Court of King's Bench of Alberta

Citation: 2357596 Alberta Ltd v Antoniuk, 2026 ABKB 81

Date: 20260206
Docket: 2303 08366
Registry: Edmonton

Between:

2357596 Alberta Ltd.

Appellant

- and -

Wendy Ann Antoniuk, Derek Chipping, Leigh Matheson, Bruce Matheson, J. Douglas Matheson Professional Corporation, Graenon Holdings Ltd., Jessica Culo, Branko Culo, Lloyd Eric Malin, Mary Lynn Malin, Carolyn Mah, Daniel Kabaroff, Lorimer B. Dawson, Barbara C. Howell, Lyle Brent Brookes, Dushan Bednarsky, John Kilduff, Barbara Finlay, David Finlay, John B. Mitchell, David Johnson, Mary Ann Johnson, Douglas Matheson, Marianne Edwards, Dale Berg, Peter Watson, Elaine Frances Watson, Anthony Nelson, Brian Beresh, Patricia Paradis, Jon Havelock, Linda Marie Uniat, Rynie Stewart, Mary Ogle, Donald James McGarvey, Lynn Melanie McGarvey, Keith Godfrey, Kim Mihalcheon, Robin Day, Claire Day, Paul Conquest, Margaret Conquest, Wendy Janes-Nelson, Don Nelson, Susan Marilyn Warner, Garth George Warner, Cathy Louise Cave, Scott John Gordon Paterson, Bonnie Abel, Delores Poppe, John Dyck, David R. Percy, Florence D. Percy, Donald Calder, James Wachowich, Pat Liviniuk, Doug Murray, Susan Angus, Victoria Brown, Catherine Freeman, Gregory Paul Noga, Vanessa Louise Noga, Karen Bilinske, Janet Howard, Elena Oskin, Alec Oskin, David Hawreluk, Colleen Hawreluk, Jeanne Hetherington, Ashwani K. Singh, Mary Clonfero, Patricia Waring, Arthur Waring, Alan, Schappert, Mary Schappert, Nazir Javer, Don Weber, Terrence Stewart, Marion Stewart, Dan Hodges, Jill Hodges, Paul Deutsch, Karen Mayer, Derrick Sarafinchan, Marian Rutledge, William Rutledge, Bruce Dancik, Brenda Laishley, Brian MacDonald, Lorne Zalasky, Ron Lucas, Tracy Lucas, Duane Marvin, Marlene Marvin, Tim Melton, Leah Gramlich, Maraia Adria, Gerard Lemieux, Donna Lemieux, Andy Sims, Lynn Holland and Victor Tanti

Respondents

Reasons for Judgment
of the
Honourable Justice A.K. Akgungor

I. Introduction

[1] 2357596 Alberta Ltd. ("the Appellant") applied to an Applications Judge to discharge a caveat. The caveat is registered as instrument number 4387AI (the "Caveat") against the title to properties legally described as Plan 2803AF, Block 109, Lots 6 and 7 (the "Site"). The Site is located in the Glenora neighbourhood in Edmonton. The Applications Judge dismissed the application. The Appellant now appeals that decision to this Court. The Respondents in this case are 65 residents of the Glenora neighbourhood, all of whom own property in Glenora that is subject to the Caveat. 67 residents are named in the style of cause but two of these Respondents have since sold their home.

[2] For the reasons that follow, the appeal is allowed and the application to discharge the Caveat is granted.

II. Preliminary Issue: Additional Evidence

[3] Appeals from the decisions of Applications Judges are governed by Rule 6.14 of the Alberta Rules of Court. Rule 6.14(3) provides that an appeal from an Applications Judge's judgment or order is an appeal on the record of proceedings before the Applications Judge and may also be based on additional evidence that is, in the opinion of the judge hearing the appeal, relevant and material.

[4] The threshold for admitting new evidence on an appeal from an Applications Judge is low: see ***Rudichuk v Genesis Land Development Corp***, 2019 ABQB 133 at paras 14-15, aff'd 2020 ABCA 42l; ***BSI Build Inc v Diep***, 2025 ABKB 739 at para. 30.

[5] In ***Spady v Spady Estate***, 2022 ABQB 591 at paras 36–37, Marion J. articulated that the test for whether additional evidence is relevant and material is whether the new evidence might reasonably be expected to significantly help determine one or more of the issues raised on the appeal.

[6] In the present case, additional evidence in support of the appeal was provided through the Supplemental Affidavit of James R. Scott affirmed on July 3, 2024. The Supplemental Affidavit attaches City reports regarding the District Policy and district plans as well as information confirming the status of the District Policy and district plans. The Supplemental Affidavit also attaches correspondence from the Glenora Community League to Edmonton City Council, dated May 16, 2024 which provides the community league's input on the draft District Policy and district plans. The Supplemental Affidavit further contains a copy of the Heritage Places Strategy Options Report dated March 19, 2024 which confirms that City administration does not recommend that the Glenora Heritage Character Area Rezoning project should be resumed.

[7] This additional evidence is not contested by the Respondents nor do they object to the additional evidence being considered as part of the appeal. There is no dispute that the District Policy and district plans were passed by the City on October 2, 2024. Similarly, there is no dispute that heritage rezoning will not occur in Glenora at this time.

[8] To the extent a ruling is required on the admissibility of the additional evidence in these circumstances, I agree with the Appellant that the evidence contained in the Supplemental Affidavit is both relevant and material and should be considered as part of the appeal. One of the key issues before the Applications Judge was the uncertainty surrounding the District Policy and district plans as they had not yet been passed when the application came before the Applications Judge. In my view, the appeal ought to be considered with the benefit of fact the District Policy and district plans have now been passed and are available for review. Both the District Policy and district plans are relevant and material to the issue of public interest.

[9] Further, the information regarding the heritage rezoning simply confirms, in report form, evidence that was before the Applications Judge with respect to the fact that the heritage zoning would not proceed at this time.

[10] Accordingly, evidence taken from the Supplemental Affidavit is summarized in the Background section below.

III. Background

[11] The factual background underlying the appeal is largely uncontested. The appeal record contains an affidavit sworn by Mr. James Scott, on behalf of the Appellant; four affidavits sworn by individual Respondents and one affidavit sworn by an expert retained by the Respondents, Mr. Sandeep Agrawal. The transcripts of the cross-examination on affidavit of both Mr. Scott and Mr. Agrawal also formed part of the record. The appeal record and Supplemental Affidavit reveal the following:

(a) The Caveat

[12] According to the book, Old Glenora, which is attached to the affidavit of Barbara Finlay, a Glenora resident since 1976, whose property is subject to the Caveat, the Caveat originated with Mr. James Carruthers. Mr. Carruthers envisioned a prestigious subdivision and to secure this aim, placed the Caveat on his property in 1911. The Caveat set down certain requirements and prohibitions to which the subdivided lots were subject.

[13] The Glenora Historic Resources Inventory prepared in June 2017 (the "Inventory") (attached to the affidavit of Wendy Antoniuk, the President of the Old Glenora Community Conservation Association and a resident of Glenora, whose property is subject to the Caveat) describes the Caveat as "ensuring that only the finest houses would be built in Glenora and that the neighbourhood would become one of the most popular locations for the professional and commercial elite who sought their own company amid its imposing dwellings".

[14] The essential terms of the Caveat are as follows:

- No building of any kind other than a private dwelling house with appropriate offices and outbuildings may be erected on the land;

- Not more than one dwelling house shall be erected on the land although two houses may be erected on the land provided they are separated by not less than 25 feet;
- No trade or business of any kind shall be carried out on any part of the land;
- No part of the land shall be used as a place of public entertainment, amusement or resort;
- Buildings must be set back at least 25 feet from the front street or road; and
- The house shall be either detached or semi-detached and the amount spent on the building of the house shall be not less than $3,000 to $5,000 (in 1911 dollars) depending on the location of the lot in the subdivision plan.

[15] The Caveat is registered against approximately 400 to 500 properties in the Glenora neighbourhood. The Caveat restricts the use of the Site, and all properties that it is registered against to single family dwellings. However, the Caveat does not prevent subdivision and lots may be subdivided in two to allow for "skinny" homes to be built. Further, the Caveat permits duplexes. The Caveat excludes commercial development in Glenora.

(b) The Site

[16] The two lots which comprise the Site have now been merged into one lot. The Site is approximately 1347 square metres in area, located on a corner abutting a local road (138 Street NW) and an arterial road (102 Avenue NW) in the western part of Glenora. The Site is separated by a lane and a small park from Stony Plain Road NW to the north, another arterial road and the future route of the Valley Line West LRT. The future Grovenor/142 Street LRT stop (West Block) is located 230 metres to the west.

[17] The Site is located off a straight arterial road and consists of rectangular lots. The Site does not have any view of the river valley.

[18] The houses (single family dwellings) currently on the Site are not listed on the Inventory of Municipal Historic Resources and the surrounding western part of Glenora does not have a large concentration of historically significant buildings compared to further east and south.

