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**Citation:** *Meridian Development Corp. v Saskatoon (City)*, 2022 SKMB 132**Date:** 2022-12-13

DETERMINATION OF AN APPEAL UNDER  
Section 226 of *The Planning and Development Act, 2007* and  
Section 17 of *The Municipal Board Act*

**Appeal Number:** PAC 2020-0027  
**Date of Hearing:** October 27, 2022  
**Location of Hearing:** Saskatoon, SK

**BETWEEN:**

Meridian Development Corp.

Appellant

- and -

City of Saskatoon

Respondent

**APPEARED FOR:**

The Appellant: Kurt G. Wintermute, Legal Counsel, MLT Aikins LLP

The Respondent: Brent McAdam, City Centre Planner, Planning and Development  
Darryl Dawson, Manager, Development Review

**HEARD BEFORE:** Chad Boyko, Panel Chair  
Felix Hoehn, Member  
Ron Walter, Member

**INTRODUCTION:**

[1] The property under appeal is:

DAB Appeal Number	Civic Address	Legal Description	Zoning District
2020-24	539 24 <sup>th</sup> Street East (at the Board hearing, was part of 838 Spadina Crescent East)	Lot 29, Block 171, Plan 102374883 (at the Board hearing, was Lot 19, Block 171, Plan 99SA32572)	M4 – Core Area Institutional Service District

[2] Meridian Development Corp. (Meridian) applied to the City of Saskatoon (City) for a Development Permit (Permit) for a 112-unit apartment with restaurant and offices.

[3] On October 2, 2020, the City refused the application because the development did not comply with the requirements of the City's Zoning Bylaw 8770 (Bylaw) for the applicable M4 District. Specifically, the City found the proposed development:

- would have a west side yard building setback deficiency of 1.5 metres for the first three stories above grade;
- 11 side yard building setback deficiencies on floor levels above the third floor;
- balconies projecting 2.1 metres into the required front yard along Spadina Crescent East on each floor from the fifth to the 19<sup>th</sup> floor, resulting in 15 deficiencies of 0.3 metres over the allowed balcony projection;
- 30 balcony projection deficiencies into the required side yard setbacks between the fifth and 19<sup>th</sup> floors; and
- a 10% transparent opening deficiency on the 24<sup>th</sup> Street East façade ground floor.

[4] Meridian appealed the decision to the City's Development Appeals Board (Board). On November 23, 2020, the Board dismissed the appeal because it found the deficiencies did not meet the requirements for variance relief in subsection 221(d) of *The Planning and Development Act, 2007*, SS 2007, c P-13.2 [Act].

[5] The Board concluded that granting the variances would amount to a special privilege because the proposed site had not yet received subdivision approval and ownership had not yet been transferred to Meridian because the project could be designed in a way that complies with the Bylaw. Also, the financial situation of Knox United Church (Knox) could not be treated as justification for not meeting setback requirements.

[6] The Board found that allowing the variances would violate the intent of the Bylaw because relaxing side yard requirements and balcony projection limits would result in injury to "sensitive land uses" in the vicinity. In addition, approving the design with

deficiencies for a building between two heritage properties would amount to the Board not being respectful of the Bylaw's intent.

- [7] The Board also found the proposed variances would injuriously affect neighbouring properties. The Board observed that St. John's Cathedral (Cathedral), a neighbouring property, opposed the project. It also noted that concerns from opponents related to potential harm to the Knox structure, injury to the enjoyment of the Riverfront Condominium property and a lack of visual transparency on 24<sup>th</sup> Street East. The Board also determined it could not rule out "potential injury" because it did not know the outcome of any future discussions between Meridian and neighbouring property owners.
- [8] Meridian asks the Planning Appeals Committee (Committee) to change the Board's decision.

#### ISSUES:

- [9] a) Did the Board make a mistake when it found the proposed variances did not meet the requirements for variance relief in subsection 221(d) of the *Act*?
- b) If so, do each of the requested variances meet the requirements of subsection 221(d) of the *Act*?

#### DECISION:

- [10] The Committee finds the Board made a mistake when it found the proposed variances did not meet the *Act*'s requirements. When the requested variances are assessed individually and according to relevant evidence and applicable law, they meet the requirements of variance relief in subsection 221(d) of the *Act*.

#### PRELIMINARY MATTERS:

##### Standard of Review

- [11] The Court of Appeal (Court) considered the standard of review to be applied by this Committee when reviewing decisions in *E.Z. Automotive Ltd. v Regina (City)*, 2021 SKCA 109. The Court found that in accordance with the appellate structure in the *Act* and the Committee's purpose, the Committee should review questions of law on a standard of correctness. For similar reasons, when reviewing questions of fact or questions of mixed fact and law where there is no extricable question of law, the appropriate standard of review is reasonableness (*ibid* at paras. 91-94 and 98).

