

**SUMMER VILLAGE OF BIRCHCLIFF  
SUBDIVISION AND DEVELOPMENT APPEAL BOARD  
JUNE 26, 2023  
RECORD OF HEARING AND DECISION**

**PRESENT**

Chair:	Roger Dufresne via Zoom
Member-at-Large:	Karen McCaffery
Member-at-Large:	Thom Jewell
Development Officer	Kara Hubbard
CAO	Tanner Evans
Recording Secretary	Teri Musseau
SV Counsel:	Alifeyah Gulamhusein
Appellant(s)	Jesse Bjornson Joanne Bjornson
Legal Counsel:	Roberto Noce, K.C.
Contractor:	Bill Robinson
Gallery:	Jodi Neish

**CALL TO ORDER**

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

**PURPOSE OF HEARING**

The purpose of the hearing is to hear an appeal received from Roberto Noce, K.C., on behalf of Jesse & Joanne Bjornson on April 28, 2023, appealing the denial of a Development Permit by the Municipal Planning Commission on April 6, 2023, for a u-shaped structure and stairs on the escarpment for the property located at 83 Birchcliff Road, Lots 4 & 5, Block 3 , Plan 4486AX, in the Summer Village of Birchcliff.

**APPEAL FILED AND NOTICE GIVEN**

Pursuant to Section 686(1) of the Municipal Government Act, the appeal was filed within the 21-day appeal period and notice was given by letter to the appellant and owners of property located within a 200' radius of the proposed development. The hearing was called to order 27 days after receipt of the letter of appeal and within 30 days as outlined in Section 686(2) of the Municipal Government Act. At the request of the Summer Village of Birchcliff's legal counsel, an adjournment was granted until June 26, 2023.

**DEADLINE FOR DECISION**

Pursuant to Section 687(2) of the Municipal Government Act, the Subdivision and Development Appeal Board must give its decision in writing together with reasons for the decision within 15 days of concluding the hearing.

**OBJECTIONS TO MEMBERS OF THE APPEAL BOARD**

The Members of the Subdivision and Development Appeal Board are appointed in accordance with the Subdivision and Development Appeal Board Bylaw #237-22.

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. Bjornson 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.

**DISCLOSURE  
OF EVIDENCE  
FINDING OF  
FACTS**

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.

**APPEAL LETTER  
READ**

Teri Musseau, Secretary, read the appeal letter received from Mr. Noce, on April 28, 2023, into record.

The Appellants, Jesse and Joanne Bjornson ("Appellants"), respectfully appeal the decision of the Municipal Planning Commission ("MPC") dated April 13, 2023, relating to a development at 83 Birchcliff Road, Summer Village of Birchcliff (Lots 4 and 5, Block 3, Plan 4486AX) on the following grounds:

- (a) The proposed development represents a permitted use on the subject lands.
- (b) The MPC failed to properly apply the *Land Use Bylaw*.
- (c) The provisions of the *Land Use Bylaw* do not limit this Board's authority to approve the proposed development.
- (d) The proposed development will not unduly interfere with the amenities of the neighbourhood nor materially interfere with or affect the use, enjoyment, or value of neighbouring parcels of land.
- (e) The proposed development conforms with the use prescribed for that land and building in the *Land Use Bylaw*.
- (f) Such further and other reasons as may be presented at the hearing of this matter.

**DUTIES AND  
JURISDICTION**

Kara Hubbard, Development Officer, provided a report to the Board on duties and jurisdiction.

The MGA provides the following guidelines for an appeal to the SDAB. An appeal may be heard by the SDAB:

- where a permit is not issued within the 40 days
- if a permit was issued with or without conditions
- if a permit was refused
- if a stop order was issued

This appeal is against a decision made by the Municipal Planning Commission (MPC) to refuse a permit. No preliminary issues or questions of jurisdiction have been presented by either the appellant or the development authority.

**HEARING  
PROCEDURES**

Chair Dufresne reviewed the procedures to be followed for the hearing.

**BACKGROUND  
OF APPEAL**

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

The history of this matter is as follows:

August 3, 2021 – The SDAB upheld the decision of the MPC refusing to issue a development permit for escarpment work and old boathouse repairs on the lands.

October 21, 2021 – The Development Authority issued Development Permit #211294 (the “2021 DP”) for the construction of lakeside stairs on the lands. The 2021 development permit included the following condition: condition #10: There shall be no structural alteration to the existing boathouse. The 2021 development permit was not appealed.

