EDMONTON
TRIBUNALS
Subdivision & Development Appeal Board

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Date: May 20, 2016
Project Number: 186028989-003
File Number: SDAB-D-16-115

Notice of Decision

[1] On May 5, 2016, the Subdivision and Development Appeal Board heard an appeal that was filed on **April 6, 2016**. The appeal concerned the decision of the Development Authority, issued on March 29, 2016, to refuse the following development:

To develop a Secondary Suite in the Basement of a Single Detached House

[2] The subject property is on Plan 1525670 Blk 5 Lot 15B, located at 11418 - 62 Street NW, within the RF1 Single Detached Residential Zone. The Mature Neighbourhood Overlay applies to the subject property.

[3] The following documents, which were received prior to the hearing and are on file, were read into the record:

- A Development Permit Application, including the plans of the proposed Development;
- The refused Development Permit; and
- The Development Officer's written submissions.

[4] The following exhibits were presented during the hearing and form part of the record:

(a) Exhibit A – Site plan for the proposed Development
(b) Exhibit B – Three signatures of support from residents within the 60 metres notification radius
(c) Exhibit C – "No Objection" letter from the Highlands Community League

Preliminary Matters

[5] At the outset of the appeal hearing, the Presiding Officer confirmed with the parties in attendance that there was no opposition to the composition of the panel.

[6] The appeal was filed on time, in accordance with Section 686 of the *Municipal Government Act*, R.S.A 2000, c. M-26.

Summary of Hearing

i) Position of the Appellant, Dylan Handy

[7] The Edmonton Zoning Bylaw provides a minimum Site area to ensure a proposed development meets the minimum required setbacks, minimum required amenity area and the minimum required number of parking spaces.

[8] If the proposed development meets all the minimum requirements, then a deficiency in the minimum required Site area should not be an issue and the "spirit of the legislation" is being met.

[9] City Council is encouraging the development of secondary suites as it increases density in older neighbourhoods, without using more green space, and provides more affordable housing to a greater number of individuals.

[10] The proposed development will be situated on what was one lot, which was created when a larger lot was subdivided into two lots. Originally there was a Single Detached House with a huge side yard. That Single Detached House is being preserved on one lot and another Single Detached House with the proposed Secondary Suite is being built on the subject lot. This new Single Detached House was approved with no variances, and meets the required setbacks and has sufficient amenity area. Four parking spaces are proposed, which exceeds the minimum required when a secondary suite is included (see Exhibit "A").

[11] The Development Officer in his Justifications for Refusal stated "that the intent of the subdivided narrow lots is to allow for only two single family dwellings where only one existed [and] with the addition of a secondary suite this would increase the number of dwellings beyond the two permitted." However, once a subdivision occurs, there are now two separate titles. There is no specific section in the Edmonton Zoning Bylaw that states a secondary suite cannot be developed on a subdivided lot.

[12] The Appellant spoke to approximately 15 individuals in the 60 metres notification radius. The three people who signed were solidly in support of the proposed development and are the most affected neighbours (see Exhibit "B"). Some individuals were neutral about the proposed development and did not want to sign the petition. One neighbour objected to the proposed development. She did not want any changes in her neighbourhood. The Community League typically does not take a position with proposed development, but was generally in support of secondary suites and had no opposition to the proposed development (see Exhibit "C").

[13] Notices regarding the Appeal were also sent to affected neighbours and no letters of support or opposition were received. It was confirmed that even though the Site is

located in the Mature Neighbourhood Overlay, there is no variation to any development regulation in that overlay. Therefore, the Appellant is under no specific duty to perform a community consultation.

[14] The Appellant clarified that it is common to have a shared laundry area, especially with a smaller Single Detached House.

[15] The Appellant has no issues with any of the conditions suggested by the Development Officer. This includes providing the parking set out in the site plan.

ii) Position of the Development Officer, Kenneth Yeung

[16] The Development Officer generally agreed with the Appellant's submission that although the proposed development is deficient in the minimum required Site area, if sufficient setbacks, amenity area and parking spaces are provided, then the "spirit of the legislation" has been met.

[17] The Development Officer stated that a Secondary Suite is considered a Dwelling; however, he conceded that as per Section 86.9 of the Zoning Bylaw, it is not to be included in the calculation of density, and increased density should not be listed as a reason for refusal.

[18] There is no section in the Edmonton Zoning Bylaw that prevented the Development Officer from giving a variance to the minimum required Site area on a subdivided lot if he chose to.

[19] The conditions suggested are standard conditions imposed on all Secondary Suites. However, Condition #11 is not applicable and should be removed.

[20] The Development Officer confirmed that the site plan submitted as Exhibit A was identical to the plans he reviewed.

iii) Rebuttal of the Appellant

[21] The Appellant had nothing to add in Rebuttal.

Decision

[22] The appeal is ALLOWED and the decision of the Development Authority is REVOKED. The development is GRANTED as applied for to the Development Authority, subject to the following CONDITIONS:

1. This Development Permit authorizes the development of a Secondary Suite in the Basement of a Single Detached House. It does not authorize any other additions or exterior alterations to the principal building.

2. A Secondary Suite shall be developed in such a manner that the exterior of the principal building containing the Secondary Suite shall appear as a single Dwelling. (Reference Section 86.4)

3. Only one of a Secondary Suite, a Garage Suite or Garden Suite may be developed in conjunction with a principal Dwelling. (Reference Section 86.5)

4. A Secondary Suite shall not be developed within the same principal Dwelling containing a Group Home or Limited Group Home, or a Major Home Based Business, unless the Secondary Suite is an integral part of a Bed and Breakfast Operation in the case of a Major Home Based Business. (Reference Section 86.6)

5. Notwithstanding the definition of Household within this Bylaw, the number of unrelated persons occupying a Secondary Suite shall not exceed three. (Reference Section 86.7)

6. The Secondary Suite shall not be subject to separation from the principal Dwelling through a condominium conversion or subdivision. (Reference Section 86.8)

7. Parking shall be provided in accordance with the stamped and approved drawings.

8. 1 parking space per 2 Sleeping Units shall be provided in addition to the parking requirements for primary Dwelling. Tandem Parking is allowed for Secondary Suites and Garage Suites. (Reference Section 54.2, Schedule 1(2))

9. The minimum width of the each required parking stall shall be 2.6 metres by 5.5 metres. (Reference Section 54.2(4)(a)(i))

10. All required parking shall be clearly demarcated, have adequate storm water drainage and storage facilities, and be Hardsurfaced. (Reference Section 54.6(1)(a)(i))

NOTES:

1. Locked separation that restricts the nonconsensual movement of persons between each Dwelling unit shall be installed.

2. An approved Development Permit means that the proposed development has been reviewed only against the provisions of the Edmonton Zoning Bylaw. It does not remove obligations to conform with other legislation, bylaws or land title

instruments such as the *Municipal Government Act*, the ERCB Directive 079, the Edmonton Safety Codes Permit Bylaw or any caveats, covenants or easements that might be attached to the Site.

