



Board of Variance Report

Date of Report: October 04, 2023
Date & Type of Meeting: Thursday, October 12, 2023 - Board of Variance
Author: Sadie Chezenko, Planner
Subject: BOARD OF VARIANCE APPLICATION
File: B2301B - Smagh
Electoral Area/Municipality B

SECTION 1: EXECUTIVE SUMMARY

The purpose of this report is to provide information to the Board of Variance in their consideration of a minor variance from the requirements outlined in Section 23 (4) and 23 (5) of the Electoral Area B Comprehensive Land Use Bylaw No. 2316, 2013 in order to site a residence and septic system on the subject property in a manner inconsistent with the regulations pertaining to the farm residential footprint.

SECTION 2: BACKGROUND/ANALYSIS

GENERAL INFORMATION

Property Owner: Roop Smagh and Kulwant Smagh
Property Location: 916 27 TH Avenue South, Erickson, Electoral Area 'B'
Legal Description: LOT 13 DISTRICT LOT 812 KOOTENAY DISTRICT PLAN 1455 EXCEPT PLAN 4569 (PID: 015-686-850)
Property Size: 4.52 Ha (11.19 Ac)
Current Zoning: Agriculture 1 (AG1)
Current Official Community Plan Designation: Agriculture (AG)

SURROUNDING LAND USES

North: Agriculture (AG 1) – within the Agricultural Land Reserve (ALR)
East: Agriculture (AG 1) – within the Agricultural Land Reserve (ALR)
South: Agriculture (AG 1) – within the Agricultural Land Reserve (ALR)
West: Agriculture (AG 1) – within the Agricultural Land Reserve (ALR)

Background Information and Subject Property

The subject property is located in Electoral Area 'B' in Erickson. The property and all adjacent neighbours are zoned Agriculture 1 (AG 1) and are in the Agricultural Land Reserve.

The property has an established cherry orchard and is classified as a farm by BC Assessment. In addition to farming, the property has been used as a residence. There are additional structures on the property including a carport, workshop, driveway and pool. In 2022, the residence was destroyed by fire.

The purpose of this application is to allow the owners to rebuild their residence and septic system in the same location as the previous residence. This is not permitted in the zone due to the Farm Residential Footprint regulations outlined in Section 23 (4) and Section 23 (5) of Area B Comprehensive Land Use Bylaw No. 2316, 2013. These regulations require that the only area that can be developed for dwellings and other non-farm structures and improvements be within a 2000sqm footprint within 60m of the front or exterior side lot line.

An application may be made to the Board of Variance if it is minor in nature, and compliance with a bylaw respecting the siting, dimensions or size of a building would cause undue hardship. The applicants assert that these regulations are creating a hardship. For further details, see the applicants' Proposal Summary attached to this report as Attachment A which outlines their rationale further.