September 2022 – Dan Daneault, the Construction Manager of Sorento Homes attended the Municipality office to seek clarification as to what was allowed under the 2021 development permit. He was advised the old boathouse could not be altered as outlined in condition #10. He confirmed he would send photographs of intended repairs to the old boathouse, but none were sent.

October 25, 2022 – The Development Authority conducted a site inspection on an adjacent property to the lands and found that the old boathouse had been disassembled, removed and was being re-constructed with a new foundation, the concrete structure.

October 28, 2022 – The Chief Administrative Officer for the Municipality spoke to Mark Macleod, the director of Sorento Homes by email and phone to advise the work done to the old boathouse was in contravention of the 2021 development permit and the Land Use Bylaw and a stop order would be issued. On the same day, the Development Authority observed the concrete structure had been constructed.

October 31, 2022 – A Stop Order was issued for breach of the 2021 development permit and the Land Use Bylaw. The Stop Order required, among other things, that the Appellants obtain a geotechnical report outlining the steps necessary to stabilize the bank and lands given the unauthorized alterations to the old boathouse and the ordered removal of the concrete structure and that the Appellants apply for a development permit to undertake the work outlined in the geotechnical report. The Stop Order was not appealed and remains valid.

November 9, 2022 – The Appellants obtained a geotechnical report from SmithDow. The purpose of the report was to verify the stability of the slope on the lands.

December 6, 2022 – The Appellants obtained a letter from SmithDow which addressed “the suggested site work required to prevent erosion and to maintain stability of the vertical bank near the toe of the slope if the u-shaped concrete structure and screw pile foundation are removed”. The letter indicated that the “existing house foundation and

proposed residential structure currently built is deemed stable with or without the u-shaped detached concrete structure.” The letter went on to outline steps to be taken after the removal of the concrete structure to maintain stability.

February 7, 2023 – Sorrento Homes made an application for a development permit for the lakeside stairs and to keep the already constructed concrete structure. A letter attached says the Appellants “believe the removal of the existing concrete structure will be damaging to the waterfront area and do not want to disturb the bank any further.” The plans submitted include a landscaping plan and a sectional of the stairs which shows the grade at the location of the stairs to be over 43%.

April 13, 2023 – The MPC issued a decision denying an application for a development permit for the concrete structure and stairs on the lands.

April 28, 2023 – The Appellants’ legal counsel filed a Notice of Appeal.

Ms. Gulamhusein proceeded to reference legislative background to support the development authority’s position.

The Municipal Government Act, Section 3 (a)(1) states the purposes of a municipality include fostering the well-being of the environment. Even permitted uses require a development permit and the development authority must give a development permit only if the use conforms to the development regulations and standards.

Ms. Gulamhusein reviewed the variance powers of the Subdivision and Development appeal board and reminded the members that even though they have the power to vary or revoke a decision that doesn’t comply if it doesn’t affect the use and enjoyment of neighbouring parcels, the development still has to conform with the use.

The Land Use Bylaw #170-13 states accessory buildings are to be located in the back yard and the development has occurred in the front yard as the front yard is the lake on waterfront parcels. Where a development is within 30 m of the top of the bank or high-water mark of Sylvan Lake, a development design plan shall be submitted as part of the development permit application and enforced as a condition of approval. The development authority has the discretion to determine the top of bank or high-water mark. The development design plan must be in accordance with the Sylvan Lake Intermunicipal Development Plan.

The Municipal Development Plan (MDP) is a high-level planning document that every municipality must adopt. The plan addresses the future planning for the municipality and provides general guidance. The Summer Village of Birchcliff’s MDP speaks to the desire to conserve the environment and limit shoreline contact. While remedial action may be required from time to time, the general desire is to keep the shoreline as natural as possible.

The Respect our Lakes document published by Alberta Environment and Sustainable Resource Development notes more natural area on

the lakeside is better for the lake. Anything that happens on the shoreline affects the lake and these changes will have an impact on the lake.

The concrete structure requires a development permit. The old boathouse may have been a legal non-conforming use but once it was demolished and replaced at greater than 75% it was no longer protected as a non-conforming building. The work done exceeded repairs or maintenance and structural alterations were made which is in contravention of the development permit issued in 2021 which specified there shall be no structural alterations to the old boathouse. This resulted in a stop order being issued.

