

**MINUTES OF THE MEETING OF THE SUBDIVISION
AND DEVELOPMENT APPEAL BOARD**

WEDNESDAY, AUGUST 15, 2012 @ 7:00 p.m.

PRESENT: Members: C. Brown, R. Hawrelak, P. Montieth,
V. Lutz, E. Reimer, G. Shipley

Development Officer B. Stehr
Recording Secretary C. Cranston
Municipal Manager D. Wolanski

Appellant Carol Owens, Steve Owens
Adjacent Property Owner Mark and Carol Fennell

1. CALL TO ORDER

Recording Secretary called the appeal hearing to order at 7:00 p.m., confirmed there was a quorum present to hear this appeal; and opened nominations for Chairman.

2. ELECTION OF CHAIRMAN

P. Monteith nominated R. Hawrelak to be Chairman, seconded by E. Reimer. R. Hawrelak accepted and assumed control of the appeal hearing.

**3. Appeal of Development Application 12-DP-057
Lot 16-17, Block 43, Plan 1117V (209 1 Street SE)
Appeal of Permission to Stay – Refused by Development Officer**

Chairman Hawrelak asked C. Owens and S. Owens, if they had any objection to any board members hearing the appeal. C. Owens and S. Owens advised they had no objections to any of the board members.

a. PRESENTATION OF APPELLANT

C. Owens advised that she is the Executor of the estate for Glenn Owens, her step son, who owned the property. Glenn had also included Steve Owens on the title of the property when it was purchased. According to the Town's records the house was built in 1945 however the Town records are not complete back to 1945. The house was sold in 1994 and the addition on the house was there at that time. It was sold again in 1996. G. Owens purchased it in the spring 2005 and it was sold again in 2012. The new owners took possession on July 18th, 2012. A new survey had been completed prior to the possession date. The survey was then brought to the Town of Redcliff for a letter of compliance; and it was refused as it was non-compliant. A Permit to Stay was then applied for which was refused and an appeal was filed. The new owners are living in the home and they have started building a garage.

Chairman Hawrelak noted that the appeal package included a copy of the legal survey which indicated the setback and the encroachment. He asked if the appellants had sought legal advice in regard to the situation. C. Owens said that she had not sought legal advice however she had informed the lawyers handling

the real estate transaction that there was an appeal on August 20th. R. Hawrelak did not want to comment on the service received at the time of the sale; however mentioned that this situation could have been a big question at the time of the sale. It is a flag that the lawyers should be waving prominently through this kind of sales.

C. Owens has searched through the papers left by G. Owens when he purchased the home and in all of his paper she has not found a letter of compliance. R. Hawrelak asked if she had found a real property report and she said that she had not. S. Owens advised that he thought that G. Owens had gone from a previous real property report and that there had been no changes and that the real property report had been provided by the people selling the home to G. Owens.

R. Hawrelak asked if the sellers raised any issues and was advised by C. Owens and S. Owens that they believed there were no issues raised at that time, but they advised that they only have the papers that they could find.

b. PRESENTATION OF DEVELOPMENT OFFICER

B. Stehr, Development Officer advised that C. Owens came to the Town hall to obtain a letter of compliance. The house was deemed Non-Compliant as the side yard setback on the south side of the house did not meet the required 1.5 metre setback required in the Land Use Bylaw and the eaves encroached into the neighboring property. C. Owens then applied for a Permit To Stay. The Development Officer further stated that he had a brief discussion with the Town of Redcliff Planning Consultant who advised him that the Town of Redcliff could not grant a Permit To Stay as there is an encroachment of the eaves onto the adjacent property. Therefore the Development Permit for a Permit to Stay was refused. C. Owens decided to appeal the decision not to grant the Permit to Stay.

R. Hawrelak asked how much of a distance into the neighboring property the encroachment is. The Development Officer advised that the home encroaches into the neighbour's property by 0.11 metres. R. Hawrelak noted that this is about 4 inches and asked the Development Officer to confirm if this is the foundation or over hang on the eaves. The Development Officer confirmed that it is the eaves.

c. PRESENTATION OF PLANNING CONSULTANT

R. Hawrelak advised that K. Snyder, the Planning Consultant could not be in attendance however copies of the written comments were circulated to all present at the hearing.

The Planning Consultant's comments are as follows:

"Scheffer Andrew Ltd. has reviewed the Appeal of Development Application 12-DP-057 and has the following comments.

Sheffer Andrew Ltd. strongly advises the Town of Redcliff Development Authority, and the Subdivision and Development Appeal Board, not to engage in

civil matters that are outside the jurisdiction of the Land Use Bylaw, or any other municipal bylaw.

Granting permission for one or more private property owners, through the issuance of a permit, for the encroachment of buildings or structures, or the use of buildings, structures or land on private property not owned by those receiving the permit is not within the authority of the Town, the Municipal Planning Commission, or the Subdivision and Development Appeal Board, nor can any municipal bylaw grant such authority.

