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**TOWN OF BANFF DEVELOPMENT APPEAL BOARD**

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File number: 22DP02

Appeal numbers: 01-22 and 02-22

Appeal by: Bowstrings Heritage Foundation (01-22) and Geordie Nokes & Julie Sivorn (02-22)

Appeal against: Development Authority of the Town of Banff

Hearing date: April 21, 2022

Decision date: May 5, 2022

Board members: Dak Kerr, Chair, public representative  
Ray Horyn, Vice-Chair, public representative  
Robin Tuck, public representative  
Grant Canning, Council representative  
Sheila Luey, Parks Canada representative  
Kendra VanDyk, Parks Canada representative

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**DECISION**

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**Description of Application**

1. The two appeals before the Development Appeal Board (the 'Board') were brought forward by three affected persons, Bowstrings Heritage Foundation (represented by Peter Poole), Geordie Nokes, and Julie Sivorn.
2. The appeals are against the decision of the Development Officer on March 10, 2022 to approve the proposed demolition of a structure located at 328 Muskrat Street, Development Permit file 22DP02. The property is owned by Jonalta Properties Ltd. (represented by Hardy Schmidtke) and has a land use designation of RNC (North Central) District.

## **Procedural History**

3. The hearing commenced on April 21, 2022.
4. There were no objections to any Board member hearing the appeal.

### **Decision:**

5. Two appeals were received, and the Board heard both appeals at the same hearing, therefore a single decision is being issued by the Board relating to both appeals.
6. The appeals are upheld in part, and the decision of the Development Authority is varied. A development permit shall be issued subject to conformance with revised conditions of approval.

## **Appearances**

7. The Board received submissions from:
  - i. Dave Michaels for the Development Authority
  - ii. Peter Poole for Bowstrings Heritage Foundation, appellant for 01-22
  - iii. Geordie Nokes, appellant for 02-22
  - iv. Hardy Schmidtke, applicant for development permit 22DP02

## **Background and Summary of Evidence**

### *Submissions of the Development Authority*

8. Mr. Michaels provided background information regarding the application. On March 10, 2022 the Development Officer approved, with conditions, an application for the demolition of a structure located at 328 Muskrat Street. The application was for the demolition only and not for any redevelopment.
9. Relevant sections of the Land Use Bylaw which relate to demolitions were reviewed, in particular section 4.2(g).
10. Mr. Michaels summarized the public notification process that occurred as part of the development permit application.
11. A review of how the application was circulated to the Banff Heritage Corporation in accordance with Town of Banff Council Policy C5003 (Heritage Resource Management) was provided.
12. A description of the differences between “Designated” heritage properties versus those on the municipal heritage inventory was provided. Designated properties were noted as those which are subject to a municipal heritage designation bylaw whereas heritage properties which were deemed to be of value by the Banff Heritage Corporation were listed on the municipal heritage inventory. The subject building was noted as not being a municipally designated heritage building but that it

was listed on the municipal heritage inventory. The subject building is commonly referred to as “the Kidney House” in the community as well as in municipal documentation.

13. A summary of Heritage Corporation Motion HER22-04 was provided.
14. A summary of feedback received from Parks Canada as part of the development permit application was reviewed. It was noted that Parks Canada had reviewed the application against the Canada National Parks Act, Impact Assessment Act, Town of Banff Incorporation Agreement, Banff National Park of Canada Management Plan, National Parks of Canada Lease and License of Occupation Regulations, and the Lease for the property.
15. A summary of the conditions of approval for the development permit was provided, as was the enabling legislative context for conditions, notably section 4.8.2 of the Land Use Bylaw.

