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## BANFF DEVELOPMENT APPEAL BOARD HEARING

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File Number: 000666

Appeal Number: 04-22

Appeal By: Janna-Joy Goff and Gail Morgan represented by H. J. (Rick) Grol

Appeal Against: A decision of the Development Officer to issue a Stop Order on 2022 August 22 at 321 Squirrel Street.

Hearing Dates: 2022 October 06; 2022 October 27; 2022 November 18;  
and 2022 December 06

Decision Date: 2022 December 21

Board Members: Dak Kerr, Chair, Public Representative  
Lachlan Mackintosh, Public Representative  
Scott McElhone, Public representative  
Brian Smythe, Public Representative  
Robin Tuck, Public Representative  
Grant Canning, Council Representative  
Kendra VanDyk, Parks Canada Agency Representative

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### Decision

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#### **A. Introduction 2022 November 18**

1. The Appeal before the Board, Appeal #04-22, was received on 2022 September 15 and was originally scheduled to be heard on 2022 October 06. The hearing was subsequently adjourned to 2022 October 27, at which time the hearing was further adjourned to 2022 November 18.

#### **B. Preliminary Issues 2022 November 18**

2. On 2022 November 18, the Board queried whether there was an issue with the makeup of the Board. At this time, Member Ray Horyn indicated he would be recusing himself from the hearing as his partner is employed by Alberta Health Services and had done work relating to the subject Property. The Board and the Agent for the Appellant agreed it would be best for Member Horyn to recuse himself.

3. The Agent for the Appellants, H.J (Rick) Grol raised the following preliminary issues:

- a) Legal Counsel for the Board, Reynolds Mirth Richards & Farmer (RMRF) LLP, has also acted for the Town of Banff's Development and Planning Department in the past in relation to the subject property;
- b) The Secretary to the Board is also the Director of the Planning and Development Department and the direct supervisor to the Development Officer who issues the Order

4. With respect to Preliminary Issue a), the agent for the appellant submitted that RMRF is the legal counsel for the Town of Banff. In 2018 February, RMRF issued a letter to the Appellants on a separate order. Although this order is not before the Board as it was subsequently withdrawn, RMRF has acted for the Town in relation to the subject property. The Appellant's Agent stated that, in his estimation, there is a reasonable apprehension of bias if RMRF were to act as legal counsel to the Development Appeal Board (DAB) on Appeal #04-22. Mr. Grol further stated that it would be appropriate for the Board to engage outside legal counsel for advice on this matter as his client is entitled to a fair hearing. In fact, the Banff DAB has done this in past, and as such there is a precedence to use outside counsel.

5. Mr. Grol further referenced a 2003 legal case that indicated a party has the right to object to a solicitor but this must be done at the commencement of the hearing. He concluded his argument by stating that the Board should not receive legal advice from the same firm that normally provides legal services to the Town of Banff .

6. Mr. Grol then submitted that the Town has also summoned his client to appear in Provincial Court on 2022 November 24 with respect to the perceived violations of the Land Use Bylaw. It is somewhat unusual to issue a Stop Order and also pursue legal action at the same time, but is something that is permissible under the *Municipal Government Act* (MGA). Mr. Grol stated that should the Board proceed with the merits of the appeal at this time, the Town may be able to use the Board's ruling as evidence in court. In his estimation, because RMRF would likely be representing the Town in court, it would be prejudicial to his client for them to also act as the Board's solicitor at this time.

7. Kelsey L. Becker-Brooks, lawyer, RMRF, stated that the previous stop order was issued for the subject property and confirmed that her Firm was involved with that stop order. With respect to the subject order, the Firm has not provided advice to the Town of Banff. She further confirmed that RMRF has been providing legal counsel to the Town for a number of years on numerous different issues, but as they have not provided legal advice with respect to the subject stop order, there is no conflict in acting as the Board's solicitor.

8. Ms. Becker-Brooks also addressed Mr. Grol's argument that there is precedence for the Board to obtain the services of outside legal counsel in the past. The circumstances of the situation referenced by Mr. Grol were different in that RMRF was representing the Town during that appeal and could not also represent the Board. This is not the case for the appeal currently before the Board.

