

MINUTES OF THE MUNICIPAL PLANNING COMMISSION
of the Town of Banff in the Province of Alberta
Town Hall Council Chamber
Wednesday, July 11, 2018 at 9:00 a.m.

COMMISSION MEMBERS PRESENT

Scott McElhone	Public Representative
Richard Church	Public Representative
Amber Wanless	Public Representative
Brian Smythe	Public Representative (Chairperson)
Ken Riordon	Public Representative (Vice Chairperson)
Corrie DiManno	Council Representative
Chip Olver	Council Representative
Bryan Howie	Parks Canada Representative

COMMISSION MEMBERS ABSENT

ADMINISTRATION PRESENT

Randall McKay	Director, Planning and Development
Darren Enns	Manager, Development Services
Dave Michaels	Planner
Jennifer Laforest	Planner
Kerry MacInnis	Administrative Assistant, Planning (MPC Recorder)

1.0 CALL TO ORDER

The Chair to the Municipal Planning Commission called the July 11, 2018 meeting of MPC to order at 9:09a.m.

2.0 APPROVAL OF AGENDA

MPC18-96 Moved by Olver to approve the agenda of the July 11, 2018 meeting of the Municipal Planning Commission agenda as amended.

Add under 7.1 - New Business: Review of Bed and Breakfast Regulations.

CARRIED

2.1 The Chair asked if any members of the Municipal Planning Commission would be declaring a conflict of interest in hearing today's meeting.

Church declared a conflict of interest in hearing agenda item #4.1 as he has a personal relationship with the application and this could be perceived as an apprehension of bias.

Minutes approved by: _____

3.0 ADOPTION OF PREVIOUS COMMISSION MINUTES

MPC18-97 Moved by Olver to approve the minutes of the June 13, 2018 meeting of the Municipal Planning Commission as amended.

- Remove the word “two” from MPC18-92 motion.

CARRIED

Church left the meeting at 9:12a.m

4.0 UNFINISHED BUSINESS

4.1 18DP07 – Proposed Additional Guestrooms within Existing Bed and Breakfast Home at 316 Lynx Street

- i. Administration provided a presentation and overview on the proposal as included in this agenda package.
 - Application to convert an existing one bedroom accessory dwelling to two commercial accommodation guestrooms;
 - The accessory dwelling is currently under construction;
 - A condition of approval requires the submission of a restrictive covenant limiting the number of guestrooms and residential bedrooms;
 - That Municipal Planning Commission consider the basement floor plan, landscaping plan and site plan provided as they relate to development permit application 18DP07;
 - That Municipal Planning Commission render a decision for development permit application 18DP07 for the addition of two (2) guestrooms as part of the existing two (2) guestroom bed and breakfast home located at 316 Lynx Street subject to the conditions of approval attached as in the June 13, 2018 MPC Request for Decision Report.

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- ii. Public input
There was no public input.
- iii. Applicant input
Susan Jakubiz, applicant, addressed the commission and spoke to the written submission included in this agenda package and these meeting minutes.

Andrew Jakubiz, applicant, addressed the commission and spoke to the written submission included in this agenda package and these meeting minutes.

MPC18-98 Moved by Howie that the MPC move in camera at 10:17a.m. to deliberate and reach its decision in accordance with section 197(2.1) of the Municipal Government Act and section 3.2.12 of the Town of Banff Land Use Bylaw.

MPC requested that the Manager of Development Services, Enns, attend the in camera discussion to answer questions of process and procedure.

CARRIED

MPC18-99 Moved by Howie to return to the public meeting at 10:50a.m.

CARRIED

Moved by Olver that the Municipal Planning Commission approve the development permit application 18DP07 for the addition of two (2) guestrooms within an existing two (2) guestroom bed and breakfast home located at 316 Lynx Street subject to the conditions of approval attached as appendix 'A'.

MPC18-100 Moved by Olver that the Municipal Planning Commission amend the conditions of approval for 18DP07 as follows:

- Add to condition 1(a) (b): and prohibiting the use of any commercial accommodation use of any units while the live in owner is not in residence.

