



**Decision
Subdivision and Development Appeal Board
APPEAL 2025-01**

SUBDIVISION AND DEVELOPMENT APPEAL BOARD DECISION

1 Silvertip Trail

Lot 1, Block 17, Plan 971 1512 (Site)

Development Permit PL20240362 – Accessory Use and Accessory Buildings (Accessory Nordic Spa Amenity) (subject development permit)

Appeal against an approval and conditions of approval by the Canmore Development Authority

ORDER OF THE SUBDIVISION & DEVELOPMENT APPEAL BOARD OF THE TOWN OF CANMORE, IN THE PROVINCE OF ALBERTA, DATED February 18, 2025.

Board Members Hearing the Appeal and Hearing Dates:

January 13, 2025 – Andre Giannandrea (Chair), Larry Bohn (public member), Bronte Valk (public member), and Tanya Foubert (councillor). Note: The Board only dealt with the preliminary issues on this date and therefore determined that the Board members in attendance were not seized for the purpose of hearing the merits of the appeal.

February 6, 2025 – Andre Giannandrea (Chair), Christoph Braier (public member), and Tanya Foubert (councillor).

INTRODUCTION

1. On February 7, 2023, the Canmore Planning Commission (CPC) approved a development permit for the addition of four accessory buildings and various outdoor hot and cold pools and outdoor seating areas (Nordic Spa) to an existing hotel (original development permit). The Appellant appealed the original development permit. The Board allowed the appeal in part and varied the conditions of the original development permit. The Appellant sought and was granted permission to appeal the Board's decision in relation to the original development permit.
2. On December 2, 2024, CPC approved the subject development permit, which is for amendments to the original development permit. The amendment proposed site plan and building design changes. The Appellant has appealed the subject development permit.

RELEVANT STATUTORY & PLANNING DOCUMENT PROVISIONS

3. Bylaw 2019-06, the Town of Canmore Subdivision and Development Appeal Board Bylaw.
4. Municipal Government Act RSA 2000 c. M-26 (MGA).
5. Land Use Bylaw 2018-22 (LUB), in particular:
 - a. Section 14.11 Silvertip Trail DC District (DC district)

PRELIMINARY MATTERS

January 13, 2025 hearing

6. The hearing of the appeal commenced on January 13, 2025

Preliminary Issues

7. The Appellant raised two preliminary issues:
 - a. Request for adjournment; and
 - b. Composition of the Board members hearing the appeal on the merits.
8. The Applicant raised a third preliminary issue in relation to an application to strike the appeal.
9. With respect to the composition of the Board, the Appellant advised that there was no objection to the Board members in attendance dealing with the preliminary issues.

Adjournment

10. The Appellant was represented by their legal counsel, Bonnie Anderson and Samantha Stokes. They advised that the Appellant was requesting a short adjournment of a few weeks for the following reasons:
 - a. There had been settlement discussions between counsel for the parties leading up to the commencement of the appeal hearing. The parties agreed to focus on settlement and that the initial hearing date would be used solely to address procedural matters. The hearing of the appeal on its merits would be adjourned to a later date.
 - b. The Appellant first learned of the application to strike on the Friday before the commencement of the hearing. While they were prepared to deal with the application to strike, they submitted that they did not have adequate notice of the application.
 - c. The Appellant was not notified of the application to amend the original development permit. They had not been provided with the updated plans. There are a number of versions of the plans and the Appellant needs additional time to review the plans to fully understand the impact of the amendments.
 - d. The Board report was only available on the Wednesday before the hearing. The Appellant did not have adequate time to review and respond to all of the materials in the Board report.
 - e. Given the time of year, a short adjournment would not be prejudicial to the Applicant as construction would not be delayed.

11. The Applicant was represented by its legal counsel, Robert Homersham. In response to the request for an adjournment:
 - a. The discussions regarding settlement were without prejudice and should not be referred to in the hearing.
 - b. There was no agreement reached regarding an adjournment. It was simply part of the discussion.
 - c. The Applicant is prejudiced by an adjournment as it is being delayed in scheduling trades, which, in turn, will delay construction.
 - d. The Notice of Appeal is not valid as it does not specify grounds of appeal. The Board should deal with the application to strike before even considering the adjournment.
 - e. Mr. Homersham made some submissions with respect to why the appeal should be struck. He indicated that he wanted to be able to make full submissions as the appeal should not even be allowed to proceed.
12. Birol Fisekci, a representative of the Applicant., made further submissions with respect to the adjournment. He reviewed the history and timing of the Applicant's development. He pointed out that the Appellant had requested various changes and concessions. The Applicant made these changes and concessions in order to address the Appellant's concern. The Applicant continues to face appeals, which is delaying its ability to schedule trades to proceed with construction.

Composition of the Board

13. On behalf of the Appellant, Ms. Anderson objected to having the same Board members sit on this appeal as the Board members who heard the appeal of the original development permit. If the Appellant is successful in the pending Court of Appeal proceedings, the Court of Appeal could direct a new hearing. The Board should exercise caution in terms of which Board members deal with this appeal. There is a reasonable apprehension of bias that Board members who decided the appeal of the original development permit will reach the same decision on this appeal.
14. In response, Mr. Homersham referred to the McCauley decision of the Alberta Court of Appeal. He submitted that it was authority for allowing a Board that had previously dealt with the same development to sit on future appeals regarding the same development. He suggested that the test for bias is "closed mind" bias, which means that proof of actual bias is required.

