

In the Court of Appeal of Alberta

Citation: *Zhuromsky v Calgary (City)*, 2025 ABCA 217

Date: 20250619
Docket: 2401-0330AC
Registry: Calgary

Between:

Evgeny Zhuromsky

Applicant

- and -

**The City of Calgary, Calgary Subdivision and Development Appeal Board,
and Best Investment Group Inc.**

Respondents

**Reasons for Decision of
The Honourable Justice Jo'Anne Streckf**

Application for Stay Pending Appeal

**Reasons for Decision of
The Honourable Justice Jo'Anne Streckf**

Introduction

[1] The applicant, Evgeny Zhuromsky, applies for an order directing a stay pending appeal of a development permit issued by the respondent, City of Calgary, and released to the respondent, Best Investment Group Inc. The applicant submits that s 39(1)(b)(ii) of the City of Calgary Land Use Bylaw IP2007 triggers an automatic stay of the development permit once an application for permission to appeal has been filed. In the alternative, the applicant seeks a stay pursuant to rule 14.48 of the *Alberta Rules of Court*, Alta Reg 124/2010 and s 18 of the *Judicature Act*, RSA 2000, c J-2.

Background

[2] Best is the owner and developer of lands immediately to the east of the applicant's lands. The City approved Best's development permit for a five-unit rowhouse building with four suites below grade. The applicant appealed the development permit to the Calgary Subdivision Development Appeal Board (SDAB). The SDAB upheld the permit, with some additional conditions, on November 18, 2024: *Zhuromsky v Development Authority of the City of Calgary*, SDAB2024-0052 (Re), 2024 CGYSDAB 52 (CanLII).

[3] On December 5, 2024, the applicant applied to this Court for permission to appeal the SDAB's decision pursuant to s 688 of the *Municipal Government Act*, RSA 200, c M-26, as amended (*MGA*). On December 6, 2024, a copy of the application for permission to appeal was provided by email (at 8:52 am) and courier to the City under cover of a letter indicating that the application for permission to appeal was enclosed for service. The letter was addressed to the Chief Administrative Officer, the City Clerk and to a lawyer in the City's Legal Services Department who was described as often representing the City on these matters.

[4] On March 25, 2025, the applicant was granted permission to appeal the SDAB's decision: *Zhuromsky v Calgary (City)*, 2025 ABCA 106. The appeal is scheduled to be heard on an expediated basis on September 11, 2025.

[5] On April 15, 2025, the applicant noticed that excavation had commenced on the property that is the subject of the appeal. Counsel for the applicant contacted the City to inquire about whether the development permit had been released. The City confirmed that the development permit had been released but did not say when it was released.

[6] On May 21, 2025, the applicant applied for a stay of the development permit pending appeal.

Section 39(1)(b) of the Land Use Bylaw

[7] Section 39(1)(b) of the Bylaw provides:

39(1) After approving a development permit application for a discretionary use, the Development Authority must:

...

(b) endorse the development permit as of the date of the decision, but must not release the permit to the applicant:

(i) before the 21 day appeal period referred to in the Municipal Government Act has expired; or

(ii) in the case of an appeal to the Appeal Body, until such time as the appeal has been fully dealt with by the Appeal Body, or the Alberta Court of Appeal in the case of an appeal or leave to appeal of a decision of the Appeal Body, or the appeal has been withdrawn or abandoned.

[8] The applicant argues that s 39(1)(b) provides for an automatic stay of a development permit once an application for permission to appeal has been filed, relying on comments in *Stubicar v Calgary (Subdivision and Development Appeal Board)*, 2019 ABCA 336 at paras 49 to 51 [*Stubicar*], *Mohr v Strathcona (County)*, 2018 ABCA 205 at para 11 [*Mohr*], and *Cameron Corporation v Edmonton (Subdivision and Development Appeal Board)*, 2012 ABCA 229 at para 4 [*Cameron*].

[9] Best and the City say that s 39(1)(b)(ii) does not automatically stay a development permit that has already been released by the development authority when an application for permission to appeal is filed. They argue that the comment in *Stubicar* to the contrary is *obiter*, and that the decisions relied upon in *Stubicar - Mohr* and *Cameron* – are distinguishable because of the different language in the bylaws at issue in those cases.

[10] Section 39(1)(b) is directed at the release of a development permit by the City. Unlike the land use bylaw at issue in *Mohr*, it does not provide that a released development permit is suspended when permission to appeal the SDAB decision is sought¹, nor does it purport to preclude a person who has received a development permit from proceeding with the development. The comment in *Stubicar* relied upon by the applicant is *obiter* and, importantly, there is no indication that the differences in the wording of s 39(1)(b) of the Bylaw, as compared to the bylaws in issue in *Mohr* and *Cameron*, were brought to the court's attention in that case. As I read the Bylaw, s

¹ See Strathcona County Land Use Bylaw, 6-2015, s 2.13.3

39(1)(b)(ii) does not automatically stay an *already released* development permit upon an application for permission to appeal being filed with this Court.

