THE CITY OF CALGARY

SUBDIVISION AND DEVELOPMENT APPEAL BOARD

DECISION

Hearing held at: Calgary, Alberta

Date of hearing: November 10, 2011

Members present: Meg Bures, Presiding Officer
John Attrell
Rick Grol
Sally Haggis
Terry Smith

Basis of appeal: This is an appeal from an approval by the Development Authority for a development permit made on the application of **The CADCO** for a **change of use: secondary suite** at 2728 Morley Trail NW.

Appeal filed by: **Jane and Tom Mabley represented by Geoffrey Horne**

Description of Application:

The appeal before the Subdivision and Development Appeal Board (Board) deals with an approval by the Development Authority for a development permit for a change of use: secondary suite at 2728 Morley Trail NW. The property is located in the community of Banff Trail and has a land use designation of Residential – Contextual One/Two Dwelling (R-C2) District.

Summary of Evidence:

The Board heard verbal submissions from the following:

Melanie Meadows, representing the Development Authority;
Geoffrey Horne of Cameron Horne, representing the appellants, in favour of the appeal;
Jane Mabley, appellant, in favour of the appeal;
Christopher S. Davis of Municipal Counsellors, representing the applicant/property owners, opposed to the appeal; and
Jordan Fordyce of Municipal Counsellors, representing the applicant/property owners, opposed to the appeal.

The Development Authority:

The Development Authority presented the report, viewgraph, photographs, and plans and additionally submitted the following:

> The appeal concerns the approval of a development permit application by the Development Authority for a secondary suite. The subject parcel is designated R-C2 – residential – Contextual One/Two Dwelling District under The City of Calgary Land Use Bylaw 1P2007.
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> The parcel contains an existing single detached dwelling with a detached garage. The purpose of the development permit was to allow for a secondary suite in the basement of the dwelling.
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> The application was submitted on August 11, 2011. Council approved an amendment to the bylaw, 33P2011, which deemed Secondary Suites as a permitted use within various districts including R-C2. This amendment was effective September 19, 2011.
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> Section 28 of The City of Calgary Land Use Bylaw 1P2007 states, in part:

Permitted Uses That Meet All Requirements	
28	**(1)** Where a ***development permit*** application is for a ***permitted use*** in a ***building*** or on a ***parcel*** and the proposed ***development*** conforms to all of the applicable requirements and rules of this Bylaw, the ***Development Authority*** must approve the application and issue the ***development permit*.**

> The proposed development is for a permitted use that conforms to all of the applicable requirements and rules set out in the bylaw. Therefore the application was approved.

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In Favour of the Appeal:

Counsel for the appellants distributed documentation to the Board including photographs and raised the following points in support of the appeal:

- The appellants have resided at their property located directly west of the subject property since 1976. The appellants' property was constructed by Mr. Mabley's family in approximately 1953.
- The basis of the appellants' appeal lies in the Development Authority's failure to apply the relevant parts of the Land Use Bylaw 1P2007. Also, in his opinion, the Development Authority has failed to apply the relevant parts of the Banff Trail/Motel Village Area Redevelopment Plan, and the Low Density Residential Housing Guidelines for Established Communities, being statutory documents which guide the Development Authority in exercising their discretion prior to the issuance of the subject development permit.
- The appellants' legal representative then elaborated on the chronology of events leading to the issuance of DP2011-3062. He explained that Mr. Zentner purchased the subject property in 2005, and upon purchase of the subject property, he installed an entry door on the west side of the dwelling which did not exist at any time prior to his possession of the subject property, and installed nine steps below grade to access the door.
- In addition to the installation of the entry door below grade, the subject property owner has also installed two windows at grade level, south of the entry door. The windows both measured 35 inches in width, and are 22 inches in height. These windows are located in what is indicated as the existing living room on the development permit plan. The entry door and the two installed windows are immediately outside of the appellants' bedroom windows.
- Shortly after the installation of the entry door, the owner of the subject property commenced construction of a secondary suite which was completed in late 2005 approximately. The appellants also submitted that, to their knowledge, there was not a development permit at the time of the construction of the secondary suite. The subject suite has been occupied by tenants almost continuously from the date of its completion until the present time, and to the appellants' recollection, the secondary suite has only been unoccupied for a period of approximately six weeks in July and August, 2011.
- He further submitted that the appellants made numerous complaints and requests for assistance with respect to this secondary suite, and notified various authorities at The City of Calgary since January 2006, including but not limited to the Development Authority, Bylaw Enforcement, and the Ward 7 Councilor, and despite these entreaties for assistance, the secondary suite has remained in use nearly continuously between January 2006 and November 10, 2011.
- Upon the vacancy of the secondary suite in July 2011, an additional complaint to The City resulted in the issuance of a Notice to Mr. Zentner, the property owner, that the secondary suite would be inspected. The property owner made an application for a development permit which was submitted for approval on August 11, 2011. The

