

**SUBDIVISION AND DEVELOPMENT APPEAL BOARD
PARKLAND COUNTY**

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DATE: September 25, 2017
FILE NO.: 17-D-450

Notice of Decision of Subdivision and Development Appeal Board

INTRODUCTION

[1] The Development Authority of Parkland County (the "County") granted a development permit application No. 17-D-450 (the "Development Permit") to Hans Hahn for a Single Detached Dwelling on NE-31-53-5-W5, Plan 6973MC, Lot 26, Municipal Address: 26-53532 Rge Rd 55, Parkland County (the "Site"). The County also granted a side yard variance from 3 m to 1.5 m (the "Side Yard Variance"). The Appellants, Jimmy Wong, Allen Wong, Lynn Chow, and William Wong, appealed the approval of the Side Yard Variance.

PRELIMINARY MATTERS

A. Board Members

[2] At the outset of the appeal, the Chair requested confirmation from all parties in attendance that there was no opposition to the composition of the Board hearing the appeal. None of the persons in attendance had any objection to the members of the Board hearing the appeal.

B. Additional Materials

[3] The Applicant submitted one additional exhibit prior to the closing of the hearing, which has been marked as Exhibit 8 on the list of exhibits at the end of this decision. The Appellants did not object to the submission of Exhibit 8.

C. Miscellaneous

[4] The Board marked the exhibits as set out on the list at the end of this decision.

[5] The appeal was filed on time, in accordance with Section 686 of the Municipal Government Act, R.S.A. 2000, c.M-26 (the "Act").

[6] The Board is satisfied that it has jurisdiction to deal with this matter. There were no objections to the proposed hearing process.

DECISION OF THE SUBDIVISION AND DEVELOPMENT APPEAL BOARD

[7] The Board allows the appeal. The Side Yard Variance is denied, but the development permit for the demolition of the old cottage and to build a new cottage is approved subject to the following conditions:

1. All development shall be landscaped in a manner to prevent any surface run-off onto adjacent properties.
2. The applicant shall keep the area subject to the development permit (demolition of cottage) in a clean and tidy condition free from rubbish and non-aggregate debris, including and required screening or buffering to the satisfaction of the Development Authority, at all times.
3. It shall be the sole responsibility of the owner to ensure that such signs, fences and boarding are put in the place as the owner shall consider necessary to protect the public generally and the residents of the area in particular from any danger arising as a result of the demolition of the cottage.
4. The submitted plans for the new cottage shall be amended to comply with the 3.0m setback on the east property line. The proposed development shall conform to the amended plans and shall not be moved, altered or enlarged except where authorized or directed through this permit approval.
5. The exterior of the single detached dwelling shall be finished in the manner shown on the submitted drawings.
6. The applicant shall remove all garbage and waste at his/her own expense and keep the site in a neat and orderly manner.
7. Any proposed changes shall first be submitted for review by the Development Authority. Any changes considered substantial or inconsistent with this approval, as determined by the Development Authority, may require separate development permit approval.
8. Failure to comply with the conditions of this permit may result in the permit being cancelled, suspended or modified.

PERMIT NOTES:

1. The applicant is responsible to obtain a building permit which is required for the demolition of the cottage. The Building Permit must be obtained from Parkland County.
2. The applicant is responsible to obtain building, plumbing, electrical, gas and private sewage permits which may be required. Permits must be obtained from Parkland County.
3. The applicant is responsible to ensure compliance with the Alberta Wildlife Act and the Migratory Birds Convention Act.
4. It is the applicant's responsibility to contact Alberta One Call at 1-800-242-3447 before any ground disturbance.
5. This property is identified in the Regional and Isle Lake Environmentally Significant Areas. Parkland County recommends avoiding residential fertilizer use in the Environmentally Significant Area boundary.

SUMMARY OF HEARING

[8] The following is a brief summary of the oral evidence heard by the Board. The Board has also reviewed all written submissions filed with the Board.

Development Authority

[9] The Board first heard from the Development Authority.

