INVESTIGATION REPORT

Pursuant to section 11 of the *Ombudsman Act*

Department of Energy, Mines and Resources

File OMB-COM-2019-08-001

(Previously OMB19-47I)

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May 8, 2023

Summary

An individual applied to the Department of Energy, Mines and Resources' Land Management Branch (Authority) for an enlargement of their existing lot. They wanted to put permanent structures on the additional land and then decided to change them to temporary structures only. They also wanted to enlarge their existing lot so that it conformed to the lot size allowed under a 'Country Residential' zoning configuration.

The Authority ran their application through its land application process in the context of lot enlargements but ultimately denied approval. It found the unused portion of their existing lot size to be big enough to accommodate their planned temporary usage. It also found that their lot, grandfathered as 'existing non-conforming', conformed with the 'Country Residential' zoning and settlement pattern around their property.

The applicant appealed the decision as per the Authority's appeal process. The decision-maker rejected the applicant's appeal because, in its view, the original decision about the applicant's lot enlargement had been correctly made.

Our investigation found that although the outcome reached may be reasonable and within the authority granted to the Director under the *Lands Act*, the 'Residential and Recreational Lot Enlargement Policy', which outlines the lot enlargement process, does not contain sufficient detail or mechanisms to ensure a fair, consistent and transparent process. For example, it was not clear what criteria would constitute an acceptable need for additional land and the Authority did not have an objective method for evaluating the application.

Our investigation also raised concerns over the fairness of the appeal process. The Authority's decision-maker, in reviewing the application decision for any procedural or interpretation errors, was predisposed to a particular outcome because the Lot Enlargement Policy lacks the necessary clarity in setting out, measuring and scoring any definitive criteria that would constitute a demonstrated need for application approval purposes.

The Ombudsman recommended that the Authority revise its Lot Enlargement Policy in plain language, including any consequential revisions to other affected policies. Any revisions should be consistent with the fairness standards clearly set out in the publication 'Fairness by Design: An Administrative Fairness Assessment Guide'' used by Ombudsman across the country.

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Complaint

On August 15, 2019, the Ombudsman received a complaint from an individual (Complainant) who alleged that the Department of Energy Mines and Resources (Authority) treated them unfairly by denying their lot enlargement application (Application) under application 2018-2862 (Complaint).

The Complaint proceeded through the Ombudsman's 'informal case resolution' process but the Complainant and the Authority could not reach resolution. The Ombudsman then decided to investigate the matter formally and assigned an investigator (Investigator) to it.

Jurisdiction

Section 11 authorizes the Ombudsman to investigate a complaint received, subject to subsection 12(1). Having considered subsection 12(1), the Ombudsman has the necessary jurisdiction.

Statutes Cited

Lands Act, RSY 2002, c.132

Ombudsman Act, RSY 2002, c.163

Subdivision Act, RSY 2002, c.209

Territorial Lands (Yukon) Act, SY 2003, c.17

Yukon Environmental and Socio-economic Assessment Act, SC 2003, c.7

Cases and Documents Cited

Cases

None cited.

Documents

Fairness by Design: An Administrative Fairness Assessment Guide, Canadian Council of Parliamentary Ombudsman (2022)

Guide to the Land Application Process, Department of Energy, Mines & Resources (July 31, 2015)

Land Application Appeal Policy, Department of Energy, Mines & Resources (undated)

Land Review Committee Terms of Reference, Department of Energy, Mines & Resources (July 7, 2015)

Residential and Recreational Lot Enlargement Policy, Department of Energy, Mines & Resources (July 07, 2016)

Explanatory Note

All section references in this investigation report (Report) are to the *Ombudsman Act*, unless otherwise stated.

The 2022 Canadian Council of Parliamentary Ombudsman publication 'Fairness by Design: An Administrative Fairness Assessment Guide' (Fairness by Design) is used by ombudsman across the country. It is a fairness assessment tool to determine whether a program decision-making process is administratively fair in design and delivery. This Report will use Fairness by Design standards to investigate the issues and reach conclusions. It can be found as follows.

> *https://www.yukonombudsman.ca/uploads/media/6335f1c3286ce/Fairness_by_Design-June17-900_2022.pdf?v1*.

Background

[1] The Authority's 'Land Management Branch' accepts applications to buy, lease and use public land. It then reviews land applications, including applications for lot enlargements, and makes decisions based on the powers provided in the *Lands Act*, the *Territorial Lands (Yukon) Act* and the *Subdivision Act*. The process also considers the interests of the public, Yukon First Nations (YFNs), the Yukon Government (YG) and other stakeholders prior to making a final decision about the disposition of public lands.

[2] Lot enlargement applications must also comply with the 'Residential and Recreational Lot Enlargement Policy' (Lot Enlargement Policy). They may be subject to a review under the federal *Yukon Environmental and Socio-economic Assessment Act* (YESAA) and require, in the case of a municipality, written acknowledgement from a municipality that the application can proceed to a conclusion. An application may result in an approval, conditional approval, denial or deferral pending more information.

Events leading to the Complaint

[3] On May 28, 2018, the Complainant submitted their Application to enlarge their 0.28-hectare lot in the Town of Watson Lake (Watson Lake). They initially wanted the lot enlargement to build a permanent garage or house, including temporary storage for boat and utility trailers.

[4] On June 13, 2018, an Authority 'Lands Officer' (Lands Officer) sent the Complainant an email requesting the following information.

- A letter from the municipal authority indicating that the proposed use was either in compliance (or not) with existing planning and zoning schemes but, if not, would be considered through an established public zoning/planning amendment process.
- As per the attached maps, a detailed site plan that included the location/approximate size of buildings to be constructed, marked access and potential storage area.
- An elaboration of their rationale for acquiring this parcel of land because some information appeared to be missing from the Application.

[5] On July 10, 2018, the Complainant emailed the Lands Officer and responded as follows.

- *I have a letter of support from* [WL]
- *A more detailed site plan has been prepared.*
- *A sketch titled 'Lot Enlargement Appl' was included and consisted of a hand-drawn square … . Above the square there is an outline of the proposed land enlargement marked with a dashed line. There is a legend on the top left to identify the following items on the sketch: temp shelter, storage, access, and application.*
- *Future plans are for construction of a garage and/or a new dwelling. Existing dwelling is old and too close to the Alaska Highway. Also for storage of my boat, utility trailer and cargo trailer.*
- *The size of my titled lot plus this agreement for sale would be in keeping with the size of the Lots in Bellview* [sic] *subdivision. Zoning is for country residential. There is light industrial lots on both sides of me and I would like some protection from any enlargements that they may apply for.*

> *At present my storage is in plain view of the Alaska Highway and also creates congestion. I would like to have it out of sight of highway traffic. A good portion of my lot is taken up by the garden, septic field and the well and therefore cannot be used for anything but.*
>
> *Irregular shape of the parcel applied for is to eliminate sloping ground and disturbed ground from previous land clearing activity behind my lot. The area is applied for* [sic] *is undisturbed.*

[6] On August 28, 2018, the Lands Officer emailed the Complainant and wanted to know in respect of building a new garage or dwelling what equipment they planned on using. The Lands Officer also wanted them to provide building dimensions even if rough. In this same email, the Lands Officer also advised that the Complainant 'would likely' have to go through a YESAA review because constructing a permanent building involves heavy equipment and moving earth.

