

**SUMMER VILLAGE OF BIRCHCLIFF
SUBDIVISION AND DEVELOPMENT APPEAL BOARD
JUNE 24, 2024
RECORD OF HEARING AND DECISION**

PRESENT	Chair:	Roger Dufresne
	Member-at-Large:	Karen McCaffery
	Member-at-Large:	Allan MacPherson
	Development Officer:	Kara Hubbard
	CAO:	Tanner Evans
	Summer Village Counsel:	Alifeyah Gulamhusein
	SDAB Counsel:	Janice Agrios, K.C.
	Appellant Counsel:	Roberto Noce, K.C.
	Recording Secretary Appellant(s)	Teri Musseau Jodi Neish Ryan Neish

CALL TO ORDER Chair Dufresne called the hearing to order at 10:00 a.m.

PURPOSE OF HEARING An appeal was received on June 13, 2023, appealing the denial of a development permit from the Municipal Planning Commission for landscaping revisions/mechanized excavation in the Summer Village of Birchcliff. The decision of the Municipal Planning Commission was appealed and heard by the Subdivision and Development Appeal Board on August 1, 2023.

The decision of the Subdivision and Development Appeal Board revoking the original permit and replacing it with a new permit was appealed to the Court of Appeal by the appellants and the decision rendered was for the application to be reheard by the Subdivision and Development Appeal Board as the Board did not have the authority to revoke the original permit.

PRELIMINARY ISSUES There were no preliminary issues or questions of jurisdiction presented by either the appellant or the development authority.

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.

OBJECTIONS TO MEMBERS OF THE APPEAL BOARD Members of the Subdivision and Development Appeal Board were asked if they felt they should disqualify themselves from hearing the appeal before them and no one felt they needed to disqualify themselves.

Mr. & Mrs. Neish were asked if they had any objection to any of the members of the Subdivision and Development Appeal Board present from hearing the case. They had no objection to any of the members hearing the case.

The members of the Subdivision and Development Appeal Board were asked if they had sought, been given or reviewed any evidence prior to the hearing.

Other than the agenda package that was sent to members a few days prior to the hearing, none of the members had sought, been

given or reviewed any evidence prior to the hearing.

**HEARING
PROCEDURES**

Chair Dufresne reviewed the procedures to be followed for the hearing. No questions or concerns were raised by anyone with the process as outlined.

**DEVELOPMENT
PRESENTATION**

Alifeyah Gulamhusein provided the Subdivision and Development Appeal Board with the background of the appeal.

The Summer Village is the regulatory body for planning matters. Their goal is to preserve, protect and maintain the shoreline and lake as the lake and shoreline are for the use and enjoyment of all not just for lakefront property owners. While the development may not immediately show impact it may take years before the effects are known.

The appellants stated there was a misinterpretation about what was permitted and confusion about what was approved. The 2021 development permit #211304 was issued but what was built was not in accordance of what was permitted. Conditions 10, 11 and 14 are in contravention of the development permit and need to be remedied. There are 4 contraventions as below:

Condition 10 - no mow zone

Condition 11 – tiered areas between retaining walls to be grass

Condition 14 – land above top of bank slope should be left in natural state

Retaining walls – to be 2 meters in height

Ms. Gulamhusein reviewed relevant documents.

The Municipal Government Act which notes the purpose of the municipality is to foster the well-being of the environment. The municipality has the ability to pass a land use bylaw which may prohibit or regulate and control the use and development of land and buildings, including, without limitation, by imposing design standards, regulating the development of buildings, and providing for any other matter council considers necessary to regulate land use.

The Land Use Bylaw, Part 3, section 4.1(4)(5) which prescribes general requirements for landscaping, environmental conservation, and development primarily (a) the conservation of existing trees and/or shrubs to the maximum extent as possible and (b) the retention in their natural state of (iv) escarpment or slope areas with a gradient of fifteen percent or greater.

The Municipal Development Plan Section which speaks to the conservation of the environment and required the development authority to refuse to allow development near the shores of the lake unless the applicant can demonstrate the development will not (a) reduce lake water quality; (b) degrade aquatic habitat; and (c) adversely impact the areas visual or natural quality through inappropriate or excessive removal of vegetation.

The Intermunicipal Development Plan objectives include protecting the long-term health of the watersheds and waterbodies and balancing environmental protection with appropriate development.

Publications from Alberta Environment were also referenced supporting the idea of leaving banks abutting the shoreline as natural as possible.

The Development Authority is asking the Board to uphold the MPC decision and deny the application for a new development permit to approve the constructed landscaping.