[10] The Development Authority indicated that the Site is zoned as Lakeshore Residential District (LSR). The single detached dwelling approved on the Site is a 110.18 sq m (1,186 sq ft) single storey structure (the "Dwelling"). The site plan indicates that the Dwelling will be situated on the Site as follows:

- a) 6.1 m to the north property line;
- b) 7.6 m to the south property line;
- c) 4.5 m to the west property line; and
- d) 1.5 m to the east property line.

[11] "Dwelling, Single Detached" is a permitted use in the Lakeshore Residential District (LSR). Section 5.6 of the Parkland County Land Use Bylaw 20-2009 (the "LUB") requires a minimum side yard setback of 3.0m. The Development Authority granted a variance of 1.5 m to the east property side yard setback.

[12] The western portion of the Site includes a tree stand and an embankment which limit the placement of a dwelling on the Site. In the opinion of the Development Authority, the Side Yard Variance is required to take into account the practical difficulties created by the features of the Site.

[13] During the Appellants' presentation, the Board was advised that the Applicant had already started construction of the Dwelling and that the foundation had already been poured. During the Applicant's submissions, the Board asked the Development Authority about the current status of the Dwelling. In response to Board questions, the Development Authority advised that the Development Permit had been approved in accordance with the Plans for the Dwelling submitted with the Application, and the Development Authority had not taken any measurements of the foundation because a building permit had not yet been issued for the Dwelling. The Development Authority also advised that the roofline for the Dwelling would be less than 1.5 m from the east property line because soffits are exempted from the setback requirements.

[14] In response to Board questions, the Development Authority advised that it might be possible to move the embankment, although the Applicant would first have to obtain a stripping and grading permit and there could be environmental concerns. However, there is nothing located on top of the embankment, such as a road, that would prevent its removal. The Development Authority advised that it considered the embankment a hardship that justified the Side Yard Variance.

[15] In response to Board questions, the Development Authority advised that the cabin previously located on the Site, which has now been demolished, did not give the Site any grandfathering rights, and that a new development permit is required for the Dwelling.

Appellants Jimmy Wong, Allen Wong, Lynn Chow, and William Wong

[16] The Board next heard from the Appellant Allen Wong and Ken Chow, who is the husband of Lynn Chow. The Appellants are the co-owners of Plan 6973MC, Lot 27, which is directly to the east of the Site ("Lot 27"), as well as Plan 6973MC, Lot 28 ("Lot 28") and Plan 6973MC, Lot 29 ("Lot 29"). These three properties have been in their family for over 45 years. There is a boathouse on Lot 27, but no

dwelling. The Appellants have used Lot 27 as a privacy buffer between the Site and their cottage on Lot 28.

[17] The Appellants oppose the Side Yard Variance because the LUB requires a 3 m side yard setback. The Appellants stated that three quarters of the Dwelling is over the 3 m setback on the east side of the Dwelling.

[18] The Appellants have been trying to sell Lot 27, Lot 28 and Lot 29, although they are ambivalent about letting the properties go. They have many family memories tied to these properties. However, they recently entered into negotiations for the sale of Lot 27, but not as part of a three lot parcel. This deal fell through when the prospective purchaser learned about the Side Yard Variance. The prospective purchaser was concerned that it would likely be impossible to obtain a variance to the setbacks on Lot 27 due to the proximity of the Dwelling and that this would negatively affect the value of Lot 27 [see page 186 of the Agenda Package].

[19] The Appellants also raised concerns that the Side Yard Variance would increase the fire hazard to Lot 27 because of the proximity of the Dwelling to the property line. The Appellants also advised that the Dwelling would be extremely close to the trees on Lot 27, which would increase the risk of damage to the Dwelling if the trees fall down. The Appellants stated that the Applicant could comply with the 3m setback if he removed portions of the embankment and moved the location of the Dwelling or downsized the footprint of the Dwelling.

[20] The Appellants advised that the Applicant has already started construction of the Dwelling and submitted photos of the work done on the foundation of the Dwelling.

[21] The Appellants also provided background information with respect to a conflict they have had with the Applicant over his use of the septic tank on Lot 27 and unsuccessful negotiations for the Applicant to purchase Lot 27 from the Appellants.

