

# REGIONAL SUBDIVISION AND DEVELOPMENT APPEAL BOARD

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September 13, 2019

Mr. Robert Iverson  
5015 50 Avenue (Box 703)  
Millet, AB  
T0C 1Z0

**RE: Appeal of a July 19, 2019 decision of the Municipal Planning Commission (MPC) (Development Authority) in respect to a Proposed Development Variance to change the regulated fence height from 1.83 m to a 2.44 m height on Lot 26, Block 2, Plan 022 4927, at 5015 50 Avenue in Millet**

## **SUMMARY OF APPEAL**

This is an appeal of the Town of Millet Municipal Planning Committee (MPC) denial of a requested fence height variance "as it does not meet neighbourhood amenities".

## **BACKGROUND OF THE APPLICATION**

During May of 2019, the Appellant built a fence of 2.44 m in height of the west side of his property. The Town received a verbal complaint from a Town of Millet resident on May 23, 2019. The Town of Millet reviewed the fence height and issued a letter on May 24, 2019 advising the Appellant of the requirements for fence heights in the Town of Millet Land Use Bylaw (LUB). A subsequent letter was written on June 13, 2019 requiring the Appellant to reduce the height of the fence to the specified limit in the LUB. The Appellant subsequently applied for a height variance on July 2, 2019. The MPC reviewed and denied the request on July 17, 2019.

## **PRELIMINARY MATTERS**

At the start of the Hearing on September 5, 2019, the Appellant and the Development Authority (DA) were given the opportunity to raise any objections to the Board Members assigned to the Hearing. No objections were raised.

With respect to the contents of the Agenda package, the Appellant raised two matters:

1. The height of the fence at the rear of the property was incorrectly shown on the diagram submitted by him. This height is not in contention as it is unchanged from the original and there is no intention to build that section of fence to 2.44 m.

2. The Appellant requested removal of evidence related to the MPC meeting of August 8, 2019, at which it considered a modifying clarification to the July 17, 2019 decision.

With regard to the first matter, the Board accepted the Appellant's statement about the rear fence height. Regarding the second matter, the Development Authority stated that the MPC was just asked for more clarity on what was meant by their July 17, 2019 denial reasons.

After recessing to consider the second preliminary matter raised by the Appellant, the Board reconvened and advised the parties that it would strike pages 58 – 64, inclusive from the evidence record.

The Appellant also asked for three letters of support he had received be accepted as part of his submission. The Board granted this request.

The Clerk to the Board also provided a copy of the August 21, 2019 letter which he had sent to all owners of land situated within 60 m of the boundary of the subject property to inform them of the Hearing.

## **MERIT HEARING ISSUES**

### **Summary of the Appellant's Submissions**

On August 8, 2019, the Appellant filed a 32-page appeal package to the Regional Subdivision and Development Appeal Board that included a Real Property Report (RPR), an overlaid drawing showing the location of the Appellant's new (2019) fencing, a number of photographs of the property fencing, a site elevation plan drawing, bylaw excerpts and rationale for the variance request.

The Appellant's submission stated that the fence is of sturdy construction, with posts cemented at a minimum depth of 1 m, minimizing any chance of frost upheaval and/or construction failure. It poses no safety issues nor does it impede the view of any traffic. It meets all requirements for distance from overhead power lines and the posts do not affect any underground utilities. It was built for beneficial purposes to the homeowner and is not a "spite fence". It does not encroach on the neighbour's property and has minimal impact on sunlight.

The Appellant stated that he had always intended to apply for a variance permit. However, he works out of town a lot, and when his brother's assistance became available with little advance notice, he decided to go ahead with building the fence and he would then apply for the variance at his earliest convenience thereafter. The Appellant further stated that his house is around 100 years old, whereas the next door multi-family 4-plex building is about 20 years old and therefore has a basement height that is at least two feet higher than the basement of his older home. The neighbour's higher basement results in a

higher porch/ deck/ landing area that is directly adjacent to the Appellant's property and when people are on it, there is a loss of privacy without a higher (2.44 m) fence.

The Appellant noted that the next door property to the west is a 4-plex building structure housing four separate families with no side fencing dividing the four units in their backyards. This results in there being a lot more kids, pets (e.g. barking dogs), etc. contributing to more noise and loss of privacy. Before building the fence, he and his partner had several instances related to noise, trespass, loss of privacy, teasing of their dog, etc.

