THE CITY OF Red Deer
Subdivision & Development Appeal Board

Appeal No.: 0262 004 2012
Hearing Held: 22 August 2012

SUBDIVISION & DEVELOPMENT APPEAL BOARD DECISION

CHAIR: R. MOISEY
PANEL MEMBER B. FARR
PANEL MEMBER F. JOYNT
PANEL MEMBER G. LEASAK
PANEL MEMBER: C. STEPHAN

BETWEEN:

MULTIPLE WOODLEA LANDOWNERS
Represented by Bruce Buckley

Appellant

and

CITY OF RED DEER
MUNICIPAL PLANNING COMMISSION
Represented by Vicki Swainson

Development Authority

and

KEITH & BETTYANN BISHOP

Applicant

DECISION:
MOVED by F. Joynt; seconded by G. Leasak:

RESOLVED that the Subdivision and Development Appeal Board having heard all of the parties who wished to speak both in favour and against the appeal filed by B. Buckley (on behalf of multiple landowners) regarding the Municipal Planning Commission's July 04, 2012 approval of an application for the development of a single family dwelling with attached garage to be located at 5324 44 Avenue (Lot 11C; Block E, Plan 752 0274) REVERSES the decision of the Municipal Planning Commission ('MPC') and allows the appeal. The development is denied.

CARRIED UNANIMOUSLY

BACKGROUND:

1. The subject property is located at 5324 44 Avenue and is zoned R1 – Residential (Low Density) District. The neighbourhood is known as the Woodlea Neighbourhood which consists of both new and original (or restored) bungalows and two storey single family dwellings.

2. The lot has an irregular (triangle) shape, is undeveloped and has been vacant for approximately 30 years.

3. *The City of Red Deer Land Use Bylaw* #3357/2006 as amm. ('LUB') requires a 7.5 meter rear yard setback in an R1 district. On July 04, 2012 the MPC approved an application for the development of a single family dwelling with attached garage with a rear yard of 1.9 meters – granting a 5.6 meter relaxation to the LUB requirement.

4. Multiple landowners in the area have appealed the decision of the MPC to this Board.

ISSUES / ARGUMENTS:

CONFLICT OF INTEREST

5. Given that The City of Red Deer is the Owner of the property in this application, the Appellant suggested that it was inappropriate for the staff of The City of Red Deer to make recommendations to the MPC and that any recommendation before the Board should be disregarded.

6. It is not appropriate for the Board to make comments on process or procedure at the MPC.

7. There are two pieces of legislation that guide the Board in this case: first, s. 2.17 (1)(c) of the LUB requires that the Board provide notice of a hearing to the owner of the land; and second, s. 687(1)(c) requires the Board to hear from anyone that was given notice of the hearing.

8. It is the Board's duty to adjudicate appeals and to ensure that the rules of natural justice are adhered to. The Board is arm's length from The City of Red Deer. 'Recommendations' made by The City of Red Deer are considered under the same lens as are submissions and arguments made by any party. Each decision of the Board is based on the individual merits of the application.

RELAXATIONS

9. The proposed development has a rear yard setback of 1.9 meters and the LUB requires a 7.5 meters – a 5.6 meter deficiency. The lot is 29.2 meters deep and the LUB requires 30.0 meters – a 0.8 meter deficiency.

10. The Development Authority stated that because the proposed development is irregular (triangular) in shape it requires only one relaxation - that being the rear yard setback. It is the position of the Development Authority that the lot meets the minimum lot area requirement as per the LUB for a R1 lot. The Development Authority stated that a lot depth relaxation (0.8 metres) is not required due to the lot shape.

11. The Boards' interpretation of the LUB is that the proposed development requires 2 relaxations – to rear yard setback and to lot depth.