9. With respect to Preliminary Issue b), Mr. Grol commented that he would withdraw his concerns as the Secretary to the Board would not be participating in this Appeal. Instead, the Municipal Clerk for the Town of Banff would be acting as the Board Secretary for Appeal #04-22. The Municipal Clerk has been designated by Council as a clerk to the Board and has successfully completed the Provincially mandated training.

### **C. Decision with Respect to Preliminary Issues Raised on 2022 November 18**

10. The Board accepted Mr. Grol's arguments with respect to Preliminary Issue a) and decided there could be a reasonable apprehension of bias should RMRF act as the Board's legal counsel. As such, the Board determined it would be best to adjourn the hearing a third time to allow for sufficient time to engage the services of outside legal counsel. The Board adjourned the hearing to 2022 December 06.

11. Lastly, prior to adjourning the matter, the Board discussed issues relating to quorum. The Incorporation Agreement indicates a representative from Parks Canada must be part of the quorum of the Board and Board Member Sheila Luey, Parks Canada Representative, who was present on 2022 November 18, would not be available on 2022 December 06. Board Member Kendra VanDyk, Parks Canada Representative, would be available that day. Mr. Grol indicated he would not raise an issue with the fact that makeup of the Board would include Member VanDyk and not Member Luey due to the fact a Parks Canada representative to proceed.

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### **D. Introduction 2022 December 06**

12. The Board reconvened on 2022 December 06.

13. On August 22, 2022, the Development Officer for the Town of Banff (the "DO") issued a stop order to the Appellants, Janna Joy Goff (registered leaseholder) and Gail Morgan (on site manager) related to unauthorized development at 321 Squirrel Street (the "Stop Order"). The Appellants appealed the Stop Order.

### **E. Preliminary Issues**

14. The Chair asked whether there was any objection to the composition of the Development Appeal Board (the "Board") or the Board staff. There were no objections.

15. Section 645(2.1) of the *Municipal Government Act* ("MGA")

a) Rick Grol, representative for the Appellants, raised a preliminary issue related to the service of the Stop Order pursuant to Section 645(2.1) of the MGA. His argument is summarized in his written submissions, which are on file. In short, while he acknowledged that Gail Morgan received the Stop Order on that date that it was issued, Janna Joy Goff did not receive the Stop Order until the next day. Section 645(2.1) of the MGA requires that notice of the Stop Order be sent or given on the same day that the decision to issue the Stop Order is made. As the Stop Order was not given or sent to Janna Joy Goff until the following day, the requirements of Section 645(2.1) of the MGA were not met and the Stop Order should be set aside. In response to questions from the Board, Mr. Grol confirmed that Gail Morgan lives on the site and that she received notice of the Stop Order in compliance with section 645(2.1) of the MGA.

b) The Development Officer (DO), Dave Michaels, outlined the efforts made to serve the Appellants on the date of issuance of the Stop Order. In summary, on 2022 August 22:

- (i) The Town hand delivered the Stop Order to Gail Morgan at the site.
  - (ii) The Town emailed the Stop Order to Gail Morgan and Janna Joy Goff. The email to Janna Joy Goff bounced back due to an error in the email address and then was successfully sent the next day.
  - (iii) The Town sent the Stop Order by registered mail to three addresses on file. The Town did not retain registered mail receipts. All of the letters were returned as undelivered.
- c) The Board determined that the Town has met the requirements of Section 645(2.1) of the MGA. The Appellants acknowledges that the Town met the requirements with respect to notice to Gail Morgan. With respect to notice to Janna Joy Goff, the Town took all reasonable steps possible to send or give notice of the Stop Order to her. The Town's correspondence regarding the development is with Gail Morgan. The notice of appeal and the most recent building permit application were completed by Gail Morgan, acting as the representative of Janna Joy Goff. Based on this evidence, the Board infers that Gail Morgan had at least ostensible, if not actual, authority to represent Janna Joy Goff, with respect to development on the site. In light of this, the Board finds that hand delivery of the Stop Order to Gail Morgan at the site meets the requirements of section 645(2.1) of the MGA to give or send notice of the Stop Order to Janna Joy Goff. In addition, the Board notes that even if the DO did not strictly comply section 645(2.1) of the MGA, there has been no resulting prejudice to Janna Joy Goff as she had the opportunity to appeal the Stop Order and has had ample time to prepare for this appeal.