## New Evidence

- [12] Meridian asked the Committee to admit new evidence under subsection 227.1(1)(c) of the *Act*, which allows the Committee to accept new evidence when the relevant information was not obtainable by the person seeking to admit it through the exercise of due diligence at the time of the Board hearing.
- [13] The new evidence Meridian sought to introduce consists of documents that relate to Meridian's application for subdivision to create a lot for the subject development and these were provided as 12 schedules to Meridian's submission to the Committee.
- Schedule 1 is a “redline” comparison of the Bylaw before and after an April 26, 2021, amendment, which affected the development standards pertinent to the development.
  - Schedule 2 is an analysis of the effect of the amendments on the development's balcony projections.
  - Schedules 3 to 6 and 9 are documents related to proceedings before City Council:
    - Schedule 3 consists of public hearing minutes dated February 22, 2021, and excerpted agenda package contents relating to the Land Description Bylaw.
    - Schedule 4 is a City Solicitor's Report dated February 22, 2021.
    - Schedule 5 is a Heritage Review Board Report dated June 2, 2021.
    - Schedules 6 and 9 are minutes of public hearings dated June 28, 2021, and March 28, 2022.
  - Schedule 10 is the Knox United Church Heritage Designation Bylaw 2003, codified to Bylaw No. 9737 (i.e., the Land Description Bylaw) effective March 28, 2022.
  - Schedules 7, 8, 11 and 12 are title documents:
    - Schedule 7 is Title #154977632 issued February 24, 2022, showing interests registered as of August 22, 2022, and accompanying parcel picture.
    - Schedule 8 is Title #54977665 issued February 24, 2022, showing interests registered as of September 8, 2022.
    - Schedule 11 is Title #154977632 issued February 24, 2022, showing heritage designation registered pursuant to paragraph 18(3)(c) of *The Heritage Property Act* on October 17, 2003, as Interest Register #108422142.
    - Schedule 12 is the Interest Discharge Summary Report dated April 8, 2022, effecting discharge of the heritage designation (Interest Register #108422142).
- [14] We have authority to accept new evidence under Section 227.1 of the *Act* and subsections 20(7) and (8) of *The Municipal Board Act*, SS 1988-89, c M-23.2. Meridian submitted that all new evidence, other than Schedule 2, are legal documents and part of the public record that the Committee could take notice of and so not “evidence” in the strict sense of the word.

- [15] Meridian also submits that none of this evidence was available at the time of the Board hearing because the relevant events had not taken place. In addition, Meridian notes the City consents to this new evidence being introduced and so no prejudice would result from introducing this new evidence.
- [16] The Panel Chair advised the parties that the Committee accepted the new documents in evidence. The Committee is not convinced that a document is admissible and not new evidence only because it is part of a public record and/or part of other proceedings. Conversely, some of the documents might be categorized as law or submissions rather than evidence. However, we do not need to rule on these questions because we are persuaded that all documents were not obtainable at the time of the Board hearing and are relevant to issues before the Committee since they pertain to the size of the variance currently required. Also, the documents are relevant insofar as the Board's negative decision was based in part on the Board's concerns about heritage property protection and that proposed development still required subdivision approval to proceed.

**Issue a): Did the Board make a mistake when it found the proposed variances did not meet the requirements for variance relief in subsection 221(d) of the Act?**

**ANALYSIS:**

- [17] The *Act* requires the Board to consider whether a variance request complies with subsections 221(d)(i), (ii) and (iii) of the *Act*. That is, the Board may only grant a variance if, in its opinion, doing so would not:
- a) give an appellant a special privilege;
  - b) defeat the intent of the Bylaw; or
  - c) negatively impact neighbouring properties.
- [18] The granting of a variance request by a board or the Committee is not the same as setting a binding precedent. Each appeal must be determined independently, based on its own merits.
- [19] Meridian submits the Board's determination that the proposed variances failed all three of the requirements set out in subsections 221(d)(i), (ii) and (iii) of the *Act* was based on numerous errors of law as well as unreasonable assessments of the evidence.

**Special Privilege**

- [20] The legal test for whether granting a variance is a special privilege can be found in *St. Andrew's Presbyterian Church v Saskatoon (City)*, 1987 CanLII 4527 (SK CA) [*St. Andrew's*] at paragraph [13]:

... would [the Board or the Committee] grant this same privilege to another property owner subject to the same bylaw restrictions where the same need and conditions existed.

