

Calgary Subdivision and Development Appeal Board  
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## CALGARY SUBDIVISION AND DEVELOPMENT APPEAL BOARD

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*Citation: 2017 CGYSDAB 42*

Case Name: SDAB2017-0042 (Re)

File No: DP2016-4802

Appeal by: Sally Predika

Appeal against: Development Authority of The City of Calgary

Hearing date: May 18, 2017 and June 08, 2017

Decision date: June 20, 2017

Board members: Stefne Madison, Presiding Officer  
Brian Corkum  
Paul Mazumdar  
Michael Meredith  
Andrew Orr  
Jim Palmer

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## DECISION

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**Description of Application:**

The appeal before the Subdivision and Development Appeal Board (Board) deals with an approval by the Development Authority of a development permit application for a new multi-residential development (4 units), accessory residential building (garage) at 33 31 Avenue SW. The property is located in the community of Erlton and has a land use designation of Multi-Residential - Contextual Grade Oriented (M-CG d72) District.

**Adjournment:**

The hearing commenced May 18, 2017 with consideration of procedural issues. The Board adjourned the hearing to June 08, 2017 with the consent of all parties involved.

**Hearing:**

The Board heard verbal submissions from:

Kenneth Melanson, representing the Development Authority;

Sally Predika, the appellant, in favour of the appeal;

James Finstad, an affected party, in favour of the appeal;

Bill Fischer on behalf of the Erlton Community Association, an affected party, in favour of the appeal;

Rick Grol of Bennett Jones, Heather Sorenson, and Greg Donaldson on behalf of the applicant, opposed to the appeal;

**Summary of Evidence:**

The Board report forms part of the evidence presented to the Board. It contains the Development Authority's decision respecting the development permit application and the materials submitted by the Development Authority that pertain to the application. The Board report further contains the notice(s) of appeal and the documents, materials or written submissions of the appellant(s), applicant and any other party to the appeal.

*Development Authority's Submission*

Mr. Melanson appeared on behalf of the Development Authority. He advised that the application was reviewed taking into account the Municipal Development Plan (MDP), the Erlton Area Redevelopment Plan (ARP), and the Land Use Bylaw rules. He referred to a number of sections within the MDP which he believed supported this type of development. He also advised that the proposed development fell within site 1 of the ARP, and that no provisions of the ARP limited the location of multi residential

developments. The ARP encourages infill development. The Board has approved other multi-residential development in the Erlton area.

The area is governed by the RM-2 development guidelines, which encourage, among other things, a variety of housing types, building details reflective of the community character, and aesthetic treatment of rooftops and decks where they are visible.

He reviewed the chamfer relaxation for the Board. He advised that a mistake was made in the initial calculation of the relaxation under section 585.13, which is a relaxation for portions of the east and west elevations extending into the height chamfer. The chamfer height is calculated in relation to the adjacent buildings, and a mistake was made in calculating the height of the west property. The adjacent west property is taller than initially thought, therefore the chamfer height increases to 8.0 metres. The end result is that a relaxation is no longer required for the west elevation, and very small relaxation is required for the east elevation.

He also provided a bylaw relaxation chart. There is a relaxation for hard landscaping under section 551 of the bylaw. The proposed development has hard landscaping in excess of the maximum 40% allowed under the bylaw. There is also a relaxation for the minimum dimensions of private amenity space under section 557 of the bylaw. This relaxation was granted in order to minimize the impact on the front yard setback. Finally there is a relaxation to planting requirements under section 552 of the bylaw in that the proposed development is one shrub below the requirements.

The M-CG district is designed to encourage multi-residential development directly adjacent to low density residential development. One way this district deals with these uses is through the chamfer rules. This development does not protrude into the chamfer setback area, and the overall height remains below the district maximum.

The Development Authority advised that the site is characterized by dense tree cover, as is the adjacent site to the west. The development is consistent with other new developments in the area with respect to roof style, materials and design. The building has been kept low and setback rules have been respected to limit impacts on adjacent properties.

Finally, the Authority stressed that Erlton is a community in transition, there is a significant amount of new infill development and there are many multi residential developments in the area. There are no absolute rights to privacy or sunlight.

The Authority requested that the Board allow the appeal in part and impose a condition addressing an error in the streetscape drawing, but uphold the issuance of the permit.

### *Appellant's Submission*

The appellant, Ms. Predika lives at 39 31 Avenue SW which is directly adjacent to the west of the proposed development. She advised she has lived in her home many years and enjoys gardening in her backyard, therefore the sun is very important to her. She showed a current photo of her rear patio on the east side of her property to demonstrate the current sunlight conditions.

She stated that if the proposed development is built, it will extend to the end of her rear yard, and it would be a massive two storey wall with a rear raised deck which would extend four feet past the rear wall.

