



White City

Development Appeals Board
Appeal Hearing

**DECISION OF THE WHITE CITY DEVELOPMENT APPEALS BOARD REGARDING
APPEAL NO. 01-22 PERTAINING TO 15 GREGORY AVENUE, WHITE CITY, SK**

Panel: Dennis Gould, Chair
Bill Wood, Board Member
Cory Schill, Board Member
Dale Strudwick, Board Member
Glenn Weir, Board Member

Secretary: Cassandra Virgin

Appellant: [REDACTED] Property Owner

Respondent: Chace Kozack, Development Officer, Town of White City

Introduction:

- 1) This appeal pertains to a fence permit refusal for a 1.8m (6ft) front yard fence at 15 Gregory Avenue. The fence permit application was refused by the Town of White City as the Development Officer does not have the authority to grant a variance to the Zoning Bylaw. The Appellant is requesting the Development Appeals Board overturn the Development Officer's refusal and direct the issuance of a fence permit.
- 2) The Appellant is requesting a relaxation of the Town's Zoning Bylaw pertaining to fence regulations to permit a 6ft (1.8m) front yard fence.
- 3) Per subsection 221(d) of *The Planning and Development Act, 2007*, the Board can allow the appeal, allow the appeal with conditions, vary, or refuse the appeal.
- 4) There is only one violation of The Zoning Bylaw restrictions in this case. The Board cannot make a decision for this request that:
 - a. would create a special privilege;
 - b. is injurious to neighbouring properties; or
 - c. defeats the intent and purpose of The Zoning Bylaw.
- 5) Notice of this appeal has been provided to property owners within a 75m radius of the subject property to allow them the opportunity to assess whether they will be injuriously affected by the proposed zoning variance. Six email submissions were received. Four in support, one against, and one of a neutral position.

Appellant's Position:

- 6) The Appellant proposes to build a 1.8m (6ft) fence in the front yard of the property.
- 7) The Appellant's home is on a large deep lot on Gregory Avenue. The well treed lot provides an attractive habitat for wild deer who frequent residential areas of White City, particularly during the winter months.
- 8) In the spring of 2022, the Appellant applied for a permit to build a 1.8m (6ft) fence around their lot in order to discourage the deer from frequenting their lot. The permit was denied as The Zoning Bylaw only permits 1.8m (6ft) fencing across the rear of the yard and part way along the east and west sides of the yard. A front yard fence can only be 1.2m (4ft).
- 9) Despite the permit to build being denied, the Appellant proceeded to complete the 1.8m (6ft) fence on all four sides on the property, with the exception of the gate at Gregory Avenue. He indicated that the design of the gate will be decided later, after the Board renders a decision on this appeal.
- 10) The Zoning Bylaw for this zone clearly limits back yard fence height at 1.8m (6ft), but also clearly limits the fence height across the front and along the sides, back to the proximity of the house, to 1.2m (4ft).
- 11) The material (wire) used to build the fence is open and provides visibility to the yard and is relatively inconspicuous, but the fence height is significantly above the 1.2m (4ft) allowed in the Town and most other municipalities where 1.2m (4ft) is sufficiently high to define property lines.
- 12) A number of neighbours have submitted support for the fence that the Appellant has built but acknowledged that fencing in the Appellant's yard may cause the deer to frequent other people's yards. The deer will continue to enter the Town. Additionally, one neighbour has submitted strong opposition to front yard fences in his area citing aesthetics, openness and character of the area, but did say he could accept a low fence, i.e. 1.2m (4ft) as allowed by The Zoning Bylaw.

Respondent's Position:

- 13) The Respondent does not have the authority to approve any minor variance or approve a permit that does not comply with The Zoning Bylaw.
- 14) The Respondent noted, the fence permit was denied however, the Appellant constructed the fence anyways.
- 15) With respect to the fence application, the Town has additional concerns, in that:
 - a. approval of a 6ft front fence would set a precedent in the Town; and

- b. no regulations for acceptable fencing materials currently exist within the Town's Zoning Bylaw meaning, if another 1.8m (6ft) fence were approved through the appeal process it may not be made of inconspicuous material.

Issues:

Would issuing a development permit grant the Appellant a special privilege in comparison to their neighbours?

16) The Board considers this front yard relaxation request of 0.6m (2ft), or 33%, to be excessive and would constitute a special privilege that the Board will not allow in this case nor in other cases involving similar circumstances. Granting this request under these circumstances would be a "special privilege" that the Board would not grant to others.

17) Therefore, the Appellant's application does not clear this bar.

Would issuing a development permit defeat the intent of the Zoning Bylaw?

18) The Respondent has pointed out The Zoning Bylaw intends to contribute to openness, defining property lines and uniformity with residential fence heights in most municipalities, The Board considers this relaxation request to be excessive and unreasonable for a front yard, and it would defeat the intent of The Zoning Bylaw.

19) Therefore, the Appellant's application does not clear this bar.

Would issuing a development permit cause injury to neighbouring properties?