development permit application was circulated to the required parties pursuant to land Use Bylaw 1P2007, as amended. On September 13, 2011, the appellants drafted a response to the development permit application and sent via email specifically to Jeff Martin of the Development Authority, the Banff Trail Community Association and to Ward 7 Councilor Druh Farrell.

- He then elaborated on the appellants' response, in which they identified numerous issues regarding the invasion of their privacy and personal enjoyment of their home as a result of the construction and occupancy of the secondary suite at the subject site. The complaints are characterized by noise, which interferes with the appellants' sleep. Additionally, the installation of a motion-sensitive light fixture illuminates the appellants' bedrooms when activated.
- Furthermore, the property owner provided an amenity space, adjacent to the entry door, which is where the tenants and their guests socialize, barbeque, smoke cigarettes and generally come and go. This amenity space is immediately adjacent to the appellants' bedrooms which also interfere with their privacy and enjoyment of their personal space in their home.
- He then submitted that the Banff Community Association responded to the Development Authority, indicating they objected to the development permit application, noting in particular the location of the entry door and amenity space. He also added that the development permit application was made a number of years after the development was done.
- The appellants' representative then submitted that at the time of development permit application, the Land Use Bylaw provided that secondary suites were a discretionary use in properties designated as R-C2, Residential – Contextual One/Two Dwelling. On September 19, 2011, City Council amended the Land Use Bylaw to provide that secondary suites were permitted uses in R-C2 Land Use Designation districts, among others.
- DP2011-3062 was issued with conditions on September 30, 2011, and of particular significance is condition number four which states that a development completion permit shall be issued for the development/relevant phase of the development /addition before the use is commenced or the development occupied. The appellants' representative reiterated that the secondary suite was occupied at all relevant times after September 30, 2011.
- He quoted the Land Use Bylaw 1P2007 as amended where a secondary suite as defined in section 295 of the Land Use Bylaw 1P2007 is a permitted use pursuant to section 425(1)(f.1), and conceded that the secondary suite at the subject property is not a secondary suite – detached garage or secondary suite – detached garden.
- The appellants then submitted that the development permit application for the permitted use does not conform with all of the requirements of the Land Use Bylaw and relied on section 30 as the basis for the Development Authority to refuse the development permit application or to approve the development permit application and grant relaxations of the requirements or rules to which the proposed use does not conform. He quoted section 30 which provides:

30. Where the development permit application is for a permitted use in a building or on a parcel and the proposed development does not conform to the all applicable requirements and rules of this Bylaw, the Development Authority may:

(a) Refuse to approved the development permit application; or

(b) Approve the development permit application and grant a relaxation of the requirement or rule to which the proposed use does not conform.

- Counsel for the appellants also submitted that section 31 of the Land Use Bylaw provides the test that the Development Authority must apply to the development permit application where such application does not comply with all the requirements of the Land Use Bylaw:

31. The Development Authority may approve a development permit application for a permitted use where the proposed development does not comply with all of the applicable requirements and rules of this Bylaw, if in the opinion of the Development Authority:

(a) The proposed development would not unduly interfere with the amenities of the neighbourhood or materially interfere with or affect the use, enjoyment or value of neighbouring properties; and

(b) The proposed development conforms with a use prescribed by this Bylaw for that land or building.

- He further submitted that the use of the word "may" in sections 30 and 31 of the Land Use Bylaw is to be construed as permissive and empowering and is not a compulsory obligation whereby the development Authority must issue a development permit, notwithstanding that the application does not comply with all the requirements and rules of the bylaw.
- At the time that the development permit application was submitted, secondary suites in the R-C2 Land Use Designation were a discretionary use. Sections 35 and 36 of the Land Use Bylaw set out the factors which must be considered by the Development Authority when making a decision to approve or deny an application for a development permit for a discretionary use. He quoted subsections 35(a)(b)(c)(d) and subsections 36(a)(b).
- He then submitted that the Development Authority has not taken into account the provisions of sections 35 and 36 of the Land Use Bylaw respecting discretionary use development permits when DP2011-3062 was issued.
- In addition, he explained that the light fixture is attached to an over-hang on the west wall of the subject site, at the top of the landing of the stairwell, rather than above the actual entry door to the secondary suite which is nine steps below grade. He

explained that the individual lights are adjustable and can be pointed in a wide arc, subject only to the adjustment by the owner or his tenants. He added that the shielding requirements respecting exterior lighting fixtures are set out in section 63 of the Land Use Bylaw where:

