

REGIONAL SUBDIVISION AND DEVELOPMENT APPEAL BOARD

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

December 23, 2021

NOTICE OF DECISION

RE: Appeal of Development Permit Application No: 316316-21-D0021 for a fence with 50% variance in fence height on Lot 11-13, Block 11, Plan 4304AH (303 – 4 Avenue SE) that is located within the Town of Three Hills.

SUMMARY OF APPEAL

This is an appeal of a development permit approval for a fence with a 50% variance in height. The fence was approved with a variance to the maximum height provisions as stated within the Town of Three Hills Land Use Bylaw - *Land Use Bylaw 1458-20* (LUB). The maximum height was relaxed from 3.0 feet to 4.5 feet, allowing the fence along the north property line to be 4.5 feet.

The Appellants – Beverly and Roger McIver – appealed the variance approval based on the fence within the eastern yard being built at a height of 6 feet. The Appellants stated that the fence is in non-compliance with the LUB and facilitates an existing eyesore within the neighborhood.

Notice of the appeal was provided to interested parties and a hearing was held on December 15, 2021.

Hearing Panel: Karen Howley, Chair
Heather Ryan, Board Member
Julia King, Board Member

SDAB Clerk: Anika Drost

BACKGROUND OF THE APPLICATIONS

The Development Authority approved a fence with a 50% variance on the height of the fence for that portion of the fence that is located within the yard abutting the northern property boundary (316316-21-DP0021) on November 9, 2021 on the lands described as Lot 11-13, Block 11, Plan 4304AH. The subject property is designated R1 – Residential District. The erection of a fence does not require a development permit, unless a variance is requested.

The Development Authority approved the development subject to the following conditions:

1. That this development permit is issued in accordance with the Town of Three Hills Land Use Bylaw 1458-20 and the *Municipal Government Act*.
2. That the applicant is responsible for ensuring the development permit is commenced, carried out, and completed in accordance with the terms and conditions of this development permit approval.
3. That the construction of the fence shall be located as shown in diagrams submitted by the applicant. Substantial changes will require the Development Authority's approval.
4. That the applicant is responsible for ensuring that all Site Line Controls as stated in Section 7.52 of the Town of Three Hills Land Use Bylaw 1458-20 are abided by.
5. That the final height of the fence measured at grade be at 4.5ft in the front yard of the property. This height applies to the section of the fence that extends past the primary residence.
6. That this permit shall cease to be valid twelve (12) months after the date on which it was issued, unless prior to its expiration, the applicant has commenced development, or the Development Authority grants an extension of time.
7. That the applicant or contractor is responsible to maintain the construction site in a good working order throughout the stages of construction to minimize hazards to pedestrians and motorists and clean up the site when construction is completed to the satisfaction of the Municipality.

An appeal was filed with the Regional Subdivision and Development Appeal Board on November 24, 2021. Affected parties were notified on December 1 and 2, 2021, with public notifications being distributed on December 8, 2021.

MERIT HEARING

Summary of the Development Authority's Submissions

The Development Authority received an application for the construction of a fence on a reversed corner lot. The application was presented to the Municipal Planning Commission as it requested a 50% variance on the height of the fence.

Section 7.30.3 of the LUB provides the fence standards, which require the fence that is located in the front yard to be no taller than 3 feet in height. This applies for any portion of the fence that extends beyond the front building wall.

The Development Authority's interpretation of the LUB provisions is that the front yard of the subject property is the yard abutting the northern property boundary. Therefore a fence portion taller than 3 feet that encroaches into the front yard, which is the yard between the northern building wall and the northern property boundary, requires a height variance. No variance was required for any portion of the fence that does not go past the northern building wall.

The initial fence that was located within the northern yard was 6 feet tall prior to the Applicant tearing it down. Since the fence was completely removed, and the Applicant intended to replace it with a fence taller than 3 feet, the Applicant now requires a variance to bring it into compliance with the LUB. During questioning, the Development Authority confirmed that the fence along the eastern portion of the property was also 6 feet in height prior to the tear down of the old fence.

During the decision making process, consideration was taken for sight lines and safety at the northwest corner of the property, abutting the alley. As such, the decision includes reference to the Town's sight line controls requirements. The Development Authority was satisfied that the sight line control provisions within the LUB would ensure safety is taken into account when constructing the fence next to an alley. No sight line issues were flagged for the northeast corner of the subject property, as the fence is well removed from the intersection due to the sidewalk and green space between the property line and the road.

The Development Authority stated that the subject property is considered a reverse corner lot, which is defined within the LUB as:

REVERSED CORNER LOT means a residential lot where the front façade of the dwelling is oriented towards the flankage side of the lot, rather than the frontage side of the lot.

