



**Board Order
Subdivision and Development Appeal Board**

SUBDIVISION & DEVELOPMENT APPEAL BOARD ORDER

**APPEAL NO. 2022-007
PL20220031**

ORDER OF THE SUBDIVISION & DEVELOPMENT APPEAL BOARD OF THE TOWN OF CANMORE, IN THE PROVINCE OF ALBERTA, DATED MAY 5, 2022.

Board Members hearing the Appeal: Peter Moreland-Giraldeau, Harry Scott, and Jim Bell.

IN THE MATTER of the *Municipal Government Act*, RSA 2000, c. M-26, as amended (the “**MGA**”);

AND IN THE MATTER of an appeal by Denise and Kyle Kitagawa against the approval of Development Permit Application File Number PL20220031.

This Appeal hearing having been duly opened before the Subdivision & Development Appeal Board on May 5, 2022.

UPON hearing oral submissions from the Appellant, Applicants Spokespersons, Members of the Public, and Development Officers;

AND UPON having regard to the Town of Canmore Land Use Bylaw No. 2018-22, the MGA and other relevant planning documents;

APPEAL INFORMATION:

PL20220031

Lot 1, Block 1, Plan 201 0793

located within the GRD Three Sisters Creek Golf Course and Recreation Area (DC district)

Stockpile Management (Similar Use to Excavation, Stripping and Grading)

Appeal against an approval by a Development Officer.

RELEVANT STATUTORY & PLANNING DOCUMENT PROVISIONS:

1. Municipal Government Act, RSA 2000, c M-26 (the “**MGA**”), in general, and specifically;
 - a. Section 180
 - b. Section 616
 - c. Section 641(3)
 - d. Section 685(4)
2. Town of Canmore Subdivision and Development Appeal Board Bylaw 2019-06 (the “**SDAB Bylaw**”), Section 24
3. Town of Canmore Municipal Development Plan (the “**MDP**”) in general, and specifically;
 - a. Section 12
4. Three Sisters Mountain Village Resort Centre Area Structure Plan 2004, Bylaw 23-2004 (the “**ASP**”);



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- a. Policy 8.1.2 (d)
- b. Policy 8.1.2 (f)
- c. Policy 8.2.2. (c)
- d. Policy 8.5.2
5. Town of Canmore Engineering Design and Construction Guidelines (the “EDCG”)
6. Town of Canmore Construction Management Guidelines (the “CMG”)
7. Town of Canmore Land Use Bylaw 2018-22 (the “LUB”) in general, and specifically;
 - a. Section 1.7.0.4
 - b. Section 1.9.0.1
 - c. Section 1.10.0.4
 - d. Section 1.15 in general, and specifically;
 - Section 1.15.0.1
 - e. Section 13
 - f. Section 14.9
 - g. Section 14.16 in general, and specifically;
 - 14.16.1
 - 14.16.2
 - 14.16.3
 - 14.16.6
 - 14.16.7 (Development Authority)

SUMMARY OF EVIDENCE PRESENTED:

1. 27-page Staff Report to the Subdivision and Development Appeal Board (“SDAB” or “Board”) from the Town of Canmore’s Acting Manager of Planning & Development, Marcus Henry and Development Planner, R. Welden, inclusive of five Attachments (the “Planning Department Report”).
2. Notice of Appeal dated April 5, 2022 submission by the Appellant, D. and K. Kitagawa.
3. 8-page Written Submission by the Appellants, D. and K. Kitagawa, inclusive of three Attachments.
4. 225-page Written Submission by the Applicant Spokesperson, G. Palmer-Stewart with Shores Jardine LLP on behalf of landowner Three Sisters Mountain Village Properties Ltd. (“TSMVPL”), inclusive of 24 Tabs of attachments.
5. Letters of Support for the Appeal that were included within the SDAB package:
 - a. B. Toren (three-page email), 115 Krizan Bay
 - b. D. Van den Beld (two-page email), 257 Miskow Close
 - c. J. Croteau & B. McMillan (one-page email), (address unknown)
 - d. J. Bruyn (two-page letter), 273 Miskow Close
 - e. K. & G. Anderson (eleven-page letter and email), 265 Miskow Close
 - f. L. LeQuelenec (three-page email), 290 Miskow Close
 - g. S. Kirschner (two-page email), 278 Miskow Close
 - h. T. Swailes (one-page email), 274 Miskow Close
6. Letters of non-support for the Appeal that were included within the SDAB package:
 - a. B. Talbot with The Devonian Group (two-page email), 100 – 729 10th Street
 - b. K. Hines with K.W. Hines Contracting Ltd. (one-page letter), 469 Eagle Heights
 - c. N. Tanner with Tanner Properties Ltd. (1-page letter)
 - d. S. Ashton with Ashton Construction Services (two-page email)
7. Corrections to provided presentation received as a late submission:



