

**SUBDIVISION AND DEVELOPMENT APPEAL BOARD
PARKLAND COUNTY**

Legislative Services, Parkland County Centre
53109A HWY 779
Parkland County, AB T7Z 1R1
Telephone: (780) 968-8471
Email: SDAB@parklandcounty.com

HEARING DATE: March 28, 2022
FILE NO.: 21-D-520

Notice of Decision of Subdivision and Development Appeal Board

INTRODUCTION

[1] The Development Authority of Parkland County (the "Development Authority") denied a development permit for an existing single detached dwelling on lands legally described as Lot 13, Block 2, Plan 1605MC within NW-25-53-6-W5, and municipally described as 44-53424 Range Road 60, Parkland County (the "Lands").

[2] On February 28, 2022, Roman Korol appealed the refusal on behalf of the applicant, Gateway Construction (the "Appellant").

[3] The Subdivision and Development Appeal Board (the "Board") heard the appeal on March 28, 2022 via videoconference in accordance with the *Meeting Procedures (COVID-19 Suppression) Regulation*, AR 50/2020.

PRELIMINARY MATTERS

A. Board Members

[4] 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. Exhibits

[5] At the beginning of the hearing the Chair confirmed that everyone in attendance had the hearing package prepared for the hearing. There was no objection to any of the exhibits which had been submitted in accordance with the Board's hearing submission dates. The Board marked those exhibits received prior to the hearing as set out at the end of this decision.

[6] During the hearing, the Appellant wished to submit screen shots evidencing the support of his neighbours for the appeal. There was no objection to the admission of these screen shots by anyone in attendance at the hearing and after redacting the personal information,

these screen shots were accepted as exhibits and are marked on the list of exhibits at the end of this decision.

C. Miscellaneous

[7] The appeal was filed in time, in accordance with section 686 of the *Municipal Government Act*, RSA 2000, c M-26 (the "MGA").

[8] The Board is satisfied that it has jurisdiction to deal with this matter. There were no objections to the proposed hearing process. There were no preliminary matters raised at the beginning of the hearing.

DECISION OF THE SUBDIVISION AND DEVELOPMENT APPEAL BOARD

[9] The Board allows the appeal and revokes the Development Authority's decision to refuse development permit 21-D-520. The Board issues development permit 21-D-520 without conditions.

SUMMARY OF HEARING

[10] The following is a summary of the oral and written evidence submitted to the Board. At the beginning of the hearing, the Board indicated that it had reviewed all the written submissions filed in advance of the hearing.

Development Authority

[11] The existing dwelling is located on the Lands at 44-53424 Range Road 60, legally described as Lot 13, Block 2, Plan 1605MC within NW-25-53-6-W5. The Lands are adjacent to Isle Lake and Island Drive.

[12] The Lands are in a Lakefront Residential area as identified in the Municipal Development Plan Bylaw No. 2017-14 ("MDP") Development Concept, Figure 7. Section 7.1.9 of the MDP supports residential development on lakefront and riparian areas. There is no applicable Area Structure Plan. The Lands are also located within the Isle Lake Environmentally Significant Area as described in the Environmental Conservation Management Plan.

[13] The Lands are located within the LSR – Lakeshore Residential District as provided in Section 5.8 of the Land Use Bylaw No. 2017-18 (the "LUB").

[14] The Development Authority received an application for an existing single detached dwelling (the "Existing Dwelling") on the Lands on November 26, 2021, as part of an enforcement file. The Development Authority deemed the application complete on December 16, 2021 and refused the development permit on February 25, 2022.

[15] The Applicant submitted following items in support of the application:

- Site Plans, including an original Site Plan and a professionally surveyed Site Plan
- Floor Plan

- Elevation Drawings

[16] In reviewing the application, the Development Authority requested a professionally surveyed site plan to determine the location of the Existing Dwelling.

[17] The Development Authority determined the use of the Existing Dwelling to be Dwelling, Single Detached. The Development Authority confirmed that the Dwelling, Single Detached is a permitted use on the Lands as outlined in Section 5.8.2 of LUB, provided that the applicable regulations are met.