## **F. Summary of Hearing**

16. Mr. Michaels, the DO, made a presentation on behalf of the Town. He provided a power point presentation, which is on file. He reviewed the history of the development on the site as well as the various enforcement actions. He then outlined the specific unauthorized development on the site as set out on the schedules to the Stop Order.

17. Rick Grol, the Appellants' representative, made a presentation on behalf of the Appellants. He provided the Board with written submissions, which are on file. To summarize:

- a) Mr. Grol outlined the history of the development on the site and explained that the most recent changes to the development were in response to COVID-19.
- b) The Appellants are in the process complying with some aspects of the Stop Order by removing the two new bathrooms and the mezzanine.
- c) Mr. Grol questioned whether the areas on the second floor identified by the DO as additional dwellings qualify as dwellings as they do not have kitchens.
- d) In particular, the food preparation areas are not kitchens. They do not have stoves or 220 volt power for stoves.
- e) The food preparation areas are shown on the original plans approved in 1988 and were installed at the time of the original construction. Therefore, even if these areas now qualify as kitchens under the current Town of Banff Land Use Bylaw ("LUB"), they should be treated as non-conforming uses. "Kitchen" was not defined in the Parks Canada regulations at the time of approval.
- f) In 2017, the Town issued a stop order. In 2018, after an inspection, the Town rescinded the stop order, which indicates that the Town was satisfied that the food preparation areas

- were in compliance. The food preparation areas are the same as they were in 2018. The Town should not be able to arbitrarily change its position.
- g) While the LUB limits the number of bedrooms in a dwelling, it does not limit the number of residents.
18. Gail Morgan, on site manager, made a presentation on behalf of the Appellants.
- a) Janna Joy Goff purchased the site in 2007. At that time, she believed that all requirements for compliance were met.
  - b) In 2017, the Town issued a stop order. As built drawings were provided to the Town and the Town rescinded the stop order.
  - c) In response to COVID-19, there were various changes to the development, including the addition of two bathrooms and a mezzanine. Gail Morgan indicated that she believed that the contractors complied with all requirements for construction of the bathrooms. She is taking action to remove the bathrooms and the mezzanine and has submitted an application for this work.
  - d) Currently, there are six people living in the development. There is no one living on the upper two floors.
  - e) AHS has lifted its order. AHS has provided direction as to how many people may reside in each bedroom.
  - f) The fire department will allow up to 10 people living in the development without changes.
  - g) While there were 42 beds and mattresses in the development, there were not 42 people residing at the development. Many of the beds and mattresses were in storage.
19. Mike Borkristl, who has extensive experience in construction and permitting, made a presentation on behalf of the Appellants. He provided a written report which is on file. In his opinion, the development is presently in compliance with the original permit requirements with only two kitchens. He questioned the DO's determination as to the areas that constitute kitchens. Some of the issues raised are building code issues, not development permit issues.
20. Ronald Husack, professional engineer, made a presentation on behalf of the Appellants. His written report is on file. In his opinion, the wall cabinets and countertops in the food preparation areas on the second floor were installed at the time that the development was originally constructed.
21. Mr. Grol made further submissions on behalf of the Appellants:
- a) He referenced a letter and photographs from Cesare Antonio, tradesperson, Mr. Antonio's opinion is that the countertops and food preparations areas were constructed as part of the original development.
  - b) At the time of the original permit issued by Parks Canada, there was no definition of or reference to "kitchen" in the applicable regulations. The food preparation areas, which the DO has deemed to be kitchens, were approved in the original plans. While these areas may not comply with the current LUB, they were approved under the original permit and therefore are non-conforming uses.
  - c) The two bathrooms and the mezzanine will be removed. The Appellants have submitted a building permit application to remove the unauthorized development.
22. Mr. Michaels made concluding remarks on behalf of the Town:

- a) Mr. Michaels addressed the requirements of the Stop Order and what remedy should follow. He suggested removal of the plumbing from the areas determined to be kitchens.
- b) It doesn't matter when the kitchens were installed. The relevant issue is whether they were ever approved.
- c) The original approval was by Parks Canada.
- d) He reviewed definitions of non-conforming use and non-conforming building from the LUB. He emphasized the requirement that the development be lawful when it was started.
- e) He then reviewed the Parks Canada approved plans from 1988. The Town used these plans as the basis for determining the development that was originally approved. The original plans show two kitchens plus a counter with a sink in the area identified as "greenhouse" on the second floor. There is nothing shown on the plans in the other area on the second floor, which the Town has now determined to be a kitchen.
- f) Intended use is important. The definition of "kitchen" in the LUB refers to intention. When the inspection was done in the 2018, the intended use of the areas now determined to be kitchens did not appear to be as kitchens. Therefore, no further action was necessary at that time. The intention to use these areas as kitchens is now clear.
- g) There is no evidence to support that the original approval from Parks Canada included the areas now deemed "kitchens".

23. Mr. Borkristl made concluding comments on behalf of the Appellants:

- a) If the locking doors are removed, the two areas deemed to be dwellings would no longer meet the definition of "dwelling".
- b) Items 1 and 3 in the Stop Order will be brought into compliance by removal of locks, the two bathrooms and the mezzanine. Items 2 and 4 of the Stop Order require modification in order to allow the food preparation areas on the second floor to remain.

24. Mr. Grol made further concluding comments on behalf of the Appellants:

- a) At the time Parks Canada approved the development in 1988, there was no definition of "kitchen" in the Parks Canada regulations.
- b) The Board has broad powers and steps into shoes of DO. If Board upholds Stop Order, then the Appellants request a stay of six months. to allow them time to take steps to bring development into compliance.
- c) The Appellants never intended to create additional dwellings.
- d) The discussions with the Town regarding additional development in 2021 were to determine whether additional dwelling units were possible due to changes in the LUB.

25. Gail Morgan made further concluding comments on behalf of the Appellants. She advised that in 2021, she discussed increasing mezzanine areas with the Town. She did not intend to proceed with additional development. It was simply a discussion.

26. In response to questions from the Board, Mr. Michaels advised:

- a) Removal of the sink and plumbing in the areas determined to be kitchens would satisfy the Stop Order. The cabinets and counters can remain.
- b) At the time of the inspection in 2018, the location of the kitchens was not the same as the original approved plans. The revised locations were acceptable as long as the overall development did not exceed two kitchens and seven bedrooms.

- c) The stairs to the mezzanine area lead to the requirement that it be included in FAR.

## **G. Decision**

27. The Board allows the appeal in part and varies the Stop Order by extending the date for compliance to 2023 May 01 . In all other respects the Stop Order is upheld.

## **H. Reasons**

28. The issues to be decided in this appeal are as follows:

- a) whether the Stop Order was properly issued, and in particular, whether the Town complied with Section 645(2.1) of the MGA;
- b) whether there is development that is in contravention of the MGA or LUB;
- c) if there is development that does not comply with the MGA or LUB, whether that development is a non-conforming use.

### Section 645(2.1) of the MGA

29. The first issue was addressed as a preliminary issue (above). The Board finds that the Town complied with Section 645(2.1) of the MGA in respect of both Appellants by delivering the Stop Order to Gail Morgan at the site, the same day that it was issued.

### Contravention of the MGA or LUB

30. Regarding the second issue, the Board has reviewed the original plans approved by Parks Canada and compared them with the plans showing the current development. Based on the evidence, the Board is satisfied that the development outlined by the Town as shown on the schedules to the Stop Order does not have development approval either from the Town or Parks Canada. In particular, and as will be discussed in more detail below:

- a) There are two unapproved dwellings on the second floor. These dwellings were created by the installation of locked doors, addition of two unauthorized bathrooms and kitchens.
- b) The FAR was increased by the addition of a mezzanine on the second floor.

