In the Court of Appeal of Alberta

Citation: Harvey v Edmonton (City), 2026 ABCA 232

Date: 20260706
Docket: 2603-0075AC;
2603-0131AC
Registry: Edmonton

Docket: 2603-0075AC

Between:

Kathleen Harvey and Michael Harvey

Applicants

- and -

The City of Edmonton
and City of Edmonton Subdivision and Development Appeal Board

Respondents

- and -

Davach Properties Inc

Respondent by Order

Docket: 2603-0131AC

And Between:

Kathleen Harvey and Michael Harvey

Applicants

- and -

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

Respondents

Reasons for Decision of
The Honourable Justice Kevin Feehan

Applications for Permission to Appeal

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I. Overview

[1] The Harveys seek permission to appeal two decisions of the Edmonton Subdivision and Development Appeal Board: 2026 ABESDAB 10046 [***Harvey*** row house] and 2026 ABESDAB 10058 [***Harvey*** backyard housing]. Both applications address decisions by the Board for developments on a single lot in the Glenora community of Edmonton and involve a third decision of the Board (the postponement decision).

[2] The Board's first March 10, 2026, decision upheld the approval by a Development Planner of a residential-use building proposed by Davach Properties in the form of a four-dwelling row house and three secondary basement suites.

[3] The May 12, 2026, third decision of the Board upheld the decision of the Development Planner for Davach Properties to construct a residential-use building in the form of a multi-unit backyard house, consisting of two dwellings above a garage.

[4] The intermediate decision of the Board, which is not the subject of permission to appeal but is relied upon by the parties in these applications, was a decision by the Board dated March 31, 2026, postponing the hearing of the backyard housing decision to provide notice to residents of a proposed variation in site coverage

[5] Given the close interrelationship of the proposed appeals, the proposed questions for appeal are substantially identical.

[6] The City of Edmonton and the Edmonton Subdivision and Development Appeal Board both advise they are not participating in this application, and neither have provided written or oral submissions.

[7] Permission to appeal both the first row house decision and the third backyard housing decision is granted, and the proposed questions for appeal are approved.

II. Background

[8] The development permit for the row house was approved on January 14, appealed on February 4, heard on March 5, and decided on March 10, 2026. The postponement decision was heard on March 10, postponing the hearing of the backyard housing hearing to April 29, 2026. The development permit for the backyard housing was granted on February 2, appealed on February 23, heard on April 29, and decided on May 12, 2026.

[9] In the row house decision, the Board dismissed an initial request of the Harveys to postpone that hearing so it could be heard in combination with the backyard housing decision. The reasons of the Board on this refusal to hear the appeals together included (***Harvey*** row house, paras 47-51):

> [47] ... It is a standard practice for applications to be submitted separately for different developments on a single Lot or Site.
>
> [48] This allows development to proceed in an orderly, economical and beneficial manner. Requiring that the full extent of potential development be evaluated for a Lot prior to granting a Development Permit for a singular structure is not only impractical but would also send a chilling effect through the development industry.
>
> [49] The Board agrees … that the cumulative impacts of development are assessed each time an application for development is made with respect to a Lot. …
>
> [50] Moreover, a subsequent application should not be seen to limit the development rights of a prior application or call into question the validity of a duly authorized approval. A landowner has the right to develop their lands in the sequence and manner they determine in their sole discretion.
>
> [51] A subsequent application may be limited by what was approved in an initial application and not the other way around.

[10] In its decision to uphold the decision of the Development Planner approving the row house application, the Board found the requested use was a permitted use under the small-scale residential (RS) zone. The main issue in contention was the site coverage of the principal row house. Davach Properties submitted that the principal building in question was 33.6 % of site coverage, well under the 45% maximum coverage set out in the regulations. The Harveys said that when considered together with the garage and backyard housing proposal, yet to be heard, the site coverage exceeded the 45% coverage allowed in the regulations. The Board found (***Harvey*** row house, paras 115-16):

> [115] … the proposed development is only for the principal building. Accordingly, irrespective of the actual area of the added Site Coverage that would be provided by the subsequent Backyard Housing application, the application before the Board is safely compliant.
>
> [116] … The impacts of a future development, are irrelevant at this stage in the process notwithstanding that the application has already been made. They will be evaluated by the Development Authority and this Board when that application is properly before it.