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- a. K. Elhatton-Lake, Shores Jardine LLP (No objections – Accepted by the SDAB Board as new information)
8. Notification to the Appellant and Applicant was dated April 14, 2022, from the SDAB Clerk, K. Bravo-Stewart.
9. Notification to the Adjacent Neighbours was dated April 14, 2022, from the SDAB Clerk, K. Bravo-Stewart.
10. Summary presentation, including a PowerPoint presentation, from the Town of Canmore’s Development Planner, R. Welden.
11. Verbal presentations, including a PowerPoint presentation, from the Applicant’s Spokesperson:
 - a. G. Palmer-Stewart with Shores Jardine LLP.
 - b. E. Abootorabi with QuantumPlace
 - c. C. Conner with McElhanney Surveyors Ltd.
12. Verbal presentations in support of the Appeal from the residents:
 - a. K. Hantman, 310 – 155 Crossbow Place
 - b. D. Van Den Beld, 257 Miskow Close
 - c. L. LeQuelenec, 290 Miskow Close
 - d. J. De Bruyn, 273 Miskow Close
 - e. M. Sapijaszko, 261 Miskow Close
 - f. K. Anderson, 265 Miskow Close
13. Verbal presentations of those in non-support of the Appeal:
 - a. B. Talbot, The Devonian Group – 100, 729 10th Street
14. Verbal presentations of those that were neutral to the Appeal:
 - a. A. Calder, Chief Administrative Officer of the Bow Valley Waste Commission

FINDINGS OF FACT:

1. The Applicant, TSMVPL, filed an application on February 8, 2022, Application File Number PL20220031 (the “**Application**”), for Stockpile Management – Excavation, Stripping, and Grading.
2. The Development Officer issued a Notice of Decision on March 15, 2022 approving the Application (the “**Approval**”).
3. The Appellant filed a Notice of Appeal on April 5, 2022 (the “**Appeal**”) against the Approval.
4. A hearing date for the Appeal was set on April 14, 2022, for May 5, 2022.
5. The Appellants, D. and K. Kitagawa, are affected property owners near the subject site.
6. The subject site has two existing stockpiles that are the subject of the Application: one consisting of topsoil and the other consisting of fill. The subject site is located within the GRD – Three Sisters Creek Golf Course and Recreation Area Direct Control District (DC District).
7. The Applicant proposes that approximately 25,000 tons of material from the fill stockpile will be removed and transferred to ‘The Gateway’, and approximately 20,000 tons of topsoil from ‘The Gateway’ site will be added to the topsoil stockpile in the subject site.
8. All parties were notified by the SDAB Clerk regarding the preliminary issues regarding Section 685 of the MGA and the scope of an appeal within a Direct Control District.



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THE BOARD THEREFORE ORDERS THAT:

The Board Substitutes its Decision below for the Development Officer's Decision, as follows:

The appeal be **ALLOWED IN PART** and Development Permit PL20220031 decision **APPROVAL IS VARIED** issued subject to the amended conditions of the attached Schedule "A".

REASONS:

Jurisdiction of the Board

The subject site is part of the Three Sisters Mountain Village Resort lands, which is currently designated as Three Sisters Creek Golf Course and Recreation Area Direct Control District (the "Direct Control District") in Section 14.16 of the LUB.

As a preliminary matter, the Board requested that the Appellants and the Applicant address the nature of the Board's jurisdiction on this appeal given that the subject site is within the Direct Control District. The Appellants stated that on April 14, 2022 they received notification from the Board's Clerk that the appeal would need to address Section 685 (4) of the MGA. Based on this notification, the Appellants stated that they had reviewed the applicability of Section 685 (4) in preparing their submissions to the Board. Counsel for the Applicant, G. J Stewart-Palmer ("Applicant's Counsel"), stated that Section 685 (4) applies to this appeal and that in her view the Development Officer appropriately addressed the Board's jurisdiction under Section 685 (4).

The Planning Department Report references Section 14.1.6.7 of the LUB to establish that the Development Officer is the Development Authority for this application.

"14.16.7 Development Authority

14.16.7.1 Council of the Town of Canmore shall be the Development Authority for all development permit applications for a golf course, golf maintenance facilities, golf clubhouses and trails in this District.

14.16.7.2 The Development Officer shall consider and make decisions on all other development permit applications in this District. The Development Officer may refer any development permit applications in this District to the Canmore Planning Commission."

The Planning Department Report sets out the provisions of Section 685 (4) of the MGA:

"685 (4) Despite subsections (1), (2) and (3), if a decision with respect to a development permit application in respect of a direct control district



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- (a) Is made by a council, there is no appeal to the subdivision and development appeal board, or
- (b) Is made by a development authority, the appeal is limited to whether the development authority followed the directions of council, and if the subdivision and development appeal board finds that the development authority did not follow the directions it may, in accordance with the directions, substitute its decision for the development authority's decision."

Following an in-camera discussion, the Board confirmed that its jurisdiction for this appeal is limited by Section 685 (4) of the MGA.

The Board notes that several written and oral submissions in favour of the appeal referenced directly or by implication Section 687 (3) (d) of the MGA. The Applicant has not sought any variances, and in any event the Board is of the view that it has no authority to apply Section 687 (3) (d) in connection with this appeal.

In determining what are the "directions of council" applicable to this appeal, the Board notes that Section 180(1) of the MGA states that "A council may act only by resolution or bylaw."

Summary – Did the Development Officer follow the directions of council?