> 63(1) All outdoor light fixtures must be aimed and shielded in a manner that does not direct illumination onto a street or adjacent residential uses.
>
> 63(2) Unless otherwise reference in subsection (3), all outdoor light fixtures must not emit light above the horizontal plane at the bottom of the light fixture.
>
> 63(3) Outdoor light fixtures may emit light above the horizontal plane at the bottom of the light fixture only where the light fixture:
>
> (a) is used for accent lighting; or
>
> (b) has a luminaire wattage 150 watts or less and does not contain a:
>
> (i) mercury vapour luminaire;
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> (ii) metal halide luminaire; or
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> (iii) high pressure sodium luminaire; or
>
> (c) [ ]

- The appellants concede that the wattage or type of light bulbs installed in the exterior light fixture is not known but submit that, notwithstanding the wattage or type of bulb, the entry lights shine directly and indirectly into their bedroom windows whenever the motion sensor is activated. They added that the entry lights are not accent lights, such that light cannot be permitted to emit above the horizontal plane of the bottom of the fixture. Also, in the plans submitted to the Development Authority, the exterior lighting was not included or indicated where it would have been placed or was proposed to be placed.
- The appellant's representative submitted that the placement of the exterior light fixture has caused a material interference with and affects the use, enjoyment and value of the neighbouring property contrary to the provisions of sections 31 and 36 of the Land Use Bylaw.
- He then elaborated on the issue of amenity space. He quoted section 353 of the Land Use Bylaw which states:

353 A secondary suite, secondary suite-detached garage and secondary suite-detached garden must have a private amenity space that:

(a) is located outdoors;

(b) has a minimum area of 7.5 square metres with not dimension less than 1.5 metres; and

(c) is shown on a plan approved by the Development Authority.

The Land Use Bylaw also provides that:

13(20) "building" includes anything constructed on placed on, in, or under land, but does not include a highway or public roadway or a bridge forming part of a highway or public roadway;

436(1) For a laned parcel, the minimum building setback from any side property line is 1.2 metres.

- He further submitted that the amenity space was included in the approved plans. However, in his opinion, it does not meet the provisions of sections 353 and 436 of the Land Use Bylaw. The amenity space as provided on the plan is located immediately adjacent to the property line between the subject property and the appellants' property, which property line is located 1.77 metres from the subject property. He added that there is no fence of any kind located on the property line between the two properties which would act as a barrier or otherwise set the amenity space apart from the appellants' property. As section 353 provides that no dimension of the amenity space may be less than 1.5 metres, the installation of the amenity space in the indicated area will result in a setback distance of 0.22 metres from the side property line, far less than the 1.2 metres mandated under section 436(1) of the Land Use Bylaw. The amenity space as approved is immediately adjacent to the appellants' bedroom windows and materially interferes with or affects their use, enjoyment and value of their property.
- Both the appellants and the subject property are located in the Banff Trail community and are subject to the relevant provisions of the Banff Trail/Motel Village Area Redevelopment Plan (ARP) which is a statutory document enacted as Bylaw 7P86. Section 35 of the LUB mandates that the Development Authority must take into account any plans and policies affecting the parcel, and in the appellants' opinion, the Development Authority did not take into account the provisions of the ARP when approving the development permit. Also, being in the Banff Trail community, both properties are located in what is considered to be an "Established Community" in accordance with the provisions of the Low Residential Housing Guidelines for Established Communities, which is also a statutory document of The City of Calgary.
- The guidelines are a further plan or policy affecting the parcel, which would have been considered by the Development Authority pursuant to section 35 of the Land

Use Bylaw. He quoted sections 4.5.1 and 4.5.2 of the guidelines with respect to this appeal and these submissions that included provisions relating to privacy and to entryways. The appellants submit that both components of the guidelines have not been addressed by the Development Authority as required pursuant to section 35 of the Land Use Bylaw.