[19] The area surrounding the Site is generally developed with single detached housing, with the exception of two high rise developments at Crescent Place (17 storeys) and West Block (15 storeys) to the west. Neither Crescent Place nor West Block were subject to the Caveat.

(c) The Glenora Neighbourhood

[20] According to the affidavit of Ms. Finlay, the area in Glenora which is subject to the Caveat exemplifies many of the features of the Garden City movement of the late 19th and early 20th centuries.

[21] As set out in the Inventory:

> One of the key defining characteristics of the Glenora neighbourhood is the early development of the garden suburb that complemented the architecture of the large and often architecturally designed estate houses. The neighbourhood's design

> was influenced from the Carruthers Caveat, passed in 1911, as well as the Garden City movement.[…]
>
> Glenora adopted a Garden City approach to support the tenants of the caveat and is a rare and highly intact example in Western Canada. The neighbourhood subdivision plan of 1911 was designed utilizing the flow and topography of the ravine and surrounding landscape. Streets were cultivated and curved to follow the natural contours of the landscape leading to irregular-sized lots, landscaped boulevards, street trees and 25 foot setbacks on properties that allowed for ample private front gardens.
>
> Serving in sharp contrast to the grid system utilized in the rest of the city, Glenora is a designed cultural landscape which achieves visual flow throughout the neighbourhood. The centre of the community, Alexander Circle […] was established with the original subdivision of the neighbourhood in 1911.

[22] The Inventory lists the special character elements of Glenora as:

- Residential setting;
- Neighbourhood design with curvilinear streets on the eastern and southern portions of the neighbourhood; a large circular block in the centre and grid-iron layout surrounding the circle and to the west;
- Wide streets lined with mature deciduous trees and cast iron light standards;
- Irregular-shaped curvilinear parklets with mature plantings; preserved urban forest on southern edge of neighbourhood and Wellington and Ramsay Ravines;
- Original large and irregular lots from 1911 subdivision; and
- Form, scale and massing of early 1910s to 1950s houses in variety of traditional and modern styles with one to two-storey massing; wide set-backs, and well landscaped lots.

[23] John Byrne, a resident of West Block, and Ms. Finlay, attached to their affidavits a CBC article which indicates that the developer of West Block contemplates the development of three additional residential towers, a mid-rise seniors' residence and stacked townhouses adjacent to the existing tower. Mr. Byrne attests that this would result in over 500 additional residential dwelling units in Glenora.

[24] Ms. Finlay attests that Glenora has already absorbed a significant increase in density through Crescent Place and West Block and will absorb more with the developments contemplated by the developer of West Block. She asserts, through a Vancouver Sun newspaper article published on August 30, 2023 attached to her affidavit, that the unintended consequences of focusing on a major unplanned increase in density in existing neighbourhoods includes lack of parking, tree loss, strain on infrastructure, higher land values and decreased affordability.

[25] The information provided by Ms. Finlay and Mr. Byrne was clarified in the affidavit of Ms. Antoniuk. Ms. Antoniuk attested that the West Block developer no longer planned to pursue the mid-rise seniors' residence and the stacked townhouses and the proposed expansion would

instead focus on an additional 25 storey residential tower and two 6 to 8 storey apartments with commercial space on the main floors.

[26] Ms. Antoniuk further asserts that to the immediate west of the existing West Block development the northwest and southwest corners of the intersection of 142 Street and 102 Avenue, there are two large vacant parcels of land which are available for re-development, likely as mixed residential and commercial uses similar to the West Block in immediate proximity of the proposed LRT station at 142nd Street and 102 Avenue. Ms. Antoniuk attests that while these two sites lie just outside the west boundary of Glenora, they are functionally part of the same node as West Block.

(d) Rezoning of the Site

[27] On October 4, 2022, Council for the City of Edmonton rezoned the Site to RA8. The Site was formerly zoned as RF1 (Single Detached Residential Zone with the Mature Neighbourhood Overlay). RA8 is Medium Rise Apartment Zone. This zoning allowed for a 23-metre high building (approximately 6 storeys) intended for residential uses such as multi-unit housing, lodging houses, and supportive housing, as well as limited commercial opportunities at the ground level such as child care services, general retail stores and speciality food services. Under the RA8 zoning, new single-family dwellings were not allowable uses.

[28] The rezoning of the Site occurred after a public consultation process from May 18, 2022 to July 10, 2022. Feedback could be provided online, by phone or by e-mail. The feedback collected is contained in a Council Report – Bylaw 20231 (the "Report"). The Report outlines the following common themes which arose during the consultation:

- The proposed 6-storey scale is not in line with the lower scale residential character of the neighbourhood, particularly the Garden City Suburb design;
- The proposal is not consistent with the Caveat;
- The scale of redevelopment will increase traffic and parking congestion on the nearby roads, especially with the impact of LRT construction and realignment of roads.
- The redevelopment will lead to the potential loss of mature trees and/or greenspace.
- Creating more density in the core of the city near the LRT is desirable and helps limit urban sprawl.
- Additional commercial, retail and service options in the neighbourhood would help bring more life to the community.

[29] The Report indicates that the Site is located within the Stony Plain Road Primary Corridor where the typical massing/form is anticipated to be mostly mid-rise with some high-rise. Stony Plain Road at this location is also identified as a Citywide Route on the Mass Transit Network with the future Valley Line LRT following the corridor and the future Grovenor/142 Street LRT stop (West Block) 230 metres from the Site.

[30] The Report further states that Glenora is one of Edmonton's oldest and most historically unique neighbourhoods; however, it is also in the core of Edmonton where recent infill goals in

the City Plan are clear and where future LRT service will be bringing change over the next many years and decades. The City Plan also contains a clear message to "preserve what matters most" and respecting the historical significance of certain buildings and areas of the City is important to achieve this. The Report finds that the Site, not containing historically significant buildings and outside the core of Glenora, is an opportunity to achieve infill goals while not compromising historical preservation outcomes.

[31] The Report confirmed that the City administration supported the rezoning application as:

- It increases residential density at an appropriate location near a future LRT stop;
- It supports intensification along a Primary Corridor identified in the City Plan; and
- The Site does not contain historically significant buildings and is outside of the more historically significant areas of Glenora.

[32] The Report notes that the Caveat itself does not restrict City Council's ability to rezone the Lands as it is a private matter between landowners.

[33] On January 1, 2024, the new City of Edmonton Zoning Bylaw No. 20001 (the "Zoning Bylaw") came into effect. Under the Zoning Bylaw, the Site is now zoned Medium Scale Residential (RMh23).

[34] The Zoning Bylaw describes the purpose of the Medium Scale Residential Zone as to allow for multi-unit residential development that ranges from approximately 4 to 8 storeys and may be arranged in a variety of configurations. Single detached housing, semi-detached housing and duplex housing are not intended in this zone unless they form part of a larger multi-unit residential development.

[35] With respect to the RM zoning, the Zoning Bylaw specifically provides as follows:

> 3.2.1 Single detached housing, semi-detached housing are only permitted where:
>
> 3.2.1.1. existing as of January 1 2024; or
>
> 3.2.1.2 developed on the same site as multi-unit housing.

[36] The Zoning Bylaw also provides for certain minimum density requirements for the RMh23 Zone. Section 4.1.2 of the Medium Scale Residential Zone provides that density for the RMh23 Zone is 75 dwellings/hectare.

[37] As part of the new Zoning Bylaw, the predominant zoning applicable to Glenora also changed. Previously, the zoning was RF1, a zone that allowed primarily for single detached housing. Under the new Zoning Bylaw, RF1 was replaced by RS, Small Scale Residential Zone, which is a more permissive zoning that allows for a range of residential housing types and up to eight residential dwellings on a site.

(e) City Plan

[38] The City Plan incorporates both a Municipal Development Plan, as required by section 632 of the *Municipal Government Act*, R.S.A., c. M-26 ("MGA"), and a Transportation Master

Plan. The City Plan, Charter Bylaw 20,000, was approved by City Council on December 7, 2020 (the "City Plan").

[39] As the City Plan is a statutory plan, adopted by Bylaw, City Council was required to hold a public hearing prior to its enactment. The City Plan is the highest level plan and sets out the goals and aspirations for City development. All other City plans must comply with the City Plan.

[40] Map 1 of the City Plan sets out "The City Plan Concept" which is based in part on Nodes and Corridors. The City Plan provides that "while all areas of the city will densify over time, deliberate urban intensification will be accommodated within a network of nodes and corridors". The Plan goes on to state that "in many locations, nodes and corridors are characterized by increasingly dense, mixed-use development which is human scaled and walkable that supports both transit and local business." The typical massing is intended to be mostly mid-rise with some high-rise.

[41] The City Plan provides that "By virtue of growing within the current urban boundary, more high-density homes will be needed to accommodate new Edmontonians over the coming decades. This change in urban form will mean more efficient use of the land resources in Edmonton and will involve welcoming more people into areas that are already well-served by amenities, mobility infrastructure and services." Further, "new residential dwelling units will continue to be added to redeveloping, developing and future growth areas but will increasingly be concentrated in redeveloping areas. Residential redevelopment will occur primarily in the form of medium- and high-density housing types."

