
CALGARY SUBDIVISION AND DEVELOPMENT APPEAL BOARD

Citation: 2021 CGYSDAB 26

Case Name: SDAB2021-0026

File No: DP2020-5250

Appeal by: Bill Fischer, Brad Smith, Beryl McNeill and Andrew Maxwell,
President of the Erlton Community Association

Appeal against: Development Authority of The City of Calgary

Hearing dates: April 22, 2021
June 10, 2021

Decision date: July 6, 2021

Board members: Jim Palmer, Presiding Officer
Bill Chomik
Elizabeth Hak
Gael MacLeod
Mike Meredith

DECISION

Description of Application:

1 The appeal before the Subdivision and Development Appeal Board (the “Board”) was brought by Bill Fischer, Brad Smith, Beryl McNeill and the Erlton Community Association, represented by Andrew Maxwell, President.

2 On March 8 2021, the Development Authority approved an application from Tricor Design Group, represented by Mike Borkristl for a new Multi-Residential Development (1 building) at 69 31 Avenue SW in the community of Erlton. The property is owned by Forbes Realty Ltd and has a land use designation of Multi-Residential – Contextual Grade-Oriented, M-CG d72.

Procedural History:

3 The hearing commenced on April 22, 2021 with consideration of procedural and jurisdictional issues. The Board adjourned the hearing to June 10, 2021. The hearing concluded on June 10, 2021 by video conference.

Decision:

4 The appeal is allowed in part and the decision of the Development Authority is varied. A development permit shall be issued for the development as presented in the amended plans filed with and accepted by the Board (which plans must be filed as a condition of approval).

Corrigendum:

A development permit shall be issued with the following Permanent Condition to be added:

The applicant shall, to the satisfaction of the Development Authority, submit a total of three (3) complete sets of amended landscape plans with corrections/revisions highlighted and annotated (file folded and collated) to the Planning Generalist.

Submissions:

5 The Board received oral and some written submissions from:

- a) Bill Fischer, an appellant;
- b) Brad Smith, an appellant;
- c) Beryl McNeil, an appellant;
- d) Andrew Maxwell, President of the Erlton Community Association, an appellant;

- e) Rick Grol, agent for the applicant and owner;
- f) Mike Borkristl, Tricor Design Group, the applicant;
- g) Justin Barrett, JCB Engineering, with the applicant, against the appeal;
- h) Paul Bergmann, against the appeal;
- i) Thomas Smekal, an affected party, against the appeal;
- j) Martin Beck, representing the Development Authority;
- k) Alan Hopkins, representing Calgary Transportation;
- l) Chris Wolfe, File Manager, the Development Authority.

6 The Board also received written submissions from Michelle (and Thomas) Smekal, Michael Kwadrans, Hana Gavora-Crosby, Lori Hern Heikoop and Carol Hern, Mona Hayes and Layia Frederiksen, Sonya Gavora, Babette Blindert, Rob Lippert, Joel and Caelly Campbell, Marlene Zboya, Francis Zboya, Zahra Allidina, Paul Neman, Sharon Martens, Monty Ghosh, Patrick Bruton, Thomas Bruton. Some of these letters were in favour of the appeal and some were against it. These letters are contained in the Board Report.

Preliminary Matter

Jurisdiction of the Board - Red Tape Reduction Implementation Act 2020, No. 2 ("Red Tape Reduction Act" or "Bill 48")

7 As a preliminary matter, the Board considered whether this appeal should be referred to the Land and Property Rights Tribunal (the "LPRT", formerly the Municipal Government Board).

Submission from the Development Authority

8 Martin Beck for the Development Authority advised that the legislation surrounding this issue was uncertain at the time of the Procedural and Jurisdictional hearing in respect to being adjacent to a historical site. After following up with the Province, it confirmed to the Development Authority that the subject site and adjacent lands are outside the provincial area of concern.

Submission from the Appellant

9 Bill Fischer submitted that a provincial employee could not determine whether the subject site's proximity to a historic site would result in referral to the LPRT, as only the Minister can make a regulation regarding this point. He stated that the property is approximately 120m away from the Erlton Roxboro escarpment.

10 Mr. Fischer stated that section 685(2.1)(a)(i)(B) of the Municipal Government Act (“MGA”) directs that when property contains or is within the prescribed distance of a historical site, the LPRT has jurisdiction. While the prescribed distance has not yet been set, this property contains a historical site. The MGA does not define “historical sites” for this purpose, but the *Historical Resources Act* defines them as those identified in the Historical Resources Map. The changes to the MGA respecting references for historical sites are not relevant as they came after this appeal was commenced.

11 He referred to the Historical Resources Map in the Board Report which prescribes the boundary of historical resources and submitted that the parcel referenced in this appeal is within the map boundary and therefore is of provincial concern as a ‘historical site’ and within the jurisdiction of the LPRT.

12 Mr. Fischer stated that he appealed to the SDAB because that was the only option provided in the notice of decision.

Submission from the Applicant-Owner

13 Mr. Grol noted that the appellant could have filed this appeal with the LPRT and also that the appellant did not raise this issue when the hearing opened. He stated that the historical site in question is adjacent to the river, not this particular site, and there are no prescribed distances noted in the MGA to determine whether an appeal should be referred to the LPRT. The correspondence from the LPRT received by Mr. Fischer did not represent legal advice. He noted that the new legislation directs that appeals that had previously been filed with the LPRT before the law changed would now revert to the SDAB, but not the vice versa.

Decision on Preliminary Matter

14 The Board finds that the subject site does not contain and is not adjacent to a historical site such that this appeal should be referred to the LPRT. There are no prescribed distances specified in the MGA that determine when a development permit should be referred to the LPRT. The reference to the provincial Historical Resources Map specifically applies to subdivision appeals, not to development permit appeals. “Historical Site” is defined in a regulation under the MGA with respect to subdivision appeals, but this definition is explicitly for that purpose and is not a general definition. Therefore, the Board must apply the plain and ordinary meaning when identifying a historical site.