1. The Development Officer did not follow the directions of council in issuing the Approval for Stockpile Management (similar use to Excavation, Stripping and Grading).
2. The proposed development activities involving removal of fill from the fill stockpile on the subject site for transportation to 'The Gateway' site fall within the meaning of the definition of "Excavation, Stripping and Grading" and within the Discretionary Use set out in Section 1.15.09.1.a. of the LUB.
3. The proposed development activities associated with the addition of topsoil from 'The Gateway' site to the topsoil stockpile on the subject site do not fall within the definition of "Excavation, Stripping and Grading" and do not fall within the Discretionary Use set out in Section 1.15.0.1.a. of the LUB.
4. Section 3.4 of the EDGC is the standard that Town Administration has implemented pursuant to delegated authority from Council to reflect the direction of council embodied in Policy 8.1.2.f. of the ASP, and as such is a direction of council for purposes of Section 685 (4) (b) of the MGA.
5. The "contain on site" requirement for dust pursuant to Section 4.2.2.4 of the City of Calgary Water Resources Erosion and Sediment Control Guidelines (the "Calgary Control Guidelines") is not applicable to the subject site as it is not a "small site" as defined in the Calgary Control Guidelines.
6. The Applicant's Erosion and Sediment Control Plan does not include an inspection and maintenance plan required by Section 100.11.4 of the Calgary Control Guidelines, nor does it address the long term cover requirement of Section 100.18 of the Calgary Control Guidelines. In issuing the Approval without these items, the Development Officer did not follow the directions of council.



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7. The Development Officer followed the direction of council contained in Policy 8.2.2 (c) of the ASP.
8. Policy 8.5.2 of the ASP is not applicable to the proposed development.
9. Section 14.6.6.1 of the LUB is not applicable to the proposed development.
10. The Development Officer followed the direction of council contained in Section 1.10.0.03 of the LUB.

Issue 1 – Did the Development Officer follow the directions of council by approving the use “Stockpile Management (similar use to Excavation, Stripping and Grading)”?

The Notice of Decision states that the Approved Use(s) is: Stockpile Management (similar use to Excavation, Stripping and Grading).

The Appellants submitted that the term “Stockpile Management” is not defined in the LUB. They further submitted that the Development Permit attempts to circumvent the LUB by characterizing “Stockpile Management” as “similar to Excavation, Stripping and Grading” to try to fit under Section 1.15.0.1 of the LUB.

In response to a question from the Board to R. Welden, Development Planner, regarding the Development Officer’s authority under the LUB to approve a use that is similar to a listed use, R. Welden responded that the proposed use is consistent with the Excavation, Stripping and Grading use.

In her oral submission to the Board, the Applicant’s Counsel stated that the wording of the Development Permit could have been tighter and that the actual use is Excavation, Stripping and Grading.

The Board notes that in the Applicant’s Counsel’s written submission to the Board, a copy of the decision of the Alberta Court of Appeal in *Rossdale Community League (1974) v. Edmonton. (Subdivision and Development Appeal Board)*, 2009 ABCA 261, was included. This case referenced a guideline in the City of Edmonton Zoning Bylaw that included a guideline to be applied in interpreting the Use Class definitions as follows:

“b. where a specific use does not conform to the wording of any Use Class definition or generally conforms to the wording of two or more Use Class definitions, the Development Officer may, in his discretion, deem that the use conforms to and is included in that Use Class which he considers to be the most appropriate in character and purpose. In such a case, the use shall be considered a Discretionary Use, whether or not the Use Class is listed as Permitted or Discretionary within the applicable Zone.”

There is no similar interpretation guideline in the LUB and accordingly the Board does not consider this case to be relevant to this Appeal.



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Since Stockpile Management is not a defined use in the LUB and there is no authority in the LUB for the Development Officer to approve a use that is not listed in the LUB on the basis that it is similar to a use which is listed, the Board finds that the Development Officer did not follow the directions of council in issuing a Notice of Decision for approved use Stockpile Management (similar use to Excavation, Stripping and Grading).

Issue 2 – Does the proposed development fall within the definition of Excavation, Stripping and Grading and within the Discretionary Use of Excavation, Stripping and Grading?

Development Officer's Position

The Planning Department Report provides a summary of the proposed development as follows:

“Development Permit application PL20220031 is to modify and mange [sic] two existing stockpiles; one consisting of topsoil and other fill, at Lot 1, Block 1, Plan 20100793. This site is part of the Three Sisters Mountain Village Resort lands, which is currently designated as Three Sisters Creek Golf Course and Recreation Area Direct Control District. Topsoil from ‘The Gateway’ site, located east of the subject site along Three Sisters Parkway, will be transferred and added to the topsoil stockpile. Concurrently, material from the fill stockpile will be removed and transferred to ‘The Gateway’ site. The development will result in an expansion of the existing topsoil stockpile and the reduction of the existing fill stockpile. Each stockpile will be reconfigured and modified as part of the development.”

The Planning Department Report submits that the proposed development is consistent with the definition of Excavation, Stripping and Grading, which is considered a Discretionary Use in all land use districts pursuant to Section 1.15.0.1 of the LUB. Section 1.15.0.1 reads in part as follows:

“1.15.0.1 The following uses are discretionary in all districts, regardless of whether they are listed in the district:

- a. Excavation, Stripping and Grading. Where permitted, if the site is not subject to additional development within nine (9) months after the commencement of excavation, stripping or grading, remediation of the site to control sediment and erosion, dust, and aesthetics shall be completed to the satisfaction of the Town. This may include planting of vegetation of a type and quantity similar to adjacent areas.”

