

DEVELOPMENT APPEAL BOARD ORDER

File No.: 03DP17
Order No.: 06-18
Appeals: 06-18
Legal Description: Lot 20B, Block A, Plan 6409GD
Municipal Address: 220 Bow Avenue

ORDER OF THE DEVELOPMENT APPEAL BOARD OF THE TOWN OF BANFF, IN THE PROVINCE OF ALBERTA dated the 15th day of June, 2018.

Development Appeal Board Members present: Dak Kerr (Public Representative), David Bayne, (Public Representative), Peter Eshenko (Public Representative) and Karen Sorensen (Council Representative);

AND IN THE MATTER of the Municipal Government Act, Revised Statutes of Alberta, 2000, Chapter M-26, or as in accordance with the Town of Banff Incorporation Agreement between the Government of Alberta and the Government of Canada dated December 12th, 1989;

AND IN THE MATTER of a decision made on the 2nd day of May, 2018 by the Development Officer wherein a development permit application for a bed and breakfast home was not accepted pursuant to Section 4.14.1 of the Land Use Bylaw;

AND IN THE MATTER of an appeal by the applicant from the said decision of the Development Officer;

This appeal having come to be heard before the Development Appeal Board on the 7th day of June, 2018 in the presence of the Development Officer, the applicant and the agent for the appellant;

AND UPON hearing the verbal submission of the Development Officer and the agent for the appellant;

AND UPON having regard to the Town of Banff Land Use Bylaw, as amended, the Municipal Development Plan, and other relevant planning policies;

AND UPON considering the relevant planning evidence adduced at this hearing and the circumstances and merits of this application;

IT IS ORDERED:

1. That Appeal No. 06-18 be upheld and that the decision of the Development Officer be overturned.
2. That the six month waiting period for the submission of a new development permit application for the same or similar use be waived and that the applicant be allowed to submit a new development permit application for a bed and breakfast home on the subject property.

BACKGROUND FACTS

From the evidence presented, the Development Appeal Board found that the applicant sought permission to apply for a new development permit application for a Bed and Breakfast Home at 220 Bow Avenue. The Board found that the Municipal Planning Commission (MPC) had previously denied the renewal of a development permit application for a bed and breakfast home on the same property based on non-compliance with the requirements of Section 10.3.2(l) and s. 10.3.2(e) of the Land Use Bylaw. Details of the resubmission interval process along with an overview of the duties responsibilities of the Municipal Planning Commission and Development Appeal Board are set out in the report prepared by administration and were presented at the outset of the hearing by Mr. Darren Enns, Manager of Development Services, on behalf of the Development Authority.

The Board found that the original decision of MPC to deny the renewal of the development of the bed and breakfast home was not appealed and that the Development Officer refused to waive the six month waiting period for the submission of a new development application on May, 2nd, 2018. The Board found that a new development permit application would not be accepted by Planning and Development until September 15th, 2018. The Board found that given timing of the development permit application review process, the proposed development could not likely be forwarded to MPC for a decision until the following month. The Board also found that there was correspondence via email between the applicant and the Development Officer which referred to the resubmission of a new development permit application, all of which is included in Tab E of the report submitted by the appellant.

Submissions on behalf of the applicant

Mr. Hugh Ham, legal counsel for the appellant, represented the applicant at the hearing.

Mr. Ham began by respectfully requesting that the Board consider waiving the six month resubmission interval for the submission of a new development permit application given the Development Officer, in his opinion, had already waived the six month waiting period in light of the nature of the email correspondence between he and the applicant. Mr. Ham noted that the decision to not accept a

new development permit application was *functus officio* so as to be incapable of being changed.

Mr. Ham cited case law from the Alberta Court of Appeal including *Altus Group Limited v City of Calgary*, *Chandler v Alberta Association of Architects* and a decision from the Supreme Court of Alberta Appellate Division *John Dalinga v The City of Calgary*.

Mr. Ham referred to the *Altus* case in terms of how it specifically considers the relationship of *stare decisis* and the standard of reasonableness. His point being that consistent rules and decisions are fundamental to the rule of law. Mr. Ham emphasized that while tribunals such as the SDAB are not bound by prior decisions, inconsistent decisions do not result in the rule of law because everyone should be treated equally under the rule of law, and not the rules of chance.

Mr. Ham spoke at length about the powers and duties of the Board and the fact that they are obligated to limit deliberations to relevant planning considerations and emphasized that the power to impose penalties for breeches of the Land Use Bylaw is given to the courts and not an administrative tribunal such as the SDAB. Reference was also made to *Dalinga v City of Calgary* decision and that, in his opinion, the Municipal Planning Commission erred in law in rendering its original decision to refuse the renewal of the development permit for the bed and breakfast home by considering irrelevant evidence.

Mr. Ham also referred to the purposes of Part 17 of the Municipal Government Act whereby plans and related matters are prepared and adopted to achieve the orderly, economical and beneficial development and use of land without infringing on the rights of individuals. He then went on to speak briefly to the nature of the *Chandler* decision and stated that once a decision is made by a person or board authorized to make a decision (such as the Development Officer in this case) they cannot change it. In his view, it appeared that the six month resubmission period imposed by the Development Officer is being treated as punishment for allegations of prior misconduct

REASONS FOR THE DECISION

The Board reviewed the context of the decision made by the Development Officer, having regard to sound planning considerations, the circumstances of the case, the evidence presented and the arguments made by the parties.

The Board acknowledges the submission by legal counsel for the appellant contained with Pages 050 and 168 of the report to the Board.

The Board has regard to the provisions of the Land Use Bylaw and Section 4.14.1 which states that *when an application for a development permit is refused, another application for the same or a similar use on the same site shall not be submitted by the same or any other applicant until six months after the date of the decision to refuse has been made. A Development Officer shall have the*

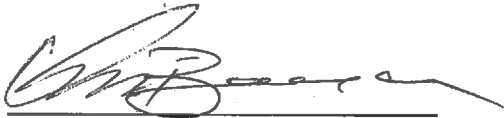
discretion to waive the waiting period for the submission of a new development permit application for the same or similar use.

The Board acknowledges that the intent of the applicant was to apply for a new development permit application for a new bed and breakfast home and that she sought the assistance of the Planning and Development Department in preparing that application. The Board recognizes the Development Officer, despite his honourable intentions to assist the applicant, would have given the impression to the applicant that the six month waiting period would be waived upon submission of a completed development permit application. The Board also finds that the content of the email exchanges between the Development Officer and the applicant could logically be interpreted by the applicant that the Development Officer was exercising his discretion to waive the six month waiting period for the submission of a new development permit.

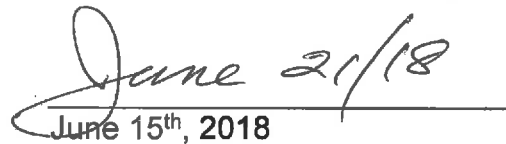
The Board also finds that an application for a four bedroom bed and breakfast home with increased requirements for onsite parking is not the same or similar to the previous application for two bedroom bed and breakfast home on the subject property.

CONCLUSION

For the above reasons, the Board allows the appeal and overturns the decision of the Development Authority. Therefore, the applicant is allowed to proceed to submit a new development permit application for the same or similar use in accordance with the provisions of the Land Use Bylaw.



David Bayne, Chairman
Development Appeal Board



June 15th, 2018