

**FOOTHILLS COUNTY
SUBDIVISION AND DEVELOPMENT APPEAL BOARD
Development Appeal Board Decision**

HEARING DATE: JULY 27, 2021

BOARD ORDER: D8/21

APPLICANT: TRAVIS SHARPE

LANDOWNER: CHRISTINE LAJEUNESSE (SHARPE)

APPELLANTS: KENNETH ISAACSON AND SHAWNA GRAVES

APPEAL AGAINST: THE APPROVAL OF LOT GRADING

SUBJECT PROPERTY: PTN. NE 22-21-29 W4M; PLAN 1012121, BLOCK 2, LOT 5 (THE PROPERTY")

BEFORE: CHAIRMAN, G. BEACOM; BOARD MEMBERS, D. MILLER, R. TAYLOR; T. MILLS, R. PERCIFIELD AND CLERK, F. FAIRWEATHER.

DECISION

Having been satisfied that notice of this hearing was provided in accordance with the Municipal Government Act, R.S.A. 2000, Chapter M-26;

And upon having read the materials provided, and upon having heard the representations from the Appellants, Applicant, and the Development Authority for Foothills County with respect to the appeal filed by the Appellants in accordance with Section 685 of the Municipal Government Act against the approval of the Development Permit 20D 207 for Lot Grading on Ptn. NE 22-21-29 W4M; PLAN 1012121, BLOCK 2, LOT 5 (The "Property");

The Subdivision and Development Appeal Board for Foothills County (the "Board") has decided to:

ALLOW the appeal and OVERTURN the Development Authority's decision to approve Development Permit 20D 207 for Lot Grading on Ptn. NE 22-21-29 W4M; PLAN 1012121, BLOCK 2, LOT 5.

The application is thereby REFUSED.

INTRODUCTION

- [1] The subject property is a 2.52 +/- acre Country Residential District parcel located on 48 Street East, 0.5 miles south of Highway 552 E, and 2.5 miles north of the Town of Okotoks.
- [2] The application requests approval for lot grading following enforcement on the parcel for the construction of a berm along the west property line without first obtaining appropriate municipal approvals.
- [3] Following enforcement action, an engineer evaluation letter prepared by Alberto F. Cruz, P. Eng., P.E. was submitted by the Applicant which stated that the berm was appropriate

to prevent damage to the subject property and further, that the berm has not and will not adversely affect neighbouring properties.

[4] On June 23, 2021, the Development Authority approved Development Permit 20D 207 for Lot Grading on Ptn. NE 22-21-29 W4M; PLAN 1012121, BLOCK 2, LOT 5.

[5] An appeal was received from the Appellants, Kenneth Isaacson and Shawna Graves on July 14, 2021 against the approval of Development Permit 20D 207.

ISSUES

1. Lot Grading

- I. The Development Authority submitted that the application requests approval for Lot Grading which is required in order to bring the existing berm into compliance with Foothills County Land Use Bylaw 60/2014.
- II. The Development Authority submitted that the area surrounding the subject parcel slopes down from the southwest towards the northeast and an environmental reserve parcel is located to the east with an environmental reserve easement located to the north and an additional environmental reserve easement and overland drainage easement located to the north.
- III. The Development Authority submitted that an engineer's evaluation letter was submitted with the application and was acknowledged to be appropriate by Foothills County's Public Works Department. The letter states that the berm diverts rainwater surface runoff from the west, towards the berm and naturally flows to the north into a collection pond located within the environmental reserve easement area. Furthermore, that the berm was constructed to prevent damage to the subject parcel and the berm would not adversely affect neighbouring properties.
- IV. The Development Authority submitted that 'Lot Grading' within the Land Use Bylaw 60/2014 means 'any work, operation or activity that results in a disturbance of the earth including the removal of top soil or borrow, borrow pits, berming, excavating, trenching, backfilling, filling, land leveling, re-contouring and, grading other than for building purposes but does not include aggregate extraction, commercial logging, tree clearing, dugouts/private dams, ornamental ponds, storm water ponds, lagoons for the purpose of processing wastewater or landscaping'.
- V. The Development Authority submitted that Section 4.2.1.36 of the Land Use Bylaw 60/2014 states that a lot grading permit is not required when the job does not adversely impact the natural drainage, storage capacity, direction or volume into, out of or through the property.
- VI. The Development Authority submitted that all other instances stated in Section 4.2 of the Land Use Bylaw 60/2014 require a development permit for lot grading and drainage changes.
- VII. The Development Authority submitted that Section 9.17.5 of the Land Use Bylaw 60/2014 states the requirements for lot grading permits. This includes but is not limited to engineered plans and written description of the development.
- VIII. The Road and Development Technologist submitted that initially the Foothills County Public Works department had a site visit and had concerns with the construction of the berm due to the drainage flow and requested that the Applicant obtain a professional opinion to ensure that the runoff would not impact the neighbouring properties. The Road and Development Technologist submitted that the Applicant hired an engineer to assess the lot grading. The Applicant provided Foothills County with a copy of the evaluation which showed that the neighbouring properties would not be negatively impacted.
- IX. The Road and Development Technologist submitted that if the berm was not in place, the water would flow on the natural drainage course through the northern neighbour's property, the Appellant's property, and into the environmental reserve easement. The Road and Development Technologist explained the engineer's evaluation states that it was expected that the water would flow west to east until reaching the Applicants berm, then flow south to north following the natural