Excavation, Stripping and Grading is defined in the LUB as follows:

“**Excavation, Stripping and Grading** means development on a site that may include removal of vegetation, re-grading, or the excavation of material in isolation of that authorized as part of a development permit or subdivision.”



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The Planning Department Report next provides a definition of “development” in the LUB:

“development means:

- a. An excavation or stockpile and the creation of either of them;
- b. A building or an addition to, or replacement or repair of a building and the construction or placing in, over or under land or any of them;
- c. A change of use of land or a building or an act done in relation to land or a building that results in or is likely to result in a change in the use of the land or building; and/or
- d. A change in the intensity of use of land or a building or an act done in relation to land or building that results in or is likely to result in a change in the intensity of use of the land or building”

The Planning Department Report then goes on to conclude as follows on this issue:

“The proposed development includes the addition of topsoil and the removal of other fill material from the site resulting in the excavation, alteration and re-grading of the existing stockpiles. The proposed development is considered similar to and consistent with the ‘development’ and ‘Excavation, Stripping, and Grading’ definitions listed above. As a result, the proposed development permit application for Stripping and Grading for Stockpile Management can be considered for this site.”

In his oral submission to the Board, R Welden stated that the intent of the “excavation, stripping and grading” definition is to permit the type of activity contemplated by the proposed development.

In response to a question from the Board as to whether or not any other development permits have been issued that authorize taking material such as topsoil or fill from one site and stockpiling them on another site have been granted, B. Kinzie commented on his recent experience and said that he could not comment on what may have occurred five years ago or earlier. B. Kinzie stated that in Silvertip, fill has been imported onto two properties pursuant to an interim agreement under a subdivision approval. He further commented that in Spring Creek, fill has been imported pursuant to an approved development permit relating to construction of a multi-family building. B. Kinzie said that he is not aware of any development permit having been issued strictly for stockpiling.

Appellants’ Position

The Appellants’ position is that the activities described in the Application fit the definition of Outdoor Storage in the LUB, which is neither a permitted nor discretionary use in the Direct Control District. The LUB defines Outdoor Storage as follows:

“Outdoor Storage means the storing, stockpiling, or accumulating of goods, equipment or material in an area that is open or exposed to the natural elements.”



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The Appellants submit that the only reason the words excavation and grading can even be used in the context of the Application is because there will be excavation of an unpermitted common materials stockpile and grading of an unpermitted topsoil stockpile. The Appellants submit that the excavating and grading activities are incidental to the indefinite Outdoor Storage and supply of materials. Their written submission also refers to the SDAB's finding of fact in Decision DP2018-105 that no Development Permit was issued for the stockpiling.

In oral submission, D Kitagawa stated that the Appellants do not see how the excavation, stripping and grading definition can be applied except as it relates to the existing stockpiles. In particular, D. Kitagawa questioned how hauling in and dumping topsoil can fit the definition.

In closing remarks, D. Kitagawa stated that the Appellants have no objection to the Applicant removing fill from the subject site. D. Kitagawa also stated that the Appellants would have less of an issue with the topsoil stockpile if it were located further west on the subject site.

Position of Others Speaking in Favour of the Appeal

In oral submission, J. Bruyn stated that he agreed with the comments made by D. Kitagawa. K. Anderson also stated in written submission and in oral presentation that the proposed development is "Outdoor Storage" and not "Excavation, Stripping and Grading".

Applicant's Position

Applicant's Counsel stated that the Applicant supports the Development Authority's submission. The Applicant's Counsel submits that the Board must take a purposive interpretation of the definition of "Excavation, Stripping and Grading" and in doing so must give effect to the intention of the legislation, the purpose of the legislation and whether the purpose has been accomplished. Applicant's Counsel submitted that the definition of "excavation, stripping and grading" includes "development", that "development" is defined in Section 616 of the MGA and "development" includes "stockpile". Accordingly, Applicant's Counsel submitted that in determining if the proposed development is "Excavation, Stripping and Grading", the word "stockpiling" should be read into the definition. Accordingly, Applicant's Counsel submitted that the definition of "Excavation, Stripping and Grading" should be interpreted as meaning "excavation and stockpiling on a site that may include removal of vegetation, re-grading, or the excavation of material in isolation of that authorized as part of a development permit or subdivision." In contrasting the definition of "Outdoor Storage" to "Excavation, Stripping and Grading", Applicant's Counsel emphasized the short term, six month duration nature of the proposed development involving the transfer of topsoil to the subject site and the transfer of fill from the subject site. Applicant's Counsel also emphasized that the proposed development is a separate development from the existing stockpiles.

Applicant's Counsel does not contest that the existing topsoil and fill stockpiles on the subject site did not have a Development Permit, however Applicant's Counsel disagrees with the Appellants that the stockpiles were unauthorized. Applicant's Counsel submitted that the existing stockpiles on the



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subject site did not require a development permit as they were authorized under a servicing agreement with the Town, citing Section 1.9.0.1.I of the LUB, which reads as follows:

“1.9.0.1 The following developments do not require a Development Permit where the work proposed or development complies with all regulations of this Bylaw:

I. Removal of trees or soil from a site or stockpiling of soil on a site when a Development Permit or subdivision approval has been issued, and where a Development Agreement has been executed for that site and said permit or agreement allows for or requires such activity.”