[22] In response to the Applicant's presentation, the Appellants stated that the average setback measurement proposed by the Applicant should not be used as the average is reduced considerably by the front of the Dwelling (nearest the lake), which is inset from the rest of the structure.

[23] In response to the Applicant's presentation, the Appellants stated that the setback of the old cabin located on the Site was not a concern to them because they did not use Lot 27. However, the setback of the Dwelling affects the future use of Lot 27.

[24] In response to the Applicant's presentation, the Appellants stated that the embankment has a gradual slope, not a sharp increase [see page 188 of the Agenda Package] and that there is substantial room next to the embankment where the Dwelling could be placed. The Appellants also suggested that the Applicant could build a retaining wall along the embankment or reorientate the Dwelling to avoid being too close to the embankment.

[25] In response to the Applicant's presentation, the Appellants provided further information with respect to the septic tank on Lot 27 and their negotiations with the Applicant to purchase Lot 27.

Applicant Hans Hahn

[26] The Board next heard from the Applicant, Hans Hahn. The Applicant provided extensive written submissions, which the Board has reviewed.

[27] The setback for the previous cabin on the Site was 2.62 feet, which is approximately half of the setback required by the LUB. The old cabin stood on the site for approximately 40 years, without complaint from the Appellants. The footprints of the old cabin and the Dwelling are almost the same. In 1993, the County informed him that the setback for the Site would not change, and he purchased the Site because of this information.

[28] The average setback for the east side yard is 3 meters, 6 inches (based upon his calculations – see pages 218-219 of the Agenda Package), and that this is the measurement that should be used, not the narrowest point.

[29] Due to the embankment on the Site, the usable width of the Site is only about 25 feet if the side yard setback is complied with. The embankment is between 1.5 m and 2.7 m high. There isn't enough room next to the embankment to move the Dwelling any closer.

[30] The Applicant also provided background information with respect to the conflict with the Appellants over his use of the septic tank on Lot 27 and unsuccessful negotiations for the Applicant to purchase Lot 27 from the Appellants.

[31] In response to Board questions, the Applicant confirmed that he started construction on the Dwelling and that the foundation had already been poured at the date of the appeal hearing. He stated that he poured the foundation after he had been advised by the County that he could construct at his own risk during the 15-day appeal period for the Development Permit. It is his practice to construct as quickly as possible, and he didn't want to waste time waiting for this appeal to be heard.

[32] In response to Board questions, the Applicant advised that he was aware of the 3 m setback requirement when he designed the Dwelling, but that he does not want to downsize the Dwelling. He and his wife entertain their large family and many visitors at the Site.

FINDINGS OF FACT

[33] The Site is located at NE-31-53-5-W5, Plan 6973MC, Lot 26, Municipal Address: 26-53532 Rge Rd 55, Parkland County.

[34] The Site is zoned Lakeshore Residential District (LSR) in Parkland County Land Use Bylaw 20-2009, as amended.

[35] The Side Yard Variance materially interferes with or affects the use, enjoyment or value of Lot 27.

[36] The Appellants are affected persons.

[37] The Applicant is an affected person.

REASONS

[38] The Board notes that its jurisdiction is found in section 687(3) of the *Municipal Government Act*. In making this decision, the Board has examined the provisions of the LUB, and has noted the provisions of the LUB as referenced in the Development Authority's Report. The Board has also considered the oral and written submissions made by the Appellants, the Development Authority, and the Applicant.

687(3) In determining an appeal, the subdivision and development appeal board

- (a) must act in accordance with any applicable ALSA regional plan;*
- (a.1) must comply with the land use policies and statutory plans and, subject to clause (d), the land use bylaw in effect;*
- (b) must have regard to but is not bound by the subdivision and development regulations;*
- (c) may confirm, revoke or vary the order, decision or development permit or any condition attached to any of them or make or substitute an order, decision or permit of its own;*
- (d) may make an order or decision or issue or confirm the issue of a development permit even though the proposed development does not comply with the land use bylaw if, in its opinion,*
 - (i) the proposed development would not*
 - (A) unduly interfere with the amenities of the neighbourhood, or*
 - (B) materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land,*
 - and*
 - (ii) the proposed development conforms with the use prescribed for that land or building in the land use bylaw.*

Affected Persons

[39] The Appellants jointly own Lot 27, which is adjacent to the Site. Due to the proximity of Lot 27 to the proposed development, they are all affected by the proposed development.