- He then concluded that the development permit should be cancelled due to the following reasons:

    - Conditions attached to the approved permit have not been complied with and the plan has been modified by the installation of entry lights without the approval of the Development Authority;
    - The development permit application contained misrepresentations of the status of the secondary suite at the time the application was made;
    - Suite has been occupied virtually continuously since its first occupation in January 2006 and remains occupied as of this date without the issuance of a development completion permit;
    - The plans do not comply with all the requirements and rules of the Land Use Bylaw such that the Development Authority is then mandated to apply the test set out in either section 31 or 36 of the Land Use Bylaw;
    - The approval has materially interfered with, or affected the use, enjoyment or value of the appellants' property;
    - Privacy for the appellants has been repeatedly and continuously interfered with since the secondary suite was installed; and
    - The Development Authority granted the approval without due consideration of the relevant sections of the Land Use Bylaw, provisions of the ARP and the Low Residential Housing Guidelines for Established Communities.

Mrs. Mabley also addressed the Board and submitted that it has been a very frustrating process to find an answer from The City regarding her concerns. She added that the only time she received an answer was when she filed a complaint about the secondary suite, which then prompted the property owner to apply for the development permit. She reiterated that their enjoyment, use and value of their property are materially affected by this secondary suite.

Opposed to the Appeal:

Counsel for the applicant distributed documentation to the Board including photographs and raised the following points in opposition to the appeal:

- Ms. Fordyce submitted that the Land Use Bylaw 1P2007 changed September 19, 2011 and the approval and decision from the Development Authority was September 30, 2011. The decision affects section 425(1) (f.1) of the Land Use Bylaw which allocates secondary suites as a permitted use.

- She pointed out that section 685(3) of the *Municipal Government Act* states:

  > 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 and misinterpreted.

- She added that in this case, the provisions of the Land Use Bylaw were not relaxed, varied or misinterpreted and as such no appeal lies for the appellants.
- Ms. Fordyce also addressed the ARP, section 2.1.1(c), which raises the objectives to ensure the availability of a variety of housing types within the community. She added that that would include single detached dwellings as well as secondary suites and other types of housing units.
- She further quoted section 2.1.2(a) of the ARP which, among other things, states:

  > there is a sense of order and attractiveness of the streetscape provided by consistent building height, setback, and individual front entry to dwelling units and well maintained front yards with attractive landscaping.
  >
  > a number of the single detached houses have been converted into rental units through the addition of suites. This is quite common in the neighbourhood.

- In her opinion, the ARP does actually address the existence of secondary suites in the community.
- Counsel then addressed the ARP specifically regarding the issue raised by the appellants' representative on page 10 of their submission, which discusses the placement of windows and section 4.5.2 of the Low Residential Housing Guidelines of Established Communities, which deals with the entry treatment and entrances. She described the windows of the secondary suite, then explained that in order to be able to see out of them, one would have to be very tall, as they are located near the ceiling of the secondary suite, and that the ARP specifically says windows and balconies should be carefully placed and oriented away from neighbouring yards to protect their privacy. She then submitted that because of the high placement of these windows, it is unlikely that the occupants of the secondary suite will be looking out into neighbouring yards and impacting neighbours' privacy.
- Further, she addressed section 4.5.2 of the ARP in regards to entrances where it states:

  > ...principal entry from the front is encouraged for reasons of visibility and the privacy aspect.

- She explained that the entrance door of the secondary suite is below grade and not on grade. Therefore it is not truly adjacent to the neighbouring bedroom windows.
- With respect to the amenity space, the counsel submitted that section 13(110) of the Land Use Bylaw explains private amenity space as amenity space provided for the use of the occupants of only one unit, and that is shown in the approved plans. Also, the entrance to the secondary suite is at the base of a set of nine stairs. She added that section 334(2) of the Land Use Bylaw has two important rules where it suggests that portions of a building located above the surface of the ground may project into setback area in accordance with the rules and the part and section 334(3) portions of a building below the surface of the ground may extend without limit into the setback area.
- She elaborated that in this application, the stairwell and the entrance itself are all below grade, and therefore, in accordance with the Bylaw, they may extend without any limits into the setback area. Therefore, the only portions in question are above grade, and that refers to section 337 in the Land Use Bylaw which cover projections into a side setback area specifically where it states:

  > Portions of a building less than 2.4 metres above grade which would include the overhang and window wells may project to the maximum of .6 metres into a side setback area.
  >
  > ..and where at least one side setback area is clear of all central air-conditions, window wells and portions of the building measured from grade to the height of 2.4 metres.