A reversed corner lot and a corner lot are treated the same under the LUB. There are no specific reversed corner lot provisions that impact the application of the LUB. The address of the house is based on the eastern property boundary which faces 4th Avenue SE.

The Development Authority confirmed that the having two fences side by side does not conflict with any LUB provisions. The LUB does not restrict the number of fences along a property line.

Summary of the Applicants' Submissions

The Applicant stated that the LUB provides no clear guidance on the treatment of corner lots, making it difficult to ascertain what restrictions apply.

The Applicant confirmed that they started building the fence before a development permit was provided. They began the process in 2019, when they confirmed with Town staff what the process would be. The Applicant assumed that the discussions with the Town about the fence were noted in her file and she would simply pay for the development permit once she was building the fence. As soon as she heard that there were concerns with the construction of the fence along the east side, construction was put on hold, which is why the west side fence was not completed.

The Applicant clarified that she decided to build the southern portion of the fence next to the Appellants' existing fence to respect the Appellants' desire to maintain the existing wooden fence.

The Applicant acknowledged that an unfinished fence can be an eyesore for the area and asked the Appellants to be mindful that other things sometimes take priority over the construction of a fence.

The Applicant raised the issue that her civic address does not reflect the fact her home faces north onto 2nd Street. She would like to have the civic address reflect that the front of the house faces 2nd Street rather than 4th Avenue. She also requested that the LUB provisions be changed to make the corner lot provisions more clear.

Summary of the Appellants' Submissions

The Appellants stated that the LUB provisions are not clear when it comes to the application of the policies in relation to the front yard. Several definitions need to be drawn in, to fully interpret the fence requirements in relation to the subject corner lot. In any case, the Appellants stated that there is added responsibility with a corner lot to make both sides of a corner lot look nice and appealing from the street.

A 6 foot fence in the front yard, which faces 4th Avenue SE, the eastern portion of the property, is non-compliant with the LUB. The Appellants were shocked when they saw the 6 foot fence posts next to their property. There is also a 12 foot gate that was assumed would be used for the storage of equipment in the front yard. The LUB stipulates that the fence in the front yard shall not exceed 3 feet in height.

The Appellant stated that the front yard is the yard facing the front property line. Front lot line is defined by the LUB as:

The property line separating a lot from an abutting public roadway other than a lane. In the case of a corner lot, the front line is the shorter of the property lines abutting a public roadway, other than a lane.

Since the eastern property line is the shortest property line facing the road, the eastern lot line should be considered the front lot line. The northern yard is the flanking front yard not the front yard.

The Appellants pointed out that *Figure 16: Yard* within the LUB clearly shows how the front yard on the subject property should be interpreted. The figure shows the exact representation of the building orientation and lot orientation as the Appellant's property and home. The front yard would clearly be between the east building wall and the eastern property boundary.

There are no concerns with the height of the fence along the western portion of the property, which the Appellants interpret to be the rear yard. They are not contesting the rear yard fence as that fence can be up to 6 feet tall according to the LUB provisions.

The Appellants stated that the subject lot is a reversed corner lot. However, the reversed corner lot classification does not impact how the LUB provisions are applied in this case. The reversed corner lot definition speaks to the orientation of the building and not the determination of the front yard in relation to a fence.

Upon questioning, the Appellants stated that the east fence does not create a safety issue. The Appellants have no issue with the fence itself as they mentioned it looks beautiful, but they are concerned with the existing height.

The Appellant stated that the Applicant's neighbour to the west currently has a hedge in the front yard that is maintained at below 3 feet. Their front yard appears to be considered the west side, which would match the height restrictions of the hedge in the LUB.

Adjacent Landowner – Carmen Sommer

Carmen Sommer, who lives west of the Applicant provided a letter in support of the fence. She stated that the fence has greatly enhanced the curb appeal of the property and that the appeal proceedings are creating more of an eyesore than the finished product, due to the unfinished fence.

KEY FINDINGS OF FACT

The Board makes the following key findings:

1. The front yard of the property is the portion of the property between the eastern building wall and the eastern lot line.
2. The fence within the front yard may not exceed 3 feet in height unless a variance to the height standard of the LUB is granted.
3. The fence in the rear yard, the yard between the western building wall and the western property line shall not exceed 6 feet in height.
4. The subject property meets the definition of a reversed corner lot as per the LUB.

5. The request to change the civic address of the subject property does not fall within the Board's authority. Assigning civic addresses is a municipal matter.
6. The concerns about the Town's unclear LUB provisions regarding the matter of yard classification and fence construction does not fall within the Board's jurisdiction. The content of the LUB is set by Council.
7. There is no distinction between the treatment of a corner lot and a reversed corner lot for the purpose of this appeal. The terms only vary in regards to the positioning of the building on the property itself.