[18] Section 5.8.4(a)(i) of the LUB requires that a Dwelling, Single Detached have a minimum front yard setback of 7.5 metres when located adjacent to an internal subdivision road. The Development Authority determined that the Existing Dwelling is adjacent to Island Drive (an internal subdivision road) and has a front yard setback of 2.5 metres. In the Development Authority's view, the Existing Dwelling does not conform to Section 5.8.4(a)(i) of the LUB.

[19] Section 5.8.4(b)(i) of the LUB requires that a Dwelling, Single Detached located on internal parcels have a minimum side yard setback of 3.0 metres. The Development Authority determined that the Existing Dwelling is an internal parcel and has a side yard setback of 1.77 metres from the west property line. The Development Authority determined that the Existing Dwelling does not conform to Section 5.8.4(b)(i) of the LUB.

[20] The Development Authority determined that the variances identified are not minor in nature. The Development Authority determined that the setback distance requested is 71% closer than allowable from the front yard and 41% closer than allowable for the west side yard.

[20] Section 16.11 of the LUB grants the Development Authority variance authority. However, due to the extent of the variance and the lack of sufficient rationale for the variance, the Development Authority decided not to exercise its authority.

[21] The Development Authority concluded that the Existing Dwelling on the Lands did not conform to the LUB and refused the application for a development permit. The Development Authority submitted that the Board should uphold the decision of the Development Authority and find that the Existing Dwelling is not in compliance with the setback requirements for the Lakeshore Residential District.

[22] In response to questions from the Board, the Development Authority advised as follows:

- a. The LUB does not define "minor variance." The Development Authority's practice is to consider a variance of 10 – 15% from the setback requirements as a minor variance.
- b. There is no definition of "hardship" in the LUB. Sometimes the Development Authority will grant a variance where the lot is deemed in some way unsuitable for development.

- c. If a development permit is not approved, that refusal is sent only to the Applicant. The Development Authority does not circulate the refusal to other landowners.

Appellant Roman Korol, Agent for Gateway Construction

[23] Roman Korol, on behalf of the Appellant, Gateway Construction, described the Existing Dwelling on the Lands. The Existing Dwelling is 24 feet (7.32 metres) wide and 50 feet (15.24 metres) long. The Existing Dwelling is situated on an angle within the Lands.

[24] Mr. Korol indicated that the Existing Dwelling cannot be built any smaller as currently designed. The house contains a staircase, and the staircase could not be built width-wise in a narrower home and also meet applicable building codes. Further, if the Existing Dwelling was built narrower and moved to the side to meet the setback requirements, the garage and lake would become inaccessible due to the steep grade of the Lands. Mr. Korol also noted the financial costs that would be incurred to make the Existing Dwelling smaller.

[25] The Existing Dwelling was built in accordance with fire safety considerations. There are fire rating walls with solid soffits, steel siding, a steel roof, and low overhang. There are no windows or other penetrations on the side of the building that requires a side yard setback variance. Mr. Korol explained that the house met a five-foot setback required by the Alberta Building Code.

[26] The Lands on which the Existing Dwelling is located were undeveloped for many years. Mr. Korol noted the following as factors that restricted the type, size and location of development that could occur on the lands:

- Poor grading and elevation changes on the Lands. At one point, the land dropped nearly 2.74 metres in two metres;
- Location of an existing septic system;
- Shape of the Lands, in conjunction with the above factors.

[27] The septic system was approved by Parkland County and installed prior to the Appellant's involvement. The location of the septic system was restricted by the proximity of the lake.

[28] The Existing Dwelling could not be built in another location on the Lands. It could not be moved any further east, as it could not be built on top of the septic system. The Existing Dwelling could not be moved any closer to the lake, as there needed to be sufficient space for entry into the garage. The location of the Existing Dwelling was further restricted by the poor grading of the lot.