20) The Board acknowledges that there were a number of neighbours who expressed support for the 1.8m (6ft) fence, but that it may result in the deer merely moving to other people's yards. Additionally, one neighbour registered opposition to the high fence citing fencing in front yards, aesthetics, openness of the area and character of the area. The board accepts these concerns as significant potential for injurious affection to neighbouring property owners.

21) Therefore, the Appellant's application does not clear this bar.

Conclusion:

The board finds that allowing the appeal:

- 1) Would give Special Privilege.
- 2) Would defeat the intent of the Zoning Bylaw.
- 3) Would negatively impact neighbouring properties.

Motion:

Strudwick/Wood: THAT Appeal 01-22 requesting a front yard fence height relaxation of 0.6m (2ft), or 33% be denied.

CARRIED UNANIMOUSLY.

22) For these reasons, the appeal is denied. The appellant shall have 20 days from issuance of this decision to appeal to the Saskatchewan Municipal Board, if desired.



Dennis Gould, Board Chair

Citation: [REDACTED] v *White City (Town)*, 2023 SKMB 50

Date: 2023-09-18

DETERMINATION OF AN APPEAL UNDER
Section 226 of *The Planning and Development Act, 2007* and
Section 17 of *The Municipal Board Act*

Appeal Number: PAC 2022-0026
Date of Hearing: July 12, 2023
Location of Hearing: Regina, SK

BETWEEN:

[REDACTED]

Appellant

- and -

Town of White City
(as represented by Robertson Stromberg LLP)

Respondent

WRITTEN SUBMISSIONS BY: (no one appeared for either party)

The Appellant: [REDACTED], Property Owner

The Respondent: Candice Grant, Legal Counsel

HEARD BEFORE: John Eberl, Panel Chair
Chad Boyko, Member

INTRODUCTION:

[1] The property under appeal is:

DAB Appeal Number	Civic Address	Legal Description	Zoning District
01-0022	15 Gregory Avenue	Lot 4, Block 1, Plan FN1033	R2 – Residential District

[2] ██████████ (Owner) is appealing a decision of the Town of White City’s (Town) Development Appeals Board (Board) with respect to a request for a variance from section 5.2.7(4) of the Zoning Bylaw (Bylaw). The Owner constructed a 6-foot-high fence which exceeds the maximum height allowed in the Bylaw. The Bylaw provides for a maximum height of 1.2 meters (approximately 3.94 feet).

[3] The Owner appealed the Town decision to the Board. The Board dismissed the appeal, concluding the constructed fence did not satisfy the criteria required to grant a variance from the Bylaw requirements.

[4] The Owner asks the Planning Appeals Committee (Committee) to change the Board’s decision.

ISSUE:

[5] Did the Board err when it found the proposed variance did not meet the requirements for relief found in subsection 221(d) of *The Planning and Development Act, 2007, SS 2007, c P-13.2 [Act]*?

DECISION:

[6] The Committee finds the Board erred when it found the proposed variance did not meet the *Act’s* requirements.

PRELIMINARY MATTER:

Standard of Review

[7] The Court of Appeal (Court) considered the standard of review to be applied by this Committee when reviewing decisions in paragraphs [91] to [94] and [98] of *E.Z. Automotive Ltd. v Regina (City)*, 2021 SKCA 109 (CanLII). The Court found that in accordance with the appellate structure in the *Act* and the Committee’s purpose, the Committee should review questions of law on a standard of correctness. For similar reasons, when reviewing questions of fact or questions of mixed fact and law where there is no extricable question of law, the appropriate standard of review is reasonableness.

Issue: Did the Board err when it found the proposed variance did not meet the requirements for relief found in subsection 221(d) of the Act?

ANALYSIS:

[8] The *Act* requires the Board to consider whether a variance request complies with subsections 221(d)(i), (ii) and (iii) of the *Act*. That is, the Board may only grant a variance if, in its opinion, doing so would not:

- i. **Grant to the appellant a special privilege inconsistent with the restrictions on the neighbouring properties in the same zoning district;**
- ii. **amount to a relaxation as to defeat the intent of the zoning bylaw; or**
- iii. **injuriously affect the neighbouring properties.**

[9] The granting of a variance request by a board or the Committee is not the same as setting a binding precedent. Each appeal must be determined independently, based on its own merits.

Special Privilege

[10] The legal test for whether granting a variance is a special privilege can be found in *St. Andrew's Presbyterian Church v Saskatoon (City)*, 1987 CanLII 4527 (SK CA) [*St. Andrew's*] at paragraph [13]:

... would [the Board or the Committee] grant this same privilege to another property owner subject to the same bylaw restrictions where the same need and conditions existed.

[11] At paragraph [108] in the more recent decision of *Big River (Rural Municipality) v Pettigrew*, 2021 SKCA 30 (CanLII), the Court acknowledged that:

St. Andrew's and *Dolman* have been widely and consistently cited in favour of a generous interpretation of a development appeals board's power to grant a variance under s. 221(d). We affirm those decisions....

