

**IN THE MATTER OF AN APPEAL UNDER
*THE UNIFORM BUILDING AND ACCESSIBILITY STANDARDS ACT***

BETWEEN:

WESTGATE PROPERTIES LTD.

APPELLANT

AND

THE CITY OF REGINA

RESPONDENT

**DECISION OF THE SASKATCHEWAN BUILDING
AND ACCESSIBILITY STANDARDS APPEAL BOARD**

Board Members:

Keith Hanson, Chairperson; Helen Christensen, Ron Filleul, and Jake Meyer

Counsel:

Sahil Shore and Neil Abbott, Gowlings WLG (Canada) LLP, for Westgate Properties Ltd.

Christine Clifford, City Solicitor's Office of Regina, for the City of Regina

Heard: July 24, 25 and 26, 2018

Decision: August 23, 2018

SUMMARY

1. This is the third decision arising from an appeal by the Appellant Westgate Properties Ltd. (“Westgate”) of an order issued by a municipal building official of the Respondent City of Regina (“the City”) under sections 17 and 18 of *The Uniform Building Accessibility Standards Act*, S.S. 1983 – 83, c. U-1.2, (hereafter referred to as “UBAS Act” or “the Act”). This decision addresses the Order to backfill the excavation at 1971 Albert Street, Regina.
2. For the reasons which follow, the Appeal Board varies the Order.

FACTS

3. This decision will not repeat facts set out in the first and second decision, which may be referred to, except as required for this decision.
4. The relevant dates are set out as follows:

2018

April 3	City building official issues Order to Comply
April 17	Westgate files Request for Hearing of Appeal and Application to Stay Order
May 16	Hearing of Application to Stay Order
May 25	Decision on Application to Stay Order (“First Decision”)
June 8	Deadline for pre-filing of materials for appeal
June 18	Hearing of preliminary issues raised by counsel
June 22	Decision on preliminary matters.
July 24, 25 and 26	Hearing of Appeal between Westgate and City

5. There have been many communications, verbal and written, between the Chief Building Official, who receives the notice of appeal and provides administrative support to the Appeal Board, and counsel during this period, including formal notices of hearing sent by registered mail, as required by section 26.1 of UBAS Act. These communications included consulting counsel on dates they were available for hearings.

CONSIDERATION

6. The following provisions of the UBAS Act are relevant to the decision:

Powers of building official

16(1) Notwithstanding any other Act, for the purpose of ensuring compliance with the provisions of this Act or the regulations or the conditions of a permit, a building official may:

- (a) at any reasonable hour, enter a building;
 - (b) be accompanied into a building by a person having special or expert knowledge on any matter to which this Act or the regulations relate;
 - (c) order the production of a register, certificate, plan or other document relating in any manner to the design, construction, erection, placement, alteration, repair, renovation, demolition, relocation, removal, use, occupancy or change of occupancy of a building and may examine and make copies of the document;
 - (d) inspect and take samples of any material, equipment or appliance being used in the design, construction, erection, placement, alteration, repair, renovation, demolition, relocation, removal, use, occupancy or change of occupancy of a building.
- (2) If a person refuses to allow a building official to exercise, or interferes or attempts to interfere with a building official in the exercise of, a power described in subsection (1), the minister or the local authority that appointed the building official may apply to a judge of the court for an order restraining that person from preventing or interfering in any manner with the building official in the exercise of his powers.

Orders of building official

...

17(4) Notwithstanding any other provision of this Act, a building official who is satisfied that a building, whether commenced or completed before or after the coming into force of this Act, is in an unsafe condition because of:

- (a) its faulty construction;
- (b) its ruinous or dilapidated state;
- (c) its abandonment;
- (d) its open or unguarded condition; or

(e) any other reason;
 may, by notice in writing, order the owner of the building or his agents, contractors, employees, successors or assigns or the registered owner of the land on which the building is situated, within the time prescribed in the notice, to take any steps prescribed in the notice that the building official considers necessary to eliminate the unsafe condition.