15 The appellant noted that the subject site is identified in the Historical Resources Map, but did not satisfy the Board that the subject site actually contains or is adjacent to a historical site. For subdivision and land use purposes, “adjacent” land includes land that is separated from another parcel by a highway, road, river or stream but this definition doesn’t apply to development permits and so in this context “adjacent” would be understood to mean that parcels actually touch each other. The Development Authority advised that the Province confirmed the subject site is not adjacent to a site that contains or is adjacent to a historical resource. The appellant did not provide evidence to the contrary identifying any historical site contained within the subject site or any lands

adjacent thereto. The subject parcel is not adjacent to a historical site in the context of a development permit.

16 The Board finds, on the basis of the evidence submitted, that the Board does have jurisdiction to hear this appeal and is not required to refer it to the LPRT.

Background and Summary of Evidence:

Submission of the Development Authority

17 Mr. Beck introduced the subject site as a Multi-Residential Development located at 69 31 Avenue SW in the community of Erlton. The site has a land use designation of M-CG d72.

18 He referred to a site plan and photographs of the surrounding area that showed the boundaries of the subject site, as well as the surrounding amenities, open spaces, roads and laneways. He highlighted that the community was mainly comprised of single, semi-detached and rowhouse dwellings with recently constructed sidewalks on both sides of the 31 Avenue SW. He provided an overview of street parking in the area, noting restrictions.

19 Mr. Beck noted letters, comments and feedback received by the Development Authority from those in the community following the posting of the subject site. Concerns from local residents included: setbacks; density; massing and height, impacts to adjacent dwellings from shadowing; the development's context within the community; and an increase in traffic to the area. Comments in favor of the development included proximity to transit and alternate forms of transportation, support for increased density, revitalizing the site and community.

20 The Municipal Development Plan ("MDP") and sections of the Erlton Area Redevelopment Plan ("ARP") apply to the site. The Low Density Residential Housing Guidelines for Established Communities ("Infill Guidelines") and the Guidebook for Great Communities would not apply.

21 The MDP classifies the site location as inner-city though it is also located on the edge of the downtown. In this area, the MDP supports development that creates complete communities, leverages existing infrastructure, provides additional housing choices and increases density to better use existing transit and services. It encourages growth and change in low density neighbourhoods and redevelopment similar in scale and built form to their surroundings which complements the established character. It also encourages building design which maximizes front door access to the street in a way that adds to and activates the public realm.

22 The ARP identifies the subject site as located in the "Low Density Residential" area of the community and also classifies it as "residential conservation" on Map 2. Residential conservation is not synonymous with the term "preservation". The ARP encourages development that is compatible with surrounding development and the local

landscape. It encourages a variety of housing types excluding apartments. It encourages wall-face, roofline and building details that reflect the community character, aesthetic treatment of roof tops and decks when visible, the provision of 0.15 visitor parking spaces per residential dwelling unit in multi-family development and adequate screening of parking. When Council adopted the ARP, it contemplated forms of development like the proposed and it would be compliant with the RM-2 guidelines in the ARP.

23 With the adoption of Land Use Bylaw 1P2007 (the "Bylaw") from its predecessor, 2P80, the land use classification transitioned from R-2M to M-CGd72. Mr. Beck advised that M-CG is a Multi-Residential district designation intended to be applied near low density residential developments. It includes a range of tools to mitigate massing and height impacts including a maximum building height of 12m and a maximum density of 72 units per hectare. The Erlton community is evolving from single detached homes to include more multi-residential uses and infill developments.

24 Since this development is a discretionary use, section 35 of the Land Use Bylaw applies. The Development Authority considered the factors listed in that section.

25 Mr. Beck stated that the building would be primarily three storeys in height with the third storeys reduced in size to comply with MC-G district massing rules and one unit would be limited to two storeys to mitigate massing impacts to the east. The development complies with building height rules, would not maximize the allowable building height and responds to the slope of the site. The massing of the building would be articulated in design and with different building materials.

26 The maximum density allowed is four units and Secondary Suites are not allowed or proposed as part of the development.

27 The development would have amenity spaces with at grade patios for units 1, 3 and 4, rooftop patios for units 3 and 4 and two balconies for unit 2.

28 Mr. Beck stated that the Bylaw requires 40% of the development to be landscaped; 33% landscaping is currently provided, but a prior to release condition would be imposed to reduce that variance to a level that the Development Authority considered reasonable. A Bylaw maximum of 40% of the landscaped area can be hardscaped; there is a 7% variance to this restriction. The soft landscaping includes a variety of trees and shrubs.

29 The development would require four parking stalls plus one visitor stall; no bike stalls are required or proposed.

30 He stated that existing rear lane access constraints to the site are caused by an end point utility pole, but advised the Development Authority approved street front driveway access to the development; there is an existing front driveway accessed from the street and this district doesn't prohibit front driveway access. A rolled curb design as opposed to a standard curb design would be used to maintain a level sidewalk where the front driveways meet the sidewalk.

31 The development would be intentionally placed into the west setback to provide additional separation from the adjacent property to the east. This placement would provide for a more urban environment along Erlton Street SW by situating the façade closer to the street. This development placement creates a number of related relaxations respecting setbacks, projections and landscaping; a similar street alignment is evident with the development to the north across the street.

32 Mr. Beck stated that the Bylaw does not guarantee privacy and sunlight, although steps, in this case, were taken to minimize these impacts. A shadow study was not required because the building would be below the maximum height and the neighbouring appellant's property is very wide, so a significant part of that property would retain access to sunlight.

33 The appellant's property would be further protected by a limited number of windows on the east façade, screening walls on rooftop amenity spaces and a six foot fence along the east side of the development parcel. Three windows could potentially cause privacy concerns; two bedroom windows and one bathroom window. They could be obscured or redesigned as transom windows if required.