12. The Appellants position is that:
    a. The LUB should be respected and not deviated from without exceptional circumstances. In support of this, the Appellant provided an excerpt from the text *Planning Law and Practice in Alberta* by Frederick Laux ('Laux') found at Exhibit 2 Page 13.

    b. The Applicant has the responsibility of establishing that exceptional circumstances exist to warrant the granting of the variance. In support of this, the Appellant provided an excerpt from

Laux (Exhibit 2 Page 10 & 12). The Appellant stated that the Applicant has not presented evidence to warrant a variance.

c. The Appellant stated that the relaxation to the rear yard setback is excessive, and that there is no evidence to indicate that the proposed development would not be detrimental to neighbouring landowners. In support of this, the Appellant provided an excerpt from Laux (Exhibit 2 Page 11).

d. In cases of redevelopment, the Development Authority has the ability to increase development standards to ensure that the development is compatible with the existing neighbourhood. In this application, the Development Authority has decreased the standards.

13. The Development Authority stated that The City of Red Deer is the landowner of the lot. The Applicant has an offer to purchase the lot that is conditional on the lot being developed. The Applicant has been working closely with the Development Authority to develop the application.

14. The Development Authority believes that the 'exceptional circumstances' referred to by the Appellant is the irregular shape of the lot.

15. The Applicant stated that the attached garage is needed to accommodate serious health concerns and to provide convenient, secure access to and from the house and the garage.

16. With regard to the lot depth, the Board does not believe that a 0.8 meter relaxation has the same potential impact as a relaxation that is given to a building structure. The lot depth relaxation needed is not excessive for this lot.

17. To assist in determining whether or not the rear yard relaxation is excessive, the Board considered and made the following findings:

a. Similar Development: The Board was not presented with any evidence of existing, similar variances in the area. In actuality, there are 2 other irregular lots in the immediate area with development that comply with the LUB.

b. Exceptional Circumstances: The Appellant argued that the Applicant needs to provide evidence of the need for a variance. The Board does not accept this argument. There is nothing in the LUB or the *Municipal Government Act*, R.S.A. 2000, Ch. M-26 (the MGA) that compels the Applicant to do this. However, the Board agrees with Laux that it is in the best interest of an Applicant to do so because it (the Board) is more likely to grant a variance when a need exists (Exhibit 2 Page 12). The Board also agrees that, generally, development should conform to the LUB and that varying from the LUB requirements should be the exception to the rule.

18. A 5.6 meter relaxation represents a 74.66% variance from the LUB. It is difficult to think that a variance of that amount could be anything but excessive. In the absence of arguments to the contrary and other legislation (i.e. area redevelopment plan), the Board finds the requested 5.6 meter relaxation to the minimum rear yard requirement to be excessive.

CHARACTER / IMPACT ON NEIGHBOURHOOD

19. Section 687(3)(d) of the MGA speaks specifically to the impact of an application on the neighbourhood. It states that the Board:

> *"may make an order or decision or issue or confirm the issue of a development permit even though the proposed development does not comply with the land use bylaw if, in its opinion,*
>
> *(i) the proposed development would not*
>
> *(A) unduly interfere with the amenities of the neighbourhood; or*
> *(B) materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land"*

20. Following is a summary of issues, arguments and Board findings relative to the character of the neighbourhood and the potential impact of the proposed development on the neighbourhood.

a. Proximity to Laneway:
The Appellant stated that due to the curve in the laneway, 3 times in the last 20 years, traffic has collided with the backyard fence of 4424-53 Street Crescent. The Appellant suggested that this would be aggravated due to the size and proximity of the proposed development to the laneway (laneway traffic would 'edge over' to avoid the proposed development).

The Development Authority advised that if the Applicant were to propose a development with a detached garage, it could actually be located closer to the laneway, at 0.9 meters (the proposed development measures 1.72 meters from the laneway). The Development Authority reiterated that the proposed development is under the maximum area coverage of 40% and believes that the proposed development fits well on the lot and is a good use of the land.

The Applicant stated that the proposed development is further from the laneway than the neighbour's garage (house # 5328) to the east.