[It should be noted that during the 'policy compliance review' stage, a Lands Officer can determine if an application triggers a YESAA assessment before it moves to the 'public review' stage. If it does, then the public review is conducted as a YESAA-triggered review. If it does not, then the public review is conducted through a non-YESAA internal assessment process involving the Authority's 'Land Review Committee'.]

[7] On September 28, 2018, the Complainant advised the Lands Officer that their long-range plan was to construct an 18 x 24-foot structure on grade that would not involve digging or removing earth. The Complainant would instead compact a gravel pad if necessary, selectively remove trees by hand, use solar power and make no changes to their well or septic field.

[8] On October 1, 2018, the Lands Officer emailed the Complainant and advised that it would be helpful to add a diagram of their lot that included the location of their house, septic, garden, storage area, and so forth because showing that the space on their titled lot was already being utilized would support the rationale for acquiring more land.

[9] On October 18, 2018, the Complainant provided a sketch of their lot consisting of a hand-drawn square, inclusive of a legend, to identify the location of the following items on the sketch, most of which appeared to fill the lot: house, septic field, well, sheds, woodshed, greenhouse, gardens, paved drive, gravel drive, firewood storage, and firepit.

[10] On October 22, 2018, the Lands Officer emailed the Complainant and requested clarification of the following.

- *The structure that you plan to build on the proposed site – will this be a dwelling (house) or a garage for storage? Your application states that "future plans are for a garage or construction of a new dwelling."*
- *In the area where you plan to build a garage or dwelling – are there stumps that will need to be pulled? If so, how do you propose to do this?*
- *Is the location of temporary shelter in your sketch where your future dwelling or garage will be placed? What is the purpose of the temporary shelter?*
- *The storage area depicted in your sketch – "to allow for storage of boat, utility trailer and cargo trailer" will you be construction* [sic] *a shelter for these items or is it just a parking area with no shelter? If you will be building a shelter for these items please provide approximate dimensions.*

[11] On October 23, 2018, the following occurred.

- The Complainant emailed the Lands Officer and advised that they had decided to 'scrap' building a house or a garage because they planned instead to put up a temporary structure on the lot enlargement parcel to protect such items as an ATV, snowmobile, tools and firewood. The storage of their cargo trailer, boat and utility trailer would not be under any covers or structure.
- The Lands Officer emailed the Complainant and responded that the Authority was waiting for a response from Watson Lake to see if their proposed use met the Watson Lake zoning requirements and its Official Community Plan.

[12] On October 26, 2018, the Lands Officer advised the Complainant as follows.

- As per an attached Watson Lake letter, the use of their proposed lot enlargement did not conform to current zoning regulations and would require an Official Community Plan amendment, as well as a zoning change to 'Country Residential' to accommodate the use.
- The Application could continue to be reviewed but approval would be subject to the Watson Lake Official Community Plan and zoning outcomes.

- The Complainant's demonstrated need rationale for acquiring the lot enlargement was not very strong.

- The next step in the process was stakeholder consultation, including Yukon First Nations and neighbours.

[13] On November 6, 2018, the Complainant advised the Lands Officer that they wanted their Application to proceed through the process 'as is'.

[14] On December 14, 2018, the Lands Officer advised consultation stakeholders that the Application did not trigger a YESAA assessment and that the consultation period was open up to and including January 14, 2019.

[15] At the close of consultations on January 14, 2019, the Lands Officer had received no significant concerns by any party.

[16] On January 24, 2019, the following occurred.

- A different Lands Officer took over the file. Since there seemed to be land on the Complainant's current property lot not being used, the Lands Officer requested that the Complainant provide a revised drawing to scale and include any reasons why the back portion of their lot was not suitable for use.

- The Complainant replied that they had already sent this information to the former Lands Officer. The Complainant referred to Watson Lake 'Zoning Bylaw 07-015' (Watson Lake Zoning Bylaw), noting that their current lot was zoned 'Country Residential'. They also noted that the smallest lot in the Bellevue subdivision, directly north of their lot, was between two and four times the size of their lot.

- The Complainant later advised the [new] Lands Officer that they figured their lot was 0.228 hectares in size and, with the lot enlargement, would then become 0.47 hectares. They noted that the minimum area in the bylaw was 0.3 hectares and the maximum was 1.0 hectares. They added that the maximum area for buildings was 30% of the total lot size and that septic fields, water wells/lines and the required distances between them take up a lot of area.

[17] On January 28, 2019, the Lands Officer telephoned the Complainant and asked for their lot extension rationale. The Complainant stated the following.

- Their lot did not meet the minimum size for Watson Lake 'Country Residential' zoning.

- The irregular shape of the proposed addition was due to a gully, long ago cleared of trees and drums.
- He could not build over water lines or a septic field.
- Watson Lake zoning regulations state that an owner cannot have more than 30% of their property 'under a roof'.
- The northeast corner of their lot was a road allowance.

[18] On February 19, 2019, a Watson Lake employee advised the Lands Officer that the road buffer next to the Complainant's lot did not affect its use and existed for potential future access to the land behind the Complainant's lot. There were no plans, at the current time, to develop their land, noting that it was zoned 'Parks and Recreation' and sometimes referred to as a 'Holding'. The Complainant also advised that the Watson Lake council supported the Application.

[19] On February 21, 2019, the following occurred.

- The Lands Officer contacted the Complainant, attaching the Application for reference. The Lands Officer asked the Complainant to clarify some of their rationale for the additional land so that the Lands Officer could make a recommendation to the Director of the Authority (Director) based on the updated Application.
- The Complainant emailed the Lands Officer and agreed. The Complainant then added the following.

  > *Reference can be made to the* [WL] *Zoning Bylaw which sates* [sic] *Country residential lots are between .3 ha and 1.0 ha in size. At present* [my lot] *is .28 ha and with the applied for area would be .4 ha, well within the zoning requirements.*

[20] On April 10, 2019, the Authority's 'Land Review Committee' (LRC) reviewed the Application and determined that it did not comply with the Lot Enlargement Policy for the following reasons.

- The Application did not demonstrate a substantial and permanent need for the lot enlargement. The existing lot could support the proposed storage space without affecting the Complainant's well and septic field. The septic field setback requirements outlined in the 'Design specifications for Sewage Disposal Systems' handbook did not restrict the use of land on their lot. In addition, the distance between their septic field and well was in compliance and had no bearing on their rationale for requesting a lot enlargement.

- The Complainant's drawing was not to scale and showed their lot to be fully utilized but the Authority satellite map showed that over half of their lot was void of improvements. In addition, 'Country Residential' zoning can accommodate temporary/removeable structures closer to lot lines (*i.e.,* a side setback can be 1 meter instead of the 7 meters required for permanent structures and a rear setback can be 3 meters instead 7.5 meters), so adding temporary/removeable structures to their lot would not exceed the maximum site coverage of 30%.

- The requested land was not under the control of WL, despite its support for zoning conformity as advocated by the Complainant. Although their lot did not meet the minimum size of a 'Country Residential' configuration, it had been surveyed in 1965 when Canada administered Yukon lands and was therefore grandfathered as an 'existing non-conforming' lot. As such, it was not in need of zoning compliance [because it already complied].

[21] On May 21, 2019, the Director sent the Complainant a letter advising that their Application was denied due to the "lack of demonstrated need for land, as required by the [Lot Enlargement Policy]" (Decision Letter). It also stated the following.