CARRIED

Minutes approved by: _____

MPC18-101 Moved by Olver that the Municipal Planning Commission amend the conditions of approval for 18DP07 as follows:

- Add as a condition of approval 1(e): The applicant must submit a statutory declaration that demonstrates the applicant is aware that any non-conformance with conditions of approval or requirements of the Land Use Bylaw will result in the revocation of the Bed and Breakfast business license.

CARRIED

MPC18-102 Moved by Olver that the Municipal Planning Commission approve the development permit application 18DP07 for the addition of two (2) guestrooms within an existing two (2) guestroom bed and breakfast home located at 316 Lynx Street subject to the conditions of approval attached as appendix 'A' as amended.

CARRIED

Appendix 'A' - Conditions of Approval – 18DP07

(1) Conditions to be met prior to the issuance of a development permit:

- (a) The applicant is required to submit an Revised Site Plan with a minimum scale of 1:200 metric which includes:
 - The removal of the tandem parking; and,
 - A minimum of 1.3m landscape buffer at each end of the surface parking lot entrance.
- (b) The applicant is required to obtain and register a Restrictive Covenant limiting the number of bed and breakfast guestrooms to four (4) , limiting the number of residential bedrooms within the single detached home to six (6) and prohibiting the use of any commercial accommodation use of any units while the live in owner is not in residence. The terms and wording of the agreement shall be to the satisfaction of the Director of Planning. The applicant is required to pay the Town of Banff the legal agreement surcharge of \$600.00 as determined in Schedule G of the Land Use Bylaw and provide evidence that the agreement has been registered on title;
- (c) The applicant is required to pay to the Town of Banff the Municipal Planning Commission Surcharge of \$375.00 as per Schedule G of the Land Use Bylaw; and,
- (d) The applicant may pursue opportunities with the Development Officer for Integrating Solar Energy within the development.
- (e) The applicant must submit a statutory declaration that demonstrates the applicant is aware that any non-conformance with conditions of approval or requirements of the Land Use Bylaw will result in the revocation of the Bed and Breakfast business license.

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(2) Specific Conditions:

- (a) This approval permits two (2) additional commercial accommodation unit at an existing Bed and Breakfast Home. A total of four (4) commercial accommodation units are permitted at this property;
- (b) The applicant is required to Schedule a Site Inspection with the Development Officer following the completion of the project to ensure the guestroom and commercial accommodation areas are in compliance with the approved plans;
- (c) Submit evidence to the satisfaction of the Development Officer for the removal of the kitchen in accordance with section 10.3.2 (d) of the Land Use Bylaw; and,
- (d) Consideration should be given to replacing two (2) existing Crab Apple Trees with approved non-fruit bearing trees following the list of recommended plant material in section 10 of the Banff Design Guidelines.

(3) General Conditions:

- (a) Obtain a valid Business Licence from the Town of Banff for the operation of a Bed & Breakfast Home. The number of commercial accommodation units shall be restricted to four (4);
- (b) The Development Permit is valid for a period not to exceed the term of the Business Licence, one (1) year from the date of issuance or until transfer/change in ownership of the subject property, whichever first occurs;
- (c) On-site parking shall conform to the approved site plan. No parking of guest vehicles is permitted on adjacent public roadways;
- (d) Planting with a low or very low flammability rating is encouraged and mature conifers within 5m of any structure shall be limbed to 3m and all standing dead shall be removed;
- (e) All signs require a separate Development Permit in accordance with the Town of Banff Land Use Bylaw;
- (f) The Bed and Breakfast Home shall be operated exclusively by the live-in owner as an accessory use. The Bed and Breakfast Home shall not change the principal residential character, use or external appearance of the dwelling;
- (g) Vehicular traffic generated by the Bed and Breakfast Home shall not be in excess of what which is characteristic of the neighbourhood in which it is located;
- (h) The owner will maintain a daily guest registry which will include rooms occupied and vehicle license plate information. If a complaint is received, the owner, upon request from the Town shall provide the daily guest registry for inspection and shall provide license plate numbers of permanent resident vehicles. The Town may request this at any time between the hours of 8:00 a.m. and 8:00 p.m.;
- (i) The owner shall be responsible for ensuring that each guest is advised that they must park in the areas designated