[29] Mr. Korol indicated that as the Existing Dwelling was located, there was no encroachment upon visuals of the surrounding area, or trees, or on the roadway. There was more than sufficient room on the Lands for plowed snow in the winter.

[30] Mr. Korol stated that when the Appellant built the Existing Dwelling, they intended to comply with required setbacks. The Appellant chose the location of the Existing Dwelling based

on existing survey pins on the lands. Using measurements from the survey pins, the Appellant believed that they did meet the setback requirements. Later, the Appellant realized that the pins were not accurate. In one location, the pin was approximately 7.5 metres from the correct location. The error greatly impacted the front yard setback between the Existing Dwelling and Island Drive. Mr. Korol acknowledged that the incorrect measurements were no excuse for failing to comply with the setback requirements.

[31] In Mr. Korol's view, the front yard setback variance was minor, as it was only one corner of the home that failed to meet the setback requirements. Most of the front yard did meet the setback requirement. He noted that at other locations along the front of the Existing Dwelling, the front yard setback was 67 feet (20.42 metres).

[32] Mr. Korol noted that neighbouring homes were similarly located on their lots. On the neighbouring property to the west, the home was located very close to the property line, and was approximately 18 inches closer to the internal subdivision road. That neighbouring home was also built without windows facing towards the Existing Dwelling. Mr. Korol indicated that generally, neighbouring homes were built between 12 inches (0.30 metres) and three feet (0.91 metres) from their side yard property lines. He indicated that the Existing Dwelling was one of only a few homes on the block to be built close to the required setbacks.

[33] Mr. Korol stated that he had asked the neighbours whether they objected to the Existing Dwelling, and no one objected. Mr. Korol also indicated that the neighbours appreciated the Existing Dwelling because it increased property value. The neighbours preferred a quality home on the Lands, rather than a smaller "shack."

[34] Mr. Korol indicated that due to an administrative error, he did not have time to obtain a letter signed by neighbours confirming that they did not object to the Existing Dwelling. At the hearing, he submitted text messages from neighbours to be marked as an exhibit. The text messages confirmed that several individuals would not contest the development.

[35] In response to Board questions, Mr. Korol indicated that the Existing Dwelling had changed ownership during construction. The Appellant started building the Existing Dwelling for a landowner in Toronto, who had purchased the development from the previous owner. The Appellant intended to apply for a permit, but due to supply chain issues during the COVID-19 pandemic, the building materials on site began to deteriorate. The Appellant chose to put siding on the house to prevent the materials from rotting.

FINDINGS OF FACT

[36] In addition to the specific facts set out under the Board's reasons, the Board finds the following as facts.

[37] The Lands are located at Lot 13, Block 2, Plan 1605MC, within the lands legally described as NW-25-53-6-W5, and municipally described as 44-53424 Range Road 60, Parkland County.

[38] The Lands are located within the LSR – Lakeshore Residential District of the LUB.

[39] The use of the Existing Dwelling is Dwelling, Single Detached.

[40] Dwelling, Single Detached is a permitted use in the LSR – Lakeshore Residential District.

[41] The Appellant, Gateway Construction, is an affected person.

[42] The requested variances will 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.

REASONS

Jurisdiction

[43] The Board notes that its jurisdiction is found in section 687(3) of the MGA. In making this decision, the Board has examined the provisions of the LUB and has considered the oral and written submissions made by and on behalf of the Development Authority and the Appellant.

687(3) In determining an appeal, the board hearing the appeal referred to in subsection (1)

(a) repealed 2020 c39 s10(52);

(a.1) must comply with any applicable land use policies;

(a.2) subject to section 638, must comply with any applicable statutory plans;

(a.3) subject to clauses (a.4) and (d), must comply with any land use bylaw in effect;

(a.4) must comply with the applicable requirements of the regulations under the Gaming, Liquor and Cannabis Act respecting the location of premises described in a cannabis licence and distances between those premises and other premises;

(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

[44] The first question the Board must determine is whether those appearing and speaking before the Board are affected persons. The Board notes that no party raised any objection with any other party's participation.

