Municipal District of Bighorn No. 8
No.2 Heart Mountain Drive, P.O. Box 310, Exshaw, Alberta T0L 2C0
Phone: (403) 673-3611 • Calgary Direct: (403) 233-7678
Fax: (403) 673-3895 • Email: bighorn@md.bighorn.ab.ca

DECISION OF THE SUBDIVISION/DEVELOPMENT APPEAL BOARD

Hearing: July 5, 13 and 14, 2022

Development Permit 88/21, Harvie Heights Community Association (Appellant)

I. Decision

The MD of Bighorn Municipal Planning Commission (the "MPC") approved development permit 88/21 for a 55-unit visitor accommodation development at Lot 3, Block 24, Plan 170JK (#750 Harvie Heights Road), in the Hamlet of Harvie Heights. This development permit included a slope setback variance. The Harvie Heights Community Association appealed that decision to this Board.

For the reasons which are set out below, the appeal is allowed in part and the development permit is upheld as approved with two changes to the conditions.

First, condition 6 of the development permit is hereby replaced with the following:

> 6. The Applicant shall not disturb or damage the Upper Aquifer in carrying out this development. Without limiting the foregoing, the other permit conditions, or additional terms within construction or development agreements, in order to definitively establish the depth to groundwater in the Upper Aquifer and the location and form of the aquitard in the vicinity of the proposed excavation / retaining wall and to protect the Upper Aquifer during construction, the Applicant shall:
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> a. Under the supervision of a geotechnical or hydrogeological engineer or other appropriate professional to the satisfaction of the Development Authority (the "Applicant's Engineer"), install such testing and monitoring equipment as may be needed to identify the depth to groundwater and the location and form of the aquitard at the site of the proposed excavation / retaining wall which shall include a minimum of three monitoring/test wells, the location of which will be immediately adjacent to the intended location of the retaining wall on the uphill side with spacing as determined by the Applicant's Engineer, which shall be screened into the saturated zone of the Upper Aquifer;
> b. Provide a report by the Applicant's Engineer to the satisfaction of the Development Authority confirming that the development, including the excavation and retaining wall, will not endanger the Upper Aquifer;
> c. Under the supervision of the Applicant's Engineer, monitor the monitoring / test wells on a weekly basis until the completion of the retaining wall and forthwith notify the Development Authority if any concerns are identified; and

d. Comply with any recommendations of the Applicant's Engineer in respect of the protection of the Upper Aquifer.

Second, the Applicant shall provide revised plans which remove the rooftop deck on the second level of Building #1 and replace it with either a flat roof or a roof consistent with the other rooftops on the building, with no outdoor amenity area at that location, to the satisfaction of the Development Authority.

II. Background

The subject property is located within the Highway Commercial District – Harvie Heights (HWY-HH). The development permit application 88/21 was approved for a 55-Unit Visitor Accommodation Development with a slope setback variance in the rear yard. The MPC, acting as the Development Authority, approved the application with conditions on the basis that the proposed development is a permitted use within the HHY-HH land use district and the variance was approved as per Section 5.2.2 of the Land Use Bylaw.

The hearing of this appeal opened on July 5th, 2022. It was then adjourned to be heard over two days on July 13th and 14th, 2022.

The adjournment was granted at the request of the appellant. The appellant requested a longer adjournment, until the week of August 22nd for reasons which included the availability of the appellant's counsel who had various other commitments during the summer months.

The Court of Appeal has been clear that planning matters must be dealt with expeditiously. The Board must also be conscious of the impact that a delay would have on the other party, in this instance the delay would delay the start of the project if the development permit were approved.

The Board found that an adjournment was reasonable to allow both parties to submit their final written submissions, but that a delay until the week of August 22nd was excessive. As such, a shorter adjournment was granted.

The hearing was conducted at the MD of Bighorn's administration building in the Hamlet of Exshaw. The Appellant was represented by its legal counsel, Mr. Richard Harrison (Wilson Laycraft Barristers and Solicitors) and Ms. Churyl Elgart (Osler, Hoskin & Harcourt LLP). The Applicant, Big Harvie Ltd. (Basecamp Properties) was represented by its legal counsel Kelsey L. Becker Brooks (Reynolds Mirth Richards & Farmer LLP). The MD of Bighorn and its development authority were represented by legal counsel Jeneane Grundberg, Q.C. and Adam Ferris (Brownlee LLP). The Board's legal counsel was Jennifer Sykes (Caron & Partners LLP).

