

REGIONAL SUBDIVISION AND DEVELOPMENT APPEAL BOARD

UNIT B 4730 ROSS STREET
RED DEER AB T4N 1X2
403-343-3394

December 1, 2020

Appellant

Ms. C. Minifie
53 Lakeview Avenue
Summer Village of Gull Lake

Applicant

Mr. & Mrs. Heller
51 Lakeview Avenue
Summer Village of Gull Lake

NOTICE OF DECISION (Corrected)

RE: Appeal of Development Permit #07-20-501600 for Decks and a Sidewalk issued to the owners of 51 Lakeview Avenue (Lot 13A, Block 2, Plan 1622212) in the Summer Village of Gull Lake

This is the decision of the Regional Subdivision and Development Appeal Board from a November 18, 2020 Virtual Hearing, held via Zoom technology, with respect to an Appeal of a Development Permit issued by the Summer Village of Gull Lake.

Before:

R. Jenkins, Chair
A. Gillard, Board Member
L. Petten, Board Member

Clerk:

P. Irwin

PRELIMINARY MATTERS

At the start of the Hearing, the Parties were given the opportunity to raise any objections to the Board Members assigned to the Hearing. No objections were raised.

There being no other preliminary matters raised, the Hearing proceeded to the Merits of the Appeal.

SUMMARY of the POSITION of the DEVELOPMENT AUTHORITY (DA)

A request for development permit information related to two sundecks constructed at 51 Lakeview Avenue, one on south side or road side of the cabin (Front Deck) and one on the north side or lake side of the cabin (Rear Deck) was received from Ms. Minifie, the adjacent property occupant at 53 Lakeview Avenue, on February 28, 2020. Ms. Minifie advised that the Rear Deck was constructed sometime in the 2015/2016 time period and the Front Deck was constructed in the 2016/2018 time period. The Development Authority (DA) found no permits on file and informed Ms. Minifie of that.

On April 1, 2020, Ms. Minifie filed an official request that the Summer Village of Gull Lake (SV) act on what Ms. Minifie regarded as a contravention of the SV's Land Use Bylaw 346-12 (the LUB). In

further correspondence, Ms. Minifie indicated that she had been wrongly advised by the SV Office (back in 2015 or 2016) that deck construction did not require a development permit.

The DA stated that she received permission from the owners of 51 Lakeview Avenue to go on their property and investigate the concerns of Ms. Minifie . She took pictures, made measurements, etc. and responded to Ms. Minifie by letter dated July 14, 2020, with observations that:

- The deck was not attached to the main dwelling;
- Survey boundary stakes were in place; a professional land surveyor at LN Land Development confirmed that, on June 3, 2020, the lathe placed on the westerly boundary were in the correct location;
- At the closest point to the property line, the deck is 1.29 m from the line; (minimum side yard setback as per the LUB is 1.5 m, but a 15% variance may be granted, i.e. a minimum side yard of 1.27 m).
- The deck extends 4.24 m from the dwelling; beyond a minimum of 3.65 m, a development permit is required as per the LUB.

The DA was satisfied that non-compliance contraventions are minimal and that as per the LUB, the deck does 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 and conforms with the use prescribed for that land or building.

The DA stated that, on July 28, 2020, she received a copy of a letter from Ms. Minifie to Mayor D'Angelo advising that she had been in contact with Alberta Municipal Affairs and asked that the SV "see to it that the SV Land Use Bylaws are enforced as written and legislated ...".

The DA stated that she contacted the property owners at 51 Lakeview Avenue and requested them to submit a development application, which she received on September 10, 2020.

After reviewing the application, the DA approved the development permit, with conditions, on September 30, 2020, and notified the Applicant that any person claiming to be affected by the decision of the DA could file an appeal to the Subdivision and Development Appeal Board within 21 days.

The DA stated that she also sent a letter to the adjacent property owners on September 30, 2020 notifying them of the development permit and that they could appeal the permit approval, and that Ms. Minifie's appeal is now before the Board.

In addition to the DA's report, she also submitted 10 attachments, including correspondences (letters and emails), location maps, LUB excerpts, and six photos.

Upon questioning about the need for a development permit for decks, the DA indicated that the LUB states that "no permit is required for sundecks and patios which do not extend more than 3.65 m (11.98 ft) from the dwelling and which are on the same or lower than the main floor of the dwelling and which comply with all minimum Yard requirements". Because the deck on the north side extends 4.24 m from the dwelling, a permit is required.

In final statements, the DA noted that the subject decks are at, or lower than, the dwelling's main floor level.

SUMMARY of the APPLICANT's POSITION

The Development Permit Applicant, the owner of the property at 51 Lakeview Drive, stated that, in 2015, he met with the then Development Authority, Myra Reiter, and asked about building a deck and was advised he could, as long as it was not physically attached to the cabin. He was also advised that trees on top of the septic field were not allowed.