drainage course into the environmental reserve easement and not adversely impact the neighbouring landowners.

- X. The Appellant K. Isaacson submitted that the engineer's evaluation letter states that the berm has been in place for 3 years, and noted the berm was constructed in June 2020.
- XI. The Appellant K. Isaacson submitted that when the engineer came to assess the subject property, he completed it at a time of year when there was no runoff, and the water was still frozen. The Appellant also noted that the engineer did not come onto his property so that the Appellant could highlight changes of the flow and the pooling of the water.
- XII. The Appellant K. Isaacson submitted that they would like to be consulted and see engineer assessment and approval happen prior to any further lot grading occurring.
- XIII. Member of the gallery P. Kinton submitted that to her recollection the berm was constructed last summer in June or July of 2020 and the Engineer's Evaluation Letter was incorrect.
- XIV. The Applicant submitted that there is a typo on the Engineer's Evaluation Letter and the berm has been in place for 1 year.
- XV. The Applicant submitted that the three reasons for constructing the berm were privacy, flooding of the house, and screening.
- XVI. The Applicant submitted that he has sympathy for the Appellants and stated that he would like to arrange for an engineer to come out at his cost, to work with himself and the Appellants to try and arrive at a solution.
- XVII. The Applicant submitted that he did not have a discussion and inform the neighbouring landowners before constructing the berm.

2. Drainage/Standing Water

- XVIII. The Appellant K. Isaacson and Appellant S. Graves are the landowners directly north of the subject parcel.
- XIX. The Appellant K. Isaacson submitted that there is natural drainage flow coming from the Applicants property and the neighbouring landowner, the Kintons' property, which runs into the pond. In previous years there has not been drainage issues. He stated his property is impacted by the change of the water drainage resulting from the Applicant's berm and that the water could have been redirected east into the ditch instead if it was constructed differently.
- XX. The Appellant K. Isaacson submitted that the drainage course was altered, causing the water to flow between the two pine trees causing water to pool at and restricting the horse's access to the waterers and hay barn. He stated that they needed to excavate that area and redirect the water into the drainage course of the natural spring.
- XXI. The Appellant K. Isaacson submitted that the only pond located on his property resulted from a natural spring and has been there since he purchased the property.
- XXII. The Appellant K. Isaacson submitted that with all the flooding, there was excess water around the pond which resulted in having to take rocks out of the culvert so that the water could flow back on the natural drainage course to the environmental reserve easement.
- XXIII. The Appellant K. Isaacson submitted that he is concerned that in the future, flooding could be worse as this has been a dry year.
- XXIV. The Appellant S. Graves submitted that they needed to create a new paddock for the horses and take measures to redirect the water by creating a trench as there were significant safety concerns for their horses. The Appellant K. Isaacson agreed with S. Graves submission and stated that it has been costly to run water, construct another horse shelter and install electric fence to contain the horses safely.
- XXV. The Applicant submitted that the neighboring landowners, the Kintons, constructed a berm which diverted water onto his property causing his house to flood. The Applicant noted that more flooding was caused from the Kintons pushing snow against their neighboring fence line. The berm was constructed to stop the water from flooding his house and was deemed necessary and sufficient to help the flooding of the property by Foothills County's Public Works Department as well as a certified engineer.