The Board heard submissions from the parties' representatives and legal counsel, an affected neighbour, and a number of expert and lay witnesses speaking on behalf of the various parties. The parties made extensive verbal and written submissions which the Board acknowledges.

III. Reasons for Decision / Findings of Fact

Aquifer

The Appellant's primary concern was about the risk the development posed to an aquifer in the area which provides water for many homes in Harvie Heights (the "Upper Aquifer").

The parties put forward significant evidence concerning the possible location of the Upper Aquifer. The concern is that the edges of the Upper Aquifer are not precisely known. The development includes excavation into the ground where the Upper Aquifer is located. The Board heard conflicting evidence about the level of damage and possibility of repair if the Upper Aquifer were damaged.

The MPC tried to address this question through condition 6 in the development permit. That condition directs further testing. However, during the course of the hearing it became apparent that not all parties agreed about the interpretation of condition 6, specifically where the testing wells were required.

This is a significant issue, and the Board is satisfied that it is appropriate to modify condition 6 to clarify the Applicant's responsibilities and the testing to be carried out. As such, the Board modified condition 6 to specify that the monitoring / testing wells must be located immediately upslope from the intended location of the retaining wall, since that is the area of concern for damage to the aquifer.

The Board acknowledges the Applicant's statements that this is a technically challenging location given the slopes in the area. However, since the Applicant intends to seek a relaxation of the Land Use Bylaw and cut into a slope, it is incumbent on the Applicant to make sure that this can be done without endangering the Upper Aquifer.

With this additional condition to ensure that the Upper Aquifer is not damaged and the other change described in this decision, the Board is satisfied that the development with its variance of the Land Use Bylaw slope setback will not unduly impact the use, enjoyment or value of neighbouring properties or neighbourhood amenities.

Use Definition

The Appellant argued that the proposed development does not meet the definition of a visitor accommodation and that it would be better categorized as a dwelling unit.

There was disagreement over whether this proposal meets the definition of a visitor accommodation, or whether it would be better categorized as a dwelling unit. The two definitions are as follows:

> "ACCOMMODATION, VISITOR" (Visitor Accommodation) means a building or group of buildings containing rooms or units, which are used for temporary lodging. A Visitor Accommodation unit shall not be occupied as a Primary Residence and no visitor or Guest shall occupy one or more rooms or units for a period exceeding 75 days per annum. Typical Visitor Accommodation units or facilities may include, but is not limited to an inn, a hotel, a motel, cabins, or detached and attached buildings. Visitor Accommodation does not include "Bed and Breakfast" or "Suites, Visitor Accommodation."
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> "DWELLING UNIT" means a room or suite of rooms operated as a self-contained unit that usually contains cooking, eating, sleeping and sanitary facilities. Dwelling Units shall have a separate entrance controlled by the person or persons occupying the Dwelling Unit.

The Appellant argued that a dwelling unit is a better definition since the units in this development are self contained and include cooking, eating, sleeping and sanitary facilities. The Appellant also argued that the Land Use Bylaw treats "boarding" and "lodging" differently, and that visitor accommodations are intended for lodging, which does not include food service while these units will include kitchens. This distinction reflects Council's intention that visitor accommodations would be more like traditional hotel rooms, where guests would leave their rooms and engage with local services for things like dining.

The Board acknowledges the Appellant's argument but is satisfied that the proposed development falls within the plain meaning of the definition of visitor accommodation. The Board based this finding on the intent behind the types of development. A person could live long-term in a dwelling unit, but a visitor accommodation unit is intended to provide shorter term temporary accommodation for people who are travelling. Since there are conditions on this development prohibiting use of the units as primary residences and limiting the lengths of stays, these units are not usable for long-term residential use and instead are consistent with short term stays.

The Appellant pointed out the potential for abuse and failure to follow the rules. While there may be potential for individuals to break the rules and try to stay longer, this is an enforcement issue which does not mean that the proposal does not fall within the use definition of a visitor accommodation.

Parking

The Appellant argued that the parking proposed for this development is inadequate.

Section 3.15.2 of the Land Use Bylaw requires one stall per accommodation unit for visitor accommodations. An accommodation unit is defined as:

> "ACCOMMODATION UNIT" means a Guest room or unit within a Resort Accommodation, Visitor Accommodation or Bed and Breakfast building, which has a separate entrance or an entrance to a common hallway.