The SDAB has the authority to grant variances, but they must comply with statutory plans such as the Municipal Development Plan and the Land Use Bylaw. In order to approve the development, variances would have to be given allowing the structure to remain in the front yard of the parcel as opposed to the rear yard and a variance would need to be granted to relax the front yard setbacks. Landscaping would need to be added whether the structure remains or is removed.

The u-shaped structure is not required to stabilize the bank and it does not comply with the statutory documents. The goal of the MDP and LUB is to keep the shoreline natural when new development occurs. The boathouse was removed and replaced with something new which does not comply with the LUB. While the neighbouring property may not be negatively impacted by the development, there is undo material interference with the lake and the protection of the lake for everyone to enjoy.

Mrs. Hubbard went through photos provided by the appellant addressing existing lakeside developments. Some of the photos did not identify the address, which made it difficult to refer to each of them and it was noted that not all were within the Summer Village of Birchcliff. Some of the developments were found to be nonconforming, added for stability, or constructed without approval.

While the Administration office services the Summer Villages of Birchcliff, Half Moon Bay, Jarvis Bay, Norglenwold, and Sunbreaker Cove, each is a separate municipality, and each has their own set of statutory documents and bylaws.

Ms. Gulamhusein reminded the board that there is an active development permit in place for stairs. If the u-shaped structure is permitted to remain, conditions such as backfilling, addition of vegetation around the structure for aesthetics, and no further changes to the concrete structure without a development permit were requested.

**APPELLANT  
PRESENTATION**

Mr. Noce presented his case to the board members.

He acknowledged the structure had been removed and was in the process of being reconstructed when a stop order was issued. During repairs, the structure collapsed which is why the boathouse was removed entirely. The new construction is taking place where the old boat house was located and is identical in size. There was no evidence the old structure reduced lake water quality, degraded aquatic habitat or adversely impacted the area's visual or natural

quality through inappropriate or excessive removal of vegetation.

Mr. Noce believes there is no dispute whether the development is a permitted use. The location of the structure is located in the front of the parcel which requires a variance as it should be in the rear yard. Mr. Noce also stated there were no issues relating to the MDP with this development and that it complies with every aspect of the MDP.

The SDAB has the authority to allow the development permit and grant the variance. The Respect Our Lakes documents are not statutory documents and do not have to be considered by the Board when making their decision. The Board does have to refer to the test when making their decision. If the development would not unduly interfere with the amenities of the neighbourhood, or materially interfere with or affect the use, enjoyment, or value of neighbouring parcels of land and the proposed development conforms with the use prescribed for that land or building in the land use bylaw, a development permit should be issued. Court cases were referenced that supported the variance power of the SDAB.

Letters of support were received from several neighbours who are supportive of the proposed development and should be considered by the Board when making their decision. The Board needs to consider the application based on the evidence presented at the hearing today as this is a brand-new application.

Mrs. Bjornson reviewed the photos she submitted with the board showing current structures located on the escarpment some of which had been approved, some with variances, and some that are non-conforming. She was surprised that the Summer Village would consider the protection of the lake and environment for the whole community and not just Birchcliff. She stated the landscaping plan was mentioned a little early as they are still under construction but that they would be landscaping to the fullest.

Mr. Robinson addressed the Board. He is the lead on the structure and part owner of Sorento Custom Homes. The intention was to clean up the existing structure and put in a decent set of stairs while redoing the boat house to use as storage. When the roof was removed the structure came down. It was their intent to rebuild the structure to the same size and height as what was there previously. They needed something to secure the stairs to which is why they applied for the development permit for the u-shaped structure as it would act as a foundation for a new boathouse and add stability to the bank. If the u-shaped structure was removed, they would need a retaining wall to retain dirt closed to the house.

Mr. Noce referenced the letters of support from the adjacent landowners who have no issues or concerns with the development. The proposed development would not interfere with the neighbouring parcels. The intention was to refurbish the old structure and it was beyond their control when it collapsed. There is no evidence that supports the structure will stand out from other developments in the community and is similar to the structure that existed previously since 1979. No complaints were ever received about the old structure and no letters of opposition have been received. There is no evidence that allowing this structure would set precedence.