31. The Appellants have applied for a building permit to remove the two bathrooms and the mezzanine, which will address part of the Stop Order.

32. Regarding the unapproved dwellings, the LUB defines “Dwelling” as follows:

Dwelling means one or more rooms that are self-contained, intended for domestic use as a residence by one or more persons, and containing kitchen, living, sleeping and sanitary facilities.

33. The Appellants contend that removal of the two bathrooms and the locked doors will bring the development into compliance in terms of the unauthorized dwellings. They contend that the food preparation areas should be allowed to remain. In this regard, the Appellants contend that the food preparation areas are not actually kitchens as they do not have stoves or 220 volt power.

34. The Board disagrees. The LUB defines “Kitchen” as follows:

Kitchen means facilities for the preparation or cooking of food, and includes any room containing counters, cabinets, plumbing, or wiring which, in the opinion of a Development Approving Authority, may be intended for the preparation or cooking of food. A kitchen within an Eating and Drinking establishment shall be limited to the area associated with the preparation or cooking of food and not include offices and / or storage.

There is nothing in this definition that requires a stove. The areas identified as kitchens on the second floor contain counters, cabinets and plumbing, all of which may be intended for the preparation of food. The evidence is that the areas in question were being used for food preparation. Therefore, the Board finds that these areas are kitchens.

35. The Board considered the Appellants submission that the kitchens were approved when the Town withdrew the stop order in 2018. Withdrawal of a stop order is not the same as development approval. The Board accepts Mr. Michaels’ evidence that, at the time of the inspection, there was no indication of an intention to use these areas for preparation or cooking of food. Therefore, at that time, these areas were not considered to be kitchens. At the time of the 2022 inspection, the situation changed and the evidence shows that the areas were intended to be used for food preparation, which brought them within the definition of “kitchen”.

36. The Board also notes the letter from a former tenant of the one of the second floor dwellings, which confirms that the area was being rented and occupied as a separate dwelling.

#### Non-conforming use

37. The Board then considered the third issue, namely, whether the kitchens are non-conforming uses. In this regard, the Appellants put forward evidence and argument that:

- a) the areas identified as kitchens are part of the original development approved by Parks Canada;
- b) at time of the original approval, the regulations did not contain a definition of “kitchen”;
- c) the areas identified as kitchens were constructed at the time of the original development.

38. Pursuant to the MGA, a “non-conforming use” is “a lawful specific use”. In other words, the use must be lawful in order to be allowed to continue.

39. The Board acknowledges that the original approved plans show the counter and sink in the area identified as the “greenhouse”. However, the Board notes that the layout of the development and the location of the kitchens has changed from that depicted on the original approved plans. In addition, based on the evidence, the Board finds that the use of the “greenhouse” fundamentally changed in that it was no longer being used as a “greenhouse”, but instead was occupied as a dwelling. The sink and counter were originally part of the “greenhouse” and not used for food preparation. This changed such that the sink and counter were being used for food preparation. As set out above, the Board has found that this area is a kitchen. The original approved plans never contemplated use of this area as a kitchen. Given the changes to the layout of the development from the original approved plans and given that the use of the “greenhouse”, and in particular, the food preparation



area, changed, the Board does not consider the kitchen in the greenhouse to be a non-conforming use.

40. The area of the other kitchen on the second floor is blank on the original plans. The evidence does not support that this area was ever approved as kitchen or for that matter as any type of a food preparation area. As there is no indication that the use of this area as a kitchen was ever “lawful”, it is not a non-conforming use.

Timing

41. The Board considered the request for six months to bring the development into compliance. The original date for compliance has passed so can no longer be met. Due to the delays in proceeding with this hearing, it is now more than three months since the Stop Order was issued. The Board is allowing in excess of four months for compliance, which in combination with the time to date, should be sufficient.

Dated this 21<sup>st</sup> day of December, 2022

Per: On Original  
Dak Kerr,  
Chair, Banff Development Appeal Board

**IMPORTANT INFORMATION FOR APPELLANTS**

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*, R.S.A. 2000, c. M-26.