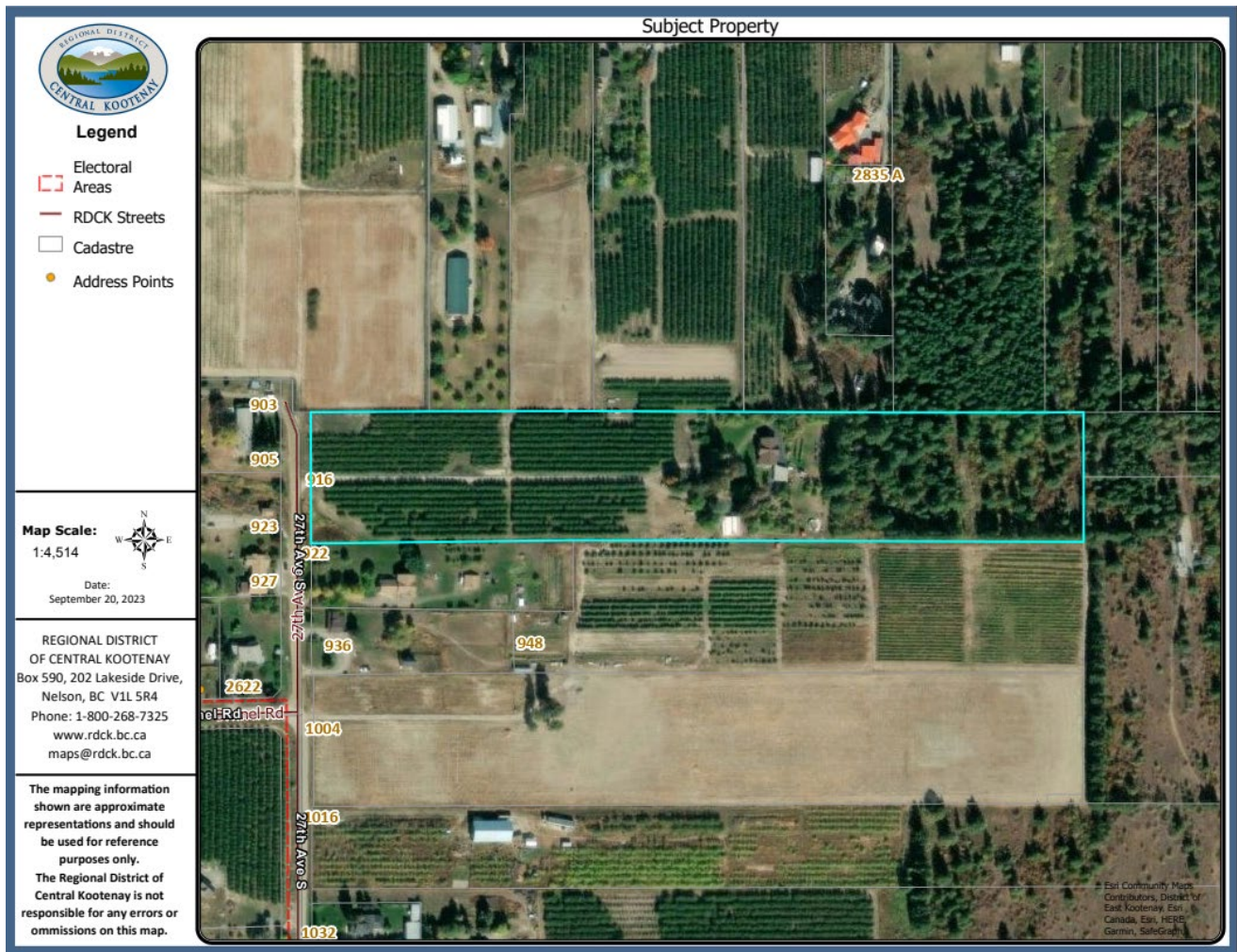


Figure 1- Subject Property

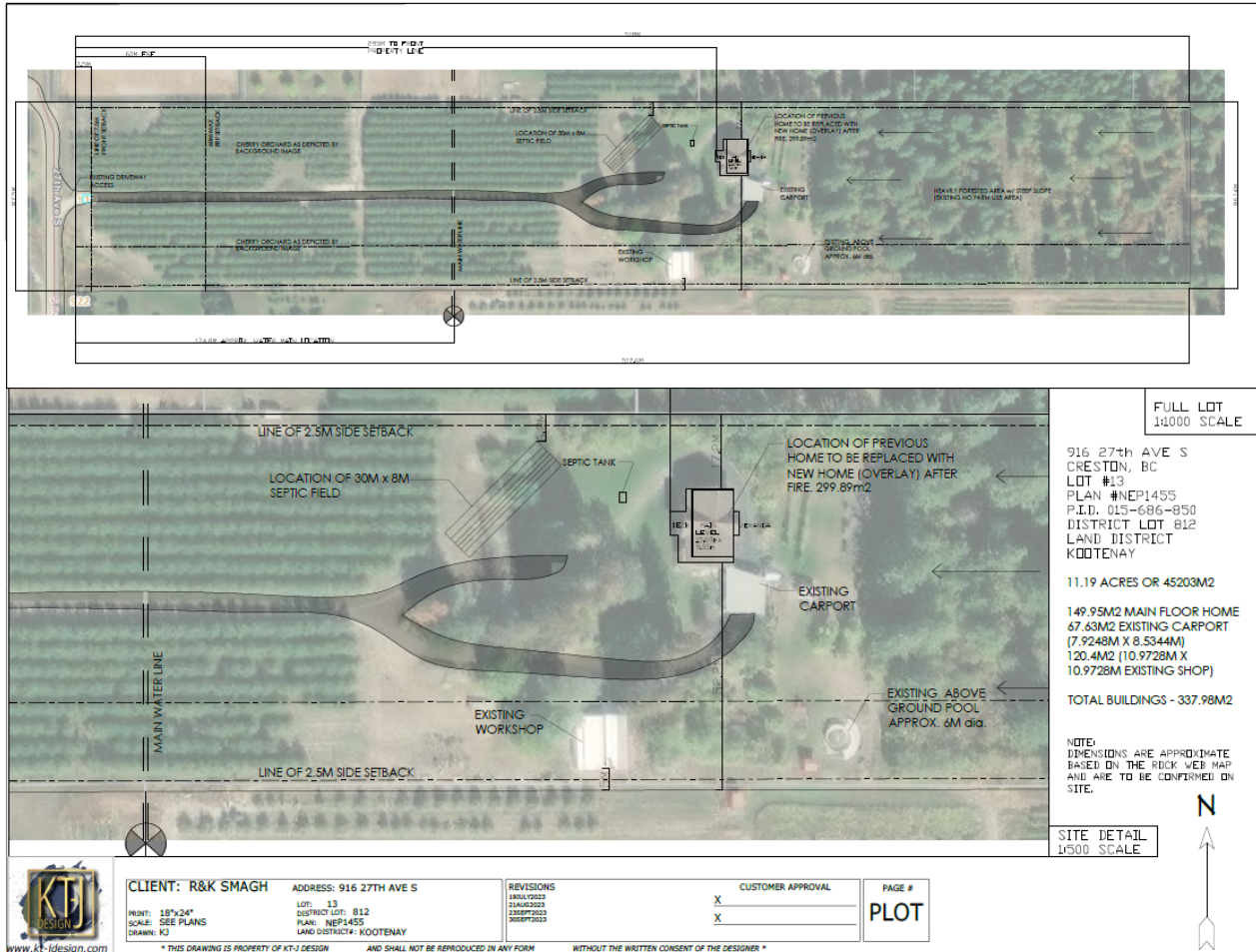


Figure 2 - Site Plan showing proposed residence and septic system location

Considerations for Decision

Section 540 of the *Local Government Act* enables a Board of Variance to order a minor variance from siting requirements of a bylaw, if the board of variance:

- a. has heard the applicant and any person notified
- b. finds that undue hardship would be caused to the applicant if the bylaw is complied with, and
- c. is of the opinion that the variance or exemption does not do any of the following:
 - i. result in inappropriate development of the site,
 - ii. adversely affect the natural environment,
 - iii. substantially affect the use and enjoyment of adjacent land,
 - iv. vary permitted uses and densities under the applicable bylaw, or
 - v. defeat the intent of the bylaw.

SECTION 3: DETAILED ANALYSIS

3.1 Financial Considerations – Cost and Resource Allocations:

Included in Financial Plan:	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No	Financial Plan Amendment:	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
Debt Bylaw Required:	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No	Public/Gov't Approvals Required:	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No

The application fee has been paid in full pursuant to the Planning Fees and Procedures Bylaw No. 2457, 2015.

3.2 Legislative Considerations (Applicable Policies and/or Bylaws):

Division 15 of the *Local Government Act* requires the establishment of a Board of Variance for a local government when a zoning bylaw has been adopted.

Section 540 of the *Local Government Act* enables a Board of Variance to order a minor variance from siting requirements of a bylaw.

3.3 Communication Considerations:

The application was referred to internal departments, other government agencies and adjacent property owners.

The following responses were received from agencies:

Agricultural Land Commission

