
CALGARY SUBDIVISION AND DEVELOPMENT APPEAL BOARD

Citation: 2018 CGYSDAB 72

Case Name: SDAB2018-0072 (Re)

File No: DP2018-2376

Appeal by: Thomas Spear

Appeal against: Development Authority of The City of Calgary

Hearing dates: September 6, 2018
November 13, 2018

Decision date: January 7, 2019

Board members: Michael Meredith, Presiding Officer
Funmi Abiiba
Bill Chomik, Chair
Bob Merchant

DECISION

Description of Application:

1 The appeal before the Subdivision and Development Appeal Board (the “Board”) was brought by Thomas Spear.

2 On July 25, 2018, the Development Authority approved the application of Formed Alliance Architecture Studio for a new single detached dwelling, secondary suite (upper floor) at 1635 6A Street NW in the community of Rosedale. The property is owned by The City of Calgary and has a land use designation of Direct Control 43Z2007. The proposed development is a discretionary development within the district.

Procedural History:

3 The hearing commenced on September 6, 2018 with consideration of procedural issues. The Board adjourned the hearing to November 13, 2018 with the consent of all parties. The hearing concluded on that date.

Decision:

4 The appeal is denied and the decision of the Development Authority upheld. A development permit shall be issued as originally issued by the Development Authority.

Appearances:

5 The Board received submissions from:

- a) Maurie Loewen for the Development Authority;
- b) Thomas Spear, the appellant;
- c) Rick Grol, agent for the applicant / owner;
- d) Michael Farrar, developer for the applicant / owner; and
- e) Teresa Goldstein of Calgary Affordable Housing.

Background and Summary of Evidence:**Submissions of the Development Authority**

6 Mr. Loewen submitted that the parcel is a remnant parcel which resulted from the 16 Avenue NW road widening. The parcel is owned by the City of Calgary, and the Calgary Affordable Housing is the developer of the property. The Development Authority

is a separate entity from the City of Calgary in this matter. He noted that the Development Authority is an independent body under the *Municipal Government Act* (the “MGA”) that is empowered to make decisions on development permits and subdivision applications. He noted that a fair and mutual decision was made based on sections 35, 36 and 37 of *Land Use Bylaw 1P2007* (the “Bylaw” or “Bylaw 1P2007”).

7 Mr. Loewen stated that although the road widening occurred in 2005, the road plan was not registered until September 13, 2007. The area has changed over time, but the remnant parcel has been vacant since that time.

8 With respect to the plans, Mr. Loewen stated that the block plan submitted by the appellant indicates the parcel is designated Direct Control. He submitted that the block plan is important in terms of evaluating the contextual rules and average setbacks in older areas. That rule is not applicable in this case because the subject parcel has a Direct Control that prescribes the minimum or maximum setbacks. The block plan is only needed to consider where the development is located on the land. It shows that the front and rear of the building lineup with the properties on the street, with a typical 4 feet side setback.

9 The site plan consist of a cul-de-sac, a side walk, a soft surface landscape front yard, a deck, and the actual building. The Direct Control does not require a major site setback. The floor plan on the other hand shows a deck on the front, and a covered porch which encourages amenity in the front and eyes on the street. Front porches induce casual conversation and boost streetscape vibrancy.

10 Furthermore, the streetscape shows the location of the proposed development. The proposed development is a modest size single-detached dwelling with a secondary suite that is located on the upper floor. The main floor is in line with the main floor of the adjacent building. This dictates where the eave line is located.

11 Mr. Loewen submitted that the building can be accessed through the front and back of the house. The front door is faced to the side but oriented towards the street. The upper floor has a balcony amenity space. It is not a high building but a two-storey building with a flat roof. There is only one side facing window midway up the side of the building and looking onto the roof or the adjacent parcels. There is no direct overlooking or direct privacy issues.

12 With respect to the applicable policies, Mr. Loewen submitted that the Direct Control was adopted in June 11, 2007 under *Land Use Bylaw 2P80* (“Bylaw 2P80”). The governing Land Use Bylaw is now Bylaw 1P2007 as Bylaw 2P80 has been repealed. Subsection 22(1)(2) of Bylaw 1P2007 provides that where there is an old Direct Control Bylaw, it should be interpreted with the intent that was given at the date of the original passage. Administratively, Bylaw 1P2007 is the ranking Bylaw but the Direct Control Bylaw is interpreted as it existed in June 11, 2007.