The Appellant noted that they bought the property about a year-and-a-half earlier. It had been a rental property and was run down, but they did a lot of work improving it and were now enjoying their back yard and wanted to reduce the issues related to loss of privacy, trespass, noise, etc. by building a 2.44 m fence. He noted that the 1.83 m fence in the front yard conforms to the LUB, and because of good street lighting, they don't have security concerns on that side of the property.

The Appellant submitted that a variance for the side yard fence, to 2.44 m, should not set a precedent for other side yard fence heights in the Town of Millet because each such application would have to be considered on its own merits and circumstances.

Upon questioning, the Appellant stated that there are no privacy or noise issues on the east side of the property, as that neighbour is the 2-storey Mercantile Building and acts as a buffer from train noise. The Appellant stated that since the pictures of the fence were taken, more stain has been added. It is not his intention to leave the top of the fence line looking jagged.

In the Appellant's summary comments, he referred to a 1987 motion in the House of Commons to amend the Constitution Act to include property rights and the right to enjoyment of property, and argued that the fence as built allows the homeowner this right of enjoyment.

#### **Summary of the Submission of the Development Authority (DA)**

The DA filed 44 pages of documentation for inclusion in the Board's Agenda package, including a partial map of Millet locating the subject property, minutes of the MPC's July 17, 2019 meeting, report to the MPC, notices to Appellant, LUB excerpts, etc.

The DA stated that a verbal concern/ complaint had been received via telephone from a resident on May 23, 2019 about the fence height on the subject property. The following day, a notice was sent to the Appellant regarding the fence height regulation and a possible stop work order, but no response was received. On June 13, 2019, the DA sent a second notice to the Appellant advising to make corrective measures to the fence height or a stop work order would be issued after July 2, 2019. On July 2, 2019, the Appellant filed a request for a height variance. The variance request was taken to the July 17, 2019 meeting of the MPC and was denied citing that in their opinion, it did not meet the neighbourhood amenities.

The DA submitted that fencing is considered a property amenity and that creating large barriers may be intimidating to others. Whereas current property owners may comment in favour of the 2.44 m height, future property owners may not.

With respect to the LUB, the DA noted in section 3.5 (Limitation of Variance), “the DA and the SDAB shall adhere to ... (a) a variance shall be considered only in cases of unnecessary hardship or practical difficulties particular to the use, character or situation of land or a building, which are not generally common to other land in the same Land Use Classification ...”.

The DA submission noted that the fence was not a “spite fence”.

Upon questioning, the DA reiterated that a fence is an amenity and it is something that is assessed by the Assessor. Also, it was stated that the subject property is zoned R2, as is the next door property. The DA stated that she is not aware of any other fence height variances in Millet.

#### **KEY FINDINGS OF FACT**

The Board makes the following key findings of fact:

1. The Town of Millet LUB defines a Fence as: a vertical physical barrier constructed to prevent visual intrusion, sound abatement, or unauthorized access (Part 2: Definitions)
2. A development permit to build a fence is not required under the Town of Millet LUB (section 3.7 (p)), provided that the requirements of the Regulations are met.
3. The LUB General Regulations section 7.1 covers matters such as fence height, location, materials, maintenance, etc. and specifies a maximum height of 1.83 m for a side yard fence.
4. The Appellant did build a side yard fence of 2.44 m height without first obtaining a variance for a fence higher than the regulated height of 1.83 m.
5. After the fence was substantially completed, the Appellant filed a request for a variance to allow a 2.44 m side yard fence height and this was denied by the Municipal Planning Commission at a July 17, 2019 meeting, “as it does not meet neighbourhood amenities”.
6. The expression “neighbourhood amenities” is not defined in the LUB. At best, the LUB defines an “amenity area” as follows: “with respect to residential use classes, space provided for the active or passive recreation and enjoyment of the occupants of a residential development, which may be for private or communal use and owned individually or in common, subject to the regulations of this Bylaw”.
7. The Appellant’s side yard fence meets all of the requirements of the LUB Regulations with the exception of the maximum height provision.