[11] However, as the City acknowledges, s 39(1)(b) of the Bylaw can effectively act as a stay of a development permit by prohibiting the City from releasing it during the periods specified in the provision. Specifically, the City is prohibited from releasing a development permit during:

- the 21 day period to file an appeal to the SDAB;
- in the event of an appeal to the SDAB, until that appeal has been determined, withdrawn or abandoned; and
- in the event of an application for permission to appeal the SDAB decision to this Court, until that application and any resulting appeal has been determined, withdrawn or abandoned.

[12] Section 39(1)(b)(i) expressly prohibits release of a development permit during the 21 day period to file an appeal to the SDAB (under s 686(1) of the *MGA*). It does not contain comparable language prohibiting the release of a development permit during the 30 day period to file an application for permission to appeal to this Court (under s 688(2) of the *MGA*). The prohibition begins again when the application for permission to appeal is brought. Accordingly, there appears to be a gap during which time the City would not be prohibited from releasing a development permit following an SDAB decision and prior to an application for permission to appeal being filed.

[13] The City takes the position that it is not prohibited from releasing a development permit until it has been formally served with the application for permission to appeal, even if it has actual knowledge that the application has been filed. In other words, the City says it is at liberty to release a development permit with knowledge that an application for permission to appeal has been filed, so long as it has not been formally served. I note that s 39(1)(b)(ii) makes no reference to service. The apparent purpose of the provision is to generally maintain the *status quo* pending an appeal. A purposive interpretation of the Bylaw suggests that the City is prohibited from releasing a development permit once it has notice that an application for permission to appeal to this Court has been filed and until the application and any resulting appeal has been determined, withdrawn or abandoned. However, as it is not necessary for the purpose of this application to determine whether the prohibition is triggered by effective notice or service of an application, I leave that question to be determined in a future case.

[14] The situation in this case is complicated because it is not possible to determine on the record whether the development permit was released by the City at a time when it was precluded from doing so by the Bylaw. Neither the City nor Best, who are the only parties with that knowledge, have disclosed to the applicant or this Court when the development permit was

released. The applicant suggests an adverse inference should be drawn from the failure of the respondents to provide that information.

[15] The City and Best's failure to disclose when the development permit was released is unexplained. Permission to appeal the SDAB decision was granted on March 25, 2025. On April 15, 2025, the applicant observed excavation work commencing on the subject property. The next day, applicant's counsel contacted the City with the following inquiry: "Has the City released the DP notwithstanding the pending appeal? Or has a DP for the basement work been issued?" The City advised that "Yes, DPP2023-07626 has been released", without providing any other information. The applicant's counsel followed up, stating she "thought it could not be released under [sic] the appeal was resolved pursuant to section 39(1)(b) (ii) of the LUB? Please advise." The City replied, "it was our understanding that section 48 of the LUB was relied upon when the permit was released".

[16] Section 48 of the Bylaw states:

48 (1) Appeals in respect of decisions on development permit applications are governed by the *Municipal Government Act*.

(2) The Appeal Body must ensure that notice of a hearing of an appeal to the Appeal Body is published at least five days prior to the date of the hearing.

(3) If the decision of the Development Authority to refuse a development permit is reversed by the Appeal Body, the Development Authority must endorse the development permit in accordance with the decision of the Appeal Body.

(4) If the decision of the Development Authority to approve a development permit application is reversed by the Appeal Body, the development permit is null and void.

(5) If a decision of the Development Authority to approve a development permit is upheld by the Appeal Body, the Development Authority must release the development permit upon completion of any outstanding prior to release conditions.

(6) If any decision of the Development Authority is varied by the Appeal Body, the Development Authority must endorse a development permit reflecting the decision of the Appeal Body and act in accordance therewith.

[17] The City's reply failed to provide a meaningful response to the inquiry from the applicant's counsel; it did not advise when the development permit was released or address section 39 of the Bylaw. In addition, Best's representative was asked when the development permit was released during cross-examination on an affidavit in support of Best's application to expedite the appeal; that request was taken under advisement and eventually refused as not relevant to that application. The timing of the release of the development permit was clearly raised again in the applicant's

memorandum on this application but was not addressed in the response materials filed by the City or Best. The information is conspicuous by its absence. Without that information it is not possible for the applicant or this Court to determine whether the applicant should have been entitled to pursue its appeal with the benefit of the automatic stay contemplated in s 39(1)(b), as would be the case if the development permit was released by the City after it received notice of the application for permission to appeal on December 6, 2024, or been formally served.

