

REGIONAL SUBDIVISION AND DEVELOPMENT APPEAL BOARD

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

December 4, 2020

Lynn Stone
4813 39 Street
Ponoka, AB T4J 0B6

RE: Appeal of Development Permit 2020-1007-0058 for an accessory building (detached garage) with a variance to allow 16' (4.88m) walls on Lot 28, Block 3, Plan 102 5930 at 3901 49 Avenue, Ponoka

SUMMARY OF APPEAL

This is an appeal of a development permit approval for an accessory building in the form of a detached garage. It involves a variance to allow 16ft (4.88m) high walls as compared to the 10.17ft (3.1m) standard set out in the Low Density Medium Lot Residential District of the Town of Ponoka Land Use Bylaw. The Appellant, Lynn Stone, is appealing the approval of the variance based on the impact the development may have on neighbouring properties. The Appellant filed the Notice of Appeal beyond the 21 day appeal period provided for in s. 686(1)(a)(i)(A) of the *Municipal Government Act*. This raises the preliminary question of whether or not the Board has jurisdiction to hear the appeal, which question was addressed as a preliminary jurisdictional matter during the hearing held on November 30, 2020.

Hearing Panel: Joe Henderson, Chair
Julia King, Board Member
Heather Ryan, Board Member

SDAB Clerk: Craig Teal
SDAB Legal Counsel: Kelsey Becker Brookes

BACKGROUND OF THE APPLICATION

Development Permit 2020-1007-0058 approves the construction of an accessory building on Lot 28, Block 3, Plan 102 5930. It is a detached garage intended to house a recreational vehicle. Lot 28 is designated Low Density Medium Lot Residential District (R1B) under the Town of Ponoka Land Use Bylaw. A detached garage is deemed an accessory building and is a permitted use in the R1B District. The approved development permit includes a variance of the maximum allowed 3.1m wall height to allow for a wall height of 4.88m.

The application for the development permit was approved on August 18, 2020. A Notice of Decision was mailed to three landowners close to Lot 28 on August 18, 2020; one to the immediate west along the shared property line (adjacent), one to the immediate south across the lane (affected) and one to the east across the street and aligned with the location of the detached garage (affected). The Notice of Decision indicated the appeal period expired on September 15, 2020. No appeal was filed and on September 16, 2020 a development permit was issued.

PRELIMINARY MATTERS

At the start of the hearing on November 30, 2020, the Appellants, Applicants, Other Parties in Attendance and Development Authority were given the opportunity to raise objections to the Board Members assigned to the hearing. No objections were raised.

The Agenda for the November 30, 2020, hearing focused on the preliminary jurisdictional issue of whether or not the appeal was filed in time and the Board had the jurisdiction to hear the appeal. Submissions and presentations made during the November 30, 2020, hearing addressed the issue of jurisdiction only and not the merits of the appeal.

HEARING

Summary of the Development Authority's Submissions

The Development Authority stated that notice of the decision was provided to those owners of property required to receive notice in accordance with the Town of Ponoka Land Use Bylaw. This was three landowners and did not include the Appellant. Mailing notice to adjacent landowners and those landowners deemed affected by the Development Authority is the only mandatory notice requirement. There is no definition of "adjacent" in the Land Use Bylaw and the common dictionary definition cannot be relied upon. The Development Authority further stated that determining which land is adjacent depends on the context and varies from case to case. The term "affected" is also not defined in the Land Use Bylaw and is at the discretion of the Development Authority.

The Development Authority indicated that in lieu of formal notice, the Board needs to consider the concept of constructive notice in determining if the appeal was filed within the applicable notice period. The Development Authority stated that an affected party has constructive notice when a person knows or ought to have known to make inquiry to determine if they have an ability to appeal a decision. The Development Authority suggested that, based on the facts available to the Development Authority, which were provided in a timeline/chart in the Development Authority's written submission, the Appellant had constructive notice when the concrete slab for the detached garage was being poured on September 28, 2020. Therefore, in

the view of the Development Authority, the time to file the appeal expired on October 19, 2020.

The Development Authority asserted that the ten other neighbours referenced in the Appellant's Notice of Appeal may have had constructive notice at different points in time. This would change the date of constructive notice and the deadline for filing an appeal. It was further suggested that any knowledge of the development these neighbours had may or should have been passed on to the Appellant, providing her with constructive notice.

Summary of the Applicant's Submissions

The Applicants, Bruce and Marlene Phillips, did not attend the appeal hearing on November 30, 2020 and no written submissions were received.

Summary of the Appellants' Submissions

The Appellant indicated her house has direct views from several windows of the detached garage and that on this basis she should have been treated as either an adjacent landowner or affected landowner. The Appellant asserts that the Development Authority should have provided her with formal notice of the decision.