The ALC has no objection to the proposed variance to the bylaw for setback depth beyond 60 meters from the property line to replace the burned residence. That said, if the proposed replacement residence is the second residence on the property and the size of the smaller residence exceeds 90 sq meters, then an ALC application for Non-adhering residential uses may be required.

Interior Health

Thank you for the opportunity to provide comments. A file review has been completed and Interior Health interests are not affected.

Ministry of Forests

We are currently unable to provide a detailed review of the referral but provide the following standard requirements, recommendations and/or comments:

- 1. All activities are to follow and comply with all higher-level plans, planning initiatives, agreements, Memorandums of Understanding, etc. that local governments are parties to.*
- 2. Changes in and about a "stream" [as defined in the [Water Sustainability Act \(WSA\)](#)] must only be done under a license, use approval or change approval; or be in compliance with an order, or in accordance with Part 3 of the [Water Sustainability Regulation](#). Authorized changes must also be compliant with the [Kootenay-Boundary Terms and Conditions and Timing Windows](#) documents. Applications to conduct works in and about streams can be submitted through [FrontCounter BC](#).*
- 3. No "development" should occur within 15 m of the "stream boundary" of any "stream" [all as defined in the [Riparian Areas Protection Regulation \(RAPR\)](#)] in the absence of an acceptable assessment, completed by a Qualified Professional (QP), to determine if a reduced riparian setback would adversely affect the natural features, functions and conditions of the stream. Submit the QP assessment to the appropriate Ministry of Water, Land and Resource Stewardship office for potential review. Local governments listed in Section 2(1) of [RAPR](#) are required to ensure that all development is compliant with RAPR.*