13 Subsection 685(1)(4)(a)(b) of the MGA explains the degree with which the Board can exercise its discretion on the Direct Control districts. Within the Direct Control, single-

detached dwellings and secondary suites are listed as discretionary uses. A secondary suite can be attached to the building above grade where the secondary suite is located above the first-storey of a single-detached dwelling. There is a maximum depth of 0.6 metres on the building setback from the northerly property line, and a minimum of 3.0 metres and a maximum of 3.5 metres to the front yard. There is no minimum to the rear yard and lot width. A minimum of 4.0 metres and maximum of 6.0 metres is allowed on the fence height for northerly property line. There is a maximum of 75% parcel coverage and a building length which stipulates that there must be a continuous fence or building through the front to the back.

14 The Bylaw check conducted showed discrepancies on the plans. The maximum balcony depth required in Bylaw 2P80 is 1.8 metres from a building façade. The plans indicate the second-storey balcony projects 2.9 metres from the building façade. A relaxation was granted on the balcony because the balcony is oriented towards the street and not towards the private amenity space. Also, it was granted because the rule is not frozen with the rest of the Direct Control rules, and the Development Authority have jurisdiction on the rule as it relates to balconies.

15 In granting the relaxation, the Development Authority applied sound planning principles and the test for relaxation as stated in sections 35 and 36 of Bylaw 1P2007, and determined that there were no undue impact on the neighbours nor any effect to the use and enjoyment of the neighbouring properties. The Development Authority determined that the relaxation was appropriate even though the parcel is in a Direct Control district.

16 Mr. Loewen further submitted that the parcel is located within the 16 Avenue North Urban Corridor. The Area Redevelopment Plan (“ARP”) was adopted by Council in 2017. He explained that when the parcel was redesignated to Direct Control district in 2007, the 16 Avenue ARP was adopted. The policy was updated in 2017 to include some of the main street language and references to the Developed Areas Guidebook. 16 Avenue NW is a main street.

17 The Low Density Residential Infill Housing Guidelines (the “Guidelines”) and the Policy to Guide Discretion for Secondary Suites and Backyard Suites also apply to the proposed development. Mr. Loewen stated that certain policies exist in the Guidelines that are already covered by the Direct Control. For instance, the required front yard setback prescribed in the Direct Control Bylaw is 3.00 metres minimum and 3.5 metres maximum, whereas, the Guidelines provide that houses should generally line up. Ultimately, the Direct Control Bylaw is the prevailing document.

18 In closing, Mr. Loewen submitted that the Development Authority determined that the proposed development complies with the Direct Control rules, the statutory policy from the ARP, the non-statutory policy which is the Infill Guidelines, the Secondary Suite Guidelines, and Servicing, Transportation Demands.

Submissions of Thomas Spear, the appellant

19 With respect to the non-compliance of the proposed development, Mr. Spear submitted that subsection 4.3.1(2)(3) of 16 Avenue North Corridor ARP provides that no new single-detached, semi-detached, or duplex residences are permitted except the housing existing in these forms on lots less than 15.25 metres wide. The creation of lots less than 15.25 metres in width are discouraged pursuant to subsection 3 of the ARP.

20 Under the Direct Control Bylaw, the property is described as a single property with plan 2187V block 5, lots 17 and 18. The building setbacks from the northerly property line must be a maximum depth of 0.6 metres. The northern property line is against the sound fence as described in the Certificate of title. Mr. Spear opined that both lots are one continuous parcel of land and the City arbitrarily subdivided the land. They developed half of the lot, in contravention of the Direct Control Bylaw.

21 With respect to the building length, the Direct Control Bylaw provides that there must be a continuous form of development within 0.6 metres of the northerly property line. Mr. Spear submitted that the northern property line abuts the existing sound wall on 16 Avenue NW, and the building is set back too far away from the northern property line.

