

Appeal No.: 0262 009 2014
Hearing Commenced: November 17, 2014
Reconvened/Adjourned: December 4, 2014

SUBDIVISION & DEVELOPMENT APPEAL BOARD DECISION

CHAIR: BILL FARR
PANEL MEMBER: ZEFF ORDMAN
PANEL MEMBER: LYNNE MULDER

BETWEEN:

ASSET BUILDERS
Represented by DAVID ZURFLUH

Appellant

and

CITY OF RED DEER
Planning Services, Inspections & Licensing
Represented by MARTIN KVAPIL

Development Authority

This is an Appeal to the Red Deer Subdivision and Development Appeal Board in respect of an application for the development of a secondary suite. The application was refused by the Development Authority due to the proposed development location being within 300 meters of the disposal area of a non-operating landfill.

The Appeal hearing commenced on the 17th day of November, 2014, and was recessed until the 4th day of December, 2014 when it was reconvened and subsequently adjourned. On both dates, the hearing was held in the City of Red Deer Council Chambers, within the Province of Alberta.

DECISION:

The Red Deer Subdivision and Development Appeal Board dismissed the Appeal due to jurisdictional issues pertaining to the primary dwelling in which the proposed secondary suite would be located.

JURISDICTION AND ROLE OF THE BOARD

1. The legislation governing municipalities in the Province of Alberta is the *Municipal Government Act*, RSA 2000 (MGA), c M-26. Planning and Development is addressed in the MGA, Part 17 and further in the *Subdivision and Development Regulation*, Alta Reg 43/2002 (SDR).
2. The Board is established by The City of Red Deer, By-law No. 3487/2012, *Appeal Boards Bylaw*. The duty and purpose of the Red Deer Subdivision and Development Appeal Board (SDAB) is to hear and make decisions on appeals for which it is responsible under the MGA and the *Land Use Bylaw* 3357/2006.

BACKGROUND

3. As per the SDR, s 13, The Development Authority shall not issue a development permit for a residence within 300 meters of the disposal area of a non-operating landfill. The primary dwelling, in which the Appellant proposes to locate the secondary suite, was built in 2013 and is within 300 meters of the disposal area of a non-operating landfill.
4. The Appellant was of the understanding that the previously approved building permit covered all necessary requirements, and was not aware of any further requirement to obtain a development permit that properly addressed the 300 meter setback on the primary dwelling. Thus, in his application to the Development Authority for the secondary suite, the Appellant did not request a development permit in relation to the primary dwelling.

PRELIMINARY MATTERS

5. The hearing on this matter commenced on November 21st, 2014.
6. The Board confirmed that the appeal before them is for the approval of a secondary suite, where a setback requirement has led to refusal by the Development Authority of the suite under s 13(3)(b) of the SDR.
7. The Board identified the following preliminary issues from Exhibit A, page 10, and invited comments from the parties:
 - a. Under "Request for the Board," the Development Authority submission states: "*Furthermore, approval is being sought for the existing detached dwelling.*"

This comment raises the issue: Does the SDAB at the hearing of the secondary suite application, have jurisdiction to grant a development permit for the primary dwelling, where previously no development permit had been granted?

- b. Request for adjournment by the Development Authority, in order to allow full consideration of the final ERMP and any related reports.

Development Authority Response

8. For clarification on comments within the Hearing Materials (Exhibit A, page 10), the Development Authority stated that there is an existing dwelling (the “primary dwelling”), and the appeal before the Board relates to a proposed secondary suite contained within the primary dwelling.
9. In the course of preparing for this appeal, it became evident to the Development Authority that the primary dwelling is within 300 meters of a non-operating land fill and did not receive a development permit at the time of construction. While the primary dwelling meets the *Land Use Bylaw* requirements, it does not meet the landfill setback requirement of s. 13 of the *SDR*.
10. The Development Authority confirmed that the primary dwelling does not meet the landfill setback requirement. To correct this outstanding item, and to ensure that the Appellant has full and proper approvals in place, the Development Authority is requesting a relaxation of the setback on both the primary dwelling and the secondary suite that is under appeal.
11. The Development Authority stated that the non-operating landfill does not currently have a site specific environmental assessment prepared. However; there is an Environmental Risk Management Plan (ERMP) for this area that is currently in draft form and not yet finalized.
12. The Development Authority requests an adjournment of this hearing be granted, for up to 90 days, in order to allow full consideration of the final ERMP and any related reports.

Appellant Response

13. The Appellant is opposed to the request for postponement. The Appellant requested that the hearing proceed on the refused application for a secondary suite within the primary residence.
14. The Appellant stated that the primary dwelling is a single family home and that it did not require the relaxation of the 300 metre setback. The Appellant stated that only multi-family dwellings are required to meet the landfill setback requirement.
15. The Appellant stated that there is already a full approval on the primary dwelling and the issue brought before the Board is the application for a proposed secondary suite that was refused by the Development Authority due to the 300 meter setback.

Issues and Findings

16. The Board recessed briefly to consider the preliminary matters and provided the following direction:
 - i. The Board intends to seek legal counsel to get an opinion on the jurisdiction of the Board to hear an appeal on a secondary suite within a primary dwelling that is without a Development Permit, and within the 300 meter setback requirement of a non-operating landfill.
 - ii. Following the Board’s determination of the jurisdictional issue, the Development Authority may resubmit the request for a postponement.

17. The Board recessed until December 4, 2014.

18. Upon reconvening the hearing, the Board made the following decision.

- i. The SDAB finds that it does not, at the hearing of the secondary suite application, have the jurisdiction to grant a development permit for the primary dwelling, where previously no development permit had been granted, since the SDAB's jurisdiction is limited by the decision which is appealed.

Here, the only development permit refusal which is before the SDAB is the refusal for the secondary suite. Hence, there is no decision being appealed in relation to a development permit for the primary dwelling before the SDAB.

- ii. The SDAB finds that it does have the jurisdiction to hear the appeal filed in relation to the proposed secondary suite. However, because the primary dwelling does not have a development permit, there can be no approval for something which is a secondary use to the primary use, which is itself an unapproved use.

In other words, it makes little sense for the Board to approve an expansion to a use which is itself un-authorized. This may be viewed as being some form of approval or authorization for the underlying use of the primary dwelling, which is not under appeal and therefore is not within the jurisdiction of this board.

19. The SDAB adjourned the hearing on the secondary suite.

CLOSING:

This decision can be appealed to the Court of Appeal on a question of law or jurisdiction. If you wish to appeal, 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 City of Red Deer, in the Province of Alberta, this 12th day of December, 2014 and signed by the Chair on behalf of all three panel members who agree that the content of this document adequately reflects the hearing, deliberations and decision of the Board.



B. FARR, Chair
Subdivision & Development Appeal Board

EXHIBIT LIST

Exhibit A.....Hearing Materials (pages 1-30)