Appeal to appeal board

18(1) An owner of a building may appeal an order made pursuant to section 17 within 15 days after service of the order on the owner by:

- (a) filing a written notice of the appeal with the chief building official;
 - (b) submitting to the chief building official all substantiating information considered necessary by the chief building official; and
 - (c) placing a deposit in the prescribed amount with the chief building official.
- (2) Within 30 days after all of the things described in clauses (1)(a) to (c) have been done, the appeal board shall conduct a hearing, consider the matter and render its decision in writing.

...

(5) On an appeal of an order made pursuant to subsection 17(4), the appeal board shall make an order:

- (a) confirming the order appealed against where the appeal board is satisfied that an unsafe condition exists and that the steps prescribed in the order are necessary to eliminate the unsafe condition;
 - (b) revoking the order appealed against where the appeal board is satisfied that:
 - (i) an unsafe condition does not exist; or
 - (ii) the steps prescribed in the order are not necessary to eliminate the unsafe condition; or
 - (c) varying the order appealed against where, in the opinion of the appeal board, sufficient cause is established.
- (6) An order pursuant to subsection (3), (4) or (5):
- (a) may be made subject to any conditions that the appeal board considers necessary;
 - (b) must be in writing; and
 - (c) must be served on the owner by registered mail addressed to the owner at his or her last known address.

7. The following exhibits, testimony, and arguments were considered by the Appeal Board:

- a. Order to Comply, dated April 3, 2018
- b. Notice of Appeal, dated received April 18, 2018, from Westgate Properties
- c. Exhibit #1 – Written submission from Westgate Properties Ltd., dated June 8, 2018

- d. Exhibit #2 – Engineer report from EXP Services Inc., dated July 6, 2018
- e. Exhibit #3 – Written submission from City of Regina for the July 24-26, 2018, hearing
- f. Exhibit #4 – Engineer report from KGS Group, dated June 29, 2018
- g. Exhibit #5 – Engineer report from Pinter & Associates, dated July 20, 2018
- h. Exhibit #6 – Letter from Isherwood to Double Star Drilling, dated April 28, 2017
- i. Exhibit #7 – Isherwood site visit report No. 30, dated September 7, 2017
- j. Exhibit #8 – Timeline from Westgate Properties Ltd., from June 2016 to December 2018
- k. Exhibit #9 – EXP model – Section 6 – Current Excavation (Failure 1)
- l. Exhibit #10 - EXP model – Section 6 – Current Excavation (Failure 2)
- m. Exhibit #11 – National Building Code requirements 4.2.4. – Design Requirements and 4.2.5. Excavations
- n. Exhibit #12 – Email from Rob Kenyon to Christine Clifford, dated July 24, 2018
- o. Exhibit #13 – KGS models – Section 6 – existing condition
- p. Exhibit #14 – KGS model – sensitivity to cohesion for Regina Clay
- q. Exhibit #15 – City of Regina commercial inspection reports
- r. Exhibit #16 – Government of Saskatchewan building official licence application website
- s. The testimony of Mr. Kai-Sing Hui, engineer from EXP Services Inc. on July 24 and 25, 2018
- t. The testimony of Dr. Rob Kenyon, engineer from KGS Group on July 25 and 26, 2018
- u. The testimony of Dr. Ibrahim El-Baroudy, engineer from Pinter & Associates on July 26, 2018
- v. The testimony of Jeremy Chalupiak, building official, City of Regina
- w. The testimony of Bill Wright, Manager of the Development Services, City of Regina
- x. Oral arguments from representatives of Westgate Properties Ltd. and the City of Regina

- y. Provisions of *The Uniform Building and Accessibility Standards Act* (the UBAS Act), *The Uniform Building and Accessibility Standards Regulations*, and *The Public Inquiries Act, 2013*

REVIEW OF THE ORDER AND APPEAL

The Order

8. Issued by Jeremy Chalupiak, building official appointed by the City of Regina and dated April 3, 2018, the following order applies to 1971 Albert Street, Regina, Saskatchewan. The Order to Comply states:

- “1) The property is in contravention of Division B, section 4.2.5.1 of the National Building Code of Canada, 2015;
- 2) The property is an unsafe condition because the owner has failed to comply with conditions regarding redesign and replacement of the temporary excavation support and recommencement of construction as stated in the November 3, 2017 report of the engineer of record within the timeframes stated in the November 3, 2017 report of the engineer of record.