3. Unless otherwise stated, all above references to "section numbers" refer to the authority under the Edmonton Zoning Bylaw 12800.

In granting the development the following variances to the *Zoning Bylaw* are allowed:

1. The deficiency of 29 square metres in the 360 square metres minimum required Site area is allowed to permit a Site area of 331 square metres.

Reasons for Decision

[23] A Secondary Suite is a Permitted Use in the RF1 Single Detached Residential Zone.

[24] The Edmonton Zoning Bylaw does not prohibit the development of a Secondary Suite on a subdivided lot.

[25] Further, Section 86.9 of the Edmonton Zoning Bylaw states that Secondary Suites shall not be included in the calculation of densities in this Bylaw.

[26] The proposed development requires no alterations to the Single Detached House in which it will be constructed. That Single Detached House was approved with no variances. It complies with the setbacks and amenity area regulations. Plus four on-site parking spaces are proposed, exceeding the three required parking spaces.

[27] The Board notes that the Development Officer generally agreed with the Appellant's submission that although the proposed development is deficient in the minimum required Site area, if sufficient setbacks, amenity area and parking spaces are provided, then the "spirit of the legislation" has been met.

[28] Thus, the Board finds the proposed development is not an overdevelopment of the site.

[29] Although not required to do so, the Appellant submitted evidence of community consultation, including the Community League. The evidence showed a mix of support for, or lack of opposition to, the proposed development.

[30] The Board is satisfied that the conditions imposed will mitigate any potential adverse effect from the proposed development.

[31] The Board finds, based on the evidence submitted, the proposed development would 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.

Ms. K. Cherniawsky, Presiding Officer
Subdivision and Development Appeal Board

Board Members:
Ms. C. Chiasson
Ms. P. Jones
Ms. A. Lund
Mr. L. Pratt

Important Information for the Applicant/Appellant

1. This is not a Building Permit. A Building Permit must be obtained separately from the Sustainable Development Department, located on the 5th Floor, 10250 – 101 Street, Edmonton.

2. Obtaining a Development Permit does not relieve you from complying with:

    a) the requirements of the *Edmonton Zoning Bylaw*, insofar as those requirements have not been relaxed or varied by a decision of the Subdivision and Development Appeal Board,
    b) the requirements of the *Alberta Safety Codes Act*,
    c) the *Alberta Regulation 204/207 – Safety Codes Act – Permit Regulation*,
    d) the requirements of any other appropriate federal, provincial or municipal legislation,
    e) the conditions of any caveat, covenant, easement or other instrument affecting a building or land.

3. When an application for a Development Permit has been approved by the Subdivision and Development Appeal Board, it shall not be valid unless and until any conditions of approval, save those of a continuing nature, have been fulfilled.

4. A Development Permit will expire in accordance to the provisions of Section 22 of the *Edmonton Zoning Bylaw, Bylaw 12800*, as amended.

5. This decision may be appealed to the Alberta Court of Appeal on a question of law or jurisdiction under Section 688 of the *Municipal Government Act*, R.S.A. 2000, c. M-26. If the Subdivision and Development Appeal Board is served with notice of an application for leave to appeal its decision, such notice shall operate to suspend the Development Permit.

6. When a decision on a Development Permit application has been rendered by the Subdivision and Development Appeal Board, the enforcement of that decision is carried out by the Sustainable Development Department, located on the 5th Floor, 10250 – 101 Street, Edmonton.

NOTE: The City of Edmonton does not conduct independent environmental checks of land within the City. If you are concerned about the stability of this property for any purpose, you should conduct your own tests and reviews. The City of Edmonton, when issuing a development permit, makes no representations and offers no warranties as to the suitability of the property for any purpose or as to the presence or absence of any environmental contaminants on the property.

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Date: May 24, 2016
Project Number: 173779193-001
File Number: SDAB-D-16-116

Notice of Decision

[1] On May 5, 2016, the Subdivision and Development Appeal Board heard an appeal that was filed on **April 11, 2016**. The appeal concerned the decision of the Development Authority, issued on April 6, 2016, to refuse the following development:

> **To construct a Single Detached House with front attached Garage, front veranda (4.32 metres by 2.97 metres), fireplace, and Basement development (NOT to be used as an additional Dwelling).**

[2] The subject property is on Plan 1223111 Unit 34, located at 34, 18343 - Lessard Road NW, within the DC2.853 Site Specific Development Control Provision. The Donsdale Neighbourhood Structure Plan and West Jasper Place South Area Structure Plan apply to the subject property.

[3] The following documents, which were received prior to the hearing and are on file, were read into the record:

- A Development Permit Application, including the plans of the proposed Development;
- The refused Development Permit;
- The Development Officer's written submissions; and
- The Appellant's written submissions.

[4] The following exhibits were presented during the hearing and form part of the record:

- Exhibit A – Letters of support for the proposed Development;
- Exhibit B – Subdivision Authority Letter of Approval dated December 5, 2013; and
- Exhibit C – Pictures of the proposed Development

Preliminary Matters

[5] At the outset of the appeal hearing, the Presiding Officer confirmed with the parties in attendance that there was no opposition to the composition of the panel.

[6] The appeal was filed on time, in accordance with Section 686 of the *Municipal Government Act*, R.S.A 2000, c. M-26.

Summary of Hearing

i) Position of the Appellant, James Murphy Q.C. and Kevin Haldane on behalf of Celebration Homes Inc.

[7] The issue before the Board is very unique and a result of several errors.

[8] The entire site is a seniors-oriented Continuing Care Retirement Community with low and medium density housing and institutional Uses plus a variety of ancillary Uses. The "ring of houses" are laid out similar to a RSL development and built right out to the building pocket. They require limited 1.2 metres Side Setbacks to accommodate minimal yard work.