APPELLANT PRESENTATION

Mr. Noce spoke on behalf of the Appellants.

The written submissions made by the Appellants were reviewed and addition documents submitted. Mr. Noce explained there was a misunderstanding by the Appellants and the development permit that was issued is vague and unclear. The Appellants believe what they built is what was approved in the 2021 development permit. The height of the retaining walls was not specific nor was the size of the hard surfaced area around the firepit. They are of the opinion that the work complies with the development permit and Municipal Development Plan.

The development is a discretionary use and should be assessed using the test for discretionary use. The Municipal Government Act was referenced, specifically section 387(3) which sets out the variance power of an appeal board and the test for exercising that power. They noted the Board may make a order or decision or issue or confirm the issue of a development permit even though the proposed development does not comply with the land use bylaw if, in its opinion, the proposed development would not (a) unduly interfere with the amenities of the neighbourhood, or (b) materially interfere with or affect the use, enjoyment or value of neighboring parcels of land, and the proposed development conforms with the use prescribed for that land or building in the land use bylaw.

The retaining wall is constructed 40 cm higher than what was approved but nowhere in the development permit does it say the height must be 2 meters. The site complies with the 50% hard landscaping allowed in the land use bylaw and is only at 49%. There is no impact on neighboring properties, overall neighbourhood, or views from the lake. The appellants have planted natural shrubs in the area identified as tier 1 (upper) which will create a natural appearance.

The lawyer for the municipality stated the onus is on the Appellant to show how the development will impact visual quality. The development has been in place for 2 years and to date there has been no evidence of any reduction in lake quality or on aquatic habitat. Changing the development now may adversely impact the lake. There are other developments that are similar. How can anyone prove which properties could be potentially impacting the environment and causing harm.

Reports were referenced from Cognidyn Engineering & Design, Rohi Engineering Ltd., and Angela Fulton from Alberta Environment. These reports support compliance with the MDP and the need to keep the retaining walls in place to preserve slope stability. The Summer Village indicates the opinions mean nothing as there is no question referenced to coincide with the responses. The Summer Village could have obtained their own engineering reports if they felt the ones provided were in question. The neighboring property

owners are in support of the development and there is no opposition from anyone. The additional studies referenced by the Summer Village should not be considered as they are not statutory documents.

Additional documentation was provided by Mr. Noce showing the Appellant's development and similar developments on the lake.

Mrs. Neish spoke to her development reiterating the submissions made on her behalf from Mr. Noce.

**QUESTIONS
FROM BOARD**

Questions were asked from the Board members to the Appellants and the Summer Village for clarity.

**IN FAVOUR OF
THE APPEAL**

A written submission was received 7 minutes prior to the start of the hearing from Joanne Bjornson in support of the development.

No one spoke in favour of the appeal.

**AGAINST THE
APPEAL**

There were no written submissions received in opposition to the appeal.

No one spoke in opposition to the appeal.

**DEVELOPMENT
OFFICER
SUMMARY**

Ms. Gulamhusein spoke in respect to the Board not considering the submissions made by the development authority referencing non-statutory documents. The Board may accept any submission they feel appropriate and believes the documents remain relevant. The photos provided by the Applicant today referencing other lake developments should not be considered by the Board as there are no details provided for those developments. They may have occurred under an old land use bylaw, may have been developed without approval, or there may be circumstances that required their development. The recommendation to lower the retaining walls was not provided by the engineers but made at the recommendation of the fire chief.

**SUMMARY
FROM
APPELLANTS**

Mr. Noce noted the schedules presented at the hearing were not part of the information provided to the Neish's with their development permit. The Appellant had to rely on the permit and a drawing that was included on the back of the permit. The municipality should have made it clear as to what they wanted.

**ADDITIONAL
MATTERS**

No additional matters were raised by either party.

**OPPORTUNITY
FOR A FAIR
HEARING**

Chair Dufresne asked Mr. & Mrs. Neish if they felt they had an opportunity to state their case. They acknowledged they had. Mr. Noce confirmed the Appellants had a full opportunity to state their case.

**HEARING
CLOSED**

Chair Dufresne asked if they felt the Board had all the information it needed to make its decision. Mr. Noce, on behalf of the Appellants, stated they were able to put forward the information the Board would require to make its decision.

**FINDINGS
OF THE BOARD**

Chair Dufresne thanked everyone for their attendance and respectful presentations. A written decision of the Board will be made within 15 days. The hearing was declared closed at 12:56 p.m. No further submissions will be entertained by the board.