## **DECISION**

The July 17, 2019 decision of the Municipal Planning Commission refusing the requested fence height variance, from 1.83 m to 2.44 m, is hereby reversed and the appeal filed by Mr. Robert Iverson is allowed, subject to the condition that the top of the fence be finished, to provide for an even fence line by removing the jagged edges. The condition must be met within 30 days of this decision.

## **REASONS FOR DECISION**

The Board finds that the Appellant's fence was indeed built for the purposes identified in the LUB definition; namely, to prevent visual intrusion or unauthorized access and for noise abatement. The additional 0.61 m of height is primarily to prevent the visual intrusion and improve privacy on the Appellant's property and secondarily to reduce noise and the chances of unauthorized access. The Board accepts that the higher basement and side yard entrance landing/deck area contribute to an unnecessary hardship in the form of loss of privacy in the absence of a 2.44 m high fence.

The Board notes that the three letters of support for the 2.44 m' fence were signed by five neighbours of adjacent properties indicating that they have no concern or problem with the current height of the fence. The DA counter argument that the current owners may not reflect the opinions or concerns of future owners of the property is a matter for future buyers to consider when determining whether or not to purchase either the subject property or the neighbouring property. The potential opinions of future parties is not impacting on the decision to grant a variance today.

There was no participation in the Hearing by, and no submissions were received from, adjacent landowners opposing the 2.44 m fence. The Board notes that, on May 23, 2019, there was a verbal "complaint" to the Town Office about the fence height; however, no reasons were given; no information was provided on any particular adverse effect. It is not known whether the "complaint" was from an adjacent property or not. In the Board's view, that call was more of an alert to the Town Office rather than a complaint and therefore the Board placed little weight on it.

The Board acknowledges section 3.5 of the LUB wherein (in part) an SDAB shall only consider a variance in cases of unnecessary hardship and the Board finds that without a 2.44 m side yard fence height, there is an unnecessary hardship in the form of loss of privacy on the Appellant's property.

The Board did not receive any evidence to suggest that the side yard fence height variance, to 2.44 m, would materially interfere with or affect the use, enjoyment or value of neighbouring properties.

The Board also notes its statutory authority (Municipal Government Act, RSA 2000, section 687(3)(d) (i) (A)) to make a decision where the proposed development would not "unduly interfere with the amenities of the neighbourhood", which are neither defined in the Act nor in the LUB.

In reversing the decision of the MPC, the Board finds that the MPC's denial reasons were insufficient by only stating that the fence would "interfere with neighbourhood amenities". The Board notes that neighbourhood amenities are not defined in the LUB, and further, no explanation is provided as to how the 2.44 m side yard fence would interfere with those undefined neighbourhood amenities.

The Board received no evidence to confirm that a fence is an amenity.

With respect to the Appellant's argument about the 1987 motion in the House of Commons to enshrine property rights within the Canadian Charter of Rights and Freedoms and that a reduction in side yard fence height would deprive the homeowner of enjoyment rights, the Board finds that, while a novel approach, without further supporting evidence, it was unable to place weight on this argument.

**CLOSING**

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.

Dated at the Town of Millet, in the province of Alberta this 13<sup>th</sup> day of September 2019 and signed by the Chair of the Subdivision Development and Appeal Board who confirms that the content of this document accurately reflects the appeal hearing, deliberations and decision of the Subdivision Development and Appeal Board.



Joe Henderson, Chair

Regional Subdivision and Development Appeal Board

**APPENDIX "A"**

PARTIES WHO ATTENDED, MADE SUBMISSIONS, OR GAVE EVIDENCE AT THE HEARING:

| Name                  | Capacity                             |
|-----------------------|--------------------------------------|
| Mr. Robert Iverson    | Appellant                            |
| Ms. Rebecca Frost     | Appellant's Partner                  |
| Ms. Michelle Skidmore | Development Services, Town of Millet |

**APPENDIX "B"**

DOCUMENTS RECEIVED AT THE HEARING:

Letter to Neighbouring Property Owners notifying them of the September 5, 2019 Hearing and a map of the subject property and the location of neighbors to whom the letter was sent.

Copy of August 29, 2019 issue Pipestone Flyer showing Notice of Hearing advertisement

Letters of Support from Neighbours:

1. Wayne & Doris Wolver
2. Judy Tilley
3. Bonnie Mcconnell & Wade Mckain