The Applicant’s written submission states that ‘The Gateway’ project does not have the space necessary to stockpile topsoil within the project site. The submission states that the alternative to using the stockpile on the subject site is disposing of the topsoil removed from ‘The Gateway’ development in a landfill, resulting in trucks needing to travel a further distance resulting in higher emissions.

In a presentation made to the Board, E. Abootorabi on behalf of the Applicant stated that denying the Development Permit would not be aligned with the Town of Canmore’s climate action plan.

Position of Others Speaking in Non-Support of the Appeal

In written submission, B. Talbot submits that the Application follows all Canmore guidelines and standards and is standard practice in Western Canada. He further submits that if the Appeal is upheld, fill will need to be disposed of at the Francis Cooke Landfill, which will prematurely shorten the life of the landfill, and in the end, require the Town of Canmore to truck waste further east at great cost and unnecessary damage to the environment. In addition, he submits that good local, native soil will be removed from Canmore and non-native soil will need to be imported from other locations east of Canmore at additional cost and a substantial increase in GHGs.

In written submission, S. Ashton submits that the Application does not appear to contradict any of the appropriate bylaws or regulations that are in place in Canmore.

Position of Others Speaking Neither In Favour Nor Against the Appeal

Bow Valley Waste Commission spokesperson, A. Calder, submitted in his remarks to the Board that the proposed development is common and makes economic and environmental sense.

The Board’s Analysis and Findings

There is no disagreement between the Appellants and the Applicant that the existing topsoil and fill stockpiles do not and never had a development permit. Although no documentary evidence was provided to the Board, the Board accepts the submission from Applicant’s Counsel that these stockpiles were authorized pursuant to Section 1.9.0.1.I of the LUB.



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The Board's analysis is focussed on (a) whether or not the proposed development falls within the discretionary use of "Excavation, Stripping and Grading" as defined in the LUB and (b) whether the proposed development falls within the definition of "Excavating, Stripping and Grading."

The Board finds that in applying a purposive interpretation of the definition of "Excavation, Stripping and Grading" within the context of Section 1.15.0.1.a. of the LUB, the words "in isolation of" in the definition, and the words in Section 1.15.0.1.a. that contemplate remediation of the site to control sediment and erosion, dust, and aesthetics "if the site is not subject to additional development within nine months after the commencement of excavation, stripping or grading", should be considered together. The Board is of the view that the word "development" in the definition of Excavation, Stripping and Grading should not be read as "excavation and stockpiling" as submitted by the Applicant's Counsel and the Development Authority, but should be given its full meaning as set out in the definition of "development" in the MGA and in the LUB. The definition of "Excavation, Stripping and Grading" contemplates development activities of any kind on a site that may involve the removal of vegetation, re-grading, or the excavation of material **in isolation** [emphasis added] of development that is authorized as part of a development permit or subdivision. The words in Section 1.15.0.1.a. assist in arriving at a purposive interpretation of this definition, as they contemplate remediation activity if additional development activity has not occurred within nine months after commencement of the excavation, stripping or grading. Through a purposive interpretation approach, the purpose of "Excavation, Stripping and Grading" as a Discretionary Use in all districts is to permit development involving excavation, stripping and grading activities separate from, and potentially in advance of, those development activities that are authorized as part of a development permit or subdivision. Section 1.15.0.1.a. then makes it clear that if the development that is authorized as part of a development permit or subdivision does not occur within nine months, then the Town may require remediation of the site.

Based on the foregoing, the Board finds that the proposed development activities involving removal of fill from the fill stockpile on the subject site for transportation to 'The Gateway' site fall within the meaning of the definition of "Excavation, Stripping and Grading" and within the Discretionary Use set out in Section 1.15.0.1.a. of the LUB. Having accepted Applicant Counsel's submission that the existing fill stockpile was previously authorized, the Board finds that these proposed development activities that may include removal of vegetation, re-grading or excavation are occurring in isolation of, and are related to, a previously authorized development and fit the purpose of the Discretionary Use. Further, these proposed development activities assist in reducing the size of the fill stockpile and are consistent with the stated purpose of the Direct Control District described below.

On the other hand, the Board finds that in applying the same principle of interpretation, the proposed development activities associated with the addition of topsoil from 'The Gateway' site to the topsoil stockpile on the subject site do not fall within the definition of "Excavation, Stripping and Grading" and do not fall within the Discretionary Use set out in Section 1.15.0.1.a. The Board's reasons for this finding are as follows:



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1. The stated purpose of the Direct Control District as set out in Section 14.16.1 of the LUB is “to provide for the development, operation and management of a golf course and other recreational facilities in accordance with the objectives and policies of the 2004 Town of Canmore Resort Centre Area Structure Plan including the provision of land for animal movement during times when the area is not being utilized for recreational purposes”. The Applicant’s written submission states that the reasons for stockpiling topsoil from ‘The Gateway’ site onto the subject site are because there is insufficient room at ‘The Gateway’ site to store the topsoil and because using the stockpile on the subject site is efficient and results in a lower environmental impact than the alternatives. The Board does not find these reasons to be persuasive that the definition of “Excavation, Stripping and Grading” should be interpreted as including stockpiling topsoil from ‘The Gateway’ site onto the subject site when viewed through the lens of the stated purpose of the Direct Control District.
2. As the Applicant has submitted, there is no development relationship between the proposed stockpiling and the existing stockpiles.
3. As the Appellants have submitted, the only defined use where “stockpile” or “stockpiling” is incorporated in the LUB is in the definition of “Outdoor Storage”. Outdoor Storage is not a permissible use for the subject site.