*Submissions of the Appellant – Bowstrings Heritage Foundation (01-22)*

16. Mr. Poole spoke on behalf of the Bowstrings Heritage Foundation in his role as President of the foundation.
17. Mr. Poole described the foundation’s mission as well as his background as a developer in Banff, conservationist of historic buildings in Banff, his past service on the Banff Heritage Corporation, and his past service on the Development Appeal Board.
18. Appeal 01-22 was summarized as an appeal against a demolition of a structure which would result in an outcome of bare land.
19. Mr. Poole referenced the site’s location relative to other heritage resources in Banff and provided the Bowstring’s Heritage Foundation’s perspective on the relevance of the structure in question to Banff’s overall historic character.
20. Mr. Poole highlighted the purpose of the land use district and the proposed use of the subject property, in particular that it was his position was the use of the property as bare land was not considered or contemplated by the Land Use Bylaw.
21. The nature of the application was summarized as an application for demolition only, and not for redevelopment as highlighted on page 103 of the agenda package (Development Permit application form).
22. Mr. Poole noted that the building inspection report starting on page 131 of the agenda package was a piece of information which was not available to the Development Officer when the decision was made to conditionally approve the permit.
23. Mr. Poole provided a summary of two clauses in the Incorporation Agreement which were relevant to the appeal, notably s.5.15 and s.5.19(2); s.5.15 require every action or decision of the DAB to conform with the National Park Management Plan, and s.5.19(2) which restricts the Development

Appeal Board from approving a proposed development which does not conform with the use prescribed for the subject land.

24. Mr. Poole noted that with respect to the connection between s.5.15 of the Incorporation Agreement and the Management Plan, the latter speaks to raising the profile and enhancing the appreciation of national historic sites and cultural heritage features in Section 4.4.
25. Also referenced were other relevant pieces of legislation and policy, notably 6.2.2.1 of the Management Plan, Directive 17 (Banff National Park – Environmental Best Management Practices For Construction Projects), the Banff Community Plan, and the legislative connections between them.
26. S.4.5 of the Land Use Bylaw was reviewed, with Mr. Poole referencing the requirement to refuse an application under s.4.5.3 where a use does not conform to the Land Use Bylaw and higher-level legislation such as the National Parks Act and Banff National Park of Canada Management Plan. In Mr. Poole's opinion, bare land which would be the outcome of this permit, is not a permitted or discretionary use in this land use district.
27. S.4.8 of the Land Use Bylaw was reviewed, notably the ability of the DAB to impose conditions.
28. Mr. Poole summarized the building inspection report submitted as part of the agenda package, particularly the presence of an oil tank on the subject property.
29. Mr. Poole summarized his request to deny the permit and / or impose conditions that would negate the removal of a heritage asset.

Submissions of the Appellant – Geordie Nokes and Julie Sivorn (02-22)

30. Mr. Nokes spoke on behalf of appeal 02-22.
31. Mr. Nokes spoke to the role of the home as a representative example of the history of the community, the architectural heritage of Banff, and a historical grounding in an ever-changing world.
32. He noted that the mandate of Banff National Park includes preservation which is relevant given the application is for demolition.
33. Mr. Nokes submitted that the role of intangible cultural heritage as represented by the building forms a direct connection to the UNESCO World Heritage Site status conferred on the Canadian Rocky Mountain Parks.
34. Mr. Nokes spoke to the environmental impacts of building demolition and the connection to the legal obligations with respect to maintaining ecological integrity.

### Submissions of the Applicant

35. Mr. Hardy Schmidtke spoke to the reasons for his purchase of the property for the purposes of redevelopment into a housing project. Mr. Schmidtke noted that the demolition was the first step in this process.
36. Mr. Schmidtke noted that with respect to the environmental requirements, he believed that all the required conditions had been met.
37. It was noted that the removal of the underground storage tank had occurred and that it was professionally removed, and that evidence had been provided in the agenda package in the form of a monitoring report.
38. Mr. Schmidtke reviewed his open offer to remove / relocate the building at no cost in the interest of preserving the existing structure. He further indicated that no parties had agreed to this proposal at this time.

### Rebuttal of the Development Officer

39. Mr. Michaels noted that the applicant is afforded certain development rights under the Land Use Bylaw, notably through the Permitted Use section of the RNC (Residential North Central) Land Use District and prior to that, through the provisions of federal leases that were issued before Incorporation in 1990.
40. Mr. Michaels noted that Parks Canada is used as a check and balance during the development permit application process. In this case, Parks Canada has effectively approved the demolition and therefore concerns around conformance with federal legislation should be assuaged.
41. The Board was advised that there are no legal barriers to stop the structure from being demolished.
42. Mr. Michaels noted that with respect to the bare land condition that would result from demolition, the land use district in question allows for similar land uses such as Public Parks.
43. Demolition should be characterized as an action and not a use as per s.2.3 of the Land Use Bylaw. The use of the land will remain as housing after the demolition occurs until such time as a change of use or development application occurs. A comparable situation would be a house which sits vacant; and that it would still be considered as housing, regardless of the fact that nobody is living on-site.
44. Mr. Michaels noted that compliance with other legislation is not triggered solely by conditions in a development permit and that those obligations exist regardless of whether or not they are conditions. This is relevant with respect to the environmental obligations which stem from the Impact Assessment Act review by Parks Canada.