34 Mr. Beck submitted that the bylaw relaxation test of Section 36 was applied and that the requested relaxations were reasonable and appropriate reflecting the urban context and the constraints of the site. He advised that the subject site is part of a larger M-CG land use area, given the neighbourhood's proximity to downtown, nearby services, amenities and access to transit. He recommended the Board deny the appeal and uphold the decision of the Development Authority and approve the development permit.

35 Mr. Hopkins with Calgary Transportation Planning, advised the new sidewalks were constructed as part of a local area improvement plan to enhance network connectivity and create a more pedestrian environment. In terms of pedestrian intensification, he submitted that most pedestrian circulation was likely from the local community and not from a wider area of the City so it would not result in a significant increase if any.

36 He stated that the front driveways are Bylaw compliant and would be safe, providing sufficient visibility for drivers in consideration of pedestrians crossing the sidewalk. The rolled curb would provide level sidewalk walkability to pedestrians crossing the front driveways. The development would also be situated safely in relation to providing clear travel visibility at the intersection of Erlton Street SW and 31 Avenue SW.

37 Enmax infrastructure considerations are outside the jurisdiction of the Development Authority respecting any changes to the current configuration; the rear lane would be useable for the proposed development's waste and recycle services.

Submissions of the appellants

38 Brad Smith, who lives across the street and advised he is a co-appellant, submitted that the proposed development did not conform to other properties on 31 Avenue SW. The MDP directs that development should be compatible with the established pattern. He submitted that 31 Avenue SW was comprised of single-family homes, duplexes and infills. This development would cover a larger area of the lot than other development in the area.

39 He expressed concern about the safety of the driveways. There would be issues of visibility to the sidewalks as they are heavily used by pedestrians and joggers. The street is used as a thoroughfare and the speed limit is often ignored. Vehicles would be crossing a sidewalk and backing onto Erlton Street SW, creating a collision risk, contrary to the statements of Transportation Planning. He stated that a self-supporting pole could be installed at the rear of the property which would allow for laneway access instead of front driveways.

40 He stated that the visitor stall would not be practical since it would be located inside of one garage. There is no available street parking along Erlton Street SW because it is restricted where the street narrows along this block. The limited visitor parking in the neighbourhood would make the street parking congestion situation worse with this development addition.

41 Beryl McNeil, who stated she is a co-appellant and lives across the street, expressed safety concerns in relation to the driveways and the lack of visibility to the sidewalk and road. She noted that one of the City's objectives is to enhance the pedestrian environment and this development would not accomplish this objective as it would have driveways crossing the sidewalk even though this issue was raised as a concern in the Detailed Team Review (DTR). Ms. McNeil advised that due to the large amount of green space attracting pedestrians and dog walkers and the area's proximity to the Stampede grounds, there is an increase in traffic, making the roads (narrowed by the new sidewalks) busier. She stated that there are other locations for a development like this one which would be more practical.

42 Ms. McNeil stated that there are significant parking stressors in the area relating to the cemetery and this development would make the parking situation worse.

43 Bill Fischer, the adjacent property owner to the east, advised that he and his neighbours support good development. He advised that there was clear evidence of good development on both block faces of 31 Avenue SW where this discretionary development is proposed.

44 He stated that many of the original homes on both sides of 31 Avenue SW have been redeveloped and that the neighbourhood consists of seven new single-family homes, eight semi-detached units in four buildings and many original homes that have been significantly remodeled. This redevelopment was supported by the community and adjacent homeowners and he referred to a series of photos that demonstrated the community's renewal.

45 Mr. Fischer submitted that the proposed development with its significant relaxations of the policies and rules of the MDP, ARP, the Bylaw and the Calgary Transportation Plan (CTP), did not meet the definition of good development. He submitted that the development was out-of-context with the area and would adversely impact adjacent developments and the neighbourhood whilst typifying insensitive development.

46 The proposed development would cause substantive neighbour and community-affecting issues in the form of the physical development pattern, driveways on the street, unreasonable setback, lack of visitor parking and overlooking and shadowing issues for his home and property.

47 Mr. Fischer highlighted that all the above issues were present in the first version of the plans the developer discussed at a September, 2020 community meeting and were repeated in all the versions circulated by the Development Authority. He stated that the issues still remained in the latest version of the plans, despite multiple reviews by the community's planning committee and comments from many dozens of our community members in an attempt to effect changes.

48 Mr. Fischer stated that the physical development pattern of the site plan (Plan SP1) was neither sensitive, compatible, nor complementary to the existing physical pattern of residential development on 31 Avenue SW as expressed by the MDP and the ARP.

49 He stated that statutory plans take priority over the Bylaw and the Board is obligated to comply with those with no power of relaxation. These are also policies referenced in section 35 of the Bylaw. The proposed development would not comply with the MDP, which directs that infill development should be sensitive and compatible and similar in scale and built form to its surroundings. The development doesn't comply with the ARP, which reflects the expectations of the community. The ARP establishes the low-rise residential character of the district and states the goal of conserving, revitalizing and enhancing the established development pattern.

50 The proposal is incompatible with its surroundings and inappropriate, contrary to the MDP and ARP and also would not meet the tests set out in section 35 of the Bylaw. Its ratio of built area would be greater in relation to the rest of the streetscape and the building penetrates too far into the rear yard and would be out of scale with its surroundings. The residential units would have views into his rear yard.

51 Mr. Fischer submitted that the front driveways should not be permitted. The driveways would have direct access to Erlton Street SW, which is a main route through the community. The developer claimed that there are other front driveways in the community, but those were built many decades ago and are exceptions or exist where the cemetery is directly behind houses (parcels without rear lanes). His own property with a front driveway would not be allowable today.

52 The front driveways would create a hazardous condition with vehicles reversing across the sidewalk and onto a narrow street. Vehicles crossing the sidewalk would also compact the snow, creating a further hazard for pedestrians. The MDP encourages design which facilitates pedestrian use and rear lane driveways accomplish this objective. The Calgary Transportation Plan prioritizes pedestrians over vehicles. The controlled streets bylaw states that there should be no street access without permission.

