

**M.D. OF BIGHORN SUBDIVISION DEVELOPMENT APPEAL BOARD
M.D. OFFICE, EXSHAW
NOVEMBER 30TH, 2010 AT 7:00 P.M.
RE: DEVELOPMENT PERMIT 52/10
A. & D. MALLORY, APPELLANTS
[SW Quarter SECTION 4-30-6-W5M, WHISPERING PINES ROAD]**

IN ATTENDANCE:

BOARD MEMBERS:

RALPH ANDERSON KEVIN HEBB REID THOMAS
ERIK BUTTERS RUSSEL LYSTER

SECRETARY:

MARTIN BUCKLEY

DEVELOPMENT OFFICER/MUNICIPAL PLANNING COMMISSION (MPC)

CAROLYN MONTGOMERY, MPC CHAIR
GREG BIRCH, ASS'T. MUNICIPAL MANAGER/DIRECTOR OF PLANNING &
DEVELOPMENT

PUBLIC:

ANNE MALLORY (the Appellant)
DAVID MALLORY (the Appellant)

Before the commencement of the hearing, the Board members selected Russel Lyster as the Chairman for the hearing.

1. Call to Order

Chairman Lyster called the hearing to order at 7:00 p.m.

2. Purpose of the Hearing

The Chairman provided the following introduction to the hearing:

“Tonight we will hear the appeal against the Notice of Decision from the Municipal Planning Commission dated October 26, 2010 refusing the application for Development Permit Application No. 52/10. My name is Russel Lyster, and I will be chairing the hearing tonight. I ask that all questions and comments be directed through me. There are Hearing Procedure sheets on chairs in the gallery, for the convenience of those at the hearing.”



3. Board Introductions - Objections

The Board members were introduced. The Appellants were asked if there were any objections to those Board members hearing the appeal; no objections were stated.

4. Case Outline/Information - Secretary

The S/DAB Secretary then provided a brief overview of the case reading from a prepared statement; and provided an overhead projection to locate the subject lands (the South-West quarter of Section 4 Township 30 Range 6 W5M, at the north end of Whispering Pines Road in the North Ranchlands area of the M.D.). A copy of the Secretary's statement is attached as Schedule 'A' and forms part of these minutes.

5. Appellant(s) or agent to speak in favour of the Appeal

Anne and David Mallory, the Appellants and owners of the subject lands, spoke on their appeal of the Municipal Planning Commission's (MPC) refusal of Development Permit 452/10; their powerpoint presentation is attached to these minutes as Schedule "B". Mr. Mallory noted that he and his wife had closed on the property on April 9th, 2009, purchasing same from the estate of the previous owner. At the time of purchase, the Appellants were aware of the 2002 Stop Order in place on the property: they had discussed the Stop Order with M.D. Planning staff, at the time, to get clarity on the Order.

The Appellants provided their powerpoint presentation, with Mr. Mallory providing most of the commentary. He noted that the Stop Order directed that "recreational activity" on the lands; he advised that all recreational activity (gun range, quad/motorcycle usage, recreational rental of the cabins, etc.) has ceased, and that sixteen of the old cabins and eleven old storage sheds have been removed. Due to the grazing lease on the adjacent Crown quarter-section (the Appellants hold a lease on this quarter), there are eight horses on site; they are required to have cattle to retain the grazing permit, but currently have a one-year exemption. The lands will remain as Agriculture Conservation.

Mr. Mallory noted that the grazing lease lands are only accessible on foot, horse or mountain bike.

The Appellants indicated they had tried to responsibly dispose of all unwanted material, and everything they could. There were numerous trips to landfills, a scrap metal dealer came out to take away scrap metal, and some old vehicles were sold in private sales. The RCMP's Forced Entry/Explosives and Hostage-Taking Units were engaged in training exercises in some of the buildings, on site, and provided three dumpsters to haul away the remains of those buildings, once their exercises were over.