22 Mr. Spear submitted that the building does not adequately address the sound attenuation requirement. Subsection 4.4.2(3)(b) of the ARP states that single-detached housing with sound attenuation is to be allowed on parcels in the Direct Control Bylaw. The sound-barrier house will provide noise attenuation to City standards for the surrounding properties as well as for the internal occupants of the building. Also, the north side of all sites should be built to incorporate a continuous sound-barrier wall that is a minimum of 13 feet in height, and have a minimum surface density of 10 kilograms per square metre. The edge of the barrier wall should extend to the north limits of the rear property line. Based on this, Mr. Spear submitted that there is no indication in the plans that the sound attenuation requirement has been met.

23 Mr. Spear further submitted that the building does not follow directions regarding temporary wooden sound wall as outlined in the Land and Asset Strategy Committee Report of November 8, 2011. The report indicated that the lots are irregular in shape, but can accommodate a house and a standard two-car garage as per the Direct Control Bylaw: Board Report at p 123. Mr. Spear stated that the intent of the ARP was that the existing sound wall around 16 Avenue NW included temporary wooden sound barriers. The idea being to remove the wooden barrier to allow for the construction of a two-car garage on a regular house. The northerly wall of a potential two-car garage would act as a sound attenuation and would be built to that standard.

24 Furthermore, the general implication noted in the Land and Asset Strategy Committee Report was that, the Development of eight new houses incorporating a sound attenuation wall on a north face, the removal of the temporary wooden structure, and the construction of the new permanent wrought iron fence, would complete the 16 Avenue NW sound attenuation wall and satisfy the vision of the ARP: Board Report at p 124. Mr. Spear submitted that the proposed development does not meet these requirements.

25 In the July 28, 2016 Community Services Report to Land and Asset Strategy Committee, it was confirmed that the building setback from the north property line cannot exceed 0.6 metres, and the adjacent temporary sections of the sound-wall be removed, and that the physical characteristics of the new development building and fence serve as the sound-attenuation barrier. Through collaborative work with the City of Calgary Planning Development and Approval Department, the requirement to remove the sound-wall in sections will not be mandatory and will be addressed through the development permit process: Board Report at pp 17 and 18. Mr. Spear submitted that the Development Authority failed to address this requirement.

26 Mr. Spear noted that there were variances from the Guidelines with respect to the design, building mass, building height, privacy, entrances, and landscaping.

27 With respect to the design, the Guidelines provide that new development should be designed in a manner which is responsive to the local context. Mr. Spear submitted that the building form is not complementary to the existing architectural presence. He stated that most of the properties are single family dwellings. There is an extensive use of metal and Hardie panel cladding for siding as opposed to that of the neighbouring properties which are made of brick or stucco. Also, the front fence of the building and the extra tall north side fence are not present in the neighbourhood. This creates a fortress-like appearance.

28 With respect to the building mass, the Guidelines state that new development should respect the existing scale and massing of its immediate surroundings. Mr. Spear submitted that there are three two-storey buildings on the street. The remaining portion of the buildings on the street are single-storey buildings, including that of its immediate neighbourhood. The building envelope is long, tall, narrow and stuffed into a less than half size lot. Furthermore, the size, materials, proposed colours, and the lack of a basement gives the impression of a temporary structure. Mr. Spear therefore submitted the project plan is visually disruptive and not compatible to the existing streetscape.

29 With respect to the building height, Mr. Spear submitted that even though the height complies with the maximum building requirement, the lack of a side yard between the adjacent single-storey building and the two-storeys proposed presents a stark contrast to the existing streetscape.

30 With respect to the privacy, the Guidelines provide that the privacy of adjacent residences should be respected. Mr. Spear submitted that the second-storey rear balcony presents overlooking problems as it offers an unobstructed view of the neighbours backyard. It also projects 2.97 metres from the building façade. This gives 1.17 metres more than what is allowed. As such, a relaxation should not be granted.

31 With respect to the entrance, Mr. Spear submitted that the proposal does not follow the Guidelines provisions. The Guidelines provide that the principal entry should be clearly identifiable from the street and located in a manner which respects the privacy of the neighbours. Mr. Spear stated that the main entry for the ground floor is not easily identifiable as such, being mostly hidden by a front fence and a front deck. It faces the

side and does not have a street friendly appearance. The main entry for the upper floor unit is also on the side, but less than 3.0 metres away from the neighbouring property. The proximity to the building walls and the neighbours existing fence presents issues around visibility, privacy and safety.