The Applicant submitted that he interviewed several local carpenters about building a deck and stairs on the south side or road side of the cabin (South Deck). He hired a 40 year qualified carpenter and advised him that the deck could not be attached to the cabin and had to be self-supporting. They went over location and size. (The stairs had to be wide enough for someone with a walker to easily ascend and descend). The carpenter advised that the deck would be built with a carrier beam close to the cabin and the next one would be 7 feet from the initial beam and any other beams would also be 7 feet apart. The work was carried out in July, 2015.

The Applicant submitted that he was satisfied with the work, and in the following year, engaged the carpenter to build a raised sidewalk on the east side and a front deck on the lake side (North Deck). This time, the carrier beam was 6 inches from the cabin, but otherwise, the building materials were similar and very sturdy. In 5 years, there has been no movement to speak of.

The Applicant referred to photos to confirm that the decks were not attached to the cabin. He also related a statement from the carpenter that the beams could not be attached to the cabin anyway because that side of the cabin was too rotten to support a deck, also noting that the cabin was originally build in 1914.

In support of his observation that the decks were not attached to the cabin, the Applicant provided a letter dated July 23, 2020 from the carpenter who built the decks and sidewalk (R. Scott Soley) stating that: " ... these decks (although connected) were "free standing and independent of the residence ...".

SUMMARY of the APPELLANT's POSITION

The Appellant, of the adjacent property at 53 Lakeview Avenue, asserts that the property owner at 51 Lakeview Avenue has developed his property with no permits for building, tree removal, or thought to bringing the property into conformance (part of the dwelling encroaches over the property line by four feet). She submits that no development permit should have been approved without the Applicant being made to bring their parcel into conformance with the Municipal Government Act and the Summer Village Land Use Bylaw.

In support of her position, the Appellant referred to section 643 of the *Municipal Government Act*, R.S.A 2000 c.M-26 and specifically sub-sections:

- (3) A non-conforming use of part of a building may be extended throughout the building, but the building, whether or not it is a non-conforming building, may not be enlarged or added to and no structural alterations may be made to it or in it.
- (4) A non-conforming use of part of a lot may not be extended or transferred in whole or in part to any other part of the lot and no additional buildings may be constructed on the lot while the non-conforming use continues.
- (5) A non-conforming building may continue to be used but the building may not be enlarged, added to rebuilt or structurally altered except (a) to make it a conforming building.

The Appellant further submits that the DA, in approving the development permit application, had not taken appropriate due regard to the adverse effects that the decks would cause to amenities such as daylight, sunlight, and privacy on adjacent parcels.

The Appellant refers to the Land Use Bylaw, section 14, to support the position that a variance should not have been granted:

14. Variance Provisions

(1) The Development Authority may approve an application for a Development Permit even though the proposed development does not comply with this Land Use Bylaw or is a Non-Conforming Building if, in the opinion of the Development Authority;

(a) the proposed development would not:

(i) unduly interfere with the amenities of the neighbourhood; or

(ii) materially interfere with or affect the Use, enjoyment or value of neighbouring Parcels of land,

and

(b) the proposed Development conforms with the Use prescribed for that land or Building in this Land Use Bylaw.

The Applicant also submits that the previously erected privacy fence between the two cabins, at 9 feet in height, is blocking sunshine from coming onto her sun porch and she is dismayed that the DA approved, given the LUB's maximum fence height of 7.21 feet (including a 10% variance). The Appellant acknowledged that she did not bother to appeal the development permit for the privacy fence (out of a concern about prejudicial bylaw enforcement). Upon questioning about the relevance of the privacy fence during the subject appeal, the Appellant stated that if the deck wasn't there, a privacy fence wouldn't be needed.

In further support of her appeal, the Appellant referred to the July 23, 2020 letter from the Applicant's deck builder and submits that he states that the two decks are "connected" to the residence.

The Appellant also submits that the \$2,000 Appeal Fee is, in her opinion, unfair compared to the \$200 fee that was in effect when the development permit application should have been made.

The Appellant referred to 22 photos in support of her appeal, as well as 22 pages of documents submitted in her initial appeal filing subsequent addendum submission.

OTHER PARTY SUBMISSION

The Board received a letter, dated November 16, 2020, from the property owners at 83 Oliver Avenue in the Summer Village. They express a concern in seeing the need for their village to uphold the intent and subsequent enforcement of the existing LUB and Policies. However, they have no explicit interest in helping or harming either party.

FINDINGS

The Summer Village of Gull Lake has a Land Use Bylaw (#346) regulating development within the Summer Village.

At the request of the DA, the Applicant submitted a development permit application for the development of decks and a sidewalk on September 10, 2020, accompanied by site plans and drawings/sketches (for work that had been carried out in 2015 & 2016). The Application was approved by the Development Authority, with conditions, on September 30, 2020.