Decision on Preliminary Issue raised at January 13, 2025 hearing

Adjournment / Application to Strike

15. The Board accepts the Appellant's submissions regarding the need for additional time to prepare for the hearing. In particular, the Board acknowledges that there is a level of complexity with respect to this development and that, particularly with the Christmas break, it is reasonable for the Appellant to require additional time to prepare for the appeal hearing. In particular, the Board agrees that with the application to strike only being raised one-business day prior to the hearing, the Appellant is entitled to additional time to respond.
16. In addition, while the Board acknowledges the delays associated with the appeal process, these delays are an inherent part of the process and are a risk with any development. This particular appeal relates to amendments that the Applicant initiated to plans that had been approved as part of the original development permit a number of months earlier. Therefore, any delay occasioned by this appeal arises due to the Applicant seeking to amend the approved plans.
17. While the Applicant is entitled to argue that the appeal should be dismissed on the basis that the Notice of Appeal is deficient, the Appellant has not had sufficient time to respond to this argument. In the Board's view, rather than dealing with this item as a separate preliminary issue, the Board is of the view that it is most efficient for the Applicant to argue this issue at the same time as the Board hears the appeal on its merits.
18. The Board therefore directs that the hearing of the appeal be adjourned to a date within 30 days. The Board also directed that hearing participants be given the option to attend virtually.

Composition of the Panel

19. The Board agrees with the Appellant that the test for bias for a subdivision and development appeal board is reasonable apprehension of bias. The Board further agrees with the Appellant that the McCauley decision is distinguishable on its facts in that the McCauley decision was not dealing with the same development or site.
20. However, the Board disagrees that simply because certain Board members have previously dealt with development permit applications on the same site, does not give rise to a reasonable apprehension of bias. In particular, with a site such as the one involved in the present proceedings, it is conceivable that there will be many development permit applications and amendments to developments over the years. Without more, the fact that particular Board members have previously dealt with development permits for the same site does not automatically mean that there is a reasonable apprehension of bias.
21. In short, the Board is of the view that something more than simply hearing the appeal from the original development permit is required to meet the test of reasonable apprehension of bias in this case.

February 6, 2025 hearing

22. The Board heard the merits of the appeal on February 6, 2025.
23. There were no objections to any Board members present hearing the appeal.
24. There were no objections to the hearing process as described by the Chair.

SUMMARY OF HEARING AND EVIDENCE PRESENTED

25. Development Permit Application PL20240362 dated September 4, 2024.
26. Notice of Decision of Approval subject to conditions issued on December 2, 2024 by CPC.
27. Notice of Appeal submitted by Stone Creek Resorts on December 17, 2024.
28. Appellant's Notice of Procedural Matters dated January 8, 2025, submitted by Bonnie Anderson, Rose LLP, agent of the Appellant.
29. Staff report submitted by Anika Drost, Development Officer, on behalf of the Development Authority on January 8, 2025.
30. Applicant's additional written submission received January 13, 2025, submitted by Robert Homersham, agent for the Applicant.
31. Appellant's written submission dated January 30, 2025, submitted by Bonnie Anderson, Rose LLP, agent of the Appellant.
32. Appellant's additional written submission received February 6, 2025.
33. Applicant's written submission dated January 30, 2025, submitted by Robert Homersham, agent for the Applicant.
34. Applicant's additional written submission received on February 6, 2025.
35. No written submissions from the public were received.
36. Verbal presentation, including slides, from Anika Drost, Development Officer.
37. Verbal presentations, including slides, on behalf of the Appellant:
 - a. Bonnie Anderson, Rose LLP, agent and legal counsel.
 - b. Samantha Stokes, Rose LLP.
 - c. Guy Turcotte, representative of the Appellant.

38. Verbal presentations, including slides, on behalf of the Applicant:

- a. Robert Homersham, agent and legal counsel.
- b. Birol Fisekci, representative of the Applicant.

39. No verbal submissions from the public were heard.

40. At the conclusion of the hearing, all parties confirmed that they had a fair hearing.

DECISION

41. The appeal is denied and the subject development permit (Development Permit PL20240362) is approved.

REASONS FOR DECISION

Findings of Fact

42. The parties were in general agreement as to the chronology of events related to the original development permit, including appeals, and the subject development permit. For the purposes of this appeal, the Board has proceeded on the basis that the chronology of events (but not argument or submissions related to discussions) set out in the “Background” section of the Appellant’s written submissions is accurate.
43. The amendments to the original development permit are summarized in the Metafor letter, dated September 24, 2024.
44. The Appellant and the Applicant provided evidence as to discussions that took place between them regarding the development. The Board finds that these discussions are not relevant to the appeal and did not consider them in reaching its decision.