53 Practical rear lane access is available for the development's parking requirements. The previous developer of this site had confirmed with Enmax that a self-supporting pole could be used, which would allow for rear access; the current developer has chosen not to pursue this option.

54 The contextual setback for this parcel is the block face from 31 Avenue SW south towards 34 Avenue SW and not north as the developer has asserted. The west setback on Erlton Street SW doesn't comply and would be a 69.4% relaxation. The building was not shifted to the west, it was expanded to the west; it would still be as close as is allowed to his property line. It would display a 106-foot length mass along Erlton Street SW.

55 The proposed development would have an insensitive interface with the public realm especially by placing a three-storey interface at a narrow choke point on the street contrary to sound planning principles. The setback of the building across the street is irrelevant since it is a different type of development (a single detached home) so different setbacks rules would apply.

56 There would be a lack of visitor parking; one stall would be required for this site by the Bylaw and the ARP. The driveways wouldn't be considered as visitor parking because that would create tandem parking which is prohibited. The visitor parking stall proposed would be functionally unavailable to the other units because it would be located in the private garage of unit 4.

57 There are overlooking and shadowing issues onto the backyard of his property. When he constructed his home, he consulted with the neighbours and placed his home forward on the lot to alleviate their concerns. Mr. Fischer presented photographs and used the developer's renderings and shadow studies to demonstrate his concerns with overlooking and shadowing. He stated the development windows would look directly into his main floor dining room and second floor bedroom.

58 Andrew Maxwell, representing the Erlton Community Association (ECA) expressed that the ECA was a co-appellant, referred to the map of the local area and pointed out the popular areas within the community, including a conservation area and a dog park that are used by residents of adjacent communities like Roxborough. He said that the area encompassing Erlton Street SW was accessed by a single overpass over MacLeod Trail SW and that it became very busy during times of events such as the Calgary Stampede. There is heavy pedestrian circulation in the area.

59 Mr. Maxwell stated that the zoning is MCGd72 with a density maximum requirement of four units. There is no minimum requirement for four units. He highlighted

that many of the issues with the proposed development could be addressed by reducing the size of the building.

60 He stated that the proposed setback on the west side would negatively impact the community by encroaching on the pedestrian realm. He expressed concerns that the front driveways would affect motorist and pedestrian safety. The developer referred to other properties on Erlton Street SW with front driveways but the properties on the other side of the street are laneless so they don't have the option of rear driveway access. The requirements in section 341(6) of the Bylaw and the Complete Streets Policy respecting front driveways would not be met by this driveway design.

61 Parking stalls are required to be used and available for their intended purpose; the visitor parking stall in a private garage does not meet this requirement.

62 Mr. Maxwell stated that the proposed development was not shifted west, it had been extended to the east. He noted that the plans do not indicate that the windows overlooking Mr. Fischer's property would be obscured.

63 Mr. Maxwell submitted that the proposed development requires variances from the Bylaw, ARP and good development practices that are unacceptable to the ECA. He submitted that the proposed development is incompatible with the character of the surrounding streetscape as well as South Erlton in general and in violation of the ARP.

Submission of the applicants

64 Mike Borkristl, principal of Tricor Design Group, addressed the location of the subject property and its overall context in the surrounding community using photos and diagrams to show the community had a diversity of size, style and scale of housing units and is in transition with new development occurring at this period of time.

65 He stated and provided photos that along Erlton Street SW there are many examples of three storey structures, some with balconies and roof patios and with front driveways. Three blocks away there is a residential development similar to the proposed development, which is compatible in appearance to its neighbouring single family home. With or without lanes, there is a pattern of front driveways with garages.

66 The proposed development would have the appearance of a semi-detached dwelling as viewed from 31 Avenue SW with front door entrances and therefore would fit into the context of the other homes on the streetscape. He stated that Mr. Fischer's property is an anomaly on the street with a large house on a comparably much larger lot and the only home on 31 Avenue SW with a front driveway. The rooflines between the two dwellings would be compatible in height and design. The proposed development would be limited to three storeys at 31 Avenue SW and two storeys with rooftop amenities through the depth of the parcel, allowing sufficient space for a family-oriented development.

67 He summarized some of the design features and decisions that had been made to make the development sensitive to the existing neighbourhood. These features include split driveways, lowering the height of the development from previous plans and adding additional greenspace. It also included using different colours and rooflines to improve the compatibility with the neighbourhood.

68 Mr. Borkristl referred to the history of the parcel development plans, highlighting past applications. The revised plans were at a lower height and massing, greater setback from east property, less opportunity for shadowing and overlooking and overall intended to be more respectful to the adjacent property. The proposed development meets all the above general rules of the M-CG district. This type of development is allowed under the M-CG district.

69 He submitted that when determining the appropriate setback from Erlton Street SW, it made more sense to consider the development across the street to determine the front setback. That property has a 1.2m setback from Erlton Street SW with an Erlton Street SW address. Applying that setback and moving the proposed development to the west would also create a greater setback separation from Mr. Fischer's property.

70 Although this is an M-CG lot, he considered the more stringent R-CG rules in the design as he felt this would deliver a more sensitive development. He noted that the intent of R-CG Development under section 539 of the Bylaw is to give greater separation to adjacent lots from massing and shadowing effects. He advised that he applied section 583, the M-CG district rule at 3.0 m regarding the south side setback which makes it contextual to the front setbacks of the homes on 31 Avenue SW; the R-CG setback rule is 0.6 m. This setback provides a triangular 6.0 m clear line of sight for vehicle circulation at the intersection and greater separation from Mr. Fischer's property along the front east setback that would not have been the case using R-CG Bylaw rules.

71 Mr. Borkristl noted that there was no maximum building depth rule in the R-CG or M-CG districts but that the M-CG building envelope rules are less respectful of adjacent development. However, the proposed development considered the R-CG more stringent setback rule between properties of 3.0 m and increased the setback further to 4.9m where the development is adjacent to Mr. Fischer's backyard and to 3.2m near the rear lane; the proposed development would therefore not maximize the building envelope allowed in the M-CG district.