The Board finds that the dwelling at 51 Lakeside Avenue is "non-conforming", based on the site plan included in the development permit application which shows that a corner of the Applicant's dwelling is partially located on the Appellant's adjacent property to the west. Neither of the parties to this hearing has taken issue with the fact of this encroachment.

Enlargement of or Addition to a Non-Conforming Building

The Board firstly addressed the question of whether or not this non-conforming building has been "enlarged or added to" by the construction of the two decks and sidewalk. The Board accepts the statement of the deck builder, the observations and photos of the Applicant, as well as the statement of the DA. The Board does not accept the Appellant's conclusion – from the deck builder's letter – that the decks are connected to the residence, because the deck builder did not explicitly state that. While the Board acknowledges that there may have some ambiguity in the deck builder's words, the Board's interpretation is that the decks and sidewalk were connected to each other and not to the dwelling. In the Board's opinion, that interpretation would be more consistent with the deck builder's further statement that they were "free standing and independent of the residence ...". After review of the evidence presented, the Board is not persuaded to conclude that the decks and dwelling are connected.

The Board finds that the decks and sidewalk have not enlarged or added to the building, because in the Board's opinion, they are free-standing and not connected to the dwelling and further that the development of the decks do not constitute an enlargement of or addition to a non-conforming building and consideration of a development permit is not precluded by clause 643 (5) of the *Municipal Government Act*.

Effect of Approved Decks on Neighboring Property

The Board next addressed the issued development permit and the effect of the decks as approved on the Appellants property.

With respect to the Rear Deck, the Board accepts that, as built, the deck at its most westerly point is 1.27 m from the property line, based on the Applicant's sketch and the DA's confirmation. This measurement was not in dispute. The minimum side yard prescribed by the LUB is 1.5 m, although a 15% variance could reduce the minimum side yard to 1.25 m. Given the proximity of the adjacent property's cottage, sunroom, etc., the Board finds that a variance should not have been granted, because the Rear Deck, when in use, does materially interfere with or affect the adjacent property owner's use, enjoyment or value of their property. The Board notes that the elevation of the deck (at or lower than the level of the dwelling floor), while permissible under the LUB, nevertheless exacerbates the diminishment of the adjacent property owner's privacy and enjoyment of her property. Moreover, even if the Rear Deck had met the minimum side yard setback requirement, the Board was of the view that the deck because of its closeness would have materially affected the Appellant's enjoyment of her own property. In making this finding,

the Board accepts the testimony of the Appellant and finds that her enjoyment of her property has been materially affected due to loss of privacy.

As to the Front Deck, the Board accepts that at 1.5 m from the Appellants property, the deck meets the minimum side setback requirements of the LUB. However as with the Rear Deck, the Board finds that the Front Deck, because of the minimal distance between the residential buildings resulting in part from the encroachment of the Applicant's cabin onto the Appellant's property and because of the elevation of the deck, also does materially interfere with and affects the Appellant's use and enjoyment of her property.

Other Issues

With respect to the Appellant's concerns about the 9 foot high privacy fence, tree cutting, new cabin windows, appeal fees, etc., the Board notes that it has no jurisdiction to consider those matters, as the subject appeal is on the permit for decks and a sidewalk. The Board would encourage the Appellant to pursue those matters with the Summer Village Office.

The Board makes no findings with respect to the letter from the property owner on Oliver Avenue, as it does not specifically address the subject appeal on decks and a sidewalk.

DECISION

The Board hereby **varies** the Development Permit #07-20-501600 for Lot 13A, Block 2, Plan 162-2212 in the Summer Village of Gull Lake, with the following new conditions:

1. The Applicant must reduce the west sides of the Front and Rear Decks in order to achieve an additional one meter of side yard setback bringing the total sideyard setback for the two decks to 2.5 meters.
2. The Applicant¹ must erect (new) privacy screens, located on west ends of the North and South Decks to mitigate the noise and visual effects on the neighboring property, the design of which is to be approved by the Development Authority before it is constructed.
3. In recognition of the time of year of these orders, the Board directs that these new conditions be completed no later than June 30, 2021.

REASONS for DECISION

The Board is mindful of the limitation of its jurisdiction to **confirm, revoke, or vary** the development permit or any condition attached, in accordance with the Municipal Government Act.

The Board finds that the Development Permit Application issued on September 30, 2020 was not prevented from being issued by the provisions of Section 643 of the *Municipal Government Act* in that the proposed development is not an addition or enlargement to the existing non-conforming building (see "Findings" section above for further reasoning).