[9] Touchmark developed three houses north of the proposed development (Units 35, 36 and 37), which included decks that inadvertently extended into a Municipal Reserve space located at the rear of the properties.

[10] To accommodate for this mistake, the Developer and the City arranged a land swap. The Developer would receive the portion of the Municipal Reserve improperly occupied by the decks on Units 35, 36 and 37 and, in exchange, the City would receive an equal amount of land from behind the subject Site, Unit 34. The Developer decided to just incur this latter amount because it had an extra 4.5 metres on Unit 34 based on the Setback. Later, the Developer also moved the east Side Lot Line to add a 0.5 metres strip to Unit 34 from Unit 33.

[11] The property needed to be rezoned by City Council to reflect this reallocation. The land swap and rezoning occurred in 2013, but the new plan was not registered until 2016.

[12] In June, 2015, an application was made for the proposed development. When the Plot Plan was prepared, the surveyor used the original 2013 plan (that did not have the reduction of land that now was Municipal Reserve) as the new plan was not yet registered. Based on the Plot Plan from June 2015, the proposed development met the regulations of DC2.853, including the 1.2 metres Setback and the 4.5 metres minimum yard adjacent to the Wedgewood Ravine and the proposed park site (Section DC2.853.4, Area A, (c) and (g)).

[13] The Sustainable Development Department waited to issue the decision on the permit until the new 2016 plan was registered. If the Sustainable Development Department had proceeded based on the 2015 plan, the house would have been approved with no variances and then in 2016, would have become a legal non-conforming building. Construction started

on the proposed development on the assumption that it was an Allowed Use with no variances. The construction has since stopped.

[14] Unfortunately, once the plan was registered in 2016, Unit 34 lost some land to the Municipal Reserve, resulting in only 1.2 metres setback and no 4.5 metres minimum yard adjacent to the proposed park site. Thus, the Development Officer refused the Application.

[15] The Appellant attached in Tab 2 the Report to City Council that accompanied the 2013 rezoning and land swap and explained the purpose behind the land swap. Representations were made to City Council that the proposed land exchange was compatible with surrounding existing and planned land uses. The idea behind the land swap was that the City and the Developer would come out equal. No party would have agreed to the rezoning and the land swap if the building pocket of the proposed development was destroyed.

[16] The Appellant set out an extract from Laux, *Planning Law and Practice in Alberta*, Third Edition, in Tab 10, about appeals involving Direct Control zones. Sometimes it is difficult to determine if discretion has been left to a Development Officer to allow a variance. If there is some discretion left, the Subdivision and Development Appeal Board (SDAB) can hear the appeal. If there is some ambiguity in a Direct Control bylaw, the SDAB cannot be certain if the Development Officer followed the directions of Council because the directions are unclear, and thus the SDAB should embark on the appeal.

[17] In this case, the Appellant argued the Development Officer failed to follow the directions of Council because it intended that all parties involved would come out equal and with the Development Officer's decision to refuse, the eventual owner of the proposed development on Unit 34 would lose out.

[18] Further, there is ambiguity about the location where the setback should be measured from. When the bylaw setting the Direct Control first passed in 2011, there was no Municipal Reserve, therefore the bylaw was originally written so the yards would be measured from the park space proposed in the 2011 bylaw. The 2011 proposed park space was located 4.5 metres back from the actual park space that now exists.

[19] The Appellant maintained that the Development Officer should have read the word "proposed" from Section DC2.853.4, Area A, (g), as proposed from the original park location and not the existing park location created as a result of the land swap. That is the most reasonable interpretation of the section and any ambiguity should be resolved in favour of the Appellant. Further, the representation made to City Council was that reconfiguration would have no impact. The Municipal Reserve space is not being used as an active park; therefore the Appellant's proposed interpretation will have no impact on the surrounding properties. In contrast, the Development Officer's interpretation will have a huge impact on the Appellant. This approach is supported by the Alberta Court of Appeal in *1694192 Alberta Ltd.* v. *Lac La Biche*, 2014 ABCA 319, where the Court cited the well-known Supreme Court of Canada case *Rizzo* on statutory interpretation (Tab 11 of the Appellant's submission):

> The grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or some inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further.

[20] Touchmark owns and leases Units 35, 36 and 37. In fact, they still own the subject Site. But the client has been interested in the property for 3 years. Touchmark has provided a letter of support for the proposed development (Exhibit A).

[21] Unit 33 (adjacent property to the east of the proposed development) also lost property to Unit 34 as shown in the 2016 plan. Those owners have provided a letter of support for the proposed development (Exhibit A).

[22] If the proposed development was required to be built with a 4.5 metres setback from the Wedgewood Ravine and proposed park site, the development on Unit 34 would be out of character with the neighbourhood which is big houses on small lots.

[23] The Appellant advanced a second argument for the SDAB to consider if it rejects the first argument. Section 720.3(3) of the *Edmonton Zoning Bylaw* provides "all Regulations in the Zoning Bylaw shall apply to development in the Direct Control Provision, unless such Regulations are specifically excluded or modified in a Direct Control Provision." Therefore, Section 11.3, which provides the Development Officer's variance powers, applies because it was not specifically excluded. The Appellant cited *Thomas* v. *Edmonton (City)*, 2015 ABCA 30, in support of his proposition that Section 11.3 is a "Regulation" as per Section 720.3(3) of the *Edmonton Zoning Bylaw*.

[24] Thus, the Development Officer should have exercised her variance powers to approve a deficiency in the minimum yard adjacent to the Ravine and proposed park site. In the Appellant's opinion, Direct Controls are not so rigid that they do not allow variances. Those Direct Controls that provide specific variance powers do so to limit this otherwise generally applicable variance power. The Appellant could not provide any case authority to support this argument.