[11] In its concluding remarks, the Board said (***Harvey*** row house, paras 129-30):

> [129] … It is only when the Accessory structure and Backyard Housing is also considered does the overall Site Coverage approach what is permitted in the RS Zone.
>
> [130] Accordingly, the applicant will need to ensure that their proposal for the Accessory structure and Backyard Housing does not exceed permitted Site Coverage. At the time that application is being reviewed, greater consideration will need to be put into the interplay … [with] what increase in Site Coverage is permitted ... .

[12] The proposed row house development, by itself, was said to be a Permitted Use, and no relaxations, variances, or misinterpretations of the Zoning Bylaw were at issue. The Board therefore found that "no appeal lies with respect to this matter" and "[n]o residual discretion [exists] where a development is for a permitted use unless the provisions of the land use bylaw were relaxed, varied, or misinterpreted": ***Harvey*** row house, paras 172, 176 [emphasis in original]. The Board also stated "[n]otions of compatibility and impacts on the use, enjoyment, and value of neighboring parcels of land or the amenities of the neighborhood are only engaged where a development is characterised as a Discretionary Development or is for a Discretionary Use": ***Harvey*** row house, para 178.

[13] On March 11, 2026, counsel for Davach Properties corresponded to the Board on the issue of site coverage. He accepted that the site coverage of the principal row house was 33.6%. He indicated, however, that the combined site coverage of the principal building and the backyard housing put total site coverage at 45.7%, "an excess of 4.9m² over the Site Coverage cap".

[14] In its postponement decision the Board said:

> [41] … the presence of a variance materially changes the character of the appeal and the issues to be determined, as a discretionary decision involving non-compliance engages different considerations and may reasonably affect whether neighbouring property owners wish to participate. A variance to the *Zoning Bylaw* for a Permitted Use means that the development must be considered a Discretionary Development ... [emphasis in original]

[15] In the postponement decision, the Board had to address the concern over the cumulative site coverage effect that a variance to the *Zoning Bylaw* for a "Permitted Use means that the development must be considered a Discretionary Development": postponement decision, para 41 [emphasis in original]. As it was now apparent that a variance would be required and that a variance had not been identified in the original development notice issued by the City, it was necessary to postpone the hearing and require a new notice be sent to affected property owners so that they were "properly notified that the proposed development may be a Discretionary Development that

does not comply with the regulations of the *Zoning Bylaw*, including the maximum allowed Site Coverage": postponement decision, para 48 [emphasis in original].

[16] In its backyard housing decision, the Board again had to address the distinction between a Permitted Use and a Discretionary Use, given the admitted need for a site coverage variation. It acknowledged that there were many measurements of site coverage in the combined row house and backyard housing applications: 45.25%, 45.3%, 45.7%, and 48.4%. It determined that the proper overall site coverage should be set at 45.7%, which it said exceeded the 45% maximum allowance in the zoning bylaw. It determined that the "Use in this case is Residential" but "the proposed development is for a Permitted Use as opposed to a Discretionary Use", and a variance of 0.7% for total Site Coverage was required: ***Harvey*** backyard housing, paras 187, 211, 213. It found that the scope and substantive impact of the required variance was "*de minimus* or minimal" and would "not have a negative effect on the neighbourhood, namely that it would not unduly interfere with the amenities of the neighbourhood, and would not materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land": ***Harvey*** backyard housing, paras 225, 228. It therefore denied the appeal and confirmed the decision of the Development Planner.

III. Test for Permission to Appeal

[17] The *Municipal Government Act*, RSA 2000, c M-26, s 688, provides for an appeal of a decision of a Subdivision and Development Appeal Board, with leave, if the appeal involves a question of law or jurisdiction of sufficient importance to merit a further appeal and has a reasonable chance of success.

[18] Permission to appeal may be granted if there is a reasonably arguable point of law or jurisdiction which could affect the result, a question of sufficient importance to merit further appeal, and a reasonable chance of success: ***Carleo Investments Ltd v Strathcona (County)***, 2014 ABCA 302, para 10, 28 MPLR (5th) 173; ***Yee v Leduc (County)***, 2016 ABCA 40, paras 9-11; ***Swanson v Fort Saskatchewan (City)***, 2019 ABCA 392, paras 8, 9; ***Augustana Neighbourhood Association v Camrose (Subdivision and Development Appeal Board)***, 2021 ABCA 427, paras 17, 18; ***Biernacki v Alberta (Land and Property Rights Tribunal)***, 2022 ABCA 56, para 10; ***Conley v Calgary (City)***, 2026 ABCA 105, para 6.