32 With respect to the landscaping, Mr. Spear submitted that the project calls for the removal of two mature trees: a Colorado blue spruce which measures 410 millimetres caliper, and a Chokecherry tree which is 230 millimetres in caliper. He stated that there is no indication by the applicant on how these trees would be replaced as required in the Guidelines.

33 With respect to the parking, Mr. Spear submitted that two off-street parking spaces are provided, with one space being undersized. There is a restriction on parking on the street and a two-hour limit parking for visitors. However if one of the rear stall is used, even partially for storage, additional vehicles will have to park on the street. Due to the fact the location is at the end of the cul-de-sac, there are no front parking spaces for visitors, guests or service vehicles. On-street parking is already at a premium on the block and this would have an adverse effect on the neighbourhood.

34 With respect to the safety issue, Mr. Spear submitted that the sound fence required for the north wall is 4.0 metres high, and extends to the entire length of the north side of the site. The height of the fence measures 4000 millimetres and is well beyond the maximum 750 millimetres allowed by the City of Calgary Transportation Department. This presents significant traffic safety issues. He further submitted that the visibility restrictions also presents personal safety issues for the street. Its presence within 5 metres of the 6-metre high existing sound wall on 16 Avenue NW creates a narrow, dim and hidden space. There is access to the space from 16 Avenue NW through existing pedestrian openings in the wall. This will provide an ideal hiding spot for criminal elements and illegal activities, especially at night. During the day, the area is used by neighbourhood children as a play area, and the very restricted sight lines put them at significant risk from passing traffic in and out of the alley.

Submissions Teresa Goldstein, Michael Farrar, and Rick Grol, agent for the applicant/owner

Teresa Goldstein

35 Ms. Goldstein submitted that Calgary's affordable housing strategy was approved unanimously by the City Council in June 2016 and this is the guiding document for the City's affordable housing.

36 She stated that the City is developing affordable housing in all neighbourhoods and Rosedale is not specifically targeted. She noted that the intent of affordable housing is to facilitate the six key strategic objective on behalf of the City, one of which is to design and build new City units.

37 Ms. Goldstein submitted that while some documents or policies required a sound attenuation and others a fence, the most sensitive and contextual development was adopted. Also, Canada Mortgage and Housing Corporation's occupancy standards are properly managed with respect to the development.

Michael Farrar

38 With respect to the plans, Mr. Farrar submitted that the project entailed eight sites. As part of the process, the context of the nature of the community was considered alongside with the Direct Control Bylaw and the Bylaw 2P80. He stated that during the engagement process with the community, and streets in the area were catalogued. Different building typology, scale, height and different components were considered. The residents of the street were given the opportunity to comment on the component they felt were important in the characterization of the buildings that define their street. This formed the decisions on the design of the building.

39 Mr. Farrar further submitted that the building is in compliance with the building height and fence, with the exception of the balcony. The balcony exist on the second floor at the front, and facing unto 6A Street NW.

40 The definition of a fence as identified in the Direct Control Bylaw indicated a requirement of 4 metres fence height. In order to mitigate the concerns of the residents, glass was used on the fence to allow some permeability and light through the fence.

41 Mr. Farrar further submitted that the development does not impede the turning radius for waste recycle vehicles to the west. The parcel is 25 feet wide in total, 21 feet wide on the east end and 2 feet on the west edge. This is not inconsistent with infill developments in inner-city established communities.

42 The site coverage is 27%. The applicant would provide two new trees: spruce and mountain ash trees. The Boulevard trees on 6A Street NW are protected and retained.

43 With respect to the elevations, Mr. Farrar submitted that there are small areas of metal identified as solid black tones which are limited to two of the feature elements, and some flashing materials to the building. The rest is primarily stucco and wood siding. These materials are consistent with the development on the street.

44 Mr. Farrar noted that while there is no basement in the project, the building is brought to grade with a full insulator envelop. The scale is consistent with the development and shows an evolution. The building is set back to the 3.5-metre required setback in addition to the 4.2-metre public boulevard. Hence, the building appears further back from the street than the plans provide.