Pursuant to section 17(1), 17(2)(c) and 17(4) of *The Uniform Building and Accessibility Standards Act* you are hereby ordered to:

- 1) Backfill the site by April 30, 2018, having first obtained all required permits and approvals; and
- 2) Following the completion of the backfill, deliver to the City a written verification from the owner’s engineer of record that the backfilling is compliant with Division B, Section 4.2.5.8 of the National Building Code of Canada, 2015.”

The Appeal

9. The Appellant, Westgate Properties Ltd., filed an appeal on April 18, 2018, which requested:

- “The Order to Comply be set aside and the Appeal Board shall make an Order as follows:
- i. An Order that National Building Code of Canada 2010 applies to the Project Site;
 - ii. An Order revoking the Order to Comply pursuant to section 18(5)(b) of the Act; and
 - iii. An Order staying the Order to Comply pursuant to section 20(1) of the Act.”

DECISION OF THE APPEAL BOARD

10. In accordance with subsections 18(5) and (6) of the UBAS Act, the Saskatchewan Building and Accessibility Standards Appeal Board hereby varies the Order to Comply issued on April 3, 2018, by the City of Regina and orders Westgate Properties Ltd. to proceed as follows:

a. General Conditions

Determine a course of action in compliance with the options noted below and provide written advice to the City of Regina no later than September 30, 2018, indicating which option Westgate Properties Ltd. chooses to pursue.

b. Complete the Project

Continue to monitor the site at 1971 Albert Street monthly, submit all monitoring reports to the City of Regina within 15 days of being recorded, and take all necessary remedial action to protect the temporary shoring, adjacent buildings, and rights of way from slumping or failure.

Commence, continue, and carry out construction of the project to completion. Return the traffic lanes on both Albert Street and Victoria Avenue to the City of Regina at the completion of the project. Return the pedestrian rights of way to the City of Regina at the completion of the project. All necessary permits, inspections, and certificates required by the UBAS Act and all other permits, inspections, or certificates under any other applicable standards, bylaws, regulations, and acts shall be the responsibility of the owner to arrange. Work to be completed to the satisfaction of the City of Regina and all other applicable regulatory authorities.

A new temporary shoring design for excavation and permit application must be submitted to the City of Regina by October 31, 2018. Excavation and shoring work to commence no later than December 8, 2018. Building design documents and application for building permit to be submitted no later than February 28, 2019. Construction to commence no later than April 1, 2019. Completion expected no later than March 30, 2022.

OR

c. Construct Permanent Shoring

Continue to monitor the site at 1971 Albert Street monthly, submit all monitoring reports to the City of Regina within 15 days of being recorded, and take all necessary remedial action to protect the temporary shoring, adjacent buildings, and rights of way from slumping or failure.

Commence, continue, and complete construction of a permanent shoring works to protect the site, adjacent buildings, and rights of way from slumping or failure. Return the traffic lanes on both Albert Street and Victoria Avenue to the City of Regina. In order to protect the public and return all pedestrian rights of way to the City of Regina, erect an appropriate covered way, and maintain in good repair for the duration of its existence, on the street facing sides of the excavation. All necessary permits, inspections, and certificates required by the UBAS Act and all other permits, inspections, or certificates under any other applicable standards, bylaws, regulations, and acts shall be the responsibility of the owner to arrange. Work to be completed to the satisfaction of the City of Regina and all other applicable regulatory authorities.

A new permanent shoring design and permit application must be submitted to the City of Regina by October 8, 2018. Excavation and shoring work to commence no later than February 28, 2019. Completion expected no later than February 28, 2020.

OR

d. Decommission and Backfill

Continue to monitor the site at 1971 Albert Street monthly, submit all monitoring reports to the City of Regina within 15 days of being recorded, and take all necessary remedial action to protect the temporary shoring, adjacent buildings, and rights of way from slumping or failure.

Decommission and backfill the excavation. Return the traffic lanes on both Albert Street and Victoria Avenue to the City of Regina. Return the pedestrian rights of way lanes on

both Albert Street and Victoria Avenue to the City of Regina. All necessary permits, inspections, and certificates required by the UBAS Act and all other applicable standards, bylaws, regulations, and acts shall be the responsibility of the owner to arrange. Work to be completed to the satisfaction of the City of Regina and all other applicable regulatory authorities.