- [21] We agree with Meridian that the Court's decision in *St. Andrew's* as well as the Court's decision in *Dolman et al. v Royal West Equities Corp.*, 1990 CanLII 7741 (SK CA) [*Dolman*] are consistent with the following:

The first proposition is that a variance should not be refused simply because other properties had no need for them or made no request for them. The second proposition is that "special privilege" analysis requires the Board to consider the extent of the variances, and the needs and conditions that give rise to them.

- [22] In the more recent decision of *Big River (Rural Municipality) v Pettigrew*, 2021 SKCA 30 [*Pettigrew*] at paragraph [108], the Court acknowledged that *St. Andrew's* and *Dolman* had been widely cited in support of a generous interpretation of the variance power under subsection 221(d) and added: "We affirm those decisions."
- [23] Meridian presented evidence linking the need for variances to the shape of the proposed lot. The Board did not address any of the developer's needs nor the condition or circumstances of the lot shape in the context of the proposed development in its analysis. Instead, it dismissed all of Meridian's evidence and argument on this point with the following comment: "The shape of the proposed site does not justify not complying with the *Zoning Bylaw* building setback requirements. The developer has the option of redesigning the project in a way that complies with the *Zoning Bylaw* requirements." This is an error of law since the Board failed to apply the legal "needs and conditions" test to the facts.
- [24] Moreover, by grounding its finding of special privilege in the developer's "option" to redesign the project in a way that complies with the Bylaw's requirements, the Board underlined its misapprehension of the legal test. The test is not whether it is possible for the applicant to comply with the Bylaw but whether the applicant demonstrated that needs and conditions would merit a relaxation of the Bylaw's requirements if other variance criteria were met.
- [25] We agree with Meridian that the Board erred by expressing the test for variance as one that requires an "absolute necessity" such that a variance application would have to be refused if the developer could comply with the Bylaw, no matter how impractical compliance would be. Instead, this Committee found that "subsection 221(d)(i) does not require the establishment of 'overwhelming need'," a decision for which leave to appeal was refused by the Court (*Saskatoon (City) v Arsic*, 2009 SKCA 122). This is consistent with the generous interpretation of the variance power affirmed in *Pettigrew*.

- [26] The Board's error regarding the legal test to apply to determine special privilege is enough for us to overturn the Board's finding on this requirement but we will nevertheless note the Board's reasons disclose it made further mistakes in its analysis of the special privilege requirement.
- [27] Meridian observed the Board's analysis did not consider the specific variances sought nor the extent of the deviation or the reasons or need put forward in support of them. Instead, the Board addressed matters irrelevant to the legal test for special privilege. The Board stated the existence of the site proposed for development was contingent on obtaining subdivision approval. The Board concluded that to grant variances before this approval was obtained and the ownership of the subdivided lot was transferred to Meridian would amount to granting a special privilege.
- [28] By requiring Meridian to be the owner of the subdivided lot before it could bring a variance application as an appeal of a refusal to issue a Permit under subsection 219(1)(b) of the *Act* and concluding that doing otherwise would amount to a special privilege, the Board fettered its authority in a manner not contemplated by the *Act*. Section 219 of the *Act* allows an appeal to be brought by "a person affected." It does not require that person to have any legal interest in the relevant land before being able to bring the appeal or to have access to the Board's variance authority under subsection 221(d) of the *Act* when determining that appeal.
- [29] The City's submission to the Committee explains why it would not have been premature for the Board to consider the appeal before the site was legally subdivided. The Board's approval of Meridian's variance application would not have relieved Meridian from obtaining all other necessary approvals to achieve compliance with the Bylaw. The City expressed the view that it was reasonable for a proponent of a major project to seek a ruling on zoning deficiencies to determine the viability of their proposal before proceeding with other costly and time-consuming steps in the development process. In any event, if the Board was concerned about allowing the appeal before the developer obtained subdivision approval, the Board could have made its order conditional on a legal subdivision of the site.
- [30] Finally, the Board also stated that approving the variances would be a special privilege because this would amount to accepting Knox's financial situation as a justification for the variances. As Meridian pointed out in its submission, Knox's desire to find a solution to its financial situation by seeking a use for an unusually shaped section of excess land was raised as background and context, not as justification for variance relief.

**Intent**

- [31] The Board concluded that granting the appeal would amount to a relaxation that would defeat the intent of the Bylaw. The Board quoted the purpose of M4 – Core Area Institutional Service District as expressed in the Bylaw itself:

The purpose of the M4 District is to facilitate a wide range of institutional, office and community activities, as well as high density residential uses within and near the downtown area.