> *The* [Lot Enlargement Policy] *requires "a description of why the land applied for is required, including why that amount of land is needed." This must be accompanied by a scaled map of the site plan demonstrating how the land will be used.*
>
> *The* [Application] *received was based on the requirement for more storage. Our review of your* [Application] *indicates this can be fulfilled on your lot in compliance with* [WL] *zoning (Country Residential) and septic field setback requirements.*

[22] On June 6, 2019, the Watson Lake Mayor sent the Director a letter acknowledging receipt of a copy of the Decision Letter. In supporting the Application, it stated the following.

> *At the June 5 meeting, Council discussed the reasons outlined in your letter for declining the* [Application]*. Although the reasons stated were based on the requirement for more storage, the* [Application] *was also to bring the property into compliance with the* [WL] *Zoning Bylaw. The bylaw stipulates that the minimum area for a Country Residential lot is 0.3 hectares. The property registered to* [the Complainant] *does not meet this requirement. The* [Application]*, if approved would increase the size of the property to a combined area of 0.4 hectare, meeting the requirement for a Country residential* [sic] *property.*

> *Council supports the proposal from* [the Complainant] *and is requesting that* [the Authority] *reconsider their* [sic] *decision, taking into consideration the* [WL] *zoning regulations.*

[23] On June 7, 2019, the Complainant sent a letter to the Authority's Assistant Deputy Minister (ADM) appealing the Director's decision to deny the Application (Appeal Letter). The Complainant's appeal referred to the 'Country Residential' zoning bylaw and its minimum lot size requirement, stating that approval of the Application would bring their lot into bylaw compliance. The Appeal Letter also stated the following.

> [Watson Lake] *… has been empowered by* [YG] *to make and pass bylaws. One is* [the Watson Lake Zoning] *Bylaw. …*
>
> *The decision made by your officer was based on policy not law.*
>
> *I have attached a letter from* [WL] *which supports the approval of* [my Application]*. …*

[24] On July 5, 2019, the Director sent a letter to the Watson Lake Mayor acknowledging Council's support rendered for the Application and advising that the primary rationale for the decision was based on the Application not meeting a demonstrated a need for the additional land requested within. It also advised the that the Complainant had since appealed this decision to the ADM, with a copy of the Mayor's June 6 letter provided to assist in the appeal. In addition, it suggested the following.

> *Notwithstanding the decision on the appeal, given your recent input on minimum lot sizes in this zone, it would appear that future land uses in this specific area may benefit from a more proactive and coordinated approach with the support of* [WL]*, the* [Authority] *and the Land Development Branch in the Department of Community Services. I have copied the* [Land Development Branch] *Director for her awareness. …*

[25] On July 9, 2019, the ADM sent the Complainant a letter advising them of the appeal decision (Appeal Decision). It stated that, in accordance with the 'Land Application Appeal Policy' (LAA Policy), an appeal can only occur on two grounds: [errors or evidence]. The Appeal Decision also stated the following.

> *Your* [Application] *did not demonstrate a clear need and rationale for additional land. Given the information on file, the* [Authority] *determined that the current size of your 0.28 hectare lot is sufficient to support your proposed temporary storage space without impacting the well and septic field.*

Your appeal letter and the supporting letter from [WL] *indicate you believe your* [Application] *should not be denied because the current configuration of your lot does not meet the* [WL's] *zoning for minimum lot size. Your lot is considered existing non-conforming. The* [Authority] *does not approve lot enlargement applications that are made for the sole purpose of achieving compliance with municipal zoning.*

Based on the information you provided in your appeal letter, I have concluded that the [Authority] *did not err during the land application review process or in the interpretation of the applicable* [Lot Enlargement Policy]*, and that the* [Authority] *properly considered the information relevant to its decision to deny your* [Application]*. For those reasons, I confirm the* [Authority's] *original decision to deny your* [Application]*.*

Issues

[26] There are two issues.

1) **Does the Lot Enlargement Policy lend itself to fairness?**

2) **Did the Authority apply its appeal process in a fair manner?**

Discussion of the Issues

Issue 1 – Does the Lot Enlargement Policy lend itself to fairness?

[27] The Director denied the Application because, in their view, the Complainant did not demonstrate a substantial and permanent need for lot enlargement.

Analysis

[28] The land application process and the Lot Enlargement Policy govern lot enlargement. The Investigator has examined them both and, while they share some significant ambiguities and overlaps, they each conform with their applicable parent legislation, the *Lands Act*. This statute allows for the disposition of Yukon public lands under the administrative control of the Commissioner to any individual who has reached the age of majority.

[29] According to the Authority's 'Guide to the Land Application Process', its land application process consists of three stages. The first involves the pre-screening of land applications for fee payment and completeness prior to accepting them for review.

[30] The second is composed of a policy compliance review and then a public review that, as previously mentioned, is either YESAA or non-YESAA-triggered. The Investigator notes, in the case at hand, that the Application did not trigger a YESAA review and subsequently proceeded to an internal process implemented by the Authority's 'Land Review Committee' for a recommendation to the Director. Land applications by the Director can be (conditional/final) approved, denied or deferred.

[31] The third stage involves documentation and monitoring once an applicant has met all the lot purchase conditions but, in the case at hand, it was irrelevant given the decision made.

[32] According to the Lot Enlargement Policy, the Investigator notes that its purpose is threefold. The first is to allow individuals to apply for residential or recreational lot enlargement to accommodate legitimate land use activities. The Investigator also notes that such activities are undefined.

[33] The second purpose is to ensure that community interests are protected in respect of the management and sale of public land.

[34] The third is to meet developmental standards as defined in the *Subdivision Act* and its regulations, including resource management plans and policies. The case at hand, given the decision made, did not involve this third stage.

[35] The Lot Enlargement Policy principles that are case-relevant in guiding decisions on lot enlargement applications are as follows.

- Land dispositions must comply with existing and proposed planning schemes.
- Applicants must demonstrate a requirement for additional land and provide a 'Detailed Rationale' with their application. This requirement can include providing for public health and safety or expanding existing, established land uses that are consistent with settlement pattern, zoning, or planning parameters.
    - The Investigator notes that the term 'Detailed Rationale' is defined elsewhere in the Lot Enlargement Policy as a "description of why the land applied for is required, including why that amount of land is needed."
    - In addition, the Investigator notes that applications must also be accompanied by a scaled map of the site plan demonstrating how the land will be used. Applications for small amounts of adjacent land may, in certain circumstances be exempt from this requirement (*e.g.,* in cases of road realignments and easements etc.). Impact on access

will be taken into consideration (*e.g.,* people, wildlife, services etc., ability to access shoreline).

- Land tenures are only authorized in an amount reasonably necessary to satisfy the purpose for which the land is needed. Residential land parcels will normally be limited to a total of 2 to 3.99 hectares unless otherwise required by existing planning and zoning.

- During the application review process, the Authority will, whenever possible, consider the principles of 'Integrated Resource Management' (IRM) in finalizing a decision. Core IRM principles, in aid of a decision, include fostering understanding, cooperation and communication with other departments, governments and agencies involved in resource management.

[36] 'Fairness by Design' sets out standards to guide fair processes and fair decisions.

[37] A 'fair process' is one that a public organization, such as an Ombudsman 'authority' (i.e., the Authority in the case at hand), must use when making decisions that directly affect an individual, such as a lot enlargement applicant. This includes meeting the duty of procedural fairness owed to the individual affected by the decision.