DECISION

The appeal filed by Roger and Beverly McIver is allowed in part and the decision of the Development Authority is varied as follows:

1. That this development permit is issued in accordance with the Town of Three Hills Land Use Bylaw 1458-20 and the *Municipal Government Act*.
2. That the development permit shall be commenced, carried out, and completed in accordance with the terms and conditions of this development permit approval.
3. That all sight line controls as stated in Section 7.52 of the Town of Three Hills Land Use Bylaw 1458-20 are abided by.
4. That the final height of the fence that is constructed in the front yard (eastern yard) beyond the foremost portion of the principal building shall not exceed 4.5ft.
5. That this permit shall cease to be valid twelve (12) months after the date on which it was issued, unless prior to its expiration, the applicant has commenced development, or the Development Authority grants an extension of time.
6. That the construction site shall be maintained in a good working order throughout the stages of construction to minimize hazards to pedestrians and motorists and clean up the site when construction is completed to the satisfaction of the Municipality.

REASONS FOR DECISION

The Board examined the LUB definitions provided by the parties and determines that the front yard of the subject property is indeed the portion of the property that is located between the east building wall and the eastern lot line.

Section 7.30.3 of the LUB states:

No person shall construct a fence or wall, or permit a hedge to grow, or combination thereof, in the front yard in a residential district higher than:

a. For internal lots [...]

b. For corner lots 1.8 m (6.0 ft) for that portion of fence or hedge that does not extend beyond the foremost portion of the principal building and 1.0 m (3.0 ft) for that portion of the fence that does extend beyond the foremost portion of the principal building on the lot or on that part of a corner site, or on that part of a highway intersection which lies within a triangle formed by a straight line drawn between two points on the exterior boundaries of said site, 3.0 m (10 ft) from the point where they intersect and shall comply with Section 7.52 SITE LINE CONTROL.

This LUB section stipulates the height requirement of a fence specifically in the front yard. It is broken up into two parts, one speaking about the restrictions for internal lots and the other about restrictions for corner lots. Since this section specifically speaks to the front yard fencing requirements for corner lots, determination of the front yard is important in applying these provisions.

Although the entirety of the LUB was not provided, the Board accepts the Development Authority's statement that there is no differentiation in the application of the LUB based on the classification of a corner lot and a reversed corner lot. The Board acknowledges that the Appellant and the Development Authority agree on the subject property being a reversed corner lot, which is defined under Section 2.170 of the LUB as:

[...] a residential lot where the front façade of the dwelling is oriented toward the flankage side of the lot, rather than the frontage side of the lot.

The dwelling frontage faces the north side, although the address of the property is based on the east side roadway. The Board finds that the identification of the property as a reversed corner lot, which was identified by the Development Authority to be treated the same as a corner lot for fence construction purposes, provides certainty that section 7.30.3(b) is the correct section to be applied, for the consideration of fence construction. However, this lot definition only speaks to the orientation of the building on the lot, it does not provide guidance for the identification of the front yard.

Front yard is defined under Section 2.90 of the LUB as:

[...] the portion of a site abutting the front lot line extending across the full width of the site, situated between the front lot line and the nearest wall of the principal building, not including projections.

In order to fully understand the front yard definition, the Board examined Section 2.88 of the LUB which states:

FRONT LOT LINE means the property line separating a lot from an abutting public roadway other than a lane. In the case of a corner lot, the front line is the shorter of the property lines abutting a public roadway, other than a lane.

Definition 2.88 clearly states that the front lot line of a corner lot is the shorter of the property lines that abuts the public road and is not a lane. As such, the front lot line of the subject property is the eastern property line, which is significantly shorter than the northern property line. When applying this definition to interpret Section 2.90 of the front yard, the front yard is the portion of the subject lot that is between the eastern building wall (not including projections) and the eastern property line that is also considered the front lot line. As such, the Board finds that the front yard of the subject property is the eastern yard abutting the eastern property line.

The Board finds that based on the definitions provided by the Appellant for rear lot line, rear yard, side lot line, and side yard as defined in the LUB:

2.161 REAR LOT LINE means either the property line of a lot which is furthest from and opposite the front lot line or, where there is no such property line, the point of intersection of any property lines other than a front lot line which is furthest from and opposite the front lot line.

2.163 REAR YARD means the portion of a site abutting the rear lot line extending across the full width of the site, situated between the rear lot line and the nearest wall of the principal building, not including projections.

2.179 SIDE LOT LINE means the property line of a lot other than a front-lot line or rear lot line.

2.180 SIDE YARD means that portion of a site abutting a side lot line extending from the front yard to the rear yard. The side yard is situated between the side lot line and the nearest wall of the principal building, not including projections.