- [32] The Board found the Bylaw provided for increased side yards with increased building height, and that sufficient side yards and limited balcony projections become more important “... when there are sensitive land uses in the vicinity.” The Board stated that while the requested yard variances have been described as minor in nature, “... the extent of the impact is more evident given the proposed location. The intent of the Bylaw is not adhered to when setback deficiencies would result in potential injury to others beyond the property boundary.”
- [33] The Board also observed that building on a site between two heritage properties would require approval from other regulatory bodies. The Board noted that some public presentations alluded to potential harm to the Knox structure and, therefore, “... allowing a design with various bylaw deficiencies will be similar to the Board not being respectful of the Bylaw intent.”
- [34] The balance of the Board’s reasons for finding that allowing the requested variances would be contrary to the intent of the Bylaw was that in the Board’s view no justification for the deficiency had been presented other than the shape of the site and that the “proposed building design is deficient on all sides and pushes the limits of the Bylaw that is intended to ensure adequate spacing between properties.” The Board also repeated its earlier view that Meridian did not need the requested variances because it could build on the site after altering the design to meet the Bylaw’s requirements.
- [35] As Meridian pointed out in its submission, although the Board quotes the Bylaw’s stated objective, the Board did not incorporate that purpose into its analysis. The Board did not consider that the proposed development furthers the stated objective of “high density residential uses within and near the downtown area” and that the variances, in turn, are proposed to facilitate the development. Nor did the Board consider whether or how any of the proposed variances would conflict with the stated objective of the Bylaw.



- [36] Instead of deriving the purpose of the Bylaw from its text and context, the Board's decision focussed on specific restrictions set out in the Bylaw and equated the Bylaw's intent with those restrictions. As Meridian submitted, the Board's conclusion effectively equates these restrictions with the Bylaw's intent, such that every relaxation in these development standards would necessarily violate the Bylaw's intent. This is not a purposive interpretation of the Bylaw and it is not a meaningful consideration of whether the proposed variances would conflict with the Bylaw's purpose.
- [37] Meridian also observes that the City supports granting the requested variances and does not view them as presenting a conflict with the intent of the Bylaw. We pause here to observe that the City's support of the variances is certainly not decisive with regard to determining whether the statutory variance requirements have been met. Nevertheless, we do see some merit in Meridian's submission that insofar as the variances would not defeat the stated purpose of the Bylaw and had the support of the City, a contrary finding by the Board would need more support than "a superficial observation that the Variances are outside of the 'black letter' of certain provisions."
- [38] There are two additional flaws in the Board's reasoning in relation to the issue of whether the variances would defeat the intention of the Bylaw. First, the Board found that the lack of evidence of approval for the development in relation to heritage protection legislation would be "similar" to a lack of respect for Bylaw intent. With respect, the heritage designation of neighbouring properties is irrelevant to the intent of the Bylaw because it derives from a distinct regulatory regime. Just as the lack of subdivision approval was not relevant to the special privilege criterion, the potential need for a separate regulatory approval in relation to heritage protection was irrelevant to the intent of the Bylaw. Second, the Board erred by conflating the second and third variance criteria when it stated that the "intent of the Bylaw is not adhered to when setback deficiencies would result in potential injury to others beyond the property boundary." Injury to neighbouring properties should be considered under the third criterion of "injurious affection."

### Negative Impact

- [39] Subsection 221(d)(iii) of the Act provides that the Board should not allow a variance if doing so would "injuriouly affect the neighbouring properties."
- [40] The Board found the requested variances would injuriouly affect the neighbouring properties. However, the Board did not provide any explanation of what this injury would consist of or how it would manifest. Instead, the Board's reasons go no further than to observe that many letters opposing the appeal were entered into evidence. As both Meridian and the City pointed out in their submissions to us, the letters are largely focussed on opposition to the development and do not distinguish between potential

negative effect flowing from the development itself from negative effects that would result from the variances under appeal. The Board made no attempt to distinguish these concerns. This is an important distinction because the Board lacked jurisdiction to rule on whether a high-density high-rise development could or should be built at the subject location. The Board only had jurisdiction to rule on whether the requested variances could be granted.

- [41] Moreover, insofar as the opposition from neighbours relates to the variances rather than the development as a whole, the Board provided no explanation of how the variances would injuriously affect the neighbouring properties. The Board merely stated that:

The concerns expressed dealt with encroachment of the neighbouring property (St. John's Cathedral - a heritage property), potential harm of the Knox United Church structure, injury to the enjoyment of the property by owner of a neighbouring property (Riverfront Condominium), and lack of visual transparency of the structure on 24th Street which is a well-used street.

St. John's Cathedral's leadership and its property committee note in their letter opposing this particular development, Exhibit B.6, that although they are not opposed to development in general, they do oppose the proposed design. The letter notes that the civic lane encroaches largely onto their property along the south property line.