The Appellant may have several potential options to achieve compliance:

- Purchase and consolidate the required land from the adjacent parcel to resolve the encroachment and establish the required setback.
- Enter into a legal agreement with the adjacent land owner which allows the encroachment to occur, and receive approval from the SDAB for a zero (0) side yard setback.

Scheffer Andrew Ltd. recommends that the Town seek legal advice to gain a full understanding of the legal circumstances in this case and the application of private property rights/laws in Alberta.”

R. Hawrelak stated that K. Snyder is very clear in that the Planning Consultant is advising the SDAB not to engage in any civil matters or matters that are outside the jurisdiction of the Land Use Bylaw or any other Municipal Bylaw . This is where it gets complicated legal wise, as now there is a question to the legal ownership of the property being sold, as the purchaser has taken possession and is building on the property. It is more than just a certificate of title issue now, in order to enter into an agreement to perhaps buy whatever property is required to find some settlement in that way.

R. Hawrelak asked if there were any questions, and was advised not at this time.

d. **PRESENTATION OF MUNICIPAL PLANNING COMMISSION CHAIRMAN**

No one was in attendance and no comments were submitted.

e. **PRESENTATION OF ANYONE SERVED NOTICE OF HEARING**

Carol & Mark Fennell, who are the adjacent property owners, were in attendance to observe the hearing. C. Fennell said that they have a couple of questions as they plan on building on their property between the two residences. She asked if they will be losing some of their building space because of the encroachment? G. Shipley commented that there would likely be extra costs to the Fennell's due to the need to fire rate new construction. R. Hawrelak advised that he believed that all new construction would have to comply with the current regulations of the Alberta Building Code and Fire Code, as well as any bylaws of the Town of Redcliff. In regard to any other issues the Development Officer would have to respond to their enquiry. The Development Officer stated that any development application would be subject to the required setback in the Land Use Bylaw, which in this case is 1.5 meters. C. Fennell expressed concerns that the encroachment would affect their ability to build. The Development Officer clarified that the 1.5 meters is from the property line not 1.5 meters from the encroachment. Anything relating to fire rating is a requirement of the Building

Code and a Safety Code Officer would provide this information. R. Hawrelak further noted that they would have to take into consideration the overhang from both properties. R. Hawrelak stated for clarification that it is 1.5 metres from the foundation wall to the property line and not the overhang of the eave. There is a legal issue obviously because the roof protrudes over the property line into the adjacent property owner's lot.

R. Hawrelak asked how much discussion the Fennell's had with Mr. Owens in regard to their future plans. C. Fennell stated that they spoke with G. Owens quite a few times generally but they never had an agreement or anything.

C. Brown asked if the Fennell's were in agreement with the suggested solution, and M. Fennell said they are not in agreement to the sale of any of their land. G. Shipley noted that it would only be about a foot that they would have to sell to the adjacent property owner and that he did not have a specific measurement. C. Fennell said that if the amount of land needed would not affect their future plans or result in increased costs to them, then she probably would not be bothered about this encroachment onto their land. She did express concerns that the encroachment issue could be a problem if they were to try to sell their property.

R. Hawrelak asked the Development Officer in regard to the 4 inches of encroachment, how much property would have to be purchased to bring it into compliance with the Land Use Bylaw. The Development Officer responded in order to bring it into compliance with the Land Use Bylaw 1.5 meters would be required. R. Hawrelak suggested that the property owners would have to get direction from the Development Officer prior to entering into a potential legal negotiation of the sale of property to determine the amount of property that would be required. This land would not have to come into full compliance but to perhaps be able to obtain a Permit to Stay within the variance permitted to the discretion of the Development Officer.

f. **PRESENTATION OF ANYONE CLAIMING TO BE AFFECTED**

D. Wolanski commented that there is another option stated in the comments from the Planning Consultant, that being an encroachment agreement. You do not have to buy any land to enter into an encroachment agreement. If an encroachment agreement had already been signed between the property owners then the appeal we would be hearing right now would be for a zero set back. He further commented that there is still the option for the property owners to proceed with an encroachment agreement. They would then come back to the Town requesting a Permit to Stay which would have to meet the Land Use Bylaw and it would be refused again. Then they could file an appeal to the SDAB requesting a zero side yard setback.

R. Hawrelak asked if that was the advice from counsel and the Municipal Manager advised that the Town cannot legally provide a permit. The options available to the property owners have been provided by the Planning Consultant. This is a civil matter and the Town would have some legal issues if any Council, board or arm's length board approved something that granted permission for the encroachment. This is something that the property owners' lawyers need to discuss as well.

C. Fennell commented that the house is likely only about 2 inches from the property line which could be an issue in the future when they want to build a garage. The Municipal Manager clarified that any future development must meet the requirements of the current Land Use Bylaw which would be 1.5 meters from the property line. Normally each property owner would have 1.5 from their property line which would be 3.0 between structures. In this case there would not be 3.0 metres between the residences. Further that there may be building code issues but there will have to be a development permit application and you would have to meet the 1.5 metres whether there is an encroachment or not. The Town can issue a development permit based on the 1.5 metre set back and it would be up to the developer to look into building code issues such as fire rating. It was suggested that Mr. and Mrs. Fennell may want to have these answers prior to agreeing to an encroachment agreement.