[42] Pursuant to the City Plan, the Site is located with the Stony Plain Road Primary Corridor, which is designated for mostly mid-rise apartments with some high-rise apartments. A frequent mass transit bus route is anticipated to operate on 102 Avenue as part of the mass transit network assumed for the 1.25 million population projection scenario of the City Plan.

[43] Section 5.2 of the City Plan also provides as a guiding value that "Edmonton protects and enhances its image and identity through heritage". Section 5.2 provides as follows in relevant part:

> 5.2.1 Promote Edmonton's history and encourage a sense of local identity by preserving and enhancing heritage.
>
> 5.2.1.1 Encourage the identification and preservation of historic resources and cultural and natural landscapes.
>
> 5.2.1.2 Consider, enhance and preserve historic resources through ongoing redevelopment processes.

(f) <u>District Policy and Plans</u>

[44] Subsequent to the decision of the Applications Judge, the City passed Charter Bylaw 24000 – District Policy (the "District Policy") on October 2, 2024. This Bylaw adopted the District Policy under the MGA as a statutory plan. The District Policy is used in conjunction with district plans to implement the district network described in the City Plan.

[45] The District Policy and the 15 district plans are statutory plans which guide decision making about land use, mobility, and growth management. The District Policy provides a consistent set of policies that apply across the city. District plans provide specific information

and direction for districts. While they are separate documents, the District Policy and district plans must be used together. The District Plans were also passed by the City on October 2, 2024.

[46] The direction given in the City Plan and existing plans and guidelines were the primary sources used to create the District Policy and district plans. Extensive public consultation was undertaken prior to the passing of the District Policy.

[47] The District Policy's consistent policy framework enables an efficient and equitable approach where policy updates will apply citywide, and growth in all areas of the City will share a common foundation. The District Policy provides guidance for the scale of development appropriate within nodes and corridors – and this guidance applies everywhere those nodes and corridors exist. The District Policy provides clear support for more intensive development in nodes and corridors and near mass transit stations.

[48] The District Policy supports the City Plan's goals of densification along nodes and corridors. For the Centre City (which includes Glenora), the District Policy's goals are to support low rise and mid rise development through Centre City; to support high rise development where the site is within 400 m of a mass transit station, along an arterial roadway or the site size and context allow for appropriate transition to surrounding development and adequate site access can be provided; and to support tall high rise development within Centre City where the site is withing 200 m of a mass transit station or along an arterial roadway. Both Stony Plain Road and 102 Avenue are defined are arterial roadways. Similar development objectives are stated in the District Policy for nodes and corridors.

[49] The District Policy also sets out objectives related to heritage places and encourages the identification of heritage places and their addition to the inventory of historic resources, promoting the continued use of heritage places and encouraging development adjacent to heritage places to respect their role and significance by using sympathetic architecture and design features such as materials, proportions, setbacks, massing and landscaping.

[50] District plans provide information on the unique geography, history and policy directions of each individual district. The main function of the plans is to show what type of development is appropriate and what public infrastructure is planned in all parts of the district.

[51] The Glenora neighbourhood is part of the Central District Plan. The Central District Plan notes that the nodes and corridors network establishes logical areas of focus for population and employment growth opportunities. While all areas of the City will densify over time, nodes and corridors are the best areas for intensive and large-scale development.

(g) DC1 Zoning and Westmount

[52] The Report notes that City administration previously contemplated work toward recognizing certain portions of Glenora for their historical significance, including bringing forward the potential for a Direct Development Control Provision ("DC1") for portions of the neighbourhood. At a June 29, 2021 Urban Planning Committee Meeting, a motion was passed to pause this work and at the March 14, 2022 City Council Meeting, a motion to resume this work was defeated. The Report indicates that, in any event, the Site falls outside of the boundaries that the City administration was considering for the DC1.

[53] A Heritage Places Strategy Options Report, dated March 19, 2024 and attached to the Supplemental Affidavit, confirms that unless an alternate source of funding to the Heritage Resources Reserve is identified, city administration does not recommend resuming the Glenora

Heritage Character Area Rezoning project. The Heritage Places Strategy Options Report further notes that city administration will continue to monitor heritage changes in Glenora and reassess resuming the project after a Heritage Places strategy provides clarity on priority and direction.

[54] The approach taken by the City for the Glenora neighbourhood can be contrasted to the approach taken for the Westmount neighbourhood. On July 15, 2019, the City passed a DC1 zoning bylaw for a certain portion of the Westmount neighbourhood. The purpose of the DC1 is stated as: "to ensure that development is sensitively integrated with the historic context of the area and reinforces elements of the area's character including the traditional pattern of single-detached development, urban design characteristics and historic craftsman and foursquare architecture".

(h) Expert evidence

[55] Dr. Sandeep Agrawal, professor at the School of Urban and Regional Planning at the University of Alberta, provided an expert opinion on behalf of the Respondents regarding the issue of "public interest" as contemplated by section 48(4) of the *Land Titles Act*, R.S.A. 2000, c. L-4 ("*LTA*"). His opinion is dated September 29, 2023.

[56] According to Dr. Agrawal, the term "public interest" is expansive. He states that the term is not unitary and that it reflects the cultural, professional, and societal values of a particular space and time. In Dr. Agrawal's view, the public interest consists of multiple interests as well as multiple publics. As an example, he opines that in a matter of planning and development, interests can vary from environmental concerns (traffic, pollution, etc) and human rights (group homes, safe injection sites), to equality and equity (social housing, emergency shelters) issues. The publics may constitute local residents and businesses, developers, community organizations, local government, and others. It is then the municipal planner's job to elicit and gather opinions and concerns of the multiple publics and find a balance among them.

[57] Dr. Agrawal is of the view that the removal of the Caveat from the Site is not in the public interest. His opinion was based on the following:

- Municipal law is only one of several factors that are indicators of public interest. Zoning is not a panacea to solve all the problems that are in the public interest, e.g. environmental concerns, equity issues, human rights concerns.
- Increased densification, as envisioned by the RA8 zoning [now RM zoning], could engage environmental and quality of life concerns. Higher density could lead to a higher urban heat island effect, more traffic and parking congestion, and a potential reduction in outdoor space, none of which is in the interest of the public. The Caveat still permits subdivisions and duplexes as a way to increase density.
- New draft zoning, which was being proposed for the entire City of Edmonton, would allow for a gentle transition to neighbouring small-scale development. This type of sensitive transition is not recognized in RA8 zoning. The height of the new development under the proposed new Edmonton zoning may just be four storeys, i.e. roughly between 32' to 40' high and not over 70' as prescribed in the current RA8 regulations. A

gentle transition between the small to medium scale through appropriate design and setback will be in the public interest.

- The new draft zoning bylaw and district policy and plans, when implemented, will further flesh out the nature of future development in the area. Edmonton's City Plan, which is at a very high level of generality and largely aspirational in nature, identifies a number of corridors (major roads) and nodes (activity areas) throughout the city where future growth is encouraged to happen. The node at the intersection of 102 Avenue and 149th Street has already been developed to add a significant density to Glenora, with more density planned for the node. The Plan identifies Stony Plain Road as a primary corridor, along which higher density is envisioned. However, 102nd Avenue, where the Site is located, is not a primary or secondary corridor flagged for higher density.
- Dr. Agrawal supports densification if properly conceived but is also in support of preserving the unique parts of the city as much as possible. Glenora is home to 14% of the overall inventory of historic resources in Edmonton. Glenora is widely recognized as the best-preserved "Garden City Suburb" in Canada with curvilinear streets, irregular lots, and preserved views of the North Saskatchewan River Valley. These characteristics of Glenora make a strong case for preserving the neighbourhood which has mainly been possible thought the Caveat. Preserving Glenora is in the public interest because it will preserve the city's identity, provide physical links to the past and become a source of inspiration for posterity.
- In Toronto, unique neighbourhoods such as Rosedale are preserved by a heritage conversation district plan which helps preserve the heritage value of the area. Bridle Path and Forest Hill are protected in Toronto's zoning bylaw through secondary plans and exceptions for minimum frontage, maximum density, and minimum lot size.
- The Applicant does not have any concrete plans for development of the Site and has not applied for or received a development permit.
- In the absence of a development plan or permit application and in a climate of regulatory uncertainty for zoning, the application to discharge the Caveat is premature.

[58] During cross-examination on his affidavit which took place on November 9, 2023, Dr. Agrawal acknowledged that the Site does not exhibit the characteristics of a 20th century suburb – Glenora as a whole does, but not the Site in particular. Dr. Agrawal further agreed that the neighbourhoods in Toronto are preserved through steps that the municipality has taken towards preservation and not through private rights, such as a restrictive covenant.

[59] Dr. Agrawal also acknowledged under cross-examination that the regulatory uncertainty he was referring to has been resolved because the zoning bylaw was passed and will be in effect as of January 1, 2024. He further stated that he understood that the district plans and policy had also been completed but that they were still in draft form and that public engagement was

ongoing. There is no dispute between the parties that the District Policy and district plans were ultimately passed by the City on October 2, 2024.