Issue 3 – Are the EDCG’s a direction of council? If so, did the Development Officer follow the requirements of the EDCG?

Is Section 3.4 of the EDCG a direction of council?

In their written submission, the Appellants made reference to Policy 8.1.2.f of the ASP as being a relevant statutory and planning document. Policy 8.1.2.f, which is one of the environmental policies in the ASP and is a direction of council, reads as follows:

“f) Follow best management practices in the application of erosion and sedimentation controls.”

Section 3.4 of the EDCG, reads as follows:

“Permits and Commencement of Construction

Typically, stripping and grading signal the commencement of construction. It is up to the developer or contractor to ensure all necessary permits and approvals from other governing agencies are in place prior to work. No construction, including stripping and grading, shall take place without a construction management plan (CMP) that has been approved by the Town. See Section 2.5 of the EDCG for further information about submission requirements.

It is the responsibility of the developer to ensure that erosion and sediment control (ESC) measures are in place prior to construction commencement. It is essential that ESC measures are kept in place for the duration of the project including through the placement of



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landscaping. The removal of vegetation and topsoil during construction or other soil disturbing activities, as well as groundwater disturbing activities can have detrimental impacts on the Town's stormwater management infrastructure, its surface water bodies, and the groundwater aquifer. The Town of Canmore requires contractors to follow the most recent edition of the City of Calgary Water Resources', Erosion and Sediment Control Guidelines with regards to details and specifications. Consultant shall propose reporting requirements as applicable to the Town of Canmore."

The Appellants submit that the Section 3.4 of the Town's EDCG requires contractors to follow the most recent edition of the City of Calgary Water Resources' Erosion and Sediment Control Guidelines (the "Calgary Control Guidelines") and that the Applicant's Construction Management Plan is not fully compliant with the Calgary Control Guidelines. Accordingly, in the first instance the Board must determine if Section 3.4 of the EDCG is a direction of council.

The Planning Department Report provides the following explanation of the role of construction management and erosion and sediment control plans in connection with Excavation, Stripping and Grading development permit applications:

"Submission of a construction management plan and an erosion and sediment control plan is a requirement for Excavation, Stripping and Grading development permit applications. The Town's Engineering Design and Construction Guidelines (EDCG) requires construction management plans be submitted and approved prior to any construction, including stripping and grading, taking place on site. The Town of Canmore Construction Management Guidelines outlines the information required to address and mitigate potential adverse effects caused by the development and construction. All construction management plans must be consistent with these Guidelines. Similarly, the EDCG outlines the information required to be included in an erosion and sediment control plan. In this case, Town of Canmore Engineering requires the applicant to follow the most recent edition of the City of Calgary Water Resources' Erosion and Sediment Control Guidelines."

In response to a question from the Board, B. Kinzie stated that the EDCG are presented to council for information but are not a council approved document. They are reviewed and accepted by the Chief Administrative Officer.

The Appellant D. Kitigawa submitted that in the Appellants' view, the EDCG are a direction of council. The Appellant stated that Town Council's Resolution 136-2020 rescinded the 2010 EDCG and delegated authority to finalize a new EDCG to Town Administration. In the Appellants' view, the current EDCG approved by Town Administration pursuant to this delegated authority constitutes a direction of council. Resolution 136-2020 reads as follows:

"Moved by Mayor Borrowman that council rescind 381-2010 "that Council adopt the 2010 Engineering Design and Construction Guidelines with the issues of handicapped accessibility



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and undermining to be addressed in future updates” and direct administration to approve the EDGC from this date forward.”

In response to a question from the Board, the Applicant’s Counsel submitted that the EDCG approved by Town Administration pursuant to delegated authority is not a direction of council, and even if so no issue was raised of non-compliance by the Development Authority with the EDCG.

The Board finds that Section 3.4 of the EDGC is the standard that Town Administration has implemented pursuant to delegated authority from Council to reflect the direction of council embodied in Policy 8.1.2.f. of the ASP, and as such is a direction of council for purposes of Section 685 (4) (b) of the MGA.

Did the Development Officer follow the requirements of Section 3.4 of the EDCG?

The Planning Department Report states that “The Construction Management Plan and Erosion and Sediment Control Plan were reviewed, deemed consistent with the Town standards, and accepted by Town Administration.” Evidence was also provided that ISL Engineering have performed a review of the Erosion and Sediment Control Plan and have provided a letter indicating no concerns with the submitted documents.

In their written submission, the Appellants stated that the Calgary Control Guidelines have a very clear “contain on site” requirement for dust pursuant to Section 4.2.2.4. Based on the presentation and answers to Board questions from C. Conner with McElhanney Surveyors Ltd., the Board is satisfied that the “contain on site” requirement for dust is not applicable to the subject site as it is not a “small site” as defined in the Calgary Control Guidelines.

In its review of the Applicant’s Erosion and Sediment Control Plan, the Board notes that it does not include an inspection and maintenance plan required by Section 100.11.4 of the Calgary Control Guidelines, nor does it address the long term cover (one calendar year inactivity) requirement of Section 100.18 of the Calgary Control Guidelines. In this regard, the Board finds that the Development Officer did not follow the directions of council.