4. The federal [Species at Risk Act \(SARA\)](#) protects Endangered, Extirpated or Threatened species listed under Schedule 1 of SARA. Developers are responsible to ensure that no species or ecosystems at risk (SEAR), or Critical Habitat for Federally listed species, are adversely affected by the proposed activities. The BC Species and Ecosystem Explorer website provides information on known SEAR occurrences within BC, although the absence of an observation record does not confirm that a species is not present. Detailed site-specific assessments and field surveys should be conducted by a QP according to [Resource Inventory Standard Committee \(RISC\)](#) standards to ensure all SEAR have been identified and that developments are consistent with any species or ecosystem specific [Recovery Strategy or Management Plan](#) documents, and to ensure proposed activities will not adversely affect SEAR or their [Critical Habitat for Federally-listed Species at Risk \(Posted\)](#).
5. Development specific Best Management Practices (BMPs) should be applied to help meet necessary legislation, regulations, and policies. Current BC BMPs can be found at: [Natural Resource Best Management Practices - Province of British Columbia \(gov.bc.ca\)](#) and [Develop with Care 2014 - Province of British Columbia](#).
6. Vegetation clearing, if required, should adhere to the least risk timing windows for nesting birds (i.e., development activities should only occur during the least risk timing window). Nesting birds and some nests are protected by Section 34 of the provincial [Wildlife Act](#) and the federal [Migratory Birds Convention Act](#). Guidelines to avoid harm to migratory birds can be found at: [Guidelines to avoid harm to migratory birds -Canada.ca](#). If vegetation clearing is required during the bird nesting period (i.e., outside of the least risk timing window) a pre-clearing bird nest survey should be completed by a QP. The following least risk windows for birds are designed to avoid the bird nesting period:
 - Bird Species Least Risk Timing Windows*
 - Raptors (eagles, hawks, falcons, & owls) Aug 15 – Jan 30*
 - Hérons Aug 15 – Jan 30*
 - Other Birds Aug 1 – March 31*
7. The introduction and spread of invasive species is a concern with all developments. The provincial [Weed Control Act](#) requires that an occupier must control noxious weeds growing or located on land and premises, and on any other property located on land and premises, occupied by that person. Information on invasive species can be found at: [Invasive species - Province of British Columbia](#). The [Invasive Species Council of BC](#) provides BMPs that should be followed, along with factsheets, reports, field guides, and other useful references. For example, all equipment, including personal equipment such as footwear, should be inspected prior to arrival at the site and prior to each daily use and any vegetative materials removed and disposed of accordingly. If noxious weeds are established as a result of this project or approval, it is the tenure holder's responsibility to manage the site to the extent that the invasive, or noxious plants are contained or removed.
8. Section 33.1 of the provincial [Wildlife Act](#) prohibits feeding or attracting dangerous wildlife. Measures should be employed to reduce dangerous human-wildlife conflicts. Any food, garbage or organic waste that could attract bears or other dangerous wildlife should be removed from the work area. If this is not feasible and waste is not removed, it should be stored in a bear-proof container to avoid drawing wildlife into the area and increasing the threat of human/wildlife conflict.
9. If this referral is in relation to a potential environmental violation it should be reported online at [Report All Poachers & Polluters \(RAPP\)](#) or by phone at 1-877-952-RAPP (7277).
10. Developments must be compliant with all other applicable statutes, bylaws, and regulations.

If the references above do not address your concerns, please do not hesitate to reach out to me for further investigation into your concerns.

2nd Response from MOF: So long as the landowner has sufficient water licence rights to support the dwelling and irrigation land, Ministry of Forests, Water Stewardship Branch has no outstanding concerns.

Fortis BC

Land Rights Comments

It should be noted that additional land rights issues may arise from the design process but can be dealt with at that time, prior to construction.

Operational & Design Comments

There are FortisBC Electric ("FBC(E)") primary distribution facilities along 27th Ave S.

All costs and land right requirements associated with changes to the existing servicing are the responsibility of the applicant.

The applicant and/or property owner are responsible for maintaining safe limits of approach around all existing electrical facilities within and outside the property boundaries.

To proceed, the applicant should contact an FBC(E) designer as noted below for more details regarding design, servicing solutions, and land right requirements.

In order to initiate the design process, the customer must call 1-866-4FORTIS (1-866-436-7847). Please have the following information available in order for FBC(E) to set up the file when you call.