A map was provided, showing the building locations and those building removed, was provided; that map is attached as Schedule "C".

It was noted that Building #16 (BM) was originally being requested as the second dwelling unit, however, upon full inspection, it was determined the wood-work was too rotten and the building would not be kept. The Appellants, therefore, are now requesting only four accessory buildings and one second dwelling unit. The accessory buildings to be retained would be:

- #1 Millen: used for lumber storage; a solid structure; no one wants it (to re-locate), and it would be "ludicrous" to tear it down.

- #2 Elk: all full of stuff
- #3 Cougar: all full of stuff
- #4 Gwen: currently used for storing hay, but is too close to the property line, and the Appellants are prepared to move it, to bring it into conformance.

The second dwelling unit to be retained would be:

- KT: to be used by their hired hand; the Appellants noted that the subject lands are an agricultural property, and that hired hands are a normal part of the agricultural community. It was further noted that Section 12.20.6 of the Land Use Bylaw does permit second dwelling units on AC properties.

The Appellants indicated that a Real Property Report (RPR) had been suggested by the MPC, but if the Appellants had brought in a surveyor to do an RPR with 25 buildings on site, the cost would have been \$10,000 or more. Mr. Mallory indicated that he does not believe any other buildings are encroaching into set-backs, but the Appellants are prepared to move same, if need be.

Mr. Mallory concluded by noting, again, that the Appellants do have the legal ability (under 12.20.6 of the Land Use Bylaw) to have a second dwelling unit, and that they can have as many accessory buildings as they want: it would be “nonsensical” to burn the existing buildings and then build new accessory buildings. He noted the Stop Order had been compiled with, in fact and in spirit; the “tenants” had been gone almost a year and a half now; the recreational activity had halted and been eliminated; and finally, reiterated that sixteen cabins and eleven storage sheds had been removed. Their request, again, was to retain four cabins as accessory buildings, and one cabin as a second dwelling unit; they were prepared to move the one cabin, to bring it into conformity with set-back requirements, if need be.

Board member Anderson asked if anyone had spoken to the Appellants about the definition of “recreational activity”, because horse-back riding could be considered recreational activity. Mr. Mallory indicated no one had discussed the definition with him. Board member Anderson asked if the Appellants had proof of contact with Alberta One-Call, regarding the Gwen set-back concern; Mr. Mallory indicated he did, and could provide same tomorrow, noting the machinery operator would not do any excavating on site, unless One-Call had authorized same. Board member Anderson asked how far away the building are, from any gas-lines; Mr. Mallory indicated there was one gas-line crossing their leased quarter, but none on their titled lands.

Board member Thomas asked if the Appellants use potable water from the well for the proposed second dwelling; Mr. Mallory indicated there is a hydrant off of the well-pump, and water is carried to the dwelling via a five gallon pail. Board member Thomas asked where the well was located, in relation to the outhouse; Mr. Mallory indicated “from here to the highway”, or a distance of approximately thirty-five metres. Board member Thomas asked about the depth of the well: Mr. Mallory indicated he wasn't sure.

Chairman Lyster noted that there was one neighbour who did not support the Appellants, and asked if the Appellants knew why; Mr. Mallory indicated he believed the neighbour had been around at the time of the previous owner's application (for the cabins and recreational activities), and that the neighbour felt the Stop Order should be adhered to. Another reason could be that the neighbour believed the Appellants should have come around sooner and talked to him. It was understood that this neighbour may support the hired hand being around.

Chairman Lyster asked if, at any time, did anyone from the M.D. suggest the interpretation of the Stop Order was incorrect; Mr. Mallory responded "no".

Board member Hebb asked how far away was the non-supporting neighbour's residence; Mr. Mallory indicated the neighbour lived in the next quarter-section to the west, and was further away than the closest resident/neighbour, who supported the Appellants. Board member Butters asked if that neighbour's support was in a letter, or verbal; Mr. Mallory indicated it was in writing.

