

In the Court of Appeal of Alberta

Citation: Leyton-High v Edmonton (City), 2026 ABCA 273

Date: 20260820

Docket: 2603-0130AC

Registry: Edmonton

Between:

Corisandra Leyton-High and Patrick J. Feehan

Applicants

- and -

**The City of Edmonton, Edmonton Subdivision and Development Appeal Board,
and Davach Properties Inc.**

Respondents

**Reasons for Decision of
The Honourable Justice Jane Fagnan**

Application for Permission to Appeal

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I Introduction

[1] The applicants apply for permission to appeal decision SDAB-D-26-095 issued by the Edmonton Subdivision and Development Appeal Board on May 8, 2026.

[2] The subject property is located within the (RS) Small Scale Residential Zone to which the Jasper Place District Plan applies. Section 2.10.2.2 of the Edmonton Zoning Bylaw 20001 provides that Residential Use buildings are a Permitted Use in the RS Zone. Under the Zoning Bylaw, Residential Uses are defined to include Row Housing and Secondary Suites.

[3] The Development Authority granted a Development Permit to the respondent:

To construct a Residential Use building in the form of a 4 Dwelling Row House with unclosed front porches, Basement Development (NOT to be used as an additional dwelling), and 3 Secondary Suites in the basement.

[4] The decision to issue the Development Permit was appealed to the Board.

[5] Section 685(3) of the *Municipal Government Act*, RSA 2000, c M-26 (*MGA*) provides:

685(3) Despite subsections (1) and (2), no appeal lies in respect of the issuance of a development permit for a permitted use unless the provisions of the land use bylaw were relaxed, varied or misinterpreted.

[6] In dismissing the appeal, the Board concluded it was presented with no information demonstrating the Development Authority had relaxed, varied or misinterpreted any provision of the Zoning Bylaw. The Board accepted that the development is for a Permitted Use, complies with the requirements of the Zoning Bylaw, and no variances were required for the Development Permit to have been issued.

II Proposed Grounds of Appeal

[7] In their joint memorandum, the applicants express an intention to appeal on the basis that the Board:

- (a) did not apply the correct legal test for bylaw compliance;
- (b) improperly deferred zoning compliance to later processes;
- (c) wrongly narrowed its jurisdiction under s 685(3) of the *MGA*; and
- (d) applied an incomplete legal test for site-performance under the Zoning Bylaw.

III Test

[8] Section 688 of the *MGA* requires an application for permission to appeal. The applicants must demonstrate that each proposed ground of appeal: (a) is sufficiently important to merit further appeal; (b) raises a question of law or jurisdiction and (c) has a reasonable prospect of success: s 688(3), *MGA*; *Augustana Neighbourhood Association v Camrose (Subdivision and Development Appeal Board)*, 2021 ABCA 427 at para 16; *Biernacki v Alberta (Land and Property Rights Tribunal)*, 2022 ABCA 56 at para 10.

IV Analysis

A Sufficient Importance

[9] A ground of appeal will generally be "of sufficient importance" within the meaning of s 688(3) where it is jurisprudentially significant or has implications that go beyond the dispute between the parties: *Borgel v Paintearth (Subdivision and Development Appeal Board)*, 2019 ABCA 25 at para 11, citing *Carleo Investments Ltd v Strathcona (County)*, 2014 ABCA 302 at para 10. A ground of appeal which only affects the parties themselves may be sufficiently important in exceptional cases: *Carleo* at para 10.

[10] The applicants submit that the issues raised are of particular importance to the public as they arise in an environment of rapid intensification of established low-scale residential neighbourhoods under the new Zoning Bylaw and are particularly concerned with "zoning creep" resulting in increased intensity and density comparable to Small Medium Scale Transition Residential Zone (RSM Zone) without the necessary change in zoning.