- She further noted that on the east side of the building, there is complete clear access with no intrusions into the setback area. The only intrusion is located on the west side of the building at the site of the amenity space, but no part of the intrusion is greater than the allowances stipulated in the Land Use Bylaw.
- She then drew the Board's attention to page 13 of the Board report, where the bylaw check was conducted by the Development Authority, where it is noted that for a laned parcel the minimum building setback for any side property line is 1.2 metres and that the new covered stairwell, which includes the area around the amenity space, is actually 1.3 metres, meaning that there is 0.1 metres distance which is not being used that is part of the allowable space.
- Furthermore, she submitted that the eaves may project maximum of 0.6 metres into side setback area and the eaves on the subject side projects only 0.08 metres into the setback area which conforms to the Land Use Bylaw.
- Mr. Davis also addressed the Board and submitted that with respect to policies the ARP is a statutory plan and it has relevance, but the Infill Guidelines is a policy document and not a statutory plan.
- He then addressed the issue of the lighting, and indicated that, in practical terms, to put in an external light, one does not need a permit, and in his understanding, to do some renovations for inside the house and maintenance for the exterior, one does not need a permit.

- He quoted section 63(1() of the Land Use Bylaw where:

  > All outdoor light fixtures must be aimed and shielded in a manner that does not direct illumination onto the street or adjacent residential uses.

- He submitted that the property owners have a light under the overhang that directs light downwards and towards the entry and does not directly shine light at the neighbours. In his view, the light the appellants are experiencing may be disturbing, but it is not direct light.
- Mr. Davis quoted 63(2) of the Land Use Bylaw which states:

  > Unless otherwise reference in subsection (3), all outdoor light fixtures must not emit light above the horizontal plane at the bottom of the light fixture.

- He submitted that the property owners have a double flood lights with 40 watt with a motion-sensor that goes on for 30 seconds to one minute, which, in his opinion, seem to be an appropriate time for safety and security reasons in entering a premise whether it is for secondary suites or for any entry. He also added that the light fixture is within the covered porch area underneath the overhang and should prevent direct lighting onto the windows of the adjacent neighbours.
- He further quoted section 63(3):

  > Outdoor light fixtures may emit light above the horizontal plane at the bottom of the light fixture only where the light fixture:
  >
  > (a) is used for accent lighting; or
  >
  > (b) has a luminaire wattage 150 watts or less and does not contain a:
  >
  > (i) mercury vapour luminaire;
  >
  > (ii) metal halide luminaire; or
  >
  > (iii) high pressure sodium luminaire; or

- He submitted that those lights tend to be used in commercial fixtures and used in a larger construction, whereas the light fixture in the subject property is an incandescent spot light with 40 watt wattage. He then added that while historically lighting has not been a focus of planning review, the lighting in use in this application is in conformance with the Land Use Bylaw.
- They understand there are concerns raised by the appellants but the property owners indicated they are seeking a successful outcome which would be for the Board to deny the appeal and in that case the Board cannot issue conditions.

The development permit is already issued but the property owners will consider voluntarily erecting a six foot fence, landscaping and trees which in their opinion would be appropriate in the side yard or amenity space. He added that it is not something that the Board can enforce or order but that the property owners are prepared to consider making those improvements to try and reduce any negative impacts on the neighbours' property. He submitted that the Development Authority made the appropriate decision, that the application does meet all the requirements of the Land Use Bylaw as it existed on the date of the approval, and in complying with the Land Use Bylaw the Development Authority had no alternative but to issue the permit.

Decision:

In determining this appeal, the Board:

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

The appeal is struck.

Reasons:

1 Having considered the written, verbal, and photographic evidence submitted, the Board notes that the appeal pertains to an approval by the Development Authority of a development permit for a change of use to secondary suite at 2728 Morley Trail NW. The property has a land use designation of Residential – Contextual Two Dwelling (R-C2) District pursuant to Land Use Bylaw 1P2007.

2 The Board has particular regard to the following sections of the *Municipal Government Act*, RSA 2000, cM-26, as amended:

Section 642(1) states:

> **642(1)** When a person applies for a development permit in respect to a development provided for by the land use bylaw pursuant to section 640(2)(b)(i), the development authority must, if the application otherwise conforms to the land use bylaw, issue a development permit with or without conditions provide for in the land use bylaw.

Section 685 states:

Grounds for appeal

685(1) If a development authority

(a) fails or refuses to issue a development permit to a person,

(b) issues a development permit subject to conditions, or

(c) issues an order under section 645,

the person applying for the permit or affected by the order under section 645 may appeal to the subdivision and development appeal board.

