

**SUMMER VILLAGE OF SUNBREAKER COVE
SUBDIVISION AND DEVELOPMENT APPEAL BOARD DECISION**

Hearing Date: November 18, 2024
SDAB File Number: SDAB-24-001
Appellants: Blair and Elizabeth Collier
Applicants: Tyler and Carla Elgar
Location: 1325 Birch Road
Legal Description: Lot 16, Block 9, Plan 5969MC (the “Lands”)

A. INTRODUCTION

1. This is an appeal of a development permit issued by the Development Authority for the Summer Village of Sunbreaker Cove (the “DA”) on October 7, 2024 for Demolition and Dwelling on the Lands.
2. The Appellants submitted a Notice for Appeal on October 24, 2024 that raised the following grounds of appeal:
 - (a) The DA erred in calculating “grade” as required pursuant to the Summer Village of Sunbreaker Cove Land Use Bylaw No. 99/13 (the “LUB”); and
 - (b) The DA misinterpreted and failed to properly apply various regulations in Part 3(1) of the LUB.
3. The DA raised the issue of whether the Subdivision and Development Appeal Board (the “Board”) had jurisdiction to hear an appeal of a permitted use.

B. RELEVANT STATUTORY AND PLANNING DOCUMENT PROVISIONS

4. Summer Village of Sunbreaker Cove Land Use Bylaw No. 99/13.
5. *Municipal Government Act*, RSA 2000 c. M-26.

C. SUMMARY OF EVIDENCE PRESENTED

6. Notice of Decision dated October 7, 2024.

7. Development Permit #247102 dated October 7, 2024.
8. Notice of Appeal dated October 24, 2024 submitted by Michael Keyes, counsel for the Appellants.
9. Written submissions dated November 12, 2024 submitted by Alifeyah Gulamhusein, counsel for the DA.
10. Written submissions dated November 18, 2024, received by the Board by email on November 15, 2024 submitted by Michael Keyes, counsel for the Appellants.
11. Letter dated November 18, 2024 submitted by Alifeyah Gulamhusein, counsel for the DA.
12. Excerpts from *Planning Law and Practice in Alberta* (Fourth Edition), Frederick A. Laux, Q.C and Gwendolyn Stewart-Palmer (the "Laux Text").
13. Presentation slides submitted by the Applicants during the November 18, 2024 hearing.
14. Pictures of the model prepared by the Appellant, Blair Collier, marked as Exhibit 1 during the hearing.

D. SUMMARY OF THE DA'S POSITION

15. The application is for Demolition and construction of a Dwelling in the Residential District (R1). Demolition and Dwelling are both permitted uses in the R1 District.
16. The maximum building height in the R1 District, measured from grade, is 10m. Grade is defined in the LUB as the ground elevation established for the purpose of determining building height.
17. Under the LUB, the DA may determine grade by calculating the average of the pre-development elevations at the corners of the parcel as shown on a reliable survey. In the DA's opinion, the word "may" infers that the method of calculation is not mandatory; however, the DA used appropriate calculations in determining grade.

18. The DA used the drawings and surveys provided by the Applicants to determine the pre-development elevation near the four corners of the parcel, being 946.5m, 947m, 954m and 950.54m. Taking the average, the DA determined that the average grade was 949.51m.
19. The proposed development is 9.67m high when measured from grade as calculated by the DA. This is less than the maximum 10m as prescribed by the LUB in the R1 District.
20. Section 642(1) of the MGA provides that if an application is for a permitted use that otherwise conforms to the land use bylaw, the DA must issue a development permit with or without conditions as provided for in the land use bylaw.
21. The DA determined that the proposed development complied with the LUB, and no other variances or relaxations to the LUB were required. As the DA considered the application to be a conforming permitted use, the DA issued the development permit, subject to conditions.
22. Pursuant to the LUB, all uses in the R1 District must comply with the regulations in Part Three: Supplementary Regulations (the "Supplementary Regulations").
23. The DA had due regard to the subjective factors contained in the Supplementary Regulations. Nevertheless, the DA concluded that the proposed development is a permitted use, and issued the development permit.
24. The DA's position is that the subjective elements of the LUB found in the Supplementary Regulations cannot take away that a use is a permitted use based on subjective considerations.
25. Even if it is found that the height of the building does not conform, then the test becomes "does the proposed development unduly interfere with the amenities of the neighbourhood or materially affect the use, enjoyment or value of neighbouring lands pursuant to section 687(3)(d)(i) of the MGA.

26. The limitation in the LUB prohibiting any variance of the building height by the DA or the Municipal Planning Commission does not bind the Board. The Board can vary the building height requirements under the LUB.
27. The Board should uphold the development permit.