Decommission and backfill design and permit application must be submitted to the City of Regina by October 31, 2018. Work to commence no later than November 30, 2018. Completion expected no later than April 30, 2019.

REASONS FOR DECISION

11. In varying the Order and providing the options for compliance noted in this Order, the Appeal Panel relied on evidence submitted, testimony given, and arguments provided during the course of the appeal hearing.
12. The testimony of experts representing Westgate Properties Ltd., the City of Regina, and retained by the Appeal Board, all agreed that the property was not in an unsafe condition when the Order to Comply was written on April 3, 2018. For this reason, the Appeal Board is satisfied that the excavation at 1971 Albert Street was not in an unsafe condition on April 3, 2018, and is not currently in an unsafe condition.
13. It was noted by the Appeal Board that no expert testified and no argument was advanced by Westgate Properties Ltd. that the site could remain in its current condition indefinitely without additional measures being taken and still remain safe. Westgate Properties Ltd. also indicated that they were willing to accept reasonable requirements for the ongoing monitoring of the site.
14. Isherwood, the former engineer of record for the excavation project, indicated that the site should be decommissioned and backfilled. The timing of this message corresponded with the end of their commitment as the engineer of record.
15. The new and current engineer of record, EXP would only indicate that the site would remain safe until December 8, 2018, the end of his contractual obligations as the engineer of record.

16. Counsel for Westgate Properties Ltd. argued that the Appeal Board should only consider NBC 2015, Division B, Article 4.2.5.1. Design of Excavations in its decision determining if the site was safe or not on April 3, 2018, the day the Order to backfill was written by the City of Regina's building official. However, the NBC is meant to be a comprehensive document which is self-referential. That is, sections within the NBC reference other sections within the NBC as being necessary to be taken into consideration when interpreting the NBC.
17. After examining the evidence, testimony, and arguments of both parties, the Appeal Board has determined they would:
 - a. reject the argument by the City of Regina that the site was unsafe on April 3, 2018, when the Order to Comply was issued;
 - b. reject the argument made by counsel for Westgate Properties Ltd. that only NBC 2015, Division B, Article 4.2.5.1. Design of Excavations be considered;
 - c. acknowledge that the temporary shoring was only temporary for the purposes of construction and was intended to be monitored and have the design adjusted as necessary to meet the needs of the construction project and the adjoining properties as the project moved forward;
 - d. acknowledge the limited ability of both the former and current engineers of record to provide assurances past the date that their contractual obligations end; and
 - e. consider their options to make conditions on an order of the Appeal Board, consistent with subsection 18(6) of the UBAS Act.
18. In considering the items noted above, the Appeal Board examined their ability to confirm, revoke, or vary the Order under subsection 18(5) of the UBAS Act.
19. The Appeal Board arrived at an opinion that sufficient cause was established to vary the order under clause 18(5)(c) of the UBAS Act.
20. Further, the Appeal Board arrived at an opinion that it was necessary to establish conditions under clause 18(6)(a) of the UBAS Act. Finding simply that the site was safe on April 3,

2018, provided no party with any option for the longer term and no successful conclusion of the current state.

21. The Appeal Board agreed with all three engineering opinions that the site could not remain in its current state indefinitely. Varying the Order, while providing options with conditions, and addressing the long term safety of the project was in the best interests of all parties.

CONCLUSION

22. The Appeal Board thanks counsel for their submissions.

23. Section 19 of the UBAS Act provides for an appeal of a decision of the Saskatchewan Building and Accessibility Standards Appeal Board to a judge of the court on a question of law alone. Section 19 states:

“19(1) Within 30 days after service of an order of the appeal board pursuant to section 18, an owner aggrieved by the order may appeal the order to a judge of the court on a question of law alone.

(2) The decision of a judge pursuant to subsection (1) is final.”

Decision dated this 23rd day of July 2018

Saskatchewan Building and Accessibility Standards Appeal Board

A handwritten signature in black ink, appearing to read 'K. Hanson', written over a horizontal line.

Per: Keith Hanson, Chairperson