(2) In addition to an applicant under subsection (1), any person affected by an order, decision or development permit made or issued by a development authority may appeal to the subdivision and development appeal board.

(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 have been relaxed, varied or misinterpreted.

3 The Board has particular regard to the following sections of Land Use Bylaw 1P2007 including but not limited to:

Section 28(1) states:

Permitted Uses That Meet All Requirements

28 **(1)** Where a ***development permit*** application is for a ***permitted use*** in a ***building*** or on a ***parcel*** and the proposed ***development*** conforms to all of the applicable requirements and rules of this Bylaw, the ***Development Authority*** must approve the application and issue the ***development permit***.

Section 30 states:

Permitted Uses That Do Not Meet All Requirements

30 Where a ***development permit*** application is for a ***permitted use*** in a ***building*** or on a ***parcel*** and the proposed ***development*** does not conform to all of the applicable requirements and rules of this Bylaw, the ***Development Authority*** may:

(a) refuse to approve the ***development permit*** application; or

(b) approve the ***development permit*** application and grant a relaxation of the requirement or rule to which the proposed ***use*** does not conform.

Section 31 States:

Test for a Relaxation

31 The ***Development Authority*** may approve a ***development permit*** application for a ***permitted use*** where the proposed ***development*** does not comply with all of the applicable requirements and rules of this Bylaw if, in the opinion of the ***Development Authority***:

(a) the proposed ***development*** would not unduly interfere with the amenities of the neighbourhood or materially interfere with or affect the ***use***, enjoyment or value of the neighbouring properties; and

(b) the proposed ***development*** conforms with a ***use*** prescribed by this Bylaw for that land or ***building***.

Section 295 states:

295 "Secondary Suite"

(a) means a ***use*** where a second, self-contained **Dwelling Unit** is located within a **Contextual Single Detached Dwelling** or **Single Detached Dwelling**;

(b) is a ***use*** within the Residential Group in Schedule A to this Bylaw;

(c) requires a minimum of 1.0 ***motor vehicle parking stalls***; and

(d) does not require **bicycle parking stalls – class 1** or **class 2**.

Section 351(1) states:

Secondary Suite – Setbacks

351 (1) For a **Secondary Suite** the minimum ***building setback***:

(a) from a ***front property line***, must be equal to or greater than the minimum ***building setback*** from the ***front property line*** for the ***main residential building***;

(b) from a ***rear property line***, must be equal to or greater than the minimum ***building setback*** from the ***rear property line*** for the ***main residential building***; and

(c) from a ***side property line***, must be equal to or greater than the minimum ***building setback*** from the ***side property line*** for the ***main residential building***.

Section 353 states:

> **Secondary Suite – Outdoor Private Amenity Space**
>
> **353** A **Secondary Suite**, **Secondary Suite – Detached Garage** and **Secondary Suite – Detached Garden** must have a ***private amenity space*** that:
>
> (a) is located outdoors;
>
> (b) has a minimum area of 7.5 square metres with no dimension less than 1.5 metres; and
>
> (c) is shown on a plan approved by the ***Development Authority***.

Section 436(1) states:

> **Building Setback from Side Property Line**
>
> **436** **(1)** For a ***laned parcel***, the minimum ***building setback*** from any ***side property line*** is 1.2 metres.

Section 425 (1)(f.1) lists "Secondary Suite" as a permitted use in the R-C2 District.

4 The Board also has particular regard to sections 13, 35, 36, and 63 of Land Use Bylaw 1P2007 and any other relevant sections referred to by the parties.

5 The Development Authority confirmed that the application was made for a change of use for a secondary suite, and it concluded that because the proposed development conforms to all the rules and requirements of Land Use Bylaw 1P2007, it must be approved.

6 Pursuant to section 425 (1)(f.1) of Land Use Bylaw 1P2007 the use of "Secondary Suite" is a permitted use in the R-C2 District.

7 Under the scheme of the *Municipal Government Act* and Land Use Bylaw 1P2007, and its operations, if an application is made for a development permit for a permitted use that complies with all rules and requirements of the Land Use Bylaw in effect, the Development Authority is required to issue a development permit. The express wording of section 685(3) of the Act provides that there is no right to an appeal if a development permit for a permitted use is issued by the Development Authority and the provisions of the Land Use Bylaw were not relaxed, varied or misinterpreted.