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on the application and not on a public roadway;

- (j) The owner shall be responsible for complying with the Alberta Fire Code;
- (k) Contact Alberta Health Services (Banff Health Unit) at 403.762.2990 regarding the *Guidelines for Bed and Breakfast Establishments* and to arrange an inspection of the property prior to operation;
- (l) Contact Alberta Health Services (Banff Health Unit) at 403.762.2990 to obtain a food establishment permit prior to operation;
- (m) Non-compliance with any conditions of the Development Permit will result in revocation of the 'Bed and Breakfast Home' permit; and
- (n) Obtain all permits required in accordance with the *Province of Alberta Safety Codes Act Revised Statutes of Alberta, Chapter S-1*. The Act requires that all property owners and contractors working in Alberta obtain permits prior to commencing work on buildings covered by the Alberta Building Code or prior to conducting work governed by the regulations of the *Canadian Electrical Code*, the *Alberta Gas Code* or the *Alberta Plumbing Code*.

Church returned to the meeting at 11:10a.m.

5.0 REPORTS

5.1 Proposed Bed and Breakfast at 220 Bow Avenue – 18DP17

i. Staff Presentation

Administration provided a presentation and overview on the proposal as included in this agenda package.

MPC18-103 Moved by Olver that the MPC move in camera at 11:37a.m to review Hugh Ham's correspondence and determine if MPC requires further legal advice on this correspondence.

- No Town of Banff staff members were present during the in camera discussion.

CARRIED

MPC18-104 Moved by Riordon to return to the public meeting at 11:47a.m.

CARRIED

MPC18-105 Moved by Smythe that it is the Municipal Planning Commission decision to postpone making a decision on the proposed development permit 18DP17 until MPC has had the opportunity to receive written legal advice with respect to Hugh Ham's written submission which was received the day prior to this MPC meeting (Ham's written correspondence has been included with these meeting minutes).

CARRIED

6.0 CORRESPONDENCE

There was no correspondence.

7.0 NEW BUSINESS

7.1 Review of Bed and Breakfast Regulations

Administration provided a verbal update regarding bed and breakfast compliance and recommendations going forward. Bylaw amendments will be forth coming before the end of this calendar year.

8.0 INQUIRIES

There were no inquiries.

9.0 DATE OF NEXT MEETINGS/ADJOURNMENT

The next scheduled meeting of the Municipal Planning Commission is scheduled for Wednesday, August 8, 2018 at 9:00 a.m.

MPC18-106 Moved by Riordon to adjourn the meeting at 12:00 p.m.

CARRIED

Brian Smythe
Chair

Kerry MacInnis
Planning and Development

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TOWN OF BANFF
SUBDIVISION TO THE MUNICIPAL PLANNING COMMISSION

SUBMISSION ON BEHALF OF KERRY-LEE SCHULTHEIS

Bed and Breakfast
Home 220 Bow Avenue

The appellant, Kerry-Lee Schultheis, previously operated a bed and breakfast house at 220 Bow Avenue but the annual renewal was denied by the Municipal Planning Commission ("MPC"). Ms. Schultheis did not appeal because it was her intent to apply for a bed and breakfast with 4 bedrooms. The SDAB has subsequently held that a 4 bedroom bed and breakfast is not the "same or similar" to a 2 bedroom operation so that the 6 month waiting period does not apply.

Ms Schultheis sought the assistance of the Town's planning department in making that application and received email from the Town's Development Officer indicating he was waiving the 6 month re-application waiting period provided for in section 4.14.1 of the Town of Banff Land Use Bylaw. The SDAB has since held that the Development Officer did, in fact, waive the six month waiting period.

As a result of the SDAB's decision, the application for a 4 bedroom bed and breakfast operation is now before the MPC.

The report by the Town's staff contains two references that require explanation. The first is to the MPC's March of 2018 decision not to renew the 2 bedroom approval and the second is a reference to the Town not having a record of a building permit having been applied for 18 years ago when the home was renovated.

The Municipal Planning Commission is a Planning Body

When considering development permit applications, the MPC must confine its considerations to planning matters only.