- [42] The Board states these allegations without any effort to determine whether these allegations were substantiated such that harm to neighbouring properties was a realistic expectation nor did the Board attempt to determine the seriousness of any harm that might result. The Board observed that Meridian was prepared to engage in further discussions with neighbours and seized on this to place a virtually impossible onus on Meridian to prove a negative; that is, to prove that no injurious affection can result from the variances: "As the Board does not have current knowledge on possible outcome of any future discussion that the Appellant may have with neighbouring property owners, the Board is unable to indicate that potential injury will not occur."
- [43] Insofar as the Board mentioned neighbour concerns that relate to the variances rather than the development as a whole, the lack of explanation or substantiation of any injurious affect means that this cannot be accepted as establishing injurious affection. Nevertheless, Meridian addressed these matters in its submission by pointing out that the proposed variances do not create an encroachment onto the property of the Cathedral. The proposed variances relevant to the Cathedral include the balcony projections on the south side and a 0.3 metre setback deficiency on the south side of the proposed site, which only applies to the fourth floor of the proposed building.

- [44] The Cathedral did not explain how the proposed balcony variances or the minor fourth floor setback deficiency would injuriously affect its property. Similarly, the Board does not explain how the lack of transparency along 24<sup>th</sup> Street East would detrimentally affect neighbouring properties in view of the short distance along 24<sup>th</sup> Street East occupied by the proposed development and the prevalence of other predominantly brick and cement buildings in the immediate area.

### Summary

- [45] The Board's analysis of each of the three of the variance criteria was fatally flawed. In summary form, the flaws in its analysis are as follows.
- [46] Regarding the requirement that the variance not be a special privilege, the Board erred in law by failing to apply the appropriate legal test. Instead, the Board misconstrued the legal test of special privilege to be that no variance could be granted if the developer could not demonstrate that the variance was an absolute necessity to the development of the property. The Board also erred by imposing subdivision as a pre-condition for variance relief, by failing to take relevant evidence of need and condition into account and by basing its decision on irrelevant evidence, namely the financial situation of Knox.
- [47] For the second variance requirement, the Board quoted but failed to apply the stated purpose of the M4 Zoning District and instead considered every relaxation in development standards a violation of the Bylaw's intent. On that reasoning, every variance application would be contrary to the intent of the relevant zoning bylaw and there would be no reason for the *Act* to include a variance power for the Board. The Board also based its finding on irrelevant considerations including the heritage designation of adjacent properties and allegations of injurious affection.
- [48] The Board's conclusion regarding injurious affection is unreasonable because the Board offered neither reasons nor evidence of how the opposition from neighbours was grounded in potential harm that would flow from the variances. Insofar as the Board was responding to neighbour concerns about the development itself as distinct from the proposed variances, this was an unreasonable interpretation of its powers because the *Act* does not give the Board authority to allow the appeal based on the unpopularity of the development itself. The Board also erred in law by placing the onus on Meridian to prove a lack of detrimental effect from the variances.
- [49] For all the foregoing reasons, the Board made a mistake when it found the proposed variances did not meet the requirements for variance relief in subsection 221(d) of the *Act*.

**Issue b): If so, do each of the requested variances meet the requirements of subsection 221(d) of the Act?**

**ANALYSIS:**

[50] Having found the Board erred in denying the variance applications that were the subject of the appeal before it, in accordance with subsection 226(3)(b) of the *Act*, the Committee may now make any decision with respect to the appeal that the Board could have made. Therefore, the Committee must determine whether the requested variances meet the criteria in subsection 221(d) of the *Act*.

[51] The Committee finds there is sufficient evidence on record to conclude the requested variances meet the requirements of the *Act*. The Committee observes that as indicated in the documents that formed part of Meridian's application to admit new evidence in this appeal and as confirmed by the City's submissions:

- a. An amendment to the Bylaw after the Board hearing and dated April 21, 2021, reduced certain balcony projection deficiencies in the proposal, thereby reducing the size of some of the requested variances.
- b. Since the Board's hearing, an amendment to the heritage designation bylaw for 838 Spadina Crescent East removed the parking lot from that designation. As a result, the new site created to accommodate the proposed development is not subject to a heritage designation.
- c. The site proposed in the appeal before the Board has since been legally created through a legal subdivision.

As discussed above, points b. and c. are not directly relevant to the issues raised in this appeal; however, we include them because these matters were of concern to the Board.

[52] Meridian filed a detailed report by Kindrachuk Agrey Architecture in the Board appeal, entitled *Development Appeals Supporting Evidence* (KAA Report). This report provides information that is helpful for considering each of the requested variances in relation to the statutory requirements for approval.