[60] Under the new zoning bylaw in Glenora, the zoning went from RF1 (single family zoning) to RS (residual small). RS includes infills, duplexes, semi-detached, some town houses – a number of different lower density housing forms. Dr. Agrawal confirmed that these forms of lower density housing are all now permitted in Glenora. Dr. Agrawal further confirmed that the City decided not to implement an overlay over the RS zoning that could have restricted development in Glenora. This decision was made after a public hearing.

[61] Under cross-examination, Dr. Agrawal confirmed that he had prepared a report entitled Edmonton's Zoning Bylaw Under the Lens of Equity dated June 16, 2021. In this report, Dr. Agrawal opined that the legacy of historically low-density, primarily single-detached residential zones - such as RF1, RF2 and others – inhibits housing diversification and densification and hence curtails access and affordability to housing for all. Dr. Agrawal further wrote in this report that "the low-rise, low-density RF zones have preserved single detached housing as the norm in Edmonton at the expense of diverse and more affordable housing forms". Dr. Agrawal confirmed under cross-examination that this was his view with respect to the RF1 zoning and the preservation of single detached housing. While this was his view in general, Dr. Agrawal confirmed that he had not taken into account, heritage, for instance, in making these assessments.

[62] Dr. Agrawal confirmed his opinion that the focus on single-family detached homes could be characterized as a classist bias against multi-unit housing, a view that has been further perpetuated and reinforced by zoning practices that prioritize and protect single detached housing. However, Dr. Agrawal clarified that this was his opinion and general view across the City and this opinion did not focus just on Glenora.

[63] Dr. Agrawal also referred in his Equity Report to NIMBY-ism (Not In My Back Yard). He defined this as resistance to new development considered to be undesirable and noted that it is an equity concern because community opposition can be motivated by prejudice and racial bias rather than legitimate land use concerns. Dr. Agrawal further observed that wealthy communities are more organized and are able to hire lawyers to oppose zoning changes. Dr. Agrawal agreed that Glenora is a wealthy community. Similarly, community consultation, which has been a quintessential underpinning of rational, comprehensive planning, can often elicit involvement from one demographic group which may amplify underlying prejudices, bias, and NIMBY-ism.

[64] One of Dr. Agrawal's recommendations in his Equity Report is that zones be streamlined into fewer zones and that mixed use be included in all zone categories including residential. Allowing mixed use would permit things such as daycares or group homes.

[65] Dr. Agrawal further confirmed that he was quoted in a media article as being opposed to restrictive covenants being used to restrict new and different form of development in largely RF1 (now RS) neighbourhoods that were built in the 1960s and 1970s. Dr. Agrawal was quoted as saying that these types of restrictive covenants could clash with City goals such as transit-oriented development and its plan for more sustainable, walkable communities. Dr. Agrawal explained that these neighbourhoods had no historic character to begin with, which is different than Glenora.

IV. Decision of the Applications Judge

[66] The legal framework underlying the application is section 48(4) of the *LTA*, which allows the Court to discharge a caveat where the caveat conflicts with the provisions of a land use bylaw or statutory plan under Part 17 of the *Municipal Government Act*, and the modification or discharge is in the public interest.

[67] In considering section 48(4) of the *LTA*, the Applications Judge concluded that the applicant had failed to demonstrate an irreconcilable conflict between the Zoning Bylaw and the Caveat and had further failed to demonstrate that discharge of the Caveat was in the public interest. The Applications Judge found that a developer could comply with both the Caveat and the Bylaw by renovating or improving the existing houses on the Site. In addition, the public interest requirement had not been adequately proven. Given that the public interest goals remained abstract as a result of the Stony Plain corridor study still being in progress, the lack of any areas redevelopment plan, and district plans being a work in progress, as well as the lack of any firm development plans by the applicant, the public interest favoured the rights and views of Respondents, as those directly and immediately affected by the proposed development.

[68] Accordingly, the Applications Judge found that this was not an appropriate circumstance in which to discharge the Caveat and the application was dismissed.

V. Standard of Review

[69] As set out in ***BSI Build Inc*** at para 21, the standard of review for an Applications Judge appeal is correctness: ***Bahcheli v Yorkton Securities Inc***, 2012 ABCA 166 at para 30; ***Lesenko v Wild Rose Ready Mix Ltd***, 2024 ABKB 333 at paras 14-15. Although it is an appeal on the record, it is considered de novo due to the ability of the appellant to expand on the factual record from the court below, in certain circumstances: ***Kadco Construction Inc v Sterling Bridge Mortgage Corp***, 2021 ABCA 52 at para 11.

[70] An appeal from an Applications Judge is not automatically an appeal *de novo* but rather the low threshold for the introduction of new evidence on appeal means that the true "appeal on the record" will be the exception rather than the rule: ***Prestige Granite & Marble Inc v Mailot Homes Inc.***, 2018 ABQB 1040 at para 47; ***Steer v Chicago Title Insurance Company***, 2019 ABQB 318 at paras 6-10.

[71] In the words of the Appellant, the standard of review is correctness where no new evidence is admitted. However, where new evidence is admitted, the judge hearing the appeal can substitute their own decision for the decision of the Applications Judge as the case is now a different case.

VI. Legal Framework and Issues

[72] The application to discharge the Caveat is brought pursuant to section 48(4) of the *LTA*. Section 48 of the *LTA* provides as follows in relevant part:

> 48(1) There may be registered as annexed to any land that is being or has been registered, for the benefit of any other land that is being or has been registered, a condition or covenant that the land, or any specified portion of the land, is not to

> be built on, or is to be or not to be used in a particular manner, or any other condition or covenant running with or capable of being legally annexed to land.
>
> (4) The first owner, and every transferee, and every other person deriving title from the first owner or through tax sale proceedings, is deemed to be affected with notice of the condition or covenant, and to be bound by it if it is of such nature as to run with the land, but any such condition or covenant may be modified or discharged by order of the court, on proof to the satisfaction of the court that the modification will be beneficial to the persons principally interested in the enforcement of the condition or covenant or that the condition or covenant conflicts with the provisions of a land use bylaw or statutory plan under Part 17 of the *Municipal Government Act*, and the modification or discharge is in the public interest.

[73] The application to discharge the Caveat was brought on the basis that it conflicts with the provisions of a land use bylaw or statutory plan under Part 17 of the MGA and the discharge of the Caveat is in the public interest. This application to discharge the Caveat does not engage the portion of section 48(4) that requires "proof to the satisfaction of the court that the modification will be beneficial to the persons principally interested in the enforcement of the condition or covenant".

[74] Accordingly, the issues to be addressed in this appeal are as follows:

a) Does the Caveat conflict with the provisions of a land use bylaw or statutory plan under Part 17 of the MGA?; and

b) If so, is it in the public interest to discharge the Caveat?

VII. Analysis

A. Does the Caveat conflict with the provisions of a land use bylaw or statutory plan under Part 17 of the MGA?

1. Meaning of "conflict"

[75] A conflict for the purposes of section 48(4) of the *LTA* occurs only when compliance with the Caveat requires a violation of the Zoning Bylaw: ***Tanti v Gruden,*** 1999 ABCA 150 at para 7. A conflict arises when it is impossible to comply with both the Zoning Bylaw and the Caveat: ***Potts v McCann***, 2022 ABQB 734 at para 41; ***Howse v Calgary (City)***, 2023 ABCA 379 at para 51.

[76] "Conflict" is intended to cover situations where the municipal body or zoning body attempts to introduce a zone or condition without reservation, to override rather than to merely allow or permit: ***Seifeddine v Adventures of England***, 1980 ABCA 29 at para 32.

2. Positions of the parties

[77] The Appellant asserts that the Caveat conflicts with the Zoning Bylaw in that no new development is permitted that would comply with both the Zoning Bylaw and the Caveat. The Respondents argue that the test for a conflict is not met as there are at least four uses of the Site that are allowed by the Caveat and which are compatible with the uses set out in the Zoning Bylaw.

[78] The Respondents submit that the four compatible uses are as follows:

i. Single detached housing, semi-detached housing and duplex housing existing as of January 1, 2024. Section 3.2.1.1 of the Zoning Bylaw effectively grandfathered single-family dwellings already existing as of January 1, 2024. Accordingly, compliance with both the Caveat and the Zoning Bylaw can be achieved if no development is undertaken and things remain *status quo* or if renovations or additions are made to the single-family dwelling.

ii. Supportive housing which consists of one or more dwellings within a single family or semi-detached house. Supportive housing means a residential use with on site or off site support to ensure the residents' day to day needs are met.

iii. Single detached and semi-detached housing may form part of multi-unit housing in accordance with section 3.2.1.2 of the Zoning Bylaw. According to the Zoning Bylaw, Multi-Unit Housing means a building that contains 1 or more dwellings combined with at least 1 use other than residential, home-based business or sign uses or any number of dwellings that do not conform to any other definition in the Zoning Bylaw. Typical examples include stacked row housing, apartments, and housing in a mixed-use building.

iv. Cluster housing – according to the Zoning Bylaw, cluster housing means a housing arrangement consisting of 2 or more principal residential buildings, other than backyard housing, on a site that includes common property, such as communal parking areas, private roadways, pathways, amenity areas, or maintenance areas that are shared.