What are relevant planning criteria?

According to the Alberta Court of Appeal in *Dalinga v. City of Calgary*, (TAB A, para 21 , 27, 28, 29 and 31) planning criteria fit within section 617 of the Municipal Government Act: (the purpose provision of Part 17 governing planning)

Purpose of this Part

617 The purpose of this Part and the regulations and bylaws under this Part is to provide means whereby plans and related matters may be prepared and adopted

- (a) to achieve the orderly, economical and beneficial development, use of land and patterns of human settlement, and
- (b) to maintain and improve the quality of the physical environment within which patterns of human settlement are situated in Alberta,

without infringing on the rights of individuals for any public interest except to the extent that is necessary for the overall greater public interest.

Specifically, and more relevant to this application according to the Court in *Dalinga*, relevant planning information does not include allegations of prior misconduct.

MPCs considering development permit applications do not have jurisdiction over criminal or quasi-criminal conduct; only courts do. MPCs are concerned solely with relevant planning criteria which are contained within the purposive section of Part 17: The purpose and function of the MPC is to judge issues on planning merits, not to make determinations of alleged prior misconduct. Allegations of misconduct are irrelevant and improper. Hence, on an application for a development permit for a bed and breakfast home, the development authority and/or SDAB must not consider whether such a use has been or will be operated within the confines of the land use bylaw. Those are enforcement issues.

Based on the March 14, 2018 report to the Municipal Planning Commission on

2018 renewals for bed and breakfast homes and bed and breakfast inns, the Town of Banff has been improperly judging renewals on the criteria of past compliance. According to the Court of Appeal, that is completely improper.

In addition, the staff report appears to raise a concern as to whether a building permit application was applied for in relation to renovations carried out, according to Ms. Schultheis, in 2000 when she and her then husband acquired the residence. Ms. Schultheis' husband was a Town employee and the contractor was then also performing renovations in the Banff Springs Hotel. Presumably one or both of them applied for a permit but Ms. Schultheis does not know for certain.

Fortunately, and in any event, the house has since passed safety inspections so there is no safety concern.

Legally, MPC's have no jurisdiction over the *Safety Codes Act*, that is the responsibility of the Safety Codes Council. To the extent that safety is an inherent safety concern (*Esso v. Golden Lee Developments*), that is covered by subsequent safety inspections.

Summary

Based on the Request for Decision presented to the MPC in March of 2018, bed and breakfast homes and inns had become a political hot potato in Banff, at least in part because of concerns with non-compliance with the land use bylaw. The Town council wanted action and the Planning Department responded.

But, the response was to forget that the goal of bylaw enforcement is compliance, not enforcement *per se*. The Planning Department report to the MPC specifically considered allegations of prior misconduct by holders of bed and breakfast development permits. That contaminated the planning approvals process with bylaw enforcement.

In the result, the MPC considered evidence that the Court of Appeal described as both irrelevant and improper in *Dalinga v. Calgary*. It is significant that the Court of Appeal specifically referred to the Supreme Court of Canada decision *Roncareffi y Duplessis* where that sort of conduct, done intentionally, resulted in personal liability for the then Premier of Quebec.

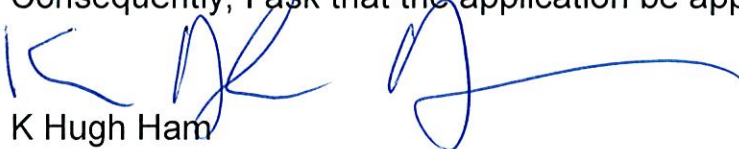
Having acted for numerous Alberta municipalities, I am well aware of the frustrations of bylaw enforcement. But, those frustrations cannot result in substantial breaches of the rights of citizens.

Regardless of whether there may have been a breach of the *Safety Codes Act* some 18 years ago, there is no safety concern with the present application.

Allegations of prior violations of the Land Use Bylaw are irrelevant considerations for municipal planning commissions.

The house meets all current safety standards and the planning merits of the application are favorable.

Consequently, I ask that the application be approved.



K Hugh Ham
Barrister and Solicitor
on behalf of Kerry-Lee Schultheis