[53] The precise variances required are as specified in the City's letter dated October 2, 2020, denying Meridian's Permit, except as reduced by the subsequent amendment to the Bylaw, as indicated below.

**West Yard Setback**

- [54] As set out in the City's denial of Meridian's Permit and in Meridian's appeal documents, section 9.4.2 of the Bylaw states that a side yard building setback of not less than 1.5 metres is to be provided for the first three storeys above grade. The proposed west side yard building setback is zero metres for the first three storeys above grade, resulting in a deficiency of 1.5 metres for the first three storeys above grade. The deficiencies are shown in a chart attached as Appendix A to the refusal letter.
- [55] The "needs and conditions" underlying this request are Meridian's desire to provide a larger gap between the proposed development and the Knox building than would be possible with the required setback. While the Bylaw requires only a 1.5 metre side yard setback along the east property line next to Knox's rear yard, the proposed development is set back 3.0 metres. According to the KAA Report, this will allow Knox more visual space and it will also "provide an access lane for the church within the proposed development side yard to maintain access for church staff to park and access the rear of their building." This increased gap will provide Knox more visual exposure and would also allow an access lane for church staff.
- [56] The extra space allowed at the rear of Knox brings about the need to build to the property line along the west side of the site so that an efficient parking layout can still be configured within this part of the building, for reasons more precisely explained in the KAA Report.
- [57] This variance does not defeat the intent of the Bylaw. It forms part of an innovative design that allows the development to further the Bylaw's objectives of including a mix of uses in combination with high density residential uses. Indeed, this variance promotes high density residential use. At the same time, it supports community uses by being sensitive to the needs of the neighbouring heritage church. Specifically, it preserves Knox's visibility with greater separation, it provides the church with an access lane and allows a parking layout that facilitates the agreement between Knox and Meridian, which contemplates Knox earning revenue from parking spaces.
- [58] The KAA Report provides support for an expectation that there would not be a negative effect on the neighbouring property, since the west property line is shared with the Saskatoon Housing Authority's (SHA) Shepherd Apartment building. This is set well back from the property line, as shown in an aerial photo provided to the Board as part of the KAA Report. A letter from the SHA supporting the development as proposed was attached to the KAA Report. The SHA's support is only subject to preserving the existing development and existing access and a guarantee that SHA be reimbursed for any costs it incurs as a result of the proposed development.

[59] Accordingly, this proposed variance meets the variance requirements set out in subsection 221(d) of the Act.

### **Side Yard Deficiencies Above Third Floor**

[60] Section 9.4.4(6) of the Bylaw states that “the side yard shall be increased in width by 0.3 metres (from 1.5 metres) for each additional floor, excluding any permitted penthouse, above three storeys; provided further, that on a corner site along a flanking street or lane the side yard need not exceed 3 metres.”

[61] The proposed fourth storey has a 1.5 metre east, north and south side yard building setback, and a west side yard building setback of zero metres. According to the City’s Permit refusal letter, floors five to 19 are proposed to have a 4.5 metre north building setback and a six metre west building setback. This would result in 11 side yard building setback deficiencies on floor levels above the third floor. The precise deficiency on each floor and its location were set out in Appendix A to the City’s Permit refusal letter.

[62] The KAA Report demonstrated that notwithstanding the proposed side yard deficiencies, the proposed development occupies 942 square metres less than the buildable area allowed by the Bylaw.

[63] The KAA Report also sets out in detail why variances are sought to allow these side yard deficiencies, beginning with the building’s “Podium,” which consists of four storeys of parking on one side and contiguous four storeys of commercial development on the other side, with both sides rising to the same height above ground (as illustrated by way of a diagram in the KAA Report):

1. The Podium is comprised of parkade area that is 4 storeys in height with a 0.3m setback deficiency, contiguous with the commercial area of the building along Spadina that is 3 storeys in height. .... A 0.3m setback is not required for the commercial areas due to its 3 storey height, and as the parkade portion continues this same overall height, the identified setback deficiency does not make effective sense to enforce on the parkade.
2. A 0.3m setback for the 4th storey of the parkade would make for a less efficient parkade layout, with the proposed providing toward overall viability within the complying height of the commercial areas. ... an additional 0.3m setback along the north, east, south and west side yards would narrow the drive lanes and ramp location placing further spatial constraints on the already constricted parkade layout of the unique site.