Issue 4 – Did the Development Officer follow the requirements of the ASP?

Policy 8.2.2 c)

Several written and oral submissions in support of the appeal raised concerns about the potential impact of the proposed development on wildlife, including without limitation oral presentations by M. Sapijaszko, J. de Bruyn and K. Anderson. As a result of these concerns, the Board asked R. Welden if the Development Officer had followed the directions of council contained in Policy 8.2.2 c) in relation to development adjacent to wildlife corridors.



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Policy 8.2.2. c) states in part that in accordance with the Canmore Municipal Development Plan, any development adjacent to established wildlife corridors, including increased intensity of existing uses will be evaluated for its potential impact on wildlife habitat and movement within and adjacent to the proposed development. R. Welden responded that this provision was considered but given the distance of the proposed development to a wildlife corridor the Development Officer did not consider this provision to be applicable. During Administration's clarifying and closing remarks, R. Welden clarified that the proposed development was not considered to be adjacent to a wildlife corridor or a wildlife patch pursuant to the Bow Corridor Ecosystem Advisory Group Guidelines. In response to a question from the Board, T. Woitenko submitted that these Guidelines are referenced in the MDP and are therefore the appropriate source for the definition of "adjacent" with regard to wildlife corridors. R. Welden stated that the proposed development is approximately 300 metres from a primary or secondary wildlife corridor and even further from a wildlife habitat patch, whereas the definition of "adjacent" in the Bow Corridor Ecosystem Advisory Group Guidelines is 175 metres from a primary corridor, 125 metres from a secondary wildlife corridor and 250 metres from a wildlife habitat patch.

The Board finds that the Development Officer followed the direction of council contained in Section 8.2.2 c) of the ASP.

Policy 8.5.2

In written and oral submissions, D. van den Beld raised a concern about the potential effect of the proposed development on undermining on the subject site. As a result of this concern, the Board asked R. Welden if the Development Officer had followed the direction of council contained in Section 8.5.2 of the ASP. Section 8.5.2 reads as follows:

"8.5.2 Policies

- a) Proposed subdivision or development on undermined areas shall be in accordance with the Canmore Undermining Review Regulation, Alberta Regulation 114/97 of the Municipal Development Act.
- b) Proposed subdivision or development on or in close proximity to undermined areas shall be subject to evaluation and reporting evaluated pursuant to the Undermining Policies contained in the Town of Canmore Municipal Development Plan."

Applicant's Counsel submitted that Subsections 3 (1) and (2) of the Canmore Undermining Review Regulation (the "Undermining Regulation") state that Part 17 of the MGA does not apply in designated land. Accordingly, Applicant's Counsel submitted that the Development Authority complied with the direction of council in this matter.

During Administration's clarifying and closing remarks, T. Woitenko stated that the Undermining Regulation takes precedence over the ASP and that Section 8.5.2 of the ASP is outdated and superseded by the Undermining Regulation. Administration stated that the MDP and Undermining Regulation have been updated so that undermining regulation is the responsibility of the Province and



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that the ASP needs to be updated in this regard. B. Kinzie stated that he had spoken with the Town's Manager of Engineering and that the intent is to regulate permanent structures rather than temporary works such as the proposed development.

Based on the representations from Applicant's Counsel and from Administration, the Board finds that Section 8.5.2 of the ASP is not applicable to the proposed development.

Issue 5 – Did the Development Officer follow the directions of council contained in Section 14.16.6.1 of the LUB?

The Board asked R. Welden if Section 14.16.6.1 of the LUB is a direction of council applicable to the proposed development. Section 14.16.6.1 of the LUB reads as follows:

“Applications for development within the District shall include the submission of an Environmental Impact Statement which shall evaluate whether the development proposal conforms to the relevant environmental policies of the Town of Canmore Municipal Development Plan and Bylaw 23-2004 Resort Centre Area Structure Plan. In addition, the EIS shall evaluate whether the development proposal conforms to the relevant recommendations contained within the November 2002 “Golder Report” and the 2004 Wildlife-Human Interaction Prevention Plan (WHIPP). The EIS shall address the following issues:

- a. How the proposed golf development has been designed to minimize wildlife habituation.
- b. Revegetation and vegetation management measures within the golf course and in adjacent private lands in wildlife corridors;
- c. Trail closure and realignments within the golf course and in adjacent wildlife corridors;
- d. A description and assessment of the impact of maintenance operations such as pre and post golf season activities and golf-season early-morning or nighttime maintenance activities on wildlife movement in the area.”

R. Welden responded to the Board that Administration's view is that an EIS was not required for this use as it is not of the size and scale required for an EIS. Applicant's Counsel submitted that the better interpretation of Section 14.16.6 is that it applies to golf courses and not to a Discretionary Use even if a golf course is not specified.

In oral submission in support of the appeal, K. Hantman submitted that the Development Officer failed to follow the direction of council by not preparing an EIS.

The Board finds that Section 14.6.6.1 of the LUB is not applicable to the proposed development.

Issue 6 – Did the Development Officer follow the directions of council contained in Section 1.10.0.3 of the LUB?