The rear property line is the western lot line, with the rear yard being located between the west building wall and the western property line. The side property lines are the portions of the lot between the north building wall and the northern property line, as well as the south building wall

and the southern property line. The side yards do not encroach into the front yard and rear yard as defined above.

The Board finds that as per its interpretation of the rear yard, the fence within the western portion of the lot does not require a height variance if it is no taller than 6 feet. Section 7.30.3(b) of the LUB only speaks to height restrictions for the front yard being 3 feet.

The LUB stipulates the fence height in relation to the foremost portion of a principal building. The Board identifies the foremost portion of the building to be the closest building portion facing the front lot line, which would match the application of the term “foremost” as used within Section 7.30.3(a) for internal lots. Within 7.30.3(a), “foremost” is used to mean the building portion facing the front lot line.

Broken down into two parts, Section 7.30.3(b) of the LUB then reads, firstly:

No person shall construct a fence or wall, or permit a hedge to grow, or combination thereof, in the front yard in a residential district higher than:

(b) For corner lots 1.8 m (6.0 ft) for that portion of fence or hedge that does not extend beyond the foremost portion of the principal building [...]

In this case, the Board finds that a fence constructed within the front yard portion that is located between the principal building wall (not including projections) and the foremost portion of the building can be up to 6 feet tall.

Secondly, Section 7.30.3(b) states:

No person shall construct a fence or wall, or permit a hedge to grow, or combination thereof, in the front yard in a residential district higher than:

[...] 1.0 m (3.0 ft) for that portion of the fence that does extend beyond the foremost portion of the principal building on the lot or on that part of a corner site, [...] which lies within a triangle formed by a straight line drawn between two points on the exterior boundaries of said site, 3.0 m (10 ft) from the point where they intersect and shall comply with Section 7.52 SITE LINE CONTROL.

The Board interprets this excerpt to mean that a fence constructed in the front yard that is located between the foremost portion of the building and the front property line can be up to 3 feet tall with the exception of creating clear sight lines as per the applicable LUB requirements.

Although the Development Authority granted a variance for the portion of fence along the northern property boundary, the Board finds that the development permit application referred to the extension of a 6 foot fence on the east side of the dwelling. The Board acknowledges that the Applicant wishes to maintain the 6 foot tall fence along the eastern portion of the property.

As such, the Board makes a determination on a 50% variance requested for the portion of fence located east of the dwelling, within the front yard.

The Board determines that the LUB requires the fence within the front yard between the foremost portion of the building and the front property line to be 3 feet. In this case, the Board considered the application for a variance to allow a 6 foot fence. The Board finds that all parties were in agreement that the 6 foot fence along the eastern property boundary does not create a safety issue for the public. Although no safety issue exists, a 6 foot fence within the front yard is inappropriate as it affects the character of the street. It affects the character by being inconsistent with the overall built form along the street as the fence protrudes into the front yard which is regulated within the LUB to contain low fencing and hedging to create a set standard of appearance. The Board acknowledges the Development Authority's differing interpretation of the LUB and their interpretation that a 4.5 foot fence along the eastern property line, which they considered to be the front yard, would be acceptable.

The Board finds that a 50% variance is more reasonable to still provide added privacy for the property, while not negatively impacting the use and enjoyment of the neighbouring landowners of their property. A 50% variance is also consistent with what the Development Authority considered to be acceptable for a fence in the front yard for the purpose of granting their initial height variance. As such, the Board grants a 50% variance, allowing a 4.5 foot tall fence located within the front yard, which is the portion of the property that is facing the eastern property line. The fence within any portions of the subject property shall adhere to the sight line control provisions of the LUB.

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 City of Red Deer, in the Province of Alberta this 23rd day of December, 2021 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.



Karen Howley, Chair

December 23, 2021

Date

APPENDIX "A"

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

<u>Name</u>	<u>Capacity</u>
Beverley Mclver	Appellant
Roger Mclver	Appellant
Chantelle Nygard	Applicant
Patrick Jensen	Representative of Applicant
Kristy Sidock	Development Authority
Ryan Leuzinger	Chief Administrative Officer
Jerritt Cloney	Municipal Intern
Byrne Lammle	Municipal Planning Commission
Doug Nault	Municipal Planning Commission
Arlin Koch	Municipal Planning Commission
John Hamm	Observer
Greg Towne	Observer

APPENDIX “B”

DOCUMENTS RECEIVED PRIOR TO THE HEARING:

<u>Reference Tab</u>	<u>Item</u>
TAB A	Notice of Appeal
TAB B	Development Permit Application
TAB C	Notice of Decision
TAB D	Information Provided by Development Authority
TAB E	Notices of Hearing
TAB F	Adjacent Landowner’s Submission – Carmen Sommer
TAB G	Applicant’s Submission