72 The proposed building meets all M-CG setback rules except on Erlton Street SW where a Bylaw relaxation would be required that provides greater separation to Mr. Fischer's property. The Development Authority agreed with moving the building closer to Erlton Street SW. He highlighted the plans of the building, referring to a 3D massing model as well as the corresponding landscape calculations and plans.

73 With respect to privacy, the corner unit 2 would not be behind the adjacent home with no overlook from windows or shadowing. Units 3 and 4 rooftop patios would be contained entirely on the west half of the development. The rooftop patios have a 2m high privacy wall blocking views to the Mr. Fischer's property.

74 He stated that due to the distance from the property line, the windows in this development would overlook their own backyards rather than Mr. Fischer's backyard. The windows could be obscured, but in his view this requirement would not be necessary as they would be a significant distance away from the adjacent property. The windows that create an overlooking issue are two secondary bedrooms, positioned 40 inches from the floor and a small bathroom room over a tub.

75 He identified windows on Mr. Fischer's home and on the proposed development and confirmed they would not align directly with each other.

76 He stated that the building complies with all height rules, including application of the chamfer rules.

77 He stated that a two metre fence would be constructed along the west property line. This would accommodate a small retaining wall needed to address drainage. Five deciduous trees, 2 to 3 m in height are proposed which would also address overlooking issues. Once the trees are mature, only one window would have the potential to overlook Mr. Fischer's property.

78 Mr. Borkristl provided a revised landscaping plan. There had been disagreement between the Development Authority about whether landscaping in window wells would be included in the calculations and some confusion about hard and soft landscaping classifications. The revised plans resolve the calculations so that now there is only a 1% landscape relaxation.

79 The visitor stall would be located in a double garage and all owners would have access via a keypad. The driveways could also function as short-term visitor parking.

80 Mr. Borkristl also referred to a detailed shadow study which showed minimal shadowing impact to the neighbouring property; shadowing was minimal through most of the year and significant areas of the property would be in complete sunlight. He stated that the images presented by the appellant Mr. Fischer were somewhat misleading because they did not reflect the full size of his yard. He noted that the shadows at some times of year from the three-storey portion of the building would be completely contained within the parcel.

81 The front driveways are necessary due to the placement of the Enmax end pole in the rear lane. There is a difference between making inquiries to Enmax and actually engaging Enmax in a detailed assessment, paying a deposit and having their engineers study the situation which is what he had completed and that had not been done previously. Enmax provided a complete engineered solution for this project on October 8, 2020, which was accepted by the Development Authority that would require a new pole and guide wire location but still prevented rear lane driveway access. Self-supporting poles are not a common solution. He presented the official response from Enmax engineers which did not present a self-supporting pole as an option.

82 He stated that section 341(1) of the Bylaw restricts front driveways accessing a major street. Major street is defined in the Transportation Bylaw, and does not include Erlton Street SW, a residential street. The proposed development complies with transportation standards for access with respect to front driveways. The distances between the garage door and the property line and intersection would be sufficient to allow good visibility for drivers exiting garages.

83 He presented images of the proposed development showing its articulation, amenity spaces and the distances between amenity spaces and neighbouring development. He presented a schematic to show how the development had been scaled back over previous proposals.

84 Justin Barrett of JCB Engineering made a presentation related to parking and referenced his report contained in the Board Report. He noted that there are about 30 driveways with access to Erlton Street SW between 25 and 34 Avenue SW including the existing driveway for the subject property. Driveways crossing sidewalks is not uncommon and the City provides these design guidelines for residential streets. One of the purposes of residential streets is allowing access to residential properties.

85 He stated that Erlton Street SW has more than sufficient capacity for the vehicle trips generated by this development based on a traffic count completed after Labour Day in 2018.

86 He submitted that the Bylaw parking requirements for the subject development are all achieved. He highlighted that transit and bicycling infrastructure are in close proximity of the subject development with sidewalks on the roadways; there is also a special crossing for pedestrians (i.e., signed, marked and flashing lights) at 25 Avenue SW and a pedestrian bridge over Macleod Trail SW to assist with safely crossing these roadways.

87 He advised that sections of sidewalk were recently constructed along Erlton Street SW, including on the west side of the subject property and noted the close proximity of the Elbow River meant trail system trips by bicycle will be very convenient for both residents and visitors. These existing features of the transportation network within the vicinity of the subject development strongly support the use of walking, bicycling and transit use for trips and also reduces the reliance on personal vehicles for trips by both residents and visitors.

88 He stated that there are good sight distances for vehicles to safely exit driveways and noted there is a stop sign at the intersection of Erlton Street SW and 31 Street SW.

89 Mr. Barrett stated that even if there were a visitor parking relaxation for the development, there was adequate parking on the street to accommodate visitor parking. He submitted that based on JCB May, 2021 street parking survey results and photographs, there is sufficient street parking capacity available to accommodate the visitor parking requirements for the subject development even when considering the reduction of parking on the street to accommodate driveways, lanes and other

restrictions. Generally parking in the area is only 30-60% utilized and there is frequently parking available directly in front of the subject site.

90 He submitted that only one visitor parking stall would be required for the development and this would only represent 9% of the remaining street parking on the south side of 31 Avenue SW. The existing residents therefore would not have any of their use of street parking impacted by the visitor parking for the proposed development.

91 Mr. Barrett submitted that from a transportation engineering perspective, if the one visitor vehicle stall in the double garage is considered a parking relaxation, then using street parking for visitors would not negatively impact the adjacent transportation network and would not impact the availability of parking for the surrounding residents and their visitors. He submitted that there is sufficient parking available on the adjacent streets for visitors to this residential development and that the proposed location of the driveways for this development on Erlton Street SW should be permitted, meeting the City's guidelines.

92 Paul Bergman, a previous developer for the site, resident of Erlton and builder by trade highlighted the design rationale of the development, the attempts to engage the community and the steps to taken to be sensitive to both the neighbouring property and the community. These steps included pulling the development away from the property line with Mr. Fischer's property and keeping parts of the development to two storeys.