[40] Although it may not be required to expressly address the status of the Applicant, in order to be clear, the Board finds the Applicant affected because his permit has been appealed.

Scope of the Appeal

[41] At issue in this appeal is the Side Yard Variance. The Appellants take no issue with the approval of the Development Permit, aside from the Side Yard Variance. The Board heard no evidence that the Dwelling is not in compliance with any land use policy or statutory plan. The only issue is whether the Applicant should be granted a variance to the 3.0m setback requirement found in section 5.8.4 of the LUB.

Side Yard Variance

[42] Pursuant to section 687(3)(d), the Board may make an order or decision or issue or confirm the issue of a development permit even though the proposed development does not comply with the

land use bylaw, provided the Board is of the opinion that the proposed use conforms with the use in the LUB, and the proposed development would not unduly interfere with the amenities of the neighbourhood, or materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land.

[43] The property is zoned Lakeshore Residential District (LSR). The proposed development conforms with the uses in the Lakeshore Residential District (LSR) district, thus the requirements of section 687(3)(d)(ii) have been satisfied.

[44] However, section 5.8.4 of the LUB requires that the minimum side yard setback for internal parcels in the Lakeshore Residential District (LSR) is 3.0 m. The Development Authority granted a 1.5 side yard setback variance for the east side of the Site, which is adjacent to Lot 27. The Board may only exercise its discretion to confirm the Side Yard Variance if, on the evidence, it concludes that the Side Yard Variance would not unduly interfere with the amenities of the neighbourhood, or materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land.

[45] There was no evidence that the Side Yard Variance would interfere with the amenities of the neighbourhood. Thus, the Board examined the impact of the Side Yard Variance on the use, enjoyment and value of the Appellant's property.

The Use and Enjoyment of Lot 27

[46] The Board considered whether the Side Yard Variance materially interferes with or affects the use or enjoyment of Lot 27.

[47] The Board heard evidence that the Appellants had previously maintained Lot 27 over the years as a buffer between the Site and Lot 28. The Appellants indicated that although they and their family own Lot 27, Lot 28 and Lot 29, they are in the process of selling Lot 27 as a "stand alone" lot. They submitted that if Lot 27 is sold independently of the other two lots, Lot 27 will, as a lot unconnected with Lots 28 or 29, have to meet the regulations for development. The Board understood this comment to mean that if Lot 27 is sold, but Lots 28 and 29 either remain with the Appellants, or are sold to other persons, the developer for Lot 27 would have to meet all development regulations without being able to utilize the space on Lots 28 or 29. The Board understood that this might result in decreased flexibility for the location of a structure on Lot 27. The Applicant did not provide any argument or evidence in response to this concern of the Appellants. To the extent that the Side Yard Variance on Lot 27 might limit future development on Lot 27, the Board finds that the Side Yard Variance will have an impact on the use and enjoyment of Lot 27.

[48] The Appellants also expressed the concern that a future developer of Lot 27 would not be able to obtain a variance to the side yard requirements for Lot 27 if the Side Yard Variance was granted to the Applicant. The impact to the Appellants appears to be that they or a subsequent purchaser of Lot 27 would suffer a loss of the use or enjoyment of Lot 27 due to the loss of flexibility in the location of the building, if they were denied the opportunity to reduce the side yards. The Board accepts the Appellants' evidence that the building flexibility of Lot 27 is negatively impacted by the Side Yard Variance. The Board is persuaded that the building footprint on Lot 27 would likely be decreased by the Side Yard Variance, as a similar variance would not likely be granted on the west side of Lot 27. The Board is also persuaded that both the building footprint and the options for orientating a

dwelling on Lot 27 would be limited by the location of the Dwelling within 1.5 m of the east property line on the Site.

[49] The Applicant stated that the side yard setback on the east side of the Site has always been narrow and the Appellants have never complained about the setback before. The Applicant also pointed to the advice he received from the County in 1993 that the setbacks for the site would not change. However, aside from this comment, the Applicant provided no evidence that Lot 27 would not lose building flexibility or privacy as a result of the proximity of the Dwelling to the property line.