She pointed to the shadow studies provided by the applicant, and noted that they showed her patio completely in shade at 9 am and 11 am on June 21. The result is that she would have no morning sun in her back yard.

She acknowledged that the properties currently contain mature trees, however she stated that trees aren't as massive as walls and don't block sunlight entirely.

Unit 4 of the proposed development looms over her back yard causing privacy issues. These issues are further compounded by the raised side entrance to unit 4. Additionally there are three windows on the side that overlook her property as well as a raised rear deck that overlooks as well.

Overall the design of the building will have a massive negative impact on her use and enjoyment of her property.

#### *Affected Persons' Submissions*

Mr. Finstad, an affected neighbour stated he lives at 41 31 Avenue SW. He advised that this proposed development is not compatible with the scale of surrounding developments. The area is characterized by single family and semi detached developments. He believes that the size, mass, and footprint of the proposed development impacts the ability of the neighbours to enjoy their property.

Mr. Fischer appeared on behalf of the Erlton Community Association. He provided the Board with written submissions at pages 120-125 of the Board Report as well as four additional pages of written submissions the day of the hearing. He stated that due to the need for relaxations, it is clear that this development is too much building for too little lot. He identified what he believed to be a further relaxation under section 566 (1) of the bylaw, in that the plans do not show a specific enclosure for the garbage container. Additionally he stated that section 581(2)(b) must be relaxed as the back units do not have an entrance facing the street, but instead are on an angle.

He also pointed to several sections of the MDP as support for his position that infill development must be sensitive and respectful of the existing physical pattern, scale, built form, and character of the neighbourhood. The Erlton ARP also makes statements

in respect of preserving and enhancing the established residential character, and to maintain the established low rise residential character of the area.

The proposed development would be located mid block and is not respectful of adjacent development or re-development. Re-development in this area is mainly single family and semi detached homes.

The total projection of the proposed development past the east side of the residence to the west including the deck is 44 feet. While there may be other taller more massive developments in the area, the most significant context is the immediate area of the development.

Overall the development doesn't comply with the policies of the MDP or the ARP and isn't sensitive to or compatible with the existing homes and the neighbourhood. It materially interferes with or affects the use and enjoyment of the two adjacent homes.

### *Applicant*

Mr. Grol, Ms. Sorenson, and Mr. Donaldson appeared on behalf of the applicant. One of the goals of the development was to focus on the efficient use of the land in order to provide affordable living. There are four-plexes as well as semi-detached residences in the area. Many multi residential developments are in close proximity to the proposed site. The proposed development is similar in scale and built form to others in the community. It was noted that a duplex and a four-plex look similar from the front. One of the key features of the proposed development is the hip roof design which is not visible from the street, and the roof matches and complements the adjacent properties.

The applicant disputes the appellant's calculation that the proposed development protrudes 38.4 feet past her home, as it did not take into consideration the extension from the west elevation of the appellant's home, and appears to include the deck of the proposed development. The applicant has calculated that the development extends approximately 20 feet past the rear façade of the appellant's home.

The adjacent neighbours have very small homes and are not compatible with the ARP. Therefore it is hard to use the adjacent neighbours as a comparison when considering context. There is no relaxation for lot coverage or height. The roof has a 4:12 pitch to match the rooflines of the adjacent neighbours. Additionally, brick was used to create articulation on the front of the development and the front patios were kept open to create transparent yards consistent with the block. Any redevelopment on the subject site would have an impact on the adjacent properties given the size of the homes. The allowable building depth (s.535(1)) of the LUB is 65%, which is virtually the same depth as the proposed building, plus the LUB allows a backyard suite.

The dwelling units of the proposed development are modest in size and sensitively designed. They will provide affordable housing for young professionals that work in the

inner city. They will also contribute to the diversity of housing stock, in accordance with sections 2.2.4 and 2.3.1 of the MDP.

This development is consistent with the purpose statement of the M-CG district. The LUB intends that this district will be redeveloped for multi-residential development.

There are walkout developments with raised decks in the neighbourhood, as well as second story balconies.

The City considers the regular garbage containers used by residents to be garbage enclosures as contemplated by section 566 of the bylaw. The garbage container is addressed through a prior to release condition. However there is nothing about the garbage enclosures that negatively impacts the neighbours use and enjoyment of their property.

Under the Municipal Government Act, a property owner has the right to develop his or her property in accordance with the Land Use Bylaw.

There is no absolute right to sunlight. The shadow study shows that the west neighbour will get sun in her backyard as of 1pm on June 21 and will have afternoon and evening sun on March 21 and September 21. Further, the subject site currently contains several tall coniferous trees that overshadow the appellant's yard. These trees were not considered in the sun shadow study.