The Appellant's position was that the parking requirements should be calculated based on the number of rooms rather than units. Many of the units contain multiple bedrooms plus potential sofa beds, so using bedrooms would more accurately reflect the total number of vehicles at the property. This would be inconsistent with the plain wording of the Land Use Bylaw. The bedrooms in the units do not have separate entrances, and while they may share a hallway this would not be a common hallway with users outside of the immediate unit.

The Appellant noted a lack of staff parking, to which the Applicant responded that employees of the company managing this property would be attending to the units when they are unoccupied. The Board accepts this explanation and also notes that it is a condition of the development permit that parking be accommodated on-site and that employee parking be provided in the future if required.

The Applicant has provided more parking stalls than the Land Use Bylaw requires. The Appellant objected to some of these stalls on the basis that they are tandem stalls. Tandem stalls are contemplated in section 3.15.8 of the Bylaw and are acceptable where appropriate. The Appellant argued that the inner tandem stalls would not be used because people would be trapped. However, if people were coming in multiple vehicles to share a unit, it would reasonable that they could coordinate use of tandem stalls.

The Appellant also argued that inadequate barrier free parking was provided and suggested that when the safety codes officer had opined that no barrier free stalls would be required for this development, they were given incorrect information and were under the impression that these were residential townhomes.

The Board has no control over the decisions of the safety codes officer, who would be responsible for determining the requirement for barrier free parking. That will be assessed as part of a more fulsome review, and if it were determined that barrier free parking was required at that time, the Applicant would have to apply for a new development permit with a revised parking arrangement, which would be addressed at that time.

The Appellant referred to other projects by Basecamp where there had been customer reviews referencing the lack of parking stalls and the size of the parking stalls. The size of parking stalls is set by the Land Use Bylaw, and the Board must review the application that is currently before it, not these other applications which were approved under different bylaws and may operate differently.

The Board placed no weight on the submissions regarding possible future changes to the Land Use Bylaw regarding parking, as the Board must look to the Bylaw as it stands at the time of its decision.

The Appellant also raised concerns about comments made by the Development Authority's representative Mr. Schulz, stating that it was inappropriate for him to comment on his personal experience, personal views about parking, or the role of the municipality when controlling development. While the Board does not necessarily agree with the Appellant that Mr. Schulz stepped outside of his proper role, it is not necessary to deal with this as the Board was able to reach its decision without taking these submissions into consideration.

The Rooftop Deck

There was disagreement over whether the development includes a "Deck, Rooftop" as defined in the Land Use Bylaw (referred to here as a rooftop deck). The definition of "Deck, Rooftop" is as follows:

> "DECK, ROOFTOP" means a raised surface on which people can stand, that is located on top of a roof of a building, but does not project beyond any façade of the storey below; is surrounded by guard rails, parapet walls, or similar feature; and is intended for use as an amenity space.

One of the buildings in this proposal includes a deck with a hot tub area located on one of the lower-level roofs. It was argued that this is not a rooftop deck because it is no located on the highest point of that building. However, that is not one of the requirements to meet the definition of a rooftop deck. This structure is located on top of part of the building and does not have more building over it, and as such is on the roof and meets the definition of a rooftop deck.

This is important because section 3.18.3 of the Land Use Bylaw states that "Any proposed buildings with a Rooftop Deck will be considered a Discretionary Use in all districts."

The Board finds that the intent behind this section was that a development which would otherwise be a permitted use would become a discretionary use if it included, among its accessory uses, a rooftop deck. This is a recognition by Council that a rooftop amenity space has the potential to increase the impacts of a development on its surroundings. The Board agrees that this rooftop deck may have significant impacts.

While not pursued in great detail in verbal submissions, the Board notes the concerns which were contained in the written materials that were before it about the impacts of that rooftop deck. This rooftop deck appears to be intended to provide a gathering place for visitors to all of the buildings, making it the potential site of large gatherings. It was confirmed at the hearing that there would be no staff on site on a regular basis, and in particular the Applicant did not indicate that there would be any management present in the evenings or at night to control activities in this space.

A large, unsupervised gathering space at this location is not compatible with the surrounding residential uses, and as such the Board requires that it be removed. This leaves the question of what to do with that space. At the option of the Applicant, that space may either be made into a flat roof or it may be made into a sloped roof consistent with the design of the development.

Flooding

The Board acknowledges the Appellant's submissions regarding the potential flooding of the site but does not agree with them. The Board accepts the findings of E2K that according to the provincial flood maps, the site is outside of the 1:100 year floodway and flood fringe of the Bow River. The Board accepts that while there may have been flooding in the area in the past, the details of that flooding were such that it may not have been a 1:100 year flood, and further the evidence before the Board was that the flooded areas were at a lower elevation and that flooding on those properties does not mean there will be flooding on the subject site.