Rick Grol

45 Mr. Grol submitted that the subject parcels were remnant parcels resulting from the expropriation of properties made by the City during the road widening project of 16

Avenue NW. At the time of the enactment of the Direct Control Bylaw, it was not envisioned that there would be a lane between these remnant parcels and the sound attenuation wall, which was constructed along the south side of 16 Avenue NW. The context of the parcel is currently different.

46 He added that when the City expropriates parcels, they become part of the road plan. The roads in the municipality of Calgary do not have a legal title. The Certificate of Title described the parcel as 2187V Block 5, lots 17 and 18 excepting thereout: Plan 01714587 Road.

47 The Boards jurisdiction is limited pursuant to section 685(4)(b) of the MGA. As the subject parcel is in a Direct Control district, the appeal is limited to whether or not the directions of Council have been followed. In this case, the development Authority followed the directions of Council as set out by the Direct Control Bylaw as well as the applicable plans and policies.

48 Regarding the applicable plans and policies, Mr. Grol submitted that the MDP contains policies that encourage densification; higher residential densities in areas that are well serviced by existing infrastructure, public amenities and transit; as well as affordable housing in all communities. He submitted that the proposed development is in keeping with the objectives and policies of the MDP.

49 He submitted that while the ARP is a statutory document, it does not have the status of the Bylaw. They are guidelines, not rigid rules that must be adhered to. Hence, the Development Authority has the discretion to implement the policies of the ARP. He further explained that when the ARP was established, the reference in the ARP to the sound attenuation wall to the north of the subject parcel was considered a northerly property line. Since the subdivision, the northerly property line is now different.

50 The objectives of the ARP is to sensitively increase residential densities, and increase the variety of size and type of housing available in the area and the adjacent communities. Mr. Grol contended that the proposed development meets the objectives of the ARP, and the noise attenuation standards of the Building Code.

51 Mr. Grol submitted that the ownership of the property or the type of users with respect to affordable housing can be regulated by the Bylaw. He stated that the City has the right to redevelop the proposed parcel like any other developer. He noted that the appellant extensively quoted from the Land and Assets Committee Reports. This is not relevant for the planning considerations for both the Development Authority and the Board because it speaks to the disposition and the land ownership issue on the property.

52 With respect to the character of the community, Mr. Grol stated that the proposed development underwent extensive engagement with the community. The community and its character is changing and newer developments are being made. Architecturally, the proposed development is in keeping with the context of the area and is compatible with the existing surrounding developments.

53 With respect to the setbacks, height and lot area, Mr. Grol submitted that the development meets the rules and requirements of the Direct Control Bylaw and the Bylaw 2P80.

54 With respect to the parking, He submitted that the proposed development meets the parking rules and requirements of the applicable Bylaw 2P80. There is no requirement in the Bylaw to build a garage or storage area. This is within the prerogative of the individual property owner.

55 Regarding the relaxation, Mr. Grol submitted that the only relaxation made to the property is to the second-storey balcony which projects 2.97 metres from the building façade. Section 20(1.1) of the applicable Bylaw 2P80 requires that a balcony shall not project more than 1.8 metres from a building façade. Mr. Grol submitted that the relaxation does not have any impact on the appellant's property nor on the amenities of the neighbourhood. The most affected neighbour is the neighbour to the south and this neighbour supports the development amongst other neighbours: Board Report at pp 98 through 102. Therefore, the relaxation meets the test of subsection 687(3)(d) of the MGA and section 36 of Bylaw 1P2007.

56 In closing, Mr. Grol submitted that the Development Authority followed the directions of Council as set out in the Direct Control Bylaw, the MDP, ARP and the Infill Guidelines. The development is compactable with the adjacent properties and sensitively designed. It meets the servicing, access and transportation requirements as set out in section 35 Bylaw 1P2007, and it is suitable for the site based on sound planning principles.

Rebuttal

The Development Authority

57 Mr. Loewen submitted that the Direct Control district clearly envisioned that the parcel be subdivided, and a remnant parcel be created. The parcel is mentioned as block 5, lot 17 because lot 18 stopped existing. The Certificate of Title referenced the new road plan. Hence, the north property line does exist.

58 In the policy the parcel was addressed as a "noise attenuation". The noise study report conducted in 2003 reflects in the current policy. A sound barrier is built in the property and it is not intended to be removed. Mr. Loewen noted that a fence can function as a sound barrier. The Direct Control does not state it must be under any particular sound barriers.