[45] Mr. Korol confirmed that he filed the Notice of Appeal on behalf of Gateway Construction. As Gateway Construction's development permit is under appeal, the Board finds that Gateway Construction is an affected person.

Statutory Plans

[46] The only evidence before the Board on the applicable MDP is the information from the Development Authority. The Lands are located within the Lakefront Residential Area as identified in Development Concept, Figure 7 of the MDP. Section 7.1.9 of the MDP supports residential development on lakefront and riparian areas. The Board heard no evidence that suggests the Existing Dwelling is not in compliance with the MDP.

Land Use District

[47] The Lands are zoned as LSR – Lakeshore Residential District.

Nature of the Use

[48] The Development Authority determined that the use of the Existing Dwelling was Dwelling, Single Detached. The Board determined that the use is Dwelling, Single Detached for the reasons set out below.

[49] The LUB defines

- "Dwelling, Single Detached" as "a Development consisting of a residential Building containing one Dwelling with or without an attached garage and/or attached carport and is separated from any other Dwelling [...]"
- "Development" as including "a building [...] and the construction or placing of any of them in, on, over or under land [...]"
- "Dwelling" as "a building [...] containing one or more habitable rooms that constitute a self-contained living accommodation unit having sleeping, cooking and toilet facilities and intended as a permanent residence."

[50] There was no dispute before the Board that the Existing Dwelling was anything other than a Dwelling, Single Detached. The pictures that were before the Board show a single detached dwelling and it is clear that the use will be for residential purposes. For these reasons, the Board concludes that the use is a Dwelling, Single Detached.

[51] A Dwelling, Single Detached is a permitted use in the LSR – Lakeshore Residential District as set out in Section 5.8.2(b) of the LUB.

Does the Existing Dwelling comply with the LUB regulations?

[52] The Development Authority's uncontradicted evidence is that the Existing Dwelling does not conform to the front yard setback or side yard setback requirements as provided in the LUB. Section 5.8.4(a)(i) of the LUB requires a front yard setback of 7.5 metres. The Existing Dwelling is located 2.5 metres from the front yard property line and requires a variance of the front yard setback from 7.5 metres to 2.5 metres. Section 5.8.4(b)(i) of the LUB requires a side yard setback of 3.0 metres. The Existing Dwelling is located 1.77 metres from the side property line and requires a variance of the side yard setback from 3.0 metres to 1.77 metres.

[53] Mr. Korol submitted that the majority of the Existing Dwelling complied with setback requirements, but that due to the position of the building, one corner required variances to the front yard and side yard setback requirements.

[54] The clear evidence before the Board is that the Existing Dwelling is located within the prescribed front yard set back and within the prescribed side yard setback. Mr. Korol did not dispute this. As a result, based on the provisions of the LUB, the submissions of the Parties, and the exhibits showing the surveys and plans of the Existing Dwelling, the Board finds as a fact that the Existing Dwelling does not comply with the front yard and side yard setback requirements in the LUB.

Should the Board exercise its variance powers under Section 687(3)(d) of the MGA to vary the setback requirements?

[55] If persuaded by the evidence presented to it, the Board has the authority to exercise the variance power granted to it under Section 637(3)(d) of the MGA. The question for the Board is whether granting the variance will cause a material interference with the amenities of the neighbourhood or material interference or effect on the use, value and enjoyment of neighbouring parcels arising from the deficiency in the setback.

[56] The Board is aware of the effect of the recent Court of Appeal case in *Edmonton (City of) Library Board v Edmonton (City of)*, 2021 ABCA 355 (the "*Edmonton Library case*"). The Court of Appeal has indicated that in relation to the question of onus, the Appellant does not have an onus to justify the variance. The Board is entitled to weigh the evidence submitted in favour of and in opposition to the request for the variance in order to come to its opinion about whether to grant the variance.

[57] The Board notes that the Court of Appeal has confirmed that there are multiple reasons for the imposition of development standards which include matters such as utilitarian, safety, privacy, environmental, aesthetic and social purposes (see paragraph 52 of the *Edmonton Library case*). The Board notes that the Court of Appeal has confirmed that the Board has wide discretion when considering a request for a variance.

