

Edmonton Subdivision and Development Appeal Board

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Date: November 5, 2015
Project Number: 172772780-002
File Number: SDAB-D-15-245

Notice of Decision

This appeal dated September 28, 2015, from the decision of the Development Authority for permission to:

Erect an over height Fence in the Side and Rear Yard (2.44m in Height)

On Plan 6083KS Blk 17 Lot 37, located at 9645 - 68A Street NW, was heard by the Subdivision and Development Appeal Board on October 21, 2015.

Summary of Hearing:

At the outset of the appeal hearing, the Presiding Officer confirmed with the parties in attendance that there was no opposition to the composition of the panel.

The appeal was filed on time, in accordance with Section 686 of the *Municipal Government Act*, RSA 2000, C M-26.

The Board heard an appeal of the decision of the Development Authority to refuse an application to erect an over height Fence in the Side and Rear Yard (2.44m in Height), located at 9645 - 68A Street NW. The subject Site is zoned RF1 Single Detached Residential Zone and is within the Mature Neighbourhood Overlay.

The development permit was refused because of an excess in the maximum allowable Height.

Prior to the hearing the following information was provided to the Board, copies of which are on file:

- A copy of the Canada Post confirmation;
- A copy of the Development Permit;
- Six on-line responses: four neighbouring property owners in opposition to the proposed development, and two responses in support of the proposed development, one from the property owner; and one from an adjacent neighbor; and
- Several photographs submitted by the Appellant.

The Board heard from Mr. Wells, the Appellant, who made the following points:

1. He wants to replace the existing fence for the safety of his dogs.
2. He changed the initial design of the fence to accommodate his neighbours.
3. The neighbour south of the subject Site has been in opposition to the proposed development from the beginning.
4. The property slopes from the front to the back and from the north to the south.
5. He was unsure how to measure the Height for the fence and contacted the City for clarification.
6. The neighbour south of the subject Site wanted to repair the old fence; however, in his opinion, that fence was not stable and he wanted to replace it and increase the Height of the fence to 8 feet for privacy reasons.
7. The fence he built is 6 feet, 7 inches at the highest point which provides safety for his dogs and family.

In response to questions by the Board, Mr. Wells provided the following information:

1. The fence was made with 6 feet boards, a 4" by 4" along the bottom and a board on top.
2. There is a retaining wall on the north side of the property that was removed. He added 4" by 4" supports to stabilize the fence so that his dogs cannot go under the fence.
3. The north side of the fence will be higher due to the retaining wall.
4. The east side of the property along the lane is level between the north and south side of the property.
5. Along the lane, he used 8 feet boards and dug them into the ground to keep the tops level and to add stability.
6. He did not consult with the property owner across the rear lane and did not realize they were in opposition to the proposed development.
7. He was told that the Height of the fence could be measured in three different ways:
 - i. At 0.5 of a metre from the side lot line;
 - ii. At 1.0 metre from his property line; or
 - iii. From his neighbour's yard at 1.0 metre from his property line.
8. He has no intention to have an 8 feet fence but only an overheight fence.
9. He received a letter in support of the proposed development from the neighbouring property owner to the north.
10. He referred to photographs he previously submitted to the Board showing a fence along the rear lane that is lower than his fence.
11. He referred to a photograph of the old shared fence with his neighbour. In the construction process the old fence was removed in stages and replaced with the new fence.
12. He referred to a picture of the new fence on the south side of the property showing that it is stepped down to maintain a similar Height along the length of the fence.
13. There are no Height measurements for the fence on the Site Plan.
14. He met with the Development Authority on April 22, 2015 who told him that the Height measurement should be taken from Grade at 1.0 metre inside his property line.

15. He met with the Development Authority again on June 17, 2015 and was told that the Height measurement should be taken from Grade at 1.0 metre from the fence into the neighbouring property.
16. Between these two measurements, his calculation for the Height of the fence is between 6 feet, 5 inches and 6 feet, 7 inches at the highest point. There is a 2 inch difference in elevation along the length of the fence.
17. The fence will only be in the Rear Yard.
18. He received the letter reproduced in his submission from the neighbour south of the subject Site after the boards were installed on that side of the fence.