E. SUMMARY OF APPELLANTS' POSITION

28. The R1 District directs that no building shall be more than 10m in height when measured from grade. Grade may be calculated by taking the average pre-development elevations at the four corners of the parcel as shown on a reliable survey.
29. None of the surveys provided by the Applicants show such pre-development elevations at the corners of the parcel. Neither the Board nor the DA are able to calculate grade as directed by the LUB.
30. Without knowing grade, the building height cannot be determined and, as such, it cannot be determined whether the proposed development is a permitted use, or whether there were any variances or relaxations granted in approving the development permit.
31. The LUB directs that the DA and Municipal Planning Commission may not vary the height limitations under the LUB.
32. The Supplementary Regulations are focused on the impacts to adjacent properties. In the Appellants' view, adjacent properties can be reasonably interpreted to include the people who live on those properties.
33. The DA failed to have due regard to the subjective factors contained in the Supplementary Regulations, and did not consider the Appellants' perspective in issuing the development permit. If due consideration was not given, the Board must revoke or vary the DA's decision.

34. Per the Laux Text, the Board must conduct its own subjective analysis having due regard to the subjective factors.
35. The wording of section 642 of the MGA is extremely important in that the application must otherwise conform to the LUB. In this case, the Supplementary Regulations cannot be treated as anything other than being part of the LUB, and, accordingly, the proposed development must conform with the Supplementary Regulations.
36. If the proposed development does not comply with the Supplementary Regulations, then the development does not otherwise conform to the LUB, is not a permitted use and section 642 of the MGA does not apply.
37. Section 687(3)(d) of the MGA provides guidance in considering the subjective factors contained in the Supplementary Regulations. This section is also focused on the impact of proposed developments on adjacent landowners and properties, and the Supplementary Regulations must be considered in the context of section 687(3)(d) of the MGA.
38. As the Board is comprised of typical residents of Sunbreaker Cove, the test in considering the Supplementary Regulations should be whether a typical resident would consider the impacts of the proposed development to be reasonable.
39. The proposed development as approved will reduce the amount of sunlight and obstruct the Appellants' view of Sylvan Lake. Due to the personal circumstances of the Appellants, this will severely reduce the enjoyment of their property.
40. The Appellants provided a scale model of the Appellants' property in relation to the proposed development. The model was prepared by the Appellant, Blair Collier. Photos of the models from various angles were added as Exhibit 1 to the Board's file.

41. The proposed development will also significantly reduce the value of the Appellants' property. The Appellants submitted a letter from a realtor, Dale Stuart, in support of this position.
42. Mr. Stuart opined in his letter that the proposed development may reduce the value of the Appellants' property by as much as \$100,000.00. Mr. Stuart provided comparables of various properties around Sylvan Lake along with his letter.
43. If the Applicants were to move the proposed development towards the rear of the parcel, it would greatly offset the negative impacts of the development on the Appellants.
44. Even if the Board finds that the height requirements of the proposed development are within the 10m maximum when measured from grade, the Board still must address the subjective factors in the Supplementary Regulations viewed through the context of section 687 of the MGA.

F. SUMMARY OF APPLICANTS' POSITION

45. The Applicants provided a slideshow for their presentation, which was added to the Board's file.
46. The Applicants bought the Lands in 2016. The existing building on the Lands was built in 1975.
47. The Applicants have used the Lands since they were purchased, but they have since outgrown the existing building and desire to construct a new building to better suit their needs.
48. The Appellants' property is significantly raised above the Lands, which has caused water to run off the Appellants' property onto the Lands and has reduced privacy on the patio at the front of the Lands.
49. While the Applicants could move the proposed development towards the rear of the Lands, they wish to maintain the back yard for their children and family.

50. The Lands are sloped at the front and back. This results in an average grade that is lower than the development site. The Applicants made efforts to ensure that the height of the building when measured from grade would not exceed the 10m maximum in the LUB.
51. The Applicants would be willing to provide a new survey to the DA showing the pre-development elevations at the corners of the Lands.

G. DECISION

52. The decision of the Development Authority is CONFIRMED, subject to the following conditions:
 - (a) The Applicants shall provide to the Development Authority a current reliable survey showing the pre-development elevations at the four corners of the Lands such that grade can be determined in accordance with the LUB, to the satisfaction of the Development Authority prior to any development.
 - (b) The maximum height of the proposed development shall be 10m when measured from grade as determined by the Development Authority in accordance with the LUB based on the current survey to be provided pursuant to the condition set out above.