IV. Analysis

[19] The Harveys say their appeals address a situation where a developer holds two approved development permits for permitted uses on a single lot on which development permits, individually, do not exceed site coverage limitations, but collectively, do exceed the allowable site coverage maximum. They say the answer to that situation turns firstly on the interpretation of two sections, which state (*Municipal Government Act*, ss 685(3), 687(3)(a.3) and (d)):

> **685(3)** ... no appeal lies in respect of the issuance of a development permit for a permitted use unless the provisions of the land use bylaw were relaxed, varied or

misinterpreted or the application for the development permit was deemed to be refused ....

687(3) In determining an appeal, the board hearing the appeal referred to in subsection (1)

...

(a.3) subject to clauses (a.4) and (d), must comply with any land use bylaw in effect;

...

(d) may make an order or decision or issue or confirm the issue of a development permit even though the proposed development does not comply with the land use bylaw if, in its opinion,

(i) the proposed development would not

(A) unduly interfere with the amenities of the neighbourhood, or

(B) materially interfere with or affect the use, enjoyment or value of neighbouring parcels of land,

and

(ii) the proposed development conforms with the use prescribed for that land or building in the land use bylaw.

[20] It also turns on the interpretation and interrelationships of two sections of the *Edmonton Zoning Bylaw, 20001*, ss 7.100.1.1.8 and 7.110.3.4 and 3.5.

[21] The Harveys say that a permitted use is not compliant if one or more requirements of the zoning bylaw are not satisfied, including that for maximum site coverage. If the permitted use is not fully compliant, then the use is treated as discretionary, and on appeal the Board has a broad discretion under s 687(3).

[22] The Harveys say that in the rowhouse decision of March 10, 2026, the Board ignored the fact that the development authority had approved both development applications and had issued development permits. And yet it determined to ignore the application for the backyard housing, even though it was aware that the cumulative effect would make the development on the single lot noncompliant as a permitted use. They say proper statutory interpretation should have required the Board to consider the cumulative effect of the two applications and treat both applications as discretionary uses. They also submit that the Board misdirected itself as to the scope of its

jurisdiction under s 687(3) and that the Board had full *de novo* jurisdiction in the matter, necessitating the same treatment as any discretionary development.

[23] Davach Properties responds that the issuance of a development permit gives rise to a separate and distinct right of appeal and a separate and distinct hearing process for that appeal. Appeals from two development permits cannot be "homogenized into a single event in the same manner as Court proceedings are consolidated". It says "the salient issue is whether the development did comprise a Bylaw-compliant, Permitted Use at the time the permit was issued by the Development Authority" [emphasis in original]. It says the Harveys, in their interpretation of s 687(3), have conflated the zoning bylaw references to a "discretionary development" with the *Acts* concept of a "discretionary use". Applying the label "discretionary development" to a permitted use, does not change its character as a permitted use, and a particular development cannot at once comprise both a permitted use and a discretionary use. Davach Properties says this distinction is important in the context of the Board's decision-making authority under s 687(3) of the *Act*.

[24] It is clear from the submissions of the parties that the dispute raises questions of statutory interpretation, and questions of law and jurisdiction. The questions posed are of sufficient importance to merit an appeal to this Court, and the appeal has a reasonable chance of success. The issues raised extend beyond the immediate facts of this case and are important to future Board decisions involving two developments on a single lot proceeding separately.

V. Conclusion

[25] The applications for permission to appeal from both the Board's March 10, 2026, row house decision and May 12, 2026, backyard housing decision are granted. The issues to proceed together before the Court of Appeal are:

1. did the Board err in law or jurisdiction by refusing an adjournment in order to consolidate the two development permit appeals or hear the two appeals together or sequentially?
2. did the Board err in law or jurisdiction by failing to apply the site coverage provisions of the zoning bylaw to the two contemporaneous approved development permits for the same lot?
3. did the Board err in law or jurisdiction by failing to properly interpret and apply s 687(3) of the *Municipal Government Act*, thereby improperly circumscribing its jurisdiction?

Application heard on June 17, 2026

Reasons filed at Edmonton, Alberta
this 6th day of July, 2026

Feehan J.A.

Appearances:

K.D. Wakefield, KC
for the Applicants

M. Gunther (no appearance)
for the Respondent, City of Edmonton

K.L. Hurlburt, KC (no appearance)
J.T. Kondro (no appearance)
for the Respondent, City of Edmonton Subdivision and Development Appeal Board

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