The Board then heard from Ms. Hamilton, representing the City of Edmonton's Sustainable Development Department, who made the following points:

1. She provided the Board with photographs of the subject Site, marked Exhibit A.
2. The photographs show the rear portion of the fence along the lane looking south.
3. The ground slopes to the south rear corner of the property.
4. She was uncertain how the Height of the fence was determined as she did not do a Site visit.
5. The Applicant asked for the 8 feet maximum to be sure that the approval would cover any portion of the fence where the Height is over 6 feet, 1 inch (1.85 metres) which is the usual allowable Height.
6. There is a narrow deck board on the top of the fence and a 4" by 4" board at the bottom making the Height of the fence 6 feet, 5 inches.
7. Section 49(3) of the *Edmonton Zoning Bylaw* states:

A fence, wall, or gate on a Site in a Residential Zone shall be less than or equal to 1.85 m in Height, measured from the general ground level 0.5 m back of the property line of the Site on which the fence, wall, or gate is to be constructed, for the portion of the fence, wall, or gate that does not extend beyond the foremost portion of the principal building abutting:

- a. the Front Yard, or
 - b. Side Yard abutting a public roadway other than a Lane.
8. In her opinion, the Height of the fence should have been measured 0.5 metre back from the lot line at the highest point.
 9. This lot is unique as it slopes from the front to the back and from side to side.
 10. There is a large hinged gate and man gate in the fence along the rear lane.

The Board then heard from Mr. Allport, who made the following points:

1. He is the neighbour south of the subject Site and opposes the proposed development.
2. His property and the subject property are similar in elevation and there was a swale between the two properties prior to the construction of the fence.
3. The fence was to be no higher than 6 feet, 1 inches (1.85 metres).

4. The original fence had steel posts that were installed into concrete.
5. The original fence was stepped down to match the slope of the ground.
6. He researched other fences in the neighbourhood that are similar to the proposed development.
7. He is agreeable to a 6 feet, 1 inch high solid fence being developed.
8. During construction, he inquired about the 4" by 4' boards at the bottom of the fence, but did not receive a response.
9. His letter to the Appellant (provided by the Appellant in his submissions) was sent when the fence boards were being installed on the first one or two sections.
10. In his opinion, the development permit application should have been for an "as built" fence and not a 2.44 metres (8 feet) fence.

In response to questions by the Board, Mr. Allport provided the following information:

1. He confirmed that his property slopes from the front to the rear, and from north to south.
2. In his opinion, stepping the fence toward the rear of the property increases the excess in Height. He is bothered by the aesthetics and by the Height, particularly the Height of the three sections closest to the lane and the section along the lane.
3. The fence is solid and approximately 7 feet high as measured at the rear of the property.
4. In his opinion, the Appellant added fill to the property to minimize the Height at the rear of the property.
5. He agreed there is a preexisting shed in the rear of the Appellants' yard which is taller than the fence and therefore the fence will not have a shadowing impact in this area.
6. He provided the Board with photographs showing the fence at the rear of the property and between the houses, marked Exhibits B to E.
7. Exhibit C shows a fence between the houses that has an excess Height of 1 to 2 inches.
8. Exhibit D shows the rear southeast corner with an excess Height of over one foot.
9. Exhibit E shows a twisted post and uneven hangers on the fence which are not aesthetically pleasing.

The Board then heard from Mr. Deroo, who is in opposition to the proposed development and made the following points:

1. He provided the Board with a written submission that included photographs and City information regarding fences, marked Exhibit F.
2. He expressed the following opinions:
 - i. The guidelines to build a fence are available on-line and should be followed;
 - ii. An overheight fence should not be allowed just for privacy reasons;
 - iii. If the Appellant had spoken to him regarding the requested Height variance, he would have been more supportive of the proposed development;
 - iv. The fence shadows the alley area and is not characteristic of the neighbourhood; and
 - v. The Appellant did not make any effort to keep within the allowable 1.85 metres maximum Height when stepping down the fence.