8 The Board acknowledges that the appellants are of the opinion that the development does not comply with all of the requirements and rules of the Land Use Bylaw, namely those of section 63, regarding the shielding of outdoor lighting that was installed to

illuminate the entrance to the secondary suite. The appellants further explained that light from the motion-sensitive light fixture above the secondary suite entrance shines directly into the Mableys' bedroom window, and thereby causes an adverse impact on them. The appellants explained that it is a two-headed light fixture, with one head directed outward from that wall, and thereby shines light directly toward the neigbours' window. The second head of the light fixture is oriented to point down the stairs toward the entrance of the secondary suite.

9 The Board notes that no light fixtures are shown on the plans associated with the application. Therefore the Development Authority had no ability to assess these fixtures. Furthermore, the Development Authority explained that it typically does not review or assess development applications for residential uses in the context of section 63. The Board accepts the Development Authority's evidence in this regard. In the Board's opinion, the provisions of Division 4 of the Bylaw are more of a regulatory nature which apply in general to all properties within the City, irrespective of whether or not development permit applications are made for such properties.

10 Based on the evidence presented at the hearing, it is the Board's interpretation that the outdoor light fixture in question is likely a conventional-style outdoor light fixture with two moveable heads, or floodlight bulbs, which is commonly available and frequently used by residential home-owners to illuminate areas of their property for safety and security purposes. Furthermore, it is the Board's opinion that the light fixture in question is not the type of lighting or light fixture that is contemplated by sections 62 and 63 of Land Use Bylaw 1P2007. Rather, having regard to a purposive and contextual interpretation of the Bylaw, the Board finds it a reasonable interpretation that the lighting rules as contained in division 4 of Land Use Bylaw 1P2007, and all of sections 62 through 66 contained therein, likely are intended to pertain to commercial, industrial or other large scale lighting applications, and that the intent of these sections of the Bylaw was not to include, pertain to or constrict conventional, small-scale, residential or home-based light fixtures. Based on the evidence presented, the lighting in question is exactly that: a conventional, small-scale, residential and home-based light fixture. Therefore, the Board finds that the proposed development in this regard does not contravene the outdoor lighting rules of division 4 of the Land Use Bylaw.

11 The appellants submitted that the amenity space for the secondary suite contravenes the Land Use Bylaw. The Board notes from photographic evidence presented that the amenity space intended for the secondary suite appears to extend along the entire west side yard of the dwelling, and is likely not merely confined to the north west corner of the dwelling/ side yard, as indicated on the site diagram of the decision-rendered plans (large scale plan 1/8 of the Board's report). To that end, it is the Board's position that, although a side yard is neither an optimum nor a desirable location for amenity space, the location does not contravene the Land Use Bylaw. All that section 353 requires is that the amenity space for the secondary suite is: (a) located outdoors; (b) has a minimum of 7.5 square metres with no dimension less than 1.5 metres; and (c) is shown on the plans approved by the Development Authority. The Board, based on the evidence, finds that the size and location of the amenity space as

shown on the approved plans does conform to section 353 of Land Use Bylaw 1P2007. Whether the amenity space shown on the plans indeed is used as amenity space or that other areas of the side yard are also used as amenity space by the residents of the secondary suite as asserted by the appellants, this is an enforcement issue which is not to the purview of the Board but is rather to the purview of the Development Authority.

12 The Board acknowledges the frustrations of the appellants regarding close proximity to the amenity space of an adjacent neighbour, and that the appellants contend that the amenity space provided for the secondary suite does not meet the provisions of either section 353 of the Land Use Bylaw, regarding the size of the amenity space, or section 436 of the Land Use Bylaw, regarding the building setback from the side property line. However, as mentioned above, the Board finds that the size of the minimum required area of the amenity space provided for the secondary suite, as indicated on the site plan, which is included in the decision-rendered plans, does comply with section 353 of the bylaw. Furthermore, regarding the location of the amenity space for the secondary suite being along the side yard of the dwelling, the Board notes that Land Use Bylaw 1P2007 does not prohibit the extension of required amenity spaces into side yard setbacks.

13 From the photographic evidence presented at the hearing, the Board notes that the entire west side yard of the dwelling could be used as amenity space for the secondary suite. This side of the dwelling contains a concrete walkway, which appears to extend the entire length of the dwelling, from the front of the property to the rear, and the southernmost portion of the walkway (i.e. nearest front of the dwelling) appears to be a wider, patio-like area.