[58] The Development Authority argued that the variances were not minor variances. From these submissions, the Board inferred that the Development Authority considers the variances to unduly interfere with the amenities of the neighbourhood and to materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land. The Development Authority did not give further details in support of its position.

[59] The Appellant's arguments suggested that the variances 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. Mr. Korol gave evidence related to safety and privacy aspects of the Existing Dwelling, which the Board considered to determine whether the variances should be granted. Mr. Korol also argued that there is hardship to meeting the setback requirements in the LUB due to the unique characteristics of the Lands in relation to its development potential.

[60] Neither the Development Authority nor the Appellant explicitly identified reasons that might underlie the setback distances. The Board has inferred that the setback distances may serve privacy and safety purposes.

Significance of Hardship

[61] The Board accepts the Appellant's evidence that the Lands have unique features that impact development of a Dwelling, Single Detached, including the location of the septic system and the elevation changes of the lot. The Board noted that the Appellant's rationale for why the Existing Dwelling did not comply with the setback requirements in the LUB was reasonable, and accords with the evidence that the Board could see from the photographs of the Lands submitted as part of the Agenda package. The Board is of the opinion that the Appellant made reasonable attempts to comply with the required setback distances in a challenging and atypical construction environment.

[62] Despite its acknowledgement of the unique development challenges arising from the topography of the Lands, the Board wishes to consider the possible reasons for the setback requirements, which the Board has determined to be privacy and safety. The Board wishes to consider those reasons to determine whether the variances will cause a material interference with the amenities of the neighbourhood or a material interference or effect on the use, value and enjoyment of neighbouring parcels. The Board's analysis in this respect is described below.

Privacy

[63] The Board has inferred that the reason for the side yard setback is to provide an aspect of privacy to neighbouring lands.

[64] The Appellant gave evidence that the Existing Dwelling was constructed without windows or other penetrations on the side requiring the side yard setback variance, which faced the neighbouring property. Photos submitted by the Appellant showed that the neighbour's home lacked windows facing toward the Existing Dwelling (see for example photo at page 55 of 93 of the Agenda Package). Since there are no windows on the side of the Existing Dwelling facing the neighbours, the impact of a reduction in the side yard setback is minimized. The Board notes that without a window on that side of the Existing Dwelling, the Appellant will not be in a position to see into the neighbouring buildings or lands from that side of the Existing Dwelling, and thus there is little impact of privacy from the reduced side yard setback. The Board finds as a fact that the lack of window on the side of the Existing Dwelling requiring the side yard setback variance and facing the neighbouring property mitigates against reduction of privacy that may be caused by the variance to the side yard setback requirement.

[65] The Board also considered Mr. Korol's evidence that the neighbouring homes are similarly located on their lots near to side yard property lines. The Existing Dwelling was constructed in a manner consistent with other homes in the neighbourhood. The Board notes that the neighbours did not object to the location of the Existing Dwelling as currently built. Board clerk staff confirmed that neighbouring landowners within a 100-metre radius were given notice of this appeal and there were no concerns received. The only evidence before the Board was that the neighbours supported the development. In the Board's view, this evidence suggests that neighbours' privacy expectations are informed by their experience of living in the neighbourhood and that they may expect nearby homes to be constructed close to property lines. In light of the absence of concern expressed by the neighbours, as well as the fact that the Existing Dwelling is constructed similar to other neighbouring homes, the Board concludes that the reduction in the side yard setback will not materially interfere with the amenities of the neighbourhood nor with the use, value and enjoyment of neighbouring parcels.