3. He referred to photographs showing fences in the area that are within the 1.85 metres Height requirement.
4. The Height measurement in the southeast corner is 6 feet, 10 inches.
5. The Height of the fence is not in keeping with the Height of the neighbour's fence to the north. There was no attempt to tie the fence into the neighbouring fence.
6. The photographs of the rear lane show that significant fill has been added at the rear of the property to raise the Grade beside the fence.
7. In his opinion, fill was added to the rear of the property to mitigate the excess in Height.
8. Privacy could have been addressed by planting trees as was done in the neighbouring property as shown in the photographs submitted.
9. His main concerns are that the Appellant did not consult adequately with his neighbours, and that this overheight fence is out of character, which sets a precedent for 6 feet, 10 inch fences in the area.

In response to questions by the Board, Mr. Deroo provided the following information:

1. Asked how the fence affected him, he stated that the east side of the property is visible to him and the fence could be improved by shortening and lowering the boards and the top railing.
2. He is not opposed to a 6 feet tall fence.
3. He did not have an opportunity to speak with the Appellant when the fence was being constructed. He observed confrontations between the Appellant and Mr. Allport. He believes the adjacent neighbour to the north of the subject Site was bullied into supporting the fence.

In rebuttal, Mr. Wells made the following points:

1. The neighbour north of the subject Site is in support of the proposed development.
2. Exhibit F shows that his fence is slightly higher than the 1.85 metre allowed as are some of the other fences in the area, particularly if he measured the fence at the 0.5 to 1.0 metre distance from the lot line to the Height of the fence.
3. He tried to follow the Grade by stepping down the fence as the slope decreased.
4. He was informed that dirt from the holes that were dug could be added along the back of the fence.
5. He spoke to the two adjacent neighbours prior to constructing the fence, but did not speak to the neighbour across the rear lane.
6. Exhibit E shows a slightly twisted wooden fence post. He used the posts suggested by the neighbour to the south, although he was concerned that the posts would dry out since they are wooden.
7. He did not consider shading across the rear lane as he is allowed to build a 1.85 metre high fence and the proposed fence is only slightly higher.
8. In his opinion, greenery is not the only option for privacy as the trees his neighbour planted in the last two years have not grown enough to be useful for privacy screening.
9. There is no benefit for him to lower the fence by 5 inches in some areas and it would be costly in time and money. This would not be a quick fix.

10. He would like to build a fence that will be straight across the east side of the lane and, in his opinion, he is allowed to build a fence that is 6 feet, 7 inches tall.
11. He reiterated that the higher fence will provide safety for his family and dog.

Ms. Hamilton, representing the City of Edmonton's Sustainable Development Department, then made the following points:

1. She clarified that as a policy, the maximum overheight fence Height which is considered compatible with adjacent developments and potentially allowed in a residential zone is 8 feet
2. The Development Permit was not considered as a Leave as Built, but was assessed according to the plans submitted.

Mr. Wells did not have anything to add in response.

Decision:

The appeal is ALLOWED and the decision of the Development Authority is REVOKED. The development is GRANTED as applied for to the Development Authority.

In granting the development the following variance to the *Edmonton Zoning Bylaw* is allowed:

The maximum fence Height of 1.85 metres required under Section 49.3 is increased by 0.59 metres to permit a maximum fence Height of 2.44 metres.

Reasons for Decision:

The Board finds the following:

1. The proposed development is Accessory to a Permitted Use in the RF1 Single Detached Residential Zone.
2. Based on the evidence, some neighbours support the proposed development and some oppose it. The concerns of the neighbours in opposition appear to centre on the Appellant's conduct, including his failure to consult adequately with them and a perceived lack of consideration.
3. The most affected neighbours are the adjacent neighbour to the north and the adjacent neighbour to the south of the subject Site.
4. Although the neighbourly relations subsequently deteriorated, the Appellant spoke with both of these adjacent neighbours during the planning and construction of the fence. After consultation with both adjacent neighbours, the Appellant made revisions to address some of their concerns.