[79] The Appellant submits that even if these four uses were permissible in terms of the structures on the Site, none of these uses comply with the minimum density requirements for the RM zone as set out in the Zoning Bylaw at section 4.1, RM Zone. For the RMh23 zone, section 4.1.2. requires a minimum density for a site of 75 dwellings per hectare (or 75 dwellings per 10,000 square metres). Using the Site's size of 1347 square metres, section 4.1.2 would require a minimum density for the Site of 10 dwellings. Dwelling as defined in the Zoning Bylaw means a self-contained unit consisting of one or more rooms used as a bedroom, bathroom, living room, and kitchen. This is in contrast to the Caveat's maximum of two dwellings.

[80] As the minimum density requirements cannot be met by any of the uses proposed by the Respondents, the Appellant submits there is an irreconcilable conflict between the Caveat and the Zoning Bylaw.

3. Analysis

i. Approaches to analyzing the conflict question

[81] The test for what constitutes a conflict is clearly established in our jurisprudence. The Caveat and the Zoning Bylaw must be incompatible. A conflict arises when it is impossible to comply with both the Caveat and the Zoning Bylaw.

[82] However, the parties divide on how the conflict test should apply in the circumstances of the present case. The Respondents assert that to determine whether a conflict exists, one must examine the Zoning Bylaw and the Caveat and determine whether there are any uses that comply with both. If there is a use that complies with both, there is no conflict and the section 48(4) analysis is at an end.

[83] The Appellant disagrees with this approach. The Appellant's view is that the conflict analysis must be considered from the perspective of new development and the question to be asked is whether anything new can be built that complies with both the Caveat and the Zoning Bylaw.

[84] Each of these approaches leads to a different outcome in terms of whether or not a conflict arises for the purposes of section 48(4) of the *LTA.*

[85] Turning first to the Respondent's approach, the Respondent put forward four options to demonstrate that there is no conflict between the Caveat and the Zoning Bylaw (renovation, supportive housing, multi-unit housing and cluster housing).

[86] The Appellant acknowledges that the owner of the Site could renovate the existing single family homes or build an addition onto the existing homes on the Site.

[87] It may well be that supportive housing is also another use permitted by both the Caveat and the Zoning Bylaw. Supportive housing is a more recent term for what was referred to as a group home in the earlier versions of the Zoning Bylaw. In ***Symanski v Excel Resources Society,*** 2004 ABQB 89, a group home comprising of six residents and two staff members in a building built on two lots was found to be a private dwelling house which complied with the terms of the Hudson's Bay restrictive covenant. The restrictive covenant confined development to a private dwelling house which accommodated only one household. In finding that the building was a private dwelling house, Marceau J. noted that the building had only one kitchen and one dining room. It was not constructed to accommodate more than one household.

[88] Given the similarities between the Hudson's Bay caveat and the Caveat, it may well be that the developer could also use the existing single family homes on the Site for supportive housing provided that the home remained essentially a single family dwelling and household.

[89] While single detached and semi-detached housing may form part of multi-unit housing in accordance with section 3.2.1.2 of the Zoning Bylaw, it is not clear to me that this type of structure would also comply with the Caveat. According to the Zoning Bylaw, Multi-Unit Housing means a building that contains 1 or more dwellings combined with at least 1 use other than residential, home-based business or sign uses or any number of dwellings that do not conform to any other definition in the Zoning Bylaw. Typical examples include stacked row housing, apartments, and housing in a mixed-use building.

[90] If Multi-Unit Housing requires 1 or more dwelling combined with at least one other use that is not residential, home-based business or sign use, then that leaves, under the Zoning Bylaw, commercial uses, industrial uses, community uses, basic service uses and agricultural uses. It appears that many of these uses would be prohibited by the Caveat's restriction against trade or business of any kind being carried out on any part of the land. Further, the Site is not an appropriate location for many of the other types of uses which include uses such as a park, protected natural area, school, cemetery, detention facility, health care facility, etc.

[91] Similarly, it is unclear to me that using the existing homes on the Site as cluster housing would comply with both the Zoning Bylaw and the Caveat. Cluster housing requires 2 or more principal residential buildings other than backyard housing, on a site that includes common property, such as communal parking areas, private roadways, pathways, amenity areas, or maintenance areas that are shared. While the Caveat may allow two single family dwellings on a lot as the Site is currently configured, this arrangement normally contemplates two independent residences with their own yards, driveways and garages. It is unclear how the "common property" such as communal parking, roadways, amenity areas or maintenance areas contemplated by cluster housing would fit within this scheme.

[92] In any event, the parties agree that, at minimum, renovation of the existing single- family dwellings on the Site and the use of supportive housing are uses to which the exising houses on the Site may be put. To this extent, the Respondents say there is no conflict between the Caveat and the Zoning Bylaw. The Appellant, however, disagrees. It says that simply identifying a residual use or some form of iterative improvement that may be undertaken to the existing houses on the Site under both the Zoning Bylaw and the Caveat does not dispose of the conflict issue. Rather, the issue must be assessed from the standpoint of new development: is there something new that can be built on the Site that complies with both the Caveat and the Zoning Bylaw?

[93] When analyzed from this perspective, a conflict clearly emerges. The Caveat requires the construction of only single family dwellings whereas the construction of new single family dwellings is not permitted by the Zoning Bylaw. Further, and significantly, the Caveat does not permit more than two dwellings on the Site whereas the Zoning Bylaw requires a minimum density of ten dwellings. When it comes to the minimum density requirements, it is impossible to comply with both the Caveat and the Zoning Bylaw. The Caveat prohibits more than two; the Zoning Bylaw requires at least then. There is no overlap.

[94] The Appellant points out two concerns that arise from the Respondents' approach. First, they argue that if the question of conflict is not analyzed from the perspective of new development, there will always be a situation that exists which complies with both the Zoning Bylaw and the Caveat. This circumstance will arise where the owner of the Site does nothing. The single-family dwellings currently on the Site will comply with the Caveat and the grandfathering provision under section 3.2.1.1 allows the single-family dwellings to remain in place under the terms of the Zoning Bylaw.

[95] Similarly, even in the absence of an express grandfathering provision in a zoning bylaw, section 643 of the MGA operates to grandfather in existing development in the event of a new zoning bylaw which renders the existing development non-conforming. To this extent, a conflict could never arise by doing nothing.

[96] As I understand the Appellant's argument, absent the lens of new development, there will always be a circumstance where no conflict arises under section 48(4) of the *LTA* because the developer can always do nothing. This would effectively neutralize the test under section 48(4) because a conflict could never be established.

[97] The second concern articulated by the Appellant that arises from the failure to apply a new development lens to the conflict issue is that it creates a dichotomy or an artificial distinction between a circumstance where there is existing development on the lot and a circumstance where the lot is a bare land lot. Where there is an existing single family dwelling

on a lot, it can be renovated or used as supportive housing and to this extent, there are uses that comply with the Zoning Bylaw and the Caveat.

[98] However, the same cannot be said for a bare land lot. On a bare land lot there is no existing single family dwelling to renovate or to repurpose into supportive housing. Only new development can be undertaken and in this case there is no new development that will comply with both the Zoning Bylaw and the Caveat, in particular, insofar as compliance with the minimum density requirements.

ii. Case law addressing the question of conflict

[99] On my review of the jurisprudence provided to the Court, there does not appear to be any express discussion addressing whether the question of conflict should be analyzed from the lens of new development. However, the cases provided remain instructive.

[100] In ***Seifeddine***, the zoning bylaw permitted both single-family dwellings and multi-family dwellings whereas the caveat restricted development to single-family dwellings. As there was overlap between the zoning bylaw and the caveat and single-family dwellings were permitted under either, there could not be said to be any conflict. In reaching this conclusion, the Court in ***Seifeiddine*** relied on another decision dealing with similar circumstances known as ***Grieves Application***, 1953 CanLII 251 (AB KB).

[101] The Court in ***Seiffedine*** reproduced the following reasoning from the *Grieves* decision:

> But surely all that means, all it can possibly mean, is that, in so far as the city of Calgary is concerned, its zoning by-laws or regulations have been altered so as to permit of multiple family dwellings being erected in an area where only single family dwellings might have been erected before. There is nothing whatsoever to suggest that the present classification is obligatory, that only multiple family dwellings may be erected in the area, and that the erection of further single family dwellings is prohibited. How then can it be said that a covenant enforceable by and against each individual owner in the area conflicts with a provision which is merely permissive and not obligatory? The city has said, 'In this area you may, at your discretion, build either multiple or single family dwellings,' to which the owners promptly reply, 'We have already agreed among ourselves that we will build only single family dwellings.' How can it be said that there is anything conflicting between the two statements?"