- XXVI. Member of the gallery P. Kinton submitted that when they do snow removal on their property, the water from the snow drains into their own donkey field and feels as though they have not negatively impacted the Applicants property.
- XXVII. Member of the gallery P. Kinton submitted that the soil on her property which is not considered a berm, was professionally graded and slopes slightly toward her own house. P. Kinton noted it would not negatively impact the Applicants property.
- XXVIII. The Applicant submitted that recycled asphalt was placed on the south end of the berm in order to stop flash flooding and to push the water down his own property line and into the ditch.
- XXIX. The Applicant submitted that the Appellants had natural springs arising on their property last year and built a pond area with a fountain in order to move the water into the natural reserve. The Applicant noted that the Appellants had water drainage issues before the berm was constructed.
- XXX. The Applicant submitted that if the increase of water came directly off the berm, there would be water erosion on the berm and on the hills and stated there is no erosion on the berm. The water causing the flooding on the Appellants property is not only coming off of the berm and there could be another reason for their flooding. The berm would absorb the water flowing onto it or the water would absorb into the soil before reaching the berm.
- XXXI. The Applicant submitted that there has been more precipitation in previous years but this year his house still flooded, and he needed to take additional steps to push the water away. The additional measures include a wall, a concrete pad, weeping tile, recycled asphalt and other drainage to try and mitigate the flooding.

3. Encroachment

- XXXII. Member of the gallery P. Kinton submitted a concern that the berm is encroaching into the fence line bordering her property. P. Kinton noted that she is concerned about the encroachment amount in the future as there has been encroachment after one year of being constructed.

4. Animal Intrusion and Screening

- XXXIII. Member of the gallery P. Kinton submitted a concern with the size of the berm as it allows the Applicant's dogs to come onto her property and disturb the donkeys.
- XXXIV. The Applicant submitted that it was his intent to maintain the berm with trees, hedges and mulch which would help it look aesthetically pleasing and would contain the dogs to his property. The Applicant noted he was unable to continue with maintenance this season due to the stop order and other personal reasons. The Applicant submitted he did place predator wire and cattle fencing along the berm to stop the dogs from leaving his property as well.
- XXXV. The Applicant submitted that he has spoken with the neighbouring landowners, the Kintons regarding the unsightliness of their property.
- XXXVI. The Applicant submitted that the berm is partially used for screening as the neighbouring landowners, the Kintons have broken down vehicles, water tanks and equipment on the fence line of the properties which is obtrusive to look at and referred Section 1 and 2 of Appendix G – Screening Standards of the Land Use Bylaw 60/2014. The Applicant stated that the neighbour land is affecting the enjoyment he has with his own property to the point of selling the property but is unable to do so with a stop order in place.
- XXXVII. Member of the gallery P. Kinton submitted that her field bordering the Applicant's property is a horse and donkey field and there is only one vehicle parked in that field.
- XXXVIII. The Applicant submitted that the berm falls under the definition of screening which means that the berm does not require a permit unless it alters the drainage. After revealing that the berm will alter drainage the engineer completed the assessment.

REASONS FOR DECISION

The Board considered the information presented by the Development Authority, the Appellants, the Applicant, and the Gallery. The Board is allowing the appeal and overturning the Development Authority's decision to approve Development Permit 20D 207 for Lot Grading on Ptn. NE 22-21-29 W4M; PLAN 1012121, BLOCK 2, LOT 5 for the following reasons:

The Board considered the Engineer's evaluation letter prepared by Alberto F. Cruz, Peng., PE's, dated April 5, 2021, which indicated that the berm would not have a negative impact to neighbouring properties. The Board further considered testimony received from the Applicant, Appellants and adjacent landowner disputing the findings of the Engineer's evaluation letter, indicating that overland drainage had, in fact been altered. As such, the Board determined that the letter does not adequately evaluate the overland drainage issues on the subject property.

The Board determined that there was not sufficient evidence to demonstrate that the lot grading had not adversely impacted the natural drainage direction or volume into, out of, or through a property; or adversely impacted the natural drainage storage capacity of the property. It was the Board's opinion that a lot drainage plan, accompanied by the associated engineered approval, would be beneficial in considering future applications.