[12] In adjudicating another fence height bylaw contravention appeal to the Committee in PAC 01/2009, *Srdjan Arsic v Saskatoon (City) [Arsic]*, which was upheld by the Court in *Saskatoon (City) v Arsic*, 2009 SKCA 122 (CanLII), we determined at paragraph [13] of our decision that subsection 221(d)(i) does not require the establishment "of overwhelming need."

[13] In deciding whether a variance to the Bylaw restrictions should be granted in this instance, the Board had concerns with respect to neighborhood aesthetics being negatively affected. In undertaking its analysis, the Board determined that allowing this appeal

would grant the applicant a special privilege inconsistent with the restrictions found in the Bylaw.

- [14] In his written submission to us, the Owner contends that the extra height of the fence is needed for the safety of his family (Committee Hearing Book (HB) p. 236). The property is secluded and parklike and has become a refuge for wild animals. The primary wildlife are deer and their predators, for example, coyotes. The fence as evidenced by photographs on the record is constructed with fine gage wire resulting in 2X4 holes in the fence. As a result, the fence blends into the mature landscaping of the subject property.
- [15] The Town argues in response that the requested variance to the Bylaw is excessive and would constitute a special privilege. Notably, the Town submits that there was no evidence before the Board that similar fences had been constructed by other property owners within the zoning district, and no evidence in this respect has been provided to us for this appeal. The Town's own records indicate that no similar fence has been permitted by the Town and indeed, that the only other fence permit appeal seeking a variance had been denied. The Town further asserts that no special need has been established as nothing sets the Appellant's property apart from other properties within the R2 zoning district.
- [16] Finally, the Town contends that the Owner's most suitable remedy is to seek amendment of the Bylaw, rather than an exception to it. The balancing necessary between the openness and character of the district prescribed by the Bylaw and the desire to keep wildlife at bay is best addressed through the political process (HB p. 247).
- [17] Based on the foregoing, when we apply the analysis in *Arsic* to the facts on the record, we find that the Owner's demonstrated safety concerns are sufficient to satisfy the requirement of need to clear the special privilege bar to variance relief. We are not persuaded by the Town's suggestion that the Owner should pursue an amendment to the relevant Bylaw provisions to address his safety concerns, rather than obtain relief from us pursuant to subsection 221(d).
- [18] We applied the facts of this case to the legal test and have concluded that allowing the appeal would not result in a special privilege for the Owner.

Intent

- [19] The Board concluded that granting the appeal would amount to a relaxation that would defeat the intent of the Bylaw. At paragraph [18] of its decision, the Board found that the intent of the Bylaw is "to contribute to openness, defining property lines and uniformity with residential fence heights in most municipalities" (HB p. 45).

- [20] In its written submission to us (HB p. 246), the Town argued that allowing a fence that is a full two feet higher than allowed by the Bylaw would defeat the intention of the Bylaw as articulated by the Board. The intention of the Bylaw is not to control wildlife (in which respect the Owner's property is not unique).
- [21] During the Board hearing, the Owner offered evidence that the placement and dimensions of the fence would not create aesthetic concerns for neighbouring property owners, and granting the requested variance would therefore not defeat the intent of the Bylaw. This position was supported by letters provided to the Board by neighbouring property owners which commented favorably on the style and material used in the construction of the fence, as well as the attractive landscaping of the Owner's property. The use of the fine gauge wire maintains the openness of the neighborhood and does not undermine the definition of property lines.
- [22] We find allowing the appeal would not defeat the intent of the Bylaw.

Negative Impact

- [23] Subsection 221(d)(iii) of the *Act* provides that the Board should not allow a variance if doing so would "injuriously affect the neighbouring properties."
- [24] The Board concluded that the requested variances would injuriously affect neighbouring properties. The Board acknowledged that neighbours expressed support for the fence to the Board, but that granting the requested variance may result in the deer merely moving to other people's yards. Additionally, one neighbour registered opposition to the high fence, citing concerns relating to the aesthetic character of the area.
- [25] The Board appears to have placed great significance on the one written complaint provided to it compared to five strongly worded letters in support of the granting the requested variance from neighbouring property owners. The neighbours supporting the variance reside within a few houses, or directly across the street from the subject property. These letters and emails directly refuted concerns relating to the negative impact the variance would have on the aesthetics of the streetscape. Moreover, a common theme among the property owners was that in the absence of the Town taking the necessary steps to control the growing wildlife population, it was reasonable for property owners to construct higher fences to protect themselves and their property.
- [26] Based on the evidence found in the Board record, we find allowing the appeal would not negatively impact neighbouring properties.

CONCLUSION:

[27] The Committee finds that allowing the appeal:

- a) would not give a special privilege to the Owner.
- b) would not defeat the intent of the Bylaw; and
- c) would not negatively impact neighbouring properties.

[28] The Committee allows the appeal and directs the Town to issue the requested fence permit.

Signed by:

Per: _____
John Eberl, Panel Chair

Signed by:

Per: _____
Jessica Sentes, Director