the following terms:

1) That the City of Winnipeg and the Owner enter into the Servicing Agreement with condition 6) Public Lane removed; and

2) That the City of Winnipeg make no further additions or amendments to the Servicing Agreement.

FOR THE MUNICIPAL BOARD

October 20, 2023
Date

Shelley Hart, Acting Chair

E. Wills
Erin Wills, Secretary