CLOSING

This decision can be appealed to the Court of Appeal on a question of law or jurisdiction. If you wish to appeal this decision you must follow the procedure found in Section 688 of the Municipal Government Act, R.S.A. 2000 Chapter M-26 which requires an application for leave to appeal to be filed and served within 30 days of this decision.

Dated at the Town of High River, in the Province of Alberta this 27th day of July 2021 and signed by the Chairman of the Subdivision and Development Appeal Board who agrees that the content of this document adequately reflects the appeal hearing, deliberations and decision of the Subdivision and Development Appeal Board.



Mr. Gar Beacom, Chairman

RELEVANT LEGISLATION

FOOTHILLS COUNTY LAND USE BYLAW 60/2014

Definitions:

LOT GRADING

Means any work, operation or activity that results in a disturbance of the earth including the removal of topsoil or borrow, borrow pits, berming, excavating, trenching, backfilling, filling, land leveling, re-contouring and, grading other than for building purposes but does not include aggregate extraction, commercial logging, tree clearing, dugouts/private dams, ornamental ponds, storm water ponds, lagoons for the purpose of processing wastewater or landscaping

SECTION 4.2 – No Development Permit Required

4.2.1.36 - Lot grading, which does not:

- a. Adversely impact the natural drainage direction or volume into, out of, or through a property; or
- b. Adversely impact the natural drainage storage capacity of the property.

SECTION 9.17 – Lot Grading and Drainage

9.17.5 - An application for Development Permit with respect to lot grading shall, in addition to the information requirements of Section 4.3 and Section 4.4, include engineered plans and a written description of the proposal describing:

- a. The location and dimensions of the proposed disturbed area;
- b. Existing conditions of the land including topography, vegetation, surface drainage patterns, and water courses;
- c. The type of lot grading activity proposed including:
 - i. Proposed grade elevations all over disturbed areas;
 - ii. Proposed surface drainage patterns;
 - iii. Amount of topsoil to be removed and replaced;
 - iv. Amount off clay cut and/or fill;
- d. Any impact on existing drainage in terms of volume and flow rate;
- e. Engineering analysis will be required for changing of existing drainage pattern;
- f. Proposed access, haul routes and haul activities;
- g. Proposals for preventing nuisance from dust;
- h. A reclamation plan that includes measures for controlling erosion and sediment, vegetation, weeds, etc.; and
- i. The costs required to reclaim the property.

- 9.17.9 - A Development Permit shall be required for any berm that exceeds 1m (3.28 ft.) in height and shall be subject to no impact on existing drainage. The berm shall be located and landscaped to the satisfaction of the Director of Public Works and Engineering.

MUNICIPAL GOVERNMENT ACT, R.S.A. 2000, CHAPTER M-26

Hearing and Decision

- 687(3)** In determining an appeal, the Subdivision and Development Appeal Board
- (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;

APPENDIX “A”

PERSONS WHO WERE IN ATTENDANCE, MADE SUBMISSIONS OR GAVE EVIDENCE AT THE HEARING:

	<u>NAME</u>	<u>CAPACITY</u>
1.	Brittany Hornsby	Foothills County - Development Officer
2.	Parth Mehta	Foothills County – Road and Development Technician
3.	Shawna Graves	Appellant
4.	Kenneth Isaacson	Appellant
5.	Travis Sharpe	Applicant
6.	Patricia Kinton	Gallery

APPENDIX “B”

I. DOCUMENTS RECEIVED PRIOR TO THE HEARING AND MADE AVAILABLE AT THE HEARING:

NO.	ITEM
1.	Development Permit Decision - 20D 207 (June 23, 2021 Decision)
2.	Engineers Evaluation Letter
3.	Notice of Appeal Package submitted by Shawna Graves and Kenneth Isaacson (July 14, 2021)
4.	Written Submission – Patricia Kinton

APPENDIX “C”

EXHIBITS MADE AVAILABLE AT THE HEARING

NO.	ITEM
1.	Power Point Presentation by the Development Authority, Brittany Hornsby
2.	Verbal Presentation by the Appellants, Shawna Graves and Kenneth Isaacson
3.	Verbal and Power Point Presentation by the Applicant, Travis Sharpe