14 The appellants contend that these concrete surfaces should be considered part of the definition of “building,” as per section 13 of the Land Use Bylaw, and, as a result, the appellants further contend that the “building” extends into the minimum required side yard setback under the Bylaw, thereby contravening section 436 of the Land Use Bylaw. However, the Board notes from the decision-rendered site plan and from the photographic evidence, specifically “Exhibit B” provided by the appellants, that the wider portion of the walkway/ patio area along the west side yard is nearest the front (southernmost) end of the dwelling, and that it appears to be, according to the site plan, more than 1.2 metres from the side property line.

15 It is the Board’s opinion that, based on the evidence presented, in this case, the concrete walkway along the west side of the building, including the widened concrete area near the front of the dwelling, serves to provide access from the front of the property to the secondary suite entrance and to the rear of the property, and are not considered to be part of the building. The Board therefore does not accept the appellants’ argument. Based on a purposive and contextual interpretation of the bylaw, the Board finds that under the scheme of Land Use Bylaw 1P2007 and its operations, walkways and concrete surfaces are not considered part of a “building” as defined in section 13 of the Bylaw. The Bylaw stipulates a minimum building setback for residential dwellings of 1.2 metres from any side property which is the side setback area. It is of

note that the Bylaw, section 334(4), specifically allows patios (which according to its definition in section 13 is an outdoor amenity space) and wheelchair ramps may project without limits into a setback area. The 1.2 metre side setback is measured from the property line to the side façade of the building. In this case the existing dwelling (i.e. the building) complies with the minimum required building setback pursuant to the Bylaw.

16 Therefore, the Board, based on the evidence and the aforementioned factors, finds that there is no contravention of Land Use Bylaw 1P2007 regarding the size or location of the amenity space for the secondary suite, or regarding the minimum required side setback area and building setback.

17 The Board reviewed all the evidence and applicable sections of Land Use Bylaw 1P2007. The Board accepts the measurements as indicated on the decision-rendered plans.

18 Based on the evidence, the Board agrees with the Development Authority and determines that the subject development in all aspects meets the rules and requirements of Land Use Bylaw 1P2007 for such use.

19 With respect to the appellants' argument that at the time of the application the use of "Secondary Suite" was a discretionary use within the applicable R-C2 District, the Board notes the following. In the Board's opinion, nothing turns on this argument. Relevant is the Land Use Bylaw 1P2007 in effect at the time the Development Authority approved the subject development and use and issued the subject development permit, not the provisions of the Bylaw in force at the time the application was made. Furthermore pursuant to section 687(3)(a.1) of the *Municipal Government Act,* in determining an appeal, the Board must among other things comply with the Bylaw in effect. Under Land Use Bylaw 1P2007 in effect, as stated above, the subject development and use is a permitted use. Therefore, sections 35 and 36 of the Land Use Bylaw, as referred to by the appellants, do not apply in this case. Furthermore, the applicant could at any time make a new application and the current Land Use Bylaw 1P2007 would govern in any event.

20 In addition, as the application is for a permitted use development and the Bylaw is not varied or relaxed, the ARP and the Low Density Residential Guidelines for Established Guidelines (Infill Guidelines) do not apply. Within the scheme of Land Use Bylaw 1P2007 and its operations, the ARP (which is a statutory plan) and the Infill Guidelines (which is a non-statutory policy plan of The City of Calgary) would only apply in the case where the application is for a discretionary use and the Development Authority pursuant to section 35 of Land Use Bylaw 1P2007 the aforementioned documents must take in account when exercising its discretion.

21 Finally, the appellants submitted that the conditions of the issued development permit are contravened (for example the suite being occupied without obtaining a development completion permit and that the residents of the secondary suite interfere

with the appellants' privacy and their use and enjoyment of their property). The Board finds that potential violations of the conditions of a development permit are enforcement issues which are to the purview of the Development Authority pursuant to the *Municipal Government Act* and the Land Use Bylaw. This is not to the purview of the Board. The appellants have the remedy to file a complaint with the Development Authority about non-compliance of development permit conditions or pursue other remedies available to them.

22 In reviewing and weighing all of the evidence, the Board finds that with respect of the development there is no relaxation, variance, or misinterpretation of the provisions of Land Use Bylaw 1P2007.

23 In accordance with section 685(3) of the *Municipal Government Act*, the Board thus finds that no appeal lies with the respect to the issuance of the development permit for the subject use and development.

24 Therefore, the Board has no jurisdiction to deal with the issues raised by the appellants against the subject development.

25 Consequently, the appeal is struck and the decision of the Development Authority is upheld.

M.A. (Meg) Bures, Presiding Officer
Subdivision and Development Appeal Board

Issued on this 25th day of November, 2011