- [64] This variance does not defeat the intent of the Bylaw for the same reasons as provided above for the west yard setback. Nor is there any reason to expect the 0.3 metre setback shortfall for the fourth storey to harm the neighbouring properties. The KAA Report provided massing diagrams to show the proposed variance resulted in no significant effect on the visual impression of the mass of the Podium, resulting in no more than a negligible impact on neighbouring properties and pedestrians.
- [65] Most of the setback deficiencies in this category are on the north side of the tower from floors 14 to 19. The KAA Report includes a drawing showing the typical residential floor plan and explains that these setback deficiencies are needed to allow “for a reasonably efficient layout with a double-loaded corridor and residential units with workable dimensions. The proposed tower is less than 15m wide in the north-south direction.” This means that the available dimensions for residential units is limited after allowing for necessary building elements such as demising walls, service shafts, exit stairs and corridors.
- [66] The KAA Report indicates the proposed approach is to create a consistent setback for the whole tower. While the building is set back further than required on the lower levels of the tower, deficiencies exist in the upper storeys. The variances can be seen as furthering the general purpose of the Bylaw of high-density residential development by facilitating this on an unusually shaped lot. The KAA Report also considered a more specific intent of the Bylaw of maintaining adequate space between buildings and indicated the proposed design satisfied this specific intent in the following manner:
- i. The total built area of the development is ~945m<sup>2</sup> less than a comparable project that is built out to the maximum area allowable by the required setbacks on all storeys (5- 19) per the adjacent area summary chart.
  - ii. The Gross Floor Space Ratio (GFSR) of the development is ~5.44 to 1 which is less than the 6 to 1 GFSR allowable by the Zoning Bylaw for this site....
- [67] In view of the development remaining significantly below the maximum area allowable by the required setbacks and the maximum gross floor space ratio allowed by the Bylaw, it is difficult to conceive of how this aspect of the requested variances could be injurious to neighbouring properties. Therefore, we conclude the side yard deficiencies above the third floor meet the variance requirements in subsection 221(d) of the *Act*.

### Balcony Projections

- [68] The third and fourth deficiencies identified in the City’s Permit refusal letter related to balcony projections. The third deficiency related to balconies projecting over front yards and the fourth deficiency concerned balconies projecting over side yards.

- [69] The City's Permit refusal letter stated that under section 5.8(2)(e) of the Bylaw, balconies are permitted in the required front yard if they do not project more than 1.8 metres. The proposal would have balconies projecting 2.1 metres into the required front yard along Spadina Crescent East from the fifth to the 19<sup>th</sup> floors inclusive. The proposal has 15 deficiencies of this type, which would project 0.3 metres more than the permitted front yard projection. These were also shown in Appendix A to the City's Permit refusal letter.
- [70] At the time of the hearing, section 5.8(4)(b) of the Bylaw provided that balconies could project 1.8 metres toward the side yard or 25% of the side yard, whichever was lesser. This would have resulted in 30 balcony projection deficiencies into the required side yard setbacks between the fifth and 19<sup>th</sup> floors, as set out in Appendix A to the City's Permit refusal letter.
- [71] Meridian's submission points out that the proposed balcony design used a total of only 150 square metres of projection, which was less than the 156 square metres the Bylaw permitted. Furthermore, as a result of separate City Council proceedings since the Board hearing, Bylaw paragraph 5.8(4)(b) has been amended on a city-wide basis to simply allow 1.8 metres in side yards flanking a street or registered lane. This eliminates any deficiency in the balcony projections for the fifth through seventh floors and reduces the deficiency from 2.1 metres to only 0.3 metres for the eighth through 19<sup>th</sup> floors. This is shown in a "redline" comparison of the Bylaw effective August 31, 2020 (pre-amendment) to the Bylaw effective April 26, 2021 (post-amendment). This comparison is Schedule 1 to Meridian's submission to the Committee, part of the new evidence permitted by the Committee, as explained above.
- [72] The KAA Report was completed before the deficiencies were decreased by the amendment referred to in the previous paragraph; however, the justification and analysis of this proposed variance is just as applicable to the lesser variance now required. According to the KAA Report, the need for a relaxation of this requirement comes from the need for more functional balconies, while at the same time staying within the overall permitted area for balconies. Drawing 1 in the KAA Report shows the permitted area of balcony projections. Along the south lane, for example, the permitted balcony projection of 750mm "does not provide enough space for even the simplest of outdoor furniture and is not a practical or functional amenity."
- [73] The proposed variances related to balcony projections do not defeat the intent of the Bylaw for essentially the same reasons as identified above for side yard deficiencies above the third floor. The variances furthering the general purpose of the Bylaw of higher density residential development by facilitating attractive residential units with functional balconies. Regarding the specific intent of the Bylaw related to space between buildings, this is maintained because the mass of the tower is located as closely as possible to the public lane to the south, thereby maintaining ample space between the proposed building



and neighbouring properties. In view of the more than sufficient space between buildings and the minor extent of the balcony variances requested, there are no reasonable grounds for anticipating the balcony projections requested would have an injurious effect on neighbouring properties.