[38] Procedural fairness is manifested in two ways. The first is the right to be heard, such that an affected individual directly has an opportunity to understand, participate in and be heard by the decision-making process. The second is the obligation of the decision-maker to have an open mind, be unbiased and not prejudge the decision they will make.

[39] A 'fair decision' is one in which a public organization, such as the Authority, follows the applicable rules and considers the individual circumstances of each case. The decision it makes must also be equitable and reflect a fair exercise of discretion.

[40] Fairness by Design, in subscribing to these standards, sets out non-exhaustive questions by which to evaluate the fairness in a public organisation's decision-making process and the decision rendered (FBD Standard). The questions relevant to the Authority's decision-making process in respect of the Application are as follows.

FBD Standard 1.4. Did the Authority effectively explain, communicate and sufficiently document to the Complainant the reasons for its decision?

[41] Evidence shows that the Director sent their Decision Letter to the Complainant on May 21, 2019, setting out the decision on the Application and the three reasons for it.

[42] The Investigator has examined the Decision Letter. It stated that Application approval was denied due to a lack of demonstrated need for the land, as required in the Lot Enlargement Policy. It then stated that the Lot Enlargement Policy required a description of why the additional land was needed, together with a scaled site map demonstrating how the additional land would be used. Finally, it stated that although the Application was based on a need for more storage space, the Authority decided that this need could be fulfilled on the Complainant's existing lot, in compliance with Watson Lake 'Country Residential' and septic field setback requirements.

[43] In other words, the Application did not meet whatever demonstrated need was required by the Lot Enlargement Policy, did not include the requisite map and, although the Complainant's request for additional land came down to more storage, such storage could be accommodated on the existing lot without affecting the Complainant's well, septic field and zoning status.

[44] In an examination of the Lot Enlargement Policy, there are several definitions but not one that includes 'demonstrated need'. There is, however, a definition of 'detailed rationale'. It is firstly a "description of why the land applied for is required, including why that amount of land is required." Since this would seem to correspond to the term 'demonstrated need' used by the Decision Letter, the evidence shows that the Complainant satisfied that component by setting out in their Application why they wanted a certain parcel of land adjacent to their titled lot.

[45] However, the definition of 'detailed rationale' imports three additional factors, the inclusion of which creates a mix of definitional and operational elements that, in the Investigator's view, is both confusing and unhelpful. The first requires the inclusion of a scaled map of the site plan demonstrating how the land will be used. There is no explanation, however, as to what would suffice as such a map. Since it must demonstrate how the land will be used, does that mean, for example, that the Complainant is required to produce a site plan map that shows the ratio between distance on the map and the corresponding distance on the ground? Would a nominally scaled map of the site be enough?

[46] The second element states that applications for small amounts of land may be exempt under certain circumstances. Does that mean, for example, that the Complainant can put forth for reasonable consideration any possible circumstances to that end, such as zoning compliance?

[47] The third element states that certain impacts on access will be taken into consideration. Does that mean, for example, that they can identify and address possible impacts on access that may arise due to their application?

[48] Does any of this mean, for example, that all of the above is the responsibility of the Authority working alone or in concert with the Complainant? The definition of 'detailed rationale' raises more questions than answers because, in the Investigator's view, it is simply too vague.

[49] Recall that the Decision later stated that Application approval was denied due to a lack of demonstrated need for the land, as required in the Lot Enlargement Policy. It then elaborated by adding merely that the Lot Enlargement Policy required a description of why the additional land was needed, together with a scaled site map demonstrating how the additional land would be used.

[50] The evidence shows that the Complainant provided a description of why they wanted the additional land and its amount, as defined in the 'detailed rationale'. The Decision Letter did not address this in any clear and effective manner nor did it put this in the context of what constituted a demonstrated need. Had it done so, then it follows that the Complainant could then have taken that away and thought about it from the perspective of fairness and whether it warranted an appeal. Instead, the Decision Letter simply referred the Complainant to the Lot Enlargement Policy.

[51] The evidence also shows that the Complainant provided a hand-drawn site map that showed how they proposed to use the two parcels as one. It labelled the infrastructure within but the sketch was not to scale. Recall that the first Lands Officer simply told them that it would be useful to include a diagram of their lot that included the location of various structures because showing that the space on their titled lot was already being utilized would support the rationale for acquiring more land. Also recall that the 'new' Lands Officer requested that they provide a revised drawing to scale but there is no evidence as to what that constituted nor any evidence of what would occur in its absence, despite the sketch they provided. The only evidence is that the Complainant stated that they had already sent this information to the former Lands Officer and then referred to Watson Lake 'Zoning Bylaw 07-015' (Watson Lake Zoning Bylaw), noting that their current lot was zoned 'Country Residential'.

[52] The Decision Letter did not explain why their site plan map failed solely on the lack of 'scale'. While the Investigator acknowledges that applications, under the heading 'Application Requirements', should include a "detailed site sketch, which includes a consistent and defined proportional drawing of the site (*i.e.,* a scaled drawing)," it could include the Complainant's sketch as well as a scaled drawing. The language also does not equate 'should' to 'must'. No matter the interpretation, the Decision Letter provided no explanation.

[53] Recall that the Decision Letter also stated that, although the Application was based on a need for more storage space, the Authority had decided that the need could be fulfilled on the Complainant's existing lot, in compliance with Watson Lake 'Country Residential' and septic field setback requirements. It provided no elaboration as to what criteria might have met a demonstrated need in respect of the Application nor did it provide any explanation about why zoning compliance was not a reason for Application approval or denial.

[54] The Lot Enlargement Policy contains a principle [F] that states the Authority will, whenever possible, consider the principles of 'Integrated Resource Management' (IRM) in finalizing a decision. Core IRM principles, in aid of a decision, include fostering understanding, cooperation and communication with other departments, governments and agencies involved in resource management. While the application was considered by the LRC, the Decision Letter makes no mention of how these core IRM principles led to a recommendation for denied Application approval later endorsed by the Director.

[55] A decision-making process should ensure that decisions are clearly communicated to those affected because this helps them understand how and why the decisions were made, especially if they want to appeal a decision. It also allows the decision-maker to check their own reasoning to ensure that they made an informed, evidence-based decision.

[56] The Investigator is of the view that the Authority did not sufficiently document to the Complainant the reasons for its decision. In addition, the Investigator is of the view that the Authority did not effectively explain or communicate why temporary storage or zoning compliance was not accepted as a demonstrated need because it did not state what is meant by the term 'demonstrated need', except to allude to the fact that more storage did not amount to it.

FBD Standard 2.2 Did the Authority have policies, practices and procedures established to ensure impartial and unbiased decision-making?

[57] From Authority testimony, an applicant applies, in this case for a lot enlargement, and a Lands Officer contacts them to begin an extensive 'shaping' process, including mapping and site inspections, in aid of preparing it for an LRC recommendation and a Director decision. During this 'shaping' process, the Lands Officer may, for example, bring the application to an internal 'workshop' to help address any issues that the application has raised, such as whether it should trigger a YESAA or non-YESAA assessment process. The application then goes out for public consultation to any affected YG departments/First Nations and to any neighbours within a one-kilometre proximity to the land at issue. During all of this, the Lands Officer keeps in touch with the applicant.

[58] The application then becomes the subject of an LRC meeting during which the Lands Officer simply reads a summary of the file with no personal interjections. LRC attendees on a 'roundtable' basis discuss the application from their perspectives. If there are any questions that cannot be answered, then the LRC meeting may be rescheduled until the Lands Officer can find the necessary answers. If there are no unanswered questions, then the LRC chair, following a period of general discussion, summarizes what has been said and frames it in the context of a recommendation. [This framing has since been revised to include a 'show-of-hands' vote by LRC participants but that addition did not exist at the time of the case at hand.]