[25] The Appellant provided the following additional information in response to questions from the Board

i) When asked if the Appellant's interpretation of proposed park would not also have the impact of making the developments on Units 35, 36 and 37 non-conforming or contrary to the very development regulation that prompted the land swap, the Appellant indicated that might well be the case, but those units were not under appeal before the Board.

ii) The Appellant was aware of the swap, but not the plan. The Appellant was given the impression that the building pocket for Unit 34 would not change. When one looks at the specific new plan, one can see it should not have happened as it significantly reduces the building pocket.

iii) While he agrees that the subject property is now consistent, in terms of lot size, with an RSL lot, and the land is not truly sterilized for development, the Appellant clarified that

he meant that the development is like RSL only so far as people may build out to the edges of the property. He recognizes a smaller house can still be built on Unit 34. However, the Appellant made inquiries and was given assurances that the building pocket would not change.

iv) While he asserted that the wording of the analysis in the Report to Council accompanying the land swap application should be interpreted to mean the building pocket of Unit 34 would be unchanged, he acknowledged it could also simply mean zoning would be compatible with existing and planned Uses, including Single Detached Housing Uses regardless of their size. He doubted that Council intended to significantly reduce the building pocket, because the Touchmark development was known to Council as comprising big houses with no Side Yards.

v) The park site was created as a designated Municipal Reserve site in 2003 or 2004. It did not actually become a park site until 2011 when the Donsdale Neighbourhood Structure Plan renamed it as a park and when the original Direct Control zoning was applied. He did not have the appendix attachment to the 2011 bylaw which he asserted established the Direct Control and initially identified the proposed park. Later, with the land swap in 2013 and the subsequent registration of the plan of subdivision, the Municipal Reserve parcel became an "existing park" and it was no longer the "proposed park area."

vi) On its face, Section 720.3(3) applies to all Direct Controls and it is clear "All Regulations shall apply." The section is all encompassing and includes the regulation in Section 11 which gives the Development Officer variance powers. These powers exist unless the Direct Control states that the Development Officer does not have Section 11 variance powers. The 4.5 metres minimum yard requirement modifies the usual setback, but not the variance power. Nothing in DC2.853 modifies Section 11. Direct Controls may be written for specific cases, but in his opinion, they are not so hard and fast that exceptions cannot occur.

vii) When asked to explain why some Direct Controls include a variance power if it already exists, the Appellant stated this is usually a limit on variance powers to curtail the usual Section 11 power. He could not cite any section in the *Edmonton Zoning Bylaw* where Section 11 variance authority is ousted.

viii) The Appellant believes that minimum required yard is intended to be applied to only to active yards adjacent to the proposed park. Unit 34 does not have an active side yard and it is no longer adjacent to the proposed park so the regulation does not apply.

ix) When asked if his interpretation of "proposed park" would mean that Units 35, 36 and 37 were in violation, the Appellant indicated he could not disagree. He noted the Units might have difficulty obtaining compliance certificates as they are not 4.5 metres from the "proposed park." However, he stated the City will not challenge them and just because those units have a problem that should not mean that Unit 34 should have a problem. He argued the discussion itself showed the bylaw is ambiguous and at end of the day, Unit 34 is no longer adjacent to the proposed park, it is adjacent to the actual park.

x) When asked why the wording was not changed in the bylaw given the reason for the swap was the 4.5 metres yard requirement, he felt no one noticed the section because they were all told nothing would change.

xi) The Appellant agrees all parties knew the swap was happening, but they were assured it would not impact the building pocket. All the parties made errors which ultimately cost

the Appellant who is here today trying to avoid waiting a year to get the Direct Control changed or being required to tear down the house.

ii) Position of the Development Officer, Fiona Hetherington

[26] With Direct Control zones, Council assumes a unique role and the Board has a different appellate jurisdiction. Council tailors development regulations to the particular site. In this way, the variances are dealt with at the Council level. Section 641(4)(b) of the *Municipal Government Act*, RSA 2000, Chapter M-26, states "despite section 685, if a decision with respect to a development permit application in respect of a direct control district is made by a development authority, the appeal is limited to whether the development authority followed the directions of council, and if the subdivision and development appeal board finds that the development authority did not follow the directions it may, in accordance with the directions, substitute its decision for the development authority's decision."

[27] The proposed development does not comply with the DC2.853 Area A, (g). The Development Officer has no variance powers set out in the Direct Control. Further, the Direct Control does not reference another section of the *Edmonton Zoning Bylaw* which incorporates another variance power; therefore there is no variance power. The Development Officer sought the advice of City of Edmonton Law Branch, who confirmed the Development Officer has no variance powers with this Direct Control.

[28] In her opinion, the Appellant's builder/surveyor was aware of the future lot lines when they submitted their plot plan in 2015. The plot plan in the Appellant's submission in Tab 7 clearly shows the revised lot lines which appear in the 2016 plan. The Development Officer read a note from the previous Development Officer's file stating that he sent an email to the applicant builder regarding the future lot lines. The Appellants were also aware that the east Side Lot Line had been moved by 0.5 metres which enlarged the lot for Unit 34.

[29] Although there was a lot of miscommunication, in her opinion, the parties involved knew there was a land swap and should have taken that into account when submitting the Development Permit Application.

[30] In her view, the Developer sought the land swap because Units 35, 36 and 37 required a 4.5 metre minimum yard along the front adjacent to the private road. This pushed the developments back on their respective lots and so the developer then sought to push the Rear Lot Line back as the developments also required a 4.5 metre minimum yard along the rear of 3 lots. Property was taken from the fourth lot, Unit 34 to achieve an equal swap of land. The purpose of the Direct Control amendment per the 2013 Report to City Council was also to ensure that no amount of public space was lost.

[31] The land swap ensured the three units would meet the 4.5 metres requirement, she cannot understand how Unit 34 would possibly be exempt from that requirement. It makes no sense that land was swapped to ensure the properties to the north had the 4.5 metres minimum yard required in the Direct Control regulations and then not require the subject Site to have the requisite 4.5 metres minimum yard under the same regulation.

[32] The Developer who sought the bylaw amendments for the Donsdale Neighbourhood Structure Plan and the Direct Control zoning land exchange was also the applicant for the subdivision plan. The Subdivision Authority approved this subdivision December 5, 2013 (Exhibit B). All parties were well aware of the new lot lines and zoning.

[33] There are no Site Coverage restrictions on this property. Other developments on this Site require 1.2 metre side setbacks and also a 4.5 metre yard in the front as they are adjacent to the private road. The subject lot, is different, it is uniquely located and larger than the other lots. As it is not adjacent to the private roadway, it requires only a 1.2 metres separation from Unit 35. The Appellant is effectively seeking permission for a 1.2 metres setback on three sides of the property (including front yard) and only a 4.5 metres yard only on back.