[102] In both ***Seiffedine*** and ***Grieves***, it appears that new development was permissible that would comply with both the caveat and the zoning bylaw. Something new could be built, here a single family dwelling, which would comply with both the caveat and the zoning. Accordingly, there was no conflict. This was similarly the case in ***Ukrainian Senior Citizens Home of St. John v Torres***, 2009 ABQB 725 ("***St. John No. 1***"). In ***St. John No. 1***, the land in question was subject to the Hudson's Bay Caveat which permitted only single-family dwellings. The zoning bylaw permitted low-rise apartment buildings as well as single-family dwellings. Again, new development could be undertaken in ***St. John No. 1***, which complied with both the caveat and the zoning and accordingly no conflict could be found.

[103] The outcome in ***St. John No. 1*** changed in ***Ukrainian Senior Citizens Home of St. John v Ukrainian Orthodox Parish of St John***, Action No. 1503 04523, November 9, 2015, unreported ("***St. John No. 2***"). By that point, the lands in question had been rezoned so that only

one type of structure could be built on the lands and that structure did not conform to the requirements of the caveat.

[104] ***St. John No. 2*** is an unreported decision for which a transcript of the oral decision was provided. Given its oral format, the decision is necessarily more concise and brief than might be expected of a formal, written decision and few details are provided on the specifics of the conflict or whether there were any potential zones of overlap between the caveat and the zoning bylaw. However, it appears that the respondents in ***St. John No. 2*** argued that there was no conflict because of minimum requirements for setback, as an example, and the caveat could coexist with those requirements in the bylaw. Clackson J. rejected this approach and found that the entirety of the bylaw which related to the lands must be considered and in that context the conflict was obvious and irreconcilable.

[105] To this extent, it appears that Clackson J. rejected the notion that any common ground that could be identified between the caveat and the zoning bylaw would satisfy the "no conflict" requirement. Rather, he found that where the structures contemplated by the zoning bylaw and the caveat were incompatible, the conflict was obvious and irreconcilable. In other words, where no new structures could be built which complied with both the caveat and the zoning, the test for conflict was met.

[106] In ***Howse v Calgary (City)***, 2022 ABQB 551 aff'd 2023 ABCA 329, Labrenz J. considered a caveat registered against title to certain lands located in Banff Trail. The caveat restricted development to one or two single family dwelling houses. The lands were subject to an area redevelopment plan, which is a statutory plan governed by Part 17 of the MGA. The City of Calgary also passed a bylaw which restricted discretionary uses for certain of the lands and imposed a minimum density requirement.

[107] In assessing the question of conflict, Labrenz J. held at para 66 that there was a clear conflict between the bylaw and the caveat. He found "the former requires a minimum density that exceeds the maximum permitted under the latter. It is impossible to comply with both; compliance with one necessarily entails non-compliance with the other."

[108] The Appellant submits that ***Howse*** is an example of this Court answering the conflict question from the lens of new development. In ***Howse***, the neighbourhood in question comprised primarily single-family detached homes. The developer sought to build structures on the lands that would not comply with the caveat and obtained zoning to support their initiatives. The zoning bylaw in ***Howse*** did not expressly grandfather in the single-family detached homes as the Zoning Bylaw does in the present case. However, section 643 of the MGA operates to grandfather the single-family detached homes under the zoning bylaw as non-conforming uses. As non-conforming uses, renovation to the existing single-family dwellings in *Howse* would not have been possible as it is in this case.

[109] While is it not clear from ***Howse*** whether there were any additional residual uses for the existing homes which might have complied with both the zoning and the caveat, it is clear that compliance with both could be achieved by doing nothing at all. To this extent, there is no conflict.

[110] However, this is not what the Court found in ***Howse*****.** Rather, a conflict was found in light of the impossibility of complying with the competing density requirements. It follows that this conclusion on conflict was reached by considering whether new development was possible

which complied with both the caveat and the zoning. Had the lens of new development not been applied, it was open to the Court to find a situation of no conflict in the event that nothing was done. By contrast, a conflict could only be found where it was considered from the perspective of whether anything new could be built which complied with both the caveat and the zoning.

iii. Conclusion on conflict

[111] Having considered the arguments of the parties and the case law set out above, I am persuaded that, when assessing a conflict for the purposes of section 48(4) of the *LTA*, the question that ought to be asked is whether anything new can be built that complies with both the Zoning Bylaw and the Caveat. I have reached this conclusion because:

- If the question of conflict is approached from other than the perspective of new development, a situation of no conflict can always be achieved through the option of doing nothing. This would render the conflict portion of the test under section 48(4) redundant.
- If the question of conflict is analyzed from other than the perspective of new development, a different answer to whether there is a conflict may arise depending on whether the lot has existing structures or whether it is a bare land lot. In my view, the question of whether or not a conflict exists must derive from a more principled approach. The answer should not rise or fall on whether the lot is bare or has existing structures.
- While not expressly stating as much, the case law outlined above appears to address the issue of conflict in the context of new development or whether something new could be built that complied with both the zoning and the caveat. In particular, ***St. John No. 2*** and ***Howse*** provide support for the proposition that it is not just any common ground such as a minimum set back requirement or doing nothing that will result in there being no conflict under section 48(4). Rather, the question should be answered in the sense of whether any new structures can be built which satisfy both the zoning and the caveat.

[112] Accordingly, the question must be asked in this case whether anything new can be built on the Site which complies with both the Caveat and the Zoning Bylaw. In my view, as was the case in *Howse*, there is no new development available which can comply with the minimum density of ten dwellings required by the Zoning Bylaw while at the same time complying with the maximum density of two dwellings as required by the Caveat. This would be impossible.

[113] On the issue of density, the Respondents argue that while minimum density is part of the Zoning Bylaw, it is not a "use" contemplated under the Zoning Bylaw. They suggest that a waiver on the minimum density requirements could be sought from the development office, much like a requirement for a 1m side yard. The Respondents submit that density is not fundamental to the use of supportive housing, for example. Accordingly, there is no conflict because the two uses comply with both the Caveat and the Zoning Bylaw and to the extent density is an issue, a waiver can be sought.

[114] I do not agree that the minimum density requirements can be so easily disregarded. First, as argued by the Appellant, the language of section 48(4) of the *LTA* refers to a conflict with "the provisions of a land use bylaw", not only the uses permitted by a land use bylaw. Second, when

considering the concept of conflict with a land use bylaw, this Court has previously determined that it is the entirety of the bylaw which relates to the lands that must be considered: *St. John No. 2* at p 2. Third, the suggestion that the density requirement could be waived by the development office like a 1 metre side yard requirement might be waived appears to be purely speculative. There is no evidence before me and indeed no real way of knowing what the development office might decide in any given case before it.

[115] Further, in ***Howse***, the density requirements formed the basis for the conflict. In upholding Labrenz J, the Court of Appeal confirmed at para 51 that there was obvious and irreconcilable conflict between the bylaws as passed and the restrictive covenant and then went into some detail on the density requirements at para 52 to illustrate the conflict:

> As noted, the restrictive covenant restricts use to private residential purposes and single or two-family dwelling houses, with or without a garage, of at least 500 square feet if a single-storey construction and 750 square feet if one and one-half or two-storey construction. The Twenty3 and Twenty4 bylaws prohibit single detached, semi-detached or duplex dwellings and set minimum densities of 150 dwelling units per hectare. They specifically allow the developers' applications for a six-storey, mixed-use building with 89 residential dwelling units, nine live/work units and approximately 224 square metres commercial space; a four-storey mixed-use building with 59 residential dwelling units, 12 live/work units and approximately 87 square metres of commercial space. The Kundan bylaw permits the requested four-unit row house exceeding the maximum density of 75 dwelling units per hectare. The restrictive covenant and the bylaws are not compatible; it is impossible to comply with both.

[116] In my view, the situation is no different here. The Caveat and the Zoning Bylaw are not compatible. It is impossible for any new development to comply with both. I find that a conflict between the Caveat and the Zoning Bylaw exists and the Appellant has established the first criterion of section 48(4) of the *LTA*.

[117] In light of the conclusions I have reached above, I find that the decision of the Applications Judge was incorrect in his assessment of whether there was a conflict under section 48(4) of the *LTA*. While the Applications Judge correctly set out the test for assessing a conflict, he did not assess the conflict by asking whether anything new could be built that complied with both the Zoning Bylaw and the Caveat. For the reasons set out above, I find this approach to be in error.

[118] My conclusion that there is a conflict between the Zoning Bylaw and the Caveat is not sufficient on its own to justify discharge of the Caveat. In accordance with section 48(4) of the *LTA*, I must also be satisfied that it is in the public interest to discharge the Caveat. I turn now to an assessment of the public interest.

B. Is it in the public interest to discharge the Caveat?

[119] In ***St. John No. 2***, Clackson J commented on a lack of authority to guide him on the question of public interest. Similarly, in the Respondents' written submissions, they note that it may be impossible to precisely or concisely define "public interest" and state that the "public interest" in any given case may be a matter of fact determined on the available evidence, whether

documentary, from ordinary witnesses or from expert witnesses. I agree that this is a sound approach.

