

# ALBERTA PUBLIC LANDS APPEAL BOARD

## Report and Recommendations

---

Date of Report and Recommendations: June 28, 2019

**IN THE MATTER OF** sections 121, 122, and 124, of the *Public Lands Act*, R.S.A. 2000, c. P-40, and sections 210, 211, 212, 213, 226, 227, and 235 of the *Public Lands Administration Regulation*, Alta. Reg. 187/2011;

**-and-**

**IN THE MATTER OF** an appeal filed by South Shepard Communities Inc. with respect to the decision of the Director, Applications Unit, Alberta Environment and Parks, to refuse an application for Department Licence of Occupation DLO 170075.

Cite as: *South Shepard Communities Inc. v. Director, Applications Unit, Alberta Environment and Parks* (28 June 2019), Appeal No. 18-0011-R (A.P.L.A.B.), 2019 APLAB 13.

**BEFORE:**

Ms. Marian Fluker, Board Member.

**PARTIES:**

**Applicant:** South Shepard Communities Inc., represented by Mr. Bernard Roth, Dentons Canada LLP.

**Director:** Ms. Lori Havanka, Director, Applications Unit, Alberta Environment and Parks, represented by Ms. Aurelia Nicholls, Alberta Justice and Solicitor General.

## **EXECUTIVE SUMMARY**

South Shepard Communities Inc. (the Appellant), applied to Alberta Environment and Parks (AEP) for a Department Licence of Occupation (the DLO) as part of the Appellant's plan for a housing project in southeast Calgary involving the removal of three wetlands, and reconstruction of a fourth wetland to act as a stormwater pond.

The Director, Applications Unit, Alberta Environment and Parks (the Director), refused the DLO application on the grounds it lacked key information. The Appellant appealed the Director's refusal of the DLO application to the Public Lands Appeal Board (the Board).

The Board scheduled an oral hearing of the appeal, however, the Appellant and the Director reached an agreement. The Appellant and the Director requested the Board recommend to the Minister that the Director's decision to refuse the DLO application be reversed and the DLO be issued to the Appellant with the standard terms and conditions.

The Board accepted the negotiated agreement and recommended the Minister reverse the Director's decision and order the DLO be issued accordingly.

## TABLE OF CONTENTS

I. INTRODUCTION .....	1
II. BACKGROUND .....	1
III. DISCUSSION .....	3
IV. RECOMMENDATION .....	4

## **I. INTRODUCTION**

[1] This is the Report and Recommendations of the Public Lands Appeal Board (the “Board”) to the Minister of Environment and Parks (the “Minister”), arising from an appeal filed by South Shepard Communities Inc. (the “Appellant”).

## **II. BACKGROUND**

[2] The Appellant is developing a housing project in southeast Calgary (the “Lands”). The Appellant’s plans for the Lands included removal of three wetlands and ephemeral drainage and reconstruction of another wetland (the “Reconstructed Wetlands”) which would serve as a stormwater pond. As wetlands are public lands under section 3(1) of the *Public Lands Act*, R.S.A. 2000, c. P-40,<sup>1</sup> the Appellant applied to the Director, Applications Unit, Alberta Environment and Parks (the “Director”) on May 19, 2017, for Department Licence of Occupation 170075 (the “DLO”) in order to complete the planned work.

[3] On August 2, 2018, the Director notified the Appellant he had refused the DLO application (the “Decision”). The Director stated his reasons for refusing the DLO application were that the DLO application did not contain:

- (a) an overview of the project area, including information on waterbodies, wetland boundaries and size, and drainage patterns;
- (b) clear rationale to explain what efforts the Appellant made to avoid the wetland, or why the Appellant chose its delineation methods;
- (c) modelling results to back up the Appellant’s statements that modification of the wetlands could not be avoided;
- (d) evidence to support the Appellant’s conclusions; and
- (e) data and analysis to demonstrate the Reconstructed Wetlands would

<sup>1</sup> Section 3(1) of the *Public Lands Act* provides:

“Subject to subsection (2) but notwithstanding any other law, the title to the beds and shores of

- (a) all permanent and naturally occurring bodies of water, and
- (b) all naturally occurring rivers, streams, watercourses and lakes,

is vested in the Crown in right of Alberta and a grant or certificate of title made or issued before, on or after May 31, 1984 does not convey title to those beds or shores.”

restore the wetland to its previous hydrological function.

[4] The Director stated in the August 2, 2018 letter:

“Based on the application and accompanying reports, this project would turn a naturally occurring wetland primarily into a storm-water pond and ornamental water feature for the proposed community. The storm pond would be tied into the municipal water system and storm-water management plan, making this a municipal responsibility.

The proposed development will cause a permanent loss of this naturally occurring wetland, habitat, function and the wildlife values associated with them and contribute to a cumulative loss in wildlife habitat in the local area.”<sup>2</sup>

[5] On August 20, 2018, the Appellant filed a Notice of Appeal with the Board. In the Notice of Appeal, the Appellant stated the Director:

- (a) erred in the determination of a material fact on the face of the record;
- (b) erred in law;
- (c) exceeded the Director’s or Officer’s jurisdiction or legal authority; and
- (d) did not comply with a regional plan approved under the *Alberta Land Stewardship Act*, R.S.A. 2009, c. A-26.8.