[34] The Development Officer submitted pictures from the Development Compliance Officer (Exhibit C). In her opinion, the proposed development is larger than any others in the aerial photo; therefore, it is out of character with surrounding developments as built.

[35] In making her decision, she did not consider the interpretations suggested by the Appellant at the hearing, she simply applied the development regulations to the Side Lot Lines on the 2016 plan.

[36] The Development Officer spoke to the Planner who brought forth the changes to Council in 2013 and he agreed with her interpretation.

[37] On questioning from the Board, the Development Officer indicated that if the configuration of property lines in place at the time the Direct Control zoning was initially applied in 2011 was used to measure the yards, the 4.5 minimum required yard would not be met for Units 35, 36 or 37.

[38] When asked about any potential negative impacts on the park of allowing the proposed development to be constructed 1.2 metres from the Side Lot Line, the Development Officer indicated that if she had variance powers, she would have relaxed the yard requirement as in her view the proposed development has no effect on neighbours and the amenities of the neighbourhood.

iii) Rebuttal of the Appellant

[39] The Appellant argued that the status of developments on Units 35, 36 and 37 was not the subject of this appeal and they are uncertain in any event.

[40] The Development Officer acknowledged that she did not consider the Appellant's argument at all regarding "proposed" versus "existing" park. The word proposed must mean something and the Appellant's argument is not an unreasonable interpretation in light of the land swap.

[41] The use of the word proposed makes this bylaw ambiguous even though the area was anticipated to be a park and actually became a park. The fact there is ambiguity allows the Board jurisdiction to revisit the decision and to interpret it in a way that makes sense on the ground and is consistent with intentions of the parties.

[42] If the proposed park meant proposed at the time of the initial Direct Control zoning in 2011 and not the park in existence now, then many results could follow. Lots 35, 36 and 37 might be non-compliant despite the land exchange. It could also be that as the proposed park became an actual park, the yard requirement in Section DC2.853.4, Area A, (g) simply disappeared for all four properties and Units 35, 36 and 37 and the proposed development are fully compliant.

[43] In this case it makes sense to use the Appellant's interpretation of "proposed park" whereby Unit 34 is no longer is not adjacent to the proposed park and neither are the other three lots. Units 35, 36 and 37 have subsumed the proposed park and are no longer adjacent to the proposed park site because they have taken it over. Unit 34 is no longer adjacent to the proposed park site as the existing park now intervenes. Therefore none of the developments needs a 4.5 yard anymore and everyone has the same amount of land.

[44] The wording of regulation DC2.853.4, Area A, (g) is very ambiguous, it might even be interpreted to mean that the minimum yard requirement applies only if a yard is adjacent both to the Wedgewood Ravine and the proposed park site even though practically, no such yard exists.

[45] Asked if it was simply an oversight that the words "and proposed park" were not removed, the Appellant indicated the drafting is unclear. The text of the regulation was not looked at or fixed. Council did not address the issue in words, but the Board should look at what Council really intended to do. Council did not mean to steal the building pocket for Unit 34, they meant to take previously sterilized land that could be used for nothing and put in into the City's hands and in exchange move the property line to create active yards for the other three units. In his view taking the building pocket from Unit 34 is an unfair and uneven swap.

[46] The bylaw probably needs to be rewritten. The Appellant does not know why the City has not clarified what is going on. The Developer and the City created a land swap they thought would work without addressing this section of the bylaw. No one investigated the circumstances adequately to get the answers.

[47] There was email correspondence between the surveyor IBI and the Appellant's home builder about the changes to both the east and west Side Lot Lines. The home builder was assured that 4.5 metres was taken away from the proposed development because that land was already sterilized and that losing 4.5 metres in lot width was not going to affect the building pocket.

[48] In addition, Units 35, 36 and 37 all have active back yards facing the park, the proposed development has only a blank wall facing the park so the 4.5 metres minimum yard should not be required for Unit 34. This practical reason justifies not applying the yard requirement to the proposed development.

[49] The City's position that where a Direct Control regulation references another section in the *Edmonton Zoning Bylaw* imports variance powers is illogical. The Development Officer's variance power is either present in the Direct Control or not, referencing another section in the *Edmonton Zoning Bylaw* does not magically confer variance powers. Based on the plain wording of Section 720.3(3), the Development Officer's variance power is present unless taken away specifically.

[50] The situation is very unique, many errors were made and the minimum yard regulation is not straightforward. The proposed development is adjacent to the park, but it is not adjacent to the proposed park.

[51] The jurisdiction of the SDAB is quite elastic in its application, the Appellant acknowledges that this position pushes the envelope of that jurisdiction, but in his view, does not take the Board outside of that jurisdiction.

[52] If the Board accepts jurisdiction, then it should determine the regulation has been met as the proposed park is not adjacent or it should exercise its discretion and apply the test in Section 687 of the *Municipal Government Act* and grant a variance.

Decision

The appeal is DENIED and the decision of the Development Authority is CONFIRMED. The development is REFUSED.

Reasons for Decision:

[53] The proposed development, Single Detached Housing, is a Listed Use in the DC2.853 zone.

[54] The original zoning for DC2.853 was created in 2011 through Bylaw 12204 to facilitate a mixture of senior housing types for Touchmark. Section DC2.853.4, Area A, states: "Development within Area A shall be in general conformance with the concept illustrated on the site plan (Appendix 1) and shall comply with the following criteria: … g. the minimum yard adjacent to the Wedgewood Ravine and the proposed park site shall be 4.5 metres (14.8 feet)."

[55] Touchmark, the initial Developer, has at all material times owned Units 35, 36, 37 as well as Unit 34 (the subject Site). The units are located on along the south east corner of the perimeter of the Site. Units 35, 36 and 37 share a Rear Lot Line with an adjacent park located to the east. Unit 34 abuts Unit 35 to the south, it flanks the same adjacent park and shares a

lot line with Wedgewood Ravine. The property line separating the Site from the park area originally ran in a straight north and south direction.

[56] IBI is the Surveyor for Touchmark, while the Appellant is the developer for the person who intends to occupy the proposed development, but to date does not own the lot.