93 He noted that this is a residential street, not a major street, so the purpose is to have dynamic interaction between homes and streets.

94 He stated that the intent behind this development was to live up to the Bylaw and the ARP. Figure 12 of the ARP shows this exact type of project.

95 He described the communications with Enmax regarding the power poles near the development. He had engaged Enmax at his own cost to engage in a proper engineering study. He had learned that a self-supporting pole here is very different from in other locations and Enmax had never approved a self-supporting pole in this location.

96 Rick Grol highlighted that the Notice of Appeal was filed by Mr. Fischer and lists Brad Smith, Beryl McNeil and the Erlton Community Association (ECA) as co-appellants. He stated that the evidence before the Board is that the ECA had decided not to appeal the approval; this evidence has not been contradicted. Mr. Grol noted that Mr. Fischer did not identify himself as acting as a representative of the ECA when filing an appeal on their behalf. He further submitted that there was no evidence in the Board Report that Mr. Smith or Ms. McNeil authorized Mr. Fischer to file an appeal on their behalf.

97 An email response dated April 6, 2021, from Mr. Maxwell, President of the ECA, to the SDAB Administration confirmed that the "attached Community Association authorization form from November 2020 is still current" but Mr. Grol advised it was the standard form that community associations provide to the SDAB Administration when identifying who is authorized to represent them. He argued that this email was not the

same as authorization to file an appeal against the subject decision of the Development Authority.

98 Mr. Grol submitted that there was no evidence of official authorization from the Board of the ECA for Mr. Fischer to file an appeal in the subject case. He requested that the Board make a preliminary ruling in its written decision that the ECA is not an appellant. He advised that the applicant team does not challenge the ECA, Mr. Smith and Ms. McNeill as being affected persons, however, in the absence of proper authorization to file an appeal, he submitted that the Board should not accept them as appellants.

99 Mr. Grol further stated that any reference to previous decisions or applications or permits approved or denied was irrelevant.

100 He asked the Board to accept the revised plans included in the report, noting that the appellant had not raised any objection to the changes. These were the plans that had been submitted just a few days after the development permit was approved, before the applicant knew about the Development Authority's approval. With these revised plans there is only a small landscaping relaxation.

101 He referred to photographs of the surrounding community that showed Multi-Residential Developments. He stated that these photos show a natural transition to developments of more than two units which is aligned with the ARP's objective for increased densification.

102 He said that none of the appellants had provided evidence of parking or traffic concerns whereas the applicant had engaged a professional study which demonstrated no such issues. He cited the *Gendron v Calgary (City, 2009 ABCA 367 (CanLII))* to say that it is not enough to simply raise an issue, evidence must be provided.

103 Mr. Grol stated that the appellants are being selective in use of policies they like in the MDP and ARP, not considering the entire context of these documents. Statutory plans are not more important than the Bylaw; they are different legal instruments. They give aspirational objectives to guide the Development Authority when exercising discretion and are not defined rules to apply in every instance. They use optional language such as "encourage", not mandatory language such as "shall" or "must". The Development Authority considered the statutory plans as required by section 35 of the Bylaw. One of the major goals of the MDP is densification of the inner city.

104 He stated that Council deliberately designated this site as M-CG, not a lower density residential district. The ARP envisions redevelopment in the form of Multi-Residential Development. He stated that the proposed development meets the purpose statement for the M-CG district providing a mix of housing, increased densification leveraging existing infrastructure and services.

105 He stated that there is no absolute legal right to protection of views or sunlight. The Bylaw could allow significantly more intrusive development within the building envelope for this parcel.

106 He stated that section 341 of the Bylaw only limits driveway access to a major street, as does section 565. Erlton Street SW is not a major street as defined in the Transportation Bylaw, so these limits do not apply.

107 Mr. Grol stated that the waste and recycling plans meet the Bylaw requirements and have no relaxations. He also stated that the drainage issues raised by some parties would be dealt with under other bylaws and are not within the purview of this Board.

108 He stated that Mr. Fischer's argument that the relaxations are excessive is irrelevant. The question is the test set out in the MGA section 687 (3)(d) and section 36 of the Bylaw respecting the impacts on Mr. Fischer, not the number of relaxations. If the relaxations are viewed in context, they are related to moving the development to the west and have no material impact on the appellant's property. The largest relaxation would be the front setback, but this must be considered in the context that the development aligns with the setback for the home across the street and new nearby development.

109 He noted that the Development Authority doesn't typically require frosting of bedroom windows. The trees would block most views and the Board could ask for additional trees and require some of them to be coniferous if required.

110 While there may be parking issues for funerals from time-to-time, the cemeteries near the community are almost at capacity so these instances would be minimal.

111 He stated that while Mr. Fischer raised concerns about the safety hazards of front driveways, he has a very wide front driveway himself. Further, the subject site already has an existing double driveway which the City cannot require be removed.

112 He stated that the traffic counts are well below the capacity of Erlton Street SW and noted that drivers avoid this road in the winter due to its steep hill.

113 He advised that the appeal was without merit and that the use, value and enjoyment of the appellants' properties and homes are not genuinely and materially affected by the proposed development.

114 He summarized the applicant's position that the Development Authority properly applied section 35 of the Bylaw in this case. It properly applied the applicable rules and requirements of the Bylaw; the Development Authority also correctly applied section 36 of the Bylaw, which is the equivalent of section 687(3)(d) of the MGA.

115 The proposed development provides a moderate increase in density in the form of high quality Multi-Residential Development with higher numbers of dwelling units and traffic generation than low density residential dwellings; conforms to the purpose statement of the M-CG district; provides grade-oriented development in the form of townhouse style dwelling units; provides Multi-Residential Development in a variety of forms and of low height and low density; complies with the MDP, CTP and ARP and is sensitive to the adjacent and surrounding area properties and provides for a variety

housing options in the community; meets servicing, access and transportation requirements; is suitable for the subject lands based on sound planning principles; and the required Bylaw relaxations meet the criteria of section 687(3) (d) of the MGA.