However, the Board finds that the sideyard setbacks of the "as is" North and South Decks are too narrow to enable the adjacent property to have some privacy, especially given the closeness of the buildings and the elevation and open configuration of the decks. The Board determined that a one meter increase in the required side yard setback for each deck, was in order to achieve a greater separation and enhance the privacy for the adjacent property.

¹ The word "Appellant" was included in error in the original Notice of Decision dated November 26, 2020. This revised Notice of Decision corrects that error substituting "Applicant" instead.

In conclusion, the Board hereby orders the above new conditions to the September 30, 2020 Development Permit.

Signed:

A handwritten signature in black ink, appearing to read "R. Jenkins", written in a cursive style.

R. Jenkins, Chair
Regional Subdivision and Development Appeal Board

This decision may be appealed to the Court of Appeal on a question of law or jurisdiction. If you wish to appeal this decision, you must follow the procedure found in Section 688 of the Municipal Government Act which requires an application for leave to appeal to be filed and served within 30 days of this decision.

Appendix "A": EVIDENCE CONSIDERED BY THE BOARD:

Appeal Hearing Package: Cover Page, Table of Contents + Appellant Submission & Development Authority Submission & Hearing Notices & Tabs: 53 pages
(as of November 8, 2020)

Addendum #1: Applicant Submission: 9 pages

Addendum #2: Additional Appellant Submission: 19 pages

Addendum #3: Submission from Other Party: 1 page

Appendix "B": PARTIES WHO ATTENDED THE HEARING VIA ZOOM TECHNOLOGY

<u>NAME</u>	<u>CAPACITY</u>
C. Minifie	Appellant
W. Heller	Applicant
T. Kleeberger	Development Authority
C. McTavish	Observer
H. Francoeur	Observer
J. Minifie	Observer
B. Hopkins	Observer
D. Francoeur	Observer
M. Grunewaldt	Observer

Development Appeals

Permit

683 Except as otherwise provided in a land use bylaw, a person may not commence any development unless the person has been issued a development permit in respect of it pursuant to the land use bylaw.

1995 c24 s95

Permit deemed refused

684 An application for a development permit is, at the option of the applicant, deemed to be refused if the decision of a development authority is not made within 40 days after receipt of the application unless the applicant has entered into an agreement with the development authority to extend the 40-day period.

1995 c24 s95

Grounds for appeal

685(1) If a development authority

- (a) fails or refuses to issue a development permit to a person,
- (b) issues a development permit subject to conditions, or
- (c) issues an order under section 645,

the person applying for the permit or affected by the order under section 645 may appeal to the subdivision and development appeal board.

(2) In addition to an applicant under subsection (1), any person affected by an order, decision or development permit made or issued by a development authority may appeal to the subdivision and development appeal board.

(3) Despite subsections (1) and (2), no appeal lies in respect of the issuance of a development permit for a permitted use unless the provisions of the land use bylaw were relaxed, varied or misinterpreted.

1995 c24

Appeals

686(1) A development appeal to a subdivision and development appeal board is commenced by filing a notice of the appeal, containing reasons, with the board within 14 days,

(a) in the case of an appeal made by a person referred to in section 685(1), after

- (i) the date on which the person is notified of the order or decision or the issuance of the development permit, or
- (ii) if no decision is made with respect to the application within the 40-day period or within any extension under section 684, the date the period or extension expires,

or

(b) in the case of an appeal made by a person referred to in section 685(2), after the date on which the notice of the issuance of the permit was given in accordance with the land use bylaw.

(2) The subdivision and development appeal board must hold an appeal hearing within 30 days after receipt of a notice of appeal.

(3) The subdivision and development appeal board must give at least 5 days' notice in writing of the hearing

- (a) to the appellant,
- (b) to the development authority whose order, decision or development permit is the subject of the appeal, and
- (c) to those owners required to be notified under the land use bylaw and any other person that the subdivision and development appeal board considers to be affected by the appeal and should be notified.

(4) The subdivision and development appeal board must make available for public inspection before the commencement of the hearing all relevant documents and materials respecting the appeal, including

- (a) the application for the development permit, the decision and the notice of appeal, or
- (b) the order under section 645.

(5) In subsection (3), "owner" means the person shown as the owner of land on the assessment roll prepared under Part 9.

1995 c24 s95

Hearing and decision

687(1) At a hearing under section 686, the subdivision and development appeal board must hear

- (a) the appellant or any person acting on behalf of the appellant,
- (b) the development authority from whose order, decision or development permit the appeal is made, or a person acting on behalf of the development authority,
- (c) any other person who was given notice of the hearing and who wishes to be heard, or a person acting on behalf of that person, and
- (d) any other person who claims to be affected by the order, decision or permit and that the subdivision and development appeal board agrees to hear, or a person acting on behalf of that person.

(2) The subdivision and development appeal board must give its decision in writing together with reasons for the decision within 15 days after concluding the hearing.

(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,

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.