H. REASONS

Jurisdiction

53. The DA raised an issue of jurisdiction related to Section 685(3) of the MGA as the proposed development is a permitted use.
54. The Board reviewed the excerpts of the Laux Text and is cognizant of the Alberta Court of Appeal's direction in *Rau v Edmonton (City)*, 2015 ABCA 136 in regard to appeals for a permitted use.

55. Having found that there was a misinterpretation or relaxation of the calculation of grade as directed by the LUB, the Board is satisfied that the appeal is properly before the Board, and the Board has jurisdiction to hear the appeal.

Determination of Grade and Height

56. The Board finds that it is not possible to determine grade as directed by the LUB based on the information that is before it.
57. Building height is to be measured from grade. Grade may be determined by taking the average of the pre-development elevations at the corners of the parcel. In this case, there is no survey before the Board showing such elevations. Approximate elevations close to the corners of the parcel do not suffice.
58. The Board is not convinced by the DA's submission that the use of the word "may" in regard to calculating grade would permit a different form of analysis. No other method is provided in the LUB, and it is an objective standard. The DA must calculate grade as directed by the LUB.
59. Without being able to determine grade and, subsequently, the height of the proposed development, it is not possible for the DA or the Board to determine whether the proposed development conforms with the LUB.
60. This issue can be addressed by the Applicants providing a new reliable survey showing the pre-development elevations at the corners of the Lands prior to development occurring. This will allow the DA to determine whether the proposed development conforms to the height requirements of the LUB.

Consideration of the Supplementary Regulations

61. The Supplementary Regulations state, in part, at section 1(1)(2) - Building Orientation and Design:

"The design, character and appearance of any building, or series of buildings, structures or signs proposed to be erected or located in any district must be

acceptable to the Development Authority having due regard various factors, including the following:

- (a) Amenities such as daylight, sunlight and privacy;
 - (b) The character of existing development in the district;
 - (c) Impact of proposed development on adjacent parcels.
62. Development in the R1 District must comply with the Supplementary Regulations. The consideration of the Supplementary Regulations is a subjective analysis.
63. The hearing before the Board is a *de novo* hearing, such that the Board has the authority to conduct its own fresh analysis of the subjective factors in the Supplementary Regulations.
64. The Appellants submit that the DA did not have due regard to the Supplementary Regulations, and point to the loss of amenities and enjoyment of property that they will suffer as a result of the proposed development.
65. As a starting point, the Board disagrees with the Appellants' suggestion that section 687 of the MGA provides guidance in considering the Supplementary Regulations. Section 687 of the MGA deals with the requirements to grant a variance. Consideration of the subjective factors in the Supplementary Regulations is a separate analysis.
66. As per the Laux Text, development permits for permitted uses are considered to be "as of right" if the proposed development conforms with all the applicable provisions of the LUB. Permitted uses are those that may be considered to be so clearly appropriate in a given district that they demand no special consideration.
67. In light of this, the Board agrees with the submission of the DA that the factors to be considered under the Supplementary Regulations must be considered through the lens of a permitted use.

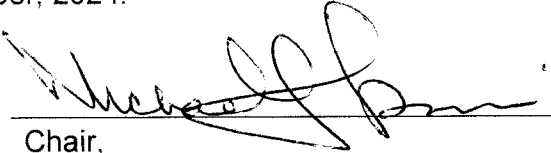
68. Based on the evidence before it, the Board is finds that the proposed development complies with the Supplementary Regulations:
- (a) The Board is of the view that the proposed development is consistent with the existing developments in the R1 district.
 - (b) To the extent that there are impacts on the Appellants' property in relation to daylight, sunlight and privacy, those impacts are reasonable and consistent with the impacts that would be expected from development in the R1 District. In particular, the higher elevation of the Appellants' property mitigates these impacts.
 - (c) Similarly, while the Board is sympathetic to the Appellants' concerns and acknowledges that the proposed development will impact the Appellants' property, the impacts are reasonable and consistent with the impacts that would be expected from development in the R1 District.
 - (d) The Board reviewed the letter and comparable properties provided by the realtor, Mr. Stuart. The Board finds that Mr. Stuart's assertion that the proposed development may result in a reduction in the Appellants' property value "by as much as \$100,000" is speculative and not supported beyond the assertion itself. Mr. Stuart was not available for the hearing due to personal circumstances, but the Board is satisfied that, from the letter provided, it would not have come to a different conclusion even if he had been available. The Board places little weight on the letter provided by Mr. Stuart.

I. CONCLUSION

69. The Board confirms the decision of the Development Authority subject to the conditions set out above.

Dated this 29 day of November, 2024.

Per: _____


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.