[59] The LRC recommendation is then sent to the Director in the form of a draft decision letter. This last stage also involves a briefing by the LRC chair so that the Director has an opportunity to raise questions or request changes before signing what becomes the decision letter to the applicant.

[60] Although the LRC recommendation does not require the Director to follow it, the act of putting it into the form of a draft decision letter is, in the Investigator's view, highly problematic from a fairness perspective. It has the effect, however unintended, of virtually crystallizing a recommendation into a decision by a non-deciding entity. In addition, it does this before the actual decision is made by the individual whose sole purpose in this process is to make an informed decision in their own right. Although there is no evidence that the Director did not make their own independent decision, despite the recommendation presented to them, this process needs to be clarified in the Lot Enlargement Policy. Such clarification would start, in the Investigator's view, with not providing the Director a recommendation arranged as draft decision.

[61] Public bodies are responsible for ensuring that their employees, in delivering public programs, understand the requirement to be impartial, act with integrity and exhibit the highest standards of ethical conduct. This means providing advice, delivering services and making decisions in a manner free from personal interest, preference or prejudice. By doing so, individuals are more likely to have confidence in the process and accept the decision made. Decision-makers are more likely to make fair decisions based on relevant facts and evidence within the applicable rules.

[62] Although the Lot Enlargement Policy speaks to a 'lot enlargement' application having to demonstrate a requirement for the additional land by way of setting out a detailed rationale to that end, it does not tell an applicant or an LRC member what constitutes a demonstrated need for additional land, approval of which is dependent on meeting this unstated need.

[63] If a temporary structure, for example, is not considered to be a demonstrated need even if there is no room on the existing lot for such a structure, then the Lot Enlargement Policy should state this. If expanding existing and established land uses consistent with any of settlement pattern, zoning or planning parameters are not considered to be demonstrated needs, then it should clearly explain this. If permanent infrastructure constitutes a demonstrated need because the existing lot cannot accommodate it, then the Lot Enlargement Policy should clearly state this.

[64] This would benefit an applicant in knowing what criteria to meet but, more importantly, it underpins the very basis on which an LRC participant and the Director should evaluate an application if such evaluation is to be transparent, consistent, stable and certain.

[65] While there is no evidence that any partiality or bias occurred within the Authority's internal parameters of what constitutes criteria for a demonstrated need, there is evidence that the parameters themselves are a manifestation of partiality and biased decision-making. From Authority testimony, the Lot Enlargement Policy is not clear or specific in terms of the criteria needed for an application to be approved. While the Authority bases its analysis and decisions on whether the existing lot can accommodate the requested use and whether the need for additional land is reasonable, it still comes down to a case-by-case interpretation that employs unstated criteria and uses past examples, where relevant, as a decision aid.

[66] While this appears to bring purpose and order to the land disposition process, the problem is that the Authority has pre-determined what it views as acceptable demonstrated need without transparently setting it out in the Lot Enlargement Policy for an applicant to see and understand.

[67] This problem is compounded because there is no objective and weighted evaluation mechanism in the Lot Enlargement Policy to measure and decide on whatever acceptable criteria must clearly be presented in an application. Without a weighted scoring system based on the ranking of that criteria, inclusive of some degree of discretion and a threshold that must be met to gain application approval, the LRC analysis and recommendation process based on 'round table' discussion and consensus lends itself to questions of partiality and bias, as does the decision-making by the Director.

[68] The Investigator is of the view that the Lot Enlargement Policy, in not setting out what constitutes the type of 'demonstrated need' required to obtain lot enlargement approval, does not ensure impartial and unbiased decision-making. The Investigator is also of the view that the policy, in not having evaluation mechanisms to measure and decide on what must be clear criteria in respect of 'demonstrated need', lends itself to the same end.

FBD Standards 3.2 Did the Authority have fair rules and decision-making criteria for making lot enlargement decisions?

[69] The Cambridge Online Dictionary defines 'demonstrate' as "to show or make something clear [or] to show something and explain how it works." As applied to the Authority's decision, the Investigator takes this to mean that the Complainant did not demonstrably show why they needed the additional land.

[70] There is no such term in the Lot Enlargement Policy except a reference in its second principle [B] that land applications must demonstrate a requirement for additional land. Even if an applicant were to show clearly why they needed the additional land, there is nothing in the policy to indicate whether the applicant's demonstrated need is sufficient for approval purposes, noting that a need for more 'temporary' storage off an adjacent existing lot does not qualify, according to the evidence.

[71] The only thing the Lot Enlargement Policy does state as indicators of a possible demonstrated need are public health and safety considerations or the expansion of existing, established land uses consistent with settlement pattern, zoning or planning parameters. Does this latter possibility mean only permanent infrastructure? Does it mean other things, like temporary structures or visual buffers that are consistent with settlement pattern, zoning or planning parameters? Are settlement patterns, zoning and planning parameters in and of themselves evidence of demonstrated need? The Lot Enlargement Policy does not provide an answer.

[72] From Authority testimony, the 'unofficial' criteria for lot enlargement approval, despite its absence in the Lot Enlargement Policy, seems to be based solely on a 'substantial and permanent' need that cannot be accommodated on the existing lot, as opposed to something temporary. Evidence shows that the Lands Officers told the Complainant during the application 'shaping process' that a lot enlargement application based on something temporary was a weak rationale, but there is no evidence that the Lands Officer clearly explained the ramifications of it. There is evidence, however, that the Complainant felt their willingness to keep any 'off-property use' legal by way of zoning compliance would be enough to send their Application forward with a reasonable expectation that it would be approved on that basis.

[73] In looking to the Lot Enlargement Policy, it is unclear why a 'detailed rationale' concerning a need for temporary storage would not suffice on its own, especially since the Complainant showed that they wanted the additional land so they could comply with the minimum lot size under the 'Country Residential' zoning configuration.

[74] In the Authority's view, the need to build a permanent structure, such as a septic field or garage, that cannot be accommodated on an existing lot size would constitute a 'demonstrated' need whereas, for example, the desire for some sort of physical buffer or even permanent storage that could otherwise be accommodated on the existing lot would not constitute such need.

[75] This amounts to importing into the term 'demonstrated need' something not obvious or clearly explained to an applicant, such as temporary structures will not be approved for purposes of lot enlargement, and then basing a lot enlargement decision on whether that importation is met or not.

[76] According to Authority testimony, the reason it distinguishes between a demonstrated need that is permanent and one that is temporary is because, as stewards of public land under the Lands Act, the Authority can set a reasonable bar for disposal. In its view, it is always accountable to the Yukon public when it disposes of public land to an individual. It is reasonable, therefore, to base a lot enlargement decision on whether the applicant has enough usable land on their existing lot to accommodate the requested use and what type of infrastructure the applicant envisages for the additional land.

[77] This position may indeed be reasonable but the Investigator cannot find it in the Lot Enlargement Policy.