[57] At some point after their construction, the Developer realized that Units 35, 36 and 37 had developed the yards behind their houses on City property and in violation of the minimum yard requirement in Section DC2.853.4, Area A, (g). To remedy this, IBI applied for a bylaw to facilitate an equal land exchange with the City extending the Rear Lot Line for units 35, 36 and 37 to the east by just over 5.0 metres and moving the eastern lot line for Unit 34 west by just over 5.0 metres.

[58] On March 28, 2013 Bylaw 12204 was amended by Bylaw 16509 solely to facilitate IBI's request for a land exchange bringing Units 35, 36 and 37 into compliance. Bylaw 16508 concurrently amended the Donsdale Neighbourhood Structure Plan to show the same land exchange and revised property lines. Land was added to three units and removed from the subject Site. The total amount of park land and private land would remain the same, but the dividing line became stepped rather than straight. The area of amendment is identified in Bylaw 16509, Appendix 1. Section DC853.4, Area A, (g), the regulation which required a 4.5 minimum yard adjacent to the Wedgewood Ravine and the proposed park site, was not changed.

[59] On December 5, 2013 a Subdivision Plan was approved for IBI adjusting the property lines as indicated in Bylaw 16509 to allow portions of the Municipal Reserve to be consolidated into the land for Units 35, 36 and 37 and in turn to remove a portion from Unit 34 and consolidate it with the adjacent Municipal Reserve. This plan does not include a change to move the western Side Lot Line between Unit 34 and Unit 33 over 0.5 metres to the west.

[60] For unknown reasons, a plan reflecting the rezoning was not registered with land titles until March 22, 2016.

[61] The Appellant's client wanted to build a Single Detached House on Unit 34. He knew of the swap and was assured by IBI or by Touchmark that the land exchange would not change the building pocket for the property. In 2015, the Appellant applied for a Development Permit and included in that application was the Plot Plan dated July 3, 2015 which shows the straight property line as it existed prior to the land exchange as well as the post-exchange jogged property line and the 0.5 metre extension of the west Side Lot Line noted in dashed lines.

[62] Due to the dashed lines, the Development Officer's predecessor held the application until the updated plan was properly registered. Regardless of the delay and based on the belief he was dealing with fully compliant development for a Listed Use, the Appellant proceeded with construction before the decision was issued.

[63] A revised Plot Plan incorporating the jogged post-exchange property lines was issued on March 29, 2016.

[64] The Development Officer used this 2016 Plot Plan to make her decision. The Development Officer refused the development based solely on non-compliance with Section DC2.853.4, Area A, (g). As she believed she had no variance authority, she refused the application. The Development Officer indicated she did not even consider the phrase proposed park site, she simply used the post exchange property lines to calculate the yard dimensions. The Development Officer indicated that if she had variance powers, she would have relaxed the yard requirement because, in her view, the proposed development has no effect on the neighbours or the amenities of the neighbourhood.

[65] The Board's jurisdiction in this matter is determined by Section 641 of the *Municipal Government Act* which provides "despite section 685, if a decision with respect to a development permit application in respect of a direct control district is made by a development authority, the appeal is limited to whether the development authority followed the directions of council, and if the subdivision and development appeal board finds that the development authority did not follow the directions it may, in accordance with the directions, substitute its decision for the development authority's decision".

[66] The Appellant submits that the Board has jurisdiction in this appeal because the Development Officer failed to follow directions of Council in two respects: first, by using the wrong interpretation of the phrase "proposed park site" and second, by failing to consider the propriety of granting a variance to the 4.5 metres yard requirement in Section DC2.853.4, Area A, (g).

[67] The Appellant contends that Council directed the Development officer to assess the development by applying the configuration of the proposed park site as it was at the time the Direct Control zoning was initially applied in 2011 (prior to the 2013 amendment). The Appellant based this ground on the argument that the phrase "proposed park site" is ambiguous - it could mean either the original park area separated from the Site by a straight lot Line or the post swap area separated from the Site by the jogged lot line. In his view, the former was the better interpretation.

[68] The Board disagrees on both aspects of this argument.

[69] The Board must read the words of the *Edmonton Zoning Bylaw* in context, in their grammatical and ordinary sense, harmoniously with the scheme and object of the Bylaw and with the intention of City Council. The Board must take a purposive approach and avoid an interpretation that would lead to an absurdity. The Board cannot create an ambiguity where one does not exist.

[70] The Board finds Section DC2.853.4, Area A, (g) unambiguous on its face. It was enacted specifically to create an area of separation between private on-site development and the adjacent park area. The phrase "proposed park site" in the context of a minimum yard

requirement in part (g) should include the 2013 amendments to the property lines separating the park from the housing development.

[71] The Board finds it unreasonable to assume, on the face of Section DC2.853, that Council intended a minimum yard regulation (which was left in the bylaw) to be restricted to an outdated proposed park boundary, rather than the proposed park site in place at the time of the amendment introduced to bring properties into compliance with the very regulation which preserves separation between developments and the park site.

[72] The 2013 land swap and bylaw amendment and lot line alterations were prompted by IBI specifically to bring units 35, 36 and 37 into compliance with the requirement for this separation space in Section DC2.853.4, Area A, (g). This specific development regulation was not removed as part of the land swap when the boundary was redrawn and has never been revised. The Board agrees with the Development Officer that it is illogical to conclude that land was swapped to ensure the properties to the north had the 4.5 metres minimum yard required in the Direct Control regulations and then not require the subject Site to have the requisite 4.5 metres minimum yard under the same regulation.

[73] Therefore, using common sense and purposive approach, the Board finds that the phrase "proposed park area" means the park site adjacent to the proposed development as it developed and ultimately appeared in the Appendix to Bylaw 16509 and in Plan 162 081 829.

[74] For the reasons which follow, if the Board is incorrect and the phrase "proposed park site" as it appears in DC 853.4, Area A, (g) is ambiguous on its face, then the Board finds on further examination the only reasonable interpretation of "proposed park site" is the one accepted by the Board above.

[75] The Appellant argued that a "proposed park site" was not created until 2011. Before that the land was nothing more than Municipal Reserve which could be any number of uses. Therefore "proposed park site" in the development regulation must only mean precisely what was initially proposed when the zoning and Direct Control was initially applied in 2011 in Bylaw 12204 and cannot therefore mean the park site created by the 2013 land swap implemented in Bylaws 16508 and 16509 (the actual park site as it ultimately came to exist).