The MDP designates this community as inner city, and sets the objective of densification of the inner city.

The site is a Transit Oriented Development site and within the Car To Go area. The City's planning policies promote that lands within TOD areas be developed with higher density in order to encourage the use of public transit.

The ARP refers to conservation, but this does not mean that new developments must mimic small bungalows. Council intended that Erlton would be redeveloped as multi-residential. Further, the ARP (s.2.1.2.1) directs that infill development "should" be compatible with the scale of the surrounding development and streetscape. This is not a mandatory requirement, "should" merely indicates a desire or request. The ARP, where it uses directive language, does not have the same status as the land use bylaw and there is discretion over where it is to be applied. The proposed development meets the guidelines for the subject site which are set out in the table on page 12 of the ARP and the guidance set out in section 2.1.2.1.

The proposed development has been designed to resemble two separate residential units from the streetscape, adequate parking is provided, it is below the maximum height and the required relaxations are mostly the result of site constraints and do not

impact the neighbouring properties. The development will actually increase the value of its neighbours.

The proposed development meets the policies of the MDP and the ARP. The MDP and the ARP allow for low density residential development, which includes low density multi-residential developments such as the subject development. The MDP must be read as a whole: individual policies do not stand on their own. The proposed development is sensitive, compatible and complementary to the pattern of development on the street and in the immediate area.

The applicant also would agree to the following modifications: frosting upper floor windows on the side elevation; privacy screens on the rear deck; increased fence height at the rear; moving the entire building forward by 1m; planting columnar aspens along the side property line; moving the garage 6m to the rear property line; and planting an additional shrub.

Letters in support of the proposed development were also provided to the Board.

### **Decision:**

In determining this appeal, the Board:

- Complied with the provincial legislation and land use policies, applicable statutory plans and, subject to variation by the Board, The City of Calgary Land Use Bylaw 1P2007, as amended, and all other relevant City of Calgary Bylaws;
- Had regard to the subdivision and development regulations;
- Considered all the relevant planning evidence presented at the hearing and the arguments made; and
- Considered the circumstances and merits of the application.

**1. The appeal is allowed and the decision of the Development Authority is overturned.**

**2. The development permit issued by the Development Authority is null and void.**

### **Reasons:**

1 The Board considered the written, verbal, and photographic evidence submitted, and notes that the appeal pertains to the Development Authority's approval of a development permit for a new multi residential development (4 units) and an accessory residential building (garage) located at 33 31 Avenue SW in the community of Erlton. The land use designation is M-CG (d72) and the use is discretionary.

2 The proposed development requires several relaxations, and the use is discretionary, therefore it must be assessed using the factors outlined in section 35 of the Land Use Bylaw as well as section 687(3)(d) of the Municipal Government Act.

3 The Board finds that the proposed relaxations do not unduly interfere with the amenities of the neighbourhood, nor materially interfere with the use, enjoyment or value of neighbouring parcels of land. However this is a discretionary development that is not appropriate given the factors outlined in section 35 of the Land Use Bylaw.

4 The chamfer height relaxation is minor and only applies to the east side of the proposed development. A very small portion of one corner projects into the chamfer. The relaxation in respect of plantings is similarly minor as only one shrub is missing. This relaxation could be easily remedied by requiring another shrub to be planted. Finally, the relaxation in respect of the size of the amenity space ultimately could not be considered to impact neighbouring properties, as there is no evidence before the Board to show that the smaller amenity space would for example, require the residents to use other portions of the property that would negatively impact the neighbours. Overall, there was no evidence to suggest that any of the relaxations would unduly interfere with the amenities of the neighbourhood, or materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land pursuant to section 687(3)(d) of the Municipal Government Act.

5 The Board finds that the two additional relaxations identified by the Community Association are not in fact relaxations. The Board finds that the standard city waste containers fall within the definition of “enclosure” in section 566 of the bylaw. Section 581(2)(b) of the bylaw only requires that the entrance on the floor closest to grade be visible from the street, it does not prohibit them from being angled so that this visibility is achieved.

6 As this is a discretionary development, the Board must assess the development based on the factors outlined in section 35 of the Land Use Bylaw. The Board notes that this area has been specifically designated as M-CG by city council. The purpose statement for M-CG in the land use bylaw is as follows:

**576** The Multi-Residential – Contextual Grade-Oriented District:

- (a) is intended to apply to the **Developed Area**;
- (b) has **Multi-Residential Development** that will typically have higher numbers of **Dwelling Units** and traffic generation than low density residential dwellings;
- (c) has **Multi-Residential Development** designed to provide some or all **units** with direct access to **grade**;

- (d) provides for **Multi- Residential Development** in a variety of forms;
- (e) has **Multi- Residential Development** of low height and low **density**;
- (f) allows for varied **building height** and **front setback areas** in a manner that reflects the immediate context;
- (g) is intended to be in close proximity or **adjacent** to low density residential development;
- (h) provides outdoor space for social interaction; and
- (i) provides landscaping to complement the design of the **development** and to help screen and buffer elements of the **development** that may have impacts on residents or nearby **parcels**.