116 Mr. Grol requested that the development permit be upheld with the revised plans as submitted.

A submission against the appeal

117 Thomas Smekal, an affected party residing four houses from the subject development, referenced his written submission and advised that Erlton was very much a community in transition. He advised that he had seen the benefits of multi-family homes in the area which added vibrancy and variety to the community. He stated there would be no neighbourhood parking or traffic concerns related to the proposed development.

Rebuttal

The Development Authority

118 Mr. Beck submitted that changes made to the development's massing, driveways and design occurred during the application review in conjunction with the applicant. The applicant worked with the Development Authority to eliminate encroachments which would not have been possible without reducing footprint of building.

119 In terms of landscaping he submitted that the changes made addressed Bylaw compliance and were welcomed.

120 He stated that stormwater runoff must be contained and managed to the Development Authority's satisfaction and this would be reviewed as part of the Development Site Servicing Plans (DSSP) process.

121 He advised that in terms of driveway design, the Development Authority concurred with the applicant's submission. He added that shared visitor stalls within garages were not an uncommon design solution; there are many situations where visitors must access a principal building to use visitor parking.

122 He noted that a lot of assumptions had been made in relation to user preferences such as vehicle ownership. Future owners might choose not to own vehicles, they may work from home or use alternate means of transport and these choices may mean very limited crossings of sidewalks and therefore minimal risks of collisions.

The appellant

123 Mr. Fischer clarified that according to his records detailing communication with Enmax, the applicant never explored a remedy involving self-supporting power poles.

124 He stated that he had received verbal authorization from the co-appellants and that the Erlton Community Association had passed a motion to be named as a co-appellant for this appeal. At one ECA meeting the developer had made a motion for the ECA to remove itself as an appellant, this was defeated and a subsequent motion was passed for the ECA to continue to be listed as an appellant.

125 He stated that the examples of similar development were in different communities, not Erlton.

126 He stated that a street is defined in the Bylaw to mean a street defined in the Transportation Bylaw, which defines streets broadly and which would include these streets.

127 Mr. Fischer submitted that the many references to his property were irrelevant and not the subject of this appeal. He stated that the visitor parking would not function as there is no external entrance, so the only way anyone can get to it is through the dwelling unit.

128 Mr. Maxwell questioned why the applicant had quoted many of the rules of the R-CG designation when the correct designation was M-CG.

The applicant

129 Mr. Borkristl explained that he had referred to R-CG district rules because for many, it is considered to be a more restrictive designation and therefore if these rules were met, that would result in a better overall project. He was not saying that the R-CG rules apply, he presented with this approach to demonstrate the proposed development is more sensitive to the neighbourhood than a typical M-CG development.

130 In relation to the access issues related to the visitor garage parking stall, he pointed out that there would be direct access to it using a secure keypad.

131 Mr. Grol stated that the defined term in the Bylaw is “major street”, not just street, so Mr. Fischer is wrong in his assertion. Erlton Street SW is not a major street.

132 Mr. Bergman advised that the ECA had decided not to appeal the application and this decision was documented within the Board Report. He stated that the ECA did not have status as a co-appellant. He stated that the only written evidence is found in the Board Report which shows the ECA planning committee deciding not to appeal this approval. In subsequent meetings the intent was to make presentations as an affected party, not an appellant.

Reasons:

133 Having found that it has jurisdiction, in determining this appeal, the Board considered the relevant provincial legislation and land use policies, applicable statutory

plans, the MDP, the Bylaw, the Erlton Area Redevelopment Plan (ARP) and considered all the relevant planning evidence presented in writing and at the hearing, the arguments made and the circumstances and merits of the application.

134 The Board reviewed the context of the proposed development and the required relaxations, having regard to, among other things, sound planning considerations, the merits of the application, the circumstances of the case and the evidence presented. The Board notes the proposed development is located in the M-CG district where Multi-Residential Development with grade access in proximity to low density development is the intended purpose for the district.

135 The applicant stated evidence or lack thereof in the Board Report suggests that Mr. Smith, Ms. McNeil and Mr. Maxwell representing the Erlton Community Association are affected parties but not appellants with Mr. Fischer. Mr. Bergmann stated the community association should be an affected party not an appellant. Mr. Smith and Ms. McNeil stated in their verbal submissions that they are co-appellants along with Mr. Fischer and are identified as co-appellants in their written submissions. Mr. Maxwell is President of the community association and stated it is a co-appellant. Therefore, the Board determines that Mr. Smith, Ms. McNeill and Mr. Maxwell, representing the community association, are appellants.

136 The appellants stated concerns related to pedestrian and vehicle circulation safety to street parking and front driveways, the visitor stall not being used, the pedestrian realm being negatively affected by placing the development closer to Erlton Street SW but did not in the Board's opinion, sufficiently demonstrate evidence to show the proposed development would have a detrimental impact on the neighbourhood. The Board notes that simply raising an issue does not constitute evidence as noted in the case *Gendron v Calgary (City, 2009 ABCA 367 (CanLII))*.

137 The Development Authority provided evidence that the front driveways as proposed were compliant with Bylaw requirements and the intersection at Erlton Avenue SW and 31 Street SW would provide good line-of-sight considering the parcel placement of the proposed development.

138 The applicant's traffic expert based on assessment of empirical data submitted that vehicle load along Erlton Street SW is well below capacity and that street parking is significantly below capacity as well. He presented evidence that there are a significant number of existing front driveways along Erlton Street SW. The Board notes that parking is restricted along Erlton Street SW which would further remove line-of-site concerns for vehicles entering or exiting the front driveways of the proposed development. There is housing development only on the east side of Erlton Street SW and greenspace on the west side. Therefore, the Board determines that the three front driveways from Erlton Street NW does not unduly impact the appellants, the neighbourhood or community and represents good planning design. The Board also determines the one single front driveway from 31 Avenue SW, adjacent to Mr. Fischer's double front driveway does not unduly affect the neighbourhood or community.

