

DEVELOPMENT APPEAL BOARD ORDER

File No.: 03DP16
Order No.: 05-18
Appeals: 05-18
Legal Description: Lot 14, Block 27, Plan 6719BC
Municipal Address: 138 Otter Street

ORDER OF THE DEVELOPMENT APPEAL BOARD OF THE TOWN OF BANFF, IN THE PROVINCE OF ALBERTA dated the 19th day of June, 2018.

Development Appeal Board Members present: Dak Kerr (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 11th day of May, 2018 by the Development Officer wherein a development permit application for a new 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 appellant and the applicant;

AND UPON hearing the verbal submissions of the Development Officer, the applicant, the agent for the appellant and those in favour of the appeal;

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. 05-18 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 AND SUMMARY OF EVIDENCE

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 138 Otter Street. 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. The Board found that the decision of MPC to deny the renewal of the development of the bed and breakfast home was appealed and that the Development Appeal Board upheld the decision of the MPC.

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 Development Officer refused to waive the six month waiting period for the submission of a new development application on May 11th, 2018 in accordance with the provisions of s. 4.14.1 of the Land Use Bylaw. The Board heard that the Development Officer was of the opinion that there were no exceptional circumstances or sound planning reasons and/or supporting rationale provided by the applicant to justify that a new application should be accepted and that upon review of the Land Use Bylaw, the Development Office could find no compelling reasons that would warrant the waiving of the six month waiting period.

The Board found that a new development permit application would not be accepted by Planning and Development until November 4th, 2018. The Board found that given timing of the development permit application review process, and the fact that a new application for the same or similar use would have to be forwarded to MPC for a decision, it was unlikely that a new permit would be issued before the end of November, 2018, or longer.

Submissions on behalf of the applicant

Kyla Conner, legal counsel for the appellant, represented the applicant at the hearing.

Ms. Conner thanked administration for their presentation and asked the Board if they required any further clarification in response to her submission on page 033 of the staff report presented to the Board. It was her opinion that there were, in fact, exceptional circumstances and valid planning reasons in support of waiving the six month resubmission period for a new development permit application. She stated that the six month waiting period was unnecessarily long and punitive and that it is unclear in the Land Use bylaw as to what the actual intent and purpose of the resubmission interval is. She noted that there was a lack of guidance provided to the Development Officer in the Land Use Bylaw in this regard and the fact that there is no guiding precedent in terms of which factors should be considered in waiving the six month waiting period.

It was also noted that because of the cap on the number of bed and breakfast homes in the land use district, the six month waiting period could jeopardize her client's ability to obtain a new development permit should another application be submitted by a different applicant.

Other submissions in favour of the appeal

Peter Christou, one of the shareholders of the numbered company that owns the subject property, thanked the Board for hearing the matter of the appeal and expressed his concern with what he believed to be a very heavy handed approach to enforcing the Bed and Breakfast Home development regulations. He noted that the enforcement measures and refusal of the appeal had resulted in a significant financial impact and negative impact on visitor experience given the number of cancelled bookings. He also explained that he was looking to the future and had been working diligently with Planning and Development staff to meet the requirements of the Land Use Bylaw and move forward in the interests of providing the highest quality customer service and guest accommodation to visitors to Banff.

Jon Whelan advised the Board that he was a 20 year resident in Banff and supported waiving the six month waiting period for the submission of a new development permit application. He also suggested to the Board, as he had done with MPC and Council, that all public committee meetings be filmed and recorded.

Jamie McVicar indicated to the Board that he operated a bed and breakfast home 430 Banff Avenue. He asked that the six month waiting period be waived given Thea's House was not attempting to hide or evade the regulations in place and have already lost thousands of dollars in bookings as a result of the decision by MPC to refuse their renewal application. He asked the Board to consider the implications of the process and if this was their idea of community.

The Board went on to discuss whether or not they have the authority to reduce the six month waiting period and establish a specific timeframe as to when a new development permit application can be submitted. Administration confirmed that the wording of s. 4.14.1 of the Land and Use Bylaw only allows the Development Authority to consider waiving or not waiving the six month time period and that there was no discretion to set specific parameters as to when an application must be submitted.

The Board discussed the resubmission interval within the context of the cap on bed and breakfast homes in the RCN Land Use District and whether or not an application could be submitted by another applicant for a bed and breakfast home pending the outcome of the subject appeal. It was noted that the cap had yet to be reached in the land use district and that up to two more bed and breakfast homes could potentially be allowed in the district

The Board also inquired as to whether or not there was a mechanism to hold a bed and breakfast home business license in place while the outcome of an appeal is pending.

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 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.* It is recognized that there is no set or specific criteria in the Land Use Bylaw which the Development Authority can utilize or make reference to in rendering a decision to waive the six month waiting period.

The Board acknowledges that the intent of the applicant is to apply for a new development permit application for a new bed and breakfast home and that they are actively engaged in the process of working with the Planning and Development Department in preparing that application and resolving outstanding issues.

The Board takes into consideration the timing of the process for renewal of the development permit application in and that it coincides with the advent of what is generally considered "high tourist season" in Banff and the nature of the bed and breakfast business whereby bookings and reservations are made months in advance.

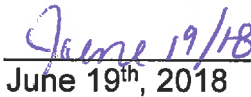
The Board recognizes that there has already been a significant loss in business to date and that it could take considerably longer than the six month waiting period to obtain a development permit if enforced. In light of the circumstances and the fact that the bed and breakfast in question appears to have operated in the past without incident for a significant period of time until now, that consideration should be given to entertaining a new application for a bed and breakfast home.

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.



Dak Kerr, Vice-Chairman
Development Appeal Board



June 19th, 2018