[50] The Applicant stated that the building on the Site had been there for many decades, but that the County changed the side yard requirements in 2009. The Applicant appeared to be arguing that he had been granted approval to keep the side yard at 1.5 feet, regardless of the current LUB regulations. The Board notes that the land use bylaw that governs is the bylaw in place at the time of the hearing before the Board. This means that the current LUB, with the requirement of a 3 m side yard is the applicable bylaw. Now that the old cabin has been demolished, the Applicant is required to obtain a new development permit, and that permit must comply with the current LUB. As such, neither the old setbacks nor the County's 1993 advice are of any relevance to this appeal.

[51] The evidence before the Board relating to the impact on use and enjoyment of the Appellants was not contested by the Applicant. The Board finds that the evidence before it supports that the Side Yard Variance will have a material impact on the use and enjoyment of Lots 27.

[52] The Appellants argued that Lot 27 had previously been used to provide privacy for the cabin on Lot 28, but that they were attempting to sell Lot 27 independently of Lots 28 and 29. With an independent sale of Lot 27 with potential development on Lot 27, a reduction in the side yard to 1.5 m means that the Dwelling is closer to Lot 27 than would be the case without the Side Yard Variance. The Board is of the view that placing the Dwelling closer to the property line could reduce the privacy of future development on Lot 27. This too is a negative impact on the use and enjoyment of Lot 27.

[53] The Board heard evidence from the Applicant that the Side Yard Variance is required because of the inconvenient location of the embankment on the Site. The Applicant, who by his own evidence was an engineer and had done other construction projects, presented little evidence for the Board with respect to the location, height, and slope of the embankment. Although the photograph at page 188 of the Agenda Package shows some slope between the foundation of the Dwelling and the trees on the west side of the Site, there is no clear indication how high or how steep the slope is. The Applicant stated that the embankment is up to nine feet high, while the Appellants stated that it is only a few feet high. The Detailed Site Plan provided by the Applicant at page 212 of the Agenda Package shows the general location of the embankment, but does not indicate how far the embankment is from the Dwelling footprint or its height or slope. The Appellants suggested that the embankment could be at least partially removed to create more space on the west side of the Site. The Development Authority agreed that this was possible.

[54] The Appellants also suggested that the Dwelling could be redesigned, either by changing the floor plan or the Dwelling's orientation on the Site, in order to accommodate the natural features of the Site and the required setbacks. There was no evidence that the Applicant considered alternatives to the location of the Dwelling. Rather, the Applicant's evidence was that he wanted the Dwelling to be the size it is because of his and his wife's social needs.

[55] The Board is not persuaded that the Side Yard Variance is necessary to permit the construction of a dwelling on the Site, nor is the Board persuaded that any construction constraints outweigh the impacts on use and enjoyment to Lot 27. There is no evidence that the Applicant considered any alternatives to the current size, location, and orientation of the Dwelling. There is also no evidence that the Applicant considered whether the embankment could be partially removed in order to accommodate the Dwelling. Rather, the Applicant chose all the features of the Dwelling that suited him and commenced construction, even prior to the date commencement was authorized by the Development Permit.

[56] In the absence of any evidence to the contrary, the Board finds that the future use and enjoyment of Lot 27 are negatively impacted by the location of the Dwelling only 1.5 m away from the east property line. Therefore, the Board finds that the Side Yard Variance is a material interference with the use and enjoyment of Lot 27.

The Value of Lot 27

[57] The Board has also considered whether the Side Yard Variance materially interferes with or affects the value of Lot 27.

[58] The Board heard evidence from the Appellants that, although Lot 27 has historically been used as one of three lots for a single purpose – the Wong’s family cabin, the Appellants now intend to sell Lot 27 as a standalone property. The Appellants presented evidence that a prospective purchaser of Lot 27 withdrew their offer to purchase after learning about the Side Yard Variance. The letter from the prospective purchaser indicated that the Side Yard Variance was the reason they had withdrawn their offer to purchase Lot 27. The Appellants argued that the loss of the recent sale of Lot 27 demonstrated that the value of Lot 27 was negatively impacted by the Side Yard Variance. The Appellants’ evidence was the only evidence before the Board on this point. The Applicant was given the opportunity to rebut this evidence, but did not respond to it, either in his written or oral submissions.