139 The appellants stated that a better design for the Enmax utility situation in the rear lane is possible based on previous correspondence and therefore could be used to design driveways from the rear lane. The applicant provided a detailed assessment and design proposal from Enmax that revised the utilities in the rear lane but still prevented driveways from the rear lane for the proposed development. The Board determines the applicant's Enmax proposal is based on an expert, detailed assessment and proposal but considers the point moot based on its determination above that the front driveway design is appropriate.

140 The Development Authority submitted that a shared visitor stall is a common development solution and the applicant advised the visitor stall located in the unit 4 garage could be directly accessed by all owners using a secure keypad. The Board determines this solution is acceptable to provide common access to the visitor parking stall. The Board also notes the driveways could be used for visitor parking and the Bylaw definition of tandem parking does not prohibit temporary, visitor parking on driveways.

141 The appellants submitted concerns related to overlooking and shadowing into Mr. Fischer's home and backyard. The applicant submitted that the proposed development windows would not look directly into Mr. Fischer's home. The proposed development was designed with screening elements for the balconies and rooftop amenities on the upper floors of the units and/or these features on the units faced west to Erlton Street SW. The development provided an east setback separation beyond Bylaw requirements for the greater portion of the structure adjacent to Mr. Fischer's backyard. Three windows that face Mr. Fischer's backyard would be located in two secondary bedrooms and not positioned at floor level, in a bathroom above a tub and are set further back from the already generous setback separation. Additional preventative measures related to overlooking include a 2 metre fence and five trees located between the proposed development and Mr. Fischer's property. The Board notes that reasonable overlooking in an urban environment is expected and in addition that Mr. Fischer's deck is located on the east side of his home. Therefore, the Board determines that there are no significant overlooking concerns related to the proposed development into Mr. Fischer's property and does not require any windows to be obscured.

142 The shadow study provided displayed some impact to Mr. Fischer's property which both the appellants and applicant attest. The Board notes Mr. Fischer's property is very wide and his deck area is located on the east side of the property. The Board accepts that the applicant has mitigated shadowing impacts by reducing the structure's height, lowered roof lines and its overall footprint below the Bylaw maximums; providing good design articulation; providing a setback greater than the Bylaw requirement. Based on the shadow study, the development design and the context of the area, the Board finds the shadow impact to Mr. Fischer's property is not significant and what would be expected from a corner lot development located in a multi-residential district adjacent to low density residential development.

143 The appellants submitted the proposed development was out-of-context with the neighbourhood and provided evidence of existing development. They advised the development is too large for a neighbourhood with generally low density development.

The applicant submitted the proposed development was contextual with the neighbourhood also providing evidence of a variety of housing types and new Multi-Residential Development in the area. He provided a view of the development from 31 Avenue SW that showed it looked like a semi-detached development and advised it was compliant with M-CG district Bylaw requirements. The setback along 31 Avenue SW was contextual to the front setbacks of homes along that streetscape. He submitted that a variety of materials and colours would be used to articulate the development and the rooflines were contextual with the neighbourhood. The Board determines the proposed development is contextual considering the design and articulation and that it is situated on a M-CG zoned parcel where low density development is intended to be in proximity to Multi-Residential Development.

144 The Development Authority presented a number of relaxations as a result of building placement into the west setback as well as landscaping relaxations. The appellants stated there were too many relaxations. The applicant submitted revised plans that reduced the soft landscaping relaxation to 1%. The Board determines the setback relaxations significantly improve the impact to Mr. Fischer's property and do not have a material impact on the pedestrian realm. The landscape relaxations from the revised plans are minor. The Development Authority accepted the revised plans. The Board agrees that the reduced west setback better aligns in context with the dwelling to the north and determines that the relaxations are reasonable and provide sensitive development in the neighbourhood. The Board accepts the revised plans from the applicant to reduce the soft landscape relaxation and will require them to replace previously approved plans.

145 In the Board's opinion, the test of section 687(3)(d) of the *Municipal Government Act* is met in regards to these relaxations; they would not unduly interfere with the amenities of the neighbourhood or materially interfere with or affect the use, enjoyment, or value of neighbouring parcels of land.

146 The appellants provided specific references to the ARP and MDP to justify the appeal and not approve the proposed development. The Development Authority used the same policies to justify approving the development. The applicant submitted Bylaw compliance as justification to deny the appeal and approve the development. The MDP and ARP though statutory documents, are broad, aspirational and not compulsory that provide recommendations for considerate and contextual development and must be read in a comprehensive manner; any inconsistencies therein are reflective of their aspirational nature. These policies must be considered for their overall intent not based on specific clauses. The Bylaw is regulatory in nature, specifying detailed conforming requirements while the MDP and ARP provide complimentary guidance to ensure appropriate development. In assessing the proposed development, the Board considered the existing realm, patterns of development in the area and the context of the site. The Board finds support in both the MDP and ARP for the proposed development in the current context.

147 Having regard to the merits of the application and sound planning considerations, the Board, based on the evidence, in keeping with section 36 of the Bylaw, finds that the proposed development, as modified with the amended landscaping plan, is generally

compatible with the adjacent developments and the neighbourhood and would not unduly interfere with the amenities of the neighbourhood or materially interfere with or affect the use, enjoyment or value of neighbouring properties. The proposed development is, from a planning perspective, appropriate for the site with the revised condition of approval as noted herein.

Conclusion:

148 For the reasons set out above, the appeal is allowed in part and the decision of the Development Authority is varied. A development permit shall be issued with the above-noted condition.



Jim Palmer, First Vice Chair and Decision Writer
Subdivision and Development Appeal Board

Issued on this 6th day of July 2021

Corrigendum of the Decision of the Board:

Please note that the following was added to paragraph 4:

A development permit shall be issued with the following Permanent Condition to be added:

The applicant shall, to the satisfaction of the Development Authority, submit a total of three (3) complete sets of amended landscape plans with corrections/revisions highlighted and annotated (file folded and collated) to the Planning Generalist.