Environmentally Sensitive Area

The Appellant argued that the subject site is an environmentally sensitive area and within the ecological boundary of a water body. Section 5.5.1 of the Land Use Bylaw directs that development shall not be located within the ecological boundary of a water body.

"Water body" is defined in the Land Use Bylaw as follows:

> "WATERCOURSE" or "WATER BODY" means any location where water flows or is present, whether or not the flow or the presence of water is continuous, intermittent or occurs only during a flood, and includes but is not limited to:
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> a) the bed and shore of a river, stream, lake, creek, lagoon, swamp, marsh, wetland or other natural body of water; or
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> b) a canal, ditch, reservoir or other man-made surface feature.

The Appellant's position is that this includes an aquifer. The Appellant argued that this must be the case because Council said that a water body includes any location where water is present and includes but is not limited to a list of items that encompass all possible surface water. Since the Bylaw says that a water body must include but is not limited to all of these possible surface features, it must include underground features such as aquifers.

The Appellant also had Mr. Wallis, a biologist, speak on its behalf and present his interpretation of the Bylaw. He referred to the definition of a water body in the *Water Act* which expressly includes aquifers.

While the Board is not questioning Mr. Wallis's skills as a biologist, this is a matter of statutory interpretation rather than biology and the question is whether Council intended to prohibit development over aquifers within the MD of Bighorn. The Board finds that this section was not intended to prohibit development over aquifers. It was pointed out to the Board that if development were not permitted over aquifers, this would apply to large areas of Harvey Heights. Further, the *Water Act* and the Land Use Bylaw are intended to address different things, and the fact that the *Water Act* includes aquifers as bodies of water does not mean that the Land Use Bylaw was intended to do the same.

Further, it is telling that Council did not list any types of bodies of water other than surface bodies of water when listing the different types of bodies of water it intended to capture with this reference. It appears that the intention behind the two items (a) and (b) in the Bylaw was to show that there could be natural and artificial bodies of water, as opposed to suggesting that bodies of water would include underground aquifers even though they are not listed.

The Board further acknowledges and accepts that while the vegetation on the slope appears to be slightly different from the vegetation in other areas, that is also explainable by the fact that it was previously disturbed.

Traffic

The issue of whether the roads in the area could handle the traffic generated by this development was raised. The Board accepts the memo by McElhanney Ltd. in that regard, which confirms that traffic generated by this development is anticipated to be within acceptable levels without requiring further study.

Development Guidelines

The Appellant argued that the proposed development does not follow the design guidelines for the district set out in the Land Use Bylaw, most notably with respect to the location and projection of stairs and outdoor amenity spaces such as balconies. The purpose of the Guidelines is to ensure that developments in this highly visible location near the park gates and near the Harvie Heights residential community have an increased sensitivity to design.

The Land Use Bylaw is clear that these are guidelines only, and not all elements are required to be incorporated into a design. The Board also acknowledges the Applicant's submission that if the building were flipped so that the stairs would be on the other side, this would place the balconies closer to the nearby residential which could have a greater impact than the sound of people coming and going. The Appellant disagreed, stating that the noise generating parts of the development tend to face the escarpment.

Ultimately, while these guidelines are not binding and thus no relaxation is being granted, the Appellant did not satisfy the Board that this development will be overly out of place near a residential community or that people using balconies or other such amenities of these units would unduly interfere with the use, enjoyment or value of neighbouring properties.

Landscaping Relaxations

The Board notes that there are some landscaping relaxations. In particular, instead of providing landscaping through the development, including islands of landscaping in the parking area, the Applicant has relied upon the large portion of the development which will remain natural area. Given that "landscaping" refers to modification and enhancement of a site, leaving a natural area undisturbed would not constitute "landscaping" *per se*. However, the Board is satisfied that to the extent there are such relaxations, they are offset by the natural area which will serve a similar purpose.

August 2, 2022

DATE

CHAIRMAN,

SUBDIVISION/DEVELOPMENTAPPEAL BOARD

A decision of the Subdivision and Development Appeal Board is final and binding on all parties subject only to an appeal of questions of law or jurisdiction pursuant to section 688 of the *Municipal Government Act*, RSA 2000 c. M-26, as amended. An application for permission to appeal to the Court of Appeal must be made within thirty (30) days after the issue of the decision.