There were no other questions of the Appellant.

6. Others In Support of the Appeal

The Chairman asked if there was anyone else present who wished to speak in support of the Appellants.

There was no one present who wished to speak in support of the Appellants; the following written submissions in support had been received:

-N/CO R. Christianson, RCMP	-Schedule "D"
-R. Deschene	-Schedule "E"
-P. & R. van Hal	-Schedule "F"
-T. & T. Heaney	-Schedule "G"

There were no other oral or written submissions received in support of the Appellants.

7. M.D. of Bighorn Advisors

The Chairman asked if there were any comments or submissions from M.D. advisors; it was indicated no comments had been received, either orally or in writing.

8. M.P.C. and/or Planning & Development Officer

The Chair then asked if there were any comments from the Planning Department or the MPC.

The Assistant Municipal Manager/Director of Planning & Development gave a history of the situation: in Year 2000, the M.D. became aware of the use of the property, from complaints by the neighbours. The subject land's owner was renting out the property, which was probably not a problem at first, but by Year 2000, it had become a real issue. The gun range had been okayed by the RCMP, but the neighbours had had enough: the subject lands were Agriculture Conservation, and the uses were not the type which were permitted under that zoning. The subject land's then-owner asked for what options were available to her: she was advised the only option was for a Land Use Bylaw amendment, and she submitted an application.

At the public hearing, there was sympathy for the owner (an elderly widow), but there was no desire to allow the re-zoning/Land Use Bylaw amendment, which would have established long-term use. Council denied the application, and put the Stop Order in place, with a ten year window of enforcement. The concept was that, through attrition, there would be a drop-off in use and the number of cabins.

Through the years, the M.D. wrote reminder letters to the owner; it was noted that, through the years, the letters written may have interchanged the words used – from “dwelling units” to “cabins”, etc. The Council motion establishing the Stop Order, however, was to direct M.D. staff to advise the owner to remove the illegal dwelling units.

A year or so ago, the Assistant Municipal Manager continued, the Appellants purchased the property, knowing the Stop Order was in place (registered on title). The Appellants were “a godsend” to the municipality, he advised, as otherwise the M.D. would still be carrying out enforcement measures today.

In April 2010, M.D. planning staff did an interim inspection; somewhere along the way, the Appellants had decided some of the cabins were sound and wanted to keep them. This led to a Development Permit application, the MPC refusal, and the appeal to the S/DAB.

The Land Use Bylaw does allow for a second dwelling unit on site: there is no need to specify who is residing in the building. When the application was put forward, there were five accessory buildings and the one secondary dwelling unit applied for.

The Assistant Municipal Manager provided excerpts from the MPC meeting were in the Appellant’s Development Permit application was considered: those excerpts are attached as Schedule “H”. There were two problems: one accessory building was too close to the property line (the MPC could not grant a variance, due to the distance, but the S/DAB was not similarly restricted), and the second problem was the floor space/square footage of the second dwelling unit (does not meet the minimum requirements). The application was also discussed with the Safety Codes Officer (Building Inspector), who noted the building did not meet the current Building Code.

The key issues were the illegal dwelling, the Stop Order and the intent of Council at the time of issuance of the Stop Order. If the S/DAB decides to grant the appeal, the Assistant Municipal Manager advised, M.D. planning staff had put together a list of conditions for consideration; the list is attached as Schedule “I”.

C. Montgomery, representing the MPC, indicated that the Development Permit application had been for three approvals: the second dwelling, retention of five cabins as accessory buildings, and the side-yard setback variance for the one cabin. The MPC was concerned with the minimum size of the second dwelling unit, and no water/sewer servicing for same; no RPR and therefore could not delineate the actual location for the property boundaries; and therefore a refusal from the MPC.

She also advised that the MPC was made aware of the Stop Order issue.