[11] Issues of zoning, infill and density have been frequent subjects of debate and discussion in the media for some time with members of the public expressing frustration at what they view as lax controls on infill development. The issues the applicants wish to raise generally relate to the ability of interested members of the public to have potential concerns addressed at the development permit stage. These issues are of sufficient importance to the public.

B Question of Law or Jurisdiction with Reasonable Prospect of Success

[12] The appellate standards of review in *Housen v Nikolaisen*, 2002 SCC 33, apply to statutory appeals from the Board's decisions: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 37; *Legacy Inc v Red Deer (City)*, 2020 ABCA 105 at para 16; *Edmonton (City of) Library Board v Edmonton (City of)*, 2021 ABCA 355 at para 27. Therefore, questions of law, such as the interpretation of the *MGA* or the Zoning Bylaw would be reviewed on appeal for correctness. This Court has observed that the *Vavilov* decision does not convert questions of fact or questions of exercise of discretion into pure questions of law so as to attract review for correctness on appeal: *Augustana* at para 20.

1 Incorrect Legal Test for Demonstrated Compliance

[13] The applicants intend to argue that the materials before the Board did not demonstrate how the mandatory requirements imposed in various bylaws could be satisfied simultaneously, and therefore the Board was required to treat that unresolved conflict as a non-compliance issue.

[14] They submit there are three such instances.

a) Incorrect Use Classification

[15] The current zoning allows row housing with secondary suites. Row housing is included in the Permitted Use definition in the Zoning Bylaw. Secondary suites are similarly included in the Permitted Use definition. The Board concluded the Development Authority correctly characterized the proposed development of the Residential Use building as a 4-Dwelling Row Housing with three secondary suites.

[16] The applicants contend that the basement unit *could* be used as a dwelling notwithstanding the prohibition.

[17] The Board emphasized that the basement area differs from other areas indicated in the architectural plans in that it has a different entry and mechanical room and does not have a working kitchen. Section 8.10 of the Bylaw requires a working kitchen in order to be considered a “Dwelling”. Further, it reasoned that using the basement area as a fourth dwelling in violation of the prohibition would be non-compliant with the Development Permit and would subject the homeowner to enforcement action.

[18] Section 642(1) of the *MGA* provides that if an applicant applies for a development permit for a permitted use that is compliant with the land use bylaw – here the Zoning Bylaw – the applicant is entitled to obtain that permit.

[19] The issue before the Development Authority was whether the development comprised a land use bylaw-compliant, permitted use. No variances or relaxations are evident on the face of the approval. The applicants have pointed to no law in support of a requirement that the Development Authority speculate as to future compliance with the Development Permit.

[20] The wording of s 685(3) is not prospective. The Board can decide if there has been a relaxation, variation, or misinterpretation under s 685(3); it has no plenary authority to disallow developments which comply with the Zoning Bylaw: *Rau v Edmonton (City)*, 2015 ABCA 136 at paras 15-16.

[21] The applicants have not established an issue of law or jurisdiction relating to the Board’s determination that the Development Authority had not relaxed, varied or misinterpreted a provision of the Zoning Bylaw. Further, this ground has no reasonable prospect of success.

b) Unobstructed Pathway

[22] The Zoning Bylaw requires at s 5.80.2.1.1 that Small Scale Residential Developments must provide “1 or more Pathways with a minimum unobstructed width of 0.9 m . . . from all main entrances of Dwellings directly to an Abutting sidewalk, Street where no sidewalk exists or to a Driveway”. The Development Permit included an explicit condition that the Pathways must be a minimum 0.9 metres.

[23] The applicants intend to argue that the Development Authority failed to take into account some elements such as the retaining wall, fence posts and swale indicated on an unstamped Lot Grading Plan that might decrease the amount of available side yard making the 0.9 metre unobstructed pathways impossible. That draft plan was not approved by anyone at the City.

[24] The respondent conceded that there were “very tight tolerances” on the site, but that the pathways were demonstrated by the Site Plan to be compliant. It argues the Development Authority is tasked to ensure the development complies with the provisions of the Zoning Bylaw; not to ensure ongoing compliance with other legislation or building requirements.