The Appellant stated she had no reason to believe that the concrete pad was anything other than a parking pad for the Applicant's recreational vehicle. She indicated that no prior discussions about the detached garage occurred between her and the Applicants. The commencement of the construction of the garage walls on October 21, 2020 was the first indication she had regarding the nature of the structure and prompted her to inquire about it from the Town. The Appellant indicated she first became aware of the issuance of the development permit on October 22, 2020 after contacting the Town Office.

The Appellant stated that she filed her appeal as quickly as possible thereafter, on October 30, 2020. She noted that some of the ten neighbours referenced in her Notice of Appeal were present at the hearing. The Appellant also noted that the increased calls and inquiries from several neighbours around October 23, 2020 indicate that the neighbouring landowners were not well informed about the development. The Appellant stated she filed one appeal based on the direction of the SDAB Clerk and did not include any co-appellants. She also pointed out that the SDAB's own notices for the hearing included ten landowners compared to those notified by the Town.

Summary of Other Parties' Submissions

Shannon Kocyba

Ms. Kocyba indicated that she had spoken to the Applicant about a concrete pad in their back yard for their recreational vehicle. At another date they spoke about a garage and the Applicant did not suggest that the garage was for their recreational vehicle.

Ms. Kocyba stated that she received the Town Notice of Decision just before going on vacation in August. Based on the fact that the August 26, 2020 advertising that was indicated in the Notice did not appear in the Ponoka News she assumed that the Town had turned down the application for the garage. She received no additional information from the Applicant and stated that her first indicator that the garage was being built was when she saw walls going up on October 21, 2020.

Steven Rausch

Mr. Rausch indicated that he had nothing new to verbally present to the Board and that he agreed with the Appellant's description of events and presentation.

Lucas Hetze

Mr. Hetze noted there was a lack of community consultation before the permit was issued. His property is a few doors down but his view has been impacted. Mr. Hetze suggested that he should have been notified by the Town directly or through advertisement in the Ponoka News. This prevented him from voicing concerns prior to construction of the garage.

Eric Hyink

Mr. Hyink indicated that he had nothing to add and agrees with the presentation and submission made by the Appellant.

KEY FINDINGS OF FACT

The Board makes the following key findings of fact:

1. The detached garage is a permitted use that involved a variance of the Land Use Bylaw standards relating to wall height. Section 13.6 of the Land Use Bylaw authorizes the Development Authority to approve a variance and does not establish a numerical limit on the degree of variance that the Development Authority may approve.
2. Notice of Decision for Development Permit 2020-1007-0058 or other formal notice was not sent to the Appellant. Notice of Decision for Development Permit 2020-1007-0058 was sent to three landowners; none of whom are parties to the appeal filed by the Appellant.
3. No appeal was filed by any of the parties who received the Notice of Decision from the Town before the indicated deadline of September 15, 2020. Subsequently, the Development Permit was issued on September 16, 2020.
4. The Development Authority identified the properties considered to be affected, and then entitled to receiving Notice of Decision, on the basis of driveway and vehicle access locations and the potential conflicts between vehicles using these driveways and accesses.
5. The Development Authority did not consider the Appellant an affected landowner.
6. The Land Use Bylaw does not include a definition of "adjacent" or "affected" to determine to whom notice of decision should be sent. Their application is made on a case by case basis and the Land Use Bylaw affords the Development Authority discretion on how to apply these terms.
7. The Appellant's property has a direct view of the detached garage that was approved.
8. Construction of the concrete pad for the detached garage commenced on September 24, 2020.
9. The evidence from the Appellant is that she had no prior knowledge of the detached garage and height of walls prior to the construction of the walls on October 21, 2020. The Development Authority has provided no other evidence to the contrary.
10. The construction of walls on October 21, 2020 touched off a flurry of inquiries to the Development Authority. The inquiries were by several different landowners near the site of the development including some who received the formal Notice of Decision from the Development Authority.

11. By October 22, 2020 the Appellant was aware that a development permit had been approved and started inquiring to the Development Authority and the SDAB about her opportunities to appeal the decision of the Development Authority.
12. The Appellant filed her appeal on October 30, 2020 with materials needed for the filing, including the fee, received by the SDAB Clerk on November 2, 2020.

DECISION

With respect to the preliminary matter of jurisdiction to hear the appeal, the Board decides as follows:

1. The Board has jurisdiction to hear the appeal brought by Lynn Stone because the appeal was filed within 21 days of the Appellant receiving constructive notice of the development; and
2. The hearing of the appeal will reconvene on Tuesday, December 15, 2020 at 5:30PM via electronic means to hear verbal presentations regarding the merits of the appeal; and
3. The hearing on the merits of the appeal will proceed on the basis of the written materials previously filed with the Board and no further written submissions will be permitted.