[120] Further, Dr. Agrawal opined, and I accept, that "public interest" is an expansive term. As noted by Dr. Agrawal, the term is unitary and it reflects the cultural, professional, and societal values of a particular space and time. In Mr. Agrawal's view, which I accept on this point, the public interest consists of multiple interests as well as multiple publics. The publics may constitute local residents and businesses, developers, community organizations, local government and others. According to Dr. Agrawal, it is then the municipal planner's job to elicit and gather opinions and concerns of the multiple publics and find a balance among them.

[121] The Court's task is similar. The Court must weigh the relevant factors, publics and interests, and then determine, on balance, whether it is in the public interest to discharge the Caveat. I turn now to this task.

1. The City Plan, District Policy, district plans and Zoning Bylaw

[122] The Appellant submits that discharge of the Caveat being in the public interest is demonstrated by the fact that City Council, acting as the duly elected representatives of the community and after hearing from the community, has expressly decided that the Site is suitable for higher density redevelopment and that development of new single family housing and new semi-detached housing is expressly prohibited. This intent is expressed in the City Plan, District Policy, Central District Plan and Zoning Bylaw.

[123] There is no doubt that, when taken together, the City Plan, District Policy, Central District Plan and Zoning Bylaw reflect the importance that the City has placed on redevelopment which focuses on increasing density in inner city areas, along nodes and primary transportation corridors and near future LRT stations.

[124] It is also important to consider that the City Plan, District Policy, Central District Plan and Zoning Bylaw were not actions of the City taken in isolation. Rather these planning document reflect the results of extensive public consultation. The City Plan refers to a comprehensive engagement process with Edmontonians, which allowed city planners to identify things of great importance to residents.

[125] The District Policy and Central District Plan were advertised in the Edmonton Journal on May 10, 2024 and May 18, 2024. The District Planning public hearing was promoted through Facebook, Google search and Instagram advertisements, LRT and Ice District digital signage, radio ads, newsletters, posters in recreation centres and Edmonton Public Library branches, as well as the City's media and social media channels from May 1 to 27, 2024. A public hearing took place on May 28, 2024.

[126] The Glenora Community League provided its input and detailed recommendations on changes to the policy recommendations in the District Policy and district plan through a comprehensive letter dated May 16, 2024 (the "May 16, 2024 Letter"). The May 16, 2024 Letter was signed by Mr. Colcy and Ms. Antoniuk, in addition to other members of the Glenora Civics Committee.

[127] The Zoning Bylaw was advertised in the Edmonton Journal on September 16 and 24, 2022 and a public hearing was held. Public consultation was also facilitated through the Engaged Edmonton web page from June 27-July 10, 2022, a project website and through an Advance Notice sent to 343 recipients on May 18, 2022. A What We Heard Report compiling

the results of the public engagement feedback was prepared and noted that of the responses received, 10 were in support of the rezoning, 59 were opposed and 1 was mixed.

[128] When considering the public interest in ***St. John No. 2***, Clackson J. noted as follows on page 3 of the transcript of his oral reasons:

> In my view, the onus is met here, despite the [residents'] opposition. We are a democracy and we rely upon democratically elected representatives to make the decisions which impact our lives. In the municipal sphere, councillors are elected to act in the interest of all citizens in all things municipal. They are obliged, therefore, to act in the public interest. […]
>
> The bylaws in question here are the result of a seven year public process which involved meetings and feedback from residents of the area.

[129] And at page 4 of the transcript of his oral reasons:

> That means that our elected representatives applied their minds specifically to the issue of what is in the public interest in terms of the development of these three specific lots. They exercise the authority Edmontonians elected them to exercise. That is democracy. The result is a democratic result and democratic results are fundamentally in the public interest.

[130] I find that Clackson J's comments are apposite here. However, I also accept that whether discharge of the Caveat is the public interest as contemplated by section 48(4) of the *LTA* cannot be determined solely by the City's decisions on zoning and development. As noted by Clackson J., the City is obliged to act in the public interest of its citizens. Accordingly, anything that the City does in terms of land use and planning would always be viewed as in the public interest and this would effectively render the public interest part of the section 48(4) test redundant. Indeed, it is well established that the existence of a bylaw which permits a change from the conditions protected by a caveat is but one of the criteria to be taken into consideration in assessing public interest: ***Seiffedine*** at para. 38; ***Howse*** at para. 46.

[131] When considering the question of public interest, the Applications Judge was concerned that planning was much less advanced than was the situation in ***Howse***. The Applications Judge noted that district plans were currently a work in progress and that while there was a City Plan, it was only aspirational. Given that the development planning was more abstract, the Applications Judge placed greater weight on the public interest concerns of the Respondents.

[132] However, the uncertainty which concerned the Applications Judge is now significantly diminished. Since the Applications Judge rendered his decision, the District Policy and District Central Plan now been passed and are in effect. Both reconfirm and support the City Plan direction of increased densification along nodes and primary corridors and in proximity to LRT stations.

[133] The Respondents acknowledge the additional certainty that the District Policy and Central District Plan bring to the City's public interest goals. However, they argue that the circumstances here still fall short of the extensive public planning process that was found in ***Howse***. They assert that the Edmonton planning was of much shorter duration than was found in ***Howse.***

[134] In *Howse*, the original area redevelopment plan was approved in 1986. It was amended in 2019 to bring it into alignment with the city plan and to allow for medium density low rise residential developments. In 2021, the site in question was re-zoned. These changes involved public consultation at various points which included meetings with advisory committees, public open houses, and a project website and feedback form.

[135] In the present case, the current City Plan was adopted in December 2020. Rezoning of the Site to RA8 took place on October 4, 2022. The Zoning Bylaw came into effect on January 1, 2024. The District Policy and district plans were passed in October 2024. Each of these processes likewise engaged extensive public consultation.

[136] I am not persuaded that the processes which led to the City vision of increased densification along nodes and primary corridors and in proximity to LRT stations was based on a less extensive or rigourous process than was present in *Howse*. While the area redevelopment plan in ***Howse*** may have been in existence since 1986, the consequential amendment to the plan did not occur until 2019. Here, the City Plan announced the vision for increased density in 2020. On this basis, it is difficult to conclude that the development goals in ***Howse*** were the product of a much longer assessment or consultation process than in the present case. Similarly, there is nothing in the evidence to suggest that the consultation processes used in the present case were inadequate compared to those used in ***Howse*.** Indeed, public hearing processes for statutory plans would have prescribed by the MGA in either case.

2. The interests of the Respondents

[137] The evidence of the Respondents regarding public interest can be summarized as follows:

- Old Glenora is a significant heritage neighbourhood which has been identified by the National Trust as being at risk. The Caveat has played a major role in preserving Old Glenora as a heritage neighbourhood.
- The City Plan (and now also the District Policy) identify heritage preservation as a key guiding principle.
- The Glenora neighbourhood is one of the best-preserved examples of the Garden City movement of the last 19th and early 20th centuries. Characteristics of the Garden City movement include curvilinear streets, large and irregular-sized lots, and irregular-shaped curvilinear parklets with mature plantings.
- The Report identified that the transition of a six storey apartment next to a single detached home is “challenging”;
- Glenora has already absorbed a significant increase in density through Cresent Place, West Block and “skinnies”. Still further development is planned for West Block.
- Increases in density may lead to parking challenges.
- There are vacant parcels on the west side of 142 Street which are available to be developed as part of the Node identified by the City Plan.
- There is strong neighbourhood opposition to the discharge of the Caveat.

[138] There is no question that Glenora is a beautiful heritage neighbourhood. It is understandable that the residents of Glenora want to preserve their neighbourhood just as it is and that they are resistant to changes that they view as threatening the character of their neighbourhood. I accept that the public interest includes the Respondents' interests in preserving their neighbourhood and those of all homeowners who have enjoyed the benefits and protections of the Caveat since 1911. I further accept that these are laudable and important interests.

[139] I also accept that the public interest includes the enforcement of private contract rights in the form of the Caveat. However, as noted in ***Howse*** (CA) at para. 54, such rights are not absolute. In my view, they are simply another factor to be weighed in the overall public interest matrix.

[140] I further accept that increased densification has occurred in Glenora through the development of skinnies, the West Block development and its plans for further development and that there are vacant lots which exist as part of the node identified by the City Plan that can be used to fulfill the City's densification objectives. However, the Appellant is not required to establish that the desired development cannot be achieved in any other location, only that the Caveat precludes it from the approved development that is itself consistent with the public interest: ***Howse*** (CA) at para. 56. To this extent, the fact that densification objectives may be achieved other than on the Site is largely irrelevant to a public interest analysis under section 48(4) of the *LTA*.

[141] The fact that there is strong neighbourhood opposition to the discharge of the Caveat can also be considered as part of the public interest. The Appellant points out that only 67 (now 65) of the 400 plus homeowners subject to the Caveat (about 15%) are participating in this application. The Appellant suggests that it can be inferred from this that the strong majority of the neighbourhood is, in fact, not actively opposed to the discharge of the Caveat.