[76] The Board disagrees based on the evidence before it. The area at issue did not first appear as a proposed park site in 2011 in Bylaw 12204. In 2004, the Direct Control Zone including Units 34, 35, 36 and 37 and the "Neighbourhood Park" are clearly identified and separated by a straight property line along the rear of Units 35, 36 and 37 and along Unit 34 in the Donsdale Neighbourhood Structure Plan (Figure 6, Bylaw 13801). The Neighbourhood Park area also appears at this location and is identified as Lot 2 M.R. Block 54, Plan 042 6165 which, based on its number, was registered in 2004. Per Section 671(2) of the *Municipal Government Act*, Municipal Reserve can be used by the municipality for four things one of which is a park. The 2004 Plan and the Donsdale Neighbourhood Structure Plan indicate "proposed park space" was in existence as of 2004, it was not a novel static invention created in 2011 in Bylaw 12204 and extinguished by the registration of the 2013 plan of subdivision.

[77] Further, the Appellant's interpretation of Section DC2.853.4, Area A, (g) led him to suggest three potential alternative results, all of which the Board finds to be unreasonable in in the circumstances.

[78] First, the Appellant stated that if his interpretation of "proposed park area" using the straight dividing lot line was adopted, then the proposed development for Unit 34 would be compliant with the regulation while developments on Units 35, 36 and 37 might be noncompliant. The Board finds this interpretation unreasonable because if the required 4.5 metres yard was measured using the 2011 lot lines, the land swap initiated by IBI to bring Units 35, 36 and 37 into compliance with this very requirement would have been useless as the yards for Units 35, 36 and 37 would always be too close to the 2011 proposed park site and in contravention of the regulation.

[79] Second, the Appellant argued that his interpretation could mean that once the park area was zoned and registered, it became an "existing park" and the "proposed park" no longer existed. Therefore, the minimum yard requirements in Section DC2.853.4, Area A, (g) simply disappeared and the proposed development would now be fully compliant. The Board finds that this proposed interpretation is not reasonable because:

i) It means the 0.03 ha land swap and bylaw amendment made solely to bring units 35, 36 and 37 into compliance with the minimum yard requirement in Section DC2.853.4, Area A, (g) was unnecessary and that the Units 34, 35, 36 and 37 could be built out to their respective rear and side property lines once the plan was registered regardless of the property line dividing the park from the Site.

ii) The minimum yard requirement in Section DC853.4, Area A, (g) remained unchanged and nothing in the notes to Council about the bylaw indicate a new intention to remove the buffer zone along the perimeter of the housing development Site between it and the adjacent park space and ravine.

[80] Third, the Appellant argued based on his interpretation that with the changed boundaries, the "proposed park" was subsumed by the expansion of Units 35, 36 and 37 and those units were therefore no longer adjacent to it. Also, Unit 34 was also no longer adjacent to the proposed park site as the actual park was now adjacent to the proposed park site. Accordingly, the minimum yard requirement does not apply to any of the four units and all are fully compliant. Again, the Board finds this unreasonable because it would permit development up to the new lot lines despite the fact that Section DC2.853.4, Area A, (g) remained unchanged. Nothing in the notes to Council concerning the bylaw indicate a new intention to remove or restrict the buffer zone along the perimeter of the Site that created by the minimum yard requirement between developments on the Site and the adjacent park space and ravine.

[81] In short, the very regulation that required a 4.5 metre yard between the development and the adjacent park prompted the land swap bylaw amendments. It seems absurd to adopt an interpretation of the phrase "proposed park" which would mean that the land swap and bylaw amendments introduced to bring Units 35, 36 and 37 into compliance with the 4.5 metre yard requirement and allow the owners to keep their improved yard spaces, also either nullified

that minimum yard development requirement entirely or failed to achieve the purpose of bringing the developments on Lots 35, 36 and 37 into compliance.

[82] The Appellant argues that the Report to Council accompanying the changes to Bylaws 16508 and 16509 are clear that the land swap was intended to have a zero net gain and that this means the building pocket for Unit 34 in particular was to remain constant.

[83] The Board agrees that the overall intent was for a form of aggregate equality between the City and Touchmark as owner of the all the affected Units, but disagrees that this leads to the conclusion that the minimum yard requirement was to be removed for Unit 34 to preserve its building pocket.

[84] The Report is clear that landowners developed the yards behind the homes in Units 35, 36 and 37 on City property and applied for a land swap to remedy the situation. The Report to Council provides at page 2 that the application is to amend the Donsdale Neighbourhood Structure Plan "whereby a 0.03 ha strip of parkland that was incorporated in an adjacent condominium project is exchanged for a similar strip of park land from the Site. There is no loss to the amount of park space" [and] "to rezone the subject areas from AP Public Parks Zone and DC2 Site Specific Development Control Provision Zone to (DC2) Site Specific Development Control Provision Zone and (AP) Public Parks Zone." The intention was for the same aggregate amount of property to remain with the condominium development and the same amount of property to remain with the City as a park.

[85] All four units affected by the land swap were owned by the same party. Units 35, 36 and 37 all gained in terms of their respective building pockets. They received the benefit of being "able to keep their improved yard spaces." The gain to Units 35, 36 and 37 had to come from somewhere; that somewhere was Unit 34. The Report says nothing about altering the requirement for a 4.5 metres yard adjacent to the park space. To the contrary, it speaks of preserving park space.

[86] The Appellant argued the contention that Council intended to preserve the building pocket for Unit 34 during the land swap is supported by comments in the Report under Analysis – Compliance with Approved Plans and Policies. The section provides: "The proposed plan amendment and rezoning will still meet the intent an goals of the Donsdale Neighbourhood Structure Plan and comply with all relevant principles and policies of the MDP. Further the proposed land exchange is compatible with surrounding existing and planned land uses."

[87] The Board disagrees. These comments make no reference to any individual building pocket, individual lot or minimum building size. They refer to surrounding zoning and land uses generally which were not impacted by the changed lot lines. Even with respect to Unit 34, the changed lot lines do not alter the range of available Uses. The building pocket may have changed, but the Appellant and Development Officer agree that it has not been eliminated.

[88] The Board also notes that in addition to arranging the land swap, IBI and Touchmark adjusted the Side Property Line between Units 34 and 33 to increase the Site Width (and consequently the building pocket) of Unit 34. As noted by the Development Officer, Unit 34 had an unusually large area and building pocket in comparison with other units on the Site. If the Developer understood that the building pocket was to remain absolutely unchanged, this adjustment which made Unit 33 smaller would not have been necessary. However, this action is consistent with the notion that the Developer understood the building pocket had been changed and moved the line to ameliorate the loss to Unit 34.