While the Board was not advised whether or not the LUB requirements applied to #5328 are identical to the ones being applied to the proposed development, given the long term existence of the neighbourhood, the Board believes it is likely and therefore believes it is reasonable to use #5328 as a comparison to visualize how close to the laneway a *detached* garage would be. The point that a detached garage would be closer to the laneway is well made. However, that is not the application under consideration.

The proximity to the lane and the rear yard setback are intertwined – one affects the other. Having found that a 74.66% variance from the LUB rear yard setback is excessive and combined with the concerns of the Appellant regarding the backyard fence at 4424-53 Street, the Board finds that the proximity of the proposed development is too close to the laneway.

b. Drainage & Snow Removal

The Appellant expressed concerns with respect to rainfall and run off into the laneway that has a history of poor drainage (at times can have depth of 6 inches of standing water). The Appellant also expressed concern regarding snow removal and questioned where snow taken from the driveway of the proposed development would be located.

The LUB does not address snow removal. The Board believes that it would be unfair to consider snow removal as an issue on which to decide this application. In their approval, the MPC required the Applicant to submit a drainage plan subject to review and approval of the Engineering Services department – the Board believes that the provision of this plan would address the Appellants drainage concerns.

c. Character

The Appellant argued that despite compliance with the LUB in most aspects, the proposed development does not 'fit in' with the neighbourhood. In support of this, the Appellant provided the Board with an analysis of 18 properties and their (approximate) parcel coverage in comparison with the proposed development.

The Appellant also argued that because of the lack of yard space, the proposed development does not fit in with the neighbourhood - which is low density and a significant contributing factor to its character. The Appellant stated that the proposed development is better suited to a high density area, not the character and nature of Woodlea.

The Applicant argued that the property is unkempt and an eyesore which has a negative economic impact on the area. To support this, he referred to photographs found in Exhibit 3 Pages 21 & 23. The Applicant stated that he worked closely and in good faith with the Development Authority to develop an application that would compliment the area.

Based on photographic evidence and the exterior building plans for the proposed development, the Board finds that the proposal is more aesthetically desirable than the current state of the lot.

d. Impact to Neighbourhood

The Appellant stated that the lack of yard space in the proposed development will interfere with the neighbour's use and enjoyment of his yard.

The Applicant stated that in consideration of his neighbour, if the proposed development were approved, he would remove the window above the garage –preserving the neighbour's privacy in the yard.

The Appellant stated that landowners in the area have purchased and developed their properties with the understanding that the lot of the subject property is park / green space and would not be developed. Several written comments support this statement and express concern for the view from their property.

The Development Authority stated that the lot will not remain green space as the sale of the lot is subject to development.

The Applicant stated that he believes much of the opposition to the proposed development is based on the history of the property and is not relevant to this application.

The Board received information that the lot is zoned R1 and has been for a significant amount of time (20+ years). This was not contested. Regardless of representations that may or may not have been made to property owners, the fact remains that the lot *could* have been developed at any time. Property owners have benefitted from the lack of a will to have it done. Further, the view from a property can change at any time. As such, property owners do not have entitlement to it. So, while the Board can empathize with the concerns identified, they are not grounds on which this application is being denied.

CLOSING:

For the reasons detailed above, this appeal is allowed and the development is denied.

This decision can be appealed to the Court of Appeal on a question of law or jurisdiction. If you wish to appeal this decision you must follow the procedure found in section 688 of the Municipal Government Act which requires an application for leave to appeal to be filed and served **within 30 days** of this decision.

Dated at the City of Red Deer, in the Province of Alberta this 04th day of September, 2012 and signed by the Chair on behalf of all five panel members who agree that the content of this document adequately reflects the hearing, deliberations and decision of the Board.

Ron Moisey

R. Moisey, Chair
Subdivision & Development Appeal Board

EXHIBIT LIST

Exhibit 1.....Agenda: pp 24-53
Exhibit 2.....Appellant written submission