
TOWN OF BANFF DEVELOPMENT APPEAL BOARD

File No: 19DP74

Appeal: #01 – 21

Appeal by: Ashok Gopinathan Pillai and Prabha Premachandran Nair Jobha

Appeal against: The Development Authority of the Town of Banff

Hearing date: May 20th, 2021

Decision date: May 20th, 2021

Board members: Kane Shepetunko Public Representative
Lachlan Mackintosh Public Representative
Stavros Karlos Public Representative
Grant Canning Councillor, Town of Banff
Peter Poole Councillor, Town of Banff
Kendra Van Dyk Parks Canada Representative
Sheila Luey Parks Canada Representative

Board Secretary: Darren Enns

DECISION

Description of Appeal and Application:

The appeal before the Development Appeal Board (the Board) was brought by applicants Ashok Pillai and Prabha Jobha. The appeal was against the decision of the Development Officer to revoke Bed and Breakfast Home Permit 19DP74, and based on the grounds that the bed and breakfast home was in compliance with all conditions of the development permit and that the following conditions were being adhered to; 1(a) the property is a single-family home and not being operating as a duplex; 1(b) the property is only operating two commercial accommodation units; and 2(f) the property is the operator's primary residence and is a single-family home.

1. The hearing began at 9:20 am on Thursday, May 20th, 2021.

Decision:

2. The appeal is denied, and the decision of the Development Officer to revoke Bed and Breakfast Home Permit 19DP74 is upheld.

Appearances:

3. The Board received submissions from:
 - a. Emma Sanborn, the Development Officer.
 - b. Ashok Pillai and Prabha Jobha, the appellants.

Background and Summary of Evidence:

Submission of the Development Officer

4. Ms. Sanborn provided the following information regarding the application.
5. The original application to the Municipal Planning Commission (MPC) on December 11, 2019 was for a new Bed and Breakfast Home containing two (2) Commercial Accommodation Units at 338 Squirrel Street. Bed and Breakfast Homes are discretionary uses. Under section 3.1.2 of the Land Use Bylaw discretionary uses are referred to the MPC for decision. The application included a change of use from Duplex Housing to Single Detached Housing. Single Detached Housing is also a Discretionary Use.
6. The subject property is located in the RSC (Squirrel/Cougar) Land Use District where five Bed and Breakfasts had previously been approved; a maximum of seven may be allocated in this district. (Schedule 'D' of the LUB)
7. LUB Section 10.3.2(e) states that a bed and breakfast home shall be operated exclusively by a live-in owner as an accessory use and shall not change the principal residential character, use or external appearance of the dwelling. Accessory Use means a use that is subordinate or incidental to the principal use of a site or building.
8. LUB Section 10.3.2(d) states that Bed and Breakfast Homes may only be located within Single-Detached Housing or accessory structures. The existing property was approved in 1992 as Duplex Housing so a change of use to Single Detached Housing was required as part of the approval. Single Detached Housing means a building containing one principal dwelling, which is separate from any other dwelling or building. Dwelling means one or more rooms that are self-contained, intended for domestic use as a residence by one or more persons, and containing kitchen, living, sleeping and sanitary facilities. To convert the duplex to a single detached dwelling the kitchen in the lower level had to be removed.

9. As a condition of the MPC approval the applicants were required to sign a Statutory Declaration confirming the following:
 - i. The owner resides at 338 Squirrel Street as their primary residence;
 - ii. The Bed and Breakfast Home will be managed and operated exclusively by the Live-in Owner;
 - iii. The Live-in Owner will not operate any of the Commercial Accommodation Units while not in residence at the property; and,
 - iv. The Live-in Owner is aware that any non-conformance with the conditions of approval or non-compliance with the Land Use Bylaw will result in the revocation of the Development Permit.
10. A further condition met by the applicants, was to enter into a Restrictive Covenant with the Town of Banff, registered against the Certificate of Title for the property, to prohibit the operation of more than two (2) Commercial Accommodation Units and to also prohibit the use of any Commercial Accommodation Units while the owner is not residing at the property.
11. After the Development Permit was approved, the applicant was allowed to pursue additional development. Under a subsequent building permit, more bathrooms were added to enhance the experience of bed and breakfast customers. Two other rooms on the main level of the house were converted to bedrooms.
12. After receiving a complaint and reviewing online booking information which indicated more than two rooms were possibly offered for accommodation, the Development Officer conducted a site inspection of the home on April 9th, 2021. The inspection team included the Development Planner, the Development Compliance Officer, a Building Inspector, a Public Health Officer, and a Municipal Enforcement Manager.
13. In the application to the MPC and in this appeal, the approved commercial accommodation units are identified as bedrooms 1 and 2. To verify the number of rooms being offered for accommodation the compliance officer looked for signs of domestic use in rooms other than the approved bed and breakfast accommodation units. Ms. Sanborn provided photographs taken during the inspection which suggest that bedrooms and bathrooms 3, 4, and 6 showed no signs of domestic use. Additional photos from accommodation booking sites advertised the bedrooms and bathrooms identified as 3 and 4.
14. The booking.com site also indicated that up to three bedrooms could be available at once. Ms. Sanborn suggested that the unapproved accommodation units, rooms 3,4, and 5 were being operated as bed and breakfast accommodation. Ms. Sanborn had attempted to book rooms on booking.com to confirm that more than two rooms could be booked at the same time and was unable to secure a reservation.
15. Ms. Sanborn's inspection of the basement indicated signs of domestic use. Although the stove had been removed, the lower-level kitchen showed signs of regular domestic use. Ms. Sanborn stated that the basement was not meant to be the owners' primary living space and that evident use of the basement does not align with the Land Use Bylaw requirement for a maximum of six bedrooms and one kitchen in a Single Detached Home.

16. Inspection of the mechanical room indicated an unapproved development which included a wall dividing the room into two separate spaces, and an exterior window well and window.
17. Section 4.13.2 of the LUB states that a Development Officer may suspend or revoke a permit where: a. the applicant fails to comply with the conditions of the permit; b. the development is contrary to the terms or conditions of the permit or provisions of this Bylaw.
18. Ms. Sanborn submitted that the applicant failed to comply with conditions of the permit. She also summarized how the conditions were not met.

- Condition 1(a): This approval provides for the Change of Use of the residential property from 'Duplex Housing' to 'Single Detached Housing'. Any future changes to the subject dwelling shall require a valid Development Permit.

Evidence suggests the house is being used as a duplex, and changes to the basement mechanical area do not have a valid development permit.

- Condition 1(b): This approval permits two (2) Commercial Accommodation Units in association with a Bed & Breakfast Home in accordance with the approved plans.

Evidence suggests five (5) bedrooms are being used as Commercial Accommodation Units.

- Condition 2(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.

Evidence suggests the principal residential use is currently as a duplex, and that the Bed and Breakfast use is not an accessory to the resident use.

19. If the board confirms the Development Officer's decision, the appellants could reapply for approval of the unapproved basement work and reapply for a Bed and Breakfast permit.

Submission of the appellants

20. Ms. Jobha told the Board that she and Mr. Pillai value the opportunity for an appeal and understand what is required to operate a bed and breakfast business. She presented the following submission.
21. The Development Officer's photo of the stove shows that it was not in the basement kitchenette, but rather in a separate storage room.

22. Due to the concerns of covid, and especially with a young baby, the owners avoided interaction with guests and had made little use of the upstairs living space. Also, Ms. Jobha's parents live with them for now and are not able to use the stairs comfortably. For these reasons there is little evidence of domestic use in the main level. She pointed out the Development Officer's photo of bedroom 5 showing the baby's crib, which is evidence of personal use on the main level.
23. Ms. Jobha apologized that photos of rooms other than the CAUs 1 and 2 appear on the booking advertising site. She had used these photos only to indicate a model of the type of rooms available for accommodation, not those specific rooms. When she created the site, she did not have photo examples of the licensed rooms. She is confident that only two bedrooms could have been booked online at any time and she questioned whether there was proof that more than two bedrooms had ever been sold. Bookings were only made online, and no phone reservations were taken. Ms. Jobha stated that the guest register has been provided to the Town.
24. The appellants apologized for not getting a development permit for the basement changes. The beds shown in the storage area are from another property.
25. The upstairs kitchen does not show personal use because it was always kept very clean and tidy for guests.

Reasons for the Decision

26. The Board considered the evidence provided and the context of the appeal, along with key Land Use Bylaw provisions.
27. To uphold the appeal, the board would have to find that the appellants met all the conditions of Development Permit 19DP74. The Development Permit was issued subject to conformance with the Town of Banff Land Use Bylaw. Photographic evidence shows construction of a wall and an exterior window in the mechanical room which was completed after 19DP74 was issued. Section 4.1.1 of the LUB reads *'Except those listed in the following section, no person, government, private or public agency, or business shall commence, or cause or allow to be commenced, or to carry on, or cause or allow to be carried on, any development unless a development permit has been issued.'* Certain exemptions for permits are allowed, however the type of development in the mechanical room is not listed as an exemption in LUB Section 4.2.0. The appellants acknowledge that they did not get the proper approval for this development. Accordingly, the board finds that the appellants did not meet the conditions of Development Permit 19DP74. Further, the board notes that the appellants signed a Statutory Declaration, Schedule 'C', which includes the clause that they were aware that any non-conformance with the conditions of approval or non-compliance with the Land Use Bylaw would result in the revocation of the Development Permit.

28. The Board considered the evidence of whether more than two bedrooms in the house could have been booked at the same time, contrary to the Development Permit, Conditions of Approval which states that the approval '*permits two Commercial Accommodation Units (CAU) in association with a Bed & Breakfast Home in accordance with the approved plans*'. The plans presented to the MPC identified rooms 1 and 2 as the proposed accommodation units. The Development Officer presented photographic evidence from an online booking site for the subject Bed and Breakfast which showed several rooms in the house other than rooms 1 and 2. Although it appears to the Board that more than two rooms could have been booked at the same time for accommodation, no conclusive evidence was provided that this had ever occurred.

Conclusion:

29. The Board denies the appeal and upholds the Development Officer's decision to revoke the Bed and Breakfast Home Permit 19DP74.
30. The appellants have the opportunity to reapply for a permit following the process in the Land Use Bylaw.

Stavros Karlos
Presiding Officer
Development Appeal Board

May 26, 2021