Further Adjournment

45. The Appellant argued that as an alternative to allowing the appeal, the Board could adjourn the appeal to allow additional time for the Applicant to provide more detail regarding the alignment of the pathway and to allow discussions between the parties to continue.
46. The Board has already allowed the Appellant’s request to adjourn the hearing for 3 ½ weeks. Planning matters are to be dealt with expeditiously. In the Board’s opinion, with the adjournment, the Appellant had sufficient time to review the materials related to the development and prepare submissions. To the extent that the Appellant was of the view that the materials were inadequate, the Appellant could raise these arguments in support of the appeal.

Application to Strike/ Summary Dismissal

47. As the parties presented their arguments on the merits of the appeal, the Board was of the view that it was not necessary to consider the Applicant's application to strike/ summary dismissal.
48. In any event, a notice of appeal is not analogous to a pleading in a lawsuit. The notice of appeal is required to set out grounds for appeal. It can do so in general terms. The Board is satisfied that the Appellant's notice of appeal adequately sets out the grounds.

Amendment of the original development permit

49. The Appellant argued that CPC did not have jurisdiction to amend the original development permit in light of the Court of Appeal proceedings in relation to the original development permit. The Appellant submitted that allowing the Applicant to do so was an abuse of process.
50. The "amendment" of the original development permit requires a new application. The MGA and LUB impose obligations on the development authority to process development permit applications. There are no provisions in the MGA or LUB that prohibit the amendment of a development permit while it is the subject of Court of Appeal proceedings.
51. Therefore, the Board is of the view that CPC had authority to approve the development permit for the amendment notwithstanding the pending Court of Appeal proceedings.

Cancellation of the original development permit as a condition

52. The Appellant argued that CPC cannot impose a condition to cancel the original development permit.
53. Section 1.10.0.2 of the LUB provides broad authority to impose conditions. The Board accepts that there cannot be multiple active development permits for the same development. Therefore, the Board agrees that cancellation of the original development permit was an appropriate (and necessary) condition of the development permit.

Scope of amendments

54. The Appellant argued that the subject development permit should not have been treated as an amendment and required a new application.
55. The Board has reviewed the application and related materials submitted for the subject development permit. The Board finds that the Applicant, in fact, submitted a complete development permit application for the amendments. The CPC then reviewed and approved the application.

56. The Board agrees with the Appellant that it is open to CPC and the Board to review the entire development when dealing with an application for an amendment. However, from a practical standpoint and for consistency, in the absence of changed circumstances, it is appropriate for the CPC or the Board to focus on the amendments rather than conducting a detailed review of the entire development. In the present case, the original development permit was the subject of a Board hearing in May 2024. There was no evidence of any changed circumstances other than the amendments themselves. Therefore, it was appropriate for the CPC to focus its review on the amendments and similarly is appropriate for the Board to do so.

Notice of Application / Information provided to Appellant

57. The Appellant raised concerns about not being included in the development permit application process or the negotiations related to the development agreement. The Appellant did not point to any specific provisions of the LUB regarding notice that were not met.

58. The development permit application process is between the Applicant and the Development Authority. There is no requirement that the Appellant be included in the development permit process or negotiation of the development agreement.

59. The Board has reviewed the notice related to the subject development permit. The Board finds that the notice requirements under the LUB were met and that the notice adequately describes the amendments. Although the subject development permit replaces the original development permit, in the Board's opinion, it was appropriate for the notice to reference the amendments given that the original development permit had been fully advertised and was the subject of a hearing before the Board a few months earlier.

Directions of Council

60. The Appellant argued Council's directions as set out in the DC district were not followed due to removal of the pathway and screening trees from the amended plans. The Appellant further submitted that in the absence of plans related to the pathway and screening trees, it was not possible to determine whether the directions of Council were followed.

61. Section 14.11.5.1 of the DC district provides that a "pedestrian oriented streetscape" shall be established. While the DC district lists various design elements in general terms, it does not set out details related to the design or alignment of a pathway and related improvements nor does it require that the detailed design be a condition of any development permits.

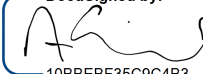
62. The general reference to "pedestrian oriented streetscape" in the DC district without more is an indication that Council intended to give the development authority broad discretion as to how to establish a "pedestrian oriented streetscape". In short, Council has left the details of establishment of a "pedestrian oriented streetscape" up to the development authority.

63. The development permit includes a condition that requires the Applicant to enter into a development agreement with the Town to pay for the construction of a pathway. The Applicant has posted security for the construction of the pathway.

64. The Board is satisfied that the condition requiring a development agreement for construction of the pathway and posting of security follows Council's direction regarding establishment of a pedestrian oriented streetscape. The DC district does not require that the development permit address the detailed design and alignment of the pathway and related improvements. These matters will be addressed in the development agreement and in accordance with the applicable Town standards.

2/20/2025 | 8:26 AM MST

Date Signed

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Andre Giannandrea, Chair
Subdivision & Development Appeal Board

In accordance with section 688 of the Municipal Government Act, this decision may be appealed to the Alberta Court of Appeal on a question of law or jurisdiction within 30 days after the issue of the decision.