- [74] We find the proposed variances for balcony projections meet the variance requirements in subsection 221(d) of the *Act*.

### **Transparent Opening Percentage**

- [75] Section 9.4.10(3) of the Bylaw requires a minimum of 40% of the surface area of the ground floor of street-facing facades to contain transparent openings. According to the City's Permit refusal letter, the 24<sup>th</sup> Street East facing ground floor façade of the proposed development does not meet this requirement.
- [76] The KAA Report explained the need for this variance comes from the unique through-site configuration of the lot, which gives it frontage on more than one street. This meant that for this development, ground floor facing frontages were more appropriately considered cumulatively than individually. In view of the approximately 100% transparent openings along Spadina Crescent East, the total openings on ground floor frontages would total about 50% even with 0% transparent openings along 24<sup>th</sup> Street East.
- [77] The unique shape of the site and narrow street frontages on both streets offer limited configurations for entry and access for the various building uses. In view of the relative prominence of Spadina Crescent East and the high pedestrian traffic along that street, active building uses such as the residential lobby, restaurant and office spaces were best oriented to that street. The frontage along 24<sup>th</sup> Street East will be used for the parkade entrance, parking area and parkade exit stairs. Strict enforcement of the transparent openings percentage into these uses would not further the intent of this Bylaw provision, which is to limit excessive lengths of blank walls and to create pedestrian friendly environments at street level.
- [78] The length of the frontage along 24<sup>th</sup> Street East is less than 18 metres and this is narrow compared to neighbouring buildings. Instead of transparent openings, the development will create a more pedestrian friendly environment through interesting façade design and intensified landscaping as illustrated in conceptual form in the KAA Report.
- [79] The Board decision indicated Meridian was asked to clarify whether the variance request for transparent openings was merely the 10% deficiency identified in the City's denial letter or whether the Board was being asked to rule on permitting as little as zero transparent openings on 24<sup>th</sup> Street East, with the caveat that 40% openings overall be

provided? Meridian acknowledged the request was that only the overall percentage of both street frontages combined be required to exceed 40% and that this could result in as little as zero transparent openings on the 24<sup>th</sup> Street East side.

- [80] We note the City did not object to Meridian's request to assess the transparent street frontage on a combined basis such that 24<sup>th</sup> Street East transparency could be as little as zero. The Board's reasons reproduce the City's submissions in support of this, citing the importance of Spadina Crescent East as a Pedestrian Priority Street in the City Centre Plan. According to page 12 of the Board's decision, the City also submitted that "considering the limited street frontage of the site that requires deliberate choices for the placement of parking, service areas, and active uses, it is appropriate that the focus on transparent openings and an active frontage has been directed to Spadina Crescent, with the resulting deficiency on 24<sup>th</sup> Street."
- [81] Considering the unusual shape and nature of the lot, the 100% transparency provided on the more prominent frontage along Spadina Crescent East and alternate means of providing a pedestrian friendly environment along 24<sup>th</sup> Street East, we find the proposed variance would not defeat the intent of the Bylaw as specifically related to the transparency requirement. At the same time, the variance contributes to the viability of a proposal that will contribute to achieving the general intent of the Bylaw of higher density residential development.
- [82] Finally, we are not persuaded that relaxing the transparency requirement along the relatively short 24<sup>th</sup> Street East frontage will have any appreciable injurious effect on neighbouring properties, particularly when combined with the high transparency along Spadina Crescent East.
- [83] Accordingly, we conclude that relaxing the required transparent opening percentage along 24<sup>th</sup> Street East meets the variance requirements in subsection 221(d) of the *Act*, as long as the overall transparency of both street frontages combined exceeds 40%. We impose this requirement in accordance with our authority to impose conditions on a variance of development standards by virtue of subsections 221(d) and 226(3)(b) of the *Act*.

#### **CONCLUSION:**

- [84] The Committee finds that allowing the appeal and permitting the development to proceed with all of the requested variances subject to the indicated condition related to transparent openings:

- a) would not give a special privilege to Meridian;
- b) would not defeat the intent of the Bylaw; and
- c) would not negatively impact neighbouring properties.

[85] The Committee allows the appeal, on the condition that the overall transparency of both the Spadina Crescent East and 24<sup>th</sup> Street East frontages combined exceeds 40%.

Signed by

Per: \_\_\_\_\_  
Chad Boyko, Panel Chair

Signed by

Per: \_\_\_\_\_  
Jessica Sentes, Director