[59] In the face of this uncontroverted evidence that the Appellants intend to sell Lot 27 as a standalone property and that they lost a sale of Lot 27 after the prospective purchaser learned of the Side Yard Variance, the Board is prepared to find that the recent sale of Lot 27 was stymied by the Side Yard Variance. The Board is also persuaded that the Appellants’ ability to sell Lot 27 in a timely fashion has been affected. The Board finds that the value of Lot 27 is negatively impacted by the location of the Dwelling only 1.5 m away from the east property line. Therefore, the Board finds that the Side Yard Variance is a material interference with the value of Lot 27.

Submissions Not Considered by the Board

[60] The Board heard evidence about the effect of the proximity of the Dwelling to some trees on Lot 27. The Appellants asserted that the proximity of the Dwelling to the trees created a fire hazard and that the trees were too close to the Dwelling. The Applicant denied that there was any greater fire hazard or risk caused by the trees, and asserted that unless there was an act of God, insurance would cover any damage. The Board notes that none of the parties provided any evidence on the exact location of the trees, the proximity of the trees to the Dwelling, the height of the trees, or the likelihood that the trees would cause damage to the Dwelling if they fell. Further, the question of who

would be liable for damage caused by the trees is not relevant to this appeal. The Board has not considered the trees, or any hazard or risk that could be caused by them, in coming to its decision.

[61] The Appellants and the Applicant also made lengthy submissions on the history of their conflict over the Applicant's use of the septic tank on Lot 27 and unsuccessful negotiations for the Applicant to purchase Lot 27 from the Appellants. None of these submissions are relevant to this Appeal, and the Board has not considered either the Appellants' or the Applicant's submissions on these points in coming to its decision.

[62] The Applicant also made extensive submissions on his construction background and his litigation experience and also provided character references. Throughout the hearing, the Board directed the Applicant to focus on the subject matter of the appeal. Despite these warnings, the Applicant provided no submissions that would have assisted the Board in determining that the Side Yard Variance would not materially interfere with the use, enjoyment, and value of Lot 27. In particular, he provided no evidence with respect to the value, size, or topography of Lot 27 or how the Side Yard Variance would affect Lot 27.

[63] The Board also heard evidence that the Applicant commenced construction of the Dwelling in advance of the hearing of this appeal, contrary to the Development Permit. The Board did not consider this evidence, nor has it had any impact on the Board's decision with respect to the Side Yard Variance.

[64] For the above reasons, the appeal is allowed and the Side Yard Variance is denied.

Issued this 6th day of October, 2017 for the Parkland County Subdivision and Development Appeal Board



for Jane Smith, Chair
SUBDIVISION AND DEVELOPMENT APPEAL BOARD

This decision may be appealed to the Court of Appeal of Alberta on a question of law or jurisdiction, pursuant to Section 688 of the Municipal Government Act, R.S.A. 2000, c.M-26. This section requires an application for leave to be filed with the Court of Appeal of Alberta within 30 days of receipt of this decision.

APPENDIX "A" REPRESENTATIONS

PERSON APPEARING

1. Kim Kozak, Development Planner
2. Craig Thomas, Supervisor, Development Planning
3. Allen Wong and Ken Chow
4. Hans Hahn

APPENDIX "B"
DOCUMENTS RECEIVED AND CONSIDERED BY THE SDAB:

Exhibit	Description	Date	Pages
1.	Table of Contents and Agenda	Sept 20, 2017	1
2.	Notice of Appeal	Sept 1, 2017	114-121
3.	SDAB Clerks Report	Sept 15, 2017	122-126
4.	Submission of the Development Authority	Sept 14, 2017	127-146
5.	Appellant Submission	Sept 19, 2017	147-188
6.	Letter in support of the Appeal	Sept 13, 2017	189
7.	Applicant Submission	Sept 19, 2017	191-233
8.	Real Estate Listing for Plan 6973MC, Lot 28	September 25, 2017	N/A