**IN FAVOUR OF  
THE APPEAL**

Written submissions received in favour of the appeal were read into the record from the following:

David Elder, 87 Birchcliff Road  
Trevor Federkiewicz, 79 Birchcliff Road  
Colin and Nita Watts, 93 Birchcliff Road  
Brad and Shauna Glover, 99 Birchcliff Road  
Wade and Kelly Becker, 335 Birchcliff Road

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 summarized her case. An engineering report from SmithDow supports removing the u-shaped structure will not have an impact on the stability of the bank. The existing house will remain stable even if the structure is removed. No development permit has been issued, and the structure is currently not compliant with the Land Use Bylaw which requires a development permit.

Questions were asked by the Board to the appellants regarding the slope stability report.

**SUMMARY FROM  
APPELLANTS**

Mr. Bjornson spoke about the engineering report which was only done so they could proceed with the building of the house.

Mr. Noce had nothing further to add except to remind the board to apply the test before making their decision. As the development does not affect neighbouring properties, a development permit should be issued, and a variance should be granted.

**OPPORTUNITY  
FOR A FAIR  
HEARING**

Chair Dufresne asked Mr. & Mrs. Bjornson if they felt they had an opportunity to state his case. They acknowledged they had.

**HEARING  
CLOSED**

Chair Dufresne thanked everyone for their attendance and presentations. A written decision of the Board will be made within 15 days. The hearing was declared closed at 11:59 a.m. No further submissions will be entertained by the board.

**FINDINGS  
OF 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:

1. This property is located in the R1 District (Lakeshore Residential).
2. The proposed development occurred in contravention of the development permit and the Land Use Bylaw #170-13.
3. The original structure is considered a legal non-conforming development.

4. The Municipal Government Act states a non-conforming building may continue to be used but the building may not be enlarged, added to, rebuilt, or structurally altered except to make it a conforming building, and for routine maintenance.
5. The U-shaped structure is not required as a retaining structure for the stability of the bank.

**Issues:**

**1. Constructed in Contravention of Development Permit**

A Development Permit #211294 was issued to the appellants in October 2021. Condition #10 of the Development Permit stated, *“there shall be no structural alteration to the existing boathouse”*.

The appellant stated that during renovations the boathouse collapsed. The appellants did not address why they commenced with rebuilding the boathouse in contravention of their Development Permit #211294 and against the direction of the Development Officer who reiterated the boathouse could not be altered as per their Development Permit.

The Municipal Development Plan 172-13, Section 6.3.4 states: *“While recognizing that remedial actions may be necessary from time to time, the Summer Village still strongly desire that banks abutting the shoreline remains as natural as possible to retain natural ecosystems. All development, including but not limited to the clearing of vegetation and the building of staircases and platforms shall require a development permit from the Summer Village.”*

The Sylvan Lake Intermunicipal Development Plan section 6.2.13 states: *“As a requirement of a development permit submission for a vacant parcel or on redevelopment lands, where the development is within 30 meters of the Top of Bank or High-Water Mark of any naturally occurring tributary to Sylvan Lake, a Development Design Plan shall be submitted as part of the permit application and enforced as a condition of approval. Determining which feature (Top of Bank or the High-Water Mark of Sylvan Lake) is appropriate will be at the discretion of the Approving Authority. Approval of the Development Design Plan shall be to the Approving Authority’s satisfaction that the design will satisfy the goal of mitigating negative impacts on watershed health.”*

It is the decision of the Subdivision and Development Appeal Board that the appellants were aware that they were not permitted to remove the existing boathouse and rebuild it. The work done was not approved and in contravention of the existing Development Permit #211294. The U-shaped structure needs to be removed and the soil compacted to ensure stability in accordance with the provided engineer report.

**2. Non-Conforming Building**

The *Municipal Government Act*, Section 643, Non-Conforming

Building states: *“A non-conforming building may continue to be used but the building may not be enlarged, added to, rebuilt, or structurally altered except:*

- (a) to make it a conforming building,*
- (b) for routine maintenance of the building, if the development authority considers it necessary, or*
- (c) in accordance with a land use bylaw that provides minor variance powers to the development authority for the purposes of this section.*

*If a non-conforming building is damaged or destroyed to the extent of more than 75% of the value of the building above its foundation, the building may not be repaired or rebuilt except in accordance with the land use bylaw.”*

It is the decision of the Subdivision and Development Appeal Board that since the boathouse was completely demolished the boathouse must not be rebuilt and the u-shaped structure should be removed.