[89] There is nothing in the *Edmonton Zoning Bylaw* and the Board received no evidence to support the Appellant's argument that Council intended to restrict the application of DC2.853.4, Area A, (g) to "active yards" and therefore the section should not apply to Unit 34.

[90] In sum, the Board finds that Section DC2.853.4, Area A, (g) was impetus for the bylaw amendment. It was being scrutinized and it was left unchanged. In the absence of evidence, the Board is not prepared to assume Council intended to remove the requirement of a 4.5 metres minimum yard and to effectively interpret the bylaw as if the phrase "and proposed park site" had been deleted.

[91] All parties acknowledged there were miscommunications and unfortunate delays in respect of this matter, particularly with respect to the registration of the Plan which reflected changes to the lot lines for Units 34, 35, 36 and 37. However, in this case, representations between the various surveyors, owners and developers do not determine the directions of Council. They raise private matters between the Appellants and IBI, Touchmark and the City that do not fall within the jurisdiction of the Board in this appeal.

[92] The Board does not agree that the Development Officer failed to follow the direction of Council by failing to consider the propriety of granting a variance to the 4.5 metres yard requirement in Section DC2.853.4, Area A, (g).

[93] The Board agrees with the Development Officer's submission that in Direct Control zones, Council tailors development regulations to the particular Site and addresses variances at the Council level.

[94] In Section DC2.853.4, Area A, (g), Council's direction is very specific. Council set an exact 4.5 metres minimum yard requirement adjacent to the Wedgewood Ravine and the proposed park site. The minimum yard requirement is over and above any setback requirements. There is no mention of a variance power for this specific regulation in DC2.853.4.

[95] The Board is not prepared to find that Section 720.3(3) of the *Edmonton Zoning Bylaw*, imports the Development Officer's general variance authority set out in Section 11.3 unless the Direct Control states that the Development Officer does not have Section 11 variance powers.

[96] The Appellant could provide no example of any Direct Control provision which included a limitation, alteration or reference to the variance authority under Section 11.3.

[97] In contrast, several sections in Direct Control zones, unlike Section DC2.853.4, Area A, (g), do specify variance authority to varying degrees. Frequently, these sections reference a sections or a range of sections located within the development regulations under the old *Land Use Bylaw* or new *Edmonton Zoning Bylaw*. For example, DC2.758.4(m) sets out a variance power similar to Section 11.3, "the Development Officer may grant relaxations to the regulations contained in Sections 40 through 60 of the *Edmonton Zoning Bylaw* and the provisions of this District if, in his opinion, such a variance would be in keeping with the General Purpose of the District and would not adversely affect the amenities, use, and enjoyment of neighbouring properties." These sections would not be necessary if the Appellant's interpretation of the *Edmonton Zoning Bylaw* were accepted.

[98] The Board also notes Section 11.3 is located under the heading "Administrative Clauses" in the *Edmonton Zoning Bylaw* and is not contained within "Development Regulations." This supports the view that Section 11.3 is not covered by the reference in Section 720.3(3) to All Regulations.

[99] Thus, taking a purposive and contextual approach, the Board determined that section 720.3(3) does not extend variance powers in found Section 11.3 to all Direct Control zones unless Section 11.3 is expressly excluded because this interpretation runs contrary to the overall intent of Direct Control zones and to other more specific regulations which address the Development Officer's variance authority in the *Edmonton Zoning Bylaw*.

[100] Having found that the Development Officer followed the directions of Council, the Board is bound by Section 641 of the *Municipal Government Act* and cannot give itself jurisdiction it does not have. The appeal is accordingly DENIED and the decision of the Development Authority is CONFIRMED.

[101] If the Board is wrong in its interpretation of Section 720.3(3) and Council did intend to grant the Section 11.3 variance power to the Development Officer in all Direct Control zones in the absence of a specific prohibition of Section 11.3, it finds that a variance would be warranted in these circumstances. The Board accepts the submissions of both the Appellant and Development Officer that the proposed development would 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.

Ms. K. Cherniawsky, Presiding Officer
Subdivision and Development Appeal Board

Board Members: Ms. C. Chiasson, Ms. P. Jones, Ms. A. Lund, Mr. L. Pratt

Important Information for the Applicant/Appellant

1. This is not a Building Permit. A Building Permit must be obtained separately from the Sustainable Development Department, located on the 5th Floor, 10250 – 101 Street, Edmonton.

2. Obtaining a Development Permit does not relieve you from complying with:

    a) the requirements of the *Edmonton Zoning Bylaw*, insofar as those requirements have not been relaxed or varied by a decision of the Subdivision and Development Appeal Board,
    b) the requirements of the *Alberta Safety Codes Act*,
    c) the *Alberta Regulation 204/207 – Safety Codes Act – Permit Regulation*,
    d) the requirements of any other appropriate federal, provincial or municipal legislation,
    e) the conditions of any caveat, covenant, easement or other instrument affecting a building or land.

3. When an application for a Development Permit has been approved by the Subdivision and Development Appeal Board, it shall not be valid unless and until any conditions of approval, save those of a continuing nature, have been fulfilled.

4. A Development Permit will expire in accordance to the provisions of Section 22 of the *Edmonton Zoning Bylaw, Bylaw 12800*, as amended.

5. This decision may be appealed to the Alberta Court of Appeal on a question of law or jurisdiction under Section 688 of the *Municipal Government Act*, R.S.A. 2000, c. M-26. If the Subdivision and Development Appeal Board is served with notice of an application for leave to appeal its decision, such notice shall operate to suspend the Development Permit.

6. When a decision on a Development Permit application has been rendered by the Subdivision and Development Appeal Board, the enforcement of that decision is carried out by the Sustainable Development Department, located on the 5th Floor, 10250 – 101 Street, Edmonton.

NOTE: The City of Edmonton does not conduct independent environmental checks of land within the City. If you are concerned about the stability of this property for any purpose, you should conduct your own tests and reviews. The City of Edmonton, when issuing a development permit, makes no representations and offers no warranties as to the suitability of the property for any purpose or as to the presence or absence of any environmental contaminants on the property.