[25] Section 7.110.2.1 of the Zoning Bylaw provides that an issued development permit means that a proposed development has been reviewed against the provisions of the Zoning Bylaw and does not remove obligations to conform with other legislation, bylaws or land title instruments. The Development Authority did not speculate on what the approval process regarding the draft Lot Grading Plan might entail or to assume the proposed development would result in future non-compliance with other bylaws. It did not purport to relax or vary any Zoning Bylaw requirement, but rather conditioned the Permit on compliance with the 0.9 metre requirement.

[26] The applicants have not established an issue of law or jurisdiction relating to the Board’s assessment that the Development Authority had not relaxed, varied or misinterpreted a provision of the Zoning Bylaw. Further, this ground has no reasonable prospect of success.

c) Soft Landscaping

[27] Section 5.60.3.2 of the Zoning Bylaw requires a minimum of 30% soft landscaping. The applicants suggested that the record indicated an inconsistency in that the Lot Grading Plan calculated soft landscaping at 30.63%. The stamped, surveyed Site Plan calculated soft landscaping at 30.07%. The Board determined that either calculation exceeded the minimum requirement.

[28] The applicants argued that factoring in the retaining wall, fence posts and swale would result in a decrease to below the minimum percentage.

[29] The Board noted that the Pathways requirement and the Soft Landscaping requirement were specifically conditioned in the Development Permit to be provided as otherwise required by the applicable bylaw.

[30] As was the case with the Pathway issue, this ground does not raise an issue of law or jurisdiction relating to the Board's task on appeal, nor does it have a reasonable chance of success.

2 Improper Deferral of Zoning Compliance and Narrowing of Jurisdiction

[31] The applicants contend that the Board erred by accepting that conflicts between the Site Plan and the Lot Grading Plan could be resolved later through permit conditions or enforcement action by the City. They argue that the Zoning Bylaw does not permit the Board to declare a development is compliant while deferring resolution of internal conflicts in the record that affect mandatory zoning requirements.

[32] Section 7.140 of the Zoning Bylaw empowers the Development Planner, at its discretion, to seek additional information from developers before deciding on a development permit application.

[33] Section 7.140.1.1 provides that the Development Planner *may* require information relating to the proposed drainage of a site or an abutting site to be submitted as part of a development permit application for new residential construction.

[34] Section 7.140.5.1 also provides that the Development Planner *may* require a detailed geotechnical engineering study to be submitted as part of a development permit application where a proposed development may be impacted by slope instability or other geotechnical hazards as determined by the Development Planner in consultation with the appropriate City department.

[35] The Development Planner did not request any additional information. Before the Board, it was suggested that the fact there was a map of the area, to search for abandoned wells, was a trigger – an “unexplained geotechnical signal” - obligating the Development Planner to require a geotechnical engineering study.

[36] The Board reviewed a GeoDiscover Map and found no indication that there was an abandoned well in the vicinity of the proposed development.

[37] The Board noted that s 7.140.1.1 of the Zoning Bylaw provides that the Development Planner *may* require information related to the proposed drainage of a site for Residential Use and s 7.140.1.4 provides that if such drainage information is required, the Development Planner *must* consider it before making the permit decision, and in consultation with the appropriate City department, *may* impose conditions on the permit in order to mitigate any impacts.

[38] The Board interpreted the use of the word “may” in these instances as granting discretion to the Development Planner. It held that if discrepancies should arise between the Plans approved in the Development Permit process and requirements later mandated in the course of the other approval processes (for example, under the Drainage Bylaw), these matters were to be dealt with at that time.

[39] The applicants argue that the discretion given to the Development Planner in ss 7.140.1.1 and 7.140.5.1 cannot be used as a “shield against misinterpretation review”. They submit the Board made a jurisdictional error by treating the discretion implied using the word “may” in the sections as foreclosing any finding of misinterpretation of the Bylaw. They argue that the information was required prior to the issuance of the Development Permit because without that information, it would be issued on an incomplete or conflicting record, resulting in “zoning creep”.