Board member Butters asked if there was a legal requirement regarding a need for piped-in water for a dwelling unit. The Assistant Municipal Managers indicated this was only if the second dwelling was a first parcel out situation, providing the rationale for this. In this case, if the applicant had wanted to bring (truck) water in and hold it within a cistern, it would be allowed.

Chairman Lyster asked if an outhouse with a holding tank was likewise acceptable; the Assistant Municipal Manager indicated as long as it’s an approved outhouse, a holding tank system is acceptable. If the outhouse were, for example, too close to a river, that situation would not be allowed.



Chairman Lyster asked, on the Stop Order, which is considered to be the legal document: the Stop Order or Council's motion? The Assistant Municipal Manager indicated the original Stop Order contained Council's resolution; the follow-up letters were worded differently through the years.

Board member Hebb asked if the Appellants had seen the original Stop Order; the Assistant Municipal Manager indicated he couldn't answer that. Chairman Lyster asked, when the title changed hands, would the new owners have received the Stop Order through Land Titles; the Assistant Municipal Manager indicated he wasn't sure.

Board member Anderson asked if the S/DAB has the legal right to override the Stop Order; the Assistant Municipal Manager indicated that he "thinks" the S/DAB has to infer that the Board does have that right. The essence of law is that the S/DAB holds the hearing, evidence is presented and a decision is made, in fairly open fashion. If the S/DAB believes the use has changed, the Board might decide that the Stop Order has been met.

In talking to the Appellants, the Assistant Municipal Manager advised, there was a realization that they might be caught in the same situation that the MPC was in, and therefore the Appellants first asked Council to lift the Stop Order, so that the issue could be looked at outside of the Stop Order. Council, however, did not agree to lift the Stop Order.

Chairman Lyster asked, if approval was to come at this meeting, would the Stop Order be lifted; the Assistant Municipal Manager indicated yes, if given that decision, the Stop Order could be lifted or adjusted. The decision to do so would be up to the Development Officer.

Board member Thomas, indicating his feeling that the epicentre of Council's action had to be the "illegal dwelling" that had to be removed within ten years; the Assistant Municipal Manager agreed. Board member Thomas asked if it was likely that there might be an inhabited house in the M.D. that doesn't meet the Building Code, nor the M.D.'s minimum building size; the Assistant Municipal Manager indicated that, with no time-line, the answer is yes, but noted that, as time goes by and rules get stricter/tighter, things change. MPC has also allowed smaller dwelling units.

Board member Anderson asked if the building now proposed as the second dwelling unit had been inspected by the Safety Codes Officer (Building Inspector); the Assistant Municipal Manager indicated it had not been. During the interim inspection, he indicated, the Officer had inspected only the first building (the one originally intended to be the second dwelling unit), which was later discarded. Board member Anderson, noting the minimum footage requirements, asked if there was any maximum variance under which the Board is limited; the Assistant Municipal Manager indicated that, while both the Development Officers and the MPC have variance limitations, the S/DAB is not limited in its variance powers.

Board member Thomas asked, if the building has to meet the Building Code, it would be viewed as a new building; the Assistant Municipal Manager indicated this would be the case, because the building never was an approved (permitted) building. It must meet today's Code, thus requiring such things as carbon monoxide detectors, smoke detectors, etc.

Chairman Lyster asked if there would be the ability to attach a caveat to a possible approval, that the building must meet today's Code; the Assistant Municipal Manager indicated that there would be that ability, however the Board doesn't necessarily have to, as it is "automatic" that the building must meet today's Code.

Board member Hebb asked if the MPC had been concerned with the lack of an RPR, or was the MPC satisfied with the sketch provided. The MPC representative indicated the lack of an RPR had been one of the MPC's real concerns.

There were no further questions of the Assistant Municipal Manager nor the MPC rep.

9. In Support of MPC's decision

The Chairman asked if there were any submissions in support of the MPC's decision, or if anyone present wished to speak in support of the decision.