[78] In addition, reference in the second principle to "existing, established land uses that are consistent with Settlement Pattern, zoning or planning parameters" is confusing. Recall that the Applicant revised their Application for, amongst other things, zoning compliance. While their 1965-surveyed lot was grandfathered as 'existing non-conforming' in a 'Country Residential' settlement pattern, they wanted the additional land so that they could meet the minimum 'Country Residential' lot size and presumably have their enlarged lot re-zoned accordingly. The Applicant accompanied their Application with a letter from the Watson Lake Mayor that favoured such re-zoning on Application approval by the Authority. Despite this, their efforts did not amount to the unstated demonstrated need.

[79] This reference in the Lot Enlargement Policy's second principle [B] could reasonably lead an applicant to apply, in good faith, for additional land because they wanted their existing, established land use to comply with the surrounding settlement pattern and zoning. It could also reasonably lead an applicant to believe that their setting out this 'demonstrated need', in the form of a detailed rationale, would likely be reasonable justification for application approval. As stated, the Investigator cannot find anything in the Lot Enlargement Policy that speaks to the contrary.

[80] The Investigator must be clear, however, that they are not suggesting that the Authority should have reached a different decision, only whether the Authority applied its process fairly in making the decision set out in the Decision Letter. That would, in their view, require the Complainant to be informed in the Decision Letter about what criteria constituted a 'demonstrated need' and why their zoning rationale did not meet it.

[81] There is no evidence that the Complainant clearly understood the significant ramifications of changing their Application from a permanent structure to a temporary one and concurrently relying on a position of zoning compliance, despite the scaled map issue. In addition, there is no stated criteria constituting 'demonstrated need' in the Lot Enlargement Policy that would enable the LRC or Director to make decisions in keeping with it.

[82] Fair rules and decision-making criteria must be visible in their use. The Investigator is of the view that the Lot Enlargement Policy falls short because it does not explicitly set out the criteria that underpin the decision-making process.

FBD Standard 4.1 Did the Authority's Lot Enlargement Policy clearly explain the decision-making steps that decision-makers had to follow to make a fair decision on lot enlargement?

[83] Policies should clearly explain the decision-making steps to be followed when making decisions. This includes the legislation and policies informing the decision, guidance on how to interpret and follow the rules, the scope of the decision-making power and how to act within it, the information and evidence that must be gathered to make an informed decision, and how to fairly consider each individual case when deciding its outcome.

[84] The Lot Enlargement Policy does not refer to its anchoring legislation, in this case the Lands Act, nor does it set out and explain the lot enlargement decision-making steps in respect of the land application process. While its stated objective is to facilitate lot enlargements and its stated purpose is to provide direction regarding the review of lot enlargement applications, it does not set out any guiding steps for the applicant or the Authority to give effect to that facilitation or direction, leaving the applicant, the Lands Officer, the LRC and the Director to figure out how the policy works, with interpretations that may be at odds with one another.

[85] If the intent of the Authority is to use the Lot Enlargement Policy in concert with the decision-making steps in its land application process, then it should clearly state this intent in the Lot Enlargement Policy. Alternatively, it could insert the applicable land application process decision-making steps into the Lot Enlargement Policy for the benefit of both the applicant and

the LRC, especially if an applicant only manages to access it and no other policy in aid of their lot enlargement application.

[86] In the absence of this stated intention, the Lot Enlargement Policy consists of a loose assortment of definitions, principles, policy parameters, application requirements and review procedures that do not, in the Investigator's view, amount to decision-making steps in respect of lot enlargement applications and evaluations. It would be like showing an applicant a box full of tools but no instructions for using those tools to build something they have in mind. That also means there is no way to know if the lot enlargement process is consistently applied by the Authority in a fair manner.

[87] The Investigator is of the view that the Lot Enlargement Policy does not set out or explain the decision-making steps that decision-makers must follow to make a fair decision on lot enlargement applications.

FBD Standard 4.2 Did the Authority's Lot Enlargement Policy allow for discretion and, if exercised, was it exercised fairly?

[88] Discretion requires decision-makers to use their professional judgement and expertise to make decisions that are consistent with the governing legislation, based independently on the merits of the case at hand, premised on good faith and founded on relevant considerations.

[89] The Lot Enlargement Policy does not refer, directly or indirectly, to any discretion that can be exercised in aid of the evaluation and decision-making process, except to state that a decision can be one of approval, denial or deferral. How such a decision is reached and the leeway that might guide its making, if such leeway exists, is left unsaid. It follows that both the Authority and an applicant cannot know whether discretion is allowed to be exercised in the application process, or if allowed, whether it is consistently and fairly exercised.

[90] Questions were raised at the LRC meeting about the Complainant's need for the additional land and what type of uses the Complainant was proposing to make of this land if approved. Discussion ensued about temporary structures being subject to reduced setbacks, noting that the Complainant's needs could therefore be accommodated on their existing lot. In addition, comments were made, for example, about their lot only being about 50% developed and that it was already compliant with local zoning because it had been grandfathered as 'existing, non-conforming'.

[91] Following this discussion, the LRC had the choice of recommending approval, denial or deferral of the Application. It chose denial. The Director agreed with this LRC recommendation

and based their decision accordingly. But to what extent were these respective choices informed by discretion or the lack of discretion? If the unstated criterial for lot enlargement approval is the demonstrable need of availability and permanent infrastructure accommodation and nothing else, then it follows that application 'approval, denial or deferral' are strictly choices as matter of form.

[92] The investigator is of the view that the Lot Enlargement Policy, as interpreted by the LRC and Director, did not allow for discretion because the Application was not about permanent infrastructure that could not be accommodated on the Complainant's existing lot. The Investigator is also of the view that neither the LRC nor the Director could make fair determinations in their respective capacities, even if discretion were allowed, because they were predisposed towards the rigid choice of outcomes based solely on considerations not set out in the Lot Enlargement Policy.

FBD Standard 4.3 Did the Authority's Lot Enlargement Policy allow staff to make reasonable administrative decisions?

[93] Given the unique circumstances and facts of each case, decision-makers must show their reasoning used to reach a decision, as well as the decision itself, because reasonable administrative decisions must be justifiable, transparent and intelligible to the individuals affected by them.

[94] The Investigator has already described what the Decision Letter contained and what it lacked by way of explanation. Part of this can be attributed to the decision-maker as to what constituted reasons for the denial of Application approval but a large measure can be attributed to the Lot Enlargement Policy itself.

[95] There is nothing in it that shows how a decision is made, let alone a reasonable one. There are principles but they simply set out the multi-faceted context in which decisions must be made. There are policy parameters but these are limited to the tenure, cost, amount and types of land about which decisions can be made, including resource management factors. There are application requirements but they amount to a list of components that make up an application. There are application review procedures but they are an unrelated set of actions, any one of which may result in an application being approved, varied or denied.

[96] While all these components are factors that influence a decision, it is unclear if the subtraction of any of them would result in a reasonable or unreasonable outcome. What is clear is the need for the Lot Enlargement Policy to set out some definitive criteria on which decision-makers can make fair, consistent, timely and transparent decisions, inclusive of any discretion

where warranted. This would also help applicants understand what would be a reasonable administrative decision in respect of their application.

[97] What is also clear and previously mentioned is the need for the Lot Enlargement Policy to set out an objective evaluation system, inclusive of an approval threshold. This would enable decision-makers to measure and decide on the acceptable criteria presented in an application. It would also help applicants understand how their application is scored, the reasons for the scores and what they could do when submitting an application so as to increase the metric possibility of approval.

[98] The Investigator is of the view that the Lot Enlargement Policy does not allow staff to make reasonable administrative decisions in respect of an application.