Upon hearing and considering the representations and the evidence of the parties concerned the Board finds the facts in the matter to be as follows:

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.

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.

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.

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.

The proposed development is to create a series of retaining walls and tiers that will result in 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.

The policies set out in the MDP and requirements to the LUB are to leave the 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.

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 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.

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.

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 purpose of a development permit, Alberta Environment approval of the location (including setback from the lake) of the sheet metal retaining wall is still required.

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 neighboring 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 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 the 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.

DECISION

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.

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 this 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 an 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 labelled as tier 2 fire pit area.
 - v. No firepit area shall be permitted on tier 1 (upper or lower) or tier 2.
 - vi. The stairs between each tier may remain and may be constructed 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. Any hedge with a minimum height of 1.1 meters 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.

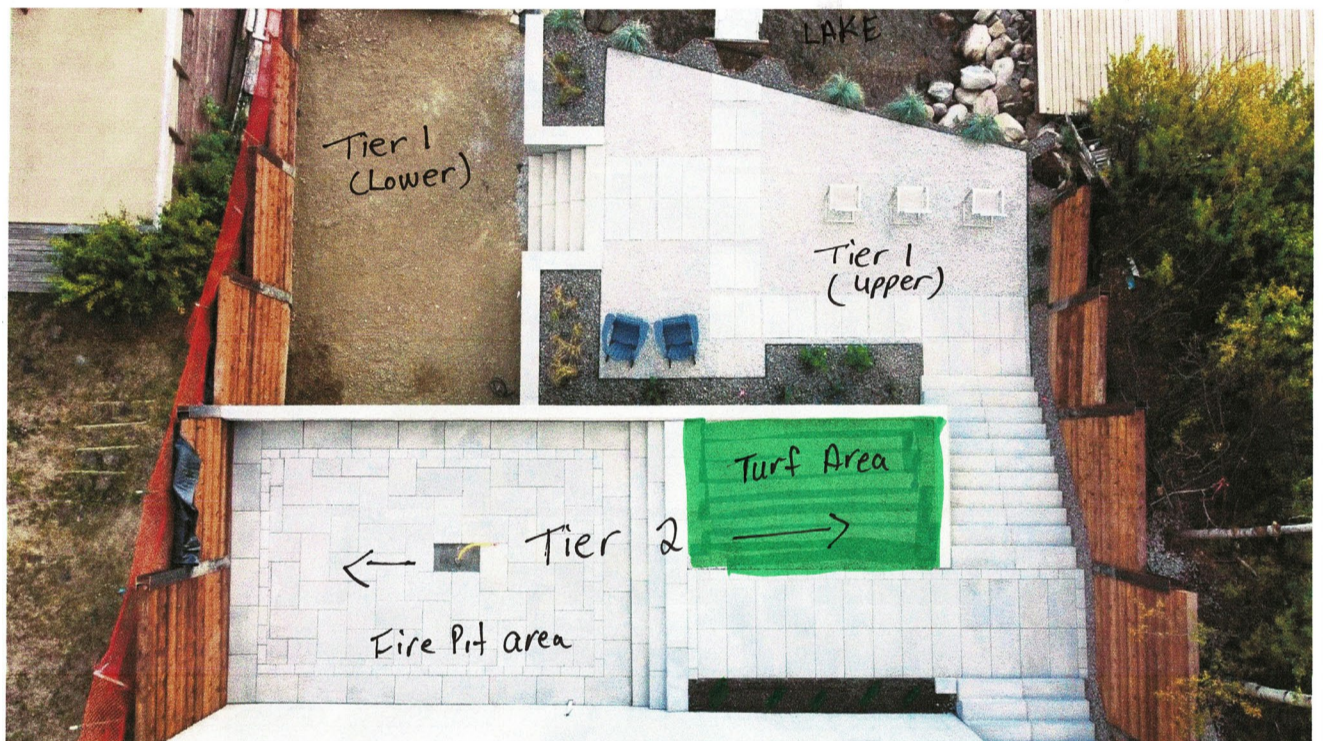
- viii. Shoreline erosion control measures are prohibited unless prior written approval has been received from the appropriate provincial authorities and the Summer Village.
 - ix. Any damage to public roads due to the construction shall be repaired immediately at the expense of the Appellants.
 - x. 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) and 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).

DATED AT THE TOWN OF SYLVAN LAKE THIS 24TH DAY OF JUNE 2024.

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

**Roger Dufresne
SDAB Chair**

SCHEDULE A"



SCHEDULE "B"