[40] Section 642 of the *MGA* requires compliance with the land use bylaw, here the Zoning Bylaw, to be demonstrated at the development permit application stage. The Development Authority deferred issues involving additional approvals required outside the Zoning Bylaw. The Drainage Bylaw process is separate from the development permit approval process.

[41] The applicants have not established an issue of law or jurisdiction relating to the Board’s task to determine whether the Development Authority had relaxed, varied or misinterpreted a provision of the Zoning Bylaw. This issue concerns the exercise of discretion granted to the Development Planner in the Zoning Bylaw to decide whether to require information. Nothing about the Board’s review of the exercise of that discretion in this case raises a question of law or jurisdiction. Further, this ground does not have a reasonable prospect of success.

3 Incomplete Legal Test for Site-Performance

[42] The applicants argue that despite substantive evidence showing the waste management area could not accommodate the required collection bins, the Board’s reasons contain no analysis of the site-performance standards in s 5.120.4.1 of the Bylaw which, they contend, constitutes an incomplete test under s 685(3).

[43] It is clear from the Board’s decision that it addressed and responded to every issue raised by the applicants during the hearing. Whether this was the “Complete Compliance Inquiry” sought by the applicants, it appears to have been a complete inquiry into the issues raised by the applicants as was otherwise required by the provisions of s 685(3) of the *MGA*.

[44] It is not the function of the Board to engage in a *de novo* re-application process as if the Development Permit application had been submitted to them in the first instance. There is an onus on an appellant under s 685(3) to demonstrate that the provisions of the Bylaw were relaxed, varied or misinterpreted in the course of the Development Permit approval.

[45] The Zoning Bylaw provides a measure of discretion for the Development Authority to approve the proposed location and dimensions. The relevant language is not specific. Section 5.120.4 does not set out a measurement requirement for waste bins. It requires that waste collection facilities be “adequate”, “to the satisfaction of the Development Planner, in consultation with the City department responsible for waste services”. The notations from the City’s Waste Services Department at page 8 of the Development Permit confirmed that the required consultation occurred and that the Development Authority’s approval of this aspect of the development was in accordance with the requirements of the Zoning Bylaw.

[46] Consultation with Waste Services was completed and no concerns were identified. It can be inferred that the Development Planner was satisfied with the response. The Board noted the Zoning Bylaw provides discretion to the Development Planner in this regard. The applicants have not pointed to a basis for the Board to conclude this did not meet with the satisfaction of the Development Planner.

[47] The applicants have not established an issue of law or jurisdiction relating to the Board’s task of determining whether the Development Authority had relaxed, varied or misinterpreted a provision of the Zoning Bylaw, nor does this ground have a reasonable prospect of success.

V Conclusion

[48] The foregoing analysis does not diminish the applicants’ concerns. This application is focused on the scope of review at this stage of the process. The applicants must establish their grounds for appeal would meet the requirements for permission to appeal. Despite counsel’s able arguments, none of the proposed grounds of appeal raises a question of law or jurisdiction in relation to the Board’s determination that the Development Authority did not relax, vary or misinterpret a provision of the Zoning Bylaw. Even assuming any of the alleged grounds raised such an issue, none has a reasonable prospect of success.

[49] The application for permission to appeal is denied.

[50] Rule 9.4(2)(c) is invoked. The Court will prepare the resulting order.

Application heard on August 6, 2026

Reasons filed at Edmonton, Alberta
this 20th day of August, 2026

Fagnan J.A.

Appearances:

C.J. Brown
for the Applicant C. Leyton-High

Applicant P.J. Feehan

K. Haldane
for the Respondent The City of Edmonton

K.L. Hurlburt, KC (no appearance)
for the Respondent Edmonton Subdivision and Appeal Board

J.W. Murphy, KC
for the Respondent Davach Properties Inc.