Conclusion: Issue 1

[99] The Investigator believes that, although the Application outcome reached may be reasonable and within the authority granted to the Director under the *Lands Act*, the Lot Enlargement Policy does not lend itself to fairness. It lacks the necessary clarity in setting out, measuring and scoring the criteria that would, individually or collectively, constitute a 'demonstrable need' in any form of detailed rationale for a lot enlargement. In short, it does not contain sufficient detail or mechanisms to ensure a fair, consistent and transparent process.

Issue 2 – Did the Authority apply its appeal process in a fair manner?

[100] The ADM denied the Complainant's appeal because, in their view, the Authority, in considering the information relevant to the Application, did not err in the land application process or in the interpretation of the Lot Enlargement Policy.

Analysis

FBD Standard 1.6 Did the Authority have an adequate appeal mechanism?

[101] The Authority has a publicly-available 'Land Application Appeal Policy' (LAA Policy). Its purpose is to outline what can be appealed, how appeals can be submitted and the timeframe for submission and response. Its objective is to provide for a fair, consistent, timely and transparent process for reviewing land application decisions.

[102] There are two grounds of appeal, noting that the Complainant did not step outside these grounds in their appeal submission.

1) An applicant believes that there was an error made by YG

   a) during the land application process, or

   b) in the interpretation of the policy under which the applicant submitted their application; or

2) an applicant believes that YG did not properly consider some previously provided information relevant to the application decision.

[103] Based on the above grounds, an appellant must submit a letter to the ADM within 30 days of receiving the decision letter and set out the details of the appeal. The ADM will then examine the appeal submission and make a 'confirm, vary or overturn' decision within 30 days of receiving it. Appeal decisions are final.

[104] The LAA Policy is essentially a procedural document outlining the nature of the decision to be made, the decision-making criteria to be considered and the decision-making process to be employed. However, it does not contain substantive information about what an appellant should provide so an informed decision can be made.

[105] Appellants should not be expected to be conversant in the law or bring a strictly objective perspective to their appeal. For example, there is no elaborating information about what might constitute a procedural error made by Authority staff during the land application process. There is nothing to explain what an interpretation error in the Lot Enlargement Policy might be, or what might be something the Authority either did not consider or consider properly. It follows that such information would help an appellant, especially one unfamiliar with the process, understand more clearly the nature of the grounds within which their appeal must be confined and what questions they might pose to obtain to that understanding.

[106] The Investigator acknowledges that the LAA Policy does contain distinct Authority contact information if the appellant has any questions about the appeal process but the Investigator is of the view that, in the absence of helpful explanation in the LAA Policy itself, this is not enough.

[107] Recall that the Complainant's Appeal Letter was dated June 7, 2019. The facts show that they set out the size of their lot and then compared it to the minimum/maximum 'Country Residential' lot sizes in the Watson Lake Zoning Bylaw. Their lot fell just short of the minimum size but, in their view, an approval of their Application on appeal would result in a combined area that would put it in compliance with the zoning bylaw for this type of lot.

[108] The Appeal Letter also shows that the Complainant considered the Watson Lake Zoning Bylaw to constitute a law whereas the Decision Letter was a matter of policy. In addition, it contained an attachment from Watson Lake supporting approval of their Application based on zoning compliance.

[109] The ADM's Appeal Decision was dated July 9, 2019. The ADM acknowledged the Complainant's Appeal Letter and pointed out the generic grounds for any appeal. The ADM then set out their decision.

[110] In their view, the Complainant did not demonstrate a clear need and rationale for the additional land and that their existing lot was sufficient in size to meet their temporary storage space need without compromising their well and septic field. Their current lot was zoned as 'existing, non-conforming'. The ADM stated that the Authority does not approve lot enlargement applications for the sole purpose of zoning compliance. In addition, there were no Authority errors or interpretation mistakes in respect of their Application.

[111] The Investigator acknowledges that, on its face, the LAA Policy provides an avenue for an aggrieved applicant to seek a review of a decision with which they disagree. It sets out the purposes and objective in respect of bringing an appeal to bear. It specifies the strict grounds for appeal and unambiguously lays out the submission steps and associated timeframes. Finally, it provides contact information if the appellant should have any process questions.

[112] However, the proof of that fairness must be in its application and outcome, something of critical value to an appellant and the appeal decision-maker. This would, in the Investigator's view, at least include the following components in the LAA Policy. It would have a process by which an appellant could submit an appeal based on a clear understanding of what the appeal grounds mean in relation to their application and the Director's decision. It would have a process in which the appeal decision-maker could examine the objective and weighted basis on which the LRC founded its recommendation and the Director founded their decision. In addition, it would establish an independent decision-maker who, in making a decision, would be required to explain clearly and in reasonable detail why an appeal was successful or not. It would also incorporate a process that accepts an appeal and provides a result within a reasonable period, as the Investigator notes it does.

[113] The Investigator is satisfied that the ADM reviewed the Application and Appeal Letter. The evidence shows that they examined the land application process and Application decision for any procedural or interpretation errors, as well as any concerns about relevant evidence. The ADM

consulted with a YG solicitor but still came to a decision in the ADM's own capacity and then issued a timely Appeal Decision that set out the decision with reasons.

[114] In short, the ADM followed the procedure and parameters as laid out. The Investigator acknowledges that they found no procedural errors in how the Authority followed the land application process, nor any interpretation mistakes concerning the Lot Enlargement Policy, nor any evidence not considered or improperly considered.

[115] However, the LAA Policy makes no allowance for a flawed Lot Enlargement Policy. For example, the ADM did not state why the Authority does not approve lot enlargement applications made for the sole purpose of achieving zoning compliance, despite this constituting one of the main reasons the Complainant used as a 'demonstrated need' for the additional land.

[116] The ADM also did not address an important misunderstanding raised by the Complainant in their Appeal Letter. The Complainant correctly believed that Watson Lake had been empowered to make bylaws and stated as such, essentially an oblique but discernible reference to their legal reliance on zoning compliance as a demonstrated need for the additional land in their Application. The Complainant then stated that the Decision Letter rested on a Director decision that was based on policy and not law. In Investigation's view, this required a response from the ADM so that they could understand why their belief amounted to a misunderstanding in this particular context. Such a response would have lent itself to why administrative decisions that are based on policy must also be grounded in anchoring law, in this case the Lands Act.

[117] The Investigator has already addressed the Lot Enlargement Policy's deficiencies elsewhere but it bears repeating that it is unclear as to what constitutes a demonstrated need for additional land, no matter the detailed rationale provided by an applicant. It is, therefore, easily susceptible to interpretation mistakes. In addition, there is ample evidence by Authority staff, as well as non-Authority LRC participants, of difficulties experienced in trying to make sense of it, other than deferring to unstated criteria and, more or less, to past application examples and decisions.

[118] This is enough, in the Investigator's view, to raise serious issue about the fairness of employing the LAA Policy to lot enlargement decisions, especially in view of the section 6 statement, "The [ADM]'s decision on the appeal is final." It places an applicant, who applies in good faith for a lot enlargement, at a distinct disadvantage because they may argue one perspective on appeal, such as subdivision conformance, when only one perspective, land use need, is definitive. It places an appeal decision-maker in a position of not being objective or being seen to be objective because they are predisposed to examine and decide on matters in accordance with that definitive perspective.

[119] The Investigator is of the view that the LAA Policy, as currently comprised, is not an adequate appeal mechanism as it applies to appeals stemming from lot enlargement decisions.