### Response of the Appellant– Bowstrings Heritage Foundation (01-22)

45. Mr. Poole clarified that the application at hand is for demolition only, and not for redevelopment.

46. Mr. Poole referenced s.12.25.3 of the Land Use Bylaw (Permitted Uses – Residential North Central (RNC) Land Use District) and how allowable uses work in concert with the district purpose.
47. The application in question is not for a Public Park and therefore, in his opinion, the stated connection between this application to create vacant land and a Public Park should be disregarded.
48. Mr. Poole noted how the Incorporation Agreement was written specifically so that provincial laws would be customized for the setting of Banff, notably s.5.15 which requires compliance of Development Appeal Board decisions with the Banff National Park of Canada Management Plan. Mr. Poole noted that the Management Plan speaks to preservation of heritage.
49. Mr. Poole requested that the Board consider the imposition of additional conditions including timing of forthcoming development permits, re-application intervals, the need for proof of compliance with environmental conditions, requirements for associated redevelopment permits with demolition permits, and that a commemorative integrity assessment be performed on the site prior to demolition.

*Response of the Appellant – Geordie Nokes and Julie Sivorn (02-22)*

50. Mr. Nokes noted the obligations of the National Parks Act to ensure that Canada’s national parks remain unimpaired for the enjoyment of future generations.

**Reasons**

51. The Board reviewed all evidence and arguments, written and oral, submitted by the parties and will focus on key evidence and arguments in outlining its reasons. The Board has considered the context of the proposed development, applicable legislation, plans and policies, sound planning considerations and the merits of the application.
52. The Board recognizes the importance of heritage and heritage buildings to the community and the National Park as noted in both the Banff Community Plan and the Banff National Park of Canada Management Plan. However, the Board also acknowledges that the Board’s primary task is to interpret relevant legislation, apply it in analyzing the appeals at hand, and determine whether or not the appeals should be upheld or not.
53. In respect of the position that the Development Officer acted in contravention of the Management Plan in approving the demolition, the Board finds that the Development Officer took all reasonable steps to ensure conformance with the Management Plan through the circulation process with Parks Canada. Through this process Parks Canada did not identify any Management Plan policy barriers or implications to prevent the demolition of the building.
54. In respect of the position that the permit must demonstrate compliance with federal requirements such as the *Determination of Significance of Impacts*, the Board finds that requiring evidence of compliance is a reasonable condition to impose and therefore will require an amended condition as noted below.

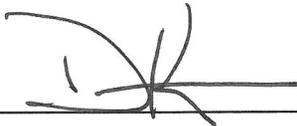
55. In respect of the position that 'vacant land' was not an allowable use in the land use district, the Board concurs with the position that the act of demolition would not have the effect of changing the use on the land and that the end result would be similar in nature to that of a vacant house. Additionally, even requiring as a condition that a development permit for redevelopment be submitted would not ensure or guarantee that any action would be taken to build housing. For these reasons, the Board finds that the result of the demolition meets the intended purpose of the RNC (Residential North Central) Land Use District.
56. The Board observed that it would be beneficial if a standardized process emerged from the upcoming Town of Banff Heritage Master Plan to conserve built heritage, and where that is not feasible or possible, guidance be provided on the documentation and recording of heritage assets in order to preserve them for future reference.

### Conclusion

57. On this basis, the Board finds the proposed development application for the demolition of a structure at 328 Muskrat Street complies with the Land Use Bylaw. In order to ensure compliance with environmental requirements of Parks Canada, the Board amends Condition 1(b) of the Notice of Decision to add:

*.... and provide written confirmation from Parks Canada indicating that all the mitigations from the Determination of Significance of Impacts are met before, during and after demolition;*

58. The Board denies the remainder of Appeal 01-22 and Appeal 02-22.



Dak Kerr, Chair  
Development Appeal Board

May 5, 2022

Date