[18] In these circumstances, I decline to find that the released development permit has been effectively stayed by s 39(1)(b)(ii) of the Bylaw. However, I conclude that it is appropriate to consider the circumstances outlined above in my determination of whether a stay of proceedings being taken pursuant to the development permit is appropriate pending the appeal.

Test for stay pending appeal

[19] In the alternative, the applicant seeks a stay of the development permit pursuant to r 14.48 of the *Alberta Rules of Court* and s 18 of the *Judicature Act*.

[20] On an application for a stay pending appeal the applicant must establish that: there is a serious question to be determined on appeal; the applicant will suffer irreparable harm if the stay is not granted; and the balance of convenience favours granting a stay: *RJR MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, 1994 CanLII 117 (SCC) at 347-349 [*RJR MacDonald*].

[21] A stay pending an appeal is a discretionary remedy, and the fundamental question is whether a stay is just and equitable in all the circumstances of the case: *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at paras 24-25. A stay may be granted if exceptional circumstances exist that would make it fit and just for it to be granted: *O'Kane v Lillqvist-O'Kane*, 2023 ABCA 251 at para 3.

Serious Question

[22] The threshold to establish a serious question to be determined on appeal is low: *Chamczuk v Whelehan*, 2022 ABCA 278 at para 7. I am satisfied that threshold has been met here as the applicant has been granted permission to appeal.

Irreparable Harm

[23] The second part of the test requires that the applicant demonstrate he will suffer irreparable harm if a stay is not granted. Irreparable refers to the nature of the harm, not its magnitude. It is harm that cannot be quantified in monetary terms or cannot be cured: *RJR MacDonald* at 341. Irreparable harm is generally demonstrated if the appeal will be rendered nugatory in the absence of a stay, meaning that the benefit sought in the appeal would be permanently lost: *Cabin Ridge*

Project Limited v Alberta, 2025 ABCA 109 at para 26; *Westcan Recyclers Ltd v Calgary (City)*, 2025 ABCA 144 at para 18.

[24] The applicant submits he will suffer irreparable harm because the construction is ongoing and will be substantially completed by the time the appeal is heard on September 11, 2025; evidence given by Best in cross-examination indicated an anticipated completion date of October 2025, with occupancy by December 15, 2025 at the latest. The applicant's counsel points out that even if the appeal is allowed and the development permit set aside, from a practical perspective it will be difficult to obtain a meaningful remedy if construction has been completed and the development is occupied. The applicant will have lost the benefit of his appeal.

[25] In all the circumstances I am satisfied the applicant has established he will suffer irreparable harm if the development proceeds and the development permit is ultimately set aside.

Balance of convenience

[26] The final factor requires that I consider whether the balance of convenience favours granting the stay. The applicant notes that, after the SDAB released its decision, he took steps to file the application for permission to appeal and made the City aware he had done so on December 6, 2024. The applicant also points out that Best elected to proceed with construction after the application for permission to appeal had been granted.

[27] Best argues that the balance of convenience weighs against granting the stay. Best says it needed to proceed with development as a condition of its mortgage financing and that if construction is not complete within 12 months from December 16, 2024, it will be required to pay out the mortgage of \$3.9 million. Best also submits the public interest weighs against granting the stay as the development is providing additional housing in a housing crisis and that the applicant delayed in having the appeal scheduled. The appeal is scheduled to be heard in September, less than six months after permission to appeal was granted, including the summer break. That schedule does not suggest that the applicant was not proceeding expeditiously.

[28] Best also argues that an undertaking in damages is an integral consideration at the balance of convenience stage and that the applicant has not offered one. An applicant seeking an interlocutory injunction or a stay pending appeal is often required to provide an undertaking to compensate for any damages sustained as a result of the interlocutory injunction or stay being granted and later set aside.

[29] However, in this case, the applicant may have been entitled to the benefit of an effective automatic stay pending appeal as contemplated in s 39(1)(b) of the Bylaw, in which case he may not have had to make this application and would not be required to post security. On the record before the court, without knowing when the development permit was released, it is not possible to determine whether that would have been the case.

[30] In all the circumstances, I am satisfied that the balance of convenience in this case favours the granting of the stay, and moreover that it is just and equitable to grant the stay pending appeal.

Conclusion

[31] The application is granted. The decision of the SDAB and any development permit issued pursuant thereto is stayed pending determination of the applicant's appeal.

Application heard on June 12, 2025

Reasons filed at Calgary, Alberta
this 19th day of June, 2025

Strekaf J.A.

Appearances:

J.A. Agrios, KC
for the Applicant

N.J. Maynard
A. Ferris
for the Respondent (City of Calgary)

J. Sykes
for the Respondent (Calgary Subdivision and Development Appeal Board)

K. Elhatton-Lake
for the Respondent (Best Investment Group Inc.)