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Although the Appellants did not specifically reference Section 1.10.0.03 in their written and oral submissions to the Board, following a question from the Board, Administration and the Applicant's Counsel acknowledged that this section constitutes a direction of council that is applicable to the proposed development.

Section 1.10.0.3 of the LUB reads as follows:

“When making a decision on a Development Permit for a Discretionary Use, the Development Authority shall consider:

- a. Any plans or policies affecting the parcel;
- b. The location of the parcel and the appropriateness of the proposed development;
- c. The merits of the proposed development and its compatibility with the intent of its Land Use District;
- d. The potential impact of the development with respect to adjacent parcels;
- e. Servicing and access requirements; and
- f. General planning principles.”

The Development Officer's Report does not specifically address the requirements of Section 1.10.0.3. Following a question from the Board, R. Welden replied that the Development Officer would have considered the requirements of Section 1.10.0.3 in making a decision. T. Woitenko, the Development Officer who signed the Notice of Decision, responded to the Board that all comments from residents were considered by the Development Officer before approving the development permit. In response to a question from the Board as to whether the discretionary proposed use is consistent with clause c., T. Woitenko stated that in her view it is because it is a discretionary use in all districts.

In oral presentation, the Applicant's Counsel submitted that the Development Officer considered the requirements of Section 1.10.0.3, summarized below. Applicant's Counsel submitted to the Board that so long as the Development Officer conducted an evaluation, then even if neighbours to the proposed development are unhappy that is not the Board's concern.

Applicant's Counsel submitted that the following is evidence that the Development Officer followed the direction of council as embodied in Section 1.10.0.3:

- (a) The Development Officer considered plans or policies, including the policies in ASP 8.2.2 (c) and 8.5.2;
- (b) No evidence was put forward that the Development Officer did not consider the issue of the location of the parcel and appropriateness of the proposed development;
- (c) Excavation, stripping and grading is common practice;
- (d) Evidence submitted by the Applicant regarding dialogue between the Applicant and the Town demonstrates that the Development Officer considered the potential impact of the development with respect to adjacent parcels;



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- (e) Evidence has been provided that McElhanney discussed servicing and access requirements with the Development Officer; and
- (f) The Development Officer considered efficiency of use, which is a general planning principle.

The Board notes that as described under Issue 3 above, there is evidence of consideration by the Development Officer of the two key policies relating to construction management and erosion and sediment control as required by the EDCG. The Board also notes that correspondence from B. Kinzie to C. Conner dated January 4, 2022 requesting that the Applicant provide “a written description of the work proposed, including scheduling (commencement, completion) and materials import/export”, “a map showing the areas affected by the work (the development area)” and “plan drawings showing the final stockpile locations/grades”, and B. Kinzie’s email to C. Conner dated March 14, 2022 advising that he has reviewed the CMP and his only comment is to revise the CMP to specify which party will inspect the haul route and to specify the party responsible for the mobilization of street sweeping equipment, is evidence that the Development Authority considered clauses (a), (b) and (e) of Section 1.10.0.3 of the LUB.

The Board also notes that the Development Permit Review dated March 7, 2022 contains evidence that the Development Authority considered clauses (a), (b), (c), (d) and (e). In particular, the Planning Comments listed numerous public comments that were received in response to the Notice of Application posting, as follows:

- Aesthetics
- Noise
- Dust, hazardous to human health
- Environmentally hazardous
- Decreased property values and marketability
- Greenhouse gas emissions
- Increased traffic on the Three Sisters Parkway, including the tipple across valley wildlife corridor
- A constructed pond to the northwest is now naturalized, would negatively affect
- Impact on wildlife
- Reduced quality of life for adjacent residents, especially during summer months
- Weeds
- Pedestrian and cyclist safety on Three Sisters Parkway
- Find a less disruptive location
- If the permit is approved, it will be appealed
- As a purchaser from Three Sisters, the requirement was to build a home within 2 years or lose ownership of the lot. This is to prevent cleared lands sitting empty or like a dump or construction site. Why can TSMV do this?

Based on the evidence, the Board finds that the Development Officer followed the direction of council embodied in Section 1.10.0.3 of the LUB.



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Conclusion

For the reasons stated above, the Board finds that the Development Authority did not follow the directions of Council. The Board substitutes the Development Authority's decision with the following:

1. The Application in respect of development related to the Excavation, Stripping and Grading of fill from the fill stockpile on the subject site is APPROVED.
2. The Application in respect of development related to the stockpiling of topsoil on the subject site is NOT APPROVED.

5/18/2022 | 10:02 AM MDT

Date Signed

DocuSigned by:

A handwritten signature in black ink, appearing to read "Peter Moreland-Giraldeau", enclosed in a blue DocuSign signature box.

BC35EDCF48C342E...

**CHAIRPERSON, PETER MORELAND-GIRALDEAU
SUBDIVISION & DEVELOPMENT APPEAL BOARD**

A decision of the Subdivision and Development Appeal Board is final and binding on all parties and persons subject only to an appeal upon or questions of jurisdiction or law pursuant Section 688 (1) & (2) of the *Municipal Government Act*, RSA 2000, c. M-26, as amended.

An application for leave to appeal to the Court of Queens Bench shall be made:

- a) to a judge of the Appellant Division, and;
- b) within 30 days after the issue of the order, decision, permit or approval sought to be appeal.