REASONS FOR DECISION

The Appellant did not receive a formal Notice of Decision from the Development Authority to inform her of the nature of the approved development and the opportunity to file an appeal of the Development Authority's decision. This was due to a narrow interpretation of the term "adjacent" applied by the Development Authority in meeting the notification requirements of the Town of Ponoka Land Use Bylaw. A similarly narrow application of the term "affected" by the Development Authority also excluded the Appellant from being sent formal notice. The Land Use Bylaw does not contain a definition of the term "adjacent" to assist the Development Authority in determining which parties must receive a Notice of Decision; however, the Land Use Bylaw does provide for the exercise of judgement by the Development Authority to include "any other person who may, in his opinion, be affected." The Land Use Bylaw does not prevent the Development Authority from taking a broad and purposeful view in choosing how to apply these two terms.

In the Board's view the Development Authority applied an unreasonably narrow interpretation to who was to be considered an "affected" landowner by defining "affected" according to a single factor involving the alignment of driveways and potential conflict between vehicle

movements and therefore excluding the Appellant. The Board notes that the Development Authority's decision involved a variance and was required to satisfy the minimum test outlined in the Municipal Government Act and the Town of Ponoka Land Use Bylaw. This test involves consideration of several factors that may "interfere with or affect the use, enjoyment, or value of neighbouring parcels of land" before a variance can be approved and necessitates a broad consideration of potential impacts on neighbouring landowners. In the Board's view, there is an incongruity between having considered the impact on neighbouring properties for the assessment of the variance but not including the same neighbouring properties as "affected" for the purpose of receiving notice of the decision.

As a result of the inadequate notice of the decision to the Appellant under the Land Use Bylaw, the Appellant only became aware of the Development Permit being approved after the time for appealing the decision had expired. In circumstance where the Development Authority has erred by not giving the requisite notice under the Land Use Bylaw, affected parties will be subject to an appeal period which starts to run when the party has constructive, as opposed to actual, knowledge of their right to appeal. In such case, once an affected party has some indication that a development permit has been approved giving rise to a right to appeal, the party seeking to appeal must do so within 21 days of acquiring such knowledge (*Masellis v. Edmonton SDAB*, 2011 ABCA 157).

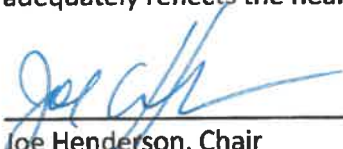
The Board considered the issue of constructive notice for the purpose of determining whether or not the appeal was filed within the applicable appeal period in order to give the Board jurisdiction to hear the appeal. Constructive notice occurs when the Appellant knew or ought to have known that they had the right to appeal. As the appeal was filed by one person, it is the Board's view that constructive notice must be based on the knowledge of the Appellant and not when other persons who are not signatories to the Notice of Appeal may or may not have had knowledge of the development.

The Board accepts that the Appellant, being Lynn Stone, first knew or ought to have known of her right to file an appeal when she observed walls being constructed that exceeded the usual height of other detached garages in the subdivision. This occurred on October 21, 2020 and is the same date as the start of the numerous calls and inquiries to the Town from other adjacent and affected property owners. It was not until that point in time that the Appellant would have known a permit had been issued with a variance, giving rise to a right to appeal. Pursuant to s. 686(1)(a)(i)(A) of the *Municipal Government Act*, the deadline to file an appeal was 21 days after this date which was November 11, 2020. The Appellant filed materials for her Notice of Appeal with the SDAB Clerk on October 30, 2020 and receipt of all required material was acknowledged by the SDAB Clerk on November 2, 2020. The appeal was filed on time.

CLOSING

This decision can 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 the date of this decision.

Dated at Ponoka County, in the Province of Alberta this 4th day of December, 2020 and signed by the Chair on behalf of all three panel members who agree that the content of this decision adequately reflects the hearing, deliberations and decision of the Board.



Joe Henderson, Chair

December 4, 2020
Date

APPENDIX "A"

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

<u>Name</u>	<u>Capacity</u>
Lynn Stone	Appellant
Martin Kvapil	Development Authority
Alifeyah Gulamhusein	Legal Counsel for the Development Authority
Shealyn Ronnie	Public
Shannon Kocyba	Public
Steven Rausch	Public
Lucas Hetze	Public
Eric Hyink	Public
Janet Hyink	Public

APPENDIX "B"

DOCUMENTS RECEIVED AT THE HEARING:

1. Notice of Appeal filed by Lynn Stone
2. Background Materials supplied by the Development Authority
3. Development Authority Submission
4. Appellant Submission
5. Submission from Shealyn Ronnie
6. Submission from Lucas Hetze
7. Submission from Steven Rausch
8. Notices sent by the SDAB