R. Hawrelak noted that the zero setback is typically for the foundation and the foundation of the building is not on the property line. He asked whether the Town would be able to approve a Permit to Stay and the Municipal Manager advised that the structure is still too close to the property line to allow a Permit to Stay to be approved as it will not meet the setback requirements of the Land Use Bylaw. R. Hawrelak noted that this is similar to other older properties in the Town that have structures too close to the property line as Land Use Bylaws have changed over time. The Municipal Manager commented that there may be a mechanism if the encroachment permit were in place that an appeal could work to get the Permit to Stay, if the Board so chose to issue one. Right now legally a Permit To Stay cannot be issued.

g. **REBUTTAL OF APPLICANT**

C. Owens asked if they could get some direction. Would it be likely if the appeal would be passed through the Board if they (the Owens) were to go to the work and extent of getting an encroachment agreement? The Municipal Manager said that the Town cannot speak for the Board. C. Owens said that they have no idea what it will cost for an encroachment agreement and what if it would cost \$5,000.00 in legal fees and they came back to the board and they said sorry they still cannot approve the Permit.

C. Brown stated that the unfortunate part of this situation is the Board must deal with what is before them and C and S. Owens will have to see what the decision is and then go from there. S. Owens stated that his biggest concern was to get this dealt with as quickly as possible as the person who purchased the property is currently building a garage on the property. The Development Officer noted that the purchaser had advised that he would be in attendance however he has not as yet arrived.

R. Hawrelak asked who is on the current title record. C. Owens said she was not sure of the name of the people who purchased the home. C. Cranston produced a copy of the current land title record from the property file and it was noted that the title had been issued on July 20, 2012 in the name of Aaron Baldwin and Angela Dutra.

R. Hawrelak commented that the Board may not be permitted to hear this appeal if you (S. Owens) are not the current titled owner. G. Shipley commented that

they are the owners until this is settled and that the new owners cannot take possession until this is settled. R. Hawrelak noted that Land Registration had issued the new title.

S. Owens stated that as part of the sale they had to get a Real Property Report, and a home inspection. If they haven't come through and finished with the Real Property Report then the title at Land Titles is probably a wash. R. Hawrelak advised that it is complicated because they have a sales agreement and contract, but if we see a certificate of title that is registered with Land Registry in somebody else's name, we have to assume that is the legal owner. They are legally the owner of the title. It all goes back to the sales agreement and the conditions of the sales agreement must be met and the lawyers should not have filed for a title unless all conditions of the sale had been met. C. Owens said that the conditions have not been met. R. Hawrelak commented that it is one of the caveats of Real Estate transactions that you don't file for a title until it all clears. C. Owens asked if the title had been filed and R. Hawrelak responded yes.

h. OTHER

S. Owens asked if they need to contact their Realtor and their Lawyer and C. Owens commented that they are aware of the situation and the SDAB meeting.

E. Reimer asked if they had received payment for the property and C. Owens said that they had received payment. P. Monteith again suggested that the Board should not be hearing the appeal.

V. Lutz suggested that the Board go In Camera. R. Hawrelak explained the process for the In Camera session and that afterward the meeting would resume and the appellant and concerned parties would be advised of the Board's decision.

i. RECESS

V. Lutz moved the Board to recess at 7:37 p.m. and the Board met in camera.

B. Stehr, D. Wolanski, C. Owens, S. Owens, C. Fennell and M. Fennell_ left the room at 7:37 p.m.

j. DECISION

G. Shipley moved that the Subdivision and Development Appeal Board refuse to hear any further the appeal against the decision of the Development Officer, to refuse to issue a permit to stay for Lot 16-17, Block 43, Plan 1117V.

The Board advised the reasons for its decision are:

1. The ownership of the property has changed and the owner on title is not present to discuss the encroachment issues; and
2. The titled owner did not have any representation at the SDAB hearing.

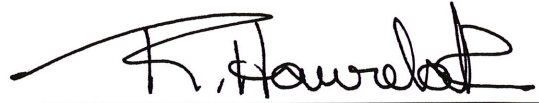
The Board reconvened at 7:50 p.m.

B. Stehr, D. Wolanski, C. Owens, S. Owens, C. Fennell and M. Fennell returned to the room at 7:50 p.m.

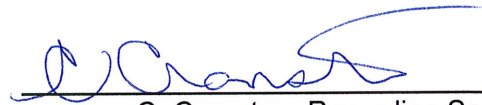
Chairman Hawrelak advised the applicant of the Board's decision and reasoning and that a letter stating the decision of the Board would be forthcoming.

4. **ADJOURNMENT**

C. Brown moved the meeting be adjourned at 7:52 p.m.



Chairman



C. Cranston, Recording Secretary