### **3. Precedent**

The definition of precedent is *“an earlier event or action that is regarded as an example or guide to be considered in subsequent similar circumstances.”*

The appellant submitted and reviewed several photos of lakeside structures on the escarpment around the Summer Village suggesting precedent had been set allowing structures to be built on the escarpment. The Development Officer was unable to confirm if all the photos were of structures within the Summer Village of Birchcliff nor if approval had been given for the construction of these structures. Some developments shown were confirmed as legal non-conforming, unauthorized, or required for stability.

In the submission it says *“There are five Summer Villages on Sylvan Lake: Birchcliff (1972), Half Moon Bay (1978), Jarvis Bay (1986), Norglenwold (1965) and Sunbreaker Cove (1991) – all sharing an administration office since 1991. Here are some examples of approvals (by the same officials) in the Summer Village of Norglenwold:”* These are 5 separate Councils each providing separate directions under separate MDP's and LUB's.

It is the decision of the Subdivision and Development Appeal Board that if the proposed development was approved it would set a precedent for all future developments.

### **4. Vegetation/Environmental Considerations**

The concern exists regarding vegetative and environmental considerations such as erosion and bank stability. It is the objective of the Summer Village of Birchcliff to protect the environment and control erosion. The “Respect Our Lakes” document issued by the Government of Alberta was referenced by the Development Authority. The Bank and Shoreline Stability sections states *“Appropriate setbacks should be used to keep development back from areas that may be susceptible to slope movement and erosion. A geotechnical assessment should be carried out using accepted engineering principles with regard to slope stability, toe erosion and*

*shoreline migration.”*

A geotechnical report was submitted by the appellant to the Development Authority. This report outlined suggested site work required to prevent erosion and to maintain stability of the vertical bank near the toe of the slope. It was determined by the engineer that the existing house foundation and proposed residential structure are deemed safe with or without the u-shaped structure. The u-shaped structure and screw pile foundation can be removed and the ground re-compacted.

Revegetation of the escarpment with native deep-rooted vegetation would increase the slope stability assisting in the prevention of erosion and run off into the lake.

It is the decision of the Subdivision and Development Appeal Board based on the above, the u-shaped structure should be removed, and the escarpment backfilled and compacted as per the direction of Smith Dow including the planting of native deep-rooted vegetation to ensure slope stability.

#### **5. Accessory Buildings/Front Yard Setback**

The u-shaped structure is not closer to the front parcel boundary or top of the escarpment areas or high-water mark than the front wall of the main building or 15m, whichever is less.

The Land Use Bylaw #170-13, Part Three, 1(1)(b) states: *“An accessory building on a parcel abutting Sylvan Lake or a reserve parcel abutting Sylvan Lake shall be situated so that (ii) it is not closer to the front parcel boundary and the top of any escarpment area or high water mark, as determined by the Development Authority, than the front wall of the main building or 15M (49.21 ft.) whichever is less.”*

It is the decision of the Subdivision and Development Appeal Board not to grant a variance as it does not meet the setback requirement.

#### **DECISION**

The Board intends to balance the interests of the landowner and those of the Municipality's. Development standards in the R1 District are in place to protect the Lake, reduce future harm, and consider the cumulative effect of allowing such developments on the shoreline in the face of the Municipality's policy. The Board found no compelling argument to support the variance.

The Concrete Structure is contrary to the goals of the Intermunicipal Development Plan (IDP), Municipal Development Plan (MDP) and Alberta Environment. It was constructed without approval, and contrary to the siting and setback requirements of the LUB, which were adopted to protect the Lake for the use and enjoyment of all.

Damage to the Sylvan Lake ecosystem will materially interfere with the value of the neighbouring parcels of land and may interfere with water quality, cause erosion and sedimentation into the lake and result in the loss of natural shoreline and habitat.

Based on the evidence presented at the hearing and with consideration for the presentations made by both the Appellant and the Development Officer, it is the decision of the Subdivision and Development Appeal Board to uphold the decision of the Municipal

Planning Commission and deny a development permit for a U-shaped structure and stairs on the escarpment at 83 Birchcliff Road.

**DATED AT THE TOWN OF SYLVAN LAKE THIS 26<sup>TH</sup> DAY OF  
JULY 2023.**

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

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**Roger Dufresne  
SDAB Chair**