59 With respect to the privacy, there are small windows on the property looking towards the south. Hence, privacy is not a concern.

The appellant

60 Mr. Spear submitted that affordable housing is not a planning issue neither is money or costs. The remnant lot could have been sold to the adjacent neighbours. Also, there were a number of community engagement meetings but their thoughts were not taken into consideration.

61 Mr. Spear opined that if the new ARP came into effect in 2017, then this development would start in 2015 under the old rules.

62 With respect to the sound attenuation, Mr. Spear submitted that the “spirit” of the ARP should be followed rather than the technicalities involved because the “spirit” of the ARP is clear and specific. It states that any development in the remnant lot must match sound attenuation, or mitigate the sound coming from 16 Avenue NW. The attenuation properties of the existing brick wall is greater than the sound attenuation quality of the temporary wooden sound wall. He submitted that as long as there is a hole in the fence, there will be zero sound attenuation.

The applicant

63 Ms. Goldstein stated that the parcels are not big, the reason why they were not sold to private developers or the adjacent land owners. There are other developments in the area that is similar to the flat roof style.

64 Mr. Farrah submitted that although majority of the community members did not support the development, the engagement identified significant support as well.

65 Mr. Grol submitted that the tunneling effect of the fence cannot be relaxed by the Development Authority nor the Board. Hence, it is an absolute requirement that the developer puts in a fence of a minimum height of 4 metres. Any determination by Council and the City about the ownership of the property is beyond the jurisdiction of the development Authority. It cannot be taking into account for the evaluation of the development permit application.

Reasons:

66 The Board reviewed all evidence and arguments, written and oral, submitted by the parties and will focus on key evidence and arguments in outlining its reasons.

67 The Board finds that the proposed development meets the requirements of the Direct Control designation. This finding is made in knowledge of the evidence that there is no sound attenuation density detailed in either the north exterior wall or the fence-like portion of the wall that is beside the balcony on the second storey of the proposed development. The Board finds that there is no need to stipulate the density of the wall as the building itself will provide the sound attenuation.

68 The Board finds that building materials to be used in the proposed development are appropriate for the area and that the design is responsive to the local context.

69 With respect to the design, the Board finds that the proposed development is compatible and responsive to the area for the following reasons:

- a) the height is below the maximum permitted height;
- b) the scale of the proposed development is consistent with other designs in the area;
- c) the design is modest in its scale and is appropriate to other buildings on the street;
- d) the front entry on the ground unit is approachable, and the deck at the front creates an attractive façade; and
- e) the landscaping to replace the removed trees will integrate the proposed development into the area.

70 The relaxation required for the balcony is appropriate as:

- a) the balcony faces the street;
- b) it does not create any overlooking issues to the neighbour to the south; and
- c) it allows the resident to look over the street, which does not create any privacy issues for the neighbours.

71 Overall, in accordance with Section 36 of the Bylaw, the relaxation does not materially interfere with the use, enjoyment or value of the neighbouring properties. If anything, the increased oversight on to the street will be beneficial to the neighbouring properties.

72 The overlooking of the windows on the south side of the proposed development is limited as the windows are in the stairwell accessing the upper secondary suite. The Board finds that the side entrance is not an issue to the neighbour to the south of the proposed development.

73 The Board finds that the proposed development's parking requirements are appropriately met. Further, the development is close to 16 Avenue North and its transit options, reducing the need for extended on-street parking.

74 The Board finds that the factors in Section 35 of the Bylaw have been satisfied in that:

- a) the plans affecting the parcel have been complied with;
- b) the proposed development is responsive to the area;
- c) the development itself has merit in its design;
- d) access and transportation requirements are met; and
- e) sound planning principles, including an appropriate relaxation and a responsive design to the local context have been satisfied.

75 The Board finds that under section 687(3)(d)(i)(A)(B) of the *Municipal Government Act*, the proposed development will not unduly interfere with the amenities of the neighbourhood, nor materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land.

Conclusion:

76 For the reasons set out above, the appeal is denied and the decision of the Development Authority is upheld. A development permit shall be issued as originally issued by the Development Authority.



Michael Meredith, Board Member and Decision Writer
Subdivision and Development Appeal Board

Issued on this 7th day of January, 2019