Safety

[66] The Board considered the safety implications of the variances (both front yard and side yard). In relation to the front yard setback, Mr. Korol's evidence was that there would be sufficient room on the Lands for snow plowed from the internal subdivision road, and that the Existing Dwelling did not encroach on the roadway. At some locations along the front of the Existing Dwelling, the front yard setback was 67 feet (20.42 metres), which was in excess of the setback required by the LUB. Based on the submissions of the Appellant, and the site plans marked as exhibits, the Board finds as a fact that only one corner of the Existing Dwelling requires a variance to the front yard setback. The Board also notes that the evidence about snow removal was not contradicted. In light of this evidence, the Board finds that the variance of the front yard setback does not create a material safety risk to users of Island Drive nor does it cause a material interference with neighbourhood amenities with respect to safety. In the Board's view, this factor favours granting the variance to the front yard setback.

[67] In relation to the side yard setback, the Appellant gave evidence that the Existing Dwelling was designed with fire safety in mind. The Existing Dwelling has fire-rated walls, steel siding, a steel roof, a lack of windows and other penetrations facing towards the neighbouring property, and a low overhang. The Board accepts the Appellant's evidence that the features of the Existing Dwelling which address fire safety mitigates against safety risks that the variance to the side yard setback may cause. As the Board has accepted this evidence and finds that the Appellant's efforts at fire mitigation address any potential safety concerns which might arise due to the buildings being closer together, the Board concludes that the variance in the side yard setback does not materially interfere or affect the use, value or enjoyment of neighbouring parcels or of the amenities of the neighbourhood.

Value and Enjoyment of Land

[68] The Board also considered the impact of the variances on the value and enjoyment of neighbouring lands. The Appellant's evidence was that Existing Dwelling increased property value and that a similar home could not be built to comply with the required setbacks due to the unsuitability of the Lands. He expressed neighbours preferred the Existing Dwelling to a smaller "shack" that would likely be built on the Lands. The Board accepts the Appellant's

evidence and finds that the variances did not create a negative effect on the value of neighbouring parcels, and rather, the Existing Dwelling as built with the variances had a positive effect.

[69] The Appellant also gave evidence that neighbouring homes were similarly located on their lots, approximately 12 inches to three feet away from property lines. The text messages before the Board suggested that at least some of the neighbours did not think the Existing Dwelling would materially interfere with the enjoyment of their property. The Appellant also indicated that Existing Dwelling did not obscure the views of the surrounding areas, or encroach on trees or on the roadway. Based on this evidence, the Board finds as a fact that neighbours would continue to enjoy sights of the surrounding landscape and would be able to use the road. As a result, the Board concludes that the Existing Dwelling and variances to the front yard and side yard setbacks do not materially interfere or negatively affect the value and enjoyment of neighbouring parcels.

[70] Having considered all the evidence presented, the Board is of the opinion that the Existing Dwelling does not unduly interfere with the amenities of the neighbourhood or materially interfere with or negatively affect the use, enjoyment or value of neighbouring parcels of land.

Conclusion

[71] For the reasons above, the Board is of the opinion that it should exercise its variance powers to approve the variances setback distances sought by the Appellant. For these reasons, the Board allows the appeal and grants development permit 21-D-520.

[72] Issued this 7th day of April 2022 for the Parkland County Subdivision and Development Appeal Board.



B. Williams, Clerk of the SDAB, on behalf of B. Bundt, 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, RSA 2000, c M-26.

APPENDIX "A"
REPRESENTATIONS

PERSONS APPEARING

1. Roman Korol, Agent for Gateway Construction
2. Rachelle Trovato, Development Planner
3. Kayla Gunnarson, Observer

APPENDIX "B"

DOCUMENTS RECEIVED AND CONSIDERED BY THE SDAB:

March 28, 2022 Agenda Package			
Exhibit	Description	Date	Pages
1.	Agenda Coversheet	March 28, 2022	1
2.	Table of Contents	Undated	2 – 3
3.	Notice of Appeal – Roman Korol	February 28, 2022	4
4.	Submission of the Development Authority	March 22, 2022	5 – 49
5.	Submission of the Appellant – Gateway Construction	March 24, 2022	50 – 93
Documents Received at the Hearing			
6.	Three screen shots of text messages between Mr. Korol and neighbours of the Lands	March 28, 2022	1 – 3