5. Based on the evidence submitted, the adjacent neighbour to the north is the most affected by the variance to Height of the fence. This neighbour provided a letter of support (included with the Appellant's submission) and an on-line response in support of the proposed development. The on-line response reads, in part:

I have no issues with the height of the fence and actually enjoy the privacy. I have spent most of my free time over the summer hauling topsoil, sod and seeding the area that occupies approximately 30 cm from the fence along the whole length of the fence due to the damage that was done during the construction of the fence and the retaining wall. I have also lost 3 trees due to root damage sustained during the building of both my fence and the neighbours. At this point I do not support any alterations of the fence that borders my property because it will invalidate all the time and energy I have devoted to fixing the damage that the construction of the fence caused in the first place.

The fence is well constructed and quite pleasing to the eye and **I find it completely ludicrous that the height of the fence is causing anyone this much concern.** I'm pretty sure the time, energy, and money that has been spent on this Appeal could have been put to better use in the community. It is after all only a fence. [Emphasis added.]

6. Based on the photographs submitted, the fence is similar in style, design and construction to other newer fences in the immediate area, including Mr. Deroo's fence. The only difference is the proposed Height.
7. The Board accepts the evidence submitted that the Appellant consulted with the Development Authority on two occasions and received inconsistent information about how to measure the Height of the fence.
8. The sun shadow impacts of this overheight fence will be borne by the Appellant and the adjacent neighbor to the north, both of whom support the application and the additional privacy which accompanies the variance.
9. Further, along a significant portion of the lane, the shadows currently cast by the large preexisting shed located in the southeast corner of the subject Site will eclipse any shadows that might otherwise be cast by the fence. Additional sun shadowing impacts across the remainder of the lane attributable to a 0.59 metres excess in Height of the fence along the rear of the property are negligible.
10. Based on the above the Board is not convinced that a variance of 0.59 metres in fence Height will unduly interfere with the amenities of the neighbourhood or materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land.

Important Information for Applicant/Appellant

1. This is not a Building Permit. A Building Permit must be obtained separately from the Sustainable Development Department, located on the 5th Floor, 10250 – 101 Street, Edmonton.

2. Obtaining a Development Permit does not relieve you from complying with:
 - a) the requirements of the *Edmonton Zoning Bylaw*, insofar as those requirements have not been relaxed or varied by a decision of the Subdivision and Development Appeal Board;
 - b) the requirements of the *Alberta Safety Codes Act*, RSA 2000, c S-1;
 - c) the requirements of the *Permit Regulation*, Alta Reg 204/2007;
 - d) the requirements of any other appropriate federal, provincial or municipal legislation; and
 - e) the conditions of any caveat, covenant, easement or other instrument affecting a building or land.
3. When an application for a Development Permit has been approved by the Subdivision and Development Appeal Board, it shall not be valid unless and until any conditions of approval, save those of a continuing nature, have been fulfilled.
4. A Development Permit will expire in accordance to the provisions of Section 22 of the *Edmonton Zoning Bylaw 12800*, as amended.
5. This decision may be appealed to the Alberta Court of Appeal on a question of law or jurisdiction under Section 688 of the *Municipal Government Act*, RSA 2000, c M-26. If the Subdivision and Development Appeal Board is served with notice of an application for leave to appeal its decision, such notice shall operate to suspend the Development Permit.
6. When a decision on a Development Permit application has been rendered by the Subdivision and Development Appeal Board, the enforcement of that decision is carried out by the Sustainable Development Department, located on the 5th Floor, 10250 – 101 Street, Edmonton.

NOTE: The City of Edmonton does not conduct independent environmental checks of land within the City. If you are concerned about the stability of this property for any purpose, you should conduct your own tests and reviews. The City of Edmonton, when issuing a development permit, makes no representations and offers no warranties as to the suitability of the property for any purpose or as to the presence or absence of any environmental contaminants on the property.

Ms. K. Cherniawsky, Presiding Officer
Subdivision and Development Appeal Board

CC:

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SDAB-D-15-246

Application No. 174718919-001

An appeal by Walton Development & Management LP VS Jason and Sarah McPeak to construct exterior alterations (driveway extension, 9.0m x 1.52m) to an existing Single Detached House, located at 5104 – Edgemont Boulevard NW, was **TABLED TO NOVEMBER 18 OR 19, 2015.**