The following letters in support of the MPC decision were received:

-F. Painsi	Schedule "J"
-J.N. Trenke	Schedule "K"

There were no other oral or written submissions in support of the decision.

10. Rebuttal by Appellants

The Appellants were asked if they wished to make any rebuttal comments to statements made at this hearing.

Mr. Mallory noted the Council decision in the Stop Order: there are no illegal dwelling units left – these are now storage units. There is no recreational activity, not even horseback riding: the offensive activities have ceased.

Mr. Mallory advised he did try and call all his neighbours, on the Development Permit request: the one neighbour did not call back, in response to Mallory's calls/messages.

He noted that he had worked very closely with the Planning staff, in order to reach compliance with the Stop Order: the family did all of the work on the week-ends, and nearly all of it by themselves. The Appellants were trying to adhere to the M.D. requirements, in good faith.

Mr. Mallory asked that the Board grant the appeal: the Appellants had followed the process, been open/honest/forthright, had invited M.D. staff to come out at anytime, and acted properly and thoroughly. He indicated he appreciated working with the M.D. staff.

Board member Hebb asked how close the proposed second dwelling would be, to reaching compliance with the Building Code; Mr. Mallory indicated he didn't really know but would find out. The building has to have the proper inspection by the Safety Codes Officer, with a report to the M.D.; the Appellants must remedy the conditions in the report.

11. Fair & Impartial Hearing

The Appellants were asked if they felt they had received a fair and impartial hearing. The Appellants indicated they had received a fair and impartial hearing.



12. Decision timing

The Chairman thanked the gallery for attending and explained that a written decision would be rendered within 15 days.

13. Conclusion of the Public Hearing aspect of the appeal.

The public portion of the Hearing concluded at 8:30 p.m.

14. Closure of Hearing

The Hearing closed at 9:05 p.m.

CHAIRMAN

SECRETARY

SCHEDULES ATTACHED:

Schedule	Item
A	Secretary's Overview
B	Appellant's submission/presentation
C	Map – building locations
D	N/CO R. Christianson, RCMP
E	R. Deschene
F	P. & R. van Hal
G	T. & T. Heaney
H	MPC minutes excerpt
I	Planning list of conditions (if approval considered)
J	F. Painsi
K	J. N. Trenke



12. **Decision timing**

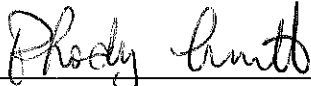
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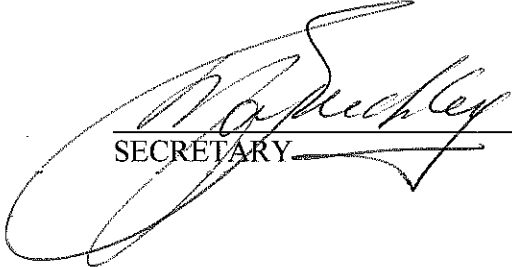
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I	Planning list of conditions (if approval considered)
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SECRETARY'S OVERVIEW

As the Chairman noted, this is an Appeal on the Notice of Decision made by the Municipal Planning Commission dated October 26, 2010. The appeal was filed by David Mallory, the applicant for the Development. Mr. Mallory is appealing the MPC refusal on Development Permit No. 52/10: this Permit is for a second Single Family Detached Dwelling unit, five accessory buildings (being five existing cabins to be converted for storage purposes), and side yard setback variances for two of the accessory buildings. The buildings are located at the lands legally described as a portion of the South-West quarter of Section 4 Township 30 Range 6 West of the Fifth Meridian, just off Whispering Pines Road.

The S/DAB has authority to consider the conditions of approval and adjust them as necessary, or alternately to uphold the Municipal Planning Commission's decision in its current form.

This appeal was advertised in the Cochrane Eagle on November 24th, 2010.

I would like to refer you to overheads showing the location of the subject property and the site plans.