[6] On August 22, 2018, the Board requested the Director provide the records he reviewed and that were available to him when making his decision (the “Director’s Record”), and for the Appellant and the Director (collectively, the “Parties”) to provide available dates for a mediation meeting. The Director’s Record was provided to the Board on October 19, 2018, and sent to the Appellant on October 23, 2018.

[7] After consulting with the Parties, the Board scheduled a mediation meeting for January 14, 2019, in Calgary. On December 31, 2018, the Parties advised the Board they were exchanging information and requested the mediation meeting be adjourned. The Board agreed, and adjourned the mediation meeting while the Parties continued to exchange information and negotiate. The Parties continued to provide the Board with updates on the status of their discussions.

<sup>2</sup> Director’s Letter, August 2, 2018, at page 2.

[8] The Board scheduled an oral hearing of the appeal for June 19, 2019.<sup>3</sup>

[9] The Parties continued to negotiate, and on June 12, 2019, the Parties informed the Board they reached an agreement (the “Agreement”).

[10] On June 13, 2019, the Board informed the Parties the hearing was cancelled.

### **III. DISCUSSION**

[11] The Parties agreed to jointly request the Board submit a Report and Recommendations to the Minister recommending the Minister reverse the Director’s Decision and issue the DLO to the Appellant with standard terms and conditions.

[12] The Parties also agreed to the following terms, which do not require any action from the Minister:

- (a) the Appellant will file an application under the *Water Act*, R.S.A. 2000, c. W-3, with the Director;
- (b) upon completion of the Reconstructed Wetlands the Appellant will transfer to the Province the title to the Reconstructed Wetlands as part of an environmental reserve for the project;
- (c) the Director will support the Appellant’s applications to the City of Calgary for municipal approvals with respect to the Lands; and
- (d) subject to the Director’s discretion under the *Public Lands Act* and all regulations applicable to the transfer of the DLO, the Agreement reached between the Parties in this appeal runs with the Lands, and is binding on future owners.

[13] The Board considers the Agreement to be reasonable and recommends the Minister reverse the Director’s Decision and issue the DLO to the Appellant with standard terms and conditions, as requested by the Parties.

<sup>3</sup> Section 236(1)(b) of the *Public Lands Administration Regulation*, Alta. Reg. 187/2011 (“PLAR”),<sup>[2]</sup> requires the Board to complete a hearing within one year from receipt of a Notice of Appeal. In order to stay within the one year period, with agreement from the Parties, the Board scheduled an oral hearing of the appeal for June 19, 2019.

#### IV. RECOMMENDATION

[14] In accordance with section 122(3) of the Act<sup>4</sup> and PLAR, the Board recommends the Minister reverse the Director's Decision and order the Director to issue the DLO to the Appellant with standard terms and conditions.

[15] In accordance with section 124(4) of the Act,<sup>5</sup> a copy of this Report and Recommendations and any decision by the Minister regarding this appeal is to be provided to:

1. Mr. Bernard Roth, Dentons Canada LLP, on behalf of the Appellant; and
2. Ms. Aurelia Nicholls, Alberta Justice and Solicitor General, on behalf of the Director.

Dated on June 28, 2019, at Edmonton, Alberta.

"original signed by"

Marian Fluker  
Board Member<sup>6</sup>

<sup>4</sup> Section 122(3) of the *Public Lands Act* provides:

"The appeal body may, with the consent of the parties to the appeal, make its report to the Minister without conducting a hearing of the appeal."

<sup>5</sup> Section 124(4) of the Act states:

"The Minister shall immediately give notice of any decision made under this section to the appeal body, and the appeal body shall immediately, on receipt of the notice of the decision, give notice of the decision to all persons who submitted notices of appeal or made representations or written submissions to the appeal body and to all the persons who the appeal body considers should receive notice of the decision."

<sup>6</sup> Ms. Fluker was Acting Chair of the Public Lands Appeal Board at the time the appeal was filed.





ALBERTA  
ENVIRONMENT AND PARKS

*Office of the Minister  
Government House Leader  
MLA, Rimbey-Rocky Mountain House-Sundre*

## Ministerial Order 31/2019

*Public Lands Act,  
R.S.A. 2000, c. P-40*

and

*Public Lands Administration Regulation,  
Alta. Reg. 187/2011*

### Order Respecting Public Lands Appeal Board Appeal No. 18-0011

I, Jason Nixon, Minister of Environment and Parks, pursuant to section 124 of the *Public Lands Act*, make the order in the attached Appendix, being an Order Respecting Public Lands Appeal Board Appeal No. 18-0011.

Dated at the City of Edmonton, Province of Alberta, this 3 day of July,  
2019.

Jason Nixon  
Minister

## Appendix

### **Order Respecting Public Lands Appeal Board Appeal No. 18-0011**

With respect to the August 2, 2018, decision of the Director, Applications Unit, Alberta Environment and Parks (the "Director"), to refuse to issue Department Licence of Occupation 170075 under the *Public Lands Act*, R.S.A. 2000, c. P-40, to South Shepard Communities Inc., I, Jason Nixon, Minister of Environment and Parks, order that:

1. The Director's decision is reversed, and the Director shall issue Department Licence of Occupation 170075 to South Shepard Communities Inc. with standard terms and conditions.