7 First, in reviewing the purpose statement for the M-CG district it is clear that the proposed development meets a number of the objectives, including providing higher density housing, it is low height and relatively low density, it is in close proximity to low density residential, and provides outdoor space for social interaction. However the Board notes that the landscaping that would screen and buffer the development from adjacent residences in order to minimize its impact is lacking.

8 The Board agrees with both the applicant and the Development Authority that the M-CG district clearly contemplates housing stock like the proposed development and the proposed development meets many, but not all, of the factors outlined in the purpose statement.

9 The MDP and ARP are relevant in the section 35 analysis. It is clear that higher density infill development is to be encouraged, however the redevelopment must be sensitive to the neighbourhood context. Erlton is a neighbourhood in transition, and there is redevelopment occurring on this block. However, in assessing whether this redevelopment is appropriate, the neighbourhood context must necessarily include the immediate neighbours. While this development is not over height nor does it maximize lot coverage, its impact on the low profile bungalows on either side is significant.

10 The parties all quoted various sections of the MDP in support of their position, either for or against the appeal. It is apparent that support can be found within the MDP for either position, and some of the same sections were relied on by both parties.

11 The MDP is a high level statutory document that provides strategic direction with respect to development in the city. It must be read as a whole and in accordance with the sustainability principles listed in Part 1 of that document. It also must be read in conjunction with the Erlton ARP, which is the local plan for redevelopment.

12 The Board recognizes that both the MDP and ARP are encouraging of a variety of housing stock providing a range of living choices in this area. The Board notes that the site is a Transit Oriented Development site and higher density is encouraged. Multi

residential developments are clearly contemplated given the M-CG land use designation. However the fact is that the use is discretionary in this district and all relevant factors under section 35 must be considered in determining the appropriateness of the development.

13 The compatibility and impact of the proposed development with adjacent developments is one such factor. The proposed development consists of long, blank side walls with no articulation. These walls have the effect of looming over the neighbouring properties. The property to the west is particularly impacted as the amount of morning sun in the back yard will be reduced. While it is true that the west property is treed, trees are qualitatively different than a solid wall in terms of the effect they have on sunlight. The Board acknowledges the applicant's submission that there is no right to sunlight, but casting a shadow and presenting a long, tall unarticulated wall to an outdoor amenity area is material to the compatibility of the development with its neighbours. Regardless of the actual measurement in feet of projection beyond the appellant's rear façade, the proposed development will present this wall adjacent to most of the appellant's rear amenity area. The Board is not satisfied that the applicant's proposal to move the building and garage would sufficiently mitigate this impact, and in any event, that is a major change to the development which would require a full evaluation by the Authority.

14 There are three side windows on each side of the proposed development. The entrance for the back units is located at the side of the property, and the entrance landing is raised such that anyone entering the residence would be able to see into the neighbour's yard. The rear decks are also raised and would overlook the adjacent properties. All of these design elements create privacy and overlooking issues for the neighbouring properties. Some can be mitigated by obscuring the glass and providing privacy screens although this is not a complete remedy and the evidence was that the raised landing cannot be changed. Like sunlight, the Board acknowledges the applicant's submission that there is no right to privacy, but privacy and overlooking relate to compatibility with adjacent properties, which is something that must be considered when reviewing a discretionary use.

15 The applicant presented many features to reduce the massing of the development when viewed from the front, including the articulation to make the development look like two individual dwellings, the roofline, and the brick surfacing. The Board is not satisfied that the massing when viewed from the side has been adequately addressed. As noted above, the neighbours when viewing this development from their rear yards are presented with a long, primarily blank wall with no articulation.

16 Overall, the proposed development is not designed in a way that is sensitive to the adjacent neighbours. The massing, shadowing and privacy impacts are significant. While multi residential development is to be encouraged in Eriton, any form of multi residential development is not automatically approved. Section 35 of the Land Use Bylaw still requires an assessment of each discretionary proposed development on its own merits, taking into account the impact on the neighbours in addition to other sound

planning considerations. The Board finds based on that assessment that the proposed development is not appropriate for this site.

### **Conclusion**

17 The Board allows the appeal and overturns the decision of the Development Authority.

18 The development permit issued by the Development Authority for this development is null and void.

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Stefne Madison, Vice Chair and Presiding Officer  
Subdivision and Development Appeal Board

Issued on this 20th day of June, 2017