Electrician's Name and Phone number

FortisBC Total Connected Load Form

Other technical information relative to electrical servicing

For more information, please refer to FBC(E)'s overhead and underground design requirements:

FortisBC Overhead Design Requirements

<http://fortisbc.com/ServiceMeterGuide>

FortisBC Underground Design Specification

<http://www.fortisbc.com/InstallGuide>

If you have any questions or comments, please contact us at your convenience.

Ministry of Agriculture

Re: File B2301B – Board of Variance Application at 916 27th Avenue South, Erickson (PID: 015-686-850) – The Subject Property

- *Thank you for providing Ministry of Agriculture and Food (Ministry) staff the opportunity to comment on File B2301B that proposes to vary the Farm Residential Footprint regulations as outlined in Section 23 (5) of Area B Comprehensive Land Use Bylaw No. 2316, 2013. From an agricultural planning perspective, Ministry staff offer the following comments:*
- *The applicant has proposed to construct a new residence on the footprint of the previous residence that was recently destroyed by fire.*
- *Despite the proposed residence being located almost 300 metres from the front lot line, Ministry staff concur with the rationale presented by the applicant's agent for locating the new residence on the footprint of the previous residence. Specifically, constructing the residence in the proposed location does not impact the existing cherry orchard and ensures that the majority of the Subject Property remains available for both current and future agricultural use.*
- *Moreover, Ministry staff note the existing driveway will continue to be utilized to access the new residence and it also appears that the square footage of the new residence will not be increased.*
- *Ultimately, Ministry staff support the proposed location for the new residence and view this location as beneficial for current and future agricultural use of the Subject Property.*

Please contact Ministry staff if you have any questions about the above comments.

The following responses were received from the public:

Ligaya and Berny Bergman of 922-27th Ave South

Our wishes are that the Shmags be approved to build on the same footprint as the previous house that burnt down. We believe yhat that is also their desired preference. The cherries across the fence would remain in production and there would be far less disturbance to our properties. Thank you.

Ronald and Daphne Henschel of 927 27th Ave. South

To the RDCK Planning Department,

Re: the Board of Variance Application submitted by Adam Koenig (on behalf of owners Roop Smagh and Kulwant Smagh) Property: 916 27th Ave. S., Erickson, BC Lot 13 District Lot 812 Kootenay District Plan 1455 Plan 4569 015-686-850

The new residence should be built on the same location as the previous residence which was destroyed by fire. It does not make sense to remove productive orchard to comply with the Farm Resident Footprint regulations outlined in Section 23 (5) of Area B Comprehensive Land Use Bylaw No. 2316, 2013.

The site of the previous residence would not be suitable for food production due to contamination by previous inground building materials, septic fields and soil content containing gravel for existing road, driveway and parking. Therefore, relocation would cause loss of viable farm land, loss of established productive orchard trees, loss of income and increased expense to the owners to relocate the residence.

Ann McClay and Dan Larsen

We are in support of the applicant building the residence in the exact same spot as the previous residence.

3.7 Staffing/Departmental Workplace Considerations:

Should the Board of Variance order be approved, Planning Staff would notify Building Staff.

3.8 Board Strategic Plan/Priorities Considerations:

Not Applicable.

SECTION 4: OPTIONS

In considering this application, the Board of Variance (BOV) has two options:

1. Approve the minor variance for the structure
2. Refuse the minor variance for the structure

Option 1:

That the Board of Variance APPROVE a minor variance from the requirements of the Comprehensive Land Use Bylaw No. 2316, 2013 Section 23 (4) and 23 (5) to enable the construction of a residence and septic system in the location shown on the attached site plan to Roop and Kulwant Smagh at 916 27TH Avenue South, Erickson, legally described as LOT 13 DISTRICT LOT 812 KOOTENAY DISTRICT PLAN 1455 EXCEPT PLAN 4569 (PID: 015-686-850).

Option 2:

That the Board of Variance REFUSE a minor variance from the requirements of the Comprehensive Land Use Bylaw No. 2316, 2013 Section 23 (4) and 23 (5) to enable the construction of a residence and septic system in the

location shown on the attached site plan to Roop and Kulwant Smagh at 916 27TH Avenue South, Erickson, legally described as LOT 13 DISTRICT LOT 812 KOOTENAY DISTRICT PLAN 1455 EXCEPT PLAN 4569 (PID: 015-686-850).

Respectfully submitted,



Sadie Chezenko, MCP
Planner

CONCURRENCE

Planning Manager – Nelson Wight

General Manager Development & Sustainability – Sangita Sudan

ATTACHMENTS:

Attachment A – Applicant’s Proposal Summary

Attachment B – Site Plan