[142] However, I decline to draw an inference here that around 85% of the Glenora residents are not actively opposed to the discharge of the Caveat. I accept that about 85% of the homeowners subject to the Caveat are not active Respondents but that does not determine whether the homeowners are otherwise opposed to the discharge of the Caveat. There are many reasons that individuals may choose not to participate in litigation. In any event, as noted by the Applications Judge, public consultation and the planning process is not a referendum. Strong neighbourhood opposition is not determinative of the public interest. It is simply a factor for consideration.

[143] I did note with interest the following passage from the May 16, 2024 letter which reflects the views of the Glenora Community League:

> We agree with more density in Glenora. However, proposing high rise buildings in the middle of the neighbourhood is absolutely not supported. Low and possibly mid-rise in some locations would be more reasonable.

[144] To this extent, it appears that the community of Glenora is not outright opposed to densification and that is accepts at that at least low and possibly mid-rise buildings in some locations are consistent with the public interest.

[145] Finally, I take note of the fact that DC1 zoning was proposed as part of an initiative to preserve and protect the heritage character of Glenora. However, the City ultimately did not proceed with the zoning. As noted by the Appellant, the City has the tools to preserve Glenora's

heritage character. However, to date, whether for budgetary reasons or otherwise, it has not chosen to take this step. This is in contrast to the steps taken in the Westmount neighbourhood.

[146] While heritage preservation is reflected as an important guiding principle in both the City Plan and District Policy, by refusing to take additional steps to protect Glenora's heritage character, the City appears to have prioritized the public interest objectives which flow from densification along nodes and primary corridors in proximity to LRT stations.

3. The expert evidence of Dr. Agrawal

[147] In his opinion dated September 29, 2023, Dr. Agrawal opines that removal of the Caveat is not in the public interest. However, the date of his opinion means that certain of the factors that Dr. Agrawal relied on in forming his opinion have now changed. For example, Dr. Agrawal's opinion set out concerns about the RA8 zoning and opined that the new draft zoning would better allow for a gentle transition to neighbouring small-scale development. He stated that a gentle transition between the small to medium scale through appropriate design and setback will be in the public interest. Since the date of his opinion, the Zoning Bylaw, which Dr. Agrawal described as allowing for a gentle transition and being in the public interest came into force on January 1, 2024.

[148] Similarly, Dr. Agrawal's opinion is based in part on a climate of regulatory uncertainty which he says makes the application to discharge the Caveat premature. However, since the date of his opinion, the Zoning Bylaw, District Policy and district plans were all passed. He acknowledged under cross-examination that the regulatory uncertainty that he relied on in his opinion has now been resolved.

[149] Further, as was pointed out by the Appellant, Dr. Agrawal erroneously stated in his opinion that the Site is not located along a primary or secondary corridor which would warrant higher density. The Report is clear that the Site falls within the Stony Plain Road Primary Corridor.

[150] In his opinion, Dr. Agrawal states that he supports densification if properly conceived but is also in support of preserving the unique parts of the City as much as possible. He notes that Glenora is widely recognized as the best-preserved "Garden City Suburb" in Canada with curvilinear streets, irregular lots, and preserved views of the North Saskatchewan River Valley. He states that preserving Glenora is in the public interest because it will preserve the City's identity, provide physical links to the past, and become a source of inspiration for posterity.

[151] In my view, the cross-examination of Dr. Agrawal reveals that he is generally in favour of densification and opposed to low-density, primarily single-detached residential zones as they inhibit housing diversification and densification which, in turn, curtails access and affordability to housing for all. In other words, he is generally opposed to what the Caveat seeks to protect. Indeed, Dr. Agrawal confirmed that this is his general opinion but stated that he has formed a different opinion for Glenora in light of its heritage character.

[152] Ultimately, I find that I can put little weight on the opinion of Dr. Agrawal. I say this first because, as set out above, certain of the key facts underlying his opinion have now changed. This is of course no fault of Dr. Agrawal's – he could only base his opinion on the facts available to him at the relevant time.

[153] Second, Dr. Agrawal was mistaken in stating that the Site does not fall within an area that warrants higher density as contemplated by the City Plan, District Policy and district plans.

[154] Third, it appears that Dr. Agrawal is largely opposed to low-density, primarily single-detached residential zones as being in the public interest. Even if I accept that Dr. Agrawal has modified his opinion on this point for the Glenora neighbourhood, his reasons for doing so appear to be based on the need to preserve Glenora's unique "Garden City Suburb" character. However, he acknowledged under cross-examination that the Site does not possess any features of the Garden City Suburb such as curvilinear streets, irregular shaped lots or views of the river valley. Accordingly, it remains unclear why discharge of the Caveat would not, in Dr. Agrawal's opinion, be in the public interest.

4. The lack of concrete development plans

[155] The Respondents assert that although the Appellant has the onus to demonstrate the public interest, the Appellant has not presented any concrete plans for the development of the Site. The Appellant concedes that there no development plans in place and an application for a development permit has not yet been made. The Respondents argue that these circumstances deprive the Court of any concrete basis for evaluating the "public interest".

[156] While the existence of concrete development plans might assist in focusing the public interest analysis, I do not view the lack of any such concrete plans as fatal.

[157] I am satisfied it is more likely than not that the Appellant intends to develop the Site consistent with the Zoning Bylaw and in particular the RMh28 zoning, which is why they would have applied for that zoning in the first place. This zoning allows for multi-unit residential development ranging from 4-8 stories.

[158] Further, while I acknowledge that Mr. Scott, when being cross-examined on his affidavit was not able to articulate specific development plans, it was earlier indicated in the record (as part of the Report), when the Appellant applied for the re-zoning, that a six-storey building was contemplated at that time. To this extent, it appears that the Appellant intends to develop the Site in a manner consistent with increased densification along a node and primary corridor in proximity to an LRT station.

[159] I also accept that there are practical impediments to the Appellant being able to provide concrete development plans at this time. Until it is known whether or not the Caveat can be discharged, the Appellant is in a state of limbo in terms of how it may develop the Site. In the circumstances, it is understandable why the Appellant may not want to invest significant resources in a development plan and development permit.

5. Conclusion on public interest

[160] The Applications Judge was not satisfied that the public interest was adequately proved. However, this conclusion was based on factors which had changed by the time the case was argued before me. This differing evidentiary record allows me to substitute my opinion for the result reached by the Applications Judge and I will do so in this case.

[161] Having weighed and considered the above factors, publics, interests and expert opinion, I am satisfied that discharge of the Caveat is in the public interest. As set out above, I have reached this conclusion because:

- As was the case in ***Howse***, the City Plan, the District Policy, the Central District Plan and the Zoning Bylaw reflect that increased densification along Nodes and primary corridors within 400 m of an LRT station within

city centre locations such as Glenora are in the public interest. It is more likely than not that the development on the Site will meet these public interest objectives.

- Again similar to ***Howse***, the City Plan, the District Policy, the Central District Plan and the Zoning Bylaw were the product of extensive public consultation.
- The District Policy and Central District Plan are now in place which eliminates the climate of regulatory uncertainty that was present before the Applications Judge.
- The Site is located on a primary corridor and is within 230 of a designated LRT station.
- While the preservation of Glenora's Garden City Suburb character is also in the public interest, the Site is not located on a curvilinear street, is rectangular and not irregular in shape and does not have a view of the river valley. In other words, the Site does not possess the characteristics of a Garden City Suburb.
- The Site is located outside of the area in Glenora that was considered for DC1 zoning which lends further support to the fact that the Site is not part of the old Glenora heritage area.
- Little, if any weight, can be placed on the expert opinion that discharge of the Caveat is not in the public interest.
- Discharge of the Caveat represents an opportunity in the specific circumstances of this case to achieve density goals as set out in the City planning documents while at the same time not compromising heritage preservation.

6. Concerns regarding floodgates

[162] As a final note, I wish to address the Respondents' concerns that this decision will amount to an opening of the floodgates. While other applications for the discharge of the Caveat may lie in wait, each of those applications must be analyzed on their own facts. The evidence in those cases may differ insofar as the public interest is concerned. The factors relevant to public interest may be weighed and balanced differently than I have done in this case. For example, it is possible that a different result might be reached if the site in question was located within the Old Glenora heritage area and did possess the characteristics of a Garden City Suburb. A different result might also be reached if the Site was not located on a primary corridor or was not located within 400 m of an LRT transit station. However, I cannot speculate on the outcome of any future application. I will state simply that each application for discharge of the Caveat must necessarily turn on its own merits.

VIII. Conclusion

[163] I am satisfied that the Caveat conflicts with the Zoning Bylaw and that the discharge of the Caveat is in the public interest. Accordingly, the appeal is allowed and the application to discharge the Caveat is granted.

[164] As the successful party on the appeal, the Appellant is entitled to its costs. If the parties are not able to agree on costs, they may return to me within 60 days to determine a procedure for addressing costs.

[165] I am grateful to counsel for their excellent submissions and materials.

Heard on the 15th day of April, 2025.
Dated at the City of Edmonton, Alberta this 6th day of February, 2026.

A.K. Akgungor
J.C.K.B.A.

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