FBD Standard 2.3 Did the Authority ensure that an independent decision-maker was used for the Complainant's appeal of the Authority's lot enlargement decision?

[120] As to the ADM's role, the Investigator has little concern from the evidence that the ADM was the appeal decision-maker, as well as the administrative supervisor of the Director who made the original decision. The ADM testified that, hypothetically, they could become aware of a particular application if the Minister's office were to bring it to their attention because the ADM would then ask the Director for an update so they could relay an answer back to the Minister. However, the evidence shows that this did not occur in the case at hand. The ADM only became involved with the Application at the appeal stage.

[121] It is, however, plausible that a senior manager, who also acts as the decision-maker on appeals, could direct a direct report, who decides on lot enlargement applications, to base approvals only on whether the existing lot cannot accommodate more permanent infrastructure with good reason. The direct report then communicates this directive to the Lands Officers and the LRC for purposes of making recommendations on such applications. The direct report then makes a decision informed by the directive which is then appealed by an appellant to the ADM. In turn, the ADM examines the decision vis-à-vis the appeal process and finds that, according to their original direction, it was correctly made.

[122] To the extent that this situation could arise or be perceived to be the case, the LAA Policy is inadequate in its reliance on the ADM as an independent decision-maker. For reasons of fairness, there are several safeguards that the Authority could put in place to remedy this. For example, it could make someone, other than the ADM to whom the application decision-maker reports, the appeal decision-maker. It could also require that decision-maker to examine the objective decision-making metrics applied at the LRC and Director stages to determine, in the appeal process, whether the application decision was fairly made. There are likely other safeguards that could be conceived and implemented by the Authority to the same end.

[123] That said, the Investigator also has no concern about the appeal decision-maker having always to act in the public interest when considering an appeal and making an appeal decision. The evidence shows that the ADM viewed public land (*i.e.,* land not disposed to any individual or entity) as a public resource for which the ADM bore procedural accountability and whose disposal decision, once exercised, had to be able to withstand rigorous public scrutiny.

[124] The Investigator is of the view that there is no evidence that the ADM, in the case at hand, was anything other than an independent decision-maker for purposes of the Complainant's appeal.

Conclusion: Issue 2

[125] The Investigator believes that the ADM, despite reasonable efforts in conducting their appeal process, was predisposed to a particular outcome in their Appeal Decision because the Lot Enlargement Policy lacks the necessary clarity in setting out, measuring and scoring the definitive criteria that constitutes a demonstrated need for Application approval purposes. As such, this prompts any appeal decision to be made, according to the evidence, on the sole basis of whether an applicant's existing lot can accommodate additional permanent infrastructure.

Conclusions

[126] In summary, the Investigator provides the following opinions.

Issue 1

The Investigator believes that the Lot Enlargement Policy is not a policy that lends itself to fairness.

a) It does not set out what criteria constitutes, individually or collectively, a demonstrable need for lot enlargement. In this absence, it leaves open for implementation by the LRC and Director the employment of an unstated demonstrable need that solely amounts to whether an applicant's existing lot can accommodate additional permanent infrastructure.

b) It does not contain any objective standard by which to measure and evaluate the Application.

Issue 2

1) The Investigator believes that the ADM, despite reasonable efforts to the contrary, could not apply the Lot Enlargement Policy to the Appeal Decision in a fair manner. The policy does not set out what criteria constitutes, individually or collectively, a demonstrable need for lot enlargement. In this absence, it only allowed the ADM to decide on the correctness of the Decision Letter, the unstated criteria of which was whether the applicant's existing lot could accommodate additional permanent infrastructure.

2) The Investigator also believes that the ADM could not evaluate the Appeal Decision fairly because the Lot Enlargement Policy, and consequently the Decision Letter, lacked any objective standard by which to measure and evaluate an application.

Recommendations

[127] I make the following recommendations.

1) The Authority should revise its Lot Enlargement Policy in plain language with a view to incorporating the Fairness by Design standards as discussed in Issue 1 of this Report.

2) In revising the Lot Enlargement Policy, the Authority should:

   a) define the term ’demonstrated need’;

   b) set out the criteria on which a lot enlargement application can be based in respect of a ‘demonstrated need’ for additional land;

   c) provide clear examples of criteria that would not constitute a ‘demonstrated need’;

   d) revise the definition of a ‘detailed rationale’ so it is not confused with a ‘demonstrated need’ for application approval and does not contain a mix of definitional and operational elements;

   e) establish some type of objective and weighted evaluative mechanism to measure and decide on whatever acceptable criteria must be presented in a lot enlargement application, such as a weighted scoring system based on the ranking of that criteria, inclusive of some degree of discretion and an approval threshold, that can be used by

      i) the LRC for recommending Director approval, variance or rejection,

      ii) the Director in guiding their decision, and

      iii) the appeal decision-maker in guiding their decision.

   f) reconsider the appeal process with a view to making an individual other than the ADM the appeal decision-maker;

   g) revise the land disposition principles into clear and simple statements free of added definitional and operational elements; and

h) configure the Lot Enlargement Policy as, for example, a 'one-window' document for the following purposes:

i) to show an applicant or appellant how it clearly fits into the land application and appeal processes, and

ii) to help them understand what to expect or where to go if they have questions prior to making an application, during the review stages, or when submitting an appeal.

3) In revising the Lot Enlargement Policy, the Authority should make consequential revisions to the LAA Policy and land application process with a similar view to incorporating Fairness by Design standards where applicable.

4) The Authority should regularly train its applicable staff, LRC participants, the Director and appeal decision-maker on the interpretation and application of the revised Lot Enlargement Policy and any other related policies that are consequentially revised.

[128] Prior to the issuance of this Report, the Investigator contacted the Authority about the recommendations. It has accepted all of them but needs additional time to implement Recommendation 2(e). The Ombudsman has given the Department six months from the date of this Report for implementation purposes (November 6, 2023).

Report regarding Investigation of Complaint

[129] As per section 23, I am reporting the results of my investigation along with my recommendations to the Authority.

[130] Under the authority granted under section 31, the Ombudsman also publishes our investigation reports, as a matter of practice, on our website for transparency and educational reasons, as well as publishing a summary in our Annual Report. These investigative reports include our finding and recommendations – and an Authority's summarized response to them. If the Ombudsman considers it in the public interest or in the interest of a person or authority, they may also issue a Special Report to the Legislative Assembly.

Report of the Ombudsman if No Suitable Action taken

[131] As per section 25, if the Ombudsman comes to the view that no suitable action has been taken within a reasonable time by the Authority in response to the opinions, reasons and recommendations made under section 23, then the Ombudsman may, after considering any

reasoned response by the Authority, submit a report to the Commissioner in Executive Council and later to the Legislative Assembly about the matter as the Ombudsman considers appropriate.

Complainant to be informed if No Suitable Action taken

[132] As per section 26, if the Ombudsman makes recommendations and no action that the Ombudsman believes adequate or appropriate is taken by the Authority within a reasonable time, then the Ombudsman shall inform the Complainant of the recommendations and may make any additional comments that they consider appropriate. In any event, the Ombudsman shall inform the Complainant within a reasonable time about the result of the investigation.

Original Signed

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Rick Smith, BA, MCP, LLB
Investigator

Original Signed

_____

Jason Pedlar, BA, MA
Ombudsman

Distribution:

- Authority

Encls:

- Fairness by Design – An Administrative Fairness Assessment Guide