

**SUMMER VILLAGE OF BIRCHCLIFF  
SUBDIVISION AND DEVELOPMENT APPEAL BOARD  
DECISION**

Hearing Date: June 24, 2024  
SDAB File Number: SDAB-24-001  
Applicants/Appellants: Jodi and Ryan Neish  
Location: 71 Birchcliff Road  
Legal Description: Lot 2, Block 4, Plan 4486AX (the "Site")  
Proposed Development: Landscaping Revisions / Mechanized Excavation

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**A. INTRODUCTION**

1. The Summer Village of Birchcliff Municipal Planning Commission (the "MPC") refused a development permit application for landscaping revisions / mechanized excavation on the Site. The Appellants appealed the refusal of the development permit application.

**B. PROCEDURAL MATTERS**

2. There were no objections to the Board members and no objections to the proposed hearing process.

3. Roberto Noce, legal counsel for the Appellants, raised an objection relating to an alleged meeting between counsel for the Summer Village and the Board Clerk. Upon hearing further information that the alleged meeting did not occur, Mr. Noce withdrew the objection.

**C. SUMMARY OF HEARING**

4. Summer Village - Alifeyah Gulamhusein (legal counsel) and Kara Hubbard (development officer) represented the Summer Village. They reviewed the Summer Village's written submissions, which are on the Board's file. To summarize:

- (a) The Summer Village is endeavouring to preserve the lake and protect the natural shoreline for the benefit of landowners and the general public.

- (b) The Appellants obtained a development permit in 2021. The development as built does not comply with conditions 10, 11 and 14 of the 2021 development permit.
- (c) With respect to the Appellants' submissions, comments from neighbouring property owners are not relevant and photographs of nearby properties are not relevant.
- (d) In response to questions from the Board with respect to the sheet metal retaining wall, the Summer Village does not have a standard regarding the location of retaining walls next to the lake. The development permit approval was based on the Appellants' geotechnical report.

5. Appellants - Roberto Noce (legal counsel) and Jodie and Ryan Neish (Appellants) represented the Appellants. Mr. Noce reviewed the Appellants' written submissions as well as the additional document submitted, which are on the Board's file. Mrs. Neish also made a presentation, that largely reiterated the points from the written submissions and that had been made by Mr. Noce. To summarize:

- (a) The 2021 development permit is vague and unclear:
  - (i) The schedules that were before the MPC were not part of the 2021 development permit. The only schedule provided is the plan on the back of the 2021 development permit.
  - (ii) The height of the retaining walls is not specified.
  - (iii) The size of the hard surfaced area around the firepit is not specified.
  - (iv) There are references to "grasses" and "native grasses".
- (b) The development as built complies with the 2021 development permit.
- (c) The development complies with the Municipal Development Plan (the "MDP").

- (d) The development is a discretionary use and should firstly be assessed using the test for discretionary use.
  - (e) The Site complies with the requirements that less than 50% be hardscaped.
  - (f) To the extent that variances are required, there is no impact on neighbouring properties, the overall neighbourhood and views from the lake.
  - (g) The Appellants have planted natural shrubs in the area identified as tier 1 (upper), which will create a natural appearance.
  - (h) The development has been in place for two years and there has been no impact on the lake.
  - (i) The Appellants have provided engineering reports and correspondence from Alberta Environment, which further supports compliance with the MDP.
  - (j) The engineering reports support that the existing development should remain in place to preserve slope stability.
  - (k) The additional studies referenced by the Summer Village should not be considered.
  - (l) Neighbouring property owners are in support and there is no opposition to the development.
  - (m) There are other similar developments on the lake.
6. In response to questions from the Board, the Appellants advised as follows:
- (a) The firepit sits on top of the tier and the bottom is permeable.
  - (b) The 2021 development permit approved bank removal to install the three tiers and the retaining walls.
  - (c) The bank no longer exists in its natural state.

- (d) Tier 1 (lower) has been left as dirt and will naturally revegetate.
- (e) The rocks adjacent to the lake were approved as part of the 2021 development permit.
- (f) The tiers have been designed in accordance with the engineering reports to allow for drainage.
- (g) The sheet metal retaining wall was put on an angle to follow the property line and reduce bank removal.
- (h) The location of the sheet metal retaining wall complies with Alberta Environment requirements.
- (i) The drawing on the back of the 2021 development permit is all that was provided to the Appellants.

7. At the conclusion of the hearing, Mr. Noce on behalf of the Appellants, confirmed that the Appellants had a full opportunity to state their case and were able to put forward the information that, in their view, the Board would require to make its decision.

#### **D. DECISION**

8. The Board allows the appeal and approves the development permit subject to the conditions set out below. The Board grants the requested variance to allow development of the escarpment subject to the conditions set out below.

9. The following conditions apply to this approval:

- (a) References to “tiers” follow the labeling set out on the sketch attached as Schedule A .
- (b) The Appellants shall provide revised plans, including elevations and landscaping, that reflect this approval within 3 months from the date of this decision to the Development Officer.

- (c) The height and locations of the retaining walls and stairs as built are approved, subject to the following:
- (i) The south portion of the sheet metal retaining wall and any other improvements that encroach over the property line (as shown on the plot plan attached as Schedule B) shall be cut back so that the sheet metal retaining wall and all other improvements are entirely within the property line.
  - (ii) The Appellants shall provide formal written correspondence to confirm that Alberta Environment approves the location (and in particular the setback from the lake) of the sheet metal retaining wall.
  - (iii) For tier 1(lower) – the entire area shall be a no mow zone with no beach or sandy area and no non-native materials, including no gravel, concrete or paving stones. In the area at the south end of tier 1 (lower) labeled for winter storage on the plan attached to the 2021 development permit, the Appellants shall plant and maintain vegetation consisting of a equal mixture of native grasses, trees and shrubbery on 100% of this area.
  - (iv) For tier 1 (upper) and tier 2 - the Appellants shall plant and maintain vegetation consisting of an equal mixture of native grasses, trees and shrubbery on 100% of this area. No non-native materials such as gravel, concrete and paving stones shall be permitted on tier 1(upper) and tier 2, including the area labeled as tier 2 fire pit area.
  - (v) No firepit area shall be permitted on any of tier 1 (upper or lower) or tier 2.
  - (vi) The stairs between each tier may remain and may be connected by a single direct point to point walkway to be no wider than 1.25 meters. The walkway material may include pavers and gravel.

- (vii) A hedge with a minimum height of 1.1 metres will serve as a railing or guard system on the retaining walls with an appropriate thickness to be confirmed by the Summer Village's Safety Codes Inspector.
  - (viii) Shoreline erosion control measures are prohibited unless prior written approval has been received from the appropriate provincial authorities and the Summer Village.
  - (ix) Any damage to public roads due to the construction shall be repaired immediately at the expense of the Appellants.
  - (x) Copies of all applicable building, electrical, and plumbing and gas permits shall be provided to the administration office to be kept on file.
- (d) Conditions c(i) to c(vii) must be met no later than one year after the date of this decision (additional time for growing / vegetation to establish may be granted but all planting must be completed).

#### **E. REASONS FOR DECISION**

10. The Site is located in the R1 District (Lakeshore Residential). This development permit application is for landscaping revisions / mechanized excavation on the escarpment of the Site, which is a discretionary use. In addition, a variance is required for development of the escarpment.

11. While both the Summer Village and the Appellants spent a great deal of time reviewing compliance with the 2021 development permit application, this application is a new development permit application. Therefore, while the Board considered the 2021 development permit application as part of the background history related to this development, the Board has dealt with this appeal on the basis that the development permit application is a new application.

12. The Board considered this appeal both through the lens of the discretionary use test and the variance test. The Board recognizes that while the tests are not identical,

there is a similarity in that both tests involve a consideration of compatibility with surrounding development and impacts on surrounding properties and the general area as well as any mitigation measures that can be implemented to address impacts.

13. The escarpment is over a gradient of 15%. In accordance with the Birchcliff Land Use Bylaw (the "LUB"), escarpment or slope areas with a gradient of 15% or greater shall be retained in their natural state.

14. The proposed development is to create a series of retaining walls and tiers that will result in a significant area of the escarpment covered in hard surfacing. While the Board treated the application as a new application, the Board recognizes that the retaining walls and the stairs are already constructed and that their removal could destabilize the bank.

15. The policies set out in the MDP and requirements of the LUB are to leave escarpment areas in their natural state. Therefore, while the Board recognizes that disturbance of the escarpment area is necessary in order to stabilize it for future development, the intent is that the resulting development look as natural as possible and not to create new recreational or living areas.

16. The proposed development does not meet the intent of the MDP and LUB for the escarpment area to remain in as close to its natural state as possible. Based on the photographs, the Board is of the view that the visual impact of the retaining walls can be mitigated with appropriate vegetation. Therefore, the Board has granted a variance to allow the retaining walls and stairs to remain as built, subject to being provided with a revised plan including elevations showing the exact location and heights of the retaining walls and removing the portion of the sheet metal retaining wall that extends outside the property line. The Board imposed the conditions requiring planting of vegetation on tier 1(upper) and tier 2 and the hedges in order to mitigate the visual impact of the retaining walls.

17. In keeping with the intent of the MDP and LUB, the Board is of the view that the firepit should not be located anywhere on the escarpment and therefore, if the Appellants still wish to proceed with the firepit, it must be located above tier 2.

18. The Board cannot approve the portion of the sheet metal retaining wall and any other improvements that extend beyond the property line and therefore, they will have to be removed. In addition, it was unclear to the Board whether the location of the sheet metal retaining wall was approved by Alberta Environment as it does not appear to be in the same location as indicated on the engineering reports. Therefore, the Board wishes to make it clear that while it is prepared to approve the location of the sheet metal retaining wall within the property line for the purposes of a development permit, Alberta Environment approval of the location (including setback from the lake) of the sheet metal retaining wall is still required.

19. With respect to some of the points raised by counsel for the Summer Village and counsel for the Appellants, the Board's comments are as follows:

- (a) The Board is of the view that the comments from neighbouring property owners are relevant and took these comments into consideration. Notwithstanding their support and the overall lack of objection, the Board is of the view that preservation of the natural appearance of the escarpment, to the extent possible, is the overriding consideration.
- (b) The Board considered the photographs of other similar developments, but found them to be of limited assistance as there was incomplete information regarding whether or not these developments had been approved.
- (c) The Board considered the additional reports submitted by the Summer Village. The reports are relevant to the exercise of the Board's discretion both in considering a discretionary use and in deciding whether to grant a variance. Having said that, the Board gave limited weight to these reports as the Board's decision is to be based on the statutory plans and LUB.
- (d) The Board found that the plan on the back of the 2021 development permit application is part of the development permit and was included as an aid to interpret the 2021 development permit. However, as set out above, the Board's task was not to determine whether the as built development



complied with the 2021 development permit, but rather to make a decision with respect to the new development permit application before it.

20. For the foregoing reasons, the development permit is approved and the variance to allow development of the escarpment is granted subject to the conditions set out above.

Dated this 5th day of July, 2024.

Per:   
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Roger Dufresne, Chair  
Subdivision and Development Appeal Board

### **IMPORTANT INFORMATION**

This decision may be appealed to the Alberta Court of Appeal on a question of law or jurisdiction under Section 